

Alcindor, Lew

From: Alcindor, Lew
Sent: Monday, March 24, 2014 9:43 PM
To: Fallon, Brian (OPA)
Subject: Re: Fwd: Ny times article

"AG has pushed for end of mass government collection under 215"

From: Fallon, Brian (OPA)
Sent: Monday, March 24, 2014 09:31 PM Eastern Standard Time
To: Alcindor, Lew; Cole, James (ODAG); Goldberg, Stuart (ODAG); Richardson, Margaret (OAG); Kadzik, Peter J (OLA)
Subject: Fwd: Ny times article

----- Original message -----

From: Marc Raimondi
Date: 03/24/2014 9:17 PM (GMT-05:00)
To: "Fallon, Brian (OPA)", "Singh, Anita (NSD)"
Subject: Ny times article

WASHINGTON — The Obama administration is preparing to unveil a legislative proposal to drastically overhaul the National Security Agency's once-secret bulk phone records program. Under the proposal, data about Americans' calling habits would be kept in the hands of phone companies, which would not be required to retain the data for any longer than they normally would, according to senior administration officials. If approved by Congress, the changes would end the most controversial part of the bulk phone records program, a major focus of privacy concerns inside the United States since its existence was leaked last year.

In [a speech in January](#), President Obama said he wanted to get the N.S.A. out of the business of collecting call records in bulk while preserving the program's capabilities. He acknowledged, however, that there was no easy way to do so, and had instructed Justice Department and intelligence officials to come up with a plan by March 28 — Friday — when the current court order authorizing the program expires.

As part of the proposal, the administration has decided to renew the program as it currently exists for at least one more 90-day cycle, senior administration officials said. But under the plan the administration has developed and now advocates, the officials said, the government would no longer systematically collect and store records of calling data. Instead, it would obtain individual orders from the Foreign Intelligence Surveillance Court to obtain only records linked to phone numbers a judge agrees are likely tied to terrorism.

The N.S.A. now retains the phone data for five years. But the administration considered and rejected imposing a mandate on phone companies that they hold onto their customers' calling records for a period longer than the 18 months that federal regulations already generally require — a burden that the companies had resisted and that was seen as a major obstacle to keeping the data in their hands. A senior administration official said that intelligence agencies had concluded

that the impact of that change would be small because older data is less important.

The new surveillance court orders would require phone companies to swiftly provide those records in a technologically compatible data format, including making available, on a continuing basis, data about any new calls placed or received after the order is received, the officials said.

They would also allow the government to seek related records for callers up to two calls, or “hops,” removed from the number that has come under suspicion, even if those callers are customers of other companies.

The N.S.A. uses the once-secret call records program — sometimes known as the 215 program, after Section 215 of the Patriot Act — to analyze links between callers in an effort to identify hidden terrorist associates, if they exist. It was part of the secret surveillance program that President George W. Bush unilaterally put in place after the terrorist attacks of Sept. 11, 2001, outside of any legal framework or court oversight.

In 2006, as part of a broader Bush administration effort to put its programs on a firmer legal footing, the Justice Department persuaded the surveillance court to begin authorizing the program. It claimed that Section 215, which allows the F.B.I. to obtain court orders for business records deemed “relevant” to an investigation, could be interpreted as allowing the N.S.A. to systematically collect domestic calling records.

Marc Rotenberg, the executive director of the Electronic Privacy Information Center, called the administration’s proposal a “sensible outcome, given that the 215 program likely exceeded current legal authority and has not proved to be effective.” While he said that he would like to see more reforms to other surveillance authorities, he said the proposal was “significant” and addressed the major concerns with the bulk records program.

Jameel Jaffer of the American Civil Liberties Union said: “We have many questions about the details, but we agree with the administration that the N.S.A.’s bulk collection of call records should end.” He added, “As we’ve argued since the program was disclosed, the government can track suspected terrorists without placing millions of people under permanent surveillance.”

The administration proposal will join a jumble of bills in Congress ranging from proposals that would authorize the current program with only minor adjustments, to proposals to end it.

In recent days, attention in Congress has shifted to legislation developed by leaders of the House Intelligence Committee. That bill, according to people familiar with a draft proposal, would have the court issue an overarching order authorizing the program, but allow the N.S.A. to issue subpoenas for specific phone records without prior judicial approval.

The Obama administration proposal, by contrast, would retain a judicial role in determining whether the standard of suspicion was met each time.

The administration’s proposal would also include a provision clarifying whether Section 215 of the Patriot Act, due to expire next year unless Congress reauthorizes it, may in the future be legitimately interpreted as allowing bulk phone data collection.

The proposal would not, however, affect other forms of bulk collection under the same provision.

The Central Intelligence Agency, for example, has [obtained orders for bulk collection of records about international money transfers](#) handled by companies like Western Union.

The existence of the N.S.A. program was disclosed and then declassified last year following leaks by Edward J. Snowden, the former N.S.A. contractor. The disclosure set off a controversy that scrambled the usual partisan lines in Congress.

The government has been unable to point to any thwarted terrorist attacks that would have been carried out if the program had not existed, but has argued that it is a useful tool.

[A review group appointed by Mr. Obama](#) and an [independent federal privacy watchdog](#) both called for major changes to the program; the latter also concluded that the bulk collection is illegal, rejecting the government’s Patriot Act interpretation.

In January, Mr. Obama narrowed how far out from suspects N.S.A. analysts could go in analyzing calling records, reducing the limit to two steps from three. He also began requiring the N.S.A. to

obtain prior court approval for using a phone number to make queries of the database.

Marc Raimondi

(b) (6)

From: Burrows, Charlotte (ODAG)
Sent: Wednesday, April 9, 2014 12:42 PM
To: Bonilla, Armando (ODAG); Braunstein, Joshua (ODAG); Brown Lee, Erika (ODAG); Childs, Heather G. (ODAG); Columbus, Eric (ODAG); Dinan, James (ODAG); Fitzpatrick, Benjamin B. (ODAG); Franklin, Shirlethia (ODAG); Gannon, Anne (ODAG); Goldberg, Stuart (ODAG); Goldsmith, Andrew (ODAG); Grooms, Daniel (ODAG); Jacobsohn, Robin (ODAG); Lan, Iris (ODAG); Margolis, David (ODAG); Michalic, Mark (ODAG); Raj, Kiran (ODAG); Starks, Geoffrey (ODAG); Steele, Brette L. (ODAG); Tomney, Brian (ODAG); Vogel, Miriam (ODAG); Walsh, James (ODAG); Zebrak, Julie R. (ODAG)
Subject: Transcript of April 8 2014 House Judiciary Committee Hearing



Transcript -
House Judiciary ...

All, Many thanks for help in preparing the Attorney General for the recent Congressional hearings. Your work is very much appreciated. In case you'd like to review for your components' equities, I've attached a searchable pdf of the transcript from yesterday. Note that this is not final, however, and should not be forwarded outside the Department.

Thanks again.

Charlotte

CQ CONGRESSIONAL TRANSCRIPTS

Congressional Hearings

April 8, 2014 - Final

House Judiciary Committee Holds Hearing on Oversight of the Justice Department

GOODLATTE:

Good morning. The Judiciary Committee will come to order. And without objection, the chair is authorized to declare recesses of the committee at any time.

We welcome everyone to this morning's oversight hearing of the U.S. Department of Justice, and I will begin by recognizing myself for an opening statement.

Welcome, Attorney General Holder, to your seventh appearance before the House Judiciary Committee since your confirmation in 2009. We are happy to have you here with us today.

Over the last year, we have all witnessed an extraordinary level of executive overreach by the Obama administration. Time after time, this president has pushed the limits on executive power beyond their constitutional boundaries.

He has repeatedly declared that, rather than faithfully executing the laws passed by the legislative branch, he will, quote, "refuse to take no for an answer," end quote, and that "where Congress won't act, I will," end quote.

Under my leadership, the House Judiciary Committee has worked diligently to oppose these broad assertions of executive power, and remind the administration and the American people that our Constitution gives Congress the power to make the law and charges the president with its faithful execution.

Our work continues today because the Department of Justice has undertaken its own form of overreach in several instances. This is so despite the fact that legal opinions from the Justice Department under President's Carter, Reagan, George H. W. Bush, Clinton and George W. Bush all agree that while the president does not have a duty to execute laws that he in good faith determines are unconstitutional, the president may not refuse to enforce an act of Congress for policy reasons.

Unfortunately, the Department of Justice, under Attorney General Holder, has done just that. For example, on October 19th, 2009, Attorney General Holder announced

that the Justice Department would stop enforcing the federal marijuana ban against persons who comply with state medical marijuana laws. The Justice Department's decision not to enforce the Controlled Substances Act in states whose laws violate federal law is not a valid exercise of prosecutorial discretion, but a formal department-wide policy of selective non-enforcement from an act of Congress.

On August 12th of this year, the attorney general directed all federal prosecutors to decline to charge the drug quantity necessary to trigger a mandatory minimum sentence if a defendant meets certain criteria. The attorney general's directive, along with contradicting an act of Congress, puts his own front line drug prosecutors in the unenviable position of either defying their boss or violating their oath of candor to the court.

Additionally, this Justice Department has continued to play fast and loose with federal taxpayer dollars. Every year since 1998, the Justice Department's inspector general has compiled a list of the top management and performance challenges facing the department. And every year since 1999, including this year, the issue of grant management has been included.

Rather than learn from its mistakes over that 15-year period, and act to effectively administer its more than 200 grants, the department has made a number of concerning changes to some of these programs over the last year. This includes limiting the universe of grant applications only to prior grant recipients under a number of its Violence Against Women programs. This type of change smacks of cronyism, and it opens these programs up to potential corruption and malfeasance. It is also in direct conflict with Congress' intent when it created competitive grants, not to mention the department's stated commitment to promoting new and innovative programs.

Secondly, I am concerned that this administration has begun a profound change in how forensic is studied and how standards are promulgated without congressional approval or oversight.

The Justice Department has permitted the National Institute of Standards and Technology, or NIST, to establish brand-new scientific area committees which will replace the longstanding the scientific working groups in forensic science that have operated for years under the Department of Justice, and are the backbone of forensic science. We have learned that these new NIST committees are rewriting forensic standards without input from established SWIG forensics experts, contrary to congressional intent.

Third, last summer, the Department of Justice announced that it would break from its tradition of having all public safety officers benefits program claims reviewed by the OJP General Counsel's Office before an official approval or denial was made. Instead, the department has delegated this important staff to a PSOB Council who reports to a political appointee.

The PSOB Council's determination regarding the legality of a claim can also be overridden by the political head of OJP. And the Department of Justice has reduced the evidence needed to establish a claim. These changes will allow payments to be paid that are not supported by the law. And they highlight the department's continued recklessness regarding taxpayer dollars, as well as the continued disregard for the limitations Congress places on how grant money should be spent.

All of this demonstrates a pattern of the -- on the part of the Obama administration to ignore or rewrite the very legislation that places limits on executive branch authority for purely political purposes.

The Justice Department has a responsibility to provide legal advice, including constitutional analyses, to the executive branch. I find it ironic then that the department has chosen on multiple occasions to act in contravention of the Constitution and congressionally enacted federal law. I would be interested in hearing what, if any, legal guidance the department, including its Office of Legal Counsel, has provided to the administration on these executive overreaches.

Attorney General Holder, I look forward to hearing your answers on all of these important topics today, as well as on other significant issues to the Justice Department and the country.

And it's now my pleasure to recognize the ranking member of the full committee, the gentleman from Michigan, Mr. Conyers, for his opening statement.

CONYERS:

Thank you, Chairman Goodlatte. And welcome, Attorney General Holder.

In the vast jurisdiction of the Department of Justice, there are many topics worthy of discussion today. And I hope that you'll get a chance to accommodate Chairman Goodlatte in all of the numerous criticisms and flaws and -- and other things that

he raised in his opening statement. Because we do want an honest appraisal of this. And I'm sure that you're up to giving us one.

First topics worthy of discussion for me today is your commitment to enforcing voting rights for all Americans in the wake of the Shelby County decision. Voter discrimination of all kinds is alive and well in this country. And it ought to be our committee's overwhelming priority to take up House Resolution 3899, The Voting Rights Amendment Act, without delay.

CONYERS:

Your work in sentencing reform is remarkable. In a country where early half of all federal inmates are serving time for drug offenses, the harshest crimes should be reserved for violent offenders. As you've stated before the Sentencing Commission last month, quote, "Our focused reliance on incarceration is not just financially unsustainable, it comes with human and moral costs that are impossible to calculate."

We should note that the department's efforts to engage state and local agencies, juvenile justice systems and community leaders to end the school to prison pipeline and ensure that every young person has the opportunity to reach his full potential regardless of the color of his or her skin. And we should celebrate the department's commitment to marriage equality as more and more of this country makes progress in what you have called one of the defining civil rights challenges of our time.

Mr. Attorney General, your leadership on these and other issues has been invaluable. Of course, throughout your tenure, you have been asked to do all this and more with fewer and fewer resources. If you can give us any guidance as to the effect of the draconian Ryan budget proposal on the Department of Justice, we would like to engage with you on that topic as well.

I'd like to focus the balance of my time on the one overriding issue, our collective effort to roll back government surveillance of United States citizens. Much of our recent debate is focused on how to end the National Security Agency's bulk collection of telephone records, under Section 215 of the USA Patriot Act. Ending that program incorrectly -- and correcting the deeply troubling legal argument at its foundation are of paramount importance. But the president's proposal and the proposal advanced by some on the House Intelligence Committee deals only with Section 215. In other words, they focus on one program used to access one database collected under one legal authority.

To me the problem is far more complicated than that narrow lens implies. And in his January 17th speech, President Obama committed to much more. First, the president instructed you, Mr. Attorney General, to institute reforms that place additional restrictions on the government's ability to retain, search and use in criminal cases. The content of communications intercepted under Section 702 of the Foreign Intelligence Surveillance Act.

On March 28th, in a letter sent to Senator Wyden, the Director of National Intelligence James Clapper confirmed that the government mines this data for information about United States certain persons. Section 702 implicated content not metadata under any other circumstance. The government would require individualized suspicion and probable cause to seize these communications.

The FISA Amendments were never intended to authorize backdoor surveillance of United States persons. And the Department of Justice should work with this committee to correct any impression to the contrary. The president asked the attorney general to amend how we use national security letters so that gag orders will not be indefinite and will terminate within a fixed time. I view this modest amendment as a bare minimum change unnecessary through the NSO regime in light of what the public now knows about government surveillance. And yet, this committee has received no indication that this reform is underway at the Department of Justice and I hope, sir, that we will hear news of this development in your testimony or soon.

And finally, the president recognized that there's an inevitable bias within the intelligence community to collect more information about the world, not less. That bias is consistent with their mission to maintain national security. But national security, of course, is not the only value we hold dear. We must also be vigilant against government overreach and protect our constitutional rights to privacy and free association. In the Congress, this committee has always been the proper forum for a discussion about civil rights, especially in the national security context. In the Executive Branch, that rule falls to the Department of Justice and specifically Mr. Attorney General, to you.

This country would be well-served by your continued leadership on this issue. In years past, the Department of Justice and the House Judiciary Committee have worked together to draft, pass and implement the Foreign Intelligence Surveillance Act, the USA Patriot Act and the FISA Amendments Act. We should renew that partnership without delay and move the USA Freedom Act through this committee

with all necessary speed. I thank you and I look forward to your testimony, attorney general. And I yield back.

GOODLATTE:

Chair thanks the gentleman. And without objection, all other members opening statements will be made a part of the record. We thank our only witness, the attorney general, for joining us today. And Attorney General Holder, if you would please rise, we will begin by swearing you in.

Do you swear that the testimony that you are about to give is the truth, the whole truth, and nothing but the truth, so help you God?

HOLDER:

I do.

GOODLATTE:

Let the record reflect that the attorney general responded in the affirmative. Thank you. And we'll begin with our introduction. On February 3, 2009, General Holder was sworn in as the 82nd attorney general of the United States. General Holder has enjoyed a long career in both the public and private sectors. First, joining the Department of Justice, through the attorney general's honors program in 1976, he became one of the department's first attorneys to serve in the newly formed Public Integrity section. He went on to serve as a judge of the Superior Court of the District of Columbia and the U.S. attorney for the District of Columbia.

In 1997, General Holder was named by President Clinton to be the Deputy Attorney General. Prior to becoming attorney general, he was a litigation partner at Covington & Burling, LLP, here in Washington, D.C. General Holder, a native of New York City, is a graduate of Columbia University and Columbia Law School.

General Holder, we appreciate your presence today and look forward to your testimony.

HOLDER:

Thank you, Mr. Chairman, Ranking Member Conyers, and also members of the committee. I'm here today to speak on behalf of my hardworking colleagues in department offices around the world about our continued commitment to the cause

of justice and the missions that we share, securing our nation and protecting the American people. Now this is and always will be our top priority. And over the past year, the department has done important work in this regard, strengthening our ability to safeguard America's national security, to disrupt the potential terrorist plots, and to ensure that those who attempt to harm our nation, its vitals interests or its people can be held accountable to the fullest extent of the law.

Last month, the department achieved a major milestone when we secured the conviction of Sulaiman Abu Ghaith, the son-in-law of Osama bin Laden and a senior member of Al Qaida on terrorism-related charges. And this verdict has proven that proceedings such as these can safely occur in the city I'm proud to call my hometown, as in other locations across our great nation.

Now we never doubted. We never doubted the ability of our Article III court system to administer justice swiftly in this case, as it has in hundreds of other cases involving terrorism defendants. And it would be a good thing. It would be a good thing for this country finally to put to rest this political debate that has otherwise questioned the experience that we've had.

Last week the Senate Intelligence Committee voted to declassify key portions of its report into past interrogations practices. Now I agree that as much of the report as possible should be made public. Of course, allowing for redactions that are necessary to protect national security. So I was pleased that the committee voted to send portions of the report forward for declassification. Having prohibited these practices upon taking office, the president believes that bringing this program into the light will help the American people understand what happened in the past and can help guide us as we move forward, so that no administration contemplates such a program in the future.

Beyond our national security work, the department will continue to build on the progress we have made in confronting a range of threats and challenges. The full resources of the department and the FBI have been made available to help conduct a thorough investigation into last week's horrific mass shooting at Fort Hood. In going forward, my colleagues and I will do everything possible to achieve justice for our brave men and women in uniform and prevent these far- too-common tragedies from happening again.

More than ever before, the department's law enforcement work today must connect with new and emerging technology, including currencies, such as bitcoin. Virtual currencies can pose challenges for law enforcement, given the appeal that they

have among those seeking to conceal illegal activity. And this potential must be closely considered. We are working with our financial regulatory partners to account for this emerging technology. Those who favor virtual currencies solely for their ability to help mask drug trafficking or other illicit conduct should think twice. The department is committed to innovating alongside this new technology in order to ensure investigations are not impeded by any improvements in a criminal's ability to move funds anonymously.

HOLDER:

Now as virtual currency systems are developed, it will be imperative to law enforcement interest that those systems comply with applicable, anti-money laundering statutes, and know your (ph) consumer controls.

Across the board, the department's comprehensive efforts reflect our commitment to integrity and equal justice in every case and in every circumstance, and nowhere is this commitment stronger than in our work to strengthen America's federal criminal justice system. Through the Smart On Crime initiative that I announced last August, my colleagues and I are taking action on a number of evidence-based reforms, including modifications to the department's charging policies with regard to mandatory minimum sentences for certain non-violent low-level drug crimes. This common-sense change will ensure that the toughest penalties are reserved for the most dangerous or violent drug traffickers. And I'm pleased to note that members of this committee have shown tremendous leadership in the effort to codify this approach into law.

I have been proud to join many of you in supporting the bipartisan Smarter Sentencing Act introduced by Representatives Scott and Labrador, and co-sponsored by Ranking Member Conyers, which would give judges more discretion in determining appropriate sentences for people convicted of certain federal drug crimes. And I pledge to keep working with leaders like you and like Senator Rand Paul and others to address the collateral consequences of certain convictions, including felony disenfranchisement policies that permanently deny formally-incarcerated people their right to vote.

Now, we will never be able to simply arrest and incarcerate our way to becoming a safer nation. That's why we need to be both tough and smart in our fight against crime and the conditions and behavior that -- that breed crime. And this struggle must extend beyond our fight to combat gun, gang and drug-fueled violence to include civil rights violations, and financial and health care fraud crimes that harm

people and endanger the livelihoods of hardworking Americans from coast to coast.

Last November, the Justice Department secured a major victory in this struggle when we obtained a \$13 billion settlement with JPMorgan Chase and Company, the largest settlement of a single entity in America history to resolve federal and state civil claims related the company's mortgage and securitization process.

As part of our ongoing efforts to hold accountable those whose conduct contributed to the mortgage crisis, the department also filed a -- a lawsuit against the ratings firm S&P. And with the \$1.2 million -- \$1.2 billion agreement we reached with Toyota last month, the largest criminal penalty ever imposed on an automotive company, we're making good on our determination to protect consumers and address fraud in all of its forms.

So, moving forward, my colleagues and I will continue to build upon these and other important efforts, and we'll keep working alongside members of Congress, including Ranking Member Conyers, Representative Sensenbrenner and Representative Lewis to address the void that has been left by last year's supreme court decision involving one of the Voting Rights Act core provisions so that we could help protect that most basic right of American citizenship.

So, I want to thank you once again for the chance to discuss these and other priorities with you today, and for your continued support of the Justice Department's other critical efforts. I look forward to working closely with you to build upon these public safety and law enforcement accomplishments that my colleagues have made possible in recent years.

Thank you very much.

GOODLATTE:

Thank you, General Holder.

We'll begin the questioning. And I'll start with this.

The Department of Justice is charged with providing legal advice to make sure the president and executive agencies operate within the bounds of the law and the Constitution. Of course, it's not just the Justice Department -- involves advice regarding our nation's health care laws, education laws, immigration laws, welfare laws.

Doesn't the Take Care Clause require the president to enforce the law, even if he doesn't like the law in question?

HOLDER:

Well, the president has a constitutional responsibility to enforce the laws. That is clear. The Justice Department has an equal responsibility to defend statutes -- defense statutes that Congress passes, unless the determinations made -- and it happens very infrequently within the Justice Department -- that there is no basis to defend the statute.

Such an event happened with regard to the Defense of Marriage Act and the ability to be had in a unique circumstance in the 2nd Circuit to make a determination that a heightened scrutiny standard should apply to the constitutional determination of that statute. And on that basis, we made the decision not to defend the statute. The decisions -- it was ultimately upheld by the supreme court.

GOODLATTE:

I am concerned about some of the decisions and some of the directives that have been issued by you and others in the Department of Justice. is it your view that there is any limit to the president's prosecutorial discretion?

HOLDER:

Well, I mean, the discretion must always be exercised in a responsible and constitutional way. There is a vast amount of discretion, I think, that a president has, and more specifically, that an attorney general has. But that discretion has to be used in an appropriate way so that you're acting consistent with the aims of the statute, but at the same time, making sure that you are acting in a way that's consistent with our values, consistent with the Constitution and protecting the American people.

GOODLATTE:

Could the president conceivably decide that with regard to a particular law, that the discretion is to not enforce that law at all, even though the law is on the books?

HOLDER:

Well, I mean, "to not enforce at all" -- I -- you know, that's a categorical -- that's a categorical statement. And in a hypothetical circumstance, that's a difficult question to answer. The determination, as I was referring to before, not to defend the constitutionality of the Defense of Marriage Act might fall into the category that you have described. But is one, as I said, that was very controversial at the time. We announced it, but ultimately, it was upheld by the supreme court.

GOODLATTE:

Currently, under the modified Section 215 order, with regard to foreign intelligence surveillance, the government is no longer determining whether there is reasonable articulable suspicion, or what's called RAS. That -- the target pertains to foreign terrorism. Those determinations are now being made by the FISC -- the Foreign Intelligence Surveillance Court. How is that structure being implemented under the modified order? And how is the FISA Court approving the queries of the data under the modified order?

HOLDER:

Well, I think that we're doing so pursuant to the orders of the president, which I think are entirely reasonable. It doesn't have an impact on our ability to make very good use of that tool to go to the court, present the case to be made using that reasonable articulable suspicion standard. The court then authorizes the action that we seek. We now limit the action that we take to two hops, as opposed to three hops. And I think that the way in which we are now proceeding is, again, consistent with the president's direction, but also is consistent with our -- consistent with our obligation to keep the American people safe. It has not had a negative impact on our ability to make use of that tool.

GOODLATTE:

And how is the court -- the FISA Court approving those queries of the data under this modified order?

HOLDER:

Well, the court is presented with a request, a determine -- a statement of -- that the -- what we have -- a statement by the department that we feel that reasonable articulable suspicion has been met, and make a determination about whether they agree or -- or disagree. And the order is then signed.

GOODLATTE:

Moving to another subject -- and that is, this question about the application for grants -- the Office on Violence Against Women, which is within the Department of Justice's purview, recently announced changes to its grant solicitation process for fiscal year 2014, which limits the universe of grant applicants prior to grant recipients for a number of the office's discretionary and competitive grant programs. Specifically, it's limiting under six of those programs to only applicants who have been prior recipients.

This concerns me greatly, both from the standpoint of the appearance of favoritism and from the standpoint of not looking for new and innovative ways to combat violence against women. I wonder if you would comment on why this policy has been permitted to...

HOLDER:

Well, our...

GOODLATTE:

... take hold.

HOLDER:

I'm sorry?

GOODLATTE:

I just -- I'm giving you an opportunity to respond to that.

HOLDER:

The -- our grant-making is really headed by our Office of Justice programs. And one of the things Carol Mason -- in whom I have total faith -- what we have tried to do under her and her predecessor, Roy Robinson, is to seek out from a variety of places grant proposals -- support those proposals that we think are of potential benefit, and then actually do something you don't think has necessarily been done before. Use evidence-based means to determine the effectiveness of those programs, and on that basis, make further determinations about -- about funding.

There is -- I'm not aware of any determinations that are made to exclude from grant-making or grant-seeking institutions that, for -- on any basis, we take into account those grant applications that are made, use neutral criteria to determine whether or not they should be supported. But then, as I said, look after what happens after the grant was made, see the actions that are taken, and, again, on an evidence-based basis, decide whether or not the program should be supported or attempted to be replicated in other parts of the country.

GOODLATTE:

Well, the information I have is to the contrary.

My time's expired, so if -- if you will, I would like to pursue that matter with you after this hearing. And we'll get you some specific questions or concerns we have. I am concerned that new applicants are being excluded, and that current applicants are being renewed not in a competitive environment.

HOLDER:

Mr. Chairman, I will say that I don't think that is the practice. But to the extent that your concern is a legitimate one, that is something that I will look at, and I will get back to you. That is not the way I understand that we are proceeding. But if I'm wrong, we will get back to you and that practice will be corrected.

GOODLATTE:

Thank you.

The gentleman from Michigan, Mr. Conyers, is recognized for his opening -- for his questions.

CONYERS:

Thank you very much.

Thank you for your statement, Mr. Holder. It's -- it's important that we come together in the Judiciary Committee and work out some of these differences or misunderstandings, as the case may be.

I'd like to turn your attention to Section 215, the Foreign Intelligence Surveillance Act -- FISA. And we're going to try to reach consensus on Section 215. And we

will amend that statute to correct the mistaken argument that relevance means everything.

Some have suggested that Section 215 could be reformed without requiring an individualized judicial determination of relevance or reasonable articulable suspicion before the government may demand certain business records. Consistent -- consensus on our committee is that prior judicial review is necessary. How do you stand on that?

HOLDER:

Well, I think that the proposal that the president has made and the interim steps that we have taken, are an indication of a basic fact I think we have to understand. Section 215, as we know it, is proposed to be ended by this administration. That is -- that's a simple fact. And what we would like to have put in its place is a system where the information is stored in a different place. The information is acquired in a different way. The amount of information that is actually held by the government is substantially reduced. I think the debate we've had as a nation has been a good one. And I think that the president's proposal that is supported unanimously by his national security team is a good step forward. We want to work with Congress to try to perfect the proposal. It is, as I said, only a proposal and can obviously be made better. So we want to work with Congress to ultimately come up with a statutory change, so that we can get to this new Section 215.

CONYERS:

Mm-hmm. Thank you. But let me see if you feel that we have to have this relevance before the government may demand certain business records under 215. On this committee, there's a consensus that prior judicial review is necessary. Do you share that view?

HOLDER:

Well, by going to to the FISC and specifying the reasonable, articulable suspicion for acquiring the information, I think we are making a particularized request. It is something that is more predicate-based than existed in the past. And I think that is a step. I think that, in fact, really deals with many of the concerns that have been expressed.

CONYERS:

On -- thank you. On January 17th, you and I were both present at the Department of Justice when President Obama made a series of commitments to reforming even more than 215, and asked that the Department of Justice institute reforms that place additional restrictions on the government's ability to retain, search and use criminal cases' communications between Americans and foreign citizens, incidentally collected under Section 702. Have you or anyone in DOJ considered some of these reforms and if they're necessary?

HOLDER:

Yeah. I mean, one of the things that I am charged with responsibility of doing, along with the Director of National Intelligence Clapper, is to look not only in 215, but the other tools that we have. Section 702 is one of them. We have begun the process that the president gave us in that regard. We are not finished with the work that we are doing. Our hope would be to come to Congress with a proposal and to work with Congress to make sure that 702, which is already subject to, you know, extensive oversight by the FISC, the Executive Branch, Congress, but just to make sure that we have the necessary procedures in place so that we are ensuring that only non- U.S. persons outside the United States are targeted to minimize the acquisition, retention and dissemination of incidentally acquired information about U.S. persons. But again, this is a process that we are still engaged in. And I don't think we get -- we're yet at a position where we can come to Congress with a concrete proposal. Once we are at that point, as we are with Section 215, we will be coming back to Congress with that proposal.

CONYERS:

Thank you. I have three other questions. I'll send them to you and we'll keep in communication. I yield back.

GOODLATTE:

The Chair thanks the gentleman. I recognize the gentleman from Wisconsin, Mr. Sensenbrenner for five minutes.

SENSENBRENNER:

Thank you very much, Mr. Attorney General, and thank you for coming here. I like to ask you a series of questions about the perjury which I believe that the Director of National Intelligence James Clapper gave to the Senate. The U.S. attorney's manual specifically permits exposure of information concerning ongoing

investigations, quote, "In matters that have already received substantial publicity." Now Director Clapper's perjury, in my opinion, has been covered extensively, and I have articles from The New Yorker, The Washington Post, Guardian, (inaudible) and The Washington Times and The Huffington Post. In light of this, are you willing to discuss whether or not the Justice Department is investigating Director Clapper for his statements before the Senate?

HOLDER:

I think that we received a letter from you, Mr. Sensenbrenner. And I think as we explained in our response to your letter, I'm really not in the position to confirm whether the department is investigating, any particular matter, but we are reviewing the material that you and other members of the committee have provided to us. And I can assure you that we will take any action that is appropriate.

SENSENBRENNER:

Well, the first letter I sent to you was several months ago. And yes, we have received a response to that. I sent you another letter last week clarifying this. So let me refresh your memory. Senator Wyden asked Director Clapper whether the NSA was collecting data about millions of Americans. Mr. Clapper said, no, sir, not wittingly. Now Senator Wyden advised the director the day before the hearing that he was going to ask this question. And after Director Clapper responded in the manner that he did, Senator Wyden gave him a chance to correct his testimony, in which he refused to do. And then, Mr. Clapper told the media that he gave the, quote, "least untruthful answer," unquote. I think we all know that lying to Congress is a federal offense. And the only way Congress and, for that matter, the courts can be able to do their job is to get truthful testimony and then apply the facts and apply the law.

Now my understanding of the offense of perjury is that it was made under oath, which it was. It was knowingly false, which Director Clapper admitted, even after he was given a chance to change the testimony and is also material to a government investigation, which I would assume includes an investigation that's being made by Congress. Do you personally believe that Mr. Clapper's testimony fits this description?

HOLDER:

Well, as I indicated, we're not in a position to confirm whether the department is investigating any particular matter. But as I said also, we will take into account in

making any determinations that we make the material that you have submitted to us.

SENSENBRENNER:

Is there any circumstance that you would prosecute a member of the administration for lying under oath to Congress?

HOLDER:

Sure.

SENSENBRENNER:

What would that be?

HOLDER:

The person lied and that determination was made and all of the other legal requirements of the perjury statute were met.

SENSENBRENNER:

Well, Director Clapper has admitted that he has lied. And I outlined the elements to convict someone of perjury. And I'll remind you it's being made under oath, was knowingly false and is material to a government investigation. Now if you want to delay this or sweep this under the carpet, wouldn't it be pointless for Congress to pass new laws, limiting data collection, if the Justice Department are at liberty and other officials are at liberty to lie about enforcing them?

HOLDER:

I'm not sure I totally understand the question. But I can tell you this. We take our responsibility seriously to investigation allegations of perjury. There have been prosecutions brought by this department over the years in that regard. With regard to this specific matter it is something, as I said, that we are looking at the materials that have been presented to us and action will be taken that is appropriate.

SENSENBRENNER:

Well, I -- you know, I seem to recall back 25 years ago, during Iran-Contra there were prosecutions. And the only way General or Colonel North and the person

who is his superior, ended up getting off is because Congress was a little too eager to provide them immunity and there was immunized testimony that was used in the prosecution. Here, there's no immunity that has been given at all. And you know, I'm interested in making sure that everybody knows that they have to tell the truth when they appear before Congress. And what more do you need besides an admission from General Clapper that he lied? I gave the least untruthful answer. My time is up.

GOODLATTE:

The Chair thanks the gentleman. I recognize the gentleman from New York, Mr. Nadler for five minutes.

NADLER:

Thank you, Mr. Chairman.

First, let me state to the attorney general that I share your commitment to trying suspected terrorists in our Article III courts and I applaud and congratulate you. And the department's successful prosecution of Osama bin Laden's son-in-law Sulaiman Abu Ghaith, I think is the pronunciation. That conviction came 13 months after his arrest and he now faces the potential of life in prison. By contrast, Khalid Sheikh Muhammed and his four co-dependents have been in custody for more than a decade and it remains uncertain when, if ever, the military commission system will finally be able to get around to a trial. I hope with the conviction of Abu Ghaith, that we can stop wasting time and money on this so-far unsuccessful military tribunal system and secure the convictions of the guilty terrorists in our Article III courts. I want to thank you again for restating today your commitment to that (inaudible) system.

Now following the failure of many savings and loans institutions in the late 1980s, special government task forces referred 1,100 cases to prosecutors resulting in more than 800 bank officials going to jail. By stark contrast, no senior executive at any large financial institution (inaudible) the 2008 financial crisis, has been charged or prosecuted.

NADLER:

Just last month, the DOJ inspector general concluded that the FBI ranked financial crime as its lowest in criminal threat in the aftermath of the 2008 financial crisis. Did not use some of the additional funding that Congress provided to pursue

mortgage fraud for this purpose and that DOJ mistakenly inflated its results in mortgage fraud prosecutions by some 90 percent. That report is very troubling.

My question is why didn't the DOJ or the FBI devote the same kind of resources that was devoted to the savings and loan crisis in the '80s? What steps are you now taking to investigate where the money allocated by Congress to pursue mortgage fraud was misspent? And what other steps are you now taking in response to the I.G.'s report?

And, finally, in light of this experience of the total failure to prosecute high-ranking -- or even investigate high-ranking bank officials for the fraud that led to the 2008 crash, what steps are you taking to ensure that the full range of possible criminal charges will be investigated with regard to General Motors and its faulty ignition switches that reportedly have been -- resulted in at least 13 deaths years after they knew about it?

HOLDER:

Well, with regard to the OIG report, I take -- I just take great exception to a lot of the conclusions that are contained therein. If you look at the report itself, the number of mortgage fraud convictions nearly doubled from fiscal year 2009 to 2010 from 555 to 1,087. And an increase further in fiscal year 2011 to 1,118. And this, I think, reflects the really mobilization on the part of the department to combat mortgage fraud during this critical period.

If you look at, as I said, some of the result that we had over the past year and a half or so, including that \$13 billion resolution with JPMorgan, that makes clear, I think, our determination to hold people accountable.

We had a 20 -- the National Mortgage Settlement resulted in \$20 billion in relief and assistance going to more than 600,000 families. And if you look at more generally our history of holding accountable institutions and individuals who are connected to this financial fraud, beginning in 2013, we have gotten guilty pleas from the following financial industry institutions: UBS, RBS, SAC Capital, Wegelin.

With respect to prosecutions of individuals, we have charged individuals from the following companies: JPMorgan, Goldman Sachs, Morgan Stanley, Credit Suites, UBS, Gravel Bank, ICAP, Galyan, SAC Capital, Stanford Financial Group Allen.

So, the notion that somehow or other we are -- not been doing what we should have been doing with regard to the mortgage fraud problem, the financial industry in general is a nice talking point. And I don't mean to say that's what you're saying. But it is used by some as a talking point. It seems to be inconsistent with the facts.

NADLER:

Well, thank you, but it is essentially what I'm saying. I think going after a company which can pay a fine out of -- paid by the shareholders is not the same as prosecuting someone other than small fry -- as prosecuting the higher-ups in these companies who -- who OKed this.

But let me get onto my next question.

The review group appointed by the president to review the Section 215, bulk collection of telephone metadata concluded among other things that a single legal standard could apply to NSLs and Section 215, because otherwise, you simply switch from one to the other.

Do you agree -- and I hope you can brief on this, because I have one more question. Do you agree that we should follow this recommendation, that we should make the same standards for NSLs as for 215?

HOLDER:

Well, I think that, you know, we have to understand the different nature of these. NSLs were a tool to obtain really narrowly defined types of records from a narrow set of institutions. By contrast, 215 allows the government to obtain any tangible things. And because 215 has a much wider breadth of materials that can be obtained, the need for judicial supervision, I think, is more obvious.

SNLs -- you get information that are used to build cases in the same way that you use grand jury subpoenas that, frankly, do not involve judicial supervision at all.

NADLER:

So you don't agree? So you don't agree with the recommendation of the -- of the president's review commission?

HOLDER:

I've stated my position, yes.

NADLER:

OK. My last question is, the -- the -- the president when he campaigned back in 2008 said he was going to reign in the State Secrets -- use of the State Secrets Doctrine. And he has mildly done that by saying only higher-ups in the department can approve it, and they'll use it more sparingly. But they still use -- you still use the State Secrets Doctrine to object to a case as an answer to a complaint and completely stop the case from being heard. And this means that people cannot get their cases into court, that rights cannot be vindicated, that the judicial system cannot even consider many allegations.

The 9th Circuit -- a 9th Circuit panel said that the problem with this is that the executive cannot be its own judge. And under this system, the executive is its own judge. I would observe that this insulates the executive from any accountability for its actions, because it can classify -- may classify some of its own actions, and then block any judicial review by incantation of the magic words "state secret."

Do you think that it is proper or wise in a democracy to trust the executive branch with such absolutely unreviewable power over our liberties in such a way that rights can be violated and no one can get into court to challenge those rights to...

GOODLATTE:

Time of the gentleman has expired. The attorney general will be permitted to answer the question.

HOLDER:

Well, really fundamentally changed the whole invocation of the State Secrets privilege. I put in place a series of measures so that that determination can only be made after review by a high-level committee, and ultimately by sign-off by the deputy attorney general and by myself, understanding that we were never to use the State Secrets privilege to hide things that were embarrassing, or to hide government misconduct. There's a reality we have to also face, though, that there are certain cases that bring into, or potentially bring into the public realm, things that would harm the national security.

I'd also note that in a different -- maybe -- I'm not sure what opinion you're referring to, but I know in another opinion, a 9th Circuit judge or a district court

judge in the 9th Circuit noted very approvingly of the changes that we had made in the Justice Department with regard to how we deal with the whole question of the invocation of the State Secrets privilege. And I'm actually proud of the work that we have done. I think that we can justify every time that we have used it. And it has been used extremely sparingly by this administration.

GOODLATTE:

The chair recognizes the gentleman from North Carolina, Mr. Coble, for five minutes.

COBLE:

Thank you, Mr. Chairman.

General, good to have you back on the Hill.

In August of 2013, the Justice Department announced it would not challenge recently-passed state laws legalizing the production, trafficking, possession and recreational use of marijuana. Subsequently, DOJ issued guidance to banks regarding the proceeds of illegal marijuana trafficking. In issuing the guidance, you said that, quote, "There is a public safety component to this because the dispensaries have lots of cash."

General, why is the only public safety issue that the dispensaries have an excessive amount of cash?

Well, and let me continue that. Is there also not a public safety issue involving the trafficking, distribution of a substance that is still illegal under federal law?

HOLDER:

Well, the notion that somehow we have retreated from our enforcement of the Controlled Substance Act with regard to marijuana is not accurate. What we have done is to clarify in a state -- in a, I guess, a pronouncement of the deputy attorney general, set out eight factors that we will take into consideration before we use our limited resources with regard to marijuana -- the enforcement of the marijuana laws. That's not inconsistent with, I think, the way in which the Justice Department was acting before. Low level possessors of marijuana were never federal cases. In any case, the things that we're talking about now involve trafficking in marijuana that goes to minors, drug driving. Where violence is involved, where cartels are

involved, so that we remain committed to enforcement of the marijuana laws when it involves those eight factors.

COBLE:

Thank you, sir.

In the responses to the questions for the record of our last hearing -- which we received last week, which is actually 11 months after you last appeared here -- you stated that, quote, "Congress has determined that marijuana is a dangerous drug, and that the legal distribution and sale of marijuana is a serious crime that provides a significant source of revenue to large-scale criminal enterprises, gangs and cartels. It is the responsibility of the Department of Justice to enforce the Controlled Substances Act in all states," close quote.

General, given your -- your apparent commitment to enforcing federal law, why is the department now encouraging banks to help dispensaries launder money? Now, this may be subject to interpretation, but I think even though transactions may well have been legal in the two states with which we are familiar, it could still -- well, strike that. I mean, to say it a different way -- given the federal exposure, that could well amount to -- to money -- money laundering, could it not?

HOLDER:

I'm sorry, sir. I didn't hear the end of this -- end of your statement.

COBLE:

Pardon?

HOLDER:

I just didn't hear the end of your question.

COBLE:

I say, admittedly, it could well be subject to interpretation, but federal involvement in these proceeds, which were legally exchanged at the time of purchase -- could -- would that -- could that not amount to money laundering?

HOLDER:

To money laundering? All right, well, what we decided -- in the statement -- the statement that we issued was to deal with what -- as I described -- was -- and I think you quoted in my letter -- a public safety concern, where as a result of the changes made in Washington and Colorado, you have institutions that would have large amounts of cash on hand. And so we wanted to come up with ways in which that cash would not necessarily be in one place, subject to robbery, whatever violence, and would be allowed to be placed into banks. And that's why those rules were changed.

Ultimately, it's for the individual banks to make determinations about whether or not they want to accept those deposits, given the eight factors that we've set out in our overall marijuana enforcement policy.

COBLE:

Well, many people, General, in response to Colorado and Washington seem to make it clear, though -- these are legal (ph) transactions -- well, they're legal transactions at the state level, but they continue to be illegal activity, in my opinion, at the federal level. Do you concur with that?

HOLDER:

Well, again, the -- there are a lot of things that are technical violative of the -- the federal law. We don't prosecute every violation of federal law. We don't have the capacity to do that. And so what we try to do is make determinations about how we use our limited resources. Those eight factors set out the things that, from our perspective, are most important about our marijuana enforcement -- our marijuana enforcement efforts.

I think that we will still be good stewards of the Controlled Substances Act. We will prevent marijuana from getting into the hands of minors. We will prevent violence in the trafficking and sale of marijuana. Prevent the cartels from profiting. Those are the factors. Those are the things that I think are -- are worthy of federal consideration.

COBLE:

Thank you, General.

Chairman, I see my red light has illuminated. I yield back with that.

GOODLATTE:

The chair recognizes the gentlewoman from California, Ms. Lofgren, for five minutes.

LOFGREN:

Thank you, Mr. Chairman.

And thank you, Mr. Attorney General, for being here today.

I want to follow up on some of the questions that have already been posed relative to surveillance.

We've had a lot of conversation in the country about phone records. But I want to talk about Section 215, and 214, for that matter.

Is it your view that other data held by third parties -- for example, financial records or e-mails or records of what an individual searches for on the Internet that are held by third parties is in the same legal posture -- I'm not suggesting it's being done -- but as a legal matter is in the -- in the same posture as phone records?

HOLDER:

Well, I -- I -- do you mean to compare it to the bulk telephony program that existed? I...

LOFGREN:

Yes. I mean, the government -- the government's view is that it is constitutional to collect bulk phone records because they're business records.

There are other records that are held by third parties -- for example, e-mails, searches of the Internet, financial records -- that are I -- I believe covered under 215. I'm just trying to probe whether that's your understanding, as well.

HOLDER:

Well, under the way in which we are trying to reform 215, the notion is that a request has to be supported by reasonable, articulable suspicion.

LOFGREN:

Well, that's -- but you're not answering my question. My question is are these other records in the same legal posture as the phone records? I (ph) need (ph) -- it's either yes or no.

(CROSSTALK)

HOLDER:

They're governed (ph) by -- I'm -- I'm -- I'm not -- I'm not sure I'm understanding the question.

I mean, they're obviously -- they're governed by the same law. So, I mean, I...

LOFGREN:

OK, then you've answered my question. Thank you.

I want to talk about...

HOLDER:

No (ph) idea (ph).

LOFGREN:

Section 702. Mr. Clapper sent a letter to Ron Wyden on March 28th indicating that there have been queries of U.S. persons of communications that he says were lawfully acquired under Section 702.

Now, I -- in taking a look at what the FISA Court said just a few years ago in -- in 2011, they observed that the NSA acquires more than 250 million Internet communications each year pursuant to Section 702. That was in 2011.

I -- I want to probe how it could be that we would collect this data looking at foreign persons on a 51 percent basis of confidence that the person is abroad, and then feel free to query for U.S. persons. How does that comply with the Fourth Amendment, in your judgment?

HOLDER:

Well, I certainly think that everything that's been done is consistent with the Fourth Amendment. But that really only goes part of the way.

The president has said, you know, just because we can do certain things doesn't necessarily mean that we should do them.

Now, we've looked at 215. We've proposed modifications as I've indicated. We're looking at Section 702 and I think we're going to have modifications that we're going to propose there, as well.

LOFGREN:

Let me ask you in terms of whether you think we have legal or constitutional limits in receiving information on American citizens in the United States that have been collected or obtained from our allies -- our -- for example, Britain or Canada or Australia's security forces.

Is there any prohibition constitutionally on our receiving information for -- from allied agencies?

HOLDER:

I'm not sure there's a constitutional prohibition, but we do have good relationships with our allies. We share information with them when that is appropriate.

LOFGREN:

Let me ask you -- in terms of other public data, we are in a situation in this country -- and really, in the world -- where there is a digital record made of us wherever we go.

I mean, you walk down the street, there -- every ATM machine has a camera; every 7-Eleven has a camera.

What is the department's view in terms of the need for a judicial review to obtain those digital records and to data mine them for information about American citizens?

HOLDER:

Well, I think the department has different standards depending on the nature of the information that is sought, the privacy implications that are -- that are at play or that are a part of the determination.

We try to do things in a way that are consistent with our obligations, obviously, under the -- the Fourth Amendment, but go beyond that so that we don't turn ourselves into a state that we do not want to ultimately be.

And so, there are different...

(CROSSTALK)

LOFGREN:

But -- but -- but the question is do you feel -- does the department feel -- does the department feel that you have to get a warrant or not to -- to obtain and data mine that -- such information?

HOLDER:

When we say data mining that's a very broad thing. I mean, it depends really on the nature of that which we seek.

I mean, if you go back -- you know, when I was a young prosecutor and you wanted to get -- I don't know, do mail (ph) covers (ph) -- mail (ph) covers (ph) for instance, you know, there are a whole variety of things that you can do with and without the courts, and that is still -- that is still the case.

LOFGREN:

Well, I see my time is expired, Mr. Chairman.

I'm going to follow up, if I may, with you, Mr. Attorney General, with some specific questions that I hope I can get answers to.

And I thank you very much.

GOODLATTE:

And we hope the attorney general will respond to those questions.

And the chair now recognizes the gentleman from Ohio, Mr. Chabot, for five minutes.

CHABOT:

Thank you very much, Mr. Chairman.

Thank you, Mr. Attorney General. On July 25th, 2013, 15 members of this committee wrote you to inquire whether the Department of Justice was consulted regarding the constitutionality of the administration's decision to delay the Employer Mandate -- and if so, what the department's decision was regarding its constitutionality.

This committee still has not received a satisfactory response.

Now, you stated publicly on the record to Senator Mike Lee of Utah at a Senate Judiciary Committee hearing held on January 29th, 2014 -- about two months ago - - that the Justice Department had, indeed, provided such a legal analysis.

Now, at that same hearing, you speculated publicly regarding what you recalled was contained in that legal analysis.

Since you have previously speculated publicly on this issues and since you have had time since that meeting back on January 29th, 2014 -- the Senate hearing -- to refresh your memory regarding the specific nature of that legal analysis, could you now please describe the specific nature of that legal analysis on the Affordable Care Act?

HOLDER:

Well, I would say this -- the department -- I'm -- I've -- I've looked at -- I've sent it -- Chairman Goodlatte sent me a letter that I had a chance to review that had contained within in my colloquy with Senator Lee -- I believe it was Senator Lee.

It seemed to be that that was a conversation that was more -- more general than the one that you have discussed.

But in any case, the government -- the department generally does not disclose the content of confidential legal advice to the president or other governmental decision making -- decision makers.

That -- the Department of Treasury has previously explained to Congress what the legal basis was for the decision to delay the enforcement of the Employer Mandate. And I think that I would refer you to -- to that document.

CHABOT:

So, when 15 members of this committee send you a request based on the legal analysis of something as significant as that, don't you think we deserve a response?

HOLDER:

I apologize if there has not been a response to that -- to that inquiry. But I think, yeah, that's certainly...

CHABOT:

All right.

HOLDER:

Worthy of a response that certainly (ph) would contain what I just told you.

CHABOT:

Thank you. Let me -- let me move on then.

The president made the unilateral decision to delay the Affordable Care Act's Employer Mandate for one year despite clear statutory language instructing that the penalties associated with the mandate shall apply -- and this is quote -- "shall apply to months beginning after December 31st, 2013" -- unquote.

Now, when Congress puts effective dates in laws, do we need to further state that the effective date cannot be waived or modified by the executive branch or is the president required to follow the law and also follow the dates that are set by Congress?

HOLDER:

Well, the president has the duty, obviously, to follow the law. You know...

CHABOT:

Wouldn't -- wouldn't that include the dates that are contained in the law? There wasn't anything -- I don't think -- confusing about them or contradictory about them. It says a specific date.

Doesn't the president have to follow that law?

HOLDER:

Well, it would depend on the statute. It would depend on the statutory interpretation that was done...

(CROSSTALK)

CHABOT:

OK, well, the statute we're talking about was the Affordable Care Act -- or Obamacare, some people refer to it.

So, that's the one we're talking about. It isn't some hypothetical law; that's the law.

HOLDER:

Yeah and as I indicated, the Treasury Department had looked at it and -- and determined that there was a legal basis for the...

CHABOT:

Well, you're his legal advisor. And I'm asking you -- that shouldn't he follow the law when it says specific dates?

And my question was -- or if that isn't the way the president's going to operate, are we going to have to put in there what I -- what I stated?

That the effective date cannot be waived or modified by the executive branch, meaning the president -- do we have to put that language in there from now on, or shouldn't that be assumed that the president doesn't have to change it if we don't put that language in there?

HOLDER:

Far be it from me to tell you all how to do your jobs. I can only talk about the statutes that actually exist and the ones that come into the -- either the department or other branches of the...

CHABOT:

All right.

HOLDER:

Executive branch (ph)...

(CROSSTALK)

CHABOT:

All right, thank you. I'm almost out of time, so let me give you one quick one.

As attorney general, you're charged with faithfully executing the law. In remarks to the state attorney general in February, you exhorted them to be suspicious of state laws that define marriage as the union of one man, one woman.

Why, when you're the top law enforcement official in the country, would you tell your counterparts in the 50 states not to defend laws constitutionally passed by those states, regardless of whether you agree with that policy or not?

HOLDER:

Look, with all due respect, Congressman, I -- I think you've gotten some really bad information. I didn't say that people needed to be suspicious of particular laws. What I...

CHABOT:

Well, I'm paraphrasing what you said. But in...

(CROSSTALK)

HOLDER:

Well, I think that's -- it's not a great paraphrase.

CHABOT:

OK, well...

HOLDER:

What I said...

(CROSSTALK)

CHABOT:

We'll go back and look at the language and...

HOLDER:

That -- that's fine. I -- I mean, what I said was that the decisions not to defend statutes cannot be based on politics or in policy. There have to...

CHABOT:

You guys would never do that.

GOODLATTE:

The time of the gentleman has expired.

CHABOT:

Thank you.

HOLDER:

Well, I mean...

GOODLATTE:

The attorney general can finish his answer.

HOLDER:

I was going to say that there have to be bases and (ph) law constitutional concerns.

The example that I used -- I remember in conversations with -- don't exactly remember who -- that in 1953, the Congress had passed a law that said that separate but equal was -- was appropriate.

And if I had been asked...

CHABOT:

There was a fugitive slave law at one time (inaudible)...

(CROSSTALK)

GOODLATTE:

The time of the gentleman has expired.

The chair recognizes the gentlewoman from Texas, Ms. Jackson Lee, for five minutes.

(CROSSTALK)

HOLDER:

I wouldn't have (ph) intended (ph) that (ph) one (ph) either.

JACKSON LEE:

Let me thank the general for your presence and your service and just the number of vast changes that are for the good that we have been able to experience.

A number of my colleagues have asked about the NSA, and I'm going to either write a letter on that or ask a question if I get enough time.

But I wanted to bring -- and I ask unanimous consent to introduce this letter into the record, Mr. Chairman, that I've sent to Mr. Holder in January of 2014.

GOODLATTE:

Without objection, it will be made a part of the record.

JACKSON LEE:

If you would, General Holder, unfortunately, Jasper, Texas, has had another incident, Jasper, Texas, the home of the late James Byrd Jr., who was violently murdered in 1998.

Another young man by the name of Alfred Wright, a 28-year-old African-American, honors graduate from the University of Memphis, whose body was found 19 days after first reported missing, and had allegedly -- the community had

allegedly been searching for 17 days, his body was somewhat mutilated, but certainly did not look like it had been in the wild, if you will, for 17 or 19 days.

He stopped his truck. It was overheated. He was in front of a store. And all of a sudden he went missing. We have, as I understand it, a Justice Department investigation, but there has been no word whatsoever.

There has been a lot of chatter, a lot of upset-ness about -- by the family members, a lot of emotion. And so my question is, how speedily can we move that investigation? And I would also encourage, even though I understand we cannot taint an investigation, but I would appreciate if there could be some dialogue.

I do not believe that dialogue with those who represent those individuals is a violation of the investigation. Is it, Mr. General?

HOLDER:

Yes, we will certainly take into account the letter that you have indicated, the letter you have talked about. I was just checking to make sure, what my instinct -- what my memory is telling me, the U.S. attorney is looking at this matter.

Not in a position to discuss this further at this time, but I have been told that the U.S. attorney has been in touch with the family. But it is something that we are taking seriously.

JACKSON LEE:

And I appreciate it, and if I could get a briefing through DoJ here in Washington, that is, General, I understand the specifics cannot be discussed, it would be helpful.

HOLDER:

OK. We will share what we can appropriately.

JACKSON LEE:

Thank you. Let me move quickly to another letter that I sent on October 15th, 2013, I ask unanimous consent to introduce this into the record. Mr. Chairman?

This letter involves a shooting in Bellaire, Texas, and unfortunately a young man, a family owned the home, and he was confronted by police on his own steps, and shot on his own steps under the allegation that he had stolen a car.

He happened to live in a majority-minority -- meaning a neighborhood that did not look like him. The unfortunate part about it is that it ended his very prominent -- or promising baseball career.

The problem is, as the response came back, that there was not going to be an investigation probably because incidences are not reported frequently out of Bellaire, Texas. It was a suggestion of practice and pattern.

I would like the Justice Department to get back with me on how that could be pursued because the fact that you have one incident means that it's a community that doesn't report police abuses, and you have a situation that has not been addressed.

This is Mr. Tolan, and this case was sent to you.

HOLDER:

OK.

JACKSON LEE:

Thank you. I ask unanimous consent to put this in the record, Mr. Chairman.

GOODLATTE:

Without objection, it will be made a part of the record.

JACKSON LEE:

Another letter that I am going to pursue questioning on, and thank you, very much, February 5th, three members of this committee sent a letter to our major leaders of civil rights organizations to comment on the clemency process that is now being in place.

So, General, could you emphasize how important this process is based upon the change in law that this committee had on the crack cocaine? And how are you -- how is it being implemented with the Federal Bureau of Prisons? How

successful do you think it is? How much more work do we need to reach these individuals who are doing it?

And let me ask this follow-up question so that I will not be left out. I'm going to send you a letter regarding the investigation of the high-speed trading and just to understand what the basis of the law on that.

But the other question I want answered besides the clemency is, there's a proposed merger between Comcast and Time Warner. You have been vigorous before in antitrust issues. I want to know how vigorous you are going to be in this very massive and impactful potential merger.

On the clemency, please, Mr. Attorney General. Again, thank you for your work.

HOLDER:

The clemency matter -- or clemency process that you talk about is something that is of concern to us. We have requested in our budget the ability to hire seven new people for our pardon attorney's office that would include four attorneys so that we can process these matters at a greater rate.

We have also begun an initiative to identify additional clemency candidates who are certainly situated to the ones that the president granted clemency to, the eight or so, I believe, a few months or so ago.

There are people who do not have ties to gangs or cartels, they are not threats to public safety, they have sentences that I think we would generally agree are excessive in nature, and where clemency is something that ought to be -- should be considered.

The deputy attorney general gave a speech in New York where he sought the help of the private bar in addition to the resources that we have sought so that we could try to make this clemency process a better and more fulsome one.

GOODLATTE:

Time of the gentlewoman has expired.

JACKSON LEE:

Mr. Chairman, Mr. Chairman, could he just take 10 seconds on Time Warner, please, by unanimous consent?

GOODLATTE:

The time of the gentleman has expired. The attorney general may answer that question in writing. It is now the opportunity of the gentleman from Alabama, Mr. Bachus, to be recognized for five minutes.

BACHUS:

Thank you, Attorney General. I hope you're feeling better.

HOLDER:

I'm getting there.

BACHUS:

Good, good. When you appeared here last may, I asked you about the Associated Press case. You were not able to supply any details because you said you had recused yourself early on.

I asked you if there was a date of that or whether it was a formal process, and you said there was no record of it. And I at that time indicated to you, and I think you probably agreed with me, that there would be a need for -- there should be a need when you recuse yourself from a case to have a formal, written entry.

Have you all adopted such a policy?

HOLDER:

Well, I have -- I guess I'm not sure that we have formally done so, but in my own mind, I've thought that to the extent that I recused myself in other matters I would do so and put a writing together of some sort that would indicate what the basis was for that recusal.

BACHUS:

I know you just indicated it was conflict of interest -- or appearance of a conflict of interest, but do you not believe that because of that and other cases that it's

essential that there actually be a formal process where you submit or whether it's just something in writing with a date and time on it?

HOLDER:

You know, I think you raised it during the hearing last year. And as I said then, I think it is a good idea. My only concern was I didn't...

BACHUS:

But I mean, as opposed to a good idea, why don't we -- why doesn't the Justice Department adopt a formal process and do that? You know, particularly -- and you are required by law to sign off on any subpoena involving the media.

So I just think particularly in a matter like that, that there ought to be a formal recusal. I'm just going to, again, renew my request that you do that and inform us if and when you do it.

HOLDER:

OK. That is fine.

BACHUS:

You know, since that time, I became aware that in a press conference about that same time you said the Associated Press case was one of the most -- and I'll -- you said it is one of the worst leaks you have seen throughout your career. Do you still believe that?

HOLDER:

Yes.

BACHUS:

It is my understanding from everything we have seen now that the information they published on Monday was going to be the subject of an announcement by the White House early Tuesday morning, and this was something that happened a year or two before in Yemen.

I am just wondering why a day's delay, something that the White House was going to announce the next day, why would it have been so serious to secretly subpoena

from Verizon all of the records on the -- am I wrong that the White House was -- was the White House not going to reveal this information the very next day?

HOLDER:

Well, I hope we are talking about the same leak. But what I was discussing was something that impinged our -- had a negative impact on our ability to -- I cannot talk about this maybe too much, but to get...

BACHUS:

Well, that case is closed, is it not, the AP case?

HOLDER:

Yes, but we still have to talk about...

BACHUS:

Well, if it's closed...

HOLDER:

... methods that were potentially...

BACHUS:

But, well, am I wrong that the White House was going to disclose -- the information disclosed in the article the very next day and just they had asked the AP to delay it one more day?

HOLDER:

But that is only after the fact of the leak had existed. Had there been no leak, then none of that...

BACHUS:

I don't think there had been any public...

(CROSSTALK)

BACHUS:

I'm not -- OK, all right.

Well, but what I'm saying is the White House was going to reveal that information the very next day.

HOLDER:

As I remember it, the plan was not to reveal it on any day, but for the fact that the leak had already occurred.

BACHUS:

All right. You know, one time I also asked you, and I think it was informally, whether or not there were any other media outlets during that period of time or since that time -- well, let's just say during that period of time that were targeted by the Justice Department other than the Rosen case and the AP case.

And you said you were not sure. Do you -- were there other...

HOLDER:

Do I...

BACHUS:

Were there other media outlets which were targeted?

HOLDER:

Other media...

BACHUS:

We know of the Rosen case, we know of the AP case. Were there other examples where media outlets were secretly targeted?

HOLDER:

Oh, I see what you mean. I would not agree that any media outlets were targeted. What happened in at least a couple of those cases was determination is made to try to get information.

We went through a process after that firestorm. I met...

BACHUS:

No, I know about that, in July, but what I am asking you, were any other media targeted, you know, by secret requests to Verizon or others to look at their information other than the Associated Press and the Rosen case, which we know of, because, you know, that was revealed? Are there any other?

HOLDER:

Well, as I said, the processes that we had in place, to the extent that we thought where I made the determination that changes needed to be made, have in fact been made.

We had a good series of meetings with media...

(CROSSTALK)

BACHUS:

Well, did you have any other...

GOODLATTE:

The time of the gentleman has expired. The chair recognizes the gentleman from Virginia, Mr. Scott, for five minutes.

SCOTT:

Thank you, Mr. Chairman. And, thank you, Mr. Attorney General, for being with us today.

I had a question about torture and just simply we have heard that torture worked in certain situations. Do you get retroactive immunity if it had worked for conducting illegal torture?

HOLDER:

Do you get retroactive immunity --

(CROSSTALK)

SCOTT:

If it worked, you got good information? What is the legal significance of getting good information if it worked?

HOLDER:

I'm not sure if I understand the question.

SCOTT:

Well, some people say it worked, therefore, the illegal -- otherwise what would have been illegal torture was OK.

Is it OK if it worked?

HOLDER:

If somebody had engaged in practices, torture, that violated federal law, the fact that it worked would not be a bar to potential criminal liability.

SCOTT:

Thank you.

If you call it enhanced interrogation, does that make it OK?

HOLDER:

No, slapping a label on something doesn't change things.

SCOTT:

Thank you. I want to switch subjects to mandatory minimums. You mentioned legislation that's pending.

What can the executive branch do to alleviate the egregious harm inflicted by an unjust mandatory minimum?

HOLDER:

Well, what I try to do is through our Smart on Crime initiative, is to make sure that we are using -- that the people in the field, our assistant U.S. attorneys are using their discretion in appropriate ways, only to bring cases. There ought to be in the federal system only to charge mandatory minimum sentences where they are appropriate, given the nature of the conduct of the defendant who is before a particular assistant U.S. attorney . And I have great faith in the men and women of the department to make those determinations in an appropriate way.

SCOTT:

Are you -- are you recommending the executive branch using the power of pardon to deal with some of these cases, too?

HOLDER:

Yes, as I replied, too, I'm not -- somebody else previously, we think that the clemency process -- the president agrees with this -- that the clemency process has to be a part of this overall look at our criminal justice system.

SCOTT:

Thank you. The Youth Promise Act, I think you are familiar with it, which requires localities to come together first of all assess how much they are spending on incarceration and other things that would be prevented with a good comprehensive evidence- based locally tailored program.

And as money is being saved to reinvest the money to keep the programs going, has the Department of Justice taken a position on the Youth Promise Act?

HOLDER:

I believe we are supportive of it.

Yes?

We are supportive of the Youth Promise Act.

SCOTT:

Thank you. And on voting rights, we are all disappointed by the Shelby decision and we are trying to -- trying to fix it.

Can -- what can we do to have -- to cover jurisdictions where there is not a formal finding of prior discrimination?

Is there any way that we can -- prior funding of recent discrimination? Is there any way that we can cover jurisdictions without that finding?

HOLDER:

Well, I think what we shared with the members of this committee and other members of Congress was a regulatory framework in which over a set period of time, a number of violations could make the particular state or jurisdiction subject to Justice Department review if there was a desire to change a voting procedure.

And I think that would respond to the Supreme Court's concern expressed in the -- in the Shelby case.

SCOTT:

Could we have someone be required to have a process precleared if it is a suspect change, if there is no prior finding of discrimination?

HOLDER:

Well, there are -- beyond what we had proposed, there are other parts of the Voting Rights Act that allow the department to look at individualized determination -- individualized actions that a particular state or jurisdiction might take place. Those cases are not easily proven.

SCOTT:

But in terms of preclearance, is there any way that you can stick them with preclearance if you do not connect that with prior findings of discrimination under the Shelby case?

HOLDER:

I think it would be difficult, and I think what we tried to come up with was a process by which the ambit of the Voting Rights Act would be spread beyond

those states that have been covered before and would focus on a requisite number of violations over a set period of time that would move over the years, so they would not become old in nature.

SCOTT:

And what can be done to improve the injunction of process --

HOLDER:

The...

GOODLATTE:

The time of the general has expired.

The chair --

SCOTT:

(INAUDIBLE).

GOODLATTE:

The attorney general can answer briefly the gentleman's question.

HOLDER:

The question was improve --

SCOTT:

If we could do it for the record, if you could comment on the -- how we can improve the process injunction so that localities don't have -- suffer irreparable harm. If you could respond that for the record, I would appreciate it.

HOLDER:

OK.

GOODLATTE:

The chair thanks the gentleman.

And the attorney general --

HOLDER:

Mr. Chairman, I'm having a hard time sometimes hearing some of the questions. I am not sure, maybe the mikes are not on or something.

GOODLATTE:

We will check on that. And in the meantime, the chair recognizes the gentleman from California, Issa, for five minutes.

ISSA:

Thank you, Mr. Chairman.

Mr. Attorney General, can you hear me OK?

HOLDER:

I can always hear you.

ISSA:

Thank you Mr. Attorney General.

(LAUGHTER)

ISSA:

Mr. Attorney General, I think you would agree that the sanctity and -- the importance and sanctity of the inspector general act is one that is important to all of government.

Would you agree?

HOLDER:

The sanctity?

ISSA:

The sanctity, the independence of the inspector generals (sic) is clearly an intent of Congress that is signed into law. And you'd agree with that?

HOLDER:

Yes. We have -- to have a good inspector general, you need some degree of independence.

ISSA:

And the -- Michael Hurwitz, your inspector general, you would agree that in fact he is a good attorney -- a good inspector general?

HOLDER:

Yes, he's a very good inspector general. I have known Mike for a good number of years.

ISSA:

Well, last week Mike said at the Senate Appropriations Subcommittee that he essentially -- I'll paraphrase -- he has been interfered with. He has had to go specifically to you or your deputy to get permission to have access to records, and that has taken time, although he has ultimately got it.

Can you tell me why you would require your inspector general to get specific -- go through a process, get specific access to materials on his investigations and the delays that come with it?

HOLDER:

Well, first, I think it's important to note that as he acknowledged that the I.G. has gotten all the documents they believe were necessary --

(CROSSTALK)

ISSA:

He said in time in the two particular cases which he felt were helpful to you that you approved it. But isn't it a form of soft intimidation by any stretch of the

imagination to force an independent individual who is supposed to have unfettered access to these documents in their investigations, which could even include an investigation of high-ranking individuals working for you, to have to ask for that by definition requires him to disclose and to essentially beg for permission to have access to documents?

Isn't that correct?

HOLDER:

Yes. This is not a policy choice that has been made by me or other attorneys general. There are legal restrictions to what the department can do with certain sensitive information that are unique to the Justice Department, such as wiretap information or grand jury information that require the attorney general, perhaps even -- or the deputy attorney general, to grant the inspector general access to that information. It is a legal restriction --

(CROSSTALK)

ISSA:

But you can grant him -- you can grant him broad access just as you grant certain individuals broad access. It's not something where he needs to apply or knows -- needs to go through a process, is it?

HOLDER:

I'm not sure exactly what the process is, but I don't think it is anything that has had a negative impact on any investigation that he's tried to conduct.

ISSA:

Well, it's had a negative impact. It's caused delays. Ultimately he was granted in the two examples where he went through the process, but, well, look, I think it speaks for itself that this is not the treatment that I.G.s normally find and it's one that is inconsistent with the act.

I would like to next go to Director B. Todd Jones' testimony last week before the -- before my -- other committee in which although he admitted you that the Department -- under the Department of Justice observation that the ATF had used mentally disabled persons, with some consistency, around the country in their

investigations, often having to train them, for example, on what a machine gun was and then send them out to buy the machine gun after they have taught them what it was, and then arrested them for buying it.

He said that in fact his agents were not able to tell that somebody had an IQ of 50 and as a result it really wasn't something that was a target, it just happened.

First of all, have you looked into this pattern by ATF abusing mentally disabled individuals in their investigations?

HOLDER:

Yes, I am familiar with that in what I guess we have come to call these storefront operations.

ISSA:

Correct.

HOLDER:

I'm really troubled by them. The ATF -- head of ATF is asking inspector general to look at these. There are no longer any storefront operations that are in existence. And the conduct that you talk about, from my perspective, is very troubling.

ISSA:

I appreciate that.

Would it be possible to have the Civil Rights Division be the one that would lead looking at the question of the use of the mentally disabled?

HOLDER:

Well, I'm sure the I.G. will look at it and make determinations and then they typically will make recommendations --

(CROSSTALK)

ISSA:

And I appreciate the I.G.'s independence in this matter.

Lastly, the investigation into the IRS' targeting of conservative groups, my understanding is it is being done by the Civil Rights Division. Is that correct?

HOLDER:

It's being what?

ISSA:

It's being done under the Civil Rights Division?

HOLDER:

No, it's being done by the Civil Rights Division and the Criminal Division, the FBI and the inspector general of the Treasury Department.

ISSA:

Why wouldn't it be appropriate to be done under Public Integrity, which is an organization you once were very involved in, that in fact is sort of considered to be one of the premier and why wouldn't they have the lead?

HOLDER:

Well, Public Integrity Section is involved.

ISSA:

And do they have -- would it be appropriate for them to have the lead, since ultimately the actions of Lois Lerner and others clearly go to the question of public integrity?

HOLDER:

I mean, it's hard to say who precisely has the lead. I mean, as I have been briefed on this, the person that I've --

ISSA:

Oh, you have never told us who was doing it, so it is kind of hard for us to know who has the lead, too.

HOLDER:

Well, no, as I said, Criminal, Civil Rights, FBI, Treasury, I.G.

As I look at the investigation and think of who is in the lead, I think of the Criminal Division as having the primary responsibility, and I talked to the assistant attorney general of the Criminal Division, but the people who are doing the work on the -- on the ground for the Criminal Division are the people in the Public Integrity Section.

ISSA:

And do you have access to 6103 information in order to further your investigation?

HOLDER:

Tax information?

ISSA:

As necessary?

Have you been granted access as necessary to tax information that would allow you to know the individuals that were targeted and so on?

HOLDER:

Well, I don't know -- I can't -- I am not sure I've had that degree of granularity. But I have access to tax information as pursuant to the investigations that we conduct.

GOODLATTE:

The time of the settlement has expired.

The chair recognizes the gentleman from Tennessee, Mr. Cohen, for five minutes.

COHEN:

Thank you, sir.

And General Holder, I have great regard for you, but I have got some questions. We will do a lightning round if you don't mind, because I've got a lot of issues, as you well know.

First of all, as all politics is local, Shelby County, Tennessee, Memphis, has an election coming up. Early voting starts April 16, a primary election and then a general election of August. We have had a whole list of problems with the election commission. We have written you over the last couple of weeks. Pastor Kenneth Whalum in Memphis, and myself. And we will have a letter which my staff member will give to one of your staff members.

We would just like to have your assurance that you will look into having monitors, because there have been elections thrown out because they let people vote that shouldn't have been allowed to vote in certain elections. And they've had -- people have been refused the right to vote and all kinds of problems.

Can you assure us that you will look into having monitors in Shelby County to see that the elections are done fairly?

HOLDER:

Yes, we'll look at that. And in fact, I think we received a letter from you last week regarding an upcoming election in Shelby County, and we are reviewing that information, but we will look at any else that you provide to us.

COHEN:

Thank you. Well, Pastor Whalum had called up. He has been speaking to an individual in your office, and it has been -- he hadn't gotten the letter. It has been two weeks and going through the legislative liaison sometimes takes time. But thank you.

That's -- going back to policy, as you well know, I am very concerned about our drug policy in our country and the way it affects minorities and the way it takes away people's liberties by incarcerating them.

I appreciate what you have done, and some of the statements you have made have been most forward, move me. And I've appreciated them. But you recently talked about changing marijuana from Schedule I, and said you would like -- you will work with Congress and Congress should take the lead.

Let me suggest to you that it is my understanding under Title 21 that you have the authority to initiate a request to the secretary of health and human services to do a study to look into marijuana and Schedule I, and that you could then change it.

In my humble opinion, and I think the majority of people in this country, there is no way that marijuana should be Schedule I because it is not in the same class as heroin and LSD as it is in the code, which breeds contempt for our laws.

And there are certainly medical bases, Dr. Sanjay Gupta has shown this in his broadcasting, but people have voted it in 20 states for multiple sclerosis, for children with epilepsy and seizures. And so has medical benefit.

And to be Schedule I, it says it has no medical benefit. Well, that is just fallacious. And the fact there is a high ability -- or likelihood of abuse, it is nothing like heroin. That is absurd.

So I would like to ask you, why will you not act as the president suggested that where Congress won't. and I predict Congress will not act in this area, because Congress is generally like tortoises until it is really clear they are not going to put their head out there, but the administration has acted on immigration, acted on environmental policy, acting on wages and minimum wages, et cetera, why won't the administration act with the pen and the phone to help people out with taking this out of Schedule I so it can be studied, because we are all in favor of research?

HOLDER:

Well, I think that we actually have acted in a responsible way in how we have made the determination how we are going to use our limited resources. The policies that I have announced as part of the Smart on Crime Initiative, the directions that I have given to people in the field, I think reflect a sensitivity to, again, the resource restraints that we have, the division between federal and local law enforcement responsibilities. And I think that we have acted appropriately.

COHEN:

In those areas you certainly have, but on Schedule I, all you have to do is to ask the secretary to make a scientific and medical evaluation. And after that then you can go further and make a determination on whether it should be Schedule I.

Schedule I says you cannot do any research on it. Why will you not ask the secretary under Title 21 Chapter 13 to initiate that program to get marijuana out of Schedule I? It is obviously not Schedule I.

HOLDER:

Well, what is obvious to one is perhaps not obvious to another. I think, as I said, that given the responsibilities that I have...

COHEN:

Well, let me ask you this, the secretary would make that study to determine it. Why not initiate this opportunity for the secretary to make the study and base it on science? And until you do that, it's not going to happen.

HOLDER:

Well, as I said, within the world in which I have primary responsibility, I think we have acted in a way that is appropriate.

COHEN:

In those areas you have. The attorney general shall before initiating proceedings under Subsection A (INAUDIBLE) control to remove a drug or other substance entirely shall request from the secretary of scientific and medical evaluation. That is all you have to do is request it. That doesn't take away from your limited resources.

HOLDER:

Well, as I said, I'm satisfied with what we have done.

COHEN:

Commutations, you know I'm interested in those issues as well. Have you looked at having a group of commutations, the people who were convicted under crack, under the old determination of 100 to 1 instead of the 18 to 1 because of the Fairness in Sentencing law, and having all of those people in a group commutation be put forward?

GOODLATTE:

Time of the gentleman has expired.

COHEN:

Can he answer the question?

GOODLATTE:

The attorney general will be permitted to answer the question.

HOLDER:

Well, I do not think that we would be looking for a group commutation. We would be looking for individuals who would be deserving of clemency or commutations given the nature of their conduct, their lack of ties to violence or to drug-dealing gangs or cartels.

We have begun an initiative to identify additional clemency recipients, this is something that I know is important to the president. And we are trying to come up with ways in which we can make individualized determinations about who should receive clemency.

COHEN:

Thank you.

GOODLATTE:

The chair recognizes the gentleman from Virginia, Mr. Forbes, for five minutes.

FORBES:

Thank you, Mr. Chairman. And, Mr. Attorney General, thank you for taking time to be with us today.

I think it comes as no surprise that a great many members of this body, I think a great many individuals across the country believe and are very concerned about the overreach they perceive coming from your office, the Internal Revenue Service, and the White House.

And we had perhaps a suggestion today that the House budget may in some way curtail that. If in fact that is the case, then many of us who were going to vote for

that budget will now not just vote for it but embrace it wholeheartedly because we get so frustrated in not being able to get answers and to control some of that overreach.

One of the areas is what you have just been talking about, the clemency situation and pardons. And I know your deputy attorney general, Mr. Cole, on January 30th actually solicited petitions for pardon and for clemency in the speech that he gave to the New York State Bar Association.

And he referenced the fact of overcrowding in our prisons. He also then mentioned that some of these individuals are truly dangerous people who threaten the safety of our communities and need to be taken off the streets for long times.

But I guess my first question is, can you give me any precedent of previous attorney general's offices who have solicited petitions for pardons or clemency limited to a particular category of crime?

In other words, he didn't mention individuals who might have been convicted of white-collar crime or campaign finance laws or a host of other areas that have been over criminalized, all who also do the overcrowding that we are very concerned with, but have a much lower recidivism rate.

HOLDER:

Well, we have a pardon attorney's office that deals with a whole range of federal crimes for which people have been convicted and then seek relief.

FORBES:

I understand that, but the concern to us is he actively was soliciting, he was actually asking the bar association to bring forward those petitions, but he only talked about drug offenses. He did not mention any of those others, because -- and my question is, any precedent that you know of that any other administration has ever solicited petitions for clemency or pardon limited to one particular category of crime?

HOLDER:

Well, I think what the deputy attorney was responding to, and which I support, I'm not putting it on him, I support this, is that we are dealing with a particular proper. And that is that I think we -- the pendulum swung a little too far in the '80s.

I mean, I was a U.S. attorney here in Washington, D.C., when this was the murder capital of the country, and we went I think a little too far with regard to some of the sentences.

FORBES:

Can I ask you about that then, if I can? Because one of the things he goes on to list is this, he says: "We are looking for petitions for individuals who had," these are his quotes, "non- violent, low-level drug offenders who were not leaders or had significant ties to gangs or cartels, without an extensive criminal history, who faced life or near life sentences."

And my question to you is, give me an example of someone who would fall in that category, because, as I'm sure you know, under 18- 3553(f), that category would not have been subjected to mandatory minimums anyway, and that was put in the law in 18 -- I mean, in 1984.

And prior to that time, anybody convicted would be subject to parole. So give me an example of someone who would have been a non- violent, low-level drug offender, not a leader, or involved in organized gangs or cartels, no extensive criminal history, who would have been facing a life or near-life sentence?

HOLDER:

A drug mule who would bring drugs from New York and got stopped at the bus terminal here, in Washington, D.C., where there's a whole bunch of drugs in a bag could get charged, not only with the possession of those drugs, which would have resulted in a huge sentence, but could have been charged with as being part of a conspiracy with all of the drugs that were involved with that conspiracy.

And though that person did not engage in a violent crime, and was nothing more than a drug mule, could have gotten a life sentence.

FORBES:

Well, he could have, but he wouldn't have had a mandatory life sentence, would he?

HOLDER:

Well, all right, if you get...

FORBES:

And then my final thing...

(CROSSTALK)

HOLDER:

... 60 or 70 years, that is not technically life...

(CROSSTALK)

FORBES:

Well, Mr. Attorney General, my time is about to expire...

HOLDER:

... in effect is a life sentence.

FORBES:

But here's my question...

HOLDER:

Which is why...

(CROSSTALK)

FORBES:

Isn't it true that the prosecutor -- the prosecutor, the jury, and the judge who were actually handling that case would have had a much better opportunity to determine that sentence than somebody in your office five years down the road?

HOLDER:

Well, except that the jury and the judge's hands were tied at that time by the sentencing guidelines or by mandatory minimums that were tied to the amounts that were involved as opposed to the conduct that a particular person engaged in. And that is the wrong that we are trying to redress.

FORBES:

Well, I think if you look again, and give me some examples, I know my time is about to expire, that wouldn't have complied under 18-3553(f), which would have gotten him out of those mandatory sentences.

And with that, Mr. Chairman, I yield back.

GOODLATTE:

I thank the gentleman from Virginia. At this time we recognize Mr. Johnson, the gentleman from Georgia.

JOHNSON:

Thank you, Mr. Chairman. Mr. Holder, good to see you today, sir.

The U.S. has the highest incarceration rate in the world. And your budget, \$27.4 billion, is your budget request for the Department of Justice for 2015, and \$8.4 billion of that \$27.4 billion is for federal prisons and detention facilities, is it not?

HOLDER:

I believe that is correct.

JOHNSON:

So about a third of your budget is to incarcerate people at the highest rate in the world, not just the civilized world, but in the world. That is disturbing.

And of the people who are incarcerated, about 40 percent of them are African-Americans. Is that a fact? Would you disagree with that?

HOLDER:

I think that number is about right. I don't -- I don't have a precise number.

JOHNSON:

And about 20 percent are Hispanics.

HOLDER:

I believe that that's also correct.

JOHNSON:

Yeah. And -- but now, has that line item in the budget, that \$8.4 billion for federal prisons, has it been increasing or decreasing?

HOLDER:

It has been -- it has been increasing. You're correct that about a third of our budget now goes to our bureau of prisons, and given this state of our system that's deservedly so. We have to support the people who work in those facilities.

But as we spend more money, as it has increased over the years, it means that we have less money to hire agents, prosecutors, or to provide grant money to our state and local partners.

There is a finite amount of money that we have, and more and more -- the more and more that goes to our federal bureau of prisons, the less we have to do all the other things that people want the Justice Department to do.

JOHNSON:

And as it goes to the Federal Bureau of Prisons, what percentage of those funds go to private, for-profit detention facilities?

HOLDER:

I don't know the number of that, but we can get you a percentage.

JOHNSON:

Approximately, would it be about a third or a fourth or half?

HOLDER:

I simply don't know. I will have to get you that information. I don't know.

JOHNSON:

Mm-hmm. I think that's pretty important.

Do they generally, do the private, for-profit facilities house federal detainees and inmates at a higher cost than the federal government can do it, or at a lower cost, in general?

HOLDER:

Again, I'm just not familiar with what our relationship is in terms of numbers or the funding stream that goes to any private facilities that we might use. I just don't know the answer to that.

JOHNSON:

Well, let me ask you this. The agency -- your agency is responsible for investigating and prosecuting not just blue collar criminals, but white collar criminals as well. But with the white collar criminals, corporate -- corporate theft, let's take -- take for instance, the -- those corporations have a much greater ability to fight back and because they have resources.

Has the fact that your agency's budget been trimmed over the past four -- three, four, five years, this trimming of your budget or cutting of it, actually, has it affected your ability to -- to go after these corporate criminals?

HOLDER:

I will say to date, no. But I will tell you that if sequestration were to reappear in 2015, '16, whenever it might show up again, the capacity of the Justice Department to do that which the American people expect us to do from the range of things from national security to white collar enforcement to violent crime enforcement would be negatively impacted. We have to at all costs -- at all costs avoid the mistake that was sequestration.

GOODLATTE:

I thank the gentleman from Georgia. And at this time, we'll hear from the gentleman from Iowa, Mr. King, for five minutes.

KING:

Thank you Mr. Chairman.

Attorney General, thanks for your testimony. I appreciate you coming here, and I recall a previous exchange in a previous hearing between us. I believe I asked a question to the effect of as your -- are your priorities, are they directed by the president in your office or are you an independent department? And I believe your response was "generally, I'm independent. I don't take direct direction from the president," and it's your job to provide equal justice under the law.

Generally, the response that I recall, and I know you're nodding your head in relative agreement.

HOLDER:

I've been here too long. You guys can quote too many things that I've said previously.

I think that's about -- that's right, that's right.

KING:

Well, and I want to make sure I represent it accurate. And I think that's an appropriate response as well. And so, I'd like to just go through a list of some of the things that pop into my head that I'm thinking about here.

One of them is relatively new, it's been back in the news fairly recently, and that's the Senator Ted Stevens issue. And I understand that that prosecution took place before you took office, but it's been reported as recently as March that an FBI agent was severely disciplined, and that the discipline was imposed for improper actions in the investigation and prosecution of Senator Ted Stevens.

Now, I think it's clear that it's very likely he lost his Senate seat over that investigation, over that conviction, and then subsequently was killed in a plane crash. That's one piece about the discipline within the FBI that I'd like to hear about.

Second, is the overreach by, allegedly, Carmen Ortiz (ph) in the -- in the case of Aaron Schwartz, who committed suicide.

Third one would be, we've seen as the -- the knockout game has been reported, at least in the news, to be primarily black on white crime, I don't know of any prosecutions there except for the federal investigation and prosecution of Conrad

Barrett (ph) who was the anomaly as far as I'm reading the news, as a white on black crime of the knockout game.

Next, Dinesh D'Souza (ph) allegedly transferred \$20,000 that showed up in a U.S. Senate campaign targeted for this investigation. I would presume there are thousands in America who are likely engaged in similar acts and unprosecuted.

Governor Bob McDonnell (ph) for charges brought against him but now five former U.S. attorneys general have come out for the Virginia and said they think this is overreach and outside the definition of the law.

And then I'm thinking about Governor Chris Christie who, when the situation of the bridge, or known as Bridgegate came up, within a week, there were federal investigators investigating the Hurricane Sandy issue.

Now, that's just things that I've put down here while I'm sitting here listening to the testimony. Here's the other side.

Black Panthers's prosecution canceled around the time you took office.

Tom Perez, let's just say assistant attorney general at the time, now secretary of labor, sat just nearly where you are and said he'd provided the lowest penalty allowable under law. We know that wasn't true. It was the smallest diminimus (ph) penalty provided under law.

You've heard Jim Sensenbrenner bring up the James Clapper issue in his testimony, the conflicting testimony under oath.

I'm thinking of another governor, Governor John Corzine (ph) a billion dollars missing in Global Crossing (ph). I don't know where prosecution there is taking place.

Lois Lerner (ph), I think she would be a candidate.

Then I'm thinking of entire classes of people that have been exempted by this administration down to the point of, I understand this is immigration enforcement, however 99.92 percent of those who have been removed aren't removed because they're unlawfully present. Only .08 percent are for that narrow little reason, because classes of people have been created by this administration exempted from the law, at least in fact.

And then marijuana companies exempted from enforcement of the law, as well essentially a suspension of the federal enforcement of marijuana laws.

We've talked about DOMA.

I take us to voter fraud and the Texas issue, where Texas says, "I want a voter ID," they get labeled as a poll tax and a racist plot.

My question really is, have you prosecuted anyone in this administration, have you -- have empanelled a grand jury, have you investigated anyone in this administration? Because it looks to me that those folks that are on the other side of the aisle are getting extra scrutiny and those on your side of the aisle are getting no scrutiny.

HOLDER:

First, I'm not going to comment on any cases that are -- are pending. I will simply say that we have followed the facts and the law in making our prosecutive determinations and making our investigatory decisions. This is an administration, this is a Justice Department that I've run that I'm proud of.

Many men and women who are the career employees or who are in the department for lesser periods of time make their decisions based only on the facts and the law, and conduct themselves in the way that is in the best traditions of -- of this department, and I'll stand, put my record up against any other attorney general, any other justice department, and any hint that we have engaged in anything that is partisan or inappropriate in nature, I totally 1000 percent reject.

KING:

But you haven't really responded to the question of whether you've investigated...

GOODLATTE:

I thank the gentleman.

KING:

... or indicted a member of the administration. That would be an unresponsive response. I would assert.

GOODLATTE:

Mr. King, time has expired, thank you.

At this time, I recognize the at large member from Puerto Rico, Mr. Pierluisi, for five minutes.

PIERLUISI:

Thank you Mr. Chairman.

It's good to see you again, General.

I have two questions. I'd like to say both and then give you an opportunity to respond. The first issue is DOJ's response to the drug-related violence in Puerto Rico.

The consulate -- Consolidated Appropriations Act, approved in January requires ONDCP to coordinate the preparation and publication of a Caribbean border counter-narcotic strategy with a focus on Puerto Rico and the USVI.

The strategy will outline the steps that the federal government is taking and recommend additional steps it should take to reduce the supply of drugs entering Puerto and the USVI, and to lower violence associated with the drug trade in the two territories. Now a strategy is essential, but it is not enough.

The strategy must be implemented with the right resources and personnel. I have made no secret of the fact that I think DOJ's response to the crisis in Puerto Rico has not been sufficiently robust. Unlike DHS, DOJ has been reluctant to search personnel to Puerto Rico.

At the same time, DOJ does deserve credit for executing an MOU with the Puerto Rico Department of Justice so that certain crimes that would otherwise be tried in state court are tried in federal court instead, often using state prosecutors deputized by DOJ for that purpose.

So my question, the first question is, are you satisfied DOJ has the appropriate level of personnel from the DEA, FBI, ATF, and the U.S. Attorney's Office in Puerto Rico to combat trafficking and violent crime in light of the severity of the problem there?

The second issue I'm raising involves again the Consolidated Appropriations Act, because it includes a provision which I fought long and hard to secure, that provides funding to the Puerto Rico elections commission to conduct the first federally sponsored status play beside (ph) in Puerto Rico's history.

This language is a response to a 2012 play beside (ph) in which a majority of voters said they do not want Puerto Rico to remain a territory and more voters expressed a desire for statehood than any other option. As you confirmed to Mr. Serrano at a hearing last week, the law requires DOJ to ensure that voter education materials and the ballot prepared by the elections commission in Puerto Rico are compatible with U.S. law and policy.

The law also states that the purpose of the play beside (ph) is to resolve Puerto Rico's status once and for all. I've introduced legislation that proposes to structure the federally sponsored play beside (ph) as a straightforward vote on the admission of Puerto Rico as a state as was done in Alaska and Hawaii. This structure is eminently fair. Those who support statehood can vote yes and those who oppose it for any reason can vote no. My bill has 130 cosponsors, and a Senate companion bill has been introduced.

As I see it, structuring the play beside (ph) as the vote in Puerto Rico's admission as a state is consistent with the U.S. law because statehood is a constitutionally valid status that would resolve Puerto Rico's political future. Do you agree?

HOLDER:

Well, with regard to the question of resources, I think that you know, given the flows that we see of drugs through the Caribbean, through the Virgin Islands, through Puerto Rico, the levels of violence that we see in Puerto Rico, there's clearly a need for additional resources.

We are a resource-strained institution. We simply are. And we have tried to do the best we could. I was in Puerto Rico in July of 2013, announced a consent decree with the police department there, met with the governor to try to talk about ways in which we might be of greater assistance, and we're trying to do what we can.

But unfortunately, we have to be creative. I wish I had more resources. And if we did, that we would be a plate -- those would be places where I think we could make great use of those additional resources.

When it comes to the -- the voting initiative, as I indicated, I guess to Congressman Serrano, the role of the department is really limited to reviewing I guess those -- those documents, and well, documents, and determining whether the documents put out by the state election commission of Puerto Rico is compatible with the constitutional laws and policies of the United States.

There's a two point, I guess \$5 million carve out of a burned JAG grant for this objective, but ours is really not -- we're not really engaged in the -- I would say the guts of the -- of the effort as much as just to oversee to make sure that the materials are -- are appropriate, that are handed out.

PIERLUISI:

Can I quickly say, but wouldn't you agree that if the vote involves an up or down vote on statehood, that you would have to say that that's consistent with U.S. law, there's nothing wrong with that in terms of U.S. law and policy?

HOLDER:

I mean if that were an issue that were presented to us, I mean, that's one that obviously we would have to -- we would seek to answer, but the task that we have been given is really to just make sure that these materials are consistent with our constitution, laws, and policies.

That's the only involvement, I think, that we have -- at least at this point.

PIERLUISI:

And would that...

GOODLATTE:

I thank the gentleman from Puerto Rico, and at this time recognize the gentleman from Arizona, Mr. Franks, for five minutes.

FRANKS:

Well, thank you Mr. Chairman.

And General Holder, thank you for being here.

General Holder, you have risen in law enforcement to the very pinnacle of that profession, and those of us here on this panel have spent a lot of our lives in search and in the cause of the right laws and the respect for the rule of law, and I would hope that there would be, in light of that on both our parts, a strong consensus and a common respect for this thing called the rule of law.

And yet, earlier, Steve Chabot, Congressman Chabot, mentioned that the Affordable Care Act's employer mandate was delayed by this administration for a year, despite statutory language instructing that penalties associated with the mandate, quote, "shall apply," let me say it very clearly, "shall apply to months beginning after December 31st, 2013," unquote.

Now, your -- your testimony was that Treasury Department had come up with some legal interpretation that that didn't apply, and I don't know whether that's dumbfounding or just heartbreaking. I mean, I really don't. If we can't read that language clearly, then I think we're in trouble. So my next question to you may be superfluous, it may be a hopeful -- and hopeless exercise here.

But my question is, the Religious Freedom Act -- Religious Freedom Restoration Act, declares that the federal government may not, quote, "substantially burden a person's exercise of religion unless it had a," quote, "compelling reason to do so." Now, you and I know what those words mean.

So, my question is, are the federal agencies like yours or federal agencies in general bound by statutory requirements put in place by Congress like the register of the Religious Freedom Restoration Act requirements I just described. Are they bound by those requirements put in place by Congress when they promulgate regulations?

HOLDER:

Sure, those are the kinds of -- I mean, they are -- if there are statutory mandates from Congress, those are the kinds of things that have to be used when we are proposing rules, regulations, things of that nature.

FRANKS:

All right. Then my next question is, did HHS consider the Religious Freedom Restoration Act and comply with it when it promulgated the HHS mandate which requires many religious employers to arrange and pay for employee health insurance that covers abortion-inducing drugs, contraceptives, and sterilization.

Did they comply with that statute?

HOLDER:

Well, I think the way in which the act was put together is consistent with the act, the way in which the religious organizations could express their concerns on the options that they had. I mean, this is something that is actually the subject matter of an ongoing -- ongoing case, and I don't want to get too much into it, but I think that the policy that the administration has taken is consistent with the -- the act that you reference.

FRANKS:

I don't know. I mean, it just sounds like we're on two different planets if that is the case. But let me ask you then, did the Department of Justice, including you or the office of legal counsel, before any of the cases came about, and I'm not asking you to -- to touch on any existing litigation, but before any of this occurred, did you provide any legal opinions, written or oral, regarding the religious employer exception to the HHS mandate?

HOLDER:

Well, as I'd said previously -- the department generally doesn't disclose the content...

FRANKS:

Yeah, but before all of that. I'm trying to get ahead of that, because we wrote you a -- a letter like this, and the response we got back didn't even know that we couldn't have been able to tie the two together. It was that unresponsive.

HOLDER:

The response didn't -- you said -- I didn't hear if you said...

FRANKS:

We wrote a letter and your response was a total non- response. Much like this. I mean, it just said -- I'm saying before the litigation ever occurred, did you ever come up -- that's not a hard one, Mr. Attorney General.

HOLDER:

Well, it's not a hard answer. The department generally doesn't disclose the content of confidential legal advice to the president or other governmental decision makers. It's something that not only this department but other Departments of Justice, that's a policy we've always followed.

FRANKS:

Well, I'm not countering that policy, but asking you if you had done anything prior to that that were legal opinions regarding a religious employer exception, before any case was filed.

I mean, it's not -- I don't -- don't think you're going to answer the question. But could you provide any copies of any opinions addressing the application of Religious Freedom Restoration Act to the federal government, including any opinions by the office of legal counsel that address the need or the lack thereof of - - for a religious employer exception.

Do you have anything like that that you could provide to us, that wouldn't be related to any litigation, but that would give us some idea of what your opinion of this statute is?

HOLDER:

Well, as indicated, it is not our practice to disclose the content of the legal advice that we give. To the extent that there are legal questions, you could ask HHS what was the basis for their legal determination to promulgate a regulation that is of concern to you.

(CROSSTALK)

FRANKS:

Thank you Mr. Chairman.

GOODLATTE:

(OFF-MIKE) from Arizona.

At this time, we recognize the gentlelady from California, Mrs. Chu for five minutes.

CHU:

Thank you Mr. Chair.

Mr. Holder, the DOJ's existence -- existing guidance on racial profiling issued in 2003 outlines provisions to ban some forms of profiling. However, the guidance does not apply to profiling based on religion and national origin. This is problematic because profiling based on religion or nationality is significantly increasing.

Now, it's my understanding that the DOJ has been engaged in a review of its guidance throughout the past few years. In April 2012, over 70 members of the House and Senate sent you a letter about this issue. When you testified before this committee last year, you indicated that DOJ was nearing the end of the review, but still we have yet to see the updated guidance.

What is the status of the review, and how will you address the issue of racial profiling based on religion and national origin?

HOLDER:

Well, that review has in fact been underway for, as you say, an extended period of time. I'm a little -- well, I will say just maybe a little too long, but I think we are near the end of that process.

I would expect that we would have -- we've made a great deal of progress, and my hope would be that we'd be able to complete the review in the relatively near future, and that we will be in a position to share with members of Congress the American people the result of that -- of that review.

This is something that will happen on my watch.

CHU:

Do you have a -- a time? Exactly when will this happen?

HOLDER:

I'm sure that I can say exactly when, but I can say that we are far closer to the end now than we were before. I mean, this has been a painstaking process, but I am -- I am hopeful that we will be at an end relatively soon.

CHU:

As you know, many people are anticipating it, so we look forward to this.

I understand that the racial profiling guidance includes a broad exception for counter-terrorism investigation and national security, yet there have been reported instances where the FBI has targeted mosques or profiled Muslims for little reason other than their faith. This occurred in San Francisco under the so-called mosque outreach program, in which the FBI collected information on the religious views and practices of Muslims in northern California, and shared the surveillance with other government agencies, but without any apparent evidence of -- of wrongdoing to target it.

So, of course it would be a great step forward if the DOJ guidance on racial profiling were amended to include a ban on discrimination on the basis of religion or national origin, but I am concerned about the national security exception eroding any such protections.

Will the revisions under discussion include any changes to the national security exemption, and how will the DOJ ensure that the rights of innocent Americans are protected?

HOLDER:

Well, I mean, I will say that it will be for others to decide whether the changes are appropriate, go far enough, don't go far enough, but the national security exception has been the focus of the -- the effort that has been underway, as I said, for this extremely long period of time. And it will -- once announced, that will be the -- the primary topic that will be discussed with regard to what the Justice Department has a responsibility for.

CHU:

OK. Well, switching gears, I would like to ask about the DLJ's Executive Office of Immigration Review. Mr. Holder, since so many non-citizens in immigration courts do not have attorneys, and lack a basic understanding of the immigration court processes, what steps is the Executive Office of Immigration Review

proposing to give non-citizens better access to information so they can move through court proceedings expeditiously, without sacrificing due process?

HOLDER:

The -- we are trying to make our EOIR system better. We have a backlog of about 358,000 cases. There's a 56 percent increase since 2009. Our budget request asks for additional immigration judge teams so that we can process these background -- get this background down to a better level.

We're also trying to come up with ways in which we make sure that people who find themselves in the system have adequate representation, doing a variety of things in that regard. We're trying to deal with the problem of unaccompanied minors. There are a whole range of cases -- whole range of issues that we are trying -- trying to deal with.

We're trying to be, again, as creative as we can, though we do need -- we simply need at some level, we just need more money to put in place these teams, to reduce the backlog, to otherwise find ways in which we can come up with this program to deal with people who have mental health issues, to deal with unaccompanied minors, and then to deal with the other problem of people who appear and don't have either counsel or don't have adequate counsel.

These are all issues that are problematic, and I think point out again the need for a comprehensive immigration reform package that would deal with a whole variety of other things that would help us a great deal with regard to what the Justice Department has to do -- what the Justice Department component is of the problem.

CHU:

Thank you.

I yield back.

GOODLATTE:

The chair thanks the gentlewoman, and recognizes the gentleman from Texas, Mr. Gohmert, for five minutes.

GOHMERT:

Thank you, Mr. Chairman.

General Holder, back April 27th, 2011, at my request, the chairman of this committee, Lamar Smith, sent a letter to the Justice Department asking for the documents in the Holy Land Foundation that had been used to prosecute them. And since then, we've had an ongoing back-and-forth. Most recently, I had a letter June 13th of 2013 asking for the documents. And I was fairly specific, to make sure that I got the documents, that the Department of Justice handed over to people convicted of supporting terrorism. They're terrorists.

We've given them the documents -- the Justice Department has -- and my information is that they've now been put on disc and sent to Illinois, so we know they're easily provided, just not to members of Congress. But in the response after seven months, approximately, from my letter in June, I'm told, "Well, they're nearly -- there's a link -- here's a link that will have nearly 500 publicly available exhibits that were admitted into evidence." And I was also told to check the public access to court electronic records.

Attorney General, I've read in the Fifth Circuit opinion about 9,600 summaries of transcripts, of conversations that the Justice Department had that were made available to attorneys for the terrorists. I still do not understand why your department can provide documents to terrorists' lawyers and many of them to four out of eight of the terrorists, and not provide them to members of Congress.

All I'm asking, again, is could we still get the documents that have been put on disc that of the 9,600 summaries of transcripts and the documents that were produced to the terrorists, and not some link, but documents that you made available, your department made available to the terrorists. I renew my request.

HOLDER:

Well, I think what we promised to do was to provide you and your staff with...

GOHMERT:

Sir, I've read you what your department promised and it is inadequate. And I realize that contempt is not a big deal to our attorney general, but it is important that we have proper oversight.

(CROSSTALK)

HOLDER:

You don't want to go there, OK?

GOHMERT:

I don't want to go there about the contempt?

HOLDER:

You should not assume that is not a big deal to me. I think that it was inappropriate. I think it was unjust. I would never think that that was not a big deal to me. Don't ever think that.

GOHMERT:

Well, I'm just looking for evidence, and normally we're known by our fruits, and there have been no indications that it was a big deal because your department has still not been forthcoming in producing the documents that were the subject of the contempt.

(CROSSTALK)

GOHMERT:

Let me move on. There have been other questions asked about the...

(CROSSTALK)

HOLDER:

... the documents that we were prepared to make available then, we're prepared to make available now, that would have obviated the whole need. This was all about the gun lobby and a desire to have...

(CROSSTALK)

GOHMERT:

So, we've been trying to get to the bottom of Fast and Furious where people died, where at least a couple hundred Mexicans died. And we can't get the information to get to the bottom of that. So I don't need lectures from you about contempt.

HOLDER:

And I don't need lectures from you either.

GOHMERT:

Because it is very difficult to deal with asking questions -- as a former judge, I'd never have asked questions of someone who's been held in contempt. We waited until the contempt was purged, and then we asked questions.

Let me ask you, do you think someone who believes marriage is between a man and a women violates the civil rights of a same-sex couple?

HOLDER:

Somebody's personal belief?

GOHMERT:

Yes.

HOLDER:

No.

GOHMERT:

How about if they have a business and they believe that?

HOLDER:

If they have a business? If a business has a...

(CROSSTALK)

GOHMERT:

If it's a private business and the owners of the private business believe marriage is between a man and a woman, are they violating a same-sex couple's civil rights, in your opinion?

HOLDER:

Well, that's obviously a matter that is under consideration by the courts and we have taken a position on that. I wouldn't want to get into something that is a pending matter.

GOHMERT:

Well, it is your opinion that matters on whether you tell attorneys general how to act in the states or how you approach businesses or individuals that have this biblical view that the president had when he was a senator in 2008. So I thought it was rather important.

Well, let me ask you...

GOODLATTE:

The time of the gentleman has expired.

The chair recognizes the gentleman -- the time -- the chair recognizes the gentleman from Florida, Mr. Deutch, for five minutes.

DEUTCH:

Thank you, Mr. Chairman.

Mr. Attorney General, thank you for being here.

Under your leadership, General Holder, the DOJ has reached historic settlements with major banks and institutions. There's the \$13 billion settlement with J.P. Morgan for its packaging and reselling of toxic mortgages, leading up to the financial crisis. There was the \$25 billion agreement with the nation's five largest mortgage servicers for widespread foreclosure abuses.

There was another \$2 billion settlement with J.P. Morgan for its role as chief banker in Bernie Madoff's multimillion dollar Ponzi scheme, and a \$1.9 billion deferred prosecution agreement with HSBC Bank for laundering money for Mexican drug cartels and conducting transactions with Cuba, Iran, Libya and Burma.

But I want to return to something that Mr. Nadler brought up earlier. And I'd like to also return, I gather it's been a theme this morning, to another hearing that was held before this committee, in this case three years ago, when we first learned that

the DOJ was launching a billion-dollar lawsuit against Deutsche Bank and Mortgage I.T. for repeatedly defrauding taxpayers when seeking insurance for bad mortgages. As you know, that billion-dollar suit was eventually resolved in a \$200 million settlement.

And we had an exchange that though it's awkward, I just feel it's necessary to walk through. I had asked whether the department would pursue criminal charges that could result in jail time for the heads of these larger banks and services. And you responded that "If there are individuals who have taken actions that would warrant individual liability, that's something that we would pursue."

So, I pointed out that under Sarbanes-Oxley, the statute provided for knowingly making false claims, one would be subject to fines of a million dollars, imprisonment of up to 10 years. If the claims were willful, the violations were willful, fines of \$5 million and jail time of up to 20 years. And I asked if that would be the basis for potential claims, to which you responded, "There are other statutes that we can bring, some as old and tried and true as wire fraud and mail fraud. There are a whole variety of tools that we have, including those that you've mentioned, and we will try to make use of all of those as we continue these investigations."

I then asked that given the vast array of potential claims that could be brought, that would bring the potential for criminal violations. When will we expect to see the cases filed? To which you said, "All I can tell you is we're looking seriously. We're going to pursue them aggressively, and as soon as we can make a determination and share that with the American people, we will. The possibility that those cases be brought is certainly the case. We're in the process of looking at them, and it is possible that criminal prosecutions will result."

It's now 2014 and not a single high-level executive with these financial institutions have faced criminal prosecutions. In fact, many of the settlements that DOJ has reached with these companies have absolved the individuals of ever answering to criminal charges.

Now, the settlements that I referred to focus on actions by individuals at firms whose actions nearly brought down the United States economy. They're not minor infractions. They didn't happen by accident and it's difficult to believe that this illegal activity happened without the knowledge or any executive at any of these financial institutions.

Indeed, it's difficult for many Americans to have full faith in our criminal justice system when none of the principals, none of the decision-makers of these companies have been prosecuted, have been taken to court, have been tried before a jury.

And I just quote one -- one more quote from Judge Jed Rakoff, senior U.S. District Court judge, who said, "Companies do not commit crimes, only their agents do." And while a company might get the benefit of some such crimes, prosecuting the company would inevitably punish directly or indirectly the many employees and shareholders who are totally innocent. Moreover, under the law of most U.S. jurisdictions, a company cannot be criminally liable unless at least one managerial agent has committed the crime in question. So why not prosecute the agent who actually committed the crime?

We've seen many large settlements, General Holder, some that resolve banks of illegal -- to resolve the claims of illegal actions. But as Judge Rakoff points out, companies don't commit crimes, only their agents do." And to date, we haven't seen any criminal convictions of executives in those companies. And I'll ask what I asked three years ago. Is the department pursuing or going to pursue criminal claims against the people at these companies that committed the crimes that were the basis of the large settlements that were reached -- the crimes that many Americans, many Americans are still recovering from today?

HOLDER:

Well, it is still the position of the Justice Department that there's no institution that is too big to prosecute; no person who is too important to prosecute. As I indicated in a previous answer, there have been individuals prosecuted from J.P. Morgan, Goldman Sachs, Morgan Stanley, Credit Suisse, UBS, Ravel (ph) Bank, ICAP, Galleon (ph), SAC, Stanford Financial Group -- all cases that have been brought against not just companies, but against individuals.

The \$13 billion agreement that we worked out with JPMorgan Chase has a carve-out that allows us to pursue criminal charges against the individuals. And so...

DEUTCH:

General Holder, hold that finish...

(CROSSTALK)

HOLDER:

... when we have the capacity to make cases, we'll make them.

DEUTCH:

And -- but in all of those cases that you listed, I appreciate the individual claims being brought against -- those claims against individuals, but to date, none of the executives -- none of the decision-makers at any of these companies have been held accountable.

GOODLATTE:

The gentleman's time has expired.

The chair now recognizes the gentleman from Ohio, Mr. Jordan.

JORDAN:

I thank the gentleman.

Mr. Holder, I sent you in the last several months six letters to you and agencies in the Justice Department, specifically ATF and FBI, asking for answers to basic questions -- and I would stress basic questions -- about your investigation, your criminal investigation into the IRS targeting of conservative groups, conduct that you called "outrageous and unacceptable" last May and the investigation that you launched last May.

And we've had countless legal experts tell us that giving answers to these questions, not what witnesses may have said, not what they conveyed, not the questions you asked, just basic information that countless legal experts tell us this is more than appropriate to get this kind of general, basic information.

So I just want to ask you just four quick questions. Bill Taylor (ph), the attorney for Ms. Lerner, it has been reported in the press that he indicated she actually sat down for an interview at the Justice Department, or with the Justice Department. So I just want to know a few things. When did you interview Lois Lerner? Where did the interview take place? Who was the personnel who conducted the interview at the Justice Department? And at any time during the interview did she exercise her Fifth Amendment rights and refuse to answer questions?

HOLDER:

Because this is an ongoing matter, I'm not going to answer those questions.

JORDAN:

You can't answer. Well, let me ask you this. Did you interview Lois Lerner?

HOLDER:

As I said, this is an ongoing matter and I'm not going to comment on an ongoing matter.

JORDAN:

So what -- her attorney has reported that you did. You won't confirm that that in fact took place?

HOLDER:

As I said, I'm not going to talk about an ongoing investigation. The Justice Department is not in the habit of talking about who is interviewed...

(CROSSTALK)

JORDAN:

But this is a part that always frustrates. I'm not asking you to tell me what she said. I'm just saying did you talk to her? Just give me the date? Did you do it last May when you started the investigation? Did you interview her in June? Did you interview her in July? Did you interview her this January? When did you do it?

HOLDER:

Well, as I said, this is an ongoing matter that the Justice Department is actively pursuing and as such it is inappropriate to comment on what it is that we are doing.

JORDAN:

How is telling this committee, and more importantly the American people, the date you interviewed Ms. Lerner, if in fact you did that, and where that took place? At

her house? At the Justice Department? Someplace you met? How is that going to compromise an investigation?

HOLDER:

You don't understand the nature of what it is that we're doing. You can't because you're not a part of the investigation.

JORDAN:

Well, you -- you were able to tell -- you know, some of us have made a big issue about the fact Barbara Bosterman (ph), (inaudible) witnesses that we've interviewed, have told us that she's the lead investigator. You were willing to tell Senator Cruz when he questioned you about that fact. You were willing to tell him she's not the lead investigator.

So you're willing to give some specific information about the process and who's conducting and who's doing what. So it seems to me you opened the door to some of these basic questions when you said, "She is not the lead investigator on this investigation."

So I'm asking you just basic things, too, like: Did in fact you talk to Lois Lerner? Or if it's not Barbara Bosserman who is the lead investigator, who is?

HOLDER:

You seem to think a door's been opened. I don't think any door has been opened at all. And I think the answers that I have given are consistent with what I've...

JORDAN:

Let me ask you about one other thing then. Did someone from the Justice Department leak to The Wall Street Journal that no criminal charges will be filed in this -- in the IRS investigation case?

HOLDER:

I have no idea who told that to The Wall Street Journal.

JORDAN:

The Federal Bureau of Investigation -- this is from a January 13, 2014 report in The Wall Street Journal. "The Federal Bureau of Investigation doesn't plan to file criminal charges over the IRS heightened scrutiny of conservative groups, law enforcement officials said." Do you know who said that?

HOLDER:

No.

JORDAN:

Have you investigated who leaked that information to The Wall Street Journal?

HOLDER:

Not to date.

JORDAN:

You have not? A year ago, in front of the Senate Judiciary Committee, you said this: "We have tried more leak cases, brought more leak cases during this -- the course of this administration than any other administration." So, leaks are pretty important to the Justice Department, and you have not investigated the leak to The Wall Street Journal that no one's going to be prosecuted in the IRS targeting scandal?

HOLDER:

If you look at all the leaks that occur...

JORDAN:

No, no, I'm asking about this leak. Have you investigated this leak?

HOLDER:

Can I -- can I answer the question?

JORDAN:

I am asking you a specific question. You said earlier you haven't investigated. I'm asking you just to -- just to confirm. You have not investigated the leak to The

Wall Street Journal that no one's going to be prosecuted in the targeting of conservative groups case with the IRS?

HOLDER:

As I said, if you look at all the leaks that happen in Washington, D.C. in connection with a whole variety of (inaudible)...

JORDAN:

Mr. Attorney General, with all due respect, have you investigated...

HOLDER:

We have looked at...

JORDAN:

... that leak?

HOLDER:

I answered the question. We have looked at a number of cases. the cases that we have focused on are ones -- in terms of leaks -- have generally been ones that dealt with national security. When I talked about the bringing of more cases, those were national security cases. When it comes to the disclosure of investigative matters, that's something that reprehensible.

JORDAN:

Are you saying this is not important?

HOLDER:

That (ph) -- it is not necessarily something that we investigate in every instance (ph).

JORDAN:

Just for -- well, just for the record, just for the committee, just for the American people, can you answer one more time, have you investigated the leak to The Wall Street Journal that no one's going to be prosecuted in the IRS investigation?

HOLDER:

Well, especially when you're dealing...

JORDAN:

Is it yes or no?

HOLDER:

No -- no, no, I'm not going to answer that way, especially when you deal with information that has no basis in fact, there is -- what would be the basis -- if somebody is providing information about a determination that has not been (inaudible)...

JORDAN:

Here's what -- if I could...

GOODLATTE:

The gentlemen's...

JORDAN:

... Mr. General...

GOODLATTE:

The gentleman's time has expired.

The gentleman from Louisiana, Mr. Richmond, is recognized.

RICHMOND:

Thank you, Mr. Chairman.

First, let me thank you, Attorney General Holder, for you and Secretary Duncan and your support of the school discipline initiative, which I think is going to do wonders in communities across the country and curb our school to prison pipeline.

Let me start with something that is not necessarily under you, your entire tenure but it overlaps. But there was an article that detailed more than 650 cases of misconduct in the last 12 years in the U.S. attorney's office with federal prosecutors and so forth, which highlights the fact that OPR falls under you.

And if you remember our issues in Louisiana, more specifically Eastern District with our U.S. Attorney stepping down, the first assistant, the second assistant, we've asked for the report to be made public. It has not been made public.

And my question becomes your stance on the Senate bill which would put it under the inspector general in an independent area in the -- outside the office of -- of the attorney general, which we plan to file a corresponding bill. So could you give me your feedback on that?

HOLDER:

I am not supportive of any action that would put under the inspector general that which now is the responsibility of the office of professional responsibility that OPR has had I think a long and distinguished history of looking at these matters, recommending where appropriate punishment that has been carried out.

They have a unique expertise. There are specific matters that I think only an OPR can handle. I have great respect for the inspector general's office. But I don't think that the merger of those functions would be in the best interest of the Justice Department.

RICHMOND:

Well, could I ask a question then? Why wouldn't we make the OPR reports and the findings of misconduct automatically public when they conclude investigations and so forth? Even...

HOLDER:

Yes (ph).

RICHMOND:

... so that would be my general question.

HOLDER:

Yes, well, we're prohibited from doing so by a number of things, but chiefly by the -- by the privacy act. We don't have the ability because of the strictures of the privacy act to make available or to make public some of the findings that we've done.

We've tried to be more transparent over the years in -- in producing summaries of the reports that we have made -- that we have made available. We sometimes share the reports with Congress.

And then Congress has the capacity to do with the report that it will, in a way that we in the executive branch do not.

RICHMOND:

So if we request a report, we can get it?

HOLDER:

I believe that that is generally true. A committee -- a committee has -- a committee chair has to make the request.

RICHMOND:

OK. What about the findings of prosecutorial misconduct or any prosecutorial infractions that are reported to the state bar associations but not reported public? Can those be made public?

HOLDER:

I'm not sure how individual bars work or what we do with regard to referrals to the bars. I'll -- I'll have to look into that.

RICHMOND:

And -- and let me just say, I am a lawyer. But prosecutorial misconduct and things like (ph) that I think should be public. And part of my concern today is that the Department of Justice can leak and say whatever it wants when it wants.

And let's just look at the mayor's race in D.C., which I'm not commenting on anybody's guilt or innocence, but to have your name tied into a federal investigation three weeks before your election and to say that it leads towards you,

I think affects the electoral process. And if our assistant U.S. attorneys can do things like that, then I think they have to be held to the same standard when they become the subject of an investigation, disciplinary action and so forth.

I -- I think we are on a very slippery slope when we start leaking information right before election time because we are influencing the election process.

HOLDER:

Well, what happened in Washington was not a leak. It was a formal filing in public about where a case was, when (ph) a -- a plea involved a particular person who was involved with that person.

And we -- I understand your -- your concern...

RICHMOND:

But we do those under seal. We do -- yes, we do a lot of things under seal for a specific period of time.

HOLDER:

No, I understand your concern and the criticism that has been that has been leveled at that decision. But if you look at it in reverse, if the Justice Department had put something under seal and waited until after the election and then revealed the information, we would have been charged potentially with withholding information that would have been relevant for voters to have.

And so what we do is simply bring the cases when they're ready to go. And sometimes it is -- is awkward. But it is the way -- it is the best way to do these -- to do these things, irrespective of what the political fallout is going to be.

GOODLATTE:

The gentleman's time has expired.

RICHMOND:

Thank you, Mr. Chairman.

HOLDER:

Thank you.

RICHMOND:

I would yield back.

GOODLATTE:

The gentleman from Texas, Mr. Poe is recognized.

POE:

I thank the Chairman.

Attorney General, I sent you a couple of questions that I -- I will ask you again about -- it has to do with the trafficking statute, United States that not only prosecutes interstate but international traffickers that come into the United States. Specific question, how many consumers, buyers have been prosecuted by your office under 18 USC 1591, the trafficking statute, just the buyer, the consumer, the child abuser, whatever you want to look at it -- call them?

HOLDER:

Yes, I -- I think we have -- I think statistics that deal with prosecutions under 1591. But I don't think that we break them down in the way that you have requested. I think that there was -- we have an issue there with regard to our ability to give you a precise number with regard to the specific category of people that you have -- that you have talked about.

So I'm not sure that we -- as I said I think we can give you a general number about 1591. But I'm not sure that we can break it down into -- into component part.

POE:

I understand. Can you give me a number, then -- total folks that have been prosecuted under that statute, whether the trafficker or whether the buyer? Do you have that number?

HOLDER:

I don't have that number in front of me. But I will pledge to get that number -- that number to you in -- in -- in due time, in (ph) -- we'll do that quick -- we'll do that quickly.

POE:

All right, thank you. I want to move over to the issue of the NSA data collection. If I understand the law correctly, NSA does their thing. And they may refer a case to the Justice Department for prosecution.

And they basically give you the evidence to prosecute. Is that a fair statement of how that works with the NSA?

HOLDER:

I'm sorry, I...

POE:

NSA does the investigation in a case, terrorist case, for example, but they want -- if they want to prosecute it, they send it to your office and you prosecute the case. Is that correct?

HOLDER:

Yes, NSA doesn't do really much in the way of investigating. I mean, they...

POE:

The evidence that they obtain...

HOLDER:

Yes, we would do the investigating. But we -- we -- we...

POE:

You investigate but you get information from them.

(CROSSTALK)

HOLDER:

... we get -- you know, we get information from a variety of places, including NSA.

POE:

Right. On February the 4th, Deputy Attorney General James Cole was here. And we talked about the massive collection of NSA information on Americans. And I asked him the question, how many people have been prosecuted by the Justice Department for -- could be attributed to the NSA bulk data collection program.

And he said, maybe one person. That was his testimony. And I have it here. Would you agree or disagree with his statement that maybe one person has been prosecuted?

Only one person has been prosecuted based upon that massive amount of information that has been collected or not?

HOLDER:

I don't know the precise number. But it's a small number. It's a small number.

POE:

So it could be just one?

HOLDER:

It could be. I -- I just don't know. But it's a...

POE:

It's a small amount.

HOLDER:

It's a small number.

POE:

Small amount of individuals. Moving over to another issue regarding privacy, e-mails, current law, as I understand it, if a person has an e-mail, that e-mail, if it gets over six years old, six months, excuse me, stored in the cloud, the Justice Department does not need a warrant to go in and retrieve that e-mail.

Is that correct or incorrect?

HOLDER:

Yes, but that's not a policy that I think that we should continue.

POE:

All right, I'm -- I'm just asking. The Justice Department doesn't need a warrant to obtain that e-mail?

HOLDER:

Yes. I -- I think what we've -- yes, I think that is true. But what we've said is that that policy, needs -- there needs to be a change made so that warrants would be appropriate regardless of the amount of that has passed.

POE:

I agree with you on that, that a warrant should be used, imposed or required. Law enforcement goes into a person's private e- mail account, no matter how old it is, should get a warrant from the Justice Department.

HOLDER:

Right.

POE:

Do you agree with that philosophy?

HOLDER:

Right. It should not be a function -- it should not be function of time.

POE:

And we have legislation, bipartisan, pending on that issue.

HOLDER:

Right.

POE:

The last question I want to ask you has to do with the concept domestic use of drones by law enforcement on targeted surveillance. Right now, my understanding is the FAA makes the rules and regulations about who gets a drone, who can use it for what purposes.

Would you think it would be better that Congress intervene and employ legislation safeguarding the fourth amendment, right of privacy basically on citizens? Or do you want -- or do you suggest, as the Attorney General, that the FAA still control who gets a -- a drone or not?

HOLDER:

Well, actually, I mean within the department, the only component in the department that uses these vehicles at this point is the FBI. The ATF is in the process of working through to see if they want to make use of them.

The inspector general has recommended that we come up with some department-wide policies about how these vehicles are used. And I think that would be an appropriate thing to do when we are in the process of trying to work through what rules and regulations would handle the use of these kinds of -- these kinds of vehicles.

GOODLATTE:

The gentleman's time has expired.

POE:

Thank you.

Gentleman from New York, Mr. Jeffries is now recognized.

JEFFRIES:

Thank you, Mr. Chair, and thank you, Mr. General for your appearance here today. Earlier today, during this hearing, in an exchange with one of my colleagues related to concern about the Affordable Care Act, you were characterized as the President's legal adviser.

Do you recall that characterization?

HOLDER:

I think so, yes.

JEFFRIES:

I think it's an erroneous characterization. Now, let me ask you a question about that, are you familiar with the title of White House Counsel, Mr. General?

HOLDER:

Yes, I've heard that.

JEFFRIES:

And would you agree that the White House Counsel is actually the President's legal advise in the Constitutional system that we have created in America?

HOLDER:

Yes. You have to understand, as questions get fired at you, you can't push -- push back with what everything that's contained in a question. But you're right.

I'm not the President's legal adviser. I'm the Attorney General of the United States. And there's a fundamental different. The White House Counsel is, in fact, the President's legal adviser.

JEFFRIES:

Thank you, Mr. General. Now, the characterization was also brought up earlier today, suggestive of the fact that under your leadership, the Department of Justice has somehow engaged in prosecutorial decisions based on race and/or party affiliation. Do you recall that suggestion?

HOLDER:

Yes.

JEFFRIES:

Now, my colleague, distinguished colleague from New Orleans recently raised the question of the matter in Washington, D.C. related to a mayoral candidate who, in fact, lost the election after perhaps being linked to Justice Department activity. Was that current mayor a Democrat, Mr. General?

HOLDER:

Yes.

JEFFRIES:

And he's a black Democrat, is that correct?

HOLDER:

Yes.

JEFFRIES:

Now, I also believe that the mayor of Charlotte was recently indicted, is that correct, by the Department of Justice?

HOLDER:

That's correct.

JEFFRIES:

And was he a Democratic mayor, Mr. General?

HOLDER:

I believe he is.

JEFFRIES:

OK. And he's African-American as well, is that correct?

HOLDER:

He is.

JEFFRIES:

So I think that the suggestions related to your Department of Justice, and there are a myriad of examples but I've got limited time, are really irresponsible, reckless and not evidence-based and think this committee would be well-served by staying within the four corners of the actual facts that are before us.

I've got limited time. So I want to deal with the gun violence issue. It's one that affects the district that I represent in Brooklyn. I think we have a gun violence problem, in fact, in America, five percent of the world's population, 50 percent of the world's guns, more than 14,000 Americans who died as a result of gun violence since the tragedy in Newtown, Connecticut.

Now, we've got a legislative track (ph), which, unfortunately, has been barren of activity. And then there's an administrative executive track. The President in January of 2013 announced a series of initiatives, some of which he charged the Justice Department with engaging in.

And I want to just explore where we're at in terms of that activity. It's my understanding that the President directed the Attorney General to review the categories of individuals prohibited from having a gun to make sure that dangerous individuals are not possessing weapons that can do harm.

Is that right?

HOLDER:

That's correct.

JEFFRIES:

Now, this is a real concern for communities that I represent. We have tough gun control laws in New York State. A lot of the guns come from the neighboring state of Pennsylvania.

Chicago famously has a lot of gun violence problems. A lot of their laws -- guns come from the neighboring state of Indiana. South Central Los Angeles has got some gun violence problems.

A lot of their guns come from the neighboring state of Arizona. That's why the Justice Department engagement is so significant. Where do things stand in terms of

that review that the President charged the Department of Justice with in January of 2013?

HOLDER:

I don't remember the exact number. I think there were 17 or 21 things that came out of the review that the President asked us to review. And I think that we have now completed all of the things that the President asked us to do, which I think was as far as we could go using only the executive power that we had.

There is still a need, I think, for legislation to deal with the -- the common-sense measures that would help deal with the gun violence problem in -- in this country. We have tried to do what we could with regard to enhanced background checks.

But there is still the need and you know, there is still a need to close, for instance, the -- the gun show loophole to deal with the problem of assault weapons, to deal also with the problem of these large -- these dodged clips (ph). There are things that, again, are overwhelmingly supported by the American people, make sense and would keep the American people safe.

JEFFRIES:

Mr. General, I agree that there's an absolute need for Congressional action. But let me also say that in the interim, I think it's important and I'd like to be able to work closely with the Department of Justice, the ATF, to deal with some of the on-the-ground problems that we have in America today, short of legislative action because, you know, the children that I represent, some of whom are dying on the streets of Brooklyn from illegal guns, from other parts of the country, can't afford for us to wait for Congressional action.

And with that, I yield back.

GOODLATTE:

The gentleman from New York yields back.

The gentleman from Utah, Mr. Chaffetz is now recognized.

CHAFFETZ:

Mr. Attorney General, thanks for being here. It's an honor to be able to -- to question you. I -- last I had a chance to question you was May 15 in 2013. I was asking about General Petraeus and his time as the CIA Director.

I followed up with a letter in March 3, 2014. I've communicated with your legislative staff through our staff. My -- my question for you regarding General -- again, this is about General Petraeus' time as the Director of the CIA, my understanding is that the FBI did go to -- to General Petraeus' home.

They took documents and other items. There's some feedback that perhaps the FBI is a bit frustrated that there has not been a prosecution moving forward. Can you give us the status of what's happening?

And is there any friction with the FBI and what to do with this case?

HOLDER:

All I can say is that this is an ongoing investigation. I'm really not in a position to say much more about it than that. I will say, you know, I've been briefed on this matter.

And I did not detect any friction in what is -- I -- I -- because I -- an ongoing (ph)...

(CROSSTALK)

CHAFFETZ:

Well, it -- it's -- you know, we're -- we're talking about two years later. And this is still hanging over his head. Is that fair? Is that really fair to have somebody who's been touted of one of America's great having this hang over his head for two years?

When do you anticipate closing this off?

HOLDER:

Well, that's a very legitimate -- a very legitimate question. I sat with General Petraeus in the situation room when was the head of the CIA. He was a great colleague.

I think he's a true patriot.

CHAFFETZ:

I've -- I've -- I've got to get to more specific questions. I think that's the concern, too, is that this has been hanging over his head. And I -- it just doesn't seem fair to have this hang over his head for so long.

When did -- when -- when did this happen when they (ph) went to his home and extracted these documents?

HOLDER:

I -- as I said, I can't comment about an ongoing investigation.

CHAFFETZ:

Last, I asked you, you said that you first found out about this in the summer of 2012. Is that still -- was that accurate? You were going to get back to me.

I haven't heard back from you.

HOLDER:

Both of the question, when you posed this a long time ago, and when I actually was first aware of this is kind of a long time at this point. It was sometime certainly in 2012 but exactly when, I don't...

CHAFFETZ:

There -- there seem to be a number of mandatory reporting statutes that were not complied with. That's one of the concerns. As Senator Feinstein said, quote, "A decision was made somewhere not to brief us, which is atypical.

This is an operationally a sensitive matter. But we -- we weren't briefed. I don't know who made that decision," end quote. This was quoted in NBC News.

HOLDER:

Oh, well...

CHAFFETZ:

Why not inform the Congress? Why not do the necessary requirements under the law, the National Security Act of 1947?

HOLDER:

Right. Without commenting on the investigation, itself, but with regard to our decision or determination about how we would interact outside of the Justice Department, we did not think on the basis of the allegations that we were looking at that there was any basis or any concern that we had about our national security on the basis of the...

(CROSSTALK)

CHAFFETZ:

There is a -- there is a news report that in spring of 2012, General Petraeus' schedule was compromised, that his security detail was informed of that. Is that true?

HOLDER:

Again, I -- I don't want to go into an ongoing investigation.

CHAFFETZ:

When is this going to be complete?

HOLDER:

It is a matter that is ongoing that we are working diligently to resolve.

CHAFFETZ:

And you -- do you have any idea when the President was told?

HOLDER:

I'm not -- I -- I don't remember right now.

CHAFFETZ:

Do you remember when Mr. Morell was told, his deputy?

HOLDER:

I don't remember that as well.

CHAFFETZ:

Mr. Brennan -- do you know when Mr. Brennan was informed?

HOLDER:

I don't remember. I'm not sure...

CHAFFETZ:

Mr. Attorney General, I've got the greatest respect for you. I appreciate personally the time you've taken with me. I asked questions to (ph) the committee about a year ago.

I sent you a follow-up letter. I work at the legislative staff. We come before a hearing again. And it appears as if you took no time to -- to go back and ask for these very basic things.

We're dealing with not the head of the -- the Department of Fish and Wildlife. We're talking about the CIA director, somebody who is revered in this country. And here we are two years later.

It seems suspicious that it continues to linger without any sort of relief. And I think the Congress' understanding of how you deal with the mandatory requirements to inform the Congress is something that's concerning Senator Feinstein.

It concerns me. I think it's fair to say concerns the Intelligence Committee. And that's what we would like some help understanding over the course of time (ph)...

HOLDER:

Well, I think we complied with the recording -- reporting requirements that you referenced and that (ph) I guess Senator Feinstein had referenced also. I can also tell you that the matter has, again, not talking about the specifics but the fact of it -- the matter has been handled in a diligent way.

And sometimes, these matters just -- they unfortunately take time.

CHAFFETZ:

The CRS, as I yield back, it says -- the CRS report says it seems that once the FBI investigation turned to possible hacking involving Petraeus' private e-mail account, the purpose of the investigation was likely to discover where the compromise of intelligence may have occurred, in which case, it would seem that to fit the definition of intelligence activity, under the NSA or just point to this CRS report, Mr. Chairman, of November 15 of 2012. Yield back.

GOODLATTE:

The gentleman's time has expired.

The gentleman from Rhode Island, Mr. Cicilline is recognized.

CICILLINE:

Thank you, Mr. Chairman. Thank you, Mr. Chairman.

And I thank the Attorney General for being here today. I do want to just make two quick points before I get to my question. One is, I -- I associate myself with the remarks of Congressman Deutch on the urgent necessity of prosecuting the executives of these financial institutions that are responsible for harm that was caused to millions of Americans and many Rhode Islanders, and appreciate and applaud the work you've done to hold institutions accountable, but urge you to continue and to help us restore the public's confidence in our judicial system by prosecuting the decision-makers, as Congressman Deutch has -- has suggested in his question.

And second, just to quickly follow up on Mr. Nadler's national security letter question we wrote to you on February 19 and I look forward to a written response, but just to -- I urge you again to look at this issue, because if you look at the history between NSL letters and section 215 and the kind of shifting use of them, the unanimous recommendation of the President's commission was, and I quote that their "All statutes authorizing the use of national security letters should be amended to require the use of the same oversight minimization retention and dissemination standards that currently govern the use of Section 215 orders."

And I would just urge you to reconsider your position on that. I think there's a reason to harmonize those and to protect the privacy interest of the American people. But what I'd like to focus on in terms of my question is the issue of gun violence and the ways that the Justice Department might think about supporting state and local efforts to combat this serious problem in our country.

Unfortunately, there seems to be a concerted strategy of obstruction here in Congress about doing anything to address the issue of firearm-related gun violence. And that's despite the fact that gun violence claimed the lives of more than 360,000 individuals in the United States between 1999 and 2010, including more than 35,000 children and teenagers according to the National Center for Injury Prevention and Control.

But a lot of states and municipalities and local stakeholders are working to address this complicated problem. And I'd like to ask about whether the Department of Justice has made an effort to study the effectiveness of two particular strategies for addressing this issue.

One is the product (ph) of state practices and another is more locally focused. The state practices -- some states have enacted laws that require mental health professionals to report certain individuals in identifying information about individuals who are seriously mentally ill or found to pose a danger to themselves or others to a firearms prohibition database, New York and Connecticut being two of them.

Obviously, I'm interested to know whether or not you have looked at these and whether these are effective strategies, particularly, in California who has had it for a couple of decades. And the second is related really to a local kind of innovation by -- and I'll give one example in my home state that I know you know about.

You visited Providence in 2011. And I know you had the opportunity to meet with the street workers at the Institute for the Study and Practice of Nonviolence with my (ph) Senator, Senator Whitehouse. And this is a -- the organization that works very closely with the police department using, you know, former gang members to help combat violence and to help de-escalate situations.

They have been heroic in their work in terms of preventing violence. But they are like many organizations, struggling with funding. And so has the Justice Department figured out ways to both identify best practices like the street workers and the institute in Providence that are effective and then figure out how we can support them with funding streams because they spend so much time on the brink, because they just don't have the resources.

And they're doing really good work that is combating gun violence and other kinds of violence. And I just love to hear your thoughts on both those issues.

HOLDER:

So you've raised two very good points. We have recently proposed a regulation that seeks to clarify who to -- due to mental health reasons, is prohibited under federal law from receiving, possessing, shipping or transporting a firearm.

Now, this regulation is open for public comment, I guess, until the beginning of this month. And it deals with the old (ph) question in this statute what is a -- an adjudicated or a mental defective or committed to a mental institution.

And so what we have tried to do is put out for comment, and see what we get back -- an expansion potentially of who under the mental health disqualifier would be prohibited from possessing a firearm. So that regulation is out there.

We are -- public comments will come in. Those comments we (ph) always seem to look at before we make a -- a final -- propose a final rule. With regard to the street program, for lack of a better term, that you described, those are the kinds of things that we are trying to identify to our office of justice programs, things that are unconventional, that are creative, that sometimes raise people's eyebrows about who is involved in -- in these kinds of efforts, and ultimately, that are potentially successful.

And we try to use an evidence-based approach. We don't go in it with any preconceived notions. I'm familiar, at least a little bit, with what you're describing in Rhode Island. It is consistent with what we've seen in other states as well.

We did (ph) get former gang members who have truly turned -- truly turned around. And if they can be used in a -- a positive way and have a positive impact on those who might otherwise duplicate the mistakes they made, those are the kinds of programs that we want to support.

Again, it is why our budget request, I think, is so important. We need the funds, the capacity to -- to fund and support these innovative, creative efforts. Not all of which are going to be successful.

And not all of which we will continue to support. But at least we want to try to give people who are trying to do innovative, appropriate, creative things at least a first chance.

CICILLINE:

I...

GOODLATTE:

Gentleman's time has expired.

The gentleman from South Carolina, Mr. Gowdy, is recognized.

GOWDY:

Thank you, Mr. Chairman.

General Holder, I appreciate the fact that you cannot comment on pending investigations. I do. So I wouldn't ask you that.

I wish the President would also follow your advice, because when he said there's not a smidgen of corruption on national television, talking about an ongoing investigation, not only did he undermine people's confidence in the efficacy of that investigation. In my judgment, he undermined your department because you can't comment on it.

I think he should have taken a pass and said the exact same thing that you said when Jimmy George (ph) has asked you the question. I also want to thank you because I think you're coming to Charleston on Friday...

HOLDER:

Right.

GOWDY:

... to see our U.S. attorney and the work that the women and men of our U.S. attorney's office are doing in Charleston and the U.S. attorney in South Carolina, is a wonderful friend of mine. We met on the opposite sides of the death penalty case, which is a strange place for a friendship to begin.

And he is an avowed progressive. And I am a conservative from the upstate of South Carolina. But we are wonderful friends, I think, in part, because we hold out this hope that the law will trump politics, that it is the greatest equalizing force in our country.

And it is the greatest unifying force in our country. So I want to thank you for going to Charleston. And I want to ask you some questions about rule of law and prosecutorial discretion.

If a bill becomes law, and there is no question with respect to its constitutionality, does the chief executive have to enforce that law?

HOLDER:

Have to enforce it?

GOWDY:

Yes.

HOLDER:

The President has a Constitutional responsibility to enforce the laws. The executive branch has a responsibility to enforcing the law.

GOWDY:

Right. So you agree with me that if a bill passes and is signed into law and there is no allegation of -- of a lack of constitutionality, the chief executive has to enforce that law?

HOLDER:

I mean, we're talking about a hypothetical situation now (ph) and that given the hypothetical that you have espoused, I would think that there was obviously -- obviously be a responsibility to enforce the law.

GOWDY:

Do you agree that there is a difference between enforcing the law and following the law?

HOLDER:

I'm not sure I quite understand that -- that...

GOWDY:

Well, here is the distinction I would make. Your department has asked to enforce certain statutes, Title 18 statutes. You have prosecutorial discretion.

HOLDER:

Yes.

GOWDY:

You can decide that these facts we can't get a conviction. But if Congress were to impose upon you a duty, in other words, to -- to make a report to us by a certain date, then you would have to follow that law.

You're not enforcing it. You're following it. So the case law has made a distinction between enforcing the law where prosecutorial discretion comes into play, and following the law where prosecutorial discretion is not a defense.

So if we were to ask you to do something, you would have to follow the law. And you could not cite prosecutorial discretion as a reason not to follow the law.

HOLDER:

Well, I would agree, but I would disagree to this extend, to the extend, if Congress passed a statute that said, the Justice Department was obligated to bring every case that under Title 18, Section 1959, with every public corruption case under a particular statute, I think that would violate separation of powers.

GOWDY:

I agree, I agree because that would thwart prosecutorial discretion.

HOLDER:

Right.

GOWDY:

But if Congress were to tell you, you have to make a report or you have to do something by X date and impose a duty on the executive branch itself, prosecutorial discretion is not going to get you out of that or else, prosecutorial discretion consumes all of the law. If -- if you have the ability to not...

HOLDER:

Yes.

GOWDY:

... to both not enforce and not follow law, then we have no law.

HOLDER:

Well, if Congress were to impose upon us a reporting requirement, I would agree with that, I mean, to say all right, you know, tell us how many cases you have brought under this statute by -- by December 31 of whatever year, something like that...

GOWDY:

You have to follow it.

HOLDER:

I think we have the --the obligation to -- to fulfill that reporting requirement.

GOWDY:

All right. I want to ask you this, you -- you issued a memo directing in certain circumstances that you're a U.S. agent (ph), USA's not informed the grand jury, and therefore not inform the jury and therefore not inform the judge about drug amounts.

HOLDER:

About drug...

GOWDY:

Drug amounts in Title 21 cases.

HOLDER:

Anti-drug (ph)...

GOWDY:

Amounts.

HOLDER:

Amounts, I'm sorry...

GOWDY:

Right. It's a memo. In cases in involving Title 21 mandatory minimum sentences based on drug type, prosecutors should decline the charge to quantity necessary to trigger (ph) mandatory memo. General Holder, we already have a safety valve.

Congress has already passed a law that if you meet these requirements, the mandatory minimum is not applicable. So why would you skew what Congress has done and trump it with a memo?

HOLDER:

Well...

GOWDY:

I'm really honestly trying to understand how you can respect the law and disrespect the statute that Congress has already passed?

HOLDER:

Well, the view that we had, based on a review that I ordered back in January of 2013, I guess, was that we have to do something about the prison population that we have. We also have to come up with ways in which we come up with a system that is both more effective, more efficient and keeps the American people safe.

And what I ultimately am trying to do is push discretion in the hands of the men and women who serve as assistant U.S. attorneys to look at the defendant who is in front of them and make an appropriate determination based on the conduct of that person what an appropriate sentence is.

GOWDY:

Mr. Chairman, I have no amount (ph) of time. Could I ask unanimous consent for 30 seconds just to follow up?

GOODLATTE:

OK.

GOWDY:

Just for 30 seconds.

GOODLATTE:

Without objection.

GOWDY:

Thank you.

Attorney general, I would just ask you under this general heading of respect for the rule of law, that you would come to like-minded members of the Judiciary Committee and say we need to expand the safety valve, because we have a law that does what your memo purports to do. And if we ever get to the place in this society where a memo is on equal footing with the law, I think we're in trouble.

So I -- I would encourage you to come to Rand Paul and Raul Labrador and others who are like-minded and fix the statute, not the memo. And with that, I would yield back.

HOLDER:

As indicated in my opening statement, Congressman Labrador's approach, Senator Paul's approach, Senator Durbin, Senator Lee, these are all the kinds of things that we want to work with Congress about. I -- I think there are ways where ultimately, the -- the best of all possible fixes is a work -- is to work -- work between the executive branch and the -- and the legislative branch.

That is something we are desirous of doing. But I do think that the -- the policy pronouncements that I've made in -- in the recent months are consistent with the law and also are -- are consistent with good law enforcement. But I...

GOODLATTE:

Go ahead, you can continue.

HOLDER:

... I was just going to say, but at the end of the day, I think the best thing would be for the two branches to get together and come up with a -- a common approach.

GOODLATTE:

Gentleman's time has expired.

Gentleman from Idaho, Mr. Labrador, is recognized.

LABRADOR:

Mr. Chairman and Mr. Holder, thanks for being here today. And I would actually want to follow up a little bit on what my good friend, Trey Gowdy was saying. As you know, you and I have had many disagreements over our history.

And I hope you know now that I'm from Idaho. And one area where we agree is on the smarter sentencing act, which I have introduced in the House with my colleague on the committee, Congressman Bobby Scott.

I'm very pleased that you're supportive of this legislation. I also understand that the President is supportive of this legislation. However, the concern that I have, you know, my job as a member of Congress is to try get my like-minded friends to agree with me on certain pieces of legislation, even if it's outside of the scope of what they usually think about.

And this is something that I think you would agree. Republicans have not always agreed with -- with Democrats on. And it's something that I've been working for the last year or so trying to get Republicans on board.

But you make actually my job much more difficult when you unilaterally, as you have, you -- you write memos and you try to do the same thing through memos that we're trying to accomplish through this legislation. When you say that you're not seeking mandatory minimum sentences for nonviolent drug crimes, you're working around Congress instead of with Congress.

So I'm extending to you my hand right now to work with you to help pass a smarter sentencing act. But could you please help me try to pass this smarter sentencing act

by not going around the law and by trying not to work through executive action only, but actually working with Congress?

Could you do that for me? Because it's making my job much more difficult.

HOLDER:

Well, we certainly want to work with you. As I indicated to Congressman Gowdy, I -- I think the policy pronouncements that I made, and -- and frankly, the raising of this issue in that speech I gave in August of, I guess, what, 2013, I guess, in the -- at the ABA (ph) in San Francisco is what really in -- in many ways, generated the conversation that we're now having.

Again, I'm talking about pushing discretion to assistant U.S. attorneys to make determinations about what is an appropriate sentence, what is an appropriate charging decision, subject to supervisory control for a defendant that is in front of them, as opposed to a previous policy that existed that required every assistant U.S. attorney to charge the most serious offense that could be proven almost regardless of what other factors were in existence.

I got more faith in the men and women who serve in this Department of Justice to make the right decisions.

LABRADOR:

But -- but you're telling them not to charge certain crimes. So I'm not sure that you are exhibiting faith. You're actually telling them, don't charge certain crimes.

And if they don't follow your orders, I think it's going to be something that I've never been an assistant U.S. attorney like my good friend, Trey Gowdy, but I'm not sure that that's something that somebody would do. Now, let's talk about a different issue.

We've heard a lot of -- recently, about the President's record of -- of deportations. And my friends on the other side continue to say that these are record deportations that we haven't had as many deportations in the history of the United States.

But my understanding is that the majority of what the administration is counting as deportations are from the border and not from the interior. Is that correct?

HOLDER:

I'm just not aware -- I don't know that.

LABRADOR:

And when I look at the number of orders of removals and the DOJ's F.Y. 2012 statistical yearbook, I see that they actually have dropped since -- 30 percent since 2009 and are down by 42 percent since 2005. How do you explain the administration's claim that we have record deportations but your own statistical yearbook says that they have dropped and continued to drop in 2013?

HOLDER:

Well, you know, I -- I don't have the statistics in front of me. But I know that the President has been, I think, unfairly labeled the deporter-in-chief. I think he is...

LABRADOR:

Well, I agree with you. I think he has been unfairly labeled because we're playing tricks with the numbers. You're counting people who were stopped at the border that in the past were not being counted as deportations.

And I think it's been a trick of my friends on the other side to try to claim that there's been a record number of deportations. But I actually don't think that is -- the evidence does not bear that out.

HOLDER:

Well, I -- when I said unfairly, I only meant to -- to say that this somehow betrays a -- an inconsistency in what the President has proposed with regard to his comprehensive immigration plan and his sensitivity to the needs of the immigrant community and what he has done with regard to these deportations. I don't think that there is necessarily a tension between them.

That's why I think that the label that has sometimes been placed on him is an unfair one.

LABRADOR:

OK, thank you.

I yield back my time.

GOODLATTE:

The Chair thanks the gentleman.

Recognizes the gentleman from Texas, Mr. Farenthold.

FARENTHOLD:

Thank you very much, Mr. Chairman. You know, I understand that this -- this committee has a constitutional duty of oversight over the -- over -- over the Department of Justice. And that's why we have Mr. Holder here today.

But I -- I don't think I can be a part of eroding the constitutional balance of power, favoring the executive over the legislative. You know, I -- I -- I don't think we should be -- Mr. Holder should be here.

He's in contempt of this body. I've called for his resignation. I've sponsored articles of impeachment. And this week, I'm going to be introducing legislation that would prevent federal employees who are held in contempt of Congress or who fully failed -- or who failed to fully comply with Congressional subpoenas not be paid their taxpayer-funded salary.

I'm going to try to get that enclosed with the appropriations bills that will be going through. I'm committed to -- to maintaining the constitutional balance of power and the authority that this branch, this legislative branch has.

And I just don't think it's appropriate that Mr. Holder be here if an American citizen had not complied with one of the Justice Department subpoenas. They would be in jail, not sitting here in front and testifying.

But I realize there are questions to be asked. And I'll yield the remainder of my time to Mr. Gowdy.

GOWDY:

I thank the gentleman from Texas.

General Holder, I want to go back to our mandatory minimum. If this were methamphetamine instead of Altoids -- and I'm going to trust that it is Altoids because it's Marino's (ph) -- if that were methamphetamine, Congress passed a statute that that amount would get you a mandatory minimum of five years.

But Congress also passed a statute that if you had de minimis criminal history, weren't organized (ph) or didn't use a weapon, that the mandatory minimum would not apply. Your memo -- now, that's after the fact, that -- that's -- that's after the trial.

That's -- that's after you've been in front of a judge to change your plea, your memo tells the AUSAs not to cite the drug amount. And I mean, they can't but...

HOLDER:

No, it doesn't say that. The memo says that, you know, you take into consideration the totality of the circumstances in making a charging determination.

It doesn't mean that if you, Trey Gowdy, you know, we're hypothetical here, you're a bad, you're, you know, a drug dealer and you've got whatever 15 ounces of whatever -- of Altoids/methamphetamine, that you can't be hit with a maximum sentence. You can't be hit with a mandatory minimum.

If that -- in the discretion of the assistant U.S. attorney, is an appropriate determination on the other hand. You know...

(CROSSTALK)

GOWDY:

But -- but why not just exercise your prosecutorial discretion and not prosecute the case, period? If you don't want low-level drug dealers in federal prison, you have absolute unfettered authority to tell your AUSAs don't pursue the case because in drug cases, all 50 states have drug laws.

HOLDER:

And...

(CROSSTALK)

GOWDY:

... if you don't prosecute it, the state D.A. will.

HOLDER:

That is the first part of the memo that I sent out to the field (ph), which was to make determinations about what truly is a federal case. You know...

(CROSSTALK)

GOWDY:

All I'm going to ask you to do is think about it. You're going to see men and women in Charleston on Friday, that if a judge asked them a question, they have no -- no choice but to answer that question honestly.

Whatever the question -- question the judge asks...

HOLDER:

Sure.

GOWDY:

... you either answer it honestly or you're going to jail.

HOLDER:

Right.

GOWDY:

What is a grand juror asked the question, how many -- how much drugs were involved? The grand jury is about to draft the indictment. They're about to true bill it. They want to know.

And it's more than 50 grams, which triggers a mandatory minimum 10 years. Are we not putting your AUSAs in the position of not being honest with the grand jury?

HOLDER:

No, not at all. You could tell the grand jury...

(CROSSTALK)

GOWDY:

How about (ph)...

HOLDER:

... tell the grand jury that the amount is, let's say, above 50 grams. However, the charging document that we have does not specify the amount. And this is the reason why we are not specifying the amount that is contained in the charging document that we are asking you to approve.

You have been totally truthful with those 23 members -- 23 members of the grand jury.

GOWDY:

One other point, in our safety valve, it is required that the defendant cooperate with the government. In your memo, it is not required that the defendant cooperate with the government to get out from under a mandatory minimum.

You would agree with me the cooperation with the government is very important when you're working narcotics cases. So why did you not require that?

HOLDER:

Now, that is one of the factors that is to be taken into consideration in making those kinds of determinations. The memo that I sent (ph) did not send (ph) out that says do not do this in -- in a kind of, you know...

GOWDY:

It said prosecutors should decline to charge the quantity necessary to trigger a mandatory minimum if the defendant meets the following criteria. I'm telling you, if I got that memo from you, and the defendant met that criteria, but didn't meet all the criteria from Congress, I'm going to go with the guy who signs my paycheck.

HOLDER:

Well, but...

GOWDY:

And there's a conflict between the two. That's my point, is your memo was trumping a Congressional statute.

HOLDER:

Well, I mean, we always have discretion. And would you say that...

GOWDY:

But you don't have discretion on whether to follow the law or not. That's my point.

HOLDER:

Well, no, I would -- I would disagree in a sense that taking into account resource constraints, it is incumbent upon those of us in the executive branch to make the maximum use of the resources that Congress gives to us. That (ph) necessarily means we're always making choices about the kinds of cases that we bring, how we deal with the cases that we bring.

(CROSSTALK)

GOWDY:

But you're already expending the resources of the prosecution or you and I wouldn't be having the question. This is all about sentencing. I -- I have no qualms if you say I'm going to decline prosecution.

You have an unfettered right to do that. What I'm saying is you don't have a right to say in mandatory minimum cases, don't tell the grand jury what the drug amount is.

I just think you're putting your AUSAs in a tough position. But as -- as is always the case, I could be wrong. And I'm definitely out of time.

FARENTHOLD:

Yield back.

GOODLATTE:

The Chair thanks the gentleman and recognizes the gentleman from North Carolina, Mr. Holding, for five minutes.

HOLDING:

General holder, thank you for being here. A quick follow-up on a previous question. In the investigation of IRS, I mean, there is a person who is leading that investigation, a first chair, if you will.

I mean, there has to be. I mean, that's how you'd run an investigation. Is that prosecutor a member of the public integrity section or is a member of the -- of the civil rights division?

HOLDER:

I'd say it's a joint investigation being done by civil rights and as well as by public integrity.

HOLDING:

All right. Well, I wish you would tell us which division the first chair is in, but you won't. The -- at the same time that you issued the memo regarding the -- charging the drug weights, part of that memo had to do with compassionate release and expanding the criteria for eligibility for compassionate release, because historically, it's been incredibly difficult to get compassionate release.

And some of the new criteria are circumstances in which there's been a death or incapacitation of a family member or a caregiver of the inmate's child or circumstances in which the spouse or registered partner inmate has become incapacitated. I think those are pretty broad exceptions or eligibility criteria.

How many people do you estimate could be eligible for compassionate release that are currently in the federal system?

HOLDER:

I don't know. I would, you know, we have and I -- I believe these numbers are correct -- over a hundred people in the federal system that were over the age of 80, I think 30-something over the age of 85. Those would be, I think...

HOLDING:

These -- are these -- these criteria that I'm looking at are pretty broad. I mean, a lot of inmates have children. A lot of inmates have spouses or partners and you know, this would apply to them.

I mean, it has to be a pretty broad number. Have you put into place any methods to track these people after they're released under compassionate release?

HOLDER:

No, I mean, these are the kinds of things that, you know, we will put in place to make sure that the determinations that we're making are appropriate ones. I mean, as I think, it's only the responsible thing to do if we're going to try these new policies to see what's the impact of it and to the extent that we are releasing people who then engage in other activities, other crimes...

HOLDING:

And as is (ph) -- you know, you've -- you've put in the memo that, you know, you will consult with the U.S. Attorney's Offices on these cases of compassionate release. But the authority to grant them is with the director of the Bureau of Prisons.

So you know, is there any judicial restraint that could be on these compassionate releases or is it just an order by the director of Bureau of Prisons?

HOLDER:

I believe the way it goes is that is, by statute, the Bureau of Prisons through the U.S. Attorney's Office has to petition the court for the -- for the release.

HOLDING:

All right. Well, to switch gears here before I run out of time, I'm concerned about the illegal distribution of tobacco products, counterfeit cigarettes, illegally gotten cigarettes that are put into the system, counterfeit tax stamps. And you know, we all know here that cigarette smuggling is often a funding source for terrorism or organized crime.

We also know that ATF, you know, is charged with the investigation of tobacco crime -- tobacco-related crimes. It's the T in ATF. People forget about that.

Yes, I appreciate that they're focused on firearms. And I -- but I would like to know, and maybe you could have some staff brief my staff on what the DOJ -- what DOJ and ATF are doing to crack down on tobacco smuggling crimes, and what resources you've got placed into this and what recommendations you have for

additional resources that you would need to, you know, properly engage in the enforcement of this.

HOLDER:

OK, we can certainly do that. I -- I think the point you make is one that people would find a little hard to believe. But you know, you've been -- you're a former U.S. attorney that, in fact, there at least have been a couple of instances where there was a tobacco terrorism connection.

We know that. And so the -- we'll -- we'll provide you with that -- we will have our staff interact (ph).

HOLDING:

Right. And before I forget, I will ask for a follow-up on the compassionate release and any studies you've got of people who -- in the system, numbers that might be eligible and, you know, whatever system you have for tracking these people, you know, as they're released into the system under these new criteria, and you know, further illegal conduct that they might engage in.

HOLDER:

That's fine.

HOLDING:

Thank you.

Mr. Chairman, I yield back.

GOODLATTE:

The Chair thanks the gentleman, recognizes the gentleman from Georgia, Mr. Collins, for five minutes.

COLLINS:

Thank you, Mr. Chairman.

It is always interesting, I mean, it's my second one with you and coming -- Mr. (ph) Attorney General, I appreciate you coming. And it's always a interesting to know what I have seen in my short time but also looking at history.

And I think one of the things that comes across today is it's just a very much of a lack of trust in who's the prosecutor, who is not prosecutor. We've heard that comment going on.

I just happen to be in another committee this morning, saw this article, just pulled it out -- 2009 paper that said Obama opening to prosecuting Bush officials over abuse. This is sort of what started the whole -- look, I think it's even going to be a day of reckoning for this past week (ph).

And that is tainted everything that's come forward. When you see, as my general (ph) friend from Iowa has talked about the prosecution case is not prosecute other things. And it gets into an issue here in which the gentleman from South Carolina brought it up.

The gentleman from Utah, I mean, Idaho has brought it up. And this time (ph), how we can work together. There is a process to this, Mr. Attorney General. And that's working together, even through difficulties, and even when we don't agree and there's problems, even to the point of we can't, in this committee today, seem to understand that you are an adviser to the President.

And that was mentioned by Mr. Chaffetz and then was sort of mockingly mentioned by my friend from New York. But even on your own budget request for the office of legal counsel, it says the mission of OLC is to assist the attorney general in his funding of legal adviser to the President and all the executive branch agencies.

If this is not your role and if this is not their role, then I think we found some money for you to put into other ideas so we'll defund (ph) this program and put this money into other places. So are you saying again to this committee that you're not a legal adviser to the President on a lot of different issues?

HOLDER:

Sure, I am, but not the way in which it was used in that question. The question was posed as if I were the -- the person kind of almost pulling the strings for the President. Of course, I'm an adviser to the President.

And of course, I have a particular area of responsibility with regard to that advice. But in terms of, you know, the person who, on a day-to-day basis, is advising the (ph) president.

(CROSSTALK)

COLLINS:

Mr. Attorney General (ph), no one is...

HOLDER:

That is the White House Counsel, as opposed to Attorney General because there's - - there's a wall. There's an independence that exists between the Justice Department and the White House.

COLLINS:

Very familiar with that wall. I think that just in the conversations going on, that needs to be understood, and I think it goes back to this, you know, issue of -- of oversight and discussion.

I want to turn the attention to ATF. We just talked about from the gentleman from North Carolina and tobacco, which is a concern. But I have a bigger concern over just what seemed to be a lack of oversight from your office and overall when ATF was going through multiple interim directors.

There is now a full-time appointed and confirmed director of ATF. But in Atlanta, this only go (ph) back to an issue of the storefront. There's been a fast and furious run (ph). We'll talk about that.

I want to go back to the storefront issue in Atlanta blaze (ph). This was at a time in which the current administrator was not in charge and there were interims going on. But you were ultimately in charge of ATF, correct?

HOLDER:

Yes...

(CROSSTALK)

COLLINS:

OK so you have oversight? Does it not concern -- and I think it concerns me on this that there seems to be, especially from fast and furious to this storefront operations, why there would seem to be no concerted oversight from your office, especially when there was not a permanent director.

Can you help me understand why they seemingly were able to operate very rogue programs? I come from a law enforcement background. My father was in law enforcement.

And the -- and the actions of one represent all. And they should not. And I agree with you there. But why was this going on? And I've asked specific questions.

Well, they're supposed to meet with me next week but I still haven't gotten any answer. Why was this program from your perspective not better managed?

HOLDER:

Well, I think it was just poor management, poor decision-making. But I also think, you know -- you know, that Congress bears some of the responsibility here by not approving a person -- a Senate-confirmed person to run ATF.

That makes a...

(CROSSTALK)

COLLINS:

So -- so hold on just one second. I have a question there. So you're saying that if we don't confirm somebody or...

(CROSSTALK)

HOLDER:

I'm not saying that -- no...

COLLINS:

... it's the Senate by the way. This is the Senate side -- would confirm, not us.

HOLDER:

Well, I'm not blaming you.

COLLINS:

And -- and -- is becoming (ph) -- that you put somebody in an interim role that they can't make good decisions, that they used handicapped personnel to -- to recruit folks.

HOLDER:

No...

COLLINS:

They take police weapons. They don't inform the local police that they have the weapons. In fact, the Atlanta and Fulton County are still searching for -- isn't (ph) - - then in your -- the ATF has not acknowledged that they have the guns?

HOLDER:

I mean, that's not what I'm saying. That's -- I'm saying that that is a factor in why I don't -- you saw I think some of the things happened in -- in ATF. If you look at the leadership that Todd Jones has been able to bring to that organization as the Senate- confirmed head of that organization, there's a certain gravitas that he has that people who preceded him simply did not have.

COLLINS:

I had -- I had great time talking to...

(CROSSTALK)

HOLDER:

It's only -- it's only a fact. It's only a fact.

COLLINS:

... I had a great time talking with him last week. Now, I'm talking with you because during the time he was not there, these were going on.

And to me, that's one of the things that's overridden these hearings a lot is that there's a simple lack of administrative trust of what's going on in the oversight, especially in ATF, but in other areas where it is viewed and especially when we can't seem to work together on getting stuff done. Instead, as -- as your word just a moment ago, just -- it was discretion to -- as we found out about the drug incidence (ph), discretion does not mean you can't follow the law.

Discretion is always there. And I think that's the concern that I have here. And it's a concern that did (ph) -- just pops up whether it was ATF, whether it started back years ago.

If there's just old basic lack of trust when you look at prosecutions, when you look at issues going on, and we can't seem to get answers that are not just basically blowing off. And that's -- I don't understand that from your perspective, especially with an agency like ATF, that had already had problems, why the leader would not have took a better hands on role there.

Can you explain that one to me?

HOLDER:

Well, we have provided documents. We provided evidence.

COLLINS:

But did it concern you -- not the documents. I want to know from you, Mr. Attorney General.

HOLDER:

Sure, it concerns me. The notion that you would use mentally unstable people, you attack (ph) to them, that you would do ridiculous things like that, it's absurd. And people will be held accountable.

(CROSSTALK)

COLLINS:

How were they held accountable?

HOLDER:

He's crazy.

COLLINS:

How were they held accountable?

HOLDER:

Well, the best...

(CROSSTALK)

COLLINS:

What did you do to hold these people accountable?

(CROSSTALK)

HOLDER:

Well, the investigations being done (ph) right now by the inspection general, once those findings are made and people are identified, they'll be held accountable in the same way that happened with regard to other things...

(CROSSTALK)

COLLINS:

These are multiple years -- these are several year old. They saw hard (ph)...

CONYERS (ph): Mr. Chairman, can we have regular order here?

GOODLATTE:

Time of the gentleman has expired.

COLLINS:

Mr. Attorney General, thank you for your question (ph). My time has expired.

GOODLATTE:

Chair recognizes the gentleman from Florida, Mr. DeSantis, for five minutes.

DESANTIS:

Thank you, Mr. Chairman.

Thanks for coming, Attorney General Holder. I want to follow up. You've been asked by Senator Lee about the Obamacare employer mandate, delayed then (ph) today by Congressman Chaffetz (ph). I mean, you cited the IRS analysis.

So I have that, if we can provide that for you. It's actually very simple. It's just one sentence. And it -- it basically says that the secretary shall prescribe all need for rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason, have any alteration of law in relation to internal revenue.

Again, that's 7805 alpha. So how would -- how would that trump an obligatory statutory mandate, because in the Affordable Care Act that says that this mandate shall take effect, it's not discretionary. This is providing authority to -- to implement statutes and -- and to prescribe rules for that effect.

But how would this be used to -- to trump that deadline? Because the deadline's essentially been suspended twice. And the second suspension, there was additional gloss added. Now, instead of a 50 employee, now we have this 50 to a hundred employee and their different rules being prescribed.

So how -- what -- what would you cite within that regulation that would give the executive branch authority to suspend the statute?

HOLDER:

Well, as I indicated, the Treasury Department came up with the analysis and the basis for the delay. It seems to me that's -- that's not a question of trumping. It seems to me that it is consistent with the -- with the act.

And the action taken by the administration in that regard was appropriate.

DESANTIS:

So let me ask you another issue. There was this, in November, we had this issue with Obamacare plans were being canceled. It was obviously politically difficult for President's Party, in particular.

And the way that provision worked was there's a grandfather provision. So as soon as the ACA was passed, you could potentially being covered (ph) if you had an existing coverage. But any new coverage that anyone got after that March 2010 date, it's a grandfather clause just didn't apply.

So this was causing a lot of problems in the marketplace. So the President came out to the podium and the -- the White House press room. And he said this, already, people have plans that predate the Affordable Care Act can keep those plans if they haven't changed.

That was already in the law. That's what's called a grandfather clause that was included in the law. Today, we are going to extend that principle, both to people whose plans have changed since the law took effect and to people who bought plans since the law took effect.

So if the grandfather clause is limited to plans that predate the implementation of Obamacare, where would the executive branch get the authority to extend the coverage of the statute to plans that were not covered by the law?

HOLDER:

Well, again, I don't know exactly what the basis is for that action. I'm confident that the determinations that were made within the administration are consistent with the law.

I think we'll (ph) -- you know, I think need to pull back a little bit here. We'll pull back a bit. We've got 7.1 million people who've signed up -- people who have health -- have health care...

(CROSSTALK)

DESANTIS:

It doesn't have (ph) excuse whether you're doing (ph). With all due respect, you...

HOLDER:

No -- no one's (ph)...

DESANTIS:

... good things or bad things but I think your time...

HOLDER:

I've given you a chance to ask a question...

DESANTIS:

... I know but my time is limited, sir. I understand what (ph)...

HOLDER:

Let's go past five minutes then. How about that?

DESANTIS:

All right.

HOLDER:

And let's pull back a little bit and see that people who did not have health care before now have it. People who didn't have great health care before now have it.

People who had preexisting conditions are now covered. Younger people like my kids who are unemployed can stay on my health care plan, that there are going to be, you know, 7.1 million people signed up.

There are substantially greater numbers of people in those other categories that I have mentioned. And let's look at -- at that -- look at the totality of that before you start to pick at -- at these things, which are nothing (ph) substantial.

I mean, there are these legitimate questions...

(CROSSTALK)

DESANTIS:

But Mr. Attorney General, the rule of law, ultimately, we have a constitutional system. That's one of the things that makes our countries unique from other -- is that you have separation of powers.

This whole architecture, a design ultimately...

(CROSSTALK)

HOLDER:

And you try to refute (ph) 50 times...

(CROSSTALK)

DESANTIS:

... ultimately to protect individual freedom. And so that's why -- so to say that oh, well, people are now staying on their parent's plans, that has nothing to do with the executive action that was taken in this instance.

And we're trying to determine whether the President has gone beyond, in this case, by rewriting provisions of the statute. And basically, you've simply referred to other analysis.

But most of us on this committee find that analysis has been wanting. And we don't think that it's been good. Final thing, this Dinesh D'Souza prosecution, I know you're not going to comment on the ongoing investigation.

But it was a straw donation reimbursement scheme is the allegation. The FBI did say that this was uncovered in terms -- during a routine review of FEC (ph) filings.

And so my question to you is, to put aside this case, how would it even be possible if all you're doing is reviewing the FEC (ph) filings to know that some of those donations have been reimbursed? Wouldn't you need to actually have targeted one of those donors and done additional investigation?

It just seems to me, by simply reviewing the FEC (ph) filings, that is not going to be sufficient.

HOLDER:

Well, I'm not going to comment, as you said, on the ongoing investigation. But I can certainly tell you that information comes to the FBI, to the Justice Department in a variety of -- of ways.

And on the basis of the receipt of that information, determinations are made about what cases are going to be investigated, what cases are ultimately going to be prosecuted.

DESANTIS:

But that's not really...

GOODLATTE:

Time of the gentleman has expired.

Chair recognizes the gentleman from Missouri, Mr. Smith, for five minutes.

J. SMITH:

Thank you, Mr. Chairman.

Attorney General, pleasure to have you here. Does federal law prohibit the sale or possession of marijuana?

HOLDER:

Technically, yes.

J. SMITH:

Technically. Is it not under the Controlled Substance Act of 1970 where it defines that as a schedule one drug? So that's a fact, right? Correct?

HOLDER:

Yes.

J. SMITH:

OK. And whenever state law conflicts with federal law, does federal law take precedence?

HOLDER:

That is -- that is generally true. It is not always true.

J. SMITH:

Would it be true in the case of the controlled substance act of 1970?

HOLDER:

That's an interesting question. If a state, for instance, decided to decriminalize the -
- the possession of a particular substance, there is a question -- there is at least an argument that could be made that the federal government could bring a supremacy clause suit against -- against the -- the state.

But there's an argument that could be made that a state cannot be forced to criminalize something. So that's -- it's actually an interesting question.

J. SMITH:

Is it, would you say, similar to the Arizona immigration case?

HOLDER:

No. There I think the -- it's clear that the responsibility for the -- the enforcement of immigration law is something that is clearly federal in -- in nature. There is not a dual responsibility as there is with regard to certain criminal laws.

J. SMITH:

I thought it was interesting in that Arizona case, Justice Kennedy, who wrote the majority opinion said states may not pursue policies that undermine federal law. And the Controlled Substance Act is a federal law.

And the state of Colorado is undermining that federal law, correct?

HOLDER:

No, I mean, what we have said is that we are looking at the way in which the law is being enforced or how we're going to enforce the law in Colorado and in Washington as well. We're going to apply those eight factors that we have put together.

And we're going to use our limited resources to go after people who engage in the trafficking use of marijuana that has an impact on those eight factors.

J. SMITH:

So if -- if my fellow former -- former -- former colleagues in the state House and state Senate would say, the state of Missouri doesn't want to participate in the Affordable Care Act, could or would you all sue the state of Missouri?

HOLDER:

Well, certain states have made that determination by not expanding Medicaid.

J. SMITH:

So my constituents...

HOLDER:

Yes.

J. SMITH:

... if they don't sign up, they will not be penalized in their IRS forms?

HOLDER:

No, that is not the way the -- the statute is written.

J. SMITH:

OK. Well, we know what the statute says in the Controlled Substance Act in 1970. And it says marijuana is a -- sale or possession is a violation of federal law.

I -- I always visit my schools back home. I talk to the kids. And I always try to bring home the theme of being a responsible citizen to society and to obey the laws of the land.

And one of the laws of the land, which is federal law from 1970, 10 years before I was ever born, that says that marijuana is a violation -- the sale or possession is a violation of federal law, what do you say to those kids when you're in the

classrooms and they ask why you choose to enforce certain laws and some laws you don't enforce?

HOLDER:

Well, first, I would say that with regard to our eight enforcement priorities, the very first one, the thing that will bring about federal involvement, federal concerns, federal action is number one, preventing the distribution of marijuana to minors. We have limited resources.

I don't think that you're meaning to suggest that the federal government should prosecute every possessed or a marijuana case that exists in the United States, which technically, we -- I suppose we'd have the ability to do. That is not what you're proposing, right?

J. SMITH:

I'm -- I'm, you know, the law of the land is the Controlled Substance Act of 1970 that says all marijuana -- it's a violation of even one marijuana cigarette. That's what the law says, correct?

HOLDER:

So you're saying that we should prosecute every one of those cases?

J. SMITH:

I'm asking you. You're the Attorney General of the United States.

HOLDER:

And I'm asking you a question I think legitimately in return to the question that you posed to me.

J. SMITH:

I'm asking why do you fail to enforce the laws of the land, Attorney General?

HOLDER:

Your premise is wrong. We are enforcing the laws of the land. We are enforcing the laws...

J. SMITH:

Does the law of the land say that under 1970, that the sale or possession of marijuana is illegal?

HOLDER:

We are enforcing the law consistent with...

J. SMITH:

And do states in the -- in the United States allow the sale of marijuana?

HOLDER:

We are enforcing the law consistent with those eight enforcement priorities. And again, the question I have for you, which you haven't answered, would you have us prosecute every marijuana possession case that exists in the United States of America?

J. SMITH:

Attorney General, when you actually came (ph), sir...

HOLDER:

Would you have us do that?

J. SMITH:

... my colleagues' questions...

GOODLATTE (ph): Gentleman (ph)...

J. SMITH:

... I'd be more than happy to answer yours.

HOLDER:

I'll take that as a no.

GOODLATTE:

The time of the gentleman has expired.

The Chair recognizes the gentleman from Pennsylvania, Mr. Marino, for five minutes.

MARINO:

Thank you.

General, I want to talk to you about two issues. One is these are important to my district. And one is the OC spray, the pepper spray for federal prisons, number one. And number two is going to be the DEA prescription drug issues.

So I think you may recall that we've had a couple of discussions on the -- on the pepper spray. In August of 2012, the bureau implemented a pilot evaluation of the pepper spray at seven high- security institutions.

In February of 2013, after six months review period, data indicated that OC spray significantly reduced incident containment times. As a result of these findings, the pilot program was expanded, I believe, to include all high-security prisons in the federal system, detention centers and jails.

In my district, the 10th district of Pennsylvania, we have the highest number of federal prison workers of any district that I know of in the country. I hear from prison guards about their concerns for their safety.

These concerns have only risen since the tragic death of Eric Williams (ph). You and I were at his funeral -- who was working in the Canaan Penitentiary when he was brutally attacked by an inmate.

And since this horrific event, I've been asking for higher safety security measures for our guards, as well as more staffing. You were to give us a report -- comprehensive report on the results of the spray.

But you know something, giving us the results of the report really is not that critical to me. My question is, why have we not put the pepper spray into effect throughout the federal system for not only those officers but also individuals that work there?

HOLDER:

Congressman, if I can get back to you on that because I -- we're all thinking that, in fact, as a result of that trial program, this has been rolled out. But if that is not the case...

MARINO:

Yes?

HOLDER:

... I want to be able to respond to you in a way that's accurate.

MARINO:

Let me help you out there. I think it's been rolled out for the official guards who are responsible and have supervision over the inmates. Where it has not been rolled out, and you can correct me if I'm wrong later on, is for example, there was a supervisor in the kitchen in one of the prisons.

It's not a really a quote prison guard but he was attacked -- brutally attacked. And he was one person supervising about 20 people in that kitchen.

So why would he or she in counseling and any other situations, because they've all been trained. You've made sure that they've all been trained on this. I think they should all have it.

And I would appreciate it if you would really kick that into gear as soon as possible.

HOLDER:

Right. I understand what you're saying. All right, we'll -- we'll look at that. We have, I think, a new and different relationship with the union and with, I think, the people who they represent.

But that's something that I think is -- is worthy of examination. I understand what you're saying but...

MARINO:

Thank you, because believe me, I have the utmost respect for the justice department. It was the pinnacle of my career when I was there.

I also -- you underscored that -- I'm going to switch over to prescription drugs now, MDEA. You underscored the department's commitment to fighting the rampant abuse of prescription drugs and heroine.

We know the epidemic that's caused. And I commend you for that effort. But I was troubled by some language that you chose in noting the department's enforcement initiatives.

At least, I inferred, you seem to equate legitimate supply chain businesses to elicit narcotics cartels. I found that disappointing. This mindset is -- is extremely dangerous to legitimate business.

As a matter of fact, how I am reading this -- and this is why I introduced a bill, H.R.4069, ensuring patient access and effective drug enforcement act of 2014. My legislation will encourage more collaboration -- operative term there, more collaboration between DOJ and legitimate companies trying to work with you to prevent prescription drug abuse.

My understanding is that DEA Now is going to the drug companies and saying, you should have realized that the amount of drugs that you were sending out to this particular individual, you should have made the determination that that that individual was abusing drugs.

And then these legitimate businesses are being held responsible for that and fined and perhaps put out of business. So I'm asking if you're -- the people of DOJ in this area and DEA talk with these companies, sit down and put together guidelines, because they have asked.

They told me they have asked asked DOJ, DEA, what are the guidelines? Can you give us some ideas because when I was a prosecutor both at the state and federal level, shipping companies and even pharmaceuticals brought information to our attention saying, hey, we think there may be an issue here going to this particular address.

You might want to look into it. So I'm asking you to set guidelines up for these companies so they can work very closely with you so we can, if not eliminate, significantly curtail the abuse of prescription drugs. Could we do that?

HOLDER:

Sure. And if -- I certainly did not mean to imply, and I don't think I said in the remarks I made if you're, for instance, referring to that -- that tape that was made that companies who are legitimately producing these very useful -- very useful products, they cannot be held responsible for the way -- for the distribution chain down the -- down the road where, you know, doctors, people who steal, you know, doing a whole variety of things, I don't -- we don't -- I don't want to cast that wide a net and to the extent that there are concerns by people in the industry.

I would more than welcome a conversation. Perhaps you can facilitate...

MARINO:

Would love to.

HOLDER:

... to -- to have that -- that conversation because the reality is, we cannot -- and this is the thing that I think -- that concerns me. There are people who have legitimate needs for these kinds of prescriptions, these kinds of substances that relieve pain.

And we cannot, in our desire, our legitimate desire and one that I'm pushing to stop opioid use, which potentially leads to heroine involvement, we can't lose sight of the fact that there are -- could be sick people, good companies who employ good people, who are trying to do the right thing.

MARINO:

I see my time has expired. But if you find yourself not having something to do, something (ph) -- which you probably never do, I'd love to discuss the issues concerning mental health and the criminal justice system.

HOLDER:

OK.

MARINO:

Thank you, sir.

I yield back.

GOODLATTE:

The Chair thanks the gentleman.

And General Holder, he is the 34th member to ask questions of you. So we thank you very much for joining us today and answering a lot of questions from a lot of members of this committee.

Without objection, all members will have five legislative days to submit additional written questions for the witnesses or additional materials for the record.

And General Holder, we hope that you will answer those questions in writing in a reasonable period of time. This hearing is adjourned.

HOLDER:

Thank you, Mr. Chairman.

CQ Transcriptions, April 8, 2014

List of Panel Members and Witnesses PANEL MEMBERS:

REP. ROBERT W. GOODLATTE, R-VA. CHAIRMAN

REP. LAMAR SMITH, R-TEXAS

REP. JIM SENSENBRENNER, R-WIS.

REP. HOWARD COBLE, R-N.C.

REP. DARRELL ISSA, R-CALIF.

REP. J. RANDY FORBES, R-VA.

REP. STEVE KING, R-IOWA

REP. TRENT FRANKS, R-ARIZ.

REP. LOUIE GOHMERT, R-TEXAS

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REP. JASON CHAFFETZ, R-UTAH

REP. STEVE CHABOT, R-OHIO

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REP. SUZAN DELBENE, D-WASH.

REP. JOE GARCIA, D-FLA.

REP. HAKEEM JEFFRIES, D-N.Y.

REP. DAVID CICILLINE, D-R.I.

WITNESSES:

ATTORNEY GENERAL ERIC H. HOLDER JR.

Cheung, Denise (OAG)

From: Cheung, Denise (OAG)
Sent: Monday, May 5, 2014 2:12 PM
To: Richardson, Margaret (OAG)
Subject: FW: HEADS UP: HJC Markup Wednesday of USA Freedom Act
Attachments: FISA-ANOS_001_xml.pdf; USA Freedom (amended) - Section-by-Section.pdf

FYI

From: Walsh, James (ODAG)
Sent: Monday, May 05, 2014 1:22 PM
To: Agrast, Mark D. (OLA); Carlin, John (NSD); Wiegmann, Brad (NSD); Singh, Anita (NSD) (b)(6) per NSD (NSD); (b)(6) per NSD (NSD); Toscas, George (NSD); Hardee, Christopher (NSD); Gauhar, Tashina (NSD)
Cc: Cheung, Denise (OAG); Kadzik, Peter J (OLA); Ruppert, Mary (OLA); Hayden, Paul A. (OLA); Fitzpatrick, Benjamin B. (ODAG)
Subject: RE: HEADS UP: HJC Markup Wednesday of USA Freedom Act

+ Ben

From: Agrast, Mark D. (OLA)
Sent: Monday, May 05, 2014 1:13 PM
To: Carlin, John (NSD); Wiegmann, Brad (NSD); Singh, Anita (NSD) (b)(6) per NSD (NSD) (b)(6) per NSD (NSD); Toscas, George (NSD); Hardee, Christopher (NSD); Gauhar, Tashina (NSD)
Cc: Cheung, Denise (OAG); Walsh, James (ODAG); Kadzik, Peter J (OLA); Ruppert, Mary (OLA); Hayden, Paul A. (OLA)
Subject: HEADS UP: HJC Markup Wednesday of USA Freedom Act

Just in:

From: Hiller, Aaron (b) (6)
Sent: Monday, May 05, 2014 12:55 PM
To: Agrast, Mark D. (OLA)
Cc: Apfelbaum, Perry; Sawyer, Heather
Subject: USA Freedom Act

Mark,

Chairman Goodlatte has informed us that he will notice the USA Freedom Act for markup this Wednesday at 1pm. Our negotiated text in the nature of a substitute is attached, as is a section-by-section.

Please keep a close hold on the text until the Chairman makes his announcement at 1pm.

I am on the road today, but you can reach me by cell a (b) (6) anytime. Heather is in the office and also available to assist. Let me know if you have any questions.

-Aaron

AMENDMENT IN THE NATURE OF A SUBSTITUTE
TO H.R. 3361
OFFERED BY MR. SENSENBRENNER OF
WISCONSIN

Strike all after the enacting clause and insert the following:

1 SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

2 (a) SHORT TITLE.—This Act may be cited as the
3 “Uniting and Strengthening America by Fulfilling Rights
4 and Ending Eavesdropping, Dragnet-collection, and On-
5 line Monitoring Act” or the “USA FREEDOM Act”.

6 (b) TABLE OF CONTENTS.—The table of contents for
7 this Act is as follows:

Sec. 1. Short title; table of contents.
Sec. 2. Amendments to the Foreign Intelligence Surveillance Act of 1978.

TITLE I—FISA BUSINESS RECORDS REFORMS

Sec. 101. Additional requirements for call detail records.
Sec. 102. Emergency authority.
Sec. 103. Prohibition on bulk collection of tangible things.
Sec. 104. Judicial review of minimization procedures for the production of tangible things.
Sec. 105. Liability protection.
Sec. 106. Compensation for assistance.
Sec. 107. Inspector general reports on business records orders.
Sec. 108. Effective date.

TITLE II—FISA PEN REGISTER AND TRAP AND TRACE DEVICE REFORM

Sec. 201. Prohibition on bulk collection.
Sec. 202. Minimization procedures.

TITLE III—FISA ACQUISITIONS TARGETING PERSONS OUTSIDE
THE UNITED STATES REFORMS

- Sec. 301. Prohibition on reverse targeting.
- Sec. 302. Minimization procedures.
- Sec. 303. Limits on use of unlawfully obtained information.

TITLE IV—FOREIGN INTELLIGENCE SURVEILLANCE COURT
REFORMS

- Sec. 401. Appointment of amicus curiae.
- Sec. 402. Declassification of decisions, orders, and opinions.

TITLE V—NATIONAL SECURITY LETTER REFORM

- Sec. 501. Prohibition on bulk collection.

TITLE VI—FISA TRANSPARENCY AND REPORTING
REQUIREMENTS

- Sec. 601. Additional reporting on orders requiring production of business records.
- Sec. 602. Business records compliance reports to Congress.
- Sec. 603. Annual report by the Director of the Administrative Office of the United States Courts on orders entered.
- Sec. 604. Reporting requirements for decisions of the Foreign Intelligence Surveillance Court.
- Sec. 605. Submission of reports under FISA.

TITLE VII—SUNSETS

- Sec. 701. USA PATRIOT Improvement and Reauthorization Act of 2005.

1 **SEC. 2. AMENDMENTS TO THE FOREIGN INTELLIGENCE**

2 **SURVEILLANCE ACT OF 1978.**

3 Except as otherwise expressly provided, whenever in
4 this Act an amendment or repeal is expressed in terms
5 of an amendment to, or a repeal of, a section or other
6 provision, the reference shall be considered to be made to
7 a section or other provision of the Foreign Intelligence
8 Surveillance Act of 1978 (50 U.S.C. 1801 et seq.).

1 **TITLE I—FISA BUSINESS**
2 **RECORDS REFORMS**

3 **SEC. 101. ADDITIONAL REQUIREMENTS FOR CALL DETAIL**
4 **RECORDS.**

5 (a) APPLICATION.—Section 501(b)(2) (50 U.S.C.
6 1861(b)(2)) is amended—

7 (1) in subparagraph (A)—

8 (A) in the matter preceding clause (i), by
9 striking “a statement” and inserting “in the
10 case of an application other than an application
11 described in subparagraph (C), a statement”;
12 and

13 (B) in clause (iii), by striking “; and” and
14 inserting a semicolon;

15 (2) by redesignating subparagraphs (A) and
16 (B) as subparagraphs (B) and (D), respectively; and

17 (3) by inserting after subparagraph (B) (as so
18 redesignated) the following new subparagraph:

19 “(C) in the case of an application for the
20 production of call detail records created on or
21 after the date of the application, a statement of
22 facts showing that—

23 “(i) there are reasonable grounds to
24 believe that the call detail records sought
25 to be produced based on the specific selec-

1 tion term required under subparagraph (A)
2 are relevant to an authorized investigation
3 (other than a threat assessment) conducted
4 in accordance with subsection (a)(2) to
5 protect against international terrorism;
6 and

7 “(ii) there are facts giving rise to a
8 reasonable, articulable suspicion that such
9 specific selection term is associated with a
10 foreign power or an agent of a foreign
11 power; and”.

12 (b) ORDER.—Section 501(c)(2) (50 U.S.C.
13 1861(c)(2)) is amended—

14 (1) in subparagraph (D), by striking “; and”
15 and inserting a semicolon;

16 (2) in subparagraph (E), by striking the period
17 and inserting “; and”; and

18 (3) by adding at the end the following new sub-
19 paragraph:

20 “(F) in the case of an application de-
21 scribed in subsection (b)(2)(C), shall—

22 “(i) authorize the production of call
23 detail records for a period not to exceed
24 180 days;

1 “(ii) provide that an order for such
2 production may be extended upon applica-
3 tion under subsection (b) and the judicial
4 finding under paragraph (1);

5 “(iii) provide that the Government
6 may require the production of call detail
7 records—

8 “(I) using the specific selection
9 term that satisfies the standard re-
10 quired under subsection (b)(2)(C)(ii)
11 as the basis for production;

12 “(II) using the results of the pro-
13 duction under subclause (I) as the
14 basis for production; and

15 “(III) using the results of the
16 production under subclause (II) as the
17 basis for production;

18 “(iv) direct each person the Govern-
19 ment directs to produce call detail records
20 under the order to furnish the Government
21 forthwith all information, facilities, or
22 technical assistance necessary to accom-
23 plish the production in such a manner as
24 will protect the secrecy of the production
25 and produce a minimum of interference

1 with the services that such person is pro-
2 viding to each subject of the production;
3 and

4 “(v) direct the Government to destroy
5 all call detail records produced under the
6 order not later than 5 years after the date
7 of the production of such records, except
8 for records that are relevant to an author-
9 ized investigation (other than a threat as-
10 sessment) conducted in accordance with
11 subsection (a)(2) to protect against inter-
12 national terrorism.”.

13 (c) DEFINITION.—Section 501 (50 U.S.C. 1861) is
14 amended by adding at the end the following new sub-
15 section:

16 “(k) CALL DETAIL RECORD DEFINED.—In this sec-
17 tion, the term ‘call detail record’—

18 “(1) means session identifying information (in-
19 cluding originating or terminating telephone num-
20 ber, International Mobile Subscriber Identity num-
21 ber, or International Mobile Station Equipment
22 Identity number), a telephone calling card number,
23 or the time or duration of a call; and

24 “(2) does not include—

1 “(A) the contents of any communication
2 (as defined in section 2510(8) of title 18,
3 United States Code);

4 “(B) the name, address, or financial infor-
5 mation of a subscriber or customer; or

6 “(C) cell site location information.”.

7 **SEC. 102. EMERGENCY AUTHORITY.**

8 (a) **AUTHORITY.**—Section 501 (50 U.S.C. 1861), as
9 amended by section 101(c), is further amended by insert-
10 ing after subsection (h) the following new subsection:

11 “(i) **EMERGENCY AUTHORITY FOR PRODUCTION OF**
12 **TANGIBLE THINGS.**—

13 “(1) Notwithstanding any other provision of
14 this section, the Attorney General may require the
15 emergency production of tangible things if the Attor-
16 ney General—

17 “(A) reasonably determines that an emer-
18 gency situation requires the production of tan-
19 gible things to obtain information for an au-
20 thorized investigation (other than a threat as-
21 sessment) conducted in accordance with sub-
22 section (a)(2) to protect against international
23 terrorism before an order authorizing such pro-
24 duction can with due diligence be obtained;

1 “(B) reasonably determines that the fac-
2 tual basis for the issuance of an order under
3 this section to approve such production of tan-
4 gible things exists;

5 “(C) informs, either personally or through
6 a designee, a judge having jurisdiction under
7 this section at the time the Attorney General
8 requires the emergency production of tangible
9 things that the decision has been made to em-
10 ploy the authority under this subsection; and

11 “(D) makes an application in accordance
12 with this section to a judge having jurisdiction
13 under this section as soon as practicable, but
14 not later than 7 days after the Attorney Gen-
15 eral requires the emergency production of tan-
16 gible things under this subsection.

17 “(2) If the Attorney General authorizes the
18 emergency production of tangible things under para-
19 graph (1), the Attorney General shall require that
20 the minimization procedures required by this section
21 for the issuance of a judicial order be followed.

22 “(3) In the absence of a judicial order approv-
23 ing the production of tangible things under this sub-
24 section, the production shall terminate when the in-
25 formation sought is obtained, when the application

1 for the order is denied, or after the expiration of 7
2 days from the time the Attorney General begins re-
3 quiring the emergency production of such tangible
4 things, whichever is earliest.

5 “(4) A denial of the application made under
6 this subsection may be reviewed as provided in this
7 section.

8 “(5) If such application for approval is denied,
9 or in any other case where the production of tangible
10 things is terminated and no order is issued approv-
11 ing the production, no information obtained or evi-
12 dence derived from such production shall be received
13 in evidence or otherwise disclosed in any trial, hear-
14 ing, or other proceeding in or before any court,
15 grand jury, department, office, agency, regulatory
16 body, legislative committee, or other authority of the
17 United States, a State, or political subdivision there-
18 of, and no information concerning any United States
19 person acquired from such production shall subse-
20 quently be used or disclosed in any other manner by
21 Federal officers or employees without the consent of
22 such person, except with the approval of the Attor-
23 ney General if the information indicates a threat of
24 death or serious bodily harm to any person.

1 “(6) The Attorney General shall assess compli-
2 ance with the requirements of paragraph (5).”.

3 (b) CONFORMING AMENDMENT.—Section 501(d) (50
4 U.S.C. 1861(d)) is amended—

5 (1) in paragraph (1)—

6 (A) in the matter preceding subparagraph
7 (A), by striking “pursuant to an order” and in-
8 serting “pursuant to an order issued or an
9 emergency production required”;

10 (B) in subparagraph (A), by striking “such
11 order” and inserting “such order or such emer-
12 gency production”; and

13 (C) in subparagraph (B), by striking “the
14 order” and inserting “the order or the emer-
15 gency production”; and

16 (2) in paragraph (2)—

17 (A) in subparagraph (A), by striking “an
18 order” and inserting “an order or emergency
19 production”; and

20 (B) in subparagraph (B), by striking “an
21 order” and inserting “an order or emergency
22 production”.

1 **SEC. 103. PROHIBITION ON BULK COLLECTION OF TAN-**
2 **GIBLE THINGS.**

3 (a) APPLICATION.—Section 501(b)(2) (50 U.S.C.
4 1861(b)(2)), as amended by section 101(a), is further
5 amended by inserting before subparagraph (B), as redes-
6 ignated by such section 101(a), the following new subpara-
7 graph:

8 “(A) a specific selection term to be used as
9 the basis for the production of the tangible
10 things sought;”.

11 (b) ORDER.—Section 501(c) (50 U.S.C. 1861(c)) is
12 amended—

13 (1) in paragraph (2)(A), by striking the semi-
14 colon and inserting “, including each specific selec-
15 tion term to be used as the basis for the produc-
16 tion;”; and

17 (2) by adding at the end the following new
18 paragraph:

19 “(3) No order issued under this subsection may au-
20 thorize the collection of tangible things without the use
21 of a specific selection term that meets the requirements
22 of subsection (b)(2).”.

1 **SEC. 104. JUDICIAL REVIEW OF MINIMIZATION PROCE-**
2 **DURES FOR THE PRODUCTION OF TANGIBLE**
3 **THINGS.**

4 Section 501(c)(1) (50 U.S.C. 1861(c)(1)) is amended
5 by inserting after “subsections (a) and (b)” the following:
6 “and that the minimization procedures submitted in ac-
7 cordance with subsection (b)(2)(D) meet the definition of
8 minimization procedures under subsection (g)”.

9 **SEC. 105. LIABILITY PROTECTION.**

10 Section 501(e) (50 U.S.C. 1861(e)) is amended to
11 read as follows:

12 “(e) No cause of action shall lie in any court against
13 a person who produces tangible things or provides infor-
14 mation, facilities, or technical assistance pursuant to an
15 order issued or an emergency production required under
16 this section. Such production shall not be deemed to con-
17 stitute a waiver of any privilege in any other proceeding
18 or context.”.

19 **SEC. 106. COMPENSATION FOR ASSISTANCE.**

20 Section 501 (50 U.S.C. 1861), as amended by section
21 102 of this Act, is further amended by inserting after sub-
22 section (i), as added by such section 102, the following
23 new subsection:

24 “(j) **COMPENSATION.**—The Government shall com-
25 pensate, at the prevailing rate, a person for producing tan-
26 gible things or providing information, facilities, or assist-

1 ance in accordance with an order issued or an emergency
2 production required under this section.”.

3 **SEC. 107. INSPECTOR GENERAL REPORTS ON BUSINESS**
4 **RECORDS ORDERS.**

5 Section 106A of the USA PATRIOT Improvement
6 and Reauthorization Act of 2005 (Public Law 109–177;
7 120 Stat. 200) is amended—

8 (1) in subsection (b)—

9 (A) in paragraph (1), by inserting “and
10 calendar years 2012 through 2014” after
11 “2006”;

12 (B) by striking paragraphs (2) and (3);

13 (C) by redesignating paragraphs (4) and
14 (5) as paragraphs (2) and (3), respectively; and

15 (D) in paragraph (3) (as so redesign-
16 nated)—

17 (i) by striking subparagraph (C) and
18 inserting the following new subparagraph:

19 “(C) with respect to calendar years 2012
20 through 2014, an examination of the minimiza-
21 tion procedures used in relation to orders under
22 section 501 of the Foreign Intelligence Surveil-
23 lance Act of 1978 (50 U.S.C. 1861) and wheth-
24 er the minimization procedures adequately pro-

1 tect the constitutional rights of United States
2 persons;” and

3 (ii) in subparagraph (D), by striking
4 “(as such term is defined in section 3(4) of
5 the National Security Act of 1947 (50
6 U.S.C. 401a(4)))”;

7 (2) in subsection (c), by adding at the end the
8 following new paragraph:

9 “(3) CALENDAR YEARS 2012 THROUGH
10 2014.—Not later than December 31, 2015, the In-
11 spector General of the Department of Justice shall
12 submit to the Committee on the Judiciary and the
13 Select Committee on Intelligence of the Senate and
14 the Committee on the Judiciary and the Permanent
15 Select Committee on Intelligence of the House of
16 Representatives a report containing the results of
17 the audit conducted under subsection (a) for cal-
18 endar years 2012 through 2014.”;

19 (3) by redesignating subsections (d) and (e) as
20 subsections (e) and (f), respectively;

21 (4) by inserting after subsection (c) the fol-
22 lowing new subsection:

23 “(d) INTELLIGENCE ASSESSMENT.—

24 “(1) IN GENERAL.—For the period beginning
25 on January 1, 2012, and ending on December 31,

1 2014, the Inspector General of the Intelligence Com-
2 munity shall assess—

3 “(A) the importance of the information ac-
4 quired under title V of the Foreign Intelligence
5 Surveillance Act of 1978 (50 U.S.C. 1861 et
6 seq.) to the activities of the intelligence commu-
7 nity;

8 “(B) the manner in which that information
9 was collected, retained, analyzed, and dissemi-
10 nated by the intelligence community;

11 “(C) the minimization procedures used by
12 elements of the intelligence community under
13 such title and whether the minimization proce-
14 dures adequately protect the constitutional
15 rights of United States persons; and

16 “(D) any minimization procedures pro-
17 posed by an element of the intelligence commu-
18 nity under such title that were modified or de-
19 nied by the court established under section
20 103(a) of such Act (50 U.S.C. 1803(a)).

21 “(2) SUBMISSION DATE FOR ASSESSMENT.—
22 Not later than December 31, 2015, the Inspector
23 General of the Intelligence Community shall submit
24 to the Committee on the Judiciary and the Select
25 Committee on Intelligence of the Senate and the

1 Committee on the Judiciary and the Permanent Se-
2 lect Committee on Intelligence of the House of Rep-
3 resentatives a report containing the results of the
4 assessment for calendar years 2012 through 2014.”;

5 (5) in subsection (e), as redesignated by para-
6 graph (3)—

7 (A) in paragraph (1)—

8 (i) by striking “a report under sub-
9 section (c)(1) or (c)(2)” and inserting “any
10 report under subsection (c) or (d)”;

11 (ii) by striking “Inspector General of
12 the Department of Justice” and inserting
13 “Inspector General of the Department of
14 Justice, the Inspector General of the Intel-
15 ligence Community, and any Inspector
16 General of an element of the intelligence
17 community that prepares a report to assist
18 the Inspector General of the Department
19 of Justice or the Inspector General of the
20 Intelligence Community in complying with
21 the requirements of this section”; and

22 (B) in paragraph (2), by striking “the re-
23 ports submitted under subsections (c)(1) and
24 (c)(2)” and inserting “any report submitted
25 under subsection (c) or (d)”;

1 (6) in subsection (f), as redesignated by para-
2 graph (3)—

3 (A) by striking “The reports submitted
4 under subsections (c)(1) and (c)(2)” and insert-
5 ing “Each report submitted under subsection
6 (c)”;

7 (B) by striking “subsection (d)(2)” and in-
8 serting “subsection (e)(2)”;

9 (7) by adding at the end the following new sub-
10 section:

11 “(g) DEFINITIONS.—In this section:

12 “(1) INTELLIGENCE COMMUNITY.—The term
13 ‘intelligence community’ has the meaning given that
14 term in section 3 of the National Security Act of
15 1947 (50 U.S.C. 3003).

16 “(2) UNITED STATES PERSON.—The term
17 ‘United States person’ has the meaning given that
18 term in section 101 of the Foreign Intelligence Sur-
19 veillance Act of 1978 (50 U.S.C. 1801).”.

20 **SEC. 108. EFFECTIVE DATE.**

21 The amendments made by sections 101 through 103
22 shall take effect on the date that is 180 days after the
23 date of the enactment of this Act.

1 **TITLE II—FISA PEN REGISTER**
2 **AND TRAP AND TRACE DE-**
3 **VICE REFORM**

4 **SEC. 201. PROHIBITION ON BULK COLLECTION.**

5 Section 402(c) (50 U.S.C. 1842(c)) is amended—

6 (1) in paragraph (1), by striking “; and” and
7 inserting a semicolon;

8 (2) in paragraph (2), by striking the period and
9 inserting a semicolon; and

10 (3) by adding at the end the following new
11 paragraph:

12 “(3) a specific selection term to be used as the
13 basis for selecting the telephone line or other facility
14 to which the pen register or trap and trace device
15 is to be attached or applied; and”.

16 **SEC. 202. MINIMIZATION PROCEDURES.**

17 (a) DEFINITION.—Section 401 (50 U.S.C. 1841) is
18 amended by adding at the end the following new para-
19 graph:

20 “(4) The term ‘minimization procedures’
21 means—

22 “(A) specific procedures that are reason-
23 ably designed in light of the purpose and tech-
24 nique of an order for the installation and use
25 of a pen register or trap and trace device to

1 minimize the retention and prohibit the dissemi-
2 nation of nonpublicly available information con-
3 cerning unconsenting United States persons
4 consistent with the need of the United States to
5 obtain, produce, and disseminate foreign intel-
6 ligence information;

7 “(B) procedures that require that nonpub-
8 licly available information, which is not foreign
9 intelligence information, as defined in section
10 101(e)(1), shall not be disseminated in a man-
11 ner that identifies any United States person,
12 without such person’s consent, unless such per-
13 son’s identity is necessary to understand foreign
14 intelligence information or assess its impor-
15 tance; and

16 “(C) notwithstanding subparagraphs (A)
17 and (B), procedures that allow for the retention
18 and dissemination of information that is evi-
19 dence of a crime which has been, is being, or
20 is about to be committed and that is to be re-
21 tained or disseminated for law enforcement pur-
22 poses.”.

23 (b) APPLICATION.—Section 402(c) (50 U.S.C.
24 1842(c)), as amended by section 201 of this Act, is further

1 amended by adding at the end the following new para-
2 graph:

3 “(4) a statement of proposed minimization pro-
4 cedures.”.

5 (c) ORDER.—Section 402(d) (50 U.S.C. 1842(d)) is
6 amended—

7 (1) in paragraph (1), by inserting “and that the
8 proposed minimization procedures meet the defini-
9 tion of minimization procedures under this title” be-
10 fore the period at the end; and

11 (2) in paragraph (2)(B)—

12 (A) in clause (ii)(II), by striking “; and”
13 and inserting a semicolon; and

14 (B) by adding at the end the following new
15 clause:

16 “(iv) the minimization procedures be
17 followed; and”.

18 (d) COMPLIANCE ASSESSMENT.—Section 402 (50
19 U.S.C. 1842) is amended by adding at the end the fol-
20 lowing new subsection:

21 “(h) At or before the end of the period of time for
22 which the installation and use of a pen register or trap
23 and trace device is approved under an order or an exten-
24 sion under this section, the judge may assess compliance
25 with the minimization procedures by reviewing the cir-

1 cumstances under which information concerning United
2 States persons was retained or disseminated.”.

3 **TITLE III—FISA ACQUISITIONS**
4 **TARGETING PERSONS OUT-**
5 **SIDE THE UNITED STATES RE-**
6 **FORMS**

7 **SEC. 301. PROHIBITION ON REVERSE TARGETING.**

8 Section 702(b)(2) (50 U.S.C. 1881a(b)(2)) is amend-
9 ed by striking “the purpose” and inserting “a purpose”.

10 **SEC. 302. MINIMIZATION PROCEDURES.**

11 Section 702(e)(1) (50 U.S.C. 1881a(e)(1)) is amend-
12 ed—

13 (1) by striking “that meet” and inserting the
14 following: “that—

15 “(A) meet”;

16 (2) in subparagraph (A) (as designated by
17 paragraph (1) of this section), by striking the period
18 and inserting “; and”; and

19 (3) by adding at the end the following new sub-
20 paragraph:

21 “(B) consistent with such definition, mini-
22 mize the acquisition, and prohibit the retention
23 and dissemination, of any communication as to
24 which the sender and all intended recipients are
25 determined to be located in the United States

1 and prohibit the use of any discrete, non-target
2 communication that is determined to be to or
3 from a United States person or a person who
4 appears to be located in the United States, ex-
5 cept to protect against an immediate threat to
6 human life.”.

7 **SEC. 303. LIMITS ON USE OF UNLAWFULLY OBTAINED IN-**
8 **FORMATION.**

9 Section 702(i)(3) (50 U.S.C. 1881a(i)(3)) is amended
10 by adding at the end the following new subparagraph:

11 “(D) LIMITATION ON USE OF INFORMA-
12 TION.—

13 “(i) IN GENERAL.—Except as pro-
14 vided in clause (ii), no information ob-
15 tained or evidence derived from an acquisi-
16 tion pursuant to a certification or tar-
17 geting or minimization procedures subject
18 to an order under subparagraph (B) con-
19 cerning any United States person shall be
20 received in evidence or otherwise disclosed
21 in any trial, hearing, or other proceeding
22 in or before any court, grand jury, depart-
23 ment, office, agency, regulatory body, legis-
24 lative committee, or other authority of the
25 United States, a State, or political subdivi-

1 sion thereof, and no information con-
2 cerning any United States person acquired
3 from the acquisition shall subsequently be
4 used or disclosed in any other manner by
5 Federal officers or employees without the
6 consent of the United States person, ex-
7 cept with the approval of the Attorney
8 General if the information indicates a
9 threat of death or serious bodily harm to
10 any person.

11 “(ii) EXCEPTION.—If the Government
12 corrects any deficiency identified by the
13 order of the Court under subparagraph
14 (B), the Court may permit the use or dis-
15 closure of information acquired before the
16 date of the correction under such mini-
17 mization procedures as the Court shall es-
18 tablish for purposes of this clause.”.

19 **TITLE IV—FOREIGN INTEL-**
20 **LIGENCE SURVEILLANCE**
21 **COURT REFORMS**

22 **SEC. 401. APPOINTMENT OF AMICUS CURIAE.**

23 Section 103 (50 U.S.C. 1803) is amended by adding
24 at the end the following new subsection:

25 “(i) AMICUS CURIAE.—

1 “(1) AUTHORIZATION.—A court established
2 under subsection (a) or (b), consistent with the re-
3 quirement of subsection (c) and any other statutory
4 requirement that the court act expeditiously or with-
5 in a stated time—

6 “(A) shall appoint an individual to serve as
7 amicus curiae to assist such court in the consid-
8 eration of any application for an order or review
9 that, in the opinion of the court, presents a
10 novel or significant interpretation of the law,
11 unless the court issues a written finding that
12 such appointment is not appropriate; and

13 “(B) may appoint an individual to serve as
14 amicus curiae in any other instance as such
15 court deems appropriate.

16 “(2) DESIGNATION.—The presiding judges of
17 the courts established under subsections (a) and (b)
18 shall jointly designate not less than 5 individuals to
19 be eligible to serve as amicus curiae. Such individ-
20 uals shall be persons who possess expertise in pri-
21 vacy and civil liberties, intelligence collection, tele-
22 communications, or any other area of law that may
23 lend legal or technical expertise to the courts and
24 who have been determined by appropriate executive

1 branch officials to be eligible for access to classified
2 information.

3 “(3) DUTIES.—An individual appointed to serve
4 as amicus curiae under paragraph (1) shall carry
5 out the duties assigned by the appointing court.
6 Such court may authorize the individual appointed
7 to serve as amicus curiae to review any application,
8 certification, petition, motion, or other submission
9 that the court determines is relevant to the duties
10 assigned by the court.

11 “(4) NOTIFICATION.—The presiding judges of
12 the courts established under subsections (a) and (b)
13 shall notify the Attorney General of each exercise of
14 the authority to appoint an individual to serve as
15 amicus curiae under paragraph (1).

16 “(5) ASSISTANCE.—A court established under
17 subsection (a) or (b) may request and receive (in-
18 cluding on a non-reimbursable basis) the assistance
19 of the executive branch in the implementation of this
20 subsection.

21 “(6) ADMINISTRATION.—A court established
22 under subsection (a) or (b) may provide for the des-
23 ignation, appointment, removal, training, or other
24 support for an individual appointed to serve as ami-

1 cus curiae under paragraph (1) in a manner that is
2 not inconsistent with this subsection.”.

3 **SEC. 402. DECLASSIFICATION OF DECISIONS, ORDERS, AND**
4 **OPINIONS.**

5 (a) DECLASSIFICATION.—Title VI (50 U.S.C. 1871
6 et seq.) is amended—

7 (1) in the heading, by striking “**REPORT-**
8 **ING REQUIREMENT**” and inserting “**OVER-**
9 **SIGHT**”; and

10 (2) by adding at the end the following new sec-
11 tion:

12 **“SEC. 602. DECLASSIFICATION OF SIGNIFICANT DECISIONS,**
13 **ORDERS, AND OPINIONS.**

14 “(a) DECLASSIFICATION REQUIRED.—Subject to
15 subsection (b), the Attorney General shall conduct a de-
16 classification review of each decision, order, or opinion
17 issued by the Foreign Intelligence Surveillance Court or
18 the Foreign Intelligence Surveillance Court of Review (as
19 defined in section 601(e)) that includes significant con-
20 struction or interpretation of any provision of this Act
21 and, consistent with that review, make publicly available
22 to the greatest extent practicable each such decision,
23 order, or opinion.

24 “(b) REDACTED FORM.—The Attorney General may
25 satisfy the requirement under subsection (a) to make a

1 decision, order, or opinion described in such subsection
2 publicly available to the greatest extent practicable by
3 making such decision, order, or opinion publicly available
4 in redacted form.

5 “(c) NATIONAL SECURITY WAIVER.—The Attorney
6 General may waive the requirement to declassify and make
7 publicly available a particular decision, order, or opinion
8 under subsection (a) if the Attorney General—

9 “(1) determines that a waiver of such require-
10 ment is necessary to protect the national security of
11 the United States or properly classified intelligence
12 sources or methods; and

13 “(2) makes publicly available an unclassified
14 summary of such decision, order, or opinion.”.

15 (b) TABLE OF CONTENTS AMENDMENTS.—The table
16 of contents in the first section is amended—

17 (1) by striking the item relating to title VI and
18 inserting the following new item:

“TITLE VI—OVERSIGHT”; AND

19 (2) by inserting after the item relating to sec-
20 tion 601 the following new item:

“Sec. 602. Declassification of significant decisions, orders, and opinions.”.

1 **TITLE V—NATIONAL SECURITY**
2 **LETTER REFORM**

3 **SEC. 501. PROHIBITION ON BULK COLLECTION.**

4 (a) COUNTERINTELLIGENCE ACCESS TO TELEPHONE
5 TOLL AND TRANSACTIONAL RECORDS.—Section 2709(b)
6 of title 18, United States Code, is amended in the matter
7 preceding paragraph (1) by striking “may” and inserting
8 “may, using a specific selection term as the basis for a
9 request”.

10 (b) ACCESS TO FINANCIAL RECORDS FOR CERTAIN
11 INTELLIGENCE AND PROTECTIVE PURPOSES.—Section
12 1114(a)(2) of the Right to Financial Privacy Act of 1978
13 (12 U.S.C. 3414(a)(2)) by striking the period and insert-
14 ing “and a specific selection term to be used as the basis
15 for the production and disclosure of financial records.”.

16 (c) DISCLOSURES TO FBI OF CERTAIN CONSUMER
17 RECORDS FOR COUNTERINTELLIGENCE PURPOSES.—Sec-
18 tion 626(a) of the Fair Credit Reporting Act (15 U.S.C.
19 1681u(a)) is amended by striking “that information,” and
20 inserting “that information that includes a specific selec-
21 tion term to be used as the basis for the production of
22 that information,”.

23 (d) DISCLOSURES TO GOVERNMENTAL AGENCIES
24 FOR COUNTERTERRORISM PURPOSES OF CONSUMER RE-
25 PORTS.—Section 627(a) of the Fair Credit Reporting Act

1 (15 U.S.C. 1681v(a)) is amended by striking “analysis.”
2 and inserting “analysis and a specific selection term to
3 be used as the basis for the production of such informa-
4 tion.”.

5 **TITLE VI—FISA TRANSPARENCY**
6 **AND REPORTING REQUIRE-**
7 **MENTS**

8 **SEC. 601. ADDITIONAL REPORTING ON ORDERS REQUIRING**
9 **PRODUCTION OF BUSINESS RECORDS.**

10 Section 502(b) (50 U.S.C. 1862(b)) is amended—

11 (1) by redesignating paragraphs (1), (2), and
12 (3) as paragraphs (5), (6), and (7), respectively; and

13 (2) by inserting before paragraph (5) (as so re-
14 designated) the following new paragraphs:

15 “(1) the total number of applications described
16 in section 501(b)(2)(B) made for orders approving
17 requests for the production of tangible things;

18 “(2) the total number of such orders either
19 granted, modified, or denied;

20 “(3) the total number of applications described
21 in section 501(b)(2)(C) made for orders approving
22 requests for the production of call detail records;

23 “(4) the total number of such orders either
24 granted, modified, or denied;”.

1 **SEC. 602. BUSINESS RECORDS COMPLIANCE REPORTS TO**
2 **CONGRESS.**

3 (a) BUSINESS RECORDS PRODUCTIONS.—Section
4 502(b) (50 U.S.C. 1862(b)), as amended by section 601
5 of this Act, is further amended—

6 (1) by redesignating paragraphs (1) through
7 (7) as paragraphs (2) through (8), respectively; and
8 (2) by inserting before paragraph (2) (as so re-
9 designated) the following new paragraph:

10 “(1) any compliance reviews conducted by the
11 Federal Government of the production of tangible
12 things under section 501;”.

13 (b) FISA AUTHORITIES IN GENERAL.—Section
14 601(a) (50 U.S.C. 1871(a)) is amended—

15 (1) in paragraph (4), by striking “; and” and
16 inserting a semicolon;

17 (2) in paragraph (5), by striking the period and
18 inserting “; and”; and

19 (3) by adding at the end the following new
20 paragraph:

21 “(6) any compliance reviews conducted by the
22 Federal Government of electronic surveillance, phys-
23 ical searches, the installation of pen register or trap
24 and trace devices, access to records, or acquisitions
25 conducted under this Act.”.

1 **SEC. 603. ANNUAL REPORT BY THE DIRECTOR OF THE AD-**
2 **MINISTRATIVE OFFICE OF THE UNITED**
3 **STATES COURTS ON ORDERS ENTERED.**

4 (a) IN GENERAL.—Title VI (50 U.S.C. 1871 et seq.),
5 as amended by section 402 of this Act, is further amended
6 by adding at the end the following new section:

7 **“SEC. 603. ANNUAL REPORT ON ORDERS ENTERED.**

8 “The Director of the Administrative Office of the
9 United States Courts shall annually submit to the Perma-
10 nent Select Committee on Intelligence and the Committee
11 on the Judiciary of the House of Representatives and the
12 Select Committee on Intelligence and the Committee on
13 the Judiciary of the Senate and make publicly available
14 on an Internet website—

15 “(1) the number of orders entered under each
16 of sections 105, 304, 402, 501, 702, 703, and 704;

17 “(2) the number of orders modified under each
18 of those sections;

19 “(3) the number of orders denied under each of
20 those sections; and

21 “(4) the number of appointments of an indi-
22 vidual to serve as amicus curiae under section 103,
23 including the name of each individual appointed to
24 serve as amicus curiae.”.

25 (b) TABLE OF CONTENTS AMENDMENT.—The table
26 of contents in the first section, as amended by section 402

1 of this Act, is further amended by inserting after the item
2 relating to section 602, as added by such section 402, the
3 following new item:

“Sec. 603. Annual report on orders entered.”.

4 **SEC. 604. REPORTING REQUIREMENTS FOR DECISIONS OF**
5 **THE FOREIGN INTELLIGENCE SURVEIL-**
6 **LANCE COURT.**

7 Section 601(c)(1) (50 U.S.C. 1871(c)) is amended to
8 read as follows:

9 “(1) not later than 45 days after the date on
10 which the Foreign Intelligence Surveillance Court or
11 the Foreign Intelligence Surveillance Court of Re-
12 view issues a decision, order, or opinion that in-
13 cludes a significant construction or interpretation of
14 any provision of this Act or a denial of a request for
15 an order or a modification of a request for an order,
16 or results in a change of application of any provision
17 of this Act or a new application of any provision of
18 this Act—

19 “(A) a copy of such decision, order, or
20 opinion and any pleadings, applications, or
21 memoranda of law associated with such deci-
22 sion, order, or opinion; and

23 “(B) with respect to such decision, order,
24 or opinion, a brief statement of the relevant

1 background factual information, questions of
2 law, legal analysis, and decision rendered; and”.

3 **SEC. 605. SUBMISSION OF REPORTS UNDER FISA.**

4 (a) **ELECTRONIC SURVEILLANCE.**—Section 108(a)(1)
5 (50 U.S.C. 1808(a)(1)) is amended by striking “the
6 House Permanent Select Committee on Intelligence and
7 the Senate Select Committee on Intelligence, and the
8 Committee on the Judiciary of the Senate,” and inserting
9 “the Permanent Select Committee on Intelligence and the
10 Committee on the Judiciary of the House of Representa-
11 tives and the Select Committee on Intelligence and the
12 Committee on the Judiciary of the Senate”.

13 (b) **PHYSICAL SEARCHES.**—Section 306 (50 U.S.C.
14 1826) is amended—

15 (1) in the first sentence, by striking “Perma-
16 nent Select Committee on Intelligence of the House
17 of Representatives and the Select Committee on In-
18 telligence of the Senate, and the Committee on the
19 Judiciary of the Senate,” and inserting “Permanent
20 Select Committee on Intelligence and the Committee
21 on the Judiciary of the House of Representatives
22 and the Select Committee on Intelligence and the
23 Committee on the Judiciary of the Senate”; and

1 (2) in the second sentence, by striking “and the
2 Committee on the Judiciary of the House of Rep-
3 resentatives”.

4 (c) PEN REGISTER AND TRAP AND TRACE DE-
5 VICES.—Section 406(b) (50 U.S.C. 1846(b)) is amend-
6 ed—

7 (1) in paragraph (2), by striking “; and” and
8 inserting a semicolon;

9 (2) in paragraph (3), by striking the period and
10 inserting a semicolon; and

11 (3) by adding at the end the following new
12 paragraphs:

13 “(4) each department or agency on behalf of
14 which the Government has made application for or-
15 ders approving the use of pen registers or trap and
16 trace devices under this title; and

17 “(5) for each department or agency described in
18 paragraph (4), a breakdown of the numbers required
19 by paragraphs (1), (2), and (3).”.

20 (d) ACCESS TO CERTAIN BUSINESS RECORDS AND
21 OTHER TANGIBLE THINGS.—Section 502(a) (50 U.S.C.
22 1862(a)) is amended by striking “Permanent Select Com-
23 mittee on Intelligence of the House of Representatives and
24 the Select Committee on Intelligence and the Committee
25 on the Judiciary of the Senate” and inserting “Permanent

1 Select Committee on Intelligence of the House of Rep-
2 resentatives, the Select Committee on Intelligence of the
3 Senate, and the Committees on the Judiciary of the House
4 of Representatives and the Senate”.

5 **TITLE VII—SUNSETS**

6 **SEC. 701. USA PATRIOT IMPROVEMENT AND REAUTHORIZA-**
7 **TION ACT OF 2005.**

8 Section 102(b)(1) of the USA PATRIOT Improve-
9 ment and Reauthorization Act of 2005 (50 U.S.C. 1805
10 note) is amended by striking “June 1, 2015” and insert-
11 ing “December 31, 2017”.



H.R. 3361, the USA FREEDOM Act
Amendment in the Nature of a Substitute
Section-by-Section

Title I – FISA Business Record Reforms

Sec. 101 – Additional requirements for call detail records.

Creates a new process for the collection of call detail records pursuant to the Administration’s proposal. For counterterrorism purposes only, when the government has reasonable articulable suspicion that a specific selection term is associated with a foreign power or an agent of a foreign power, it may apply to the FISA court for an order requiring the ongoing production of call detail records related to that specific selection term and two “hops” removed. The government may renew these orders every 180 days.

The term “call detail records” is defined to mean a telephone number, an IMSI or IMSEI number, a telephone calling card number, or the time or duration of a call. The term does not include the contents of any communication; nor does it include names, addresses, or financial information; nor does it include cell site location information.

Except for records that remain relevant to an authorized counterterrorism investigation, the government is required to destroy all information obtained under this program within five years of production.

Sec. 102 – Emergency authority.

Creates a new emergency authority for the use of Section 215. The Attorney General may authorize the emergency production of tangible things, provided that such an application is presented to the court within seven days. If the court denies an emergency application, the government may not use any of the information obtained under the emergency authority except in instances of a threat of death or serious bodily harm.

Sec. 103 – Prohibition on bulk collection of tangible things.

Provides that Section 215 may only be used where a specific selection term is provided as the basis for the production of tangible things. No order issued under Section 215 may authorize the bulk collection of tangible things.

Sec. 104 – Judicial review of minimization procedures for the production of tangible things.

Provides that the court may evaluate the adequacy of minimization procedures under Section 215. Under current law, the court is only empowered to determine whether or not the government has minimization procedures in place.

Sec. 105 – Liability protection.

Amends the liability protections to third parties who provide information, facilities, or technical assistance to the government in compliance with an order issued under Section 215. This provision mirrors the liability provisions in Titles I and VII of FISA.

Sec. 106 – Compensation for assistance.

Explicitly permits the government to compensate third parties for producing tangible things or providing information, facilities, or assistance in accordance with an order issued under Section 215.

Sec. 107 – Inspector general reports on business records orders.

Requires the Inspector General of the Department of Justice to conduct a comprehensive review of the use of Section 215 with respect to calendar years 2012 to 2014. Also requires the Inspector General of the Intelligence Community to assess the value and use of intelligence obtained under Section 215 over the same period.

Sec. 108 – Effective date.

Provides that the new telephone metadata program, the new Section 215 emergency authority, and the prohibition on bulk collection of tangible things under Section 215 take effect 180 days after enactment.

Title II – FISA Pen Register and Trap and Trace Device Reform

Sec. 201 – Prohibition on bulk collection.

Provides that the pen register and trap and trace device authority may not be used without a specific selection term as the basis for selecting the telephone line or other facility to which the pen register or trap and trace devices is to be attached or applied.

Sec. 202 – Minimization procedures.

Requires that the government adopt procedures that are reasonably designed to minimize the retention and prohibit the dissemination of nonpublic information about United States persons. Explicitly authorizes the court to assess compliance with these procedures while a pen register or trap and trace device is in use.

Title III – FISA Acquisitions Targeting Persons Outside the United States Reforms

Sec. 301 – Prohibition on reverse targeting.

Clarifies the prohibition on reverse targeting by providing that the government may not intentionally target a person under Section 702 if a purpose of the acquisition is to target a person reasonably believed to be in the United States.

Sec. 302 – Minimization procedures.

Codifies the requirement that the government must minimize the acquisition, and prohibit the retention and dissemination of, wholly domestic communications captured under Section 702.

Sec. 303 – Limits on use of unlawfully obtained information.

Provides that the government may not use information acquired outside the scope of court-approved targeting and minimization procedures.

Title IV – Foreign Intelligence Surveillance Court Reforms

Sec. 401 – Appointment of amicus curiae.

Provides that both the FISA court and the FISA Court of Review shall, if deemed appropriate, appoint an individual to serve as amicus curiae in a case involving a novel or significant interpretation of law. Permits the court to appoint amicus curiae in any case.

The presiding judges of the courts will designate five individuals who are eligible to serve as amicus curiae. These individuals shall possess expertise in privacy and civil liberties, intelligence collection, telecommunications, or any other area of law that may lend legal or technical expertise to the courts, and shall possess appropriate security clearances.

Sec. 402 – Declassification of decisions, orders, and opinions.

Requires the Attorney General to conduct a declassification review of each decision, order, or opinion of the FISA court that includes a significant construction or interpretation of law. In the interest of national security, the Attorney General may provide a summary of the decision rather than a declassified copy.

Title V – National Security Letter Reform

Sec. 501 – Prohibition on bulk collection.

Prohibits the use of various national security letter authorities without the use of a specific selection term as the basis for the national security letter request.

Title VI – FISA Transparency and Reporting Requirements

Sec. 601 – Additional reporting on orders requiring production of business records.

In addition to existing annual reporting requirements, requires the government to report on the number of requests made for call detail records under the new telephone metadata program.

Sec. 602 – Business records compliance reports to Congress.

Requires the government to provide to Congress any compliance reports related to the use of Section 215.

Sec. 603 – Annual report by the Director of the Administrative Office of the United States Courts on orders Entered.

Requires the Director of the Administrative Office of the United States Court to make an annual report on the number of orders issued under sections 105, 304, 402, 501, 702, 703, and 704 of FISA, as well as the number of appointments of individuals to serve as amicus curiae to the FISA court.

Sec. 604 – Reporting requirements for decisions of the Foreign Intelligence Surveillance Court.

Requires the Attorney General to provide to the relevant committees, within 45 days of each decision, order, or opinion that includes a significant construction or interpretation, a copy of each such decision and a brief statement of the relevant background.

Sec. 605 – Submission of reports under FISA.

Includes the House Judiciary Committee in several existing reporting requirements.

Title VII – Sunsets

Sec. 701 – USA PATRIOT Improvement and Reauthorization Act of 2005.

Aligns the sunset of the three sun-setting provisions of the USA PATRIOT Act with the sunset of the FISA Amendment Act on December 31, 2017.

Grooms, Daniel (ODAG)

From: Grooms, Daniel (ODAG)
Sent: Wednesday, July 2, 2014 5:56 PM
To: Moran, Molly (OAG)
Subject: FW: (b)(5), (b)(7)(E) per DEA
Attachments: (b)(5), (b)(7)(E) per DEA Legal Analysis final 20130927.docx

From: Quinn, Maura F. (DEA)
Sent: Tuesday, July 01, 2014 4:58 PM
To: Grooms, Daniel (ODAG)
Cc: Goggin, Wendy H. (DEA-US)
Subject: (b)(5), (b)(7)(E) per DEA

Hi Danny,

(b)(5) per DEA
[Redacted]

(b)(5) per DEA
[Redacted]

Thanks, Maura

(b)(5), (b)(7)(E) per DEA; (b)(5) per OLC
[Redacted]

(b)(5), (b)(7)(E) per DEA; contains further (b)(5) withholdings per OLC

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(b)(5), (b)(7)(E) per DEA; contains further (b)(5) withholdings per OLC

Gauhar, Tashina (ODAG)

From: Gauhar, Tashina (ODAG)
Sent: Friday, September 5, 2014 7:39 PM
To: Cole, James (ODAG)
Cc: Goldberg, Stuart (ODAG)
Subject: FW: Draft Talking Points
Attachments: USA Freedom Act Background Paper and Talking Points.docx

Jim – As discussed today at the NSD meeting, attached is the background paper and talking points for the DNI to talk to Senator Feinstein on Tuesday. The document includes a background description of the main points, talking points to address those points, and flags potential member concerns.

Thanks,
Tash

From: Walsh, James (ODAG)
Sent: Friday, September 05, 2014 6:36 PM
To: Gauhar, Tashina (ODAG)
Subject: FW: Draft Talking Points

FYI

From: Robert Litt (b)(3) per ODNI
Sent: Friday, September 05, 2014 5:57 PM
To: (b)(3), (b)(6) per ODNI; Evans, Stuart (NSD) (b)(3), (b)(6) per ODNI; 'Gillis, Ryan'; Hardee, Christopher (NSD) (b)(6), (7)(C) per FBI (FBI); Bosworth, Michael; Miller, Karen D. (FBI); Wiegmann, Brad (NSD) (b)(6), (7)(C) per FBI (FBI) (b)(3) per NSA (b)(3) per NSA (b)(3), (b)(6); Baker, James A. (FBI) (b)(6), (7)(C) per FBI (FBI); Hedger, Stephen; Pollack, Joshua; Fonzone, Christopher; Egan, Brian J. (b)(6) per NSD (NSD); Walsh, James (ODAG); 'Lehner, Jonathan'; Paul.Ahern@treasury.gov; Trisha Anderson (Trisha.Anderson@treasury.gov)
Cc: (b)(3), (b)(6) per ODNI; Deirdre M Walsh (b)(3), (b)(6) per ODNI (b)(6), (7)(C) per FBI (FBI)
Subject: RE: Draft Talking Points

Call is off for today; DNI will talk to Feinstein on Tuesday.

From: (b)(3), (b)(6) per ODNI
Sent: Friday, September 05, 2014 5:55 PM
To: 'Evans, Stuart (NSD)' (b)(3), (b)(6) per ODNI; 'Gillis, Ryan'; Hardee, Christopher (NSD) (b)(6), (7)(C) per FBI (FBI); Bosworth, Michael; Miller, Karen D. (FBI); Wiegmann, Brad (NSD) (b)(6), (7)(C) per FBI (FBI) (b)(3) per NSA (b)(3) per NSA (b)(3), (b)(6); Baker, James A. (FBI) (b)(6), (7)(C) per FBI (FBI); Hedger, Stephen; Pollack, Joshua; Fonzone, Christopher; Egan, Brian J. (b)(6) per NSD (NSD); Walsh, James (ODAG); 'Lehner, Jonathan'; Paul.Ahern@treasury.gov; Trisha Anderson (Trisha.Anderson@treasury.gov)
Cc: Robert Litt (b)(3), (b)(6) per ODNI; Deirdre M Walsh (b)(3), (b)(6) per ODNI (b)(6), (7)(C) per FBI (FBI)
Subject: RE: Draft Talking Points

Stu: Not too late. Attached, with DOJ edits.

(b)(3), (b)(6) p

From: Evans, Stuart (NSD) (b) (6)
Sent: Friday, September 05, 2014 5:22 PM

To: (b)(3), (b)(6) per ODNI; 'Gillis, Ryan'; Hardee, Christopher (NSD) (b)(6), (7)(C) per FBI (FBI); Bosworth, Michael; Miller, Karen D. (FBI); Wiegmann, Brad (NSD) (b)(6), (7)(C) per FBI (FBI) (b)(3) per NSA (b)(3) per NSA (b)(3), (b)(6); Baker, James A. (FBI) (b)(6), (7)(C) per FBI (FBI); Hedger, Stephen; Pollack, Joshua; Fonzone, Christopher; Egan, Brian J. (b)(6) per NSD (NSD); Walsh, James (ODAG); 'Lehner, Jonathan'; Paul.Ahern@treasury.gov; Trisha Anderson (Trisha.Anderson@treasury.gov)
Cc: Robert Litt (b)(3), (b)(6) per ODNI (b)(3), (b)(6) per ODNI (b)(6), (7)(C) per FBI (FBI)
Subject: RE: Draft Talking Points

(b)(3), (b)(6), if not too late, a couple minor edits from us to (b)(5) per NSD

Thanks.

Stu

From: (b)(3), (b)(6) per ODNI
Sent: Friday, September 05, 2014 5:13 PM
To: 'Gillis, Ryan'; Hardee, Christopher (NSD) (b)(6), (7)(C) per FBI (FBI); Bosworth, Michael; Miller, Karen D. (FBI); Wiegmann, Brad (NSD); Evans, Stuart (NSD) (b)(6), (7)(C) per FBI (FBI) (b)(3) per NSA (b)(3) per NSA (b)(3), (b)(6); Baker, James A. (FBI) (b)(6), (7)(C) per FBI (FBI); Hedger, Stephen; Pollack, Joshua; Fonzone, Christopher; Egan, Brian J. (b)(6) per NSD (NSD); Walsh, James (ODAG); 'Lehner, Jonathan'; Paul.Ahern@treasury.gov; Trisha Anderson (Trisha.Anderson@treasury.gov)
Cc: Robert Litt (b)(3), (b)(6) per ODNI (b)(3), (b)(6) per ODNI (b)(6), (7)(C) per FBI (FBI)
Subject: RE: Draft Talking Points

Thank you for all the comments. Here are the final talking points the DNI will use later today.

Have a good weekend.

(b)(3), (b)(6)

From: Gillis, Ryan [<mailto:ryan.gillis@odni.gov>] (b)(6) per NSC
Sent: Friday, September 05, 2014 10:33 AM
To: (b)(3), (b)(6) per ODNI; 'Hardee, Christopher (NSD)' (b)(6), (7)(C) per FBI (FBI); Bosworth, Michael; 'Miller, Karen D. (FBI)'; 'Wiegmann, Brad (NSD)'; 'Evans, Stuart (NSD)' (b)(6), (7)(C) per FBI (FBI) (b)(3) per NSA (b)(3) per NSA (b)(3), (b)(6); 'Baker, James A. (FBI)' (b)(6), (7)(C) per FBI (FBI); Hedger, Stephen; Pollack, Joshua; Fonzone, Christopher; Egan, Brian J. (b)(6) per NSD (NSD); James D Walsh (NSD) (b)(6)
Cc: Robert Litt (b)(3), (b)(6) per ODNI (b)(3), (b)(6) per ODNI (b)(6), (7)(C) per FBI (FBI)
Subject: RE: Draft Talking Points

These are outstanding.

Most of my comments are intended to highlight (b)(5) per NSC (b)(5) per NSC. I would ask the SMEs to particularly review the suggestion (b)(5) per NSC (b)(5) per NSC – and I fully defer if those do not reflect your operational perspectives.

From: (b)(3), (b)(6) per ODNI
Sent: Friday, September 05, 2014 7:51 AM
To: 'Hardee, Christopher (NSD)' (b)(6), (7)(C) per FBI (FBI); Bosworth, Michael; 'Miller, Karen D. (FBI)'; 'Wiegmann, Brad (NSD)'; 'Evans, Stuart (NSD)' (b)(6), (7)(C) per FBI (FBI) (b)(3) per NSA (b)(3) per NSA (b)(3), (b)(6); 'Baker, James A. (FBI)' (b)(6), (7)(C) per FBI (FBI); Hedger, Stephen; Gillis, Ryan; Pollack, Joshua; Fonzone, Christopher; Egan, Brian J. (b)(6) per NSD (NSD); James D Walsh (NSD) (b)(6)
Subject: RE: Draft Talking Points

Cc: Robert Lit (b)(3), (b)(6) per ODNI; Deirdre M Wals (b)(3), (b)(6) per ODNI (b)(6), (7)(C) per FBI (FBI)
Subject: RE: Draft Talking Points

All,

Now that the joint DNI-AG letter is done, I am recirculating the talking points for any final comment. It is my understanding that the DNI may have a call as early as this afternoon. To that end, please let us know quickly if you have any concerns.

Thank you,

(b)(3), (b)(6)

From: (b)(3), (b)(6) per ODNI
Sent: Monday, August 18, 2014 9:41 AM
To: 'Hardee, Christopher (NSD)' (b)(6), (7)(C) per FBI (FBI) (b)(6) Michael Bosworth; Miller, Karen D. (FBI); Wiegmann, Brad (NSD); Evans, Stuart (NSD) (b)(6), (7)(C) per FBI (FBI) (b)(3) per NSA (b)(3) per NSA (b)(3), (b)(6); Baker, James A. (FBI) (b)(6), (7)(C) per FBI (FBI); (b)(6) Stephen Hedger (b)(6) Ryan Gillis per NSC (b)(6) Joshua Pollack; (b)(6) Christopher Fonzone (b)(6) Brian Egan
Cc: Robert Litt (b)(3), (b)(6) per ODNI; Deirdre M Walsh (b)(3), (b)(6) per ODNI (b)(6), (7)(C) per FBI (FBI)
Subject: RE: Draft Talking Points

Thank you for all the comments. I have attached a revised draft reflecting all the changes.

From: Hardee, Christopher (NSD) (b)(6)
Sent: Thursday, August 14, 2014 5:39 PM
To: (b)(6), (7)(C) per FBI (FBI) (b)(6) Michael Bosworth; Miller, Karen D. (FBI) (b)(3), (b)(6) per ODNI; Wiegmann, Brad (NSD); Evans, Stuart (NSD) (b)(6), (7)(C) per FBI (FBI) (b)(3) per NSA (b)(3) per NSA (b)(3), (b)(6); Baker, James A. (FBI) (b)(6), (7)(C) per FBI (FBI); (b)(6) Stephen Hedger (b)(6) Ryan Gillis per NSC (b)(6) Joshua Pollack; (b)(6) Christopher Fonzone (b)(6) Brian Egan
Cc: Robert Litt (b)(3), (b)(6) per ODNI; Deirdre M Walsh (b)(3), (b)(6) per ODNI (b)(6), (7)(C) per FBI (FBI)
Subject: RE: Draft Talking Points

One comment on th (b)(5) per NSC bullet from DOJ.

From: (b)(6), (7)(C) per FBI (FBI)
Sent: Thursday, August 14, 2014 5:11 PM
To: (b)(6) Michael Bosworth; Miller, Karen D. (FBI) (b)(3), (b)(6) per ODNI; Wiegmann, Brad (NSD); Hardee, Christopher (NSD); Evans, Stuart (NSD) (b)(6), (7)(C) per FBI (FBI) (b)(3) per NSA (b)(3) per NSA (b)(3), (b)(6); Baker, James A. (FBI) (b)(6), (7)(C) per FBI (FBI) (b)(6) Stephen Hedger (b)(6) Ryan Gillis per NSC (b)(6) Joshua Pollack; (b)(6) Christopher Fonzone (b)(6) Brian Egan
Cc: (b)(3), (b)(6) per ODNI (b)(6), (7)(C) per FBI (FBI)
Subject: Re: Draft Talking Points

Michael, Jim Baker will call you later this evening to discuss (b)(5) per FBI (b)(5) per NSC; (b)(5) per FBI.

From: Bosworth, Michael (b)(6) >
To: Miller, Karen D. (b)(3), (b)(6) per ODNI; Wiegmann, Brad (NSD) (JMD); Hardee, Christopher (NSD) (JMD); Evans, Stuart (NSD) (JMD) (b)(6), (7)(C) per FBI; Rajesh D (b)(3) per NSA; Anthony, Teish (b)(3) per NSA (b)(3) per NSA (b)(3), (b)(6); Baker, James A. (b)(6), (7)(C) per FBI; Hedger, Stephen (b)(6) >; Gillis, Ryan (b)(6) per NSC >; Pollack, Joshua

(b) (6) >; Fonzone, Christopher (b) (6) >; Egan, Brian J.
(b) (6) >

Cc: Robert Litt (b) (6) > (b)(3), (b)(6) per ODNI ;
Deirdre M Wals (b)(3), (b)(6) per ODNI (b)(6), (7)(C) per FBI
Sent: Thu Aug 14 16:53:43 2014
Subject: RE: Draft Talking Points

I'm puzzled by some of the comments in this email and in the attached document.

FBI, when do you have time to discuss?

Thanks,
Michael

From: Miller, Karen D (b)(7)(E) per FBI]
Sent: Thursday, August 14, 2014 4:47 PM
T (b)(3), (b)(6) per ODNI; Wiegmann, Brad (NSD) (JMD); Hardee, Christopher (NSD) (JMD); Evans, Stuart (NSD) (JMD);
(b)(3), (7)(E) per FBI ; Rajesh D (b)(3) per NSA ; Anthony, Teish (b)(3) per NSA
(b)(3) per NSA (b)(3), (b)(6); Baker, James A (b)(3), (7)(E) per FBI; Hedger, Stephen; Gillis, Ryan;
Bosworth, Michael; Pollack, Joshua; Fonzone, Christopher; Egan, Brian J.
Cc: Robert Lit (b)(3), (b)(6) per ODNI ; Deirdre M Wals (b)(3), (b)(6) per ODNI (b)(3), (7)(E) per FBI
Subject: RE: Draft Talking Points

(b)(3), (b)(6), the FBI is concerned tha (b)(5) per FBI (b)(5) per NSC; (b)(5) per FBI

(b)(5) per FBI

Thanks for the opportunity to review. Karen

Karen Davis Miller
Section Chief
National Security Law Branch
Office of the General Counsel
(b)(7)(E) per FBI

Confidentiality Statement:

This message is transmitted to you by the Office of the General Counsel of the Federal Bureau of Investigation. The message, along with any attachments, may be confidential and legally privileged. If you are not the intended recipient of this message, please destroy it promptly without further retention or dissemination (unless otherwise required by law). Please notify the sender of the error by a separate e-mail or by callin (b)(7)(E) per FBI.

From (b)(3), (b)(6) per ODNI
Sent: Wednesday, August 13, 2014 5:06 PM
To: Wiegmann, Brad (NSD) (JMD); Hardee, Christopher (NSD) (JMD); Evans, Stuart (NSD) (JMD) (b)(6), (7)(C) per FBI;
Miller, Karen D. (b)(6), (7)(C) per FBI; Rajesh D (b)(3) per NSA ; Anthony, Teisha (b)(3) per NSA
(b)(3) per NSA (b)(3), (b)(6); Baker, James A. (b)(6), (7)(C) per FBI; Hedger, Stephen; Gillis, Ryan;
Bosworth, Michael; 'Pollack, Joshua'; Fonzone, Christopher; Brian J. (b)(6) Brian Egan) Egan
(b)(6) Brian Egan)
Cc: Robert Litt (b)(3), (b)(6) per ODNI ; Deirdre M Walsh (b)(3), (b)(6) per ODNI
Subject: Draft Talking Points

I hope you all are well. The DNI has been asked to make some calls to Members on the USA Freedom Act. We have prepared the attached background paper and talking points for his use. We would appreciate any thoughts or comments you might have.

Thanks,

(b)(3), (b)(6)

(b)(3), (b)(6) per ODNI

Deputy General Counsel

Office of the Director of National Intelligence Office of General Counsel

(b)(3), (b)(6) per ODNI

(b)(3), (b)(6) per ODNI

(b)(6), (b)(7)(C) per EOUSA

From: (b)(6), (b)(7)(C) per EOUSA
Sent: Monday, November 17, 2014 7:32 PM
To: Lynch, Loretta (USANYE)
Subject: FW: Issue Papers
Attachments: Issue Papers 11-17-2014.zip

From: O'Brien, Alicia C (OLA) (b) (6)
Sent: Monday, November 17, 2014 6:50 PM
To: (b)(6), (b)(7)(C) per EOUSA
Cc: Miller, Marshall (CRM)
Subject: RE: Issue Papers

Apologies, please use this zip file.

Alicia C. O'Brien
Office of Legislative Affairs

(b) (6)

(b) (6)

From: O'Brien, Alicia C (OLA)
Sent: Monday, November 17, 2014 6:39 PM
To: (b)(6), (b)(7)(C) per EOUSA
Cc: Miller, Marshall
Subject: RE: Issue Papers

Please see the attached zip file adding the national security papers. There are 4 outstanding papers:

- (1) Benghazi
- (2) CALEA/Going Dark
- (3) GTMO
- (4) Immigration – Executive Action

We hope to have 1-3 by the end of the week. The fourth is on hold pending executive action.

Thanks again for all your help- Alicia

<< File: Issue Papers 11-17-2014.zip >>

Alicia C. O'Brien
Office of Legislative Affairs

(b) (6)

(b) (6)

From: O'Brien, Alicia C (OLA)
Sent: Friday, November 14, 2014 6:14 PM
To: (b)(6), (b)(7)(C) per EOUSA
Cc: Miller, Marshall
Subject: Issue Papers

The attached zip file contains the table of contents and issue papers completed to date. The national security papers will be ready on Monday. Thank you again for all your help.

Have a nice weekend- Alicia

Alicia C. O'Brien
Office of Legislative Affairs

(b) (6)

(b) (6)

<< File: Issue Papers 11-14-2014.zip >>

O'Brien, Alicia C (OLA)

From: O'Brien, Alicia C (OLA)
Sent: Tuesday, November 18, 2014 5:11 PM
To: Gaston, Molly (OAG); Miller, Marshall; Richardson, Margaret (OAG); Franklin, Shirlethia (OAG); Fallon, Brian (OPA)
Cc: Kadzik, Peter J (OLA)
Subject: RE: Wed.-Thurs. agenda
Attachments: Transcripts.zip

Transcripts attached. We'll have the QFRs compiled tomorrow.

Alicia C. O'Brien
Office of Legislative Affairs

(b) (6)

(b) (6)

From: O'Brien, Alicia C (OLA)
Sent: Tuesday, November 18, 2014 11:40 AM
To: Gaston, Molly (OAG); Miller, Marshall; Richardson, Margaret (OAG); Franklin, Shirlethia (OAG); Fallon, Brian (OPA)
Cc: Kadzik, Peter J (OLA)
Subject: RE: Wed.-Thurs. agenda

We'll also have the AG and DAG confirmation transcripts and QFRs, as well as the AG's most recent SJC oversight hearing, printed for her tomorrow. I'll send electronically to the group later today.

Alicia C. O'Brien
Office of Legislative Affairs

(b) (6)

(b) (6)

From: Gaston, Molly (OAG)
Sent: Tuesday, November 18, 2014 11:31 AM
To: Miller, Marshall; O'Brien, Alicia C (OLA); Richardson, Margaret (OAG); Franklin, Shirlethia (OAG); Fallon, Brian (OPA)
Cc: Kadzik, Peter J (OLA)
Subject: RE: Wed.-Thurs. agenda

You can see Comey's at <http://www.judiciary.senate.gov/meetings/nominations-2013-07-09> – fast forward to about 17 minutes in.

From: Miller, Marshall
Sent: Tuesday, November 18, 2014 11:23 AM
To: O'Brien, Alicia C (OLA); Richardson, Margaret (OAG); Gaston, Molly (OAG); Franklin, Shirlethia (OAG); Fallon, Brian (OPA)

Cc: Kadzik, Peter J (OLA)
Subject: RE: Wed.-Thurs. agenda

Do we have any video of prior confirmation hearings – perhaps with Comey? I'd like to see (and perhaps Loretta would too) video of questioning style of committee members.

From: O'Brien, Alicia C (OLA)
Sent: Tuesday, November 18, 2014 8:42 AM
To: Richardson, Margaret (OAG); Miller, Marshall; Gaston, Molly (OAG); Franklin, Shirlethia (OAG); Fallon, Brian (OPA)
Cc: Kadzik, Peter J (OLA)
Subject: Wed.-Thurs. agenda

Please see attached. Just let me know if you have any edits/additions. We'll get lunch for the group both days, so also let me know if you plan to be there during those sessions.

Thanks- Alicia

<< File: Agenda (11-19 and 11-20).docx >>

Alicia C. O'Brien
Office of Legislative Affairs

(b) (6)

(b) (6)

CQ CONGRESSIONAL TRANSCRIPTS
Congressional Hearings
Jan. 15, 2009 - Final

Senate Judiciary Committee Holds Hearing on the Nomination of Eric Holder to be Attorney General, Day One

LIST OF PANEL MEMBERS AND WITNESSES

LEAHY:

Just so that everybody understands, we are in the historic Senate Caucus Room. Normally, we would have been in a different room, but there are a number of these hearings going on. And there are certainly more people than we normally see in the hearings.

Lately, there seem to be a number of demonstrations in hearings. I just want everybody to understand the ground rules. I want everybody to be able to watch this hearing. I want them to be able to watch it comfortably. If people stand up and block the view of those behind them, I would direct the officers to remove the people who are blocking the view.

Now, I'll take this position whether people are standing up in demonstration of a position for or against one I might hold or for or against one Senator Specter might hold or any other senator.

I'm sure that's not going to be necessary. I'm sure everybody's going to show appropriate amount of decorum. But that's what we -- that is what we expect and that is what we'll have.

So with that, I welcome everybody here.

The election of Barack Obama and Joe Biden and the president-elect's selection of Eric Holder, Jr. to be attorney general for the United States provides an historic opportunity for the country to move past the partisanship of the past decades.

We can make a real difference if we come together to solve the nation's problems and protect against serious threats and meet the challenges of our times.

Let's honor the wishes of the American people who, in November, broke through debilitating divisions to join together in record numbers. Let us acknowledge that our inspirational new president-elect has move the forward promptly to assemble an extraordinarily well-qualified and diverse group of Cabinet officers and advisers. Let's us move away from any kind of partisanship to serve the common good.

It was seven score and 4 years ago that this nation answered the fundamental question President Lincoln posed in his Gettysburg Address. The world learned that liberty, equality, and democracy could serve as the foundation for this great and united nation. And we Americans have cause and occasion to reflect during the next several days about our great country.

The inauguration of our new president is Tuesday. Monday is a holiday the country has set aside to celebrate and rededicate

ourselves to the cause of freedom and equality. Today is the anniversary of the birthday of the extraordinary man for whom that holiday is named.

And with this hearing, we take another step up the path for the time Dr. King foresaw when people are judged by the content of their character.

Eric Holder has the character to serve as the attorney general of the United States of America. He passes any fair confirmation standard. His record of public service has earned him strong support from law enforcement organizations, civil rights groups, victims rights advocates, former members of the administration of President Reagan -- the president who first nominated him as a judge -- and from those of President Bush and many others.

This week, the Justice Department's inspector general released a report about the shameful political interference in the civil rights division of the Justice Department during the past few years. America's diversity, when drawn together, is a source of our nation's strength and resilience. Americans have to be able to trust their Justice Department.

That trust can never be squandered or taken for granted. We need leaders who are prepared to take up the oars of a Justice Department whose dedicated law enforcement professionals have been misused and demoralized.

Eric Holder is just such a leader. Before the November election, I co-authored an article with my friend, the ranking member, in which we wrote the attorney general's duty is to uphold the Constitution and the rule of law not to circumvent them. The president of the American people are best served by the attorney general who gives sound advice and takes responsible action rather than one who develops legalistic loopholes to serve the partisan ends of a particular administration.

We wrote that article addressed to both John McCain and Barack Obama. We wrote it before we knew who was going to be president. We wrote it so the next president might adhere to our advice. And I have every confidence that Eric Holder is the person we described.

LEAHY:

The career professionals and those of us who have worked for years with the career professional at the Department of Justice, most of them we have no idea what their political background is. We just know how good they are.

But they reacted with delight when Eric Holder was designated by President-elect Obama because they, too, know him well. They know him from his 12 years as an anti-corruption prosecutor at the public integrity section, from his time as a U.S. attorney for the District of Columbia, from his tenure as a judge, and from his service as the deputy attorney John.

Now, I would hope that we'd have a prompt confirmation so we can restore morale and purpose throughout the Justice Department. It's important the Justice Department has its senior leadership in place without delay.

The attorney general is the top law enforcement officer in the country. He's a key member of the national security team. We've seen billions of dollars devoted to bailouts in the last few months. We need to ensure that those resources are not diverted by fraud or deceit. We need the Justice Department to be at its best.

And I have been encouraged by the initial reaction of many Republicans, including some serving on this committee, when Mr. Holder's name was reported as a likely nominee and when he was designated by the president-elect. I commended their bipartisanship (inaudible) do one of the best friends I've ever had in the Senate, Senator John Warner who introduced Mr. Holder to the committee.

The responsibilities of the attorney general of the United States are too important to have this appointment delayed by

partisan bickering. We've known and worked with Mr. Holder for more than 20 years. We knew him when he was nominated by President Reagan, and we confirmed him. We knew him when he was nominated by President Clinton, and we confirmed him. Three times confirmed by the Senate to important positions.

His record of public service, his integrity, his experience, his commitment to the rule of law merit our respect. We need an attorney general, as Robert Jackson said 68 years ago, who serves the law and not factional purposes, who approaches this task with humility. That's the kind of man Eric Holder is, the kind of prosecutor Eric Holder always was, and the kind of attorney general he will be.

The next attorney general will understand our moral and legal obligation to protect the fundamental rights of all Americans, to respect the human rights of all people.

This is part of the change we need and the change the American people voted for. When he designated Mr. Holder, President-elect Obama said let me be clear, the attorney general serves the American people and I have every expectation that Eric will protect our people, uphold the public trust, and adhere to our Constitution.

The next president understands the role of the attorney general of the United States. And I have no doubt that Mr. Holder understands what's required of the attorney general. His experience, the lessons he has learned will serve him and the American people well.

Senator Specter?

SPECTER:

Thank you, Mr. Chairman.

Next to the president of the United States, there is no federal officer more important than the attorney general. The attorney general is different from any other Cabinet officer because Cabinet officers ordinarily carry out the policies of the president. But the attorney general, has an independent duty to the people and to uphold the rule of law.

The Constitution calls for the United States Senate to advise and consent. And I agree with the chairman about the necessity to help President-elect Obama tackle the problems of enormous difficulties which this nation faces. There is provided, in the Constitution, separation of power and checks and balances so that it is the duty of the United States Senate to exercise its responsibilities and to make an appropriate inquiry.

Independence is a very important item. Harry Daugherty was attorney general during the Teapot Dome scandals. So I mention Attorney General Daugherty because, coming in, I took a look at the long list of hearings for seatings which have been held in this room. One of them was Teapot Dome. Another was the sinking of the Lusitania, the McClellan committee, Iran-Contra, many, many hearings.

There has been a question raised as to whether the issues when I have posed for Mr. Holder are political in nature. I have not hesitated to oppose prominent members of my own party asking pointed questions which is the constitutional responsibility of a senator and making an independent judgment and voting against them when I thought it was warranted. And one of those hearings was held right here in this room.

Almost every major newspaper in the country has comment about the importance of questioning Mr. Holder. And as I said on the floor, I have an open mind but I think there are important questions to be asked and upon the questions to be answered.

The editorials have commented about the need for the questioning of Mr. Holder based upon some of the factors in his

background. There's no doubt he comes with an excellent resume, but there are questions nonetheless. So says the New York Times, the Washington Post, the Wall Street Journal, the Philadelphia Enquirer, the Rocky Mountain News, and many other newspapers across the country.

The basic issue of national security is, perhaps, the attorney general's most important responsibility to protect the American people. And I think we need to know how Mr. Holder is going to approach that job. What does he think about the Patriot Act? What does he think about the interrogation techniques?

There's a big difference between what is faced by those who are following the Army Field Manual compared to what the FBI does compared to what the CIA does. There are very different lines of questioning and I saw that in the 104th Congress when I chaired the Intelligence Committee.

SPECTER:

I voted against water boarding. It's torture. And I took the lead to the Senate floor in fighting for habeas corpus. And I opposed President Bush's signing statements. So I have no hesitancy to stand up on those issues.

But there's a very important question of balance. And we want to find out how Mr. Holder is going to approach those issues.

We have major issues of violent crime in this country. Career criminals have to be treated one way. I want to know what he has in mind about realistic rehabilitation, to try to take first offenders -- and especially juveniles -- out of the recidivist crime cycle.

We have to know where he stands on anti-trust. We need to know what he will do on the prosecution of white collar crime.

There have been a spate of fines, which look heavy on their surface, \$1 million. But contrasted with the billions involved in the fraud, it's insufficient. I want to know how tough he's going to be along that line, especially with what we've seen with corporate fraud leading to the tremendous financial problems this country has today.

At the same time, there has to be a balance of right to counsel. Mr. Holder authored in 1999, the memorandum which provides that the Department of Justice will go easy on a corporation, if they will cooperate where individual constitutional privileges are involved. That's a matter which has to be inquired into, where he stands under the anti-trust laws.

All of these matters, I think, are appropriate for inquiry. And I look forward to an opportunity to discuss them with the nominee.

One additional comment. And I want to read this, because I want to get it right. I ordinarily don't read, but I will on this.

Aside from the substance of Mr. Holder's qualifications, there is a serious issue on senators' minority rights and the inadequacy of our opportunity for preparation. On this I speak for the Republican Senatorial Caucus. Ordinarily, I speak only for myself. But today, I speak for the caucus.

In light of Mr. Holder's extensive record -- and we looked at some 86 boxes at one stage -- there has been insufficient time for the examination of those records. On the Roberts and Alito confirmations, the minority was consulted and accorded the time they requested on scheduling. That was not done here.

The chairman declined to co-sign the letter requesting records from the Clinton Library. With only my signature representing 40-plus Republican senators, my request was treated as any other citizen's request under the Freedom of Information Act, and the records have not been obtained.

When the minority previously had a dozen witnesses under similar circumstances, we got three. When two witnesses, Ms.

Mary Jo White and Mr. Roger Adams, refused to appear, our requests for subpoenas were denied.

Realizing the public's understandable disdain for Washington's political bickering, we have sought to temper these objections. And I retain the cordial relationship with the chairman, with whom I've worked very closely for many years, but feel constrained to recite them here briefly for the record.

I thank the chairman.

LEAHY:

Well, I thank my good friend from Pennsylvania. I would note that, I think the last hearing for Attorney General Mukasey was -- I think we did it in four weeks. I do recall the deputy Republican leader being critical it took four weeks. And he said something about three weeks should have been enough. I believe we had a recess of some sort in between there.

We did it in four weeks. They said that wasn't really fast enough. This has been -- Mr. Holder was -- we were told by the Obama team in November, that he was going to be the nominee. We had November and December, and now we're into January.

I did postpone it by an extra week from the time. I did say at the time that made it -- it went several weeks beyond what the Republican leader had said it should take for an attorney general.

Now, this is not a lifetime position, either, as our Supreme Court justices. But be that as it may, I think adequate time has been given.

Certainly, questions -- I understand what the distinguished ranking member has said about his opposition to waterboarding. As we know, Attorney General Mukasey would not declare that as being torture. Every Republican voted for him, nonetheless. But that's why you ask the questions, and we wanted (ph) the questions.

One of the first people to introduce is a distinguished colleague, John Warner. He is the former senior senator from Virginia. He served here for 30 years.

I consider it my privilege to have served all those 30 years with him. We've traveled together around the world. We worked together. We have done so many significant pieces of bipartisan legislation together. He set the tone and tenor of what it should be.

I have referred to him over the years as my senator when I'm away from home and spending time in the home in Virginia. I consider him a senator's senator.

Senator Warner, please go ahead.

WARNER:

Thank you, Mr. Chairman and distinguished ranking member, and to each of my colleagues.

I am deeply humbled by this opportunity to appear this morning and participate in what I regard, and I think you regard, as one of the most solemn responsibilities of the United States Senate, fulfilling our constitutional responsibility of advice and consent.

I've been privileged through these 30 years in the United States Senate to know each of you and to work with each of you, and to form my own opinion that each of you will fairly and objectively and conscientiously approach this solemn duty of

advice and consent for this historic nomination of Eric Holder to be the chief law enforcement officer of our nation, the attorney general of the United States of America.

WARNER:

I have known Mr. Holder for a number of years. We both started our careers basically as prosecutors, although separated by at least 20-some-odd years, two decades.

And we approached our duties in life based upon the foundations that we were taught and learned in the role as prosecutors, both here in the nation's capital.

So, I've joined this morning out of friendship. But also, I weighed very heavily coming before the Senate again, so soon after my retirement. But I felt that I wanted to be among those all across this nation who are working for a bipartisan approach, to support the president-elect in facing what is, I think each of us believe, is the most complicated and challenging set of issues that ever faced a president.

Behind me sits Eric Holder, and the president-elect has exercised his judgment that this is the individual whom he deems best qualified from the hundreds of thousands of lawyers serving in the United States, the best qualified to become the attorney general of the United States.

I'm also privileged to be joined this morning by a very good friend, Eleanor Holmes Norton. We have worked together on behalf of the Greater Capitol Region these many years. And I am privileged to say that we have had some accomplishments through these years.

Quickly, Mr. President, the public record has a complete dossier on this nominee. But given that people in every corner of the United States today are following this hearing, this very important hearing, I'd like, with the permission of the chair and ranking member, to briefly summarize how this distinguished American got from his home in the greater environment of New York City and a household which he probably classifies as middle class, to become the nominee for attorney general of the United States. It's truly remarkable.

Fortunately, the elders in his household, his parents and others, put great emphasis on education. Consequently, he excelled in public schools, and then went on, had the good fortune to get his undergraduate degree and his law degree from Columbia University.

And then, rather than go into a top law firm, and perhaps a lucrative opportunity, he -- as we say in the trial profession -- he plunged into the cauldron of the courtroom to start his career, arguing case after case before the juries and the judges.

Prosecution is a tough way to enter the profession, but both of us chose this course.

He was a federal prosecutor in the public integrity section of the U.S. Department of Justice. There he tried many cases and prosecuted successfully widely heralded public corruption cases against officials from both -- and I emphasize "both" -- political parties, as recognized by the chairman and the ranking member in their opening statements.

Thereafter, Eric was appointed a D.C. superior court judge by President Ronald Reagan, recognizing this man's impartiality and his bipartisan approach to the rule of law. We always must come back that the rule of law is the fundamental foundation of this great nation of ours.

He performed his duties on the bench with distinction, won the accolades of both the bench and the bar, and then was appointed the United States attorney for the District of Columbia, in 1993.

Having been a member of that office, as I said, two decades before, I wish to point out that the United States attorney for the District of Columbia has a very wide range of jurisdiction. And much of it relates to common law crime, unlike other U.S. attorneys.

He performed that subject and that responsibility from 1993 to '97. From '97 to 2001, he served as deputy attorney general of the United States, the critically important number two job at the Department of Justice. And there, he gained invaluable experience for his current nomination, and developed a bipartisan reputation in making difficult and tough decisions.

And on that point, I've had an opportunity in preparing for this hearing to visit with the nominee and many, many colleague who have known him and came up through the similar chairs of responsibility in the Department of Justice.

Mr. Chairman, Eric Holder would be the first to say that his career was marked by certain misjudgments. He freely acknowledges that. I doubt if there's one of us in this room, particularly those of us who have been prosecutors, who haven't looked back on our careers and recognized that we've made misjudgments.

But the key to this man is that he learned from those experiences, and learned in such a way that those misjudgments will not be repeated.

From 2001 to the present, he practiced law as a partner in the prestigious firm here in Washington, D.C., the firm Covington and Burling, where he experienced in our criminal justice system the other side, namely, that of counsel to those who have the misfortune to fall afoul of the law.

He also represented major companies, executives in a wide variety of complex litigation. That's experience that he will find invaluable, if confirmed by the Senate in this new position.

We both readily acknowledge, Eric Holder and I, that we achieved our goals in life largely by learning from career public servants with whom we had the privilege to serve -- the clerks, the judges, the justices at all levels of our courts, our fellow prosecutors, and the vast system of careerists that serve America to provide for the rule of the law and the respect we have for the Constitution.

WARNER:

I humbly acknowledge my gratitude for having received that same benefit that he did because the Department of Justice is known, perhaps more so than any other department save the Department of Defense, for a cadre of careerists who put the rule of law and their oath to the Constitution foremost in discharging their responsibilities.

I mentioned that having had that same experience, I had the opportunity in later life when I was privileged to be here in the Senate working in association with my good colleague here to recognize the judge, a circuit federal circuit judge in the nation's capital, for whom I served as a law clerk, Judge E. Barrett Prettyman, and naming the courthouse for him, and later joining again with my colleague to my left to name the next addition to the federal courthouse for a man named William Bryant.

Now, William Bryant was a prosecutor, in a sense a career one, a defense counsel, and as a young man in the prosecutor's office, I learned more from William Bryant as to how to try a case and the vagaries of appearing before the jury and the trial judges than from any law professor in my career.

So that was the way I acknowledged the careerists. Our distinguished nominee in his opening statement will do likewise. But it is essential -- and this nominee will do that -- it is essential to protect those careers in the operations and functions they have

in the Department of Justice from the always present political pressures that exist in every single corner of the nation's capital and the government. He will protect them so that they can perform their duties.

He will be the principal adviser to the president, and much has been said in the opening statements by both of my distinguished colleagues, chairman and ranking member, about the importance of the rule of law and independence.

And I went back and read the Congressional Record, Senator Specter, where you delivered quite an oration here on the sixth of January this year. And in it you said the following: "The attorney general is unlike any other cabinet officer whose duty is to carry out the president's policy. The attorney general has the corollary independent responsibility" -- I repeat "independent responsibility" -- "to the people to uphold the rule of law."

Then joining the distinguished chairman, you wrote the following, the two of you: "The attorney general's duty is to uphold the Constitution and the rule of law, not to circumvent them. The president and the American people are best served by an attorney general who gives sound advice and takes responsible action."

That is the nominee, in my judgment.

I was so privileged to join so many distinguished lawyers whom I've known and served with who have come forth, unsolicited, largely Republican in background, who have served as deputy attorney general, as prosecutors from all over the country, to lend our support to this important hearing. I would hope that, and ask if I might put in as a part of my...

LEAHY:

Without objection, they'll be part of the record.

(CROSSTALK)

WARNER:

... some of those exceptional letters. But I point out, again, my pride to have joined with them, most of them having far more distinguished legal careers than I have.

But it's interesting, Mr. Chairman, as I read those letters, they had a common theme in describing this nominee. It was in several of the letters. It was very simple but very profound. And it's stated as follows, and I quote them: "Eric Holder is a good man." Now, that says a lot.

I further note that our forty-first president, George Herbert Walker Bush, in a public appearance on television when asked about the president, he said, I wish the new president well. And then his son, our current president, likewise, has wished this president well.

This president has made a choice. This president has chosen an individual that's going to come before you momentarily in advise and consent. It's the gravity of the times that gives rise to the unprecedented level of bipartisanship that accompanies all stages of formation of this new administration and this historic inauguration to be next week.

I thank you.

LEAHY:

Thank you, Senator Warner.

You and I have sat on the inaugural stand for inaugurations for both Democrats and Republicans as president. And I think we have both wished whoever, whichever party they were from, wished them well.

Congresswoman Norton, I want to recognize you. You were recently elected by the people of the District of Columbia to your eleventh consecutive term in the House of Representatives. And, please, Congresswoman Norton, go ahead.

NORTON:

Thank you very much, Mr. Chairman.

And unrelated to my own testimony, I've been asked by the chair of the Congressional Black Caucus to request that her letter for the caucus in support of Mr. Holden be admitted into the record.

LEAHY:

I thank you. It will be. Senator Feinstein had already sent that letter and asked that it be part of the record. I've read the letter. It definitely will be part of the record.

NORTON:

Thank you, Mr. Chairman.

Mr. Chairman, it is a particular pleasure to appear before you this morning with my good friend whom I miss already. The fact that John Warner, who enjoys such a sterling reputation in this body, has stood for Eric Holder, I think, speaks volumes about Mr. Holder's experience and character.

Considering your time restraints, I'm going to read my thoughts this morning, Mr. Chairman and Ranking Member Specter.

NORTON:

I'm pleased to introduce Eric Holder, a longtime resident of the District of Columbia. But my few words this morning have little in common with the predictable introductions of home state senators and others.

I did not know Eric Holder until he competed for the post of United States attorney for the District of Columbia. I came to know him in much the same way that you will know him after today's hearing.

Because the district has the same federal officials as the states but no senators, President Bill Clinton granted me the courtesy to recommend the U.S. attorney district court judges and the U.S. marshal.

In the district's two centuries as the nation's capital, residents have had to live with the decisions of these important federal officials while having no way to affect their appointments. I was determined to vindicate the president's courtesy by the transparency and the competitiveness of the process and the excellence of the candidates recommended.

I appointed a commission of distinguished lawyers and other private citizens, named as chair Pauline Schneider, a past president of the District of Columbia Bar, and charged the commission to search widely for candidates and to thoroughly investigate and interview them and send me three candidates for each post.

I then made my recommendations to the president for each post after doing my own due diligence and interviewing each of the three candidates.

Some may think that Washington has more lawyers than people with good sense. But lawyers in this town are among the most able in the United States. The commission soon heard from some of the best of the lot.

Eric Holder's distinguished biography is before you. Without reiterating the many features of the academic and legal background that recommend his appointment, what particularly stood out for us were the uniformly excellent reports

concerning his work in the Justice Department's first Public Integrity Section; his nomination by President Ronald Reagan to the D.C. Superior Court, whose appointments as Article I judges are made by the president, and the high praise for his service there; the outstanding evaluations of his extensive and varied criminal and civil trial experience; and his unimpeachable character and collegiality, as reported by all who had worked with Eric Holder.

Perhaps the best indication of Eric's excellence, however, is that in a very competitive pool of the best and the brightest, he rose to the top like cream in rich milk.

Besides demonstrating his own excellence, however, Eric carried an unusual burden of which he was unaware. More than usual, the quality of the commission's recommendations for U.S. attorney and for judges was of pathbreaking importance. We knew that these appointments were without precedent in the city's history. Even small differences in quality mattered if the point was not only to get the best candidates but to demonstrate that this city could do so.

Eric Holder created a new gold standard for the position of United States attorney for the District of Columbia. The republican U.S. attorneys who followed him adopted his innovations localizing the district's part of his jurisdiction by, for example, placing assistant U.S. attorneys in communities for the very first time while strenuously carrying forward significant federal prosecutions.

Eric wore two very different high-profile hats at the same time with remarkable skill. He more than vindicated the challenge he was given and our confidence in him.

Eric Holder may be the first person to work his way up from career trial attorney in the Department of Justice to become the United States attorney general. Imagine the effect his appointment will have on the demoralized Department of Justice staff.

If experience at every level of the department and the record of excelling in everything you have ever done matters to this committee, Eric Holder is unusually well qualified to become our attorney general.

I am pleased and proud to recommend him to you without reservation.

LEAHY:

Well, congresswoman, you and I have served together for over 20 years, and I worked closely with you on a number of things. And that is high praise indeed, and I appreciate it.

Senator Warner, I know you and the congresswoman have many other places to go. Thank you for taking the time here.

We'll rearrange the dais a little bit, and give Mr. Holder a chance.

Mr. Holder, will you please stand and raise your right hand.

Do you affirm or swear that the testimony you are about to give before this committee be the truth, the whole truth and nothing but the truth, so help you God?

HOLDER:

I do.

LEAHY:

Thank you.

Please be seated.

I'm never sure whether to address you as Mr. Holder or Judge Holder, Deputy Attorney General Holder. But Mr. Holder, please go ahead and give your opening statement.

First, before you do, though, would you introduce the members -- before we set the clock, introduce the members of your family? I've already met them, but so all the members of the committee can see them here.

HOLDER:

Thank you, Mr. Chairman.

Seated behind me and right behind me is my wife, Dr. Sharon Malone. The beautiful woman to her left is my mother, Miriam Holder. The series of beautiful young women here is my daughter, Maya Holder, Brooke Holder. My little guy there, that's Eric Holder III, born on the same day as my father. He was going to have a different name, but we decided since he was born on my dad's birthday, his last birthday, that that had to be his name. So he's not named after me; he's named after my dad. That's my brother, William Holder, his wife, Deborah (ph) Holder, my niece, Amanda Holder.

LEAHY:

Thank you all. And I know you have many, many friends. I see former FBI director Louis Freed in the front row and I see so many others. Please, Mr. Holder, go ahead.

HOLDER:

Thank you, Mr. Chairman, Senator Specter, and members of the Judiciary Committee. I am deeply honored to appear before you today.

In five days, just a short distance from his historic room, the next president of the United States will take the oath of office. He will swear to preserve, protect, and defend the Constitution of the United States.

I have been asked by him to serve as attorney general, the Cabinet officer who is the guardian of that revered document. I feel the full weight of this responsibility. If confirmed by the Senate, I pledge to you and to my fellow citizens that I will faithfully execute my duties as attorney general of the United States of America.

I will do so by adhering to the precepts and principles of the Constitution. And I will do so in a fair, just, and independent manner. This is the fourth time I have come before the Senate for confirmation to a position in law enforcement. I served almost 30 years as a prosecutor, judge, and senior official within the Department of Justice.

President-elect Obama and Vice President-elect Biden asked me to assume this responsibility because they know I will fight terrorism with every available tool at my disposal and reinvigorate the department's traditional missions of protecting public safety and safeguarding our precious civil rights.

I accept their trust in me and, with your support, I intend to lead an agency that is strong, independent, and worthy of the name the Department of Justice. Now, I could not have arrived at this moment without the sacrifice and example of so many others.

I begin, of course, by recognizing the support of my family who you've just met. My wife Sharon, a respected professional in her own right, has put up with a lot over the years because of my demanding work. And she has done so with the love and grace that characterizes all that she does.

Thank you, sweetheart.

My wife is a tremendously talented physician. But the best example of her skills and qualities as a person are on display not in her doctor's office but in our home in the form of our three children. They make our lives infinitely richer, and I thank them for their love and patience.

It wasn't until I was a parent myself that I truly appreciated all that my parents did for me. My father, only 12 years old when he came to this country from Barbados, worked hard throughout his life to teach my brother and me about the promise of America. He and my mother made sure that we never wasted the opportunities presented to us especially in education in the excellent New York City public school system.

My brother grew up to be a Port Authority police officer and a successful businessman. And I grew up to arrive at this humbling moment. I'm glad my mother is here to see had I day. I know my father would be proud.

In addition to my family, there are others who have inspired and guided me. Sitting here today, the very day that civil rights leader, Martin Luther King, would have celebrated his 80th birthday, I acknowledge the debt that I owe him and thousands of other Americans, black and white, who fought and died to break the back of segregation.

Dr. King devoted himself to breathing life into our Constitution. I feel privileged just to stand in his shadow and hope that, as attorney general, I can honor his legacy.

Now, one of those who served on the front lines of the struggle for equality was my late sister-in-law, Vivian Malone Jones, who integrated University of Alabama in 1963. In an atmosphere of hate almost unimaginable to us today, she and fellow student James Hood faced down Governor George Wallace and in the presence of then deputy attorney general, Nicholas Katzenbach, they enrolled in that great university.

The very next day, NAACP leader, Medgar Evers, was gunned down in his driveway in Mississippi. But Vivian never considered backing down. She went to class despite the ever-present danger late saying simply that she decided not to show any fear. She never did throughout her too-short life.

In a career in public service that began the civil rights division in the Department of Justice and ended as an advocate for environmental justice, she showed me the meaning of courage and perseverance.

Finally, I want to acknowledge the thousands of career employees at the Department of Justice. They have been my teachers, my colleagues, and my friends. When I first joined the department's public integrity section in 1976, they showed me what it meant to serve the people.

When I was the United States attorney in the District of Columbia, they worked beside me to fight drug crimes, drug trafficking, and public corruption. And when I was deputy attorney general of the United States, they were my troops in the daily battle for justice.

These career professionals are not only the backbone of the Department of Justice, they are its soul. If I am confirmed as attorney general, I will listen to them, respect them, and make them proud of the vital goals we will pursue together.

In fact, if I have the honor of becoming attorney general, I will pursue a very specific set of goals. First, I will work to strengthen the activities of the federal government and protect the American people from terrorism. Nothing I do is more important. I will use every available tactic to defeat our adversaries, and I will do so within the letter and the spirit of the Constitution.

Adherence to the rule of law strengthens security by depriving terrorist organizations of their prime recruiting tools. America

must remain a beacon to the world. We will lead by strength. We will lead by wisdom. And we will lead by example.

Second, I will work to restore the credibility of a department badly shaken by allegations of improper political interference. Law enforcement decisions and personnel actions must be untainted by partisanship.

Under my stewardship, the Department of Justice will serve justice not the fleeting interests of any political party.

Attorney General Mike Mukasey and Deputy Attorney General Mark Filip have done much to stabilize the department and restore morale. For that, Judges Mukasey and Filip deserve the gratitude of the American people, and they have my personal gratitude and thanks. But there is more work to do.

Third, I will reinvigorate the traditional missions of the Justice Department. Without ever relaxing our guard in the fight against global terrorism, the department must also embrace the historic role in fighting crime that it has, in protecting civil rights, preserving the environment, and ensuring fairness in the marketplace.

To that end, the Justice Department must wage an aggressive effort against financial fraud and market manipulation. As taxpayers are asked to rescue large segments of our economy, they also have a right to demand accountability for wrongdoing that only the Department of Justice can provide.

At the same time, we must rededicate ourselves to the fight against violent crime which tears at the fabric of our neighborhoods.

The Justice Department must also defend the civil rights of every American. In the last eight years, vital federal laws designed to protect rights in the workplace, the housing market, and the voting booth have languished. Improper political hiring has undermined this important mission. That must change. And I intend to make this a priority as attorney general.

The Department of Justice must also protect American consumers. We need smart anti-trust enforcement to prevent and punish unlawful conduct that hurts markets, excludes competition, and harms consumer welfare. The Justice Department shall also reinvigorate its efforts to protect the public in areas such as food and drug safety and consumer product safety.

And we must work actively with the EPA and other agencies to protect our environment.

In all of this, I hope to establish a full partnership with this committee and with Congress as a whole. The checks and balances in our Constitution establish a healthy tension among the three branches as each ensures that the other do not overstep their boundaries. But too often in recent years, that natural tension has expressed itself in unhealthy hostility.

President-elect Obama and I respect Congress and we respect the federal judiciary. We will carry out our constitutional duties within the framework set forth by the founders and with the humility to recognize that congressional oversight and judicial review are necessary. They are beneficial attributes of our system and of our government.

In particular, I know how much wisdom resides in this committee from your collective decades of service in government. And I'll be sure to draw upon it.

The years I spent in government taught me a lot. As a public corruption prosecutor, I took on powerful interests to ensure that citizens receive the honest services of the people who serve them. As a judge, I used the awesome power I had to deprive criminals of their liberty, a power that weighs heavily on anyone who exercises it.

And as a high-ranking official in the Department of Justice, I faced a series of complex, time-sensitive, prosecutorial, and

administrative decisions every time I stepped inside the building.

Now, my decisions were not always perfect. I made mistakes. I hope that enough of my decisions were correct to justify the gratifying support that I have received from colleagues in law enforcement in recent weeks. But with the benefit of hindsight, I can see my errors clearly and I can tell you how I learned from them.

I can also assure you that I will bring to the office the principle that has guided my career. That the Department of Justice, first and foremost, represents the people of the United States not any one president, not any political party, but the people of this great country.

I learned that principle in my first days at the department when I sent corrupt public officials from both parties to jail. It guided my work as U.S. attorney for the District of Columbia when I prosecuted one of the most powerful members of my own party at the very time he held in his hands a top legislative initiative of my own president.

And it guided my service as deputy attorney general when I recommended independent counsel investigations not just of members of the Cabinet but of the very president who appointed me and in whose administration I proudly served.

None of those calls was easy, but I made them because I believe they were the right decisions under the law. If confirmed as attorney general, I pledge to you that the same principle will guide my service and inform every decision that I make.

I have spent most of my career at the Department of Justice and I cherish it as an institution. Its history, its spirit, its people, and its sense of integrity are unmatched within the federal government. If I have the honor of serving as attorney general, I will uphold the trust that you have placed in me.

I will do so by ensuring the department is an instrument of our great Constitution but more than that, the servant of the American people.

Thank you very much.

LEAHY:

Thank you, Mr. Holder. We'll have the first round of ten-minute questions.

Water boarding has been recognized to be torture since the time of Spanish Inquisition. The United States has prosecuted American soldiers for using this technique. Earlier in the last century, they prosecuted Japanese soldiers for using it on Americans in World War II. But the two most recent nominees to serve as attorney general of the United States hedged on the question of water boarding.

They would not say that if an American were water boarded by some other government or terrorist anywhere in the world, whether it would be torture and illegal. They maintained it would depend upon the circumstances.

Do you agree with me that water boarding is torture and illegal?

HOLDER:

If you look at the history of the use of that technique used by the Khmer Rouge, used in the inquisition, used by the Japanese and prosecuted by us as war crimes. We prosecuted our own soldiers for using it in Vietnam.

I agree with you, Mr. Chairman, water boarding is torture.

LEAHY:

Do you believe that other world leaders would have the authority to authorize the torture of United States citizens if they deemed it necessary for their national security?

HOLDER:

No, they would not. It would violate the international obligations that, I think, all civilized nations have agreed to at the Geneva Conventions.

LEAHY:

Do you believe that the president of the United States has authority to exercise a commander-in-chief override and immunize acts of torture? I ask that because we did not get a satisfactory answer from Former Attorney General Gonzales on that.

HOLDER:

Mr. Chairman, no one is above the law. The president has a constitutional obligation to faithfully execute the laws of the United States. There are obligations that we have as a result of treaties that we have signed -- obligations, obviously, in the Constitution. Where Congress has passed a law, it is the obligation of the president, or the commander-in-chief, to follow those laws.

The president acts most forcefully and has his greatest power when he acts in a manner that's consistent with the congressional intent -- consistent with congressional intentions and directives.

If one looks at the various statutes that have been passed, it is my belief that the president does not have the power that you've indicated.

LEAHY:

The reason I asked that, just yesterday, here in the "Washington Post," you see it says, "Detainee tortured," says U.S. official. Trial overseer cites abusive methods against 9/11 suspect.

Now, that's the convening authority for the military commissions, a top Bush administration official, in charge of deciding whether to bring Guantanamo Bay detainees to trial. Wouldn't refer an important case for trial, because, as she said, we tortured the detainee involved.

I'm glad to see we now have a nominee for attorney general who is unequivocal on this.

Now, one substantive criticism I've heard of your position on important issues stems from a brief you signed onto before the Supreme Court decided the case of District of Columbia v. Heller. The Supreme Court has now clarified the law in that area.

And for those who may wonder, the Heller case, the Court recognized the personal right to bear arms guaranteed in the Second Amendment of the Constitution. It expressly held for the first time that the Bill of Rights includes this right among its guarantees of individual liberty and freedom.

As I told you, Mr. Holder, I am a gun owner, as a very large percentage of people in my state of Vermont are. My own home in Vermont, I enjoy target shooting. And before anybody asks, our nearest neighbor is over a half-a-mile away, and it's our son.

But do you accept and understand that the Second Amendment guarantees an individual right to bear arms?

HOLDER:

I understand that the Supreme Court has spoken. The amicus brief that I signed on to recited the history of the Justice Department's positions that had been taken prior to the Heller decision.

Also expressed the belief in that amicus brief, that was signed by a number of other Justice Department officials, that it was our view, looking at the Second Amendment and looking at the applicable case law, that the Second Amendment did not confer an individual right.

The reality is now that the Supreme Court has spoken. And that is now the law of the land.

I respect the Supreme Court's decision. And my actions as attorney general, should I be confirmed, will be guided by that Supreme Court decision.

LEAHY:

Last year, for the first time in our history, this committee reported media shield legislation, a bipartisan 15-to-four vote in the Senate, in the committee.

We -- this legislation provided qualified privilege. It allows journalists to maintain confidentiality of their sources. And reasonable exceptions, of course, prevent terrorism and protect national security and personal safety.

If you are confirmed as attorney general, will you work with both Republicans and Democrats on this committee on a federal media shield law?

HOLDER:

Yes, I will, Mr. Chairman. It is my belief that a carefully crafted law to shield the press in the way that you have described is appropriate.

Now, there are concerns that I'm sure will be expressed by people in the Justice Department, and I want to talk to the career folks in the department.

I'd also want to ensure that, with the passage of any law, that we would still have the capacity to protect the national security and to prosecute any leaks of intelligence information that might occur.

But with those caveats, and with the ability to interact with people in the department, I am in favor of the concept of such a law.

LEAHY:

Now, you're very familiar with the Justice Department's Office of Legal Counsel. They're supposed to provide fair, impartial, independent legal advice for the executive branch.

Now, the press reports and our own hearings have shown that they have -- it's been used most recently to advance extreme theories of executive power. We've seen it in torture, warrantless wiretapping, and so on.

Will you, if you're confirmed as attorney general, commit to undertake a comprehensive review of all OLC opinions currently in effect, and to correct and withdraw any that have what appear to be incorrect or problematic analyses? Understand, these opinions really carry, de facto, the weight of law throughout the executive branch.

HOLDER:

Yes. I will make that pledge.

It is important that these OLC opinions -- which are so important, as you described -- that they truly reflect what the law is, that they reflect our values. And I want to ensure that any OLC opinions that are in effect are consistent with those two purposes.

And I'll do so respecting the fact that OLC respects the notion of stare decisis, that we don't change OLC opinions simply because a new administration takes over.

The review that we would conduct would be a substantive one and will reflect the best opinions of probably the best lawyers in the department as to where the law should be, what their opinion should be. It will not be a political process. It will be one based solely on our interpretation of the law.

LEAHY:

Thank you.

Now, some senators, following -- and including commentators like Karl Rove -- have spoken extensively about your role in the pardon of fugitive Mark Rich at the end of President Clinton's second term. And I was very critical of that pardon at the time, notwithstanding the president's constitutional right to pardon people. Probably been critical of a number of different presidents' use of that constitutional right.

You have also publicly said you wish you'd handled the issue differently. Details of this matter have been exhaustively hashed out in several congressional hearings. The Congress has spent millions of dollars looking into this.

You appeared voluntarily and repeatedly to testify on the matter -- something we haven't seen from officials of the current administration.

So, I want to give you a chance to address the suggestion by some that, based on your actions, you are not independent, you would not be able to say "no" to a president that might nominate you. And I have a two-part question to you.

How do you respond to those that say the Mark Rich pardon shows you do not have the character to be an independent attorney general? And what did you learn from that experience?

HOLDER:

As I indicated in my opening statement, I made mistakes. And my conduct, my actions in the Rich matter was a place where I made mistakes.

I have never said anything other than that. I appeared before two congressional committees and said nothing but that.

I've accepted the responsibility of making those mistakes. I've never tried to hide. I've never tried to blame anybody else.

What I've always said was that, given my -- given the opportunity to do it differently, I certainly would have.

I should have made sure that everybody, all the prosecutors in that case, were informed of what was going on. I made assumptions that turned out not to be true. I should have not spoken to the White House and expressed an opinion without knowing all of the facts with regard to that matter.

That was and remains the most intense, most searing experience I've ever had as a lawyer. There were questions raised about me that I was not used to hearing.

I've learned from that experience. I think that, as perverse as this might sound, I will be a better attorney general, should I be confirmed, having had the Mark Rich experience.

I've learned that I have to ensure that there is full consultation with all the prosecutors who are involved in those kinds of matters. I can't assume that that, in fact, will happen. I have to make sure that it happens.

I think we have to work to improve the pardon process within the Department of Justice. It appears that at the end of every administration, there seems to be a deterioration in the process. And so, I think we have to work on the Justice Department side to make sure that the rules and regulations are followed.

It was something that I think is not typical of the way in which I've conducted myself as a careful, thoughtful lawyer. As I said, it is something where I made mistakes, and I learned from those mistakes.

LEAHY:

And, of course, the pardon was issued by President Clinton, not by you.

But what I want to do -- and I have talked this over with Senator Specter -- obviously, Senator Specter is next. I will then recognize senators by seniority back and forth in the usual way, if they are here. If a senator misses their turn, then they would be put in the next time they appear.

Senator Specter?

SPECTER:

Thank you, Mr. Chairman.

Mr. Holder, pursuing the issue of the Rich pardon, you are a high-level professional, outstanding record. No doubt about your professional judgment. And the comment that it's a mistake is one way of approaching it.

But when you take a look at the hard facts, it's a little hard for me to see how you came to the conclusion you did, even conceding the fact that none of us is perfect.

In the Rich matter, he was charged with trading with the enemy. He reached a deal with the Khomeini regime during the Iranian hostage crisis to purchase Iranian oil in exchange for arms, automatic rifles and handheld rockets. He was involved in trading with the Soviet and Iranian oil to the apartheid government, reprehensible apartheid government, in exchange for Namibian uranium, which was sold back to the Soviet Union, reportedly involved with Castro's efforts to escalate its nuclear war program in 1991, and with respect to a uranium deposit in western Cuba.

He had contributed very large sums to the Democratic Party -- \$867,000 -- to the Clinton Library \$450,000, \$63,000-plus to others.

And in this context, the House committee found that you recommended Jack Quinn, had told Jack Quinn, who was former White House counsel, he would not have to provide a copy of the petition, that he could go directly to the White House, which circumvented the normal pardon procedures.

And you had the pardon attorneys opposed to it. Margaret Love said "no."

The House committee came to these conclusions. The preponderance of the evidence indicates that Eric Holder was deliberately assisting Quinn with the Rich petition, and deliberately cut the rest of the Justice Department out of the process to help Quinn obtain the pardon for Mark Rich. This conclusion is supported by an e-mail sent by Quinn to Kitty Behan, and others, three days before Quinn's meeting with Holder on November 21st.

And this is the confirmation e-mail. Subject, Eric, quote, spoke to him last evening. He says, go straight to the White House. Also says timing is good. And SHD -- should get in soon. Will elaborate when we speak.

Now, I've had some experience with fugitives. And when you deal with a fugitive, it seems to me you focus on an extradition warrant.

Given the background of this man, it's hard to brush it off, it seems to me, as a mistake. The guy had a reprehensible record. The guy was a fugitive.

The indicators are, our House finding, that you were very heavily involved, and yet you testified you were only casually involved -- the question of candor on that comment. And then you had a president who obviously wanted to grant a pardon.

SPECTER:

Now, if this were some underling or somebody who wasn't too bright, or wasn't too experienced, you'd slough it off as a mistake. But given your experience and your background and your competency, and the surrounding circumstance of President Clinton looking for a cover, how do you -- how do you explain it beyond simply "It's a mistake"?

HOLDER:

Well, I don't mean to minimize what I did by calling it a mistake, or mistakes, in the fact that I take what I did seriously, and I've expressed regret for what I did consistently.

I would not take as gospel everything that is contained in that House report. And we can certainly talk about the various things that they have said. I dispute...

SPECTER:

Well, what do you disagree with?

HOLDER:

Well, for instance, this notion that I recommended Mr. Quinn to the gentleman that I was sitting next to at a dinner. I mean, I think first...

(CROSSTALK)

SPECTER:

Well, what did happen?

HOLDER:

Well, first there's the matter of fundamental fairness. I voluntarily appeared before that committee and was never asked that question. And yet that appeared in the report.

If you look at even the material that's contained in that report, you will see that after I supposedly made this recommendation to a person who I did not know -- and according to the report I said, "You go hire a lawyer; that person comes to me; and we'll work it out." Now, I as deputy attorney general, according to this report, would have said to a perfect stranger, "You come to me with a lawyer, and we'll work it out." I don't know what...

SPECTER:

What happened as to Quinn? OK, if you weren't asked about. Did you recommend Quinn? What are the facts, aside from what the House says?

HOLDER:

I did not recommend Mr. Quinn.

And, again, if you look at the report you will see that the people who were trying to determine who a lawyer would be for Mr. Rich spent six months, interviewed a whole host of people after this dinner that I attended, before they decided on the representation. They interviewed a number of people in addition to Mr. Quinn before they made that decision.

SPECTER:

Well, you refer to a dinner. There has been a report that at that dinner you pointed to Quinn as a person to represent Rich. Is that not true?

HOLDER:

That is not correct.

SPECTER:

What is correct?

HOLDER:

I had a conversation with a gentleman, and he asked about what happens if somebody has a problem with the Justice Department. And I think, as best as I can remember, all I did was explain to him how the process worked, that there were levels of review -- levels of appellate review, for lack of a better term -- review within the department. If somebody has an issue with somebody in the field, there are measures that you can take with the person in the field and that the Justice Department in Washington, D.C., has ultimate responsibility for the conduct of the Justice Department, including those parts of the department that are the field.

SPECTER:

Are you saying that Quinn's name never came up?

HOLDER:

No, it did not.

And if you look at the minority component of the report, there is some question as to whether or not the gentleman, whose name I now remember, Mr. Kecks (ph), even said what the majority says that he did say.

SPECTER:

Is it true that you told Quinn after he was in the case that he did not have to provide you with a copy of the petition?

HOLDER:

No, I think if you're referring to Mr. Quinn's e-mail that says I told him to go straight to the White House, that did not occur.

SPECTER:

Well, there's a separate point, a separate point that Quinn testified to that you said in response to his offer to provide a copy of the Rich pardon petition that you said you didn't have to. It goes to the issue as to whether anybody else in the department would've known about it.

HOLDER:

Yes, I'm sorry. Now I understand what you're -- yes. At a meeting that we had, I believe in November, Mr. Quinn indicated that that's what I told him after we'd had a meeting on something else.

I don't remember that conversation, but I've never disputed that I might have said that to Mr. Quinn because I worked under the assumption that was true that pardon applications that were filed in the White House were routinely sent to the Justice

Department. The White House sent matters for pardons -- referrals for pardons -- to the Justice Department because they are supposed to originate with the pardon attorney at the Justice Department.

SPECTER:

How do you explain this e-mail -- and I acknowledge it's not your e-mail, but it's a contemporaneous e-mail which Quinn sent saying, corroborating at least as far as he's concerned your statement "Go directly to the White House; circumvent the Department of Justice." How do you explain that?

HOLDER:

It's difficult for me to explain that. I never told Mr. Quinn to go straight to the White House. That would've been, in some ways, illogical given the fact that things that went to the White House would come to the Justice Department in any case.

I don't know what Mr. Quinn -- where he got that from. I don't know, you know, a conversation I had with him he misinterpreted something that I said. But I never told him go straight to the White House with that pardon application.

SPECTER:

Were you aware, Mr. Holder, of the atrocious record that Rich had in dealing with Khomeini and the Iranians at an (inaudible) nation and arms in exchange for oil in Oracas (ph)? Were you aware of this kind of a record this man had?

HOLDER:

No, I was not.

And that was one of the mistakes that I made. I did not really acquaint myself with his record. I knew that the matter involved -- it was a tax fraud case; it was a substantial tax fraud case. I knew that he was a fugitive. I did not know a lot of the underlying facts that you have described. And as I said, that was a mistake.

SPECTER:

One last question on this round...

LEAHY:

I'll give you extra time for that, but that will -- I am going to try to keep close to the time on this. Then, go ahead.

SPECTER:

One last question: When the pardon attorney, Margaret Love, said "Don't do it," did you ask her why she said that, which would've been an avenue to find out what an atrocious record this man had?

HOLDER:

Well, senator, with all due respect, Margaret Love was not the pardon attorney at the time that this matter was being considered. And the pardon attorney who was present at the time, Mr. Adams, never expressed an opinion about this, again, because he didn't have the material in front of him.

SPECTER:

I'll come back to this.

LEAHY:

Senator Kohl?

KOHL:

Thank you, Mr. Chairman.

Mr. Holder, you've been selected by the president-elect for a very important position, and for that you must be very grateful to him personally. But as we know, once you are confirmed you will not be his lawyer but the American people's lawyer.

Your role among cabinet members is unique. Your first duty will be to the Constitution, to the rule of law and not to the president. In the minds of many people, Attorney General Gonzales stepped over that line and was perceived too much as the president's lawyer and not the people's.

One of your top priorities will be to restore the integrity of the Justice Department. Because of the U.S. attorney's firings and other scandals, the American people came to believe that the department's activities from law enforcement to hiring were driven too much by politics.

How can you assure us that you are the right person to restore the independence of the Justice Department, especially in light of the questions raised by your critics that you were not sufficiently independent of the White House in the Clinton administration?

HOLDER:

Senator, everything that I owe as a professional I owe to the Department of Justice. It is an institution that I love. I came into the department as a bright young lawyer, a fresh young lawyer out of Columbia University, into the honors program. I had the pleasure of working with the best lawyers, I think, in the world. I learned how to be a lawyer at the Justice Department.

I understand that the attorney general is different from every other cabinet officer. Though I am a part of the president's team, I am not a part of the president's team in the way that any other cabinet officer is. I have a special and unique responsibility.

There has to be a distance between me and the president. The president-elect said when he nominated me that he recognized that, that the attorney general was different from other cabinet officers.

I think if you look at my record, if you look at my career and the decisions that I have made, I have shown that I have the ability and, frankly, the guts to be independent of people who have put me in positions.

President-elect Obama -- President Obama -- is not, I expect, going to ask me to do anything that would compromise what I should be doing as attorney general. But I want to assure you and the American people that I will be an independent attorney general. I will be the people's lawyer.

KOHL:

In light of what you just said, are you prepared if some issue comes up that is a matter of basic constitutional principles that you differ with the president on that you will resign your job?

HOLDER:

I do not think that that is a situation that I'll face. We have a president-elect who is a brilliant constitutional lawyer, a person with a great moral compass, a person who I think will take criticism and advice. And I would think that if we had a constitutional problem as significant as the one that you are describing in your hypothetical that we would somehow work it through.

If, however, there were an issue that I thought were that significant that would compromise my ability to serve as attorney general in the way that I have described, that as the people's lawyer, I would not hesitate to resign.

KOHL:

Mr. Holder, for decades this country has been looked up to around the world for its unwavering commitment to human rights and the rule of law. There is a growing consensus that the detention center at Guantanamo Bay has tarnished that image.

While the past two attorneys general, the current secretaries of defense and state, and the president himself have publicly said that they would like to close Guantanamo, no steps as yet have been taken.

Many of us were encouraged by press reports which suggest that a change will occur in this next administration. Shortly after taking office, the president-elect will reportedly issue an order to close the prison, but it does remain unclear how this will be done and how long it will take.

Can you give us some indication about how you feel, or what your priorities will be, how long you believe it will take, and what we will do with those detainees?

HOLDER:

Yes, senator, Guantanamo will be closed.

The president-elect during the campaign made that promise. Steps are being taken as we speak to look at the manner in which that can occur.

I will tell you this will not be an easy task. The physical closing of the facility is something that can be done relatively quickly. The question is, what will we do with the people who are there now -- roughly, I guess, 250 or so people?

To responsibly close the facility, I think that we have to understand who these people are, make an independent judgment of who they are based on an examination of the records that exist down there, so that we can treat them in an appropriate way.

I think substantial numbers of those people can be sent to other countries safely. Other people can be tried in a jurisdiction and put in jail. And there are possibly going to be other people who we're not going to be able to try, for a variety of reasons, but who nevertheless are dangerous to this country. And we're going to have to try to figure out what we do with them.

But I think that review that we'll have to go through to figure out who these people are and in what categories they fit will take an extended period of time. And I think that is the thing that will prevent us from closing Guantanamo as quickly as I think we would like.

But I want to assure the American people that Guantanamo will be closed.

KOHL:

Mr. Holder, while the president and the vice president have called them "enhanced interrogation techniques" or "special measures," as the facts have leaked out we now know that the White House authorized the abuse of prisoners in our custody. The administration admitted to using waterboarding, and press reports have suggested that sleep deprivation, extreme temperatures and other abusive techniques have also been authorized.

This administration, of course, has taken a different view with respect to their legality. They have maintained that they were advised by the Justice Department that all of the approved techniques were legal. They have had the backing of three attorneys general. According to press reports, former Deputy Attorney General James Comey reportedly said that the administration would be, quote, "ashamed" when the world eventually learned of these legal opinions.

Will you put an end to the use of abusive interrogation techniques? What is your description of what they are? What can we hope to expect from you?

HOLDER:

Our Justice Department will adhere to the values that have made this nation great. It is the intention of the president-elect, it is my intention, to make sure that we have interrogation techniques that are consistent with who we are as Americans so that we don't do things that will serve as a recruiting tool for people who are our enemies.

The decisions that were made by the prior administration were difficult ones. It is an easy thing in some ways to look and in hindsight be critical of the decisions that they made.

And yet, having said that, the president-elect and I are, I think, both worried, disturbed, by what we have seen, what we've heard. The pledge that he has made and that I will make is that we will make sure that the interrogation techniques that are sanctioned by the Justice Department are consistent with our treaty obligations, the Geneva Treaty obligations that we have, and will be effective at the same time.

One of the concerns that I have as I've talked to the generals and admirals who are responsible for interrogation techniques is what they have said is that some of these enhanced techniques do not necessarily produce good intelligence. And we'll want to make sure that whatever it is that we do produces intelligence that will be useful to us and help us in our fight against those who would do us harm.

KOHL:

Thank you.

One last question, and this relates to your ability to exercise your responsibilities independently of what the president may or may not like. He is reported, as you know, to have considerable skills as a basketball player.

(LAUGHTER)

KOHL:

And you have indicated to me, when we met in my office, that you also are a person of considerable skill.

In the event -- in the event, Mr. Holder, he invites you to the gym for a little one-on-one, will you promise us and the American people that you will do everything in your power to defeat him as badly as you can?

(LAUGHTER)

My vote depends on your answer.

(LAUGHTER)

HOLDER:

Senator Kohl, he's 10 years younger than me.

(LAUGHTER)

He plays a lot more frequently than I do. Having said that, I've got a New York City game.

(LAUGHTER)

I come from the city that produced Connie Hawkins, Kareem Abdul Jabbar, Nate "Tiny" Archibald. I learned how to play ball in P.S. 127 in Queens. If you give me a little time and a little space to get back in shape, I think I could hang with him.

(LAUGHTER)

I don't think I'm ever going to be in a position to beat him nor do I think that would be a wise thing to do.

(LAUGHTER)

KOHL:

Well said, sir.

HOLDER:

Thank you.

LEAHY:

I want you to know, Mr. Holder, I've been here 34 years for these hearings. That is the first time that question has ever been asked.

(LAUGHTER)

What we're going to do -- I was going to break for five minutes at this point. Senator Kyl has, as we all do, different things he's supposed to be at. So to accommodate him, what we'll do is we'll do his round and then we're going break for about five minutes and then come back.

Senator Kyl?

KYL:

Thank you, Mr. Chairman. If that's all right with you, Mr. Holder -- and by the way, I think Herb may just be look for some new talent for the bucks. Be careful there.

(LAUGHTER)

It's good to visit again. And I appreciated our decision in which we discussed a wide range of issues. And as I mentioned at that meeting, one of the first things I did like to do is to just have you state for the record your views and commitments you made regarding the whole series of issues that we discussed.

The first one relates to DNA. As we discussed last December, the Justice Department published regulations that require federal agencies to collect DNA samples from individuals who are arrested under federal authority and from illegal immigrants who are being deported.

The regulations require these agencies to collect DNA samples at the same time that they take fingerprints and mug shots. The Justice Department is charged with implementing and administering the new regulations. It's the department's job to ensure that the DNA samples are collected and analyzed.

Mr. Holder, if you're confirmed as attorney general, will you see to it that the new DNA regulations are enforced and that DNA samples are collected and analyzed as required under the new rules? And will you seek sufficient resources to implement the regulations?

HOLDER:

Yes, I will, Senator. The collection of that evidence is, I think, critical for crime solving. Your use of DNA evidence is often seen as a way in which people who are charged with crimes are absolved. And that certainly is a beneficial effect. But I think, too

often, people forget that the collection of this evidence is a very important crime-fighting tool.

And so I will support those regulations. I think, as you indicated, it's entirely possible that one of the things that we're going to need are additional resources to make sure that we have the capacity, the ability to do that job in the way that Congress intended.

KYL:

And I'll do my best to help to make sure Congress supports the resource requirements.

Next, capital habeas. As you know, in 2005, Congress passed an amendment that will implement the opt-in system for a faster review of state capital cases in federal courts.

The amendment requires of U.S. attorney general to review whether states are providing counsel to capital defendants. With the review of the attorney general's decision and the D.C. Circuit Court, the state of Arizona will probably be interested in submitting such a petition for review.

If you are confirmed as attorney general, will you review the state of Arizona's application in a timely manner and make a timely determination of whether Arizona is providing counsel to capital defendants and post-conviction review?

HOLDER:

I will take my obligations seriously under those regulations and look at the evidence that the states provide with me that they have complied with the regulations. And to the extent the states do, I will give the relief that is dictated by those regulations.

I want to make sure that, in fact, the resources in capital cases that the regulations call for are provided to defendants. But for states that actually do meet those requirements, I will check the necessary boxes.

KYL:

And what you stated, I think, is absolutely true. We're just interested that it doesn't drag on beyond the time that normal review process would require.

Next, we talked some about FISA. One of the amendments to FISA deals with the so-called lone wolf terrorists. These are individuals who have believed to be involved in international terrorism but who we, at least, don't have any evidence that they are actually taking orders from a particular organization.

And the provision was enacted specifically because of the FBI's previous inability to obtain a warrant to monitor Zacarias Moussaoui, the co-conspirator in the 9/11 plot who was arrested before the attacks but who could not be searched pursuant to FISA because despite his likely involvement in preparations for terrorism, agents could not link him to Al Qaida or any other group.

The lone wolf provision needs to be reauthorized by the end of this year. Will you support reauthorization of FISA's Lone Wolf Surveillance Authority?

HOLDER:

I expect that I will. There are three provisions that are up for reauthorization. What I'd like to do is examine how those provisions have worked, talk to people, investigators and lawyers, and get a sense of what it is they think has worked well with regard to those provisions, what perhaps needs to be changed.

At least a couple of those provisions were contained in a proposal that President Clinton made back in the late '90s and I went

before a couple of congressional committees seeking their institution. One of them was lone wolf and the other had to do with roving surveillance.

So I would expect that, with regard to those, I would probably be supportive of them.

KYL:

And, in fact, let me just discuss this because we discussed all three. And these are the other two.

One is the reauthorization of the Patriot Act's multi-point wiretap authority and the other is reauthorization of Section 215 of the Patriot Act.

When we discussed this, I neglected to note -- although you're probably aware -- that unlike the typical administrative subpoena, this requires a judicial approval before it's granted. First, with respect to the multi-point wiretap authority, would you support reauthorization of that?

HOLDER:

Again, I would like to have some interaction with the people who are responsible for the use of that tool. It's a very useful tool. And make sure they're satisfied with the way in which it is presently constructed. But I would expect that I would be able to support that.

KYL:

And with regard to Section 215 orders as well?

HOLDER:

That's one that I think has certainly generated more controversy, I believe, than the other two. And I think that the examination, the questions that I need to ask people in the field and who have been using that, I'd want to know as much as I possibly can.

But as I said, the tools that we have been given by Congress in FISA are important ones. And so I would look at all three of these and make the determination as to whether or not I will be able to support them. But I would expect that I would.

KYL:

We also discussed -- let's see here -- the operation streamline -- I'll tell you what. Before I ask that, we discussed the warrantless surveillance. Since that's somewhat related to this, you indicated that comments that you had made in a speech on June 13, 2008 were directed to the status of the law pre-FISA modifications from the legislative branch when Congress later -- I believe it was the next month -- modified the FISA law, there was an explicit type of search that was provided allowing warrantless monitoring of suspected communications of international terrorists predicated on the principle that the 4th Amendment gives greater leeway to intelligence investigations of foreign threats.

Do you agree with that general principle? But more importantly, in the context of our conversation, do you believe the new law is constitutional? And if confirmed, will you support its enforcement?

HOLDER:

Yes, I believe that the law is constitutional. One of the things that I think is, in some ways, regrettable is that the program -- that I've not been read into and I don't know all the dimensions of it -- but as I understand it that program is a very useful tool. It's a very essential tool for us in fighting terrorism.

I think that what was unfortunate is that we could have had that tool congressionally sanctioned at a much earlier stage. I think

that, as we saw in the Steel Seizure concurrence of Justice Jackson, the president has his greatest power when he acts consistent with congressional directives. And I think that, in this instance, that's instructive.

Had the administration come to Congress and asked for that enhanced authority many years before, I have no doubt that Congress would have granted him that tool. Having done that though and having had Congress say that this is an appropriate thing to do, I think, as I said, that is a very useful tool and one that we will make great use of.

KYL:

We discussed, in the context of illegal immigration, an operation called Operation Streamline by the Border Patrol. And there's a Department of Justice aspect to this.

Essentially, that's been utilized in two Border Patrol sectors. A third one is now underway. I specifically discussed the Yuma border sector, for example. This is a situation where repeat illegal border crossers are put in jail for 30 days, sometimes it can be more if they've committed the crime over and over and over.

And that resulted in extraordinary disincentive for them to try to cross illegally. In the Yuma border sector, for example, there's been a 93 percent reduction in border apprehensions after just two years and much of that, at least, Border Patrol attributes to this policy of jailing the people for 30 days.

However, as with so many of these other things, it requires resources. And in that regard, a lot of the resources fall on the Department of Justice side. I hope I've gotten to you already, but I promised I would get you a letter from Judge John Roll who is the chief judge for the Arizona district, in which he outlines some of the requirements for additional judges, magistrates, U.S. marshals, prosecutors, defense attorneys, as well as the hearing space and detention facilities.

And if you'd like to address all of those things individually, fine. But just as a general proposition, if you are confirmed, will you support the appointment of the additional personnel and the resources for the items that I mentioned to try to continue to expand Operation Streamline for as long as we may need that along our southern border in order to help deter illegal immigration?

HOLDER:

Senator, that was -- I did not -- I was not aware of that operation until you brought it to my attention during our meeting. I think it's actually a pretty interesting concept and, I think, one that ought to be explored and I'd want to work with you all to see if it's something that can be expanded.

I think one component of it -- at least, as I understand it. You can correct me if I'm wrong -- for an initial -- the first time a person comes across, I don't think they're jailed. I think the person is warned and then is put in jail the second time?

KYL:

It's after the first crossing. In other words, it's for repeat offenders.

HOLDER:

Repeat offenders, yes. And I think that is something that is worth looking at.

One of the things that has always worried me is that a disproportionate share of what is a national problem is borne by the states along our southern border. Resources that need to be directed to what is, in essence, a national problem are too often not sent to the place where it is really needed. The states of Arizona and the other states along that border.

So my commitment would be to try to work with you, as I think we have in the past, to try to determine what resources are

necessary and what programs would be good to try to affect a reduction in the number of illegal immigrants who come across those borders.

KYL:

I appreciate that. I just introduced your good friend and colleague, Governor Janet Napolitano, from Arizona in the Department of Homeland Security hearing. I think she and I have discussed this as well. So I look forward to the opportunity of working with both of you on trying to provide some additional deterrents to illegal border crossing.

LEAHY:

Thank you.

I might note, my friend from Arizona has raised some good points. Some of them we will probably have hearings on, especially, in renewal of legislation. I will work with Senator Kyl and senators on both sides of the aisle with that but especially these immigrations matters, senators who are from border states -- I see Senator Cornyn here and Senator Kyl and Senator Feinstein is here.

A few minutes ago -- I rely heavily on their own personal experience. Before we break, the committee has received letters of support for Mr. Holder's nomination from numerous major national law enforcement and criminal justice organizations.

Among those -- I am going to put these, without objection, put these letters into the record including the letters from the -- and these are letters in support, Mr. Holder, of your confirmation. Letters from the National Association of Police organizations, the Fraternal Order of Police, the Federal Law Enforcement Officers Association, the National Association of Assistant U.S. Attorneys, the National Sheriffs Association, the American Probation and Parole Association, the International Association of Chiefs of Police, the International Union of Police Associations, the Major Cities Chiefs Association, the National Association of Blacks in Criminal Justice, the National Association of Drug Court Professionals, the National Association of Attorneys General, the National Black Prosecutors Association, the National Crime Prevention Council, the National Criminal Justice Association, the National District Attorneys Association -- I noticed that, especially, as I was once vice president of the National District Attorneys Association -- the National Law Enforcement Officers Memorial Fund, the National Narcotic Officers Associations Coalition, the National Organization of Black Law Enforcement Executives, the National Organization of Police Officers, the National Troopers Coalition, the Police Executive Research Forum -- I think one gets the drift in these kind of -- they will be in the records.

LEAHY:

And with that, we will stand in a short recess.

(RECESS)

LEAHY:

I'm always hesitant to ask photographers to back off, but I'm going to have to ask everybody to give me a little break here.

We are -- (inaudible) to understand what is going on here. We don't have Senator Kennedy with us this morning. He's -- the Cabinet nominations for the committee he chairs. I should note that he's not only a former chairman but he served on the Judiciary Committee longer than any senator in the nation's history. It's his 46th year of service on this committee.

Now, we're also missing Senator Biden who made his valedictory address to the Senate this morning. We told Senator Biden, another former chairman of this committee, that we didn't mind him taking a drop-down position to become vice president. But we do miss him.

And the next person we're going to hear from is Senator Feinstein, the senior senator from California. She's also the new chair of the Senate Select Committee on Intelligence. She's a very good friend of all of ours.

And, Senator Feinstein, the floor is yours.

FEINSTEIN:

Thank you very much, Mr. Chairman.

And, welcome, Mr. Holder.

HOLDER:

Good morning.

FEINSTEIN:

I hope shortly we'll be calling you Attorney General Holder.

I would like to begin with something internal to the department. I want to ask you a quick question on Guantanamo.

LEAHY:

If the senator could hold just a moment so we can get rid of that feedback. And we'll start the clock again.

FEINSTEIN:

And about the use of contractors in carrying out interrogation techniques. But let me begin with this. The inspector general of the Department of Justice has, over the past year, put out four different reports which really revealed substantial politicization of the Department of Justice. The latest one just came out on January 13th. It was an investigation about allegations of politicized hiring and other improper personnel actions in the civil rights division.

It points out that a Bradley Schlossman, a political appointee in the civil rights division, had been screening applicants for career positions based on their political beliefs and had been removing disloyal lawyers from sections in the department to make way for, quote, real Americans.

The report also found that Schlossman made false statement in sworn testimony to this committee; namely, in direct response to questions the chairman put to him, the question that I put to him, and a question that Senator Schumer put to him.

My question is: Have you read this report? And if so, what actions can you take to follow up on it?

HOLDER:

I have not had a chance to read the report, Senator. And yet I have read the news accounts of it. What's contained in the report is very disturbing. The notion that the Justice Department would ever take into account a person's political affiliation or political beliefs in making hiring decisions is antithetical to everything that the department stands for and everything that I'm familiar with.

I served very proudly in the Justice Department under Republican attorneys general, Democratic attorneys general. And there was never a thought given to what your party affiliation was, what your political beliefs were in hiring, in promotion decisions.

What we have seen in that report, I think, is aberrant but is also, I think so, one of the major tasks the next attorney general is going to have to do is he has to reverse that.

FEINSTEIN:

Well, this document -- clear lying to this committee. And I believe that that's a violation of law. And I would hope that the Justice Department would take action. However you do it, I don't think we can do nothing to someone representing the government who comes before us and lies.

HOLDER:

Yes. I understand that prosecutors in the U.S. attorney's office in D.C. -- again, just based on the press reports -- actually reviewed the report and have made a prosecutive determination. If I am fortunate enough to be confirmed as attorney general, I will indicate to you that I will review that determination.

I don't know all the facts of the case. But given the findings in the inspector general's report that are consistent with what you have said, I want to know why the determination was made not to pursue charges, criminal charges.

FEINSTEIN:

Thank you very much.

I listened carefully to your answers to Senator Kohl's question about Guantanamo. I also read the speech that you made in the middle of 2008 where you very clearly stated that it should be closed. And here you said it will be closed.

Let me ask these questions about that. Do you believe military commissions are sufficient to prosecute detainees who have been declared enemy combatants and pose a danger to the national security of the United States?

HOLDER:

I don't think that the military commissions that we now have in place have all of the due process requirements that I would like to see contained in them. We have to come up with a system that will deal with those three categories of people that I described -- that I believe are contained at Guantanamo. Those who I think we can safely repatriate to other countries, those who we can try, and then deal with those who, perhaps, are too dangerous but nevertheless cannot be tried.

In trying to deal with those detainees who we will try, I think we have to examine what tools will be available to us, what forums will be available to us -- Article three courts, military courts, the possibilities exists, I suppose, that we could use military commissions. But they would have to be, I think, substantially revamped to provide the due process rights that I think are consistent with who we are as Americans.

FEINSTEIN:

Well, let me just discuss this with you. Assuming Guantanamo is closed and one of the big criticisms of Guantanamo has been that it's a hypocritical situation. One set of law applies to people at Guantanamo and another set of laws in the United States.

So assuming that the 80 or so -- well, however many detainees need to be relocated, can be relocated, we've checked with military and federal, supermax prisons and believe there is space for them. And they come to the United States. You would assume they would fall under regular federal law.

Do you agree with that?

HOLDER:

I think we want to leave our options open. I don't know exactly what system we would put in place or what system we would utilize in order to try those people. This is something that, even as we speak, that we are trying to work through as an administration in anticipation of President-elect Obama becoming President Obama.

But the one thing I can assure you and the American people and, frankly, the world is that whatever system we use, it will be consistent with our values. It will be a system that has due process guarantees. It will be seen as fair.

FEINSTEIN:

Some of us -- Senator Whitehouse, myself, other senators have just introduced a bill that is in the Intelligence Committee which would close Guantanamo within 12 months which would essentially provide for a single standard for interrogation across the United States government, namely the Army Field Manual, and prohibit of use of contractors doing interrogation.

Let me ask you about the Army Field Manual. As you know, it has been revised by the military. It is a comprehensive, thoughtful manual. It has more than a dozen different techniques. It is supported across the United States military and about 30 retired generals as being an adequate standard for the United States to use.

Do you believe that the Army Field Manual should comprise the standard for interrogation across the United States government?

HOLDER:

Well, I have been impressed in my interactions with those generals and admirals as they've discussed what they are allowed to do under the terms of the Army Field Manual, and how they don't think that the inability to do these enhanced interrogation techniques has in any way had a negative impact on, they think, their ability to get good intelligence.

So, my view is that, I think, starting with what we have in the Army Field Manual, I think that's a good place for us to start. I personally think that the techniques that are outlined there are consistent with what we are supposed to do under Common Article 3 and the other parts of the Geneva Convention.

And I'm not convinced at all that, if we restrict ourselves to the Army Field Manual, that we will in any way be less effective in the interrogation that we do of people who have sworn to do us harm.

This is something that the president-elect is considering now, and giving all components an opportunity to express their views -- not only the military, but those on the intelligence side. If there's a contrary view, we want to give them an opportunity to make their case.

But it is my view, based on what I've had an opportunity to review and what I've been exposed to, that I think the Army Field Manual is adequate.

FEINSTEIN:

Currently, all interrogation is done by contractors. CIA interrogation is done by contractors.

And I wrote a letter to General Mukasey in the early part of last year, challenging this, because all inherently governmental activities under the law should be carried out by government employees. He wrote back saying that these contractors were not covered under that section of the law.

I have a real issue with this.

Have you had an opportunity to look at that? And can you comment?

HOLDER:

I'm not up to speed on that. But let me say this. The concern that you expressed, I think is a very legitimate one.

I think, across the board, and especially when it comes to law enforcement functions interpreted pretty broadly, you want to

have employees of our government who are conducting and doing law enforcement activities. This is not something that you want to farm out, that you want to give to people who are not sworn.

It doesn't mean that these people can't be trained and everything. But I think that, when it comes to core law enforcement responsibilities -- and interrogation, I would think, would be one of those -- I would like to, to the extent that is possible, restrict that.

FEINSTEIN:

There is...

LEAHY:

Thank you.

FEINSTEIN:

There is -- oh, my time is up. So short.

Thank you, Mr. Holder.

Thank you, Mr. Chairman.

LEAHY:

Thank you, Senator Feinstein.

And I want to recognize next the senior senator from Utah, Senator Hatch, who is a longtime friend -- we have served here for decades -- and also former chairman of the committee. He has been a consistent supporter of the work of the Department of Justice.

And Senator Hatch, it's yours.

HATCH:

Well, thank you, Mr. Chairman.

Congratulations, Mr. Holder, on this appointment. Welcome back to the Judiciary Committee.

This is the fourth time that you have come to the Senate for confirmation, so far without a single negative vote. We just have to see if that continues, that trend.

Candidly, there are some real issues and concerns, as you know. We've chatted about them. And you're chatting about them here. And I say that as someone who has said that I'm inclined to support your nomination.

Now, in a speech last year, you stated, "I never thought I would see that a president would act in direct defiance of federal law by authorizing warrantless NSA surveillance of American citizens. This disrespect for the law is not only wrong, it is destructive in our struggle against terrorism."

Now, do you believe that the president has -- whoever is president of the United States -- has inherent authority under Article 2 of the Constitution to engage in warrantless foreign intelligence surveillance? Or, in your opinion, does FISA trump Article 2?

HOLDER:

Senator, no one is above the law. The president has the constitutional obligation to make sure that the laws are faithfully executed.

In rare instances where Congress passes a law that is obviously unconstitutional -- if, for instance, Congress were to pass a law that the secretary of defense should be the commander-in-chief, or that women would not have the right to vote -- I think that the president in that instance would have the ability to act contrary to a congressional dictate.

But the president has his power at its maximum, at its zenith, when he acts consistent with congressional direction. Now, when it comes to the FISA statute, there's an exclusivity provision in the FISA Act, that essentially says, as Congress has expressed, this is the exclusive way in which that kind of surveillance should occur.

My speech was taking the administration to task for not following the dictates of FISA.

As I indicated, I think, in response to a previous question, I think that, had the administration worked with Congress, as we are pledging to do, that that tool -- a very valuable tool, a very valuable tool -- could have been in the arsenal of the administration without any question about its legality.

HATCH:

How do you -- how do you reconcile your analysis of the Terrorist Surveillance Program with the longstanding precedents of *Truong* and *Keith* before an intelligence surveillance court reviews a decision in the *In re Sealed Case*, and the recent Second Circuit decision in the *Wadi al-Haj* case?

HOLDER:

Senator, I can't hear you too well.

HATCH:

Well, in the recent Second Circuit decision in the *Wadi al-Haj* case, I think it is.

HOLDER:

I'm sorry, sir. I didn't hear the whole question.

HATCH:

Well, I asked you, how do you -- I'm sorry. Maybe I can pull this thing forward.

How do you recognize your analysis of the TSP, Terrorist Surveillance Program, with these longstanding precedents, from *Truong*, *Keith*, *In re Sealed* and the *Wadi al-Haj* case?

HOLDER:

Well, senator, it's my belief that the statute lays out the means by which the president has the power, the executive branch has the power to do that type of surveillance.

It is, as I said, a very valuable tool. It is one that sets out very explicitly the means by which this can be done.

It seems to me that, it's incumbent upon anybody in the executive branch who is engaged in that kind of surveillance to be mindful of the dictates of FISA, and then to perform in that way.

HATCH:

Well, let me just ask this question. As the former deputy attorney general during the Clinton administration, were you part of the decision-making process of DOJ that authorized the warrantless search of the residents of spy Aldrich Ames, a U.S.

citizen, in 1993?

Do you believe that search at that time was illegal?

HOLDER:

Senator, I don't know all of the circumstances under which that occurred. I was not at Main Justice in '93. I was the U.S. attorney in D.C., so I didn't participate in '93, if that's when it occurred. I didn't participate in that decision. And I'm not familiar with all that might have happened.

I don't know whether there were exigent circumstances. I don't know exactly what happened in connection with that.

HATCH:

OK. But back to our prior point, is the president's inherent authority under the Constitution -- can that be limited by a statute?

HOLDER:

The president's inherent authority. Well...

HATCH:

Right.

HOLDER:

... it's...

HATCH:

I mean, you're relying on the statute as though that's binding on Article 2 of the Constitution.

HOLDER:

Well, the president obviously has powers under the Constitution that cannot be infringed by the legislative branch. That's what I was saying earlier.

There are powers that the president has, and that have been delegated to him that he has. And in the absence -- Congress does not have the ability to say, with regard to those powers, you cannot exercise them.

There's always the tension in trying to decide where that balance is struck. And I think we see the best result when we see Congress interacting with the president, the executive branch interacting with the legislative branch, and coming up with solutions...

HATCH:

That still doesn't negate the fact that the president may have inherent powers under Article 2 that even a statute cannot vary.

HOLDER:

Well, sure. The...

HATCH:

Do you agree with that statement?

HOLDER:

Yes, there are certain things that the president has the constitutional right, authority to do, that the legislative branch cannot impinge upon.

HATCH:

OK.

Now, the FISA Amendments Act of 2008 included important civil liability protections for those providers who assisted the government with the Terrorist Surveillance Program in the aftermath of the September 11th terrorist attacks.

Now, according to this act, in order for the liability protections to apply, the attorney general must first file a certification with the court. Now, last fall, Attorney General Mukasey filed the appropriate certifications with the court. You're aware of that. OK.

Now, do you believe that those private partners who assisted the government should be given civil liability protection?

HOLDER:

Well, that is now contained in a statute. The duty of the Justice Department is to defend statutes that have been passed by Congress, unless there is some very compelling reason not to.

President-elect Obama was against the -- immunity was granted to those ISPs, Internet service providers -- but nevertheless voted for the statute that contained that immunity. It would seem to me that unless there are compelling reasons, even given the opposition, unless there are compelling reasons, I would not -- I don't think that we would reverse course.

HATCH:

OK. So, if confirmed as attorney general, you will honor the certifications by Attorney General Mukasey.

HOLDER:

Yes, I believe that we would. Obviously, we have to look at if there are changed circumstances, if there is some basis to change that determination. But in the absence of that, I don't think we would.

HATCH:

Well, thank you.

There have been numerous calls for prosecution of various individuals, ranging from the vice president to attorneys at the Office of Legal Counsel, for their support or approval of the Terrorist Surveillance Program and the CIA's interrogation and detention program.

Now, if confirmed as the attorney general, do you intend to undertake, order or support a criminal investigation of those individuals, including those individuals at the Office of Legal Counsel, who were involved in drafting legal opinions on these matters? Or are you willing to acknowledge that there can be differences of opinion, but they acted in accordance with their best good faith efforts under the circumstances at the time?

HOLDER:

Well, senator, no one is above the law. And...

HATCH:

I'll agree with that.

HOLDER:

We will follow the evidence, the facts, the law, and let that take us where it should.

But I think President-elect Obama has said it well. We don't want to criminalize policy differences that might exist between the outgoing administration and the administration that is about to take over. We certainly don't want to do that.

HATCH:

But would you consider these policy differences, or policy decisions?

HOLDER:

Well, one of the things I think I'm going to have to do is to become more familiar with what happened that led to the implementation of these policies. I've not been read into a variety of things that I will be exposed to, should I become attorney general. And that would, I think, better inform any decision that I would make in that regard.

HATCH:

OK.

Let me just switch the subject -- I've got just another 40 seconds -- and explore your position -- well, let me just start with this.

I want to ask you about the constitutional right to keep and bear arms. As you know, that's a matter of great concern. I've always been baffled by those who claim they see rights that are not in the Constitution at all, but cannot seem to see the rights that actually are expressly written there.

You have in the past, both as deputy attorney general and private citizen, stated your belief that the Second Amendment confers only a collective right to keep and bear arms, rather than an individual right.

Last year you signed a friend of the court brief that took this position before the Supreme Court in the District of Columbia v. Heller case.

Now, the Supreme Court rejected that position and held that the Second Amendment right to keep and bear arms is an individual right.

In your -- in this hearing, who is right, you or the Supreme Court?

HOLDER:

In the ballgame that we...

HATCH:

That sounds like an unfair question...

HOLDER:

No, no. No, it's fair. In the ballgame...

HATCH:

... (inaudible) but I just want (inaudible) point.

HOLDER:

... that we call our judicial system, the Supreme Court gets to be the umpire. They call the balls and strikes.

They made the determination that the Second Amendment conferred an individual right. I will obviously respect that. And any actions I take as attorney general will take that into account.

HATCH:

The question I have then, were they correct, the Supreme Court?

HOLDER:

Well, you know, I will say that I think, based on Justice Department precedent, there was a good argument to be made in the amicus brief that we submitted. But I think it's one that I think lawyers can disagree on. And five justices of the Supreme Court have indicated what the Second Amendment is. And so, yes, they're right.

HATCH:

Thanks, Mr. Chairman. I appreciate...

LEAHY:

Thank you very much, Senator Hatch.

And before I recognize Senator Feingold, I've been trying to put these letters into the record. I mentioned the letters of support from the 130 law enforcement and criminal justice organizations, civil rights organizations, victims' advocates, legal practitioners and others.

I'll now put into the record letters from several former officials, including a letter from the attorney general, the Republican attorney general under George H.W. Bush, William Barr, in support of you. And the assistant attorney general for the office of legal counsel under President Reagan and then the solicitor general under President George W. Bush, Ted Olsen; a former U.S. attorney, a Republican congressman, undersecretary for homeland security in the Bush administration, Asa Hutchinson; a Republican former congressman, Bob Barr; two former deputy attorneys general under President George W. Bush, Jim Coleman and Larry Thompson; a letter from former federal judge and FBI director, Louis Freeh, who was here earlier today; and then a number of other high-ranking Republican (inaudible) executive branch officials.

Without objection, those letters will be made part of the record.

Senator Feingold is the chair of our Constitution Subcommittee. And Senator Feingold, I yield to you.

FEINGOLD:

Thank you. Thank you so much Mr. Chairman.

Mr. Holder, welcome and congratulations on your nomination. I certainly appreciated your meeting with me on short notice a few weeks ago. And I look forward to many more fruitful discussions of the important issues facing the department should you be confirmed.

And I would like to start with a topic that we discussed then and that you were just talking to Senator Hatch about. As you know, I've been very concerned about the extreme and wrong-headed legal theories that the outgoing administration came up with to justify assertions of executive power beyond what the Constitution allows.

These theories were developed by lawyers operating for Department of Justice in cooperation with lawyers from the White House counsel's office and the office of the vice president. They were used to justify actions by the executive branch, particularly in the areas of torture and warrantless surveillance that I believe were illegal and inexcusable.

I voted against the confirmations of Alberto Gonzales and Michael Mukasey because their answers on this key question, respect for the rule of law, were so troubling. So one of the things I'm looking for from you is a clear indication that the new administration and your Department of Justice will make an unmistakable break from the past when it comes to these issues.

And I already heard you make the statement that those gentlemen didn't make which is the president is not above the law.

So I will ask you the same question I asked Mr. Gonzales. First, what is your view of the president's constitutional authority to authorize violation of the criminal law, duly enact the statutes that may have been on the books for many years when acting as commander-in- chief?

HOLDER:

The president, as I've said, is not above the law, has a constitutional obligation to follow the law and execute the laws that this Congress passes. If you look at the Steel Seizure concurrence of Justice Jackson that, I think, sets out in really wonderful form the power that the president has and where the president's power is strongest and where it is weakest.

It is weakest in Category 3 where Congress has indicated something contrary to what the president wants to do. That is where Justice Jackson says the president's power is at its lowest level. And I think -- I'm not a constitutional scholar -- but I think that there has never been a president who's been upheld when he's tried to act in Category 3. I think, but I'm not sure.

FEINGOLD:

I believe that's right. And I want to follow that. Using the construct of Justice Jackson, more specifically, does the president, in your opinion, have the authority, acting as commander- in-chief, to authorize warrantless searches of Americans homes and wiretaps of their conversations in violation of the criminal and foreign intelligence statutes of this country?

HOLDER:

I think you're then getting into Category 3 behavior by the president. Justice Jackson did not say that the president did not have any ability to act in Category 3. Although, as I said, I'm not sure there's ever been an instance where (inaudible) courts have said that the president did act appropriately in that category.

It seems to maybe it's difficult to imagine a set of circumstances given the hypothetical that you have used and given the statutes that you have referenced that the president would be acting in an appropriate way given the Jackson construct, when I think is a good one.

FEINGOLD:

So you see FISA law as under Category 3, right?

HOLDER:

Yes. I think the FISA law is a good statute and it has an exclusivity provision that seems to me to be pretty clear.

FEINGOLD:

You discussed with Senator Hatch whether or not there was some kind of independent, inherent power of the president. Is there anything in the FISA statute that makes you believe that the president has the ability under some other inherent power to disregard the FISA statute?

HOLDER:

No, I do not see that in the FISA statute.

FEINGOLD:

Well, thank you. I think that's a very important break in favor of the rule of law that we've been waiting for in this country for many years. And I appreciate that answer.

As I'm sure you know, Congress will consider legislation this year to reauthorize the expiring provision of the USA Patriot Act. You were talking with Senator Kyl about that. Unfortunately, the last time Congress considered reauthorizing the Patriot Act, the administration used scare tactics and over-the-top rhetoric to discount the legitimate concerns raised by both Democrats

and Republicans in Congress.

And I have to say the administration seemed for interested in scoring political points than trying to sit down and find some common ground in some of these provisions where we all want to stop those who intend to harm us but not affect the rights of completely innocent Americans.

I hope to work with you in a productive way on legitimate concerns that I and others in the Senate have about the extent of government surveillance powers. In fact, I believe you joined a bipartisan letter in the summer of 2005 proposing a number of changes to the Patriot Act.

I appreciate what you said in response to Senator Kyl about needing to hear from professionals who use these authorities. It's important to hear from experts and advocates concerned about these authorities and how they affect the privacy and civil liberties of innocent Americans.

So in light of that, will you commit to working with us on these issues to keeping the lines of communication open at all at another times and to try to resolve any differences as partners who have the same ultimate goal -- the protect the American people and the constitutional rights of our citizens?

HOLDER:

Absolutely, Senator. I will be here as often as I can either in formal settings or informal ones to talk about the needs that I identified that we have in law enforcement in fighting terrorism.

I think we're going to need law enforcement tools. We need to always look at them to make sure that they are consistent with the obligations that we have, the new challenges that we face. But we always have to be mindful of the fact that there is a civil liberties component to this. And we have to make sure that we understand, as I've said in many speeches, that there's not a tension between respecting our great tradition of civil liberties and having very effective law enforcement and anti-terror tools.

There's a false choice, I think, that is often presented. So I would look forward to working with you and the other members of the committee in trying to make sure that we have good, effective laws that are consistent with our values.

FEINGOLD:

Thank you for that answer.

As you know, there was much about last year's FISA amendment act with which I strongly disagreed and it included, of course, the granting of immunity to telecommunication companies that allegedly cooperated with the president's warrantless wiretapping program and the inclusion of new surveillance powers without adequate protection for the rights and privacies of innocent Americans.

But one positive provision was a requirement that the Department of Justice inspector general, in cooperation with other relevant inspectors general undertake a comprehensive review of the warrantless wiretap program.

And I'm told the IG's report is due to be completed by July of this year. This report could offer the most complete assessment to date of how the program came about and operated for over five years. Will you pledge the full cooperation of the Department of Justice for this effort? And will you pledge to support making as much of the report public as possible so that the American people can finally learn of the full story of this illegal program?

HOLDER:

Absolutely. I think the report that will be done by the inspectors general and led by a fine inspector general at the Department

of Justice will be an important tool, an important assessment tool for us to find out how these statutes have been working, how these provisions have been working.

I know that Glenn Fine and the people working with him will not be shy in expressing any concerns that they have. But they'll also not be shy to tell us how these tools have been effective. I think that that is going to be a good starting point for a conversation that I think we need to have about where we stand with regard to the state of the law and give us a good sense of are we in a good place, are there things that we need to change.

So I look forward to that report. And I will do all that I can to ensure that as much of that is made public as is possible.

FEINGOLD:

Thanks. Your testimony recognized the importance of restoring the credibility of the Department of Justice after the terrible issues involving the stewardship of Mr. Gonzales. And you correctly note that despite the steps taken in the right direction by Attorney General Mukasey, there's more work to be done.

Certainly, the release this week of the OPR IG report on politicized hiring and other personnel actions at the civil rights division only underscores that point.

As with so many of the mistakes and abuses of the last administration, I don't think it's just enough to end the misconduct. The lingering effects of that misconduct must also be addressed. So whether it's politicized hiring in the civil rights division or immigration judges or allegations of politically motivated prosecutions as in the Siegelman (ph) case, and there may still be many more.

What will you do to make sure that justice is truly served and that those who engage in wrongdoing don't, in effect, have the last laugh? And in addition, will you cooperate in any further oversight of these matters by the Congress especially with respect to documents that have, until now, been withheld?

HOLDER:

Well, one of the things I'm going to be to do, I think so, as attorney general in short order is to make -- basically do a damage assessment and understand in a way that I do not now how has the institution been harmed by the activities that were uncovered by these inspector general reports.

What has been the lasting impact? There's certainly been damage to the department's reputation. I'd want to know if, as a result of those actions, has there been any structural damage to the department.

I will work to see -- make that assessment. I will be more than glad to come back to this committee and share with you what I have found and, perhaps, with some suggestions that I might work out with you all, how we might prevent those kinds of things from happening in the future.

I look forward to working with you in that regard.

FEINGOLD:

What about the documents?

HOLDER:

To the extent that there are documents that will help this committee in that assessment and to the extent that there is not a reason why we should be holding on to them, I will make them available, all with the presumption that, you know, transparency is the best thing and making available documents makes the most sense.

There are institutional concerns that we have that I think should be respected. But I also respect the oversight obligations that this come has. And to the extent that I can make documents available in this context or in others, I will do that.

FEINGOLD:

Thank you, Mr. Holder.

Thank you, Mr. Chairman.

LEAHY:

Thank you. Thank you very much, Senator.

Senator Sessions is here. Of course, Senator Sessions is also a former U.S. attorney. He knows (inaudible) and we've relied on him for that experience.

Senator Sessions, it's over to you.

SESSIONS:

Thank you, Mr. Chairman.

And congratulations, Mr. Holder on the nomination. You certainly bring excellent background and experience to the job as a federal prosecutor for a number of years and as a federal judge.

I think you come to the office with far more experience than Attorney General Gonzales had. I thought he was a good man, but when you lack experience, sometimes, you can make errors unintentionally. I think Former Attorney General Janet Reno was a state prosecutor, but was really inexperienced in a lot of the big issues that come before an attorney general.

So you do have the background. You have a great family. It's good to see your wife, a fine physician and an Alabamian and the sister of one of the leading -- one of the leading persons in changing the racial situation in the south as she led the fight to alter the segregated higher education policies that were so often conducted in the south. And those were unacceptable, and she did a very important, historic role -- played a big historic role in that and is so recognized today.

So I know you're committed to justice and fairness and equal rights. I just want to ask a few things that we've -- you've had a lot of questions so far about national security. You made your opening statement. You said I will use every available tactic to defeat our adversaries. That's basically what President Bush said. I'm charged with defending this republic; I'm going to use whatever power I can.

And then you go on to say and I will do so within the letter and the spirit of the Constitution. Well, first of all, fundamentally, isn't it the controlling authority -- the constitutional requirements first? Would you agree with what the Constitution actually requires is the fundamental requirement of public service?

HOLDER:

I'm sorry? The Constitution requires?

SESSIONS:

What the Constitution requires is what you're committed to do. Is that not correct?

HOLDER:

That is correct.

SESSIONS:

Now, the only thing that worries me about the spirit of the Constitution is that the spirit tends to be in the eye of the beholder. And what you might think is spirit of the Constitution, somebody else might not.

And I guess I'm worrying about these intelligence offices and military offices and people in the Department of Defense who attempted to protect and defend this country in a time of great concern after the 9/11 attacks and if you formed a prosecution policy, you would want it to be based on plain law of the Constitution and not what somebody might think is within the spirit of the Constitution, would you not?

HOLDER:

Well, Senator, as you know, having been a prosecutor and a great U.S. attorney yourself, there are a whole variety of things that have to go into making a prosecutive determination: What was that person's intent? Did that person act under the thought that he or she had authorization from a higher authority? These are all the kinds of things that would have to be weighed in trying to make a determination whether somebody had acted appropriately, inappropriately, lawfully, or unlawfully. Those are the kinds of things, I think, that have to be weighed.

SESSIONS:

I certainly agree with that. I do just note that you in your June 2008 speech to the American Constitution Society you note, you say that actions after 9/11 were excessive and unlawful. Is that your prosecutorial decision, or is that your impression based on what you may have felt at the time?

HOLDER:

I think that's a fair way of putting it. I think it's an impression. Again, I've not, at that point -- and I'm not now -- read into all of the programs that I was taking the administration to task there about. I was focusing on the surveillance program.

There may be components to that that I don't understand, am not familiar with. I've had a chance to look at everything's that been written -- not everything, but a lot -- that has been written about it, have looked at the, I guess, the white paper that the administration put out justifying its view of how it could use the FISA statute.

SESSIONS:

I thank you for just saying that. It makes me feel somewhat better.

I've been in probably 30 hearings in Armed Services and in Judiciary on these matters. They're very complex. The law changed as time went by. Supreme Court cases came and clarified uncertainties, sometimes overruling what had been previously approved to be legal.

And so I think that is important. It makes me feel a little better about your next statement in that speech where you said we owe the American people a reckoning. You're not threatening and not guaranteeing you're going to prosecute people until you fairly evaluate all of the facts and the evidence and the law they thought they were dealing with at the time?

HOLDER:

No, senator.

And, actually, when I used that term, that's gotten a lot more attention than I think it deserves. I really was only talking about sharing information with the American people to the extent that we could about what was done in their name. I wasn't really thinking about prosecutions at all in that regard. I was thinking about information sharing.

SESSIONS:

Well, you know, Jack Goldsmith, the man who wrote the book *The Terror Presidency*, he was a brilliant lawyer in the Department of Justice. He felt that some of the things that the Bush administration did were in error. And he's been critical and cited as a critic of the administration.

But he made these comments: One consequence of the OLC's authority -- that's the Office of Legal Counsel, and that's an office within the Department of Justice, as you know, that is given authority to express opinions -- he said one consequence of their authority to interpret the law is the power to bestow on government officials what is effectively an advance pardon for actions taken at the edges of vague criminal laws.

In other words, if something is vague, and the attorney general, Office of Legal Counsel, says it's OK, then isn't an official in the intelligence agencies and the military or the Federal Investigative Service entitled to rely on that until it's reversed?

HOLDER:

Well, one of the things that you'd have to take into account in making a prosecutive decision, or just making a determination as to whether somebody had acted appropriately, would be to see under what authority they were acting. An OLC opinion that gave a person the ability to do something and was reasonably relied on, was appropriate -- and the opinion was appropriately and in good faith drafted -- would be something that would obviously have to be taken into account in deciding whether somebody acted appropriately or not. That would be a huge factor.

SESSIONS:

I think that's true. And sometimes those opinions could've been in error. As attorney general of Alabama, I used to have to issue those opinions. And it did protect the offices of the state until some lawful court reversed it.

And I just think we need to remember that as these officers are out there trying to serve their country. Attorney General Mukasey says you rely -- he said if you don't follow that principle, it would tell people you rely on a Justice Department opinion as part of a program, then you will be subject to criminal investigation when and as and if the tenure of the person who wrote the position changed or the political winds changed. In other words, a person's got -- the average guy out there serving his country has got to be comfortable that he can rely on the opinions of the Department of Justice.

You know, I'm glad you say that.

With regard to the FALN clemency situation, we had a hearing on it in the Senate, and it was pretty contentious. The United States Senate passed a resolution that was 95-2 -- I think that most every member of this committee supported it -- that deplored that pardon and included "whereas the release of terrorists is an affront to the rule of law, the victims and their families, and every American who believes that violent acts must be punished to the fullest extent of the law," then it deplored those activities. We discussed that at some length, and my time is winding down now. Maybe we'll be able to talk about it a little later.

HOLDER:

Sure.

SESSIONS:

But fundamentally let me say this: I thought it was an inexplicable pardon. I believe that it reversed the recommendation of Margaret Love, a very fine pardon attorney who I believe you removed, and imposed and allowed this to go forward in a way that I think is unjustifiable -- I just think is unjustifiable. And you indicated you learned from that process.

Let me ask you fundamentally now...

(CROSSTALK)

LEAHY:

A vote is started.

SESSIONS:

OK.

LEAHY:

And the time is up. Do you want to make a short...

SESSIONS:

I've got...

LEAHY:

Because we're going to have to...

SESSIONS:

Oh, I'm over. I thought I had 20 seconds.

LEAHY:

We are going to have a second...

SESSIONS:

I'm over 20 seconds...

LEAHY:

We are going to have a second round of...

SESSIONS:

I'll just ask this simple question: You've indicated you made a mistake. Do you believe that the decision and the ultimate act of President Clinton to pardon these individuals was wrong?

HOLDER:

I think it's a difficult decision that the president had. I think that there were a lot of people who were in support of that clemency request: Nobel Peace Prize laureates, Coretta Scott King, President Carter, Desmond Tutu, Cardinal O'Connor in New York.

When one looks at the nature of the offenses that put those people in jail, these were criminals. These were terrorists. These were bad people. But the president's determination was that they had not committed any acts themselves that resulted in death or bodily injury.

And on that basis, and given the amount of time that they had served in jail -- roughly 16-19 years, most I think 19 years -- and given the length of the sentences that they had received, it was his determination that the clemency requests were appropriate, taking all that into consideration.

SESSIONS:

But do you personally now -- I know the president has justified it...

LEAHY:

Senator...

SESSIONS:

Do you personally have an opinion after all of this whether it was right or wrong?

HOLDER:

I think that given all that I have described that what the president did was reasonable.

LEAHY:

Senator Schumer, you're also, like all of us, are juggling three different committees. I'm going to recognize you. I'd ask -- the vote started, several of us would be leaving, myself included -- at the end of your round of questioning, would you -- we will then stand in recess until 2:15 at the end of Senator Schumer's questions.

And, Senator Sessions, I guarantee you will have another round.

SESSIONS:

Thank you.

SCHUMER:

Thank you, Mr. Chairman.

Thank you, Mr. Nominee. And I appreciate -- I'll try to stick with my 10 minutes and get over to the vote.

And I want to thank you for your years of service. I worked with you when you were deputy attorney general. I was impressed then as I am now with your integrity, your experience, your excellence.

Much of the discussion leading up to your hearing has focused on the question of your independence: Will you be the people's lawyer or the president's lawyer? And I think this is absolutely and correctly at the heart of the matter, because every other day, it seems, another scathing report from the inspector general hits us on the head like a hammer reminding us that the likes of Alberto Gonzales and Bradley Schlossman sullied and demoralized a great legal institution -- probably the finest civil service institution in the country -- that they really dragged through the mud.

So we're in dire need of a less political and more independent Justice Department beginning at the very top. And I spent a lot of time in the last Congress, as you know, making this point.

Four years ago, moreover, the question of independence was my central consideration when Alberto Gonzales sat in the witness chair: that he was too close to the president, didn't understand the nature of the job of attorney general.

As I said when I voted against him at the time, "It's hard to be straight shooter when you're a blind loyalist." And I think that in my entire Senate career, the vote against Alberto Gonzales may have been one of the most vindicated by subsequent history.

So some of my friends across the aisle are questioning your independence and making ludicrous comparisons to Mr. Gonzales. And they're cherry picking a few episodes from your long and distinguished career and ignoring, conveniently, other more substantial actions you've taken that manifest a true independent streak in the best traditions of the Justice Department.

My colleagues have mentioned them already. I'm not a fan of either the Marc Rich pardon or the FALN. I disagree with your ultimate analysis on FALN -- and on Marc Rich, I guess, although you certainly said that was a mistake. I was a critic then,

and I'm a critic now.

The essential point, though, is that many who have criticized your role in those pardons -- Democrat and Republican alike -- recognize your entire career and vigorously support your nomination: Jim Comey, Louis Freeh, the Fraternal Order of Police.

So if we're going to make an informed assessment about your independence, I think we have to look at the entire record. And as I look at your background and record, it's clear that you are less connected and less beholden to the new president than most attorneys general in the last 50 years.

Let's review for a moment. I have a few quick questions for you.

Have you ever been President-elect Obama's personal lawyer, like William French Smith had been for years for Ronald Reagan?

HOLDER:

No, I have not.

SCHUMER:

Have you ever been a staffer to Barack Obama, like Ed Meese had been for President Reagan?

HOLDER:

No, I have not, senator.

SCHUMER:

Have you ever served as official counsel to Barack Obama, like Alberto Gonzales had been for George Bush?

HOLDER:

No, I have not, senator.

SCHUMER:

And, by the way, has Barack Obama ever dispatched you to the hospital room of a sick government official...

(LAUGHTER)

... to get him to authorize an illegal wiretap program?

HOLDER:

(Inaudible)

SCHUMER:

Yeah, I didn't think so.

HOLDER:

No, he has not.

(LAUGHTER)

SCHUMER:

All right.

And I take it you're not a close relation to the new president, like Bobby Kennedy was to Jack Kennedy?

HOLDER:

No, we're not related by blood, though people do say we look alike.

(LAUGHTER)

SCHUMER:

I don't think so.

(LAUGHTER)

Although you're both very handsome.

HOLDER:

I've heard he's handsome. I was going to try to, you know, draft on that.

SCHUMER:

OK.

Let me ask you this: Have you ever been a professional politician, like, say, John Ashcroft or Dick Thornburg?

HOLDER:

No, I've never run for office.

SCHUMER:

OK.

Before last year, at age 57 after 30 years as a lawyer, did you owe any paid job or government appointment to Barack Obama?

HOLDER:

No, I have not. I do not.

SCHUMER:

When did you first meet the president-elect?

HOLDER:

After he was elected but before he was sworn in as a senator.

SCHUMER:

Great.

What did the president-elect tell you about what kind of attorney general he wanted you to be?

HOLDER:

He said, Eric, you've got to understand you've got to be different. You know, we have a pretty good relationship. That's probably going to change as a result of your taking this position. I don't want you to do anything that you don't feel comfortable doing.

You've got to be my counselor. You've got to tell if I'm going to get myself in any kind of trouble. I understand that the Justice Department is different. I understand that you're going to be different.

He said he hoped that it wouldn't affect our relationship, but he says he understands that I have a different obligation than other people in the Cabinet.

SCHUMER:

OK. Well, that's refreshing, because I doubt that President Bush ever had that kind of conversation with Alberto Gonzales. And it's a refreshing change.

So when we talk about independence, we need to keep in mind the notion of independence is often a two-way street.

I welcome your nomination, not just because you will be a different kind of attorney general but because Barack Obama will be a different kind of president.

So I really want to thank you. I believe that your nomination, should you be approved, will end the rancid politization at the department, because it will mean an end to waterboarding and other shameful forms of torture and because it will mean a full return to the rule of law and our reputation around the world.

SCHUMER:

I believe you, unlike some of your predecessors, will be the chief law enforcement officer of the land above all. So I want to look forward, not backward. We should be focus is on how you will lead the department and how you'll change it. And so in that vein, I have some questions for you.

Now, Senator Leahy touched on this, but I want to elaborate because I had questioned quite pointedly and carefully Mr. Schlossman. I thought then that he wasn't telling the truth. And, of course, the IG's report said he made false states to Senator Leahy, Senator Feinstein, and several to me.

So last week -- and I am not satisfied that the referral to the U.S. attorney was just, you know, they said they're not going to prosecute without any explanation whatsoever. I wrote General Mukasey asking them that the matter of Schlossman be additionally referred to Nora Dannahey. She's the acting U.S. attorney for Connecticut. She's been made special prosecutor already to look too possibility of -- possibly criminal activity in the department's hiring and firing.

Do you see any problem with making such a referral should you be selected as -- or approved as attorney general?

HOLDER:

Well, I'd say that I have great respect for the lawyers who work in the U.S. attorney's office in D.C. at the office that I had the great privilege of leading. There are good lawyers there. And the fact that it is -- if it's accurately reported that they had a chance to fully look at that matter and they declined prosecution, that would be significant for me.

On the other hand, I'm very disturbed by what I read or have read about that is contained in the report where the inspector general essentially makes a finding that false testimony was given before this committee.

And as I indicated to Senator Feinstein, I would like to -- myself -- review the determination that was made by the U.S. attorney's office.

SCHUMER:

At the very minimum, without disclosing any confidential grand jury or other information, could we at least get a report on why

the U.S. attorney in D.C. refused to prosecute? Was it that, you know, was it that he disputed the lying to Congress terminology of the IG? Was it that he didn't think he could prove the case? Perjury cases and false statement cases are difficult?

Would you at least be willing to commit to us to do that?

HOLDER:

I will to the extent that I can share that information. I mean, grand jury secrecy frequently prevents a prosecutor from sharing all of the reasons why he or she has made a particular determination.

But to the extent that we can, I will do that.

SCHUMER:

Good. Because I'm not asking for specific details of who said what before the grand jury but just why the ultimate conclusion was made. And if you disagree with it, I presume you would refer to -- you'd look somewhere, and Ms. Dannahey's office is the right place to go.

Just one more on the Civil Rights Division. Again, a crown jewel of this Justice Department, the report from the IG revealed in many ways it was more like a campaign headquarters than a hall of justice. The report luridly detailed the remarkable extent to which the Civil Rights Division -- what a great tradition in that body -- through Democrat and Republican presidents alike, under George Bush the first, they took the voting rights act to a greater extent than anybody else.

And then from 2003 to 2006, one single appointee, political appointee, Schlossman, hired 63 lawyers, 20 percent of the lawyers working at OCR, on the basis of their conservative political leanings. It's a blatant violation. It would be a blatant violation if some did -- if a Democrat did the same thing on the liberal side.

And one supervisor saying to another that he took his coffee Mary Francis Berry style -- black and bitter type of overtly racist statement all the more shocking when it's a supervisor at the Civil Rights Division who says this.

What are you going to do to make sure that this doesn't happen again? What are you going to do to sort of clean up and straighten out the Civil Rights Division with its great tradition?

HOLDER:

Let me be very clear. The attempt to politicize the department will not be tolerated should I become attorney general of the United States. It will be my intention to return that division and the Department of Justice as a whole to its great traditions and the great traditions that it had under Democratic and Republican attorneys general and presidents.

What we have seen revealed in these inspector general reports is almost unbelievable to me. It is clearly abhorrent. And it's inconsistent with the way in which I would run the Department of Justice.

SCHUMER:

We expect a thorough cleaning up of the Civil Rights Division. Setting it back on its civil service course, if you will.

HOLDER:

It is my intention to devote a huge amount of time looking at the Civil Rights Division and restoring that division, making sure that there's a sense of mission, there's a focus on the things that have made that one of -- as I think you appropriately call it -- one of the jewels in the Justice Department.

I see somebody sitting behind you, Billy Omens (ph), who served in the civil right division very proudly. He the kind of person who we need in the division. He's the kind of person who should be supervising people. He's the kind of person who should be teaching the young lawyers in the Civil Rights Division. That is what is my intention; to bring the Civil Rights Division back to the kind that existed when Billy Omens (ph) was there.

SCHUMER:

Thank you, Mr. Holder. And I am quite certain from your record, the basis of your testimony today you'll be confirmed and will be a really fine attorney general.

SCHUMER:

We are adjourned till 2:15.

(RECESS)

LEAHY:

It is amazing what a busy day this is in the Senate. Senators have been in and out. There have been numerous confirmation hearings going on.

There have been farewell speeches on the Senate floor, one by a man I have sat with on this committee for over 30 years, Senator Joe Biden of Delaware, who is leaving to become vice president. The other, a senator, my neighbor from the State of New York, Senator Hillary Clinton. And so, a number of senators have left to be there for their farewell.

I have apologized to each one of them. We've been -- that, obviously, I've been here, as have other people chairing such hearings.

They are now in the process of swearing in a new senator from Illinois, who is no longer Senator-designee Burris, but now Senator Burris.

So, I'm going to go next, speaking of elected or appointed, the newly re-elected, the newly re-elected and senior senator from South Carolina, Senator Graham. I mention the senior senator, because one of his predecessors, whom I also served, Senator Hollings, served as junior senator from South Carolina for how many years, Lindsey? About 30?

GRAHAM:

Thirty-six.

LEAHY:

Thirty-six years. The most senior junior senator ever. That's because Strom Thurmond, who came here with the 1st Congress -- the Continental Congress...

(LAUGHTER)

... was the senior senator.

But Lindsey Graham is the senior senator from South Carolina. He's recently been in Afghanistan, Pakistan, Iraq with Senator Biden. We're glad to have you back.

Go ahead.

GRAHAM:

Thank you. I enjoyed my trip with the vice president- elect, and I did a lot of listening. It was fun.

(LAUGHTER)

LEAHY:

That apparently is not -- that apparently is not the totally inside joke as you might have thought it was.

(LAUGHTER)

GRAHAM:

Thank you, Mr. Chairman. And I can assure you, I'm genetically term-limited. So, I do have a tough act to follow in Thurmond and Hollings.

But the one thing I would like to say to our nominee, I cannot think of a more personal decision one can make than hiring a lawyer. And you'll be the nation's lawyer, the attorney general.

But my perspective on these matters is that the president of the United States deserves the ability, within reason, to pick a lawyer in the attorney general that he or she has great confidence in. And the fact that this president has chosen you speaks well for you. And given your resume, even though we have probably a lot of political differences, I could understand why he has great confidence in you.

Having said that, as we move forward, one of the big issues facing this nation, and the legal community within our nation, is what to do with detainees that are captured in what is called the war on terror?

It's complicated. It's emotional. But I think it's very important that we get it right.

And, Mr. Holder, is it fair to say that we're at war, in your opinion?

HOLDER:

I don't think there's any question but that we are at war. And I think, to be honest, I think our nation didn't realize that we were at war when, in fact, we were.

When I look back at the '90s and the Tanzanian -- the embassy bombings, the bombing of the Cole, I think we as a nation should have realized that, at that point, we were at war. We should not have waited until September the 11th of 2001, to make that determination.

GRAHAM:

I'm almost ready to vote for you right now.

(LAUGHTER)

I'll stop.

I agree with you. We're at war. And the enemy that we're at war with, would you agree, is an unconventional enemy?

HOLDER:

No question about that. There is not going to be a surrender signing on the battleship Missouri. This war is not going to end in that way.

GRAHAM:

And the people who are fighting, they don't wear uniforms.

HOLDER:

They do not, which...

GRAHAM:

They operate outside the law of armed conflict.

HOLDER:

They do.

GRAHAM:

Maybe some of the most vicious people our nation has ever fought in our history.

HOLDER:

I would agree with that.

GRAHAM:

If you were trying to explain to a civics class in the ninth grade the battlefield, where is the battlefield in this war? What makes up the battlefield?

HOLDER:

That's a very interesting question, senator.

The battlefield -- there are physical battlefields, certainly, in Afghanistan. But there are battlefields, potentially, you know, in our nation. There are cyber battlefields that we're going to have to -- where we're going to have to engage.

But there's also -- and this sounds a little trite, but I think it's real -- there's a battlefield, if you want to call it that, with regard to the hearts and minds of the people in the Islamic world.

We have to do things in a way, conduct ourselves in a way that we win that battle, as well, so that people there who might otherwise be well intentioned, do not end up on the wrong side and against us.

GRAHAM:

The way I put it, there's a higher ground in every war. And there's physical higher ground, and in this case, there's the moral high ground, which I think is essential to win this war, is for America to maintain the moral higher ground. Do you agree with that?

HOLDER:

Yes, I do.

GRAHAM:

Now, when you talk about the physical battlefield, if our intelligence agencies should capture someone in the Philippines that is suspected of financing Al Qaida worldwide, would you consider that person part of the battlefield, even though we're in the Philippines, if they were involved in an Al Qaida activity?

HOLDER:

Yes, I would.

GRAHAM:

OK.

Now, as we decide what form to try people and how to interrogate them, and how to detain them, the only thing I ask of this new administration is that we not criminalize the war. I'm not asking for the ability to be inhumane.

Matter of fact, I am crying out for our country to realize that, if we capture somebody in this war on terror, and no matter how vicious the enemy may be, it becomes about us, not them. Once they're in our capture, it's not about who they are or what they believe. It's about our values.

So, as we close Guantanamo Bay, I would just urge you to sit down with military lawyers, people in both parties and great legal minds, and let's think through this process of how we can be at war with this enemy and protect ourselves, and maintain the moral high ground that will be essential.

And the hard case for me -- and, I think, for the country at large -- is that person that is captured in this war on terror, because of the sensitive nature of the information, may not be subject to the normal criminal process, whether it be a military trial or an Article 3 trial. But we know, based on competent evidence, that they will go back to the fight.

Have you thought much about what to do with that group?

HOLDER:

Struggled with that, and continue to struggle with that. These are extremely difficult questions, the ones that you have posed.

And it's one of the reasons why in my opening remarks I said it, and I meant it sincerely, that all of the knowledge and all of the good ideas does not reside in the executive branch.

You're a person who has spent a lot of time thinking about these issues. We had a very interesting conversation when I came to visit you, and had, I thought, some very, very interesting perspectives and some good thoughts. This committee has been engaged in thinking about the very questions that you raise.

We are going to have to come up with American solutions. These are truly not Republican and Democratic issues. I mean, we as a nation -- and this committee in particular -- I think has to come up with a way in which we resolve those issues.

And the one that you have raised is one that has given me a great deal -- I've given a great deal of thought to. How do we deal in an appropriate way with somebody who we know is a danger to this country, and yet be true to our values, and, in that battle for the hearts and minds that I discussed, make it appear that we're treating this person sworn to harm us, treat that person in a fair way, in a way that frankly they would not treat us?

GRAHAM:

Absolutely.

HOLDER:

And how we resolve that issue, that particular issue, I think will say more about us as a nation than almost anything.

GRAHAM:

Well, let me put on the record sort of a goal I think we all share, that if we hold someone in prison, in a military prison, it will not be because somebody in the executive branch said so. It has to be as a result of a process that would allow independent checks and balances.

I really believe that the federal courts have a tremendous responsibility and role in answering the questions before -- that we're talking about now.

So, my goal would be, is that, if we hold somebody off the battlefield that we think is part of the enemy force, not subject to normal criminal trials, that it will be done with a process that people have confidence in, that the person will be held only after an independent judiciary agrees that the evidence is competent, and that the executive branch collaborates with the Congress and other respected institutions in making that decision.

I think that's sort of been lacking. If we can find that common ground, I think the country will be better off.

And when it comes to the trial of people suspected of committing a war crime, I hope you will look long and hard at our military justice system. I've been part of it for 25 years. And I think you've seen at Guantanamo Bay, some of the sentences show that the jurors, the panel members are very reflective. And they evaluate the evidence, and they take their duty very responsibly.

I'd end on this note. Our allies are struggling with this problem. Every other nation deals with this through the criminal, the domestic criminal lens.

And as I understand it, there is no concept in domestic criminal law that would allow you to hold someone indefinitely without trial.

Do you agree with that?

HOLDER:

I think that's right.

GRAHAM:

And let me tell anyone who's listening, there should not be. No one should be held in a domestic criminal environment indefinitely without the right to a trial.

But I do believe that every person who commits to going to war against America, or any other peaceful nation, should be held off the battlefield as long as they're dangerous.

Do you agree with that?

HOLDER:

I do.

GRAHAM:

There is a difference between a warrior and a criminal. And if you want to know that difference, go read the transcript of Khalid Sheikh Mohammed as he testifies before the combat status review tribunal. There is no doubt in my mind that he is at war with us and that if he ever was released he would go back to the fight. So there's a difference between a common criminal and a committed warrior.

The military justice system is humane, is transparent, I think is the right forum. And I look forward to working with you as we answer these hard questions.

So, God bless. Thank you for your willingness to serve your country in this capacity.

HOLDER:

Thank you, senator.

LEAHY:

I might say, just for a moment, Mr. Holder, Senator Graham has discussed these issues with me. Sometimes we've been on long trips, sometimes just privately. I've relied on his own experience in the Judge Advocate General's Corps.

We've also had a number of military, as Senator Graham knows, come before us and testify, sometimes risking their own careers to say what they feel should be done. We sat there with two- and three-star generals testifying that way. And they and Senator Graham and others have been most instructive to the members of this committee who have not been in the military of how the uniformed court of military justice works.

And I would suggest, should you be confirmed as I fully expect you to be, that you may want to spend -- and we'll obviously have hearings on this subject -- but you may want to spend some time in informal discussions with people like Senator Graham, myself and others, both Republicans and Democrats on this committee, maybe in an informal setting, who will at least let you know what our views are and have the kind of candid, off-the-record discussion that one should, because this is a major issue facing our country.

HOLDER:

Yes. I think that's actually a very good idea. And I referenced, if you want to talk about the substance, the conversation that I had with Senator Graham. I spent probably half an hour, 45 minutes, with him. And I left there thinking that this is a gentleman who has thought about these issues an awful lot.

I think what you say about our military system of justice is correct, not only in the sentences that have been handed down but also the evidentiary rulings the judges have made there, things that I think a lot of people did not necessarily expect to see in that system.

And I think that what you're saying, Mr. Chairman, makes an awful lot of sense. There is a -- as I said, you all have grappled with these issues a lot longer than I have, quite frankly. And it would be foolish not to tap into the wisdom that resides in this committee.

LEAHY:

And if there is no objection, I want to put into the record a letter of support from 10 retired generals and admirals -- this is 10 retired generals and admirals that support you, Mr. Holder. They're experts in military issues including military detention, interrogation.

They have reflected the conscience of the nation in this area. And they say in their letters, to summarize them, that they feel you will keep America safe while protecting our basic constitutional rights. And I think that should be considered.

Now, when I first came on this committee, I served with Senator Mathias of Maryland, a man who showed great conscience. And I served for years with Senator Sarbanes of Maryland, a person I know and know well, also traveled with. And his successor is now here, Senator Cardin, who carries on the tradition of thoughtful senators from Maryland.

And Senator Cardin, thank you for being here. The floor is yours.

CARDIN:

Well, thank you, Mr. Chairman. I had great mentors in Senator Mathias and Senator Sarbanes.

Mr. Holder, thank you. Thank you for being willing to serve your country. And I want to thank your family, because we know

the sacrifices that they have to make in the long hours that you are going to need to put in as the attorney general of the United States.

I want to talk a little bit about the Civil Rights Division. The Civil Rights Division has such an important function in our country. They're responsible for the enforcement of the federal statutes against discrimination, the Civil Rights Acts, the Voting Rights Act, the Equal Credit Opportunity Act, the Americans with Disabilities Act, National Voter Registration Act, and Uniformed and Overseas Citizens Absentee Voting Act, and the list goes on and on. It's a critically important division in the Department of Justice and for the people of this country.

The record over the last eight years has been alarming. There have been so few important cases brought by the Civil Rights Division over the eight years in, you know, in just about every category. They have resisted being proactive in protecting the civil liberties and civil rights of the people of this country.

When you look at the allocation of resources that's been given to the Civil Rights Division, it's been reduced. We've already had several senators comment about Bradley Schlossman's activities and his partisan politics in the personnel decisions made in the Civil Rights Division -- illegal activities, I might add.

I want to give you an opportunity to tell me your own personal commitment to the Civil Rights Division if you are confirmed to be attorney general and how you will direct that division head as far as the historic role of the Civil Rights Division and what you expect to see during the Obama administration.

HOLDER:

Senator, I agree with you. The Civil Rights Division is unique. It is in some ways the conscience of the Justice Department. And I think in some ways you can measure the success of an attorney general's tenure by how the Civil Rights Division has done.

The Civil Rights Division has not necessarily gotten the attention, the resources, the support that it has needed and requires over the last few years.

Should I become attorney general, that would be my intention: to give it the resources that I have and the attention that the division needs and to revitalize a place that has really tons and tons of great lawyers and paralegals and support staff, people who are dedicated to the mission of that division -- people who work hard and stay there, you know, extraordinarily long periods of time through the course of their careers when they could go and do other things and get paid far greater amounts of money. They're committed to the mission of the division. And that, I think, has got to be one of the things I really focus on should I become attorney general.

One of the things we're going to have to do as an initial matter is to get a great assistant attorney general, a person who is steeped in civil rights law, a person who is respected, and a person who will understand that the job he or she is going to be given is going to be a tough one, and will be committed to revitalizing that great division.

I think we can do it. I think we'll also need the help of the members of this committee in terms of resources, oversight -- there's a whole variety of ways in which I think you could help us. But that will be a priority for me.

CARDIN:

I appreciate that.

I want to just mention one example. In voting rights cases, the record over the Bush administration: They've brought zero cases on behalf of African Americans for voting rights between the years of 2001 and 2006. Yet they were there to defend the

Georgia draconian voter ID law that's been called the modern-day poll tax.

In my campaign for the United States Senate in the 2006 elections, there were deceptive practices that took place in Maryland and in other states around the nation that were aimed directly at reducing minority participation in the elections.

We asked the Justice Department to take a look at those practices. Senator Schumer sent the letter in asking for action. Senator Obama, then Senator Obama, filed legislation to strengthen deceptive practices laws to give the Justice Department additional tools, if they need those additional tools, to make it clear that we won't tolerate those who are using campaign tactics to suppress minority participation.

I would like you to review the laws that you have, the tools that you have today, and come back to us and let us know whether you have adequate tools available to you so that the federal government can be actively involved to make sure that those types of practices that took place in my state and many other states around the nation -- such things as sending out letters in minority communities telling them the election day was the wrong day to try to keep them from voting -- that you have the tools to make sure that the full weight of the attorney general, the Department of Justice, can be used to prevent those types of activities.

HOLDER:

Senator, I appreciate that offer. And should I be confirmed I will take you up on it.

The needs are great in that division. I hope the expectations are high, and I hope that we will meet those expectations.

This is a president-elect who is committed to the very things that you are talking about. This is an attorney general, or a person who could be the attorney general, who shares the concerns that you have.

CARDIN:

Well, again, I thank you for that.

I'll mention one other area that I think shows a disparity, a racial disparity in our country. We've had a lot of discussion about the crack cocaine issue. And when you take a look at the statistics, African Americans now serve virtually as much time in prison for drug offenses as whites do for violent crimes.

Thirty-seven percent of the people arrested for drug violations, 59 percent of the convictions, and 74 percent of those sentenced to drug offenses are African American, even though they represent only 15 percent of the population.

My point is this: We know we have disparities in our laws. We know we have disparities in the way prosecution is centered, and it's very clear that's true in regards to crack cocaine. We need a strategy to make sure that we rid ourselves of those types of practices in this country.

I don't want to be soft on those who are violating our criminal statutes. I want to make sure that we are tough. Drugs are a huge menace to our society, and I want to do everything I can to make sure we have effective laws. But let's make sure it is fairly applied in this country.

And I would like to have your commitment that you will work with us and come up with a strategy where we can have, I think, a fairer system of justice and a tough system as well.

HOLDER:

Well, I think that's right.

We have to be tough. We have to be smart. And we have to be fair. Our criminal justice system has to be fair. It has to be viewed as being as fair.

When I was a judge here in Washington, D.C., I saw in the people who served on juries here a knowledge, a recognition, that -- at least in their minds -- parts of the criminal justice system were not fair. And you saw it in some of the verdicts that I saw in cases that I presided over.

And when I would speak to jurors afterwards and say, well, you know, "Why did you vote this way in a case where it seemed to me the government had all the evidence that proved all the elements of the crime?" And they'd talk about inadequacies in the criminal justice system, disparate penalties, and say that, you know, "Really, I'm not going to be a part of that."

And so I think those are the kinds of attitudes that we have to recognize that are out there and come up with a system, as you say, that is tough, smart and fair.

CARDIN:

I have time for one more question. So let me return to the issue of torture for one moment. And your answers were very strong, and I strongly support what you have said in regards to torture.

But I want to call your attention to one other area in which could be a concern, and that is the use of rendition where the United States has custody of individuals and turned them over to other countries where we know that they will in fact use torture as a means of interrogation.

The United States has entered into the Convention Against Torture. That convention provides that we should not expel, extradite or otherwise effect the involuntarily removal of any person to a country where there are substantial grounds for believing the person would be in danger of being subjected to torture.

Could you just tell me pretty clearly that in your points about torture being illegal in this country that it would be wrong for the United States to turn over custody of an individual that we have to a country where we have reason to believe that they will use torture against an individual that we've transmitted custody?

HOLDER:

Let me try to state this as simply as I can: It simply should not be the policy or the practice of the United States of America to turn over a prisoner, a captured person, to a nation where we suspect or have reason to believe that that person will be tortured.

I've engaged in, as United States attorney, renditions, ordered renditions, but this was to bring people from a foreign country to this country for trial. If we are sending somebody to a place where -- England, Canada, I don't know, some place where we have some basis to believe people will be adequately treated and fairly tried -- we're in a fundamentally different situation than sending somebody to a country where we think they will be mistreated and will not be tried in a fair system. And that should not be the policy or practice of our great nation.

CARDIN:

Again, I thank you for those clear answers. They're the ones that at least I wanted to hear. And I just want to concur with Senator Graham and his comments in regards to the way that we treat the people that we detain. And I look forward to your confirmation as the next U.S. attorney general.

HOLDER:

Thank you, Senator.

LEAHY:

Thank you very much.

We also, we have a former attorney general, former Supreme Court justice, newly reelected senator from Texas, has been my partner on Freedom of Information Act legislation. And because no good deed goes unpunished, his caucus has now elected him to be head of the Republican Senatorial Campaign Committee.

I'm glad you could have time, however, to be here. And I recognize Senator Cornyn from Texas.

CORNYN:

Thank you, Mr. Chairman.

Mr. Holder, good afternoon.

HOLDER:

Good afternoon.

CORNYN:

I mentioned to Mr. Holder -- good afternoon.

HOLDER:

Good afternoon.

CORNYN:

Good to see you. I mentioned in our conversations, Mr. Chairman, Mr. Holder and I, about our commitment to open government issues and Freedom of Information Act reform. And I believe he agreed that open government, more transparency produces greater confidence in their government, and more accountability among public servants.

And I don't want to speak for you, Mr. Holder, but I think you agreed that you would work with us to open up the government, to make it more transparent and more accountable.

Did I represent that correctly?

HOLDER:

I would hire you as my lawyer. You did, yes, exactly right. That's consistent with our conversation.

CORNYN:

Well, let me -- since Senator Cardin did a good job asking about things like rendition, I just -- it's at the top of my list to think about.

If we close Guantanamo Bay -- and a military tribunal or some other tribunal determines that an individual is not guilty of a particular war crime with which they're charged, and they are ordered released -- if we close Guantanamo Bay and put these detainees at Fort Leavenworth, or somebody else, and their home country won't take them back, what do you propose we do with them?

HOLDER:

That is a difficult question. It's one that, I guess, Senator Graham was talking about.

At the end of the day, if we have a basis to determine that a person is dangerous, and we have evidence that would demonstrate that that person is dangerous, I don't think that, given the Supreme Court decision in Hamdi, and the responsibility that I have as attorney of the United States, should I be confirmed, for the safety of this nation, that that is a person who we can release.

Now...

CORNYN:

You're aware that, according to the Department of Defense, about 61 detainees who have been released from Guantanamo Bay have rejoined the fight against the United States and our allies. And that would be the kind of danger that you would want to protect our country from. Is that correct?

HOLDER:

We want to try to minimize that possibility, while at the same time making sure that we are fair in making a determination that somebody is dangerous, and then having periodic reviews to make sure that that person remains dangerous.

I think if you do that, we are within our rights and within the law to detain that person.

CORNYN:

Let me re-address and, because of the nature of these -- I've been in and out, and forgive me if this is territory you've covered before. It probably is.

But as you know, on August 11, 1999, President Clinton extended offers of clemency to 16 terrorists who were committed to gaining Puerto Rico's independence by waging war on the United States. They had not shown remorse for their crime, and they had not even applied for clemency.

Yet the clemency that was granted by President Clinton has been condemned overwhelmingly by both parties in both houses of Congress. And I'm advised -- and please, I'm asking this as a question -- I was advised that this morning, that you called this clemency reasonable.

Could you explain why you think it's reasonable?

HOLDER:

Yes. I thought -- what I said was, I thought that the president's determination was a reasonable one, given the fact that there was -- that these people had served really extended periods of time in jail. Given the fact that -- the nature of the offenses of which they were convicted, they did not directly harm anyone. They were not responsible directly for any murders.

But I think another factor is that we deal with a world now that is different than the one that existed then. That decision was made in a pre-9/11 context.

I don't know what President Clinton would do now. I tend to think that I would probably view that case in a different way in a post-9/11 world.

CORNYN:

How about in a post-New York Trade Center bombing of 1993, attacks against our embassies in Africa, the bombing of the USS Cole? Would those have been sufficient to raise your concern about granting clemency to acknowledged terrorists, who did not even apply for clemency and who showed no remorse for their crimes?

HOLDER:

I was saying to Senator -- I think it was Senator Graham -- that I think we as a nation didn't come to understand that we were at war soon enough, that we waited, perhaps, until the attacks in New York and Pennsylvania and Washington on September the 11th.

And, you know, hindsight is always 20-20. But I think that, looking at the incidents that you have referenced, those -- again, I can't speak for the president -- but those, I think, might have had an impact on my views.

CORNYN:

Did you recommend clemency for the FALN terrorists to President Clinton?

HOLDER:

Yes.

CORNYN:

Was that a mistake?

HOLDER:

No, I don't think it was a mistake.

CORNYN:

Well, let me rephrase that, in fairness to you. You said, after 9/11, you would have viewed it differently. Post-9/11, if you had it to do over again, would you do the same thing? Or would you have declined to recommend it to the president?

HOLDER:

It's an interesting question. I think that I would have viewed it differently. I think that the recommendation that I might have made would have been different in this way.

I think I would have said either this is something we shouldn't do, or, to the extent that you want -- or to the extent that there's a desire to do something, and you're asking what my opinion is -- that the sentences should not be commuted to the extent that they were.

I think that's where I probably would have ended up. I don't think I would have -- I would not have ended up, I think, in the same place that I was when that happened.

CORNYN:

You would agree with me that, I assume that after 9/11, the legal, correct and appropriate way to address this novel attack against the United States, and the fact that we -- I think you agreed with Senator Graham earlier that they should not be treated -- terrorism should not be considered just a mere crime. But that these are -- this whole -- the war against terror raised a number of novel legal issues that, really, we had not had to struggle with since World War II. And even then, it was far different than it was today -- or is today.

I want to just ask you a hypothetical. Earlier you condemned the use of waterboarding. But you're familiar with the ticking time bomb scenario. And I just want to pose a hypothetical for you.

Let's say, as attorney general, you find out that there are terrorists who have access to chemical, biological or nuclear weapons, and that you have a detainee who is in possession of information that, if disclosed, would prevent those weapons from being detonated in the United States and thousands, maybe tens of thousands of innocent people being killed.

You would still refuse to condone aggressive interrogation techniques like waterboarding to get that information, which would, under my hypothetical, save perhaps tens of thousands of lives?

HOLDER:

Well, I think there are a couple of ways in which I'd look at that. One, I would not assume that, because I would say waterboarding should not be done, that that's the only tool, the only mechanism that we would have in our arsenal to try to get that information from that person as quickly as we could.

I also think I'm not at all certain that waterboarding somebody, torturing somebody, whatever technique you want to use, is necessarily going to produce the results that we want.

What I've heard from the experts is that people will say almost anything to avoid torture. They will give you whatever information they think you want to hear. And so, I'm not at all certain that, given the time sensitivity that I assume you have in your hypothetical, that waterboarding that person would necessarily give us the result that we want.

And I think we also have to understand that we have other things in our arsenal that we could use, other techniques that we could use that would, I think, perhaps produce the result that we want.

CORNYN:

Well, of course, torture is illegal under international treaties and under our domestic laws. And I've heard -- when I've heard people talk about torture in expansive ways, where things like sleep deprivation, other techniques that maybe you would employ as an alternative are considered torture to them, as well.

But under my hypothetical, if that were the only thing standing between you and the death of tens of thousands of Americans, you would decline to use that interrogation technique in order to save those lives. Is that correct?

HOLDER:

Well, again, I think your hypothetical assumes a premise that I'm not willing to...

CORNYN:

I know you don't like my hypothetical.

HOLDER:

No. Hypothetical is fine. But the premise that underlies it, I'm not willing to accept, and that is that waterboarding is the only way in which I could get that information from those people.

CORNYN:

Assume it was.

(LAUGHTER)

HOLDER:

See, I -- given the knowledge that I have about other techniques, and what I've heard from retired admirals and generals and FBI agents, there are other ways, in a timely fashion, that you can get information out of people that is accurate and will produce useable intelligence.

And so, it's hard for me to accept or to answer your hypothetical without accepting your premise. I don't think I can do that.

CORNYN:

One last question, quickly. You're aware that some of the techniques that are used -- aggressive questioning techniques are used as part of training by American military officers and enlisted men as part of their own survival training, are you not sir?

HOLDER:

Well, it's my understanding -- and I might be wrong here -- that we acquaint our people with those techniques so they can have some familiarity, some understanding of what it is they might face, if they are captured by people who are far less -- well, put it out there -- far less civilized, far less humane, far less conversant with the rules of law and war, so that they understand that.

That is not necessarily because that's done, it's something that we are condoning. It's just to make them, to the extent we can, more resistant to the techniques that might be applied to them.

CORNYN:

Thank you very much.

Thank you, Mr. Chairman.

LEAHY:

Thank you, Senator Cornyn.

We -- let's see. Earlier today, the assistant Democratic leader from Illinois was the senior and junior senator from that state. He is back again as just senior member. We noted here, Senator Durbin in the hall earlier, that your new colleague has been sworn in.

And I would also note that he's the chair of our Human Rights Subcommittee. That's a subcommittee that was created when Senator Durbin -- because of Senator Durbin's longtime interest in this subject. And he's chaired it to great bipartisan praise.

Senator Durbin?

DURBIN:

Well, thank you, Mr. Chairman. That was very kind of you. And I apologize for stepping out, but for the purpose noted. It was to add another Democratic vote, which, as the whip of the Democrat Caucus, I thought was a high priority for me and for our future president.

HOLDER:

I won't argue with that, senator.

DURBIN:

You'd better not.

Mr. Holder, I'm honored that you're here today. And I was present for your opening statement. I reflected on it, because I paid special attention to this issue of torture.

At times, it has been a source of torture politically, and for me, for some of the things I've said and questions I've raised. But I felt from the outset that it really struck at the fundamentals of who we are as Americans.

Arthur Schlesinger, Jr., the late historian, said that, and I quote, no position taken has done more damage to the American reputation in the world ever than on the torture policy of this outgoing administration.

It led me to vote against Attorney General Alberto Gonzales, as well as his successor, Attorney General Michael Mukasey. I felt that they were equivocal, and in the case of Gonzales had been involved in the formulation of that policy.

I listened to your opening statement. And in three words -- in three words -- the world changed as far as I'm concerned, because you stated without hesitation, "Waterboarding is torture."

I can't tell you how many times Senator Whitehouse and I asked that of the current attorney general. And we could never, ever get a straight, declarative sentence.

I think it's important -- important for our country, important for our position in the world. And I understand Senator Cornyn's questions. I think they are questions that everyone who watches Jack Bauer on "24" would ask. And most Americans do. I have. It's a different scenario.

And when we're going to draw values and principles and laws, we have to really be cognizant of the fact that you can always construct a scenario that'll challenge the foundation of any legal principle. And I think it is far better for us to stand by standards that have guided our nation for generations, and return to them now with this new administration.

The Judge Advocates General are the top military justice lawyers in America. And I've asked them about the techniques other than waterboarding -- painful stress positions, threatening detainees with dogs, forced nudity, mock execution. And they told me that each of those techniques is illegal and violates Common Article 3 of the Geneva Conventions.

When I asked Attorney Generals Gonzales and Mukasey the same question, they refused to respond.

I think it's only fair that I ask you that question. Let me ask you that question directly.

Do you agree with the Judge Advocates Generals? Would it be illegal for enemy forces to subject an American detainee to painful stress positions, threatening detainees with dogs, forced nudity or mock execution?

HOLDER:

I am not as conversant with those techniques as I am with waterboarding as something I really kind of focused my attention on. And so, I would not go so far as to say that those constitute torture. I don't know enough about them.

On the other hand, Common Article 3 requires that people -- prisoners be treated in a humane fashion. And so, I would agree that the techniques that you have described, I would agree that the folks in the Judge Advocate General Corps are in fact correct, that those techniques violate Common Article 3.

DURBIN:

So, in your mind, that cross that threshold and become inhumane.

HOLDER:

I believe that's right.

DURBIN:

I was interested in the questions asked earlier about rendition. I won't return to that issue.

I'm sorry that our colleague -- we're all sorry that our colleague, Senator Kennedy, cannot be with us today. And when the new organizational chart comes out, for the first time in 46 years, he won't be on the Senate Judiciary Committee, and we're going to miss him.

One of the issues that he cared about dearly, and I shared his concern, was the issue of immigration. And I'd like to ask you a question or two about that.

We've had decisions made, policies implemented by the this administration about the legal rights of those who are charged with being in this country illegally.

The so-called streamlining regulations of this administration drastically reduced the time that immigration judges devote to each case, increasing the number of decisions issued with no written opinion, and resulting in a huge backlog of cases in the federal appeals courts.

Now, Richard Posner is a judge I know in Chicago. You probably know Judge Richard Posner as well as I do. He is probably as conservative as they come. But he and I get together for lunch once a year, and we talk about the issues before us.

And he was unequivocal in what he said about what's happened as a result of these new policies. He issued an opinion in which he concluded, "The adjudication of immigration case at the administrative level has fallen below the minimum standards of legal justice." That's a quote from Judge Posner.

What are your views on these questions, about the streamlining regulations, the administrative reviews, the delays and the backlogs? Do you believe that they have compromised the basic standards of justice in America?

HOLDER:

Well, I believe that in any proceeding in which the United States is a participant, we have to be fair, and we have to be perceived as being fair, whether it is a criminal proceeding where death is a possibility as an option for a convicted defendant, or we're making a determination about what the immigration status is of somebody.

We have to make sure that people are given, if not a technical, legal due process -- all the technical, legal due process that somebody might get in a trial -- we have to make sure that using that word, that phrase expansively, that everybody gets due process -- we are true to ourselves, true to our nation, true to who we are as a people, if we do that. We cannot hold ourselves out as better than other nations -- and I think we are -- unless we do those kinds of things and commit ourselves to doing it.

It's not easy. It necessarily means an expenditure of resources. This is a difficult time for us, trying to figure out where limited resources are going to go. And yet, that in some ways is the ultimate test.

It's an easy thing to adhere to your values in times that are non-stressful, where the money is flowing. This is really the test, when we are at war in a couple places around the world, when we have budgetary concerns.

This is the test for America. Are you really who you say you are? I believe we are. And I believe, with the appropriate leadership, we can handle and deal with the issues that you're talking about.

DURBIN:

I trust that you will consider reviewing the policies and regulations that led to this current situation involving the review of immigration cases.

HOLDER:

I'll certainly do that. But more than that, what I'd like to do is work with the members of this committee, to come up with ways in which we are true to ourselves, true to our values, and come up with the necessary resources, so that we are able to do that.

DURBIN:

I know Mr. Schumer asked you earlier about this Mr. Schlozman, Bradley Schlozman, in terms of people he hired in the Civil Rights Division of the Department of Justice. And I know he asked you about the question of whether he was subject to prosecution.

I'd like to ask you I guess a more practical question. According to the inspector general's report, Mr. Schlozman hired 63 career attorneys into the Civil Rights Division, who had demonstrably conservative or Republican Party Convention credentials. He hired only two career attorneys who were identifiable as Democrats. He clearly was applying some sort of ideological litmus test, in clear violation of the Civil Service Reform Act.

So, those 63 career attorneys in the Civil Rights Division comprise almost 20 percent of the entire workforce in that division. So, they technically have civil service protection. They were appointed to these positions, apparently in contravention of the Civil Service Reform Act.

What's the recourse here? Are you forced to accept those 63?

HOLDER:

I'm not sure what the recourse is, but I don't think we should paint with too wide a brush who these people are, these 63 lawyers at the Justice Department in the Civil Rights Division.

I don't know who they are. They could be very well-intentioned people, dedicated to the mission of the Civil Rights Division. It doesn't mean, because they are conservative, because they are Republican, that they should not have the jobs that they now hold.

I think the focus really ought to be on the mechanism that was used to get them into the department.

DURBIN:

I agree with that.

HOLDER:

And what he did is deplorable. What he apparently did in front of this committee, according to the inspector general, by not telling the truth is also deplorable.

And as I indicated -- I think it was to Senator Feinstein -- should I be confirmed as attorney general, I'm going to review the decision, the determination made by the U.S. Attorney's Office here in D.C. -- again, that I have great respect for -- but I'm going to review that determination, to make sure that their decision to decline prosecution was an appropriate one.

DURBIN:

Thank you very much, Mr. Holder.

Mr. Chairman, I yield.

LEAHY:

Excuse me. Thank you. Thank you very much.

I'd recognize our friend from Oklahoma, Senator Coburn. And good to have you here. Good to have -- you have waited here very, very patiently. And I...

COBURN:

Happy to do it, Mr. Chairman.

LEAHY:

Glad to have you here. Please, the floor is yours.

COBURN:

Thank you.

Well, welcome again. I'm sure we're going to be here a while.

A couple of things. I handed you a list of supposed wastes and problems within the Justice Department. It totals nearly \$10 billion.

And the reason I gave that to you is, one of the things that we worked on this past year, but was not funded, but the Justice Department did have was a cold case initiative on unsolved civil rights crimes.

And I'm just going to ask you for a commitment today. Whether we fund that or not, will you commit to make sure that the intent of the Emmett Till unsolved civil rights crimes are fulfilled?

You have plenty of money there to do it, even if we don't fund it. And I'm looking for a commitment that that will become a priority under your management of the Justice Department, whether we do a good job of funding it or not. I think there's plenty of money for you to move around, both in terms of grants to states. And I'd like a response on that.

HOLDER:

The fact that that initiative exists, that this committee, that this Congress thought it important enough to devote its attention to it, is an indication of this committee, our government at its best. I actually believe that.

Those are crimes committed a long time ago that, without the perseverance and the conscience that I think this committee demonstrated, could have been forgotten. They are stains on our nation's history. There are still raw feelings about what happened.

And so, yes, you do have my commitment. And I'll figure out ways to try to move money around.

COBURN:

The commitment's in the name of the board, the Emmett Till Board, and one gentleman in particular, Alvin Sykes. And we owe a great deal of gratitude to him.

I tried to make that a more efficient bill. I wasn't able to do it. And we all sent out press releases, but it still isn't funded, and it still isn't happening. And what needs to happen is it needs to happen, whether we fund it or not. There's plenty of move in there.

I want to go back to FALN for a minute, being from Oklahoma, and the tremendous tragedy that we had there. And I've heard your statements in terms of reasonableness.

Why did not the weight of the prosecutors and the victims' families bear more on your decision in terms of thinking that that was a reasonable pardon? Tell me how you came to this idea that it's -- you know, it's possibly reasonable.

HOLDER:

I mean, I did factor that into my determination. You had two United States attorneys who weighed in against it. Law

enforcement was against it. There are obviously the feelings that victims had. And we took those into -- I took those into -- let's talk about me -- I took those into account, and balanced that against the people who were advocating for it, an impressive group of people.

Also looked at the nature of the crimes, the duration of the sentences that they had served. And it seemed to me that on balance, on balance -- it was a difficult decision -- but on balance, in a pre- 9/11 world, that the sentences that they had -- substantial sentences, up to 19 years, 16, 19 years -- that that was appropriate, that the clemency petitions were appropriate.

That was what -- those are the factors I considered.

COBURN:

So, when we had our conversation together in the office, which I enjoyed very much, you admitted to a couple of mistakes of judgment. But you would tell this committee now, you don't think that was one of them.

HOLDER:

No, I think we can certainly have a difference of opinion about that. But I don't think that what I did there was a mistake in the same way that I would describe what I did in the pardon, the Rich pardon matter, as a mistake.

COBURN:

I just have to kind of think back. And the fact that, if Terry Nichols were to get clemency right now, what would the people of Oklahoma think? You know.

Here's the co-conspirator in the Oklahoma City bombing. And under the same circumstances, you know -- which, granted, there is some differences in the case, but there's not a whole lot of difference. One is aiding and abetting versus commission of an act. So, that is still worrisome to me.

I want to spend some time -- I talked with you about the Heller decision in my office. I believe the Second Amendment right -- I believe the Supreme Court got it right. And I know your position on it, and I know you have publicly stated that that's the law of the land now, in terms of our individual right to hold and own a gun.

Post-Heller, can you kind of give me what your position is now? You've been -- you know, there's a lot of publicity out there in terms of written statements and previous comments about what you believe the Second Amendment.

Tell me where you sit today, and more specifically, with that thought as attorney general of the United States, what you would do with that.

HOLDER:

Well, I think that post-Heller, the options that we have in terms of regulating the possession of firearms has been narrowed. I don't think that it has been eliminated. And I think that reasonable restrictions are still possible.

But any time that we think about interfering with what the Supreme Court has said is a personal right. That has to be factored in now with the Heller decision and the Supreme Court's view of the Second Amendment.

I don't think that that means that we should turn away from the efforts that we have made to make this nation more safe, to be responsible about guns and who has them, how they are used. I mean, our effort, for instance, to go after felons in possession of weapons, I mean, should be as strong now as it was pre-Heller.

But I think that there is certainly -- we're in a different world. I think we operated for a good many years with the assumption

that the Second Amendment referred to a collective right. We now know that that is not the case.

And so, we are still, I think, going to have to grapple with that and understand what that means. But I think it is a huge factor. It's a major difference.

COBURN:

Let me ask you specifically. Much of your statements in the past had to do with guns as far as sporting events.

Do you believe there's any assurance given by Heller that, outside of sporting use, there's a right to own and hold a gun?

HOLDER:

Outside of...

COBURN:

Utilization for sport -- for hunting, for skeet shooting, for target practice. Do you believe that there's a right to own a gun for other than hunting or sportsman's purposes?

HOLDER:

I think, post-Heller, absolutely. I mean, that's one of the things that we're dealing with in Washington, D.C., now.

COBURN:

What kind of common sense gun regulations would you like to see enacted?

HOLDER:

Well, I agree with President-elect Obama. You know, closing the gun show loophole, banning the sale of cop-killer bullets, things of that nature, those are, I think, the things that we need to focus on. Those are things I think have a law enforcement component to them. Those are things that I think are still viable in a post- Heller world.

COBURN:

Do you find any irony in the fact that you can serve your country in the military at 18, but in some places we would want to limit your ability to own a weapon until you're 21?

HOLDER:

Well, I don't -- well, I guess there is a bit of dissonance there. These decisions are made on, I guess, a state-by- state basis.

Yes, I guess there is some dissonance there.

COBURN:

As attorney general, will you make the commitment to defend the Heller's holding that the Second Amendment protects an individual's right to bear arms?

HOLDER:

Sure. That is the law as the Supreme Court has given it to me.

COBURN:

Would you do so, if the Supreme Court granted cert in a case affecting or revisiting Heller?

HOLDER:

I'm sorry. Would I...

COBURN:

Would you also defend Heller, if the Supreme Court were to grant cert in a case affecting or revisiting Heller?

HOLDER:

Oh, I see what you mean.

Well, I mean, you have to examine the facts of the particular case and understand how those facts fit under the Heller determination. But Heller...

COBURN:

Well, let's assume it does.

HOLDER:

OK. Well, I mean, we follow -- I'm a lawyer who follows the doctrine of stare decisis. The Supreme Court has spoken. And in viewing these new facts, one would have to take into account in a very substantial way, because it is the ultimate -- the ultimate arbiter has said what the Second Amendment means. I have to take that into account in deciding what position the Justice Department will take.

I mean, Heller is a significant, significant opinion.

COBURN:

I'm sorry. I didn't hear the last part of that.

HOLDER:

Heller was a very significant opinion.

COBURN:

Yes, it is. It's one I'm very happy about as a Second Amendment advocate, and as somebody from Oklahoma.

If the Court were to change, and yet Heller still holds, and it was challenged again, as the chief law enforcement officer of the country, you would be obligated to defend the stare decisis of Heller. Is that true?

HOLDER:

Sure. That would have to be something that would take -- that I'd have to take into consideration in determining what the Justice Department's position was on a new case, a new set of facts. That would be a factor.

Stare decisis would tell the solicitor general, me, that you have to take into consideration the fact of the Heller decision. Correct.

COBURN:

I'm out of time. Thank you very much. We'll come back to this.

HOLDER:

Thank you.

LEAHY:

I do want to compliment the senator from Oklahoma for his rendition of "Rocket Man."

COBURN:

Thank you.

LEAHY:

You will probably not move Elton John from the charts, but you carried the tune better than the chairman could.

COBURN:

Well, actually, I'm a Beach Boy generation. So, it was a little hard for me to move to the other genre.

LEAHY:

We'll do "Margaritaville" next time.

(LAUGHTER)

Senator Whitehouse?

WHITEHOUSE:

Thank you, Mr. Chairman.

Mr. Holder, welcome to the committee. I'm pretty much at the tail end of a long and thorough at least first round of questioning.

And I'd like to cycle back first to the beginning, just because of my respect and affection for the man, to remark on how pleased I was that Senator Warner, who served here for so long and with such distinction, for his first, I guess you could call it, official return to the body that he served, really is an embodiment of both independence and dignity -- two characteristics you share with him -- chose to do so to support your candidacy, and to call all of us to the better angels of our nature.

I was touched and impressed. And I know he's not here any longer, but I would like to say that for the record anyway.

On a more personal note, I want to say how impressed I am with your kids. This has been a long episode for them. It is a lot -- it is a lot less exciting for them than it is for you...

(LAUGHTER)

... to be here. And it's a sign of what a wonderful upbringing they've had at the hands of their mom and grandmother, that they've represented your family so well here today.

HOLDER:

We will take into account the fact that they might otherwise be at school right now.

WHITEHOUSE:

That's right.

(LAUGHTER)

LEAHY:

And I should note that, at some point after the next break -- well, obviously, you do whatever you want to do. But -- and I should say -- and I'll certainly give you extra time for this.

I mentioned to your mother that it's part of the Constitution few of us understand, that grandparents are required to spoil grandchildren.

(LAUGHTER)

And then the parents can deal with it afterwards.

HOLDER:

She's a very constitutional -- she's a good constitutional lawyer. She follows the Constitution quite well.

WHITEHOUSE:

We in the Senate have the good fortune and privilege to be present at occasionally extraordinary moments. One, for instance, was Senator Kennedy, who I'm thinking of today -- he's not with us, but other people have mentioned him -- his return to the Senate for the critical Medicare vote, where he made such a difference after his diagnosis.

The year before, it was probably Senator Schumer's hearing in this committee, that brought Deputy Attorney General Comey before us, to tell an appalling and astonishing tale of the mission to Attorney General Ashcroft's bedside.

Deputy Attorney General Comey and FBI Director Mueller with their lights on, racing to the hospital, pounding up the stairs to try to get there, the FBI director calling ahead to the agents by the stricken attorney general's bedside to tell them, whatever you do, don't leave this man alone in the room with the White House counsel and chief of staff to the president. Don't let them throw Comey out of the room.

And then, after that, we've learned about the eyeball-to-eyeball confrontation between the Department of Justice and the White House.

Jim Comey's testimony was remarkable. I know he is a supporter of yours, that he supports your nomination, and that he's written to us on your behalf.

What struck me was the personal nature of some of his discussion, of how lonely and exposed it felt to be that far out under that much pressure, standing on that principle. And I know you have been there as well.

As a United States attorney, you were there when you indicted and convicted the Democratic chairman of the House Ways and Means Committee -- probably one of the handful of most powerful men in this town. You were there again as deputy attorney general when you cleared a special prosecutor to go after a member of the Cabinet of the president who appointed you. And you were certainly there when you cleared the expansion of the investigation of the president himself who had appointed you.

If you don't mind me asking you a personal question, can you tell us a little bit about what you were feeling at those moments? And in those moments, if it was lonely, as I suspect it was, what were your touchstones that gave you the courage and confidence to go forward and continue with those difficult decisions?

HOLDER:

Well, I appreciate the question, Senator Whitehouse. And I'm sure you have felt those moments, as well, having been the United States attorney, and having had to make those lonely decisions.

I think you go back to the beginning and why you took -- or why we took those jobs. You wanted to do the right thing. We swore to an oath to uphold the law.

And if you're going to be a good prosecutor, you have to treat the facts that come before you, irrespective of the political party of the person who might be involved and the connection they might have to you, personal or otherwise, the impact that it's

going to have on the administration that you serve.

That is why the attorney general is different. It has to be, in some ways, distant from the Cabinet and even from the president that the attorney general serves.

Personally, those were not necessarily difficult decisions, because it's what I expected of myself, and what people who mean something to me would expect of me -- not difficult in that sense. But they were, nevertheless, ones that, after made, I think you reflect on.

And you have feelings about the impact of those decisions on the lives of people who you admire, people who you have worked with. It doesn't give you any great sense of joy to have done them. And yet, it is what you are called on to do.

It is what I will do, if I am fortunate enough to become the next attorney general of the United States, to make those kinds of decisions in the way that I have in the past -- lonely ones, as you've described them, but the right decision. I think I've shown a capacity to do it in the past, and a determination to do it in the future.

WHITEHOUSE:

Thank you.

Let me rattle off a few quick questions.

The Bush administration knocked down the firewall between the Department of Justice and the White House, limited conversations on cases to a very, very small number of officials.

I have many disagreements with Attorney General Mukasey, but to his credit, he did rebuild that firewall. Would you pledge to us to maintain it?

HOLDER:

I will. I've been presumptuous enough that we have actually started working on that in anticipation for whoever might be attorney general -- I'm not going to be so presumptuous there -- so that the communication between the White House and the Justice Department reflects that which Judge Mukasey has put in -- or Attorney General Mukasey has put in place -- and is consistent with what existed during the Clinton administration.

WHITEHOUSE:

The tainting -- some would even say corruption -- of the Department of Justice during the course of this administration has been both pervasive and systematic. It is my view that, frankly, if we went down this committee and everybody listed something that bothered them that had happened, and you had that whole list assembled, there'd still be more.

In that regard, what process do you think is appropriate coming on, to use a sailing metaphor, is the new captain of the ship, to do a damage assessment, see what needs to be fixed? And that way you can move on to the business, but you will know, as the commander of the department, that there is a process in place to make sure that whatever has been left undone that ought to have been done, or whatever had been done that ought not to have been done, is set right.

HOLDER:

Well, I think you set it out. An assessment has to be done. And that assessment has already begun in the transition effort that is ongoing. Attorney General Mukasey, Deputy Attorney General Philip (ph), have been most generous in sharing information with us, have been honest with us, very frank with us in pointing out places that they think need special attention.

I have to say about those two gentlemen, that the only thing that they were not given was the luxury of time. I think that, given more time, they would have done more.

But we're going to have time. Hopefully, I will be one of the people who will have that time. And it is incumbent upon those who will run the Justice Department to do that damage assessment. What is -- given what has happened, where does the damage still exist, and then come up with mechanisms to try to repair that.

A lot of it will be inspirational. There are a lot of people who are still down in the department. So, there has to be that kind of connection. I think it's going to have to be a personal connection.

I think, should I be confirmed, I'm going to have to spend a lot of time walking the halls, getting on airplanes and talking to people in the field at the various U.S. attorneys offices, and making them feel a sense of mission, that the Justice Department is back in the way that it traditionally has been -- and as I said previously, under Republican and Democratic attorneys general and presidents.

WHITEHOUSE:

Our distinguished chairman was courteous enough to say I could have a little more time. And so, let me trespass on his indulgence with one final question.

There's been some discussion about the prosecution of false statements to Congress in addition to the recent OIG report about false statements by Department of Justice officials to Congress. I have referred a matter involving the EPA administrator to the Department of Justice regarding false statements to the Environment and Public Works Committee. I think that, frankly, it's been something of a recurring problem.

And in addition to asking you to review the District of Columbia U.S. Attorney's Office determination, I would ask you if you would consider working with us on what might be appropriate prosecution guidelines for such offenses, and what might be appropriate notice or training to people who come before us about the obligation that they take on when they testify.

Because I think people tend to forget that they're here under oath. And I think I've heard stuff that's everything from simply slipshod to outright cold-blooded lies.

HOLDER:

Well, I think there's certainly an obligation on the part of those of us in the executive branch to make sure that those who testify on behalf of the agencies that we lead or could lead, that they're armed with all the tools that they need, so that they can acquit themselves in a way that we would expect them to.

I think the point that you make about training -- testifying is not necessarily something that comes to people naturally. I've done this more than a few times, and I've got to tell you that this process has still frightened me.

And to put younger people, who have not done it before, before, you know, senators, congressmen like yourselves without training them, without making them understand the significance of what it is they are doing, without making them understand what's on the line, reflects poorly on people who run those agencies.

HOLDER:

So, I will take that suggestion as a good one, and try to work with the people in the department so that what we had seen in the recent past is not replicated in the Justice Department that we will have.

WHITEHOUSE:

I thank you.

And I thank the distinguished chairman.

LEAHY:

I thank you.

My friend, the senator from Kansas, Senator Brownback is here. I'll yield to him.

And then after his questions, we will take a break to give everybody a chance to stretch as the members of Obama family that are out in the hall hardly have gotten any news.

Senator Brownback?

BROWNBAC:

Thank you very much, Mr. Chairman.

The nominee...

LEAHY:

That's the Holder family, I'm sorry.

BROWNBAC:

So, congratulations on the nomination.

I do have a number of questions to ask you but I want to congratulate you and your family for an extraordinary American journey. And it has been that.

I want to start off on Guantanamo Bay. And one of the places that people are talking about moving the Guantanamo Bay detainees is Fort Leavenworth, Kansas which is in my state.

The Fort Leavenworth does not want these detainees. If I could put it any clearer to you, I would. But they don't want these detainees.

And the reason they don't want these detainees is that it really gets in the way of their primary mission which is education.

This is the Command and General Staff College at the military which is at Fort Leavenworth. It's a small base. It also has a disciplinary brig but it's an eight square-mile base.

It has no perimeter fence. It's bordered on the Missouri River. It has a train that regularly goes through about every 15 minutes. It has major sources of terrorist target points that they could go at.

But that's only one piece of it. The primary mission of Fort Leavenworth is to train a next generation of Army and military leaders.

And as the Command and General Staff College -- Secretary Powell went through this facility. I just checked today. I'm looking at these numbers. We currently have 111 students from 91 different countries at Fort Leavenworth today.

And we have heard from students from Egypt, Jordan, Saudi Arabia and Pakistan that they will leave the school if the detainees come to Fort Leavenworth.

And the point is that a number of Islamic countries don't think these detainees should be held anywhere. And then if you hold them at the same place that they're training their next generation of Army and military leaders, they're saying, we're out of here, we're gone.

And so, the people there in the base are saying, you're really messing with the primary mission. And on top of that, the relationships are built there often between army officers -- our army officers and the ones from Pakistan, Saudi Arabia and Kuwait -- are key relationships in the ongoing war on terrorism.

And if you hurt that by moving detainees to a place at Leavenworth that's not fit anyway to move this, this is a big hit. And I would just plead you really to look at the specifics.

I heard your clear statement earlier that you're closing Guantanamo but this physical plan doesn't fit and the mission is significantly harmed if these detainees are moved to Fort Leavenworth.

And I would hope you would conduct an open and a very clear process before any are moved anywhere, particularly looking at a place like Fort Leavenworth.

HOLDER:

Senator, I will pledge to do that.

There is a review now that is underway to try to figure out what might happen with whatever the number of people are who might have to be moved once that assessment of what the population of Guantanamo looks like.

You've raised very, very important points. The inability to have people from Islamic countries leave and then cut short that interaction that they might have with our military is really something that over the long term could harm the interest of our nation.

So, that factor would be one that I will take back to the discussions that we're having. I think that -- it's definitely something that I heard before but I think that's a very important point.

BROWNBACK:

That's a big issue for them and I have spoken to Secretary Gates and the chairman of joint chiefs about this as well.

Last Congress, Senator Kennedy and I successfully worked to pass a prenatally and postnatally diagnosed conditions act and there's no reason I expect you to know about that bill but what it was targeted at was to provide an adoption list for children borne with Down Syndrome.

Right now, if you do the in utero test for Down Syndrome, 80 percent of the children are aborted. And both Senator Kennedy and I thought that was a really tragedy.

What we need to do is to try to figure a system to try to encourage that they would be warned. And this is a very tough situation, if you can't handle it, there are people that want to do this, rather than killing the child.

And we also put in that there would be current information put forward about life expectancy of Down Syndrome children, conditions for early treatment. And we're both very proud that we could get this.

The Kennedy family has been great on working with people with disabilities and I was delighted to partner with him on it.

The thing I find extraordinary is that the Americans with Disabilities Act, part of which, the Justice Department will be enforcing applies and protects people with disabilities yet we tend to not apply it. But at a certain point of life and the children tend to be killed before it gets applied to them.

I would hope you would review with them, the Department of Justice, when you would apply the ADA, the Americans with Disabilities Act.

I know there are other agencies that have jurisdiction and maybe primary jurisdiction over this but that you would look at when do we apply the ADA.

I don't know if you're familiar with that or if you could make a point of view on it.

HOLDER:

I think a core of what you're talking about are very personal, difficult decisions that people would have take...

BROWNBACK:

I'd say a very legal question on your part.

HOLDER:

... but I think the legal determination is based on what the Supreme Court has said in essence are personal decisions tied to the right to privacy. I think the legislation that you described, that you worked on with Senator Kennedy, is admirable.

The possibility of adopting Down's children, that's obviously a wonderful thing. The application of the statute that you mentioned in, I guess, a prenatal sense, I just don't know what the impact of that would be on...

BROWNBACK:

Can you see the disconnect here?

If that child gets here, it's protected as the ADA applies. If it doesn't, 60 to 80 percent are killed.

I would hope you would look at that and say that this should be applied at an earlier point because clearly the intent is to protect this child, not to kill it.

Finally, and I want to get into this and I hope we can get into more in the second round. I looked at your background and as much of which I find very impressive and admirable, the Marc Rich case really bothers me.

And I looked at this and a guy that renounces his U.S. citizenship and works with Iran in weaponry that maybe is being used against our allies in the Middle East and is a fugitive, and then you allowed this to move on forward.

I just -- that one just seems to me to be really extraordinary. And when I go through the factual setting of it, you're a thorough lawyer. You wouldn't be where you are today if you weren't a thorough lawyer.

This case just screams out. It's something that it seems like you had pushed back aggressively against. And then it has the political connections to it as well.

One of the things I've been very troubled about lately is the number of political corruption cases we've had going on in the United States. And you've had several recently.

And then this one has a connection where his former wife is giving money to the president's library, where this is going to at

the late last minute. I just think it undermines confidence in the overall system.

And I haven't heard yet, really, a satisfactory explanation to me from you about how you let that one go through given the nature of this case.

I asked Mr. Chairman for the record that the letter dated January 12th of this year from the -- this is detailing what the House Committee have put forward sent by Congressman Dan Burton, be entered into the record that goes to some of the specific dates and the hearing -- the lengthy hearing at the House that the House did on this.

I just -- I look at all those things. That one seems to be really out of stream given the thoroughness that you've operated with in the past and it seems to have a lot of political connections to it. And it really troubles me.

HOLDER:

Well, as I indicated in my opening statement, I think, in response to questions put to me by senators Specter and Hatch, I've made mistakes in that matter.

One thing I want to make clear, though, with regards to this notion of political connections, I was not aware at that time about the contributions or the ties that existed between Mr. Richard's wife and other people in the Democratic Party, things of that nature, with regard to questions about the facts and some of the ones that you had mentioned.

That was the mistakes I made. I did not acquaint myself in a way that I should have about all that existed in the files about Mr. Rich.

I think had I done that, I would have come up with a different determination; but that is one of the things that I have said consistently during Mr. Burton -- Congressman Burton's hearings and interviews that I've done before this committee today that that was one of the mistakes that I made.

I think, as I've also said, that my record should be viewed in its entirety. And as you make your determinations as to whether you think I'm fit to serve as attorney general, this matter in which I made mistakes, I think, should be contrasted with a whole host of other decisions that I've had to make where I think I got it right which is not to minimize -- I don't mean to do that. I'm not minimizing the mistakes that I made there but I do think that -- I would hope that this will be placed with all the contents.

LEAHY:

The senator from Kansas has asked consent for a letter to be introduced into record. I apologize if I didn't hear that. Of course, it would be introduced into record.

Senator Hatch, you wanted to say something before we recess?

HATCH:

I'll be very short, Mr. Chairman.

Mr. Holder, you've acquitted yourself well.

First of all, I support you and believe that you should be supported. And let me just make this one comment and I won't make it as a point of question. I just want to see what you think.

First, as you may have heard today, an advice of court of review, at least its earlier decision, that the Protect America Act of 2007 which allows warrantless foreign intelligence surveillance is constitutional.

Now, I know that everyone will have to study the decision but I wanted to note particularly the court, quote and quote, "We hope that a foreign intelligence exception in the Fourth Amendment's warrant requirement exists when surveillance is conducted to obtain foreign intelligence for national security purposes and is directed against foreign powers or agents of foreign power reasonably believed to be located outside the United States," unquote.

Now, this is very significant decision.

And Mr. Chairman -- and your answers to me earlier to be consistent with this decision. You're willing to be bound by the Constitution and I know you would be and I appreciate you saying that.

And Mr. Chairman, I ask consent that an article from today's New York Times written by Eric Lichtblau about this decision, the "Intelligence Court Rules Wiretapping Legal" be put into record at this point.

(UNKNOWN)

Objection, it will be, unless...

HATCH:

Mr. Chairman, if I could just, one other thing.

This is difficult for you to go through but there are some points. And I just want you to know that I've been carefully monitoring this and you're part of the family, not just part of the family but I look forward to you being confirmed and serving in this really important position and I hope that you'll do it in a non- partisan way which I think you will.

And I hope that the mistakes of the past will influence you even further towards being a great attorney-general and that's what I'm expecting of you.

And thank you Mr. Chairman.

LEAHY:

All right. Thank you.

HATCH:

And I'm sorry if I...

LEAHY:

No, I thank you, Senator Hatch for your comment. We've worked together on these matters for many years.

One of the things that stood out while you were on the following discussion by Senator Graham is Mr. Holder's willingness to sit not just in formal meetings but to have some informal gatherings with some of these issues with both Republicans and Democrats.

I've always felt that law enforcement should not be a matter -- you don't get the law enforcement to say a crime is a Republican crime or a Democratic crime. If you've got a crime and a victim, you don't ask what their political parties are. You ask how you go about helping the victims catching the criminal and both the Republican and Democrats, I've been told, after the comment you've sent to me, they intend to take you up on that.

We'll stand in recess until the call of the chair.

(RECESS)

LEAHY:

Thank you all.

And, again, one of the things I heard universally is how Mr. Holder's great your children had been and glad to see you personally giving them a break.

We have a longstanding and valued member of this committee, the senior senator from Iowa and he is justifiably proud to be first author the False Claims Act and -- the modern version of it. And I know you've worked in that same area, Mr. Holder. You have not had your first round, is that correct?

HOLDER:

That's right.

LEAHY:

It seems like it was so long ago; but go ahead. I'll yield to the senior senator from Iowa so he can have his first round.

GRASSLEY:

Mr. Holder, first of all, obviously, I haven't given your department the attention I should today and been here all the time because I'm a ranking member on the Senate Finance Committee and we had four hours of discussion before we passed out a bill dealing with the Children's Health Insurance Bill.

So, that's where I've been.

I'm a ranking senior Republican there and I had to be there. So, I'm sorry, I missed in. I hope I'm not repetitive, but if I am, please forgive me.

The LA Times recently reported that you urged pardon attorney Roger Adams to change his recommendations against clemency for Puerto Rican terrorists to a recommendation in favor of clemency for at least some of them. Then, after Roger Adams resisted, you directed him to draft a neutral options memo.

I'd like to show you an FBI surveillance video secretly recorded in a Chicago apartment and ask you some questions. This chilling video shows Edwin Cortes and Alejandria (sic) Torres. These were two of the terrorists who received clemency from President Clinton after you directed that the Justice Department change its recommendations.

The video shows Cortes and Torres in the process of building a bomb. Were the two terrorists in this video in the group that you asked the pardon attorney to draft a positive recommendation for?

HOLDER:

Senator, I can't answer that question. I don't have the records in front of me. I don't know the names of the people who were among that group of 15, I guess.

I don't know the answer to that.

GRASSLEY:

OK. Well, as I said, their names were Edwin Cortes and Alejandria (sic) Torres. At the time you directed the pardon attorney to draft a neutral options memo, had you ever seen this video before?

HOLDER:

No. I've not seen this video before.

GRASSLEY:

Are you weren't aware that the video existed?

HOLDER:

I think I've seen it in some news accounts in the recent past, like, over the last week or so, something like that.

GRASSLEY:

Were you aware that after this video was taken, a search to the apartment led to the seizure of 24 pounds of dynamite, 24 blasting caps, weapons, disguises, false identification, and thousands of rounds of ammunition?

HOLDER:

I can't say that I'm aware of that specific fact. I did know that the people who were a part of that group, for lack of a better term, had access to, had been captured with explosives. I don't know the amounts or whether it was in connection with this particular thing.

GRASSLEY:

Were you aware that FALN terrorists threatened to kill the judge at their sentencing hearing?

HOLDER:

That one I'm not. I'm not aware of that.

GRASSLEY:

Well, these are facts that I believe. So, let me ask you this. If you don't think that before the president decides to overturn the sentences of people like those in this video that were doing the things I said they were doing, that the Justice Department ought to make sure that he is aware of the important facts like these.

HOLDER:

I'm sorry. The question was...

GRASSLEY:

The question is don't you think that before the president, a president, in this case, President Clinton, decides to overturn the sentences of people like those in the video that we just showed doing what I said that they were doing, that the Justice Department ought to make sure that the president is aware of the important facts like these that I just stated.

HOLDER:

Yes. If the pardon process, the clemency process is working well, the president should have before him all of the relevant facts so that he can make an appropriate determination using the power that he has, fully informed.

GRASSLEY:

Yes. So then, let me get on this case to what I believe you said and how you characterized it in light of all that we've discussed here. Did you believe that it is fair to characterize Cortes and Torres, quote, unquote, "non-violent," and, therefore, deserving a clemency?

HOLDER:

I'm not sure I ever described them as non-violent. What I said before was that -- I'm not -- I don't know if these two are the individuals are part of that 15 of that group. What I said is that with regard to the group of 15, none of them had themselves

been directly linked to a murder or directly linked to a crime that involved an injury to somebody.

Crimes of violence can be defined in a whole variety of ways that don't necessarily involve injury to a person. Some drug offences are considered crimes of violence even though a person has not been hurt. But the distinction I made was the way in which I phrased it at the beginning of the day, I guess, and throughout the day.

GRASSLEY:

Well, earlier today, you said in response to a question from Senator Sessions that the people who received clemency didn't actually hurt anyone and that you thought that the granting them clemency was reasonable, but isn't it true that the only person that the people in the video didn't hurt anyone is -- or why they didn't hurt anyone -- is because the FBI caught them before they got a chance to do their damage.

HOLDER:

Yes, that might be so, but that is, nevertheless -- you know, it's a difference between let's hypothetically say murder and attempted murder. If some -- there's an intervening act that stops the person from committing the crime that they wanted to do, the person's intent is certainly nefarious and worthy of punishment but the ultimate crimes are fundamentally different ones.

GRASSLEY:

On another pardon, I know that Senator Specter is going through the Rich pardon, but I have some details that I'd like to ask as well. In addition to being an unrepentative (sic) fugitive who had renounced his U.S. citizenship to avoid justice, Marc Rich was also a billionaire tax cheat.

Speaking as a ranking member of the Finance Committee where we talk an awful lot about tax gap and making sure that the tax laws are effective, it bothers me that giving Rich a get-out-of-the-jail free card happens and that's especially offensive to me.

You have admitted to poor judgment in your handling of this case. However, it is hard for many people to accept a general statement of regret because Rich was so obviously undeserving and because all that money that his ex-wife gave to political leaders just before the pardon made it look like a corrupt operation.

I'd like to hear what you have to say to those people who think I made a mistake and I'm sorry just isn't enough. What specific facts or legal considerations led you to be neutral, leaning favorable to the Rich pardon? Was it a decision you made on fact, the law or political consideration?

HOLDER:

The mistakes that I made in the Rich matter as I think I said earlier all involved the fact that -- a variety of things -- among them, I should have been more informed about Marc Rich and his case. I was not.

I should have kept the people who were involved in the prosecution in the Southern District of New York -- good lawyers -- and people at Main Justice who were involved in the pardon process, I should have kept them involved. I assumed that they were. I found out later that they were not.

With regard to the political stuff and the money going back and forth between, I guess, Rich's wife or supporters, whatever, that I did not know about. That did not enter into the decision or the actions that I took.

With regard to the question of what my recommendation was, when I said neutral, as I've testified, I guess, eight, nine years ago at this point, neutral was an inartful (sic) way of saying I don't know enough about this case. I should have used a

different word, I suppose.

When they talk about leaning towards favorable, what people frequently do not put to the end of that phrase is what I said was neutral leaning towards favorable if there was a foreign policy benefit that might be gained. And that was on the basis of the prime minister of Israel weighing in and supporting the pardon.

I didn't say that I'm saying we should do this pardon. I said, "Look, if there is a foreign policy benefit that somebody else will have to make the determination, if there is that, then that might be something that would make me think that this is something we ought to consider."

GRASSLEY:

If the attorney for Rich had been someone that you had no relationship with rather than former White House Counsel Jack Quinn, would you have been as sympathetic to his case as you were?

HOLDER:

I wasn't sympathetic to the case. All I did with regard to Mr. Quinn as I've done for any number of lawyers initially was to try to set up a meeting that he wanted to have with the people in the Southern District of New York to review his case.

The lawyers in the Southern District of New York refused to do that and that was the end of it. I didn't pressure anybody. I didn't question their judgment.

I might have done it differently, but it was their case. They made the decision not to do it.

When it came to the pardon component of this, I had, I think, two conversations with Mr. Quinn, one in November, another one on that last night in January. I wasn't particularly sympathetic.

I didn't do anything to try to make this pardon happen. I certainly didn't perform as well, I think, as I should have. And had I performed as well as I was capable of doing, I might have done something more.

I think I would have done more to try to prevent it, but I didn't do anything affirmatively to try to make the pardon happen.

GRASSLEY:

Well, I think maybe you just stated a partial answer to this next question. So, let me -- but let me ask it anyway. What do you think was your biggest mistake in the handling of the Rich pardon? And please be very specific about what you think you should have done differently.

HOLDER:

Yes. I should have made sure that I was better informed, that I knew more about the facts about the underlying case about the history of Mr. Rich. I should not have spoken to the White House and made the statements that I made without having had all of that knowledge.

I should have ensured that the involved lawyers were actually a part of the process instead of assuming that they were. I think those are the mistakes that I made in connection with the Rich matter.

GRASSLEY:

Thank you. (OFF-MIKE)

LEAHY:

OK. Thank you.

The Freedom of Information Act or FOIA was something that Senator Cornyn and I have worked establishes a statutory presumption of disclosure of information that's in the possession of the federal government actually places the burden on the government to justify if they're going to be withhold anything from the American public.

When requesters think they had been wrongly denied, of course, they can sue and the Justice Department defends against those lawsuits.

Now, each new attorney general in position establishes what the ground rules are going to be on the FOIA. Attorney General Reno urged departments to disclose or on the side of disclosing unless there was a foreseeable harm.

The current policy we're using now is issued by then Attorney General John Ashcroft who reversed the presumption of disclosure to non-disclosure by telling federal departments and agencies the Justice Department would defend their action and not disclose it. They can make any kind of legal argument.

Will you review the FOIA policies and practices and will you -- if you do review them, will you do it at least with a consideration to reopening the kind of openness, or to reestablish the kind of openness that FOIA was intended?

HOLDER:

I will pledge to do that. I don't know exactly how the administration is going to be structured and what traps I would have to run through in order to actually promulgate the policy but that which Attorney General Reno, her policy, I think, is the way -- the place where we ought to be and that would be what I would be working towards.

And my thought would be -- my guess would be that the administration would support that.

LEAHY:

Much of the legislation I've worked on in a bi-partisan way, I might tell you, has been to improve the criminal justice system, improve and increase DNA testing, for example. The Justice for All Act passed in 2004 includes the Innocence Protection Act.

I had worked with former Republican Congressman Ray LaHood, Democratic Congressman Bill Delahunt, the House's both former prosecutors that keyed the Kirk Bloodsworth Post-Conviction DNA Testing Grant Program, the idea being we didn't want an innocent person in prison or on death row. But at the same time, as former prosecutors, we didn't want to see an innocent person go to jail knowing that that meant the guilty person is still out loose and could commit the same crime over again.

The Justice Department has been slow and affected, sometimes, obstructions as to implementing this program. They put a barrier that resisted funding key programs.

The fact of the matter is it's something that works well for both prosecution and the defense. Will you work with me and others in the Congress in both parties to see if the key DNA testing programs are effectively funded and implemented?

HOLDER:

I look forward to that, Senator. The Justice Department -- we in the Justice Department have not only a responsibility for trying to solve crimes and convict the people who committed them. The Justice Department, unlike maybe the responsibility that, I think, the defense attorneys have -- they have these more unique functions. We have a more unique function.

We have -- and especially those of us who potentially are in charge of the department -- have a responsibility to the system. And to the extent we can have tools that are made available to acquit people, exonerate people as well as find them guilty,

those things should be supported.

That's what I was talking about, I think, earlier with Senator Kyl. I agree with what he said and what you are saying that there is a need for technology.

LEAHY:

We also have the Debbie Smith DNA Backlog Reduction Program for a reduced backlog of untested rape kits and all. These are all things that we should work at that will make law enforcement go better and, also, not only will keep innocent people from going to jail but will make it more effective and will get the actual person who committed the crime so they're not out there where they might commit the crime again.

Just like the enforcement of the Violence Against Women Act, will you make enforcement of this a priority including enforcement in Indian Country?

HOLDER:

Yes, I will. It has been something that has been of importance to me since I was the United States attorney here in Washington, D.C. I started the domestic violence unit in the U.S. Attorney's office in D.C., having witnessed the crimes and the assaults that -- and the unique problems that these cases present while I was a judge here in Washington, D.C.

I took the concerns that I saw, that were generated by what I saw as a judge into the U.S. Attorney's office and started a domestic violence unit. And so, I would be more than happy to work with you on...

LEAHY:

And, lastly, many of us from both parties work very, very hard to re-authorize the Voting Rights Act. We do it for everybody -- black, whites, Hispanic, whatever, they might be, poor, rich -- to make sure that the right to vote in this country is given to everybody.

Now, it's -- there is a direct appeal to the Supreme Court on that, I understand, probably Senator Specter was with President Bush when he signed the reauthorization. Will you, if you're the attorney general, will you defend the constitutionality of the Voting Rights Act Reauthorization before the United States Supreme Court?

HOLDER:

Yes. The Justice Department has as a matter of policy the obligation to defend federal statutes. I can't think of a statute that my department of justice, should I be confirmed, would be more proud to stand behind.

LEAHY:

Thank you.

Senator Specter?

SPECTER:

Thank you, Mr. Chairman. With only a five-minute round, I'll try to be brief on the questions and I'll appreciate your being brief on the responses.

You testified Mr. Holder that you're not intimately involved, only a passing familiarity with the Marc Rich case, yet the record shows that you met or talked with Quinn on October 22nd 1999, November 8th 1991, January 18th 2000, February 28th 2000, November 17th 2000, November 21st 2000. Do you stand by at testimony that you were not intimately involved, only had a passing familiarity with this matter?

HOLDER:

Yes. The conversations that I had with him dealt with, I think, certainly at the beginning part of it, the question of whether or not he was going to get a meeting with the U.S. Attorney's office in the Southern District of New York.

When it came to the actual part, and I think I had two contacts with him -- one in November, one in January, I never had a detailed conversation with Mr. Quinn about the facts of the case. And I have said that that is a mistake that I had.

I, you know, I shouldn't even have had that conversation with him or independently I should have acquired sufficiently knowledge so that I could have acted in a better way.

SPECTER:

Well, that doesn't sound like a passing familiarity to me, but we'll let that stand.

We came to the point as to whether you made any inquiry. According to the testimony of Roger Adams, the pardon attorney, he called you at 1 a.m. on January 20 because he was concerned that a pardon might be given to Marc Rich.

You testified this morning when I asked you about all these sordid details about Marc Rich, about trading with the Iranians during a hostage crisis, oil for arms, handheld rockets, dealing with the Soviet Union and Namibia, on apartheid government in South Africa in exchange for Namibian uranium. That was certainly an opportunity when Roger Adams, the pardon attorney called you. He opposed the commutation of Rich, the pardon of Rich, to find out what the facts were.

When he called you at 1 a.m., wasn't that a pretty clear cut signal that he was very concerned to call you at home in the middle of the night, an occasion for you to say, well, what's up here, Mr. Adams? What are you so concerned about? And then you would have found out about all of these.

HOLDER:

Well, that's -- I suppose that could have happened. Now, the call, as I remember, the call with Roger at that time was to inform me, he might have actually called at 11 o'clock.

I'm not sure. I think he might have -- but the call from Roger, I think, was to tell me that the Rich pardon had gone with it -- Pincus Green's were on the list.

The way I viewed those calls at that point, I thought we were dealing with a fait accompli, that the President of the United States on the last day in office at 11 o'clock at night, or whenever it was I got that call, had made up his mind and that the decision was a final one.

I didn't expect that I would have the capacity to turn President Clinton's mind around that late in the administration. I mean, this was the last night of his administration.

SPECTER:

But you were on the record as saying neutral, leaning favorable, that the president there has a waiver of privilege on this pardon matters according to a letter from David Kendall to Congressman Dan Burton.

Did President Clinton talk to you about the Rich pardon?

HOLDER:

I never spoke to President Clinton about the Rich pardon.

SPECTER:

You've been questioned extensively about FALN and, in the context of your testimony, that you have tried to follow and respect the career professionals on the FALN matter according to the Los Angeles Times, January 9th, 2009. Mr. Holder instructed the Pardon Attorney's office to, quote, "Effectively replace the department's original report recommending against any commutation with one that favored clemency for at least half the prisoners."

Mr. Adams told the Los Angeles Times that he responded to Mr. Holder, quote, "Of his strong opposition to any clemency in several internal memos and a draft report recommending denial and at least one face-to-face meeting but, each time, Holder wasn't satisfied."

Well, Mr. Holder, if you wanted to make a recommendation of clemency, why didn't you have the directness to do so on your own without seeking the cover of the pardon attorney who had told you he was against it? Why submit a second request for a report after there has been opposition registered?

HOLDER:

All I asked Roger Adams to do was his job. The responsibility was -- what I asked him to do was to draft the memo that went from me. The memo did not go from Roger Adams or from anybody else.

The name that is on the memo is mine. It is a routine thing for the deputy attorney general to ask people who work for him to prepare memoranda...

SPECTER:

But he had told you he was opposed to it, and you go back to him and say, "Change it. I want you to recommend clemency for at least half of these people." Why do you place the burden on him to give you cover if you want to make a recommendation of clemency?

LEAHY:

Senator, this time is up. But go ahead and answer the question.

HOLDER:

Well, I'm not asking for cover. I'm asking him as I said to do his job. And I would not get covered given the fact that the memorandum went from me.

My name is on that memorandum so that anybody can look at that and say, "Well, now, who made this crazy decision?" You look at it. It says from the Deputy Attorney General to the president."

Eric Holder's name is on it. Roger Adam's name is not.

(CROSSTALK)

LEAHY:

Senator Kohl wanted to -- Senator Kohl wanted to ask his five minutes and then go to vote. As soon as he's finished there, if you want to ask one more question, go ahead.

Senator Kohl?

KOHL:

I thank you so much, Mr. Chairman. If confirmed, you'll be responsible for a budget of nearly \$26 billion. As you know, your

allocation of that budget will provide us with some insight into your priorities.

Over the past years, we saw a concerted effort by this administration to sharply reduce federal funding for local law enforcement, something many of us were deeply troubled by. Funding for improved and effective programs by cops earned in juvenile justice has been decimated.

Last year, the president's budget requested a 60 percent reduction for state and local law enforcement programs, which was below its already inadequate levels of prior years. And as a result, vital services to our communities have been cut, police departments have had to downsize, local prosecutors have been laid off, thus, drug test forces have been eliminated, and prevention and intervention programs have had to scale back their services or even close their doors.

Given your support for these programs in the past, can we expect to see a real change here? Will restoring these programs to their funding levels of prior years before the Bush administration be a top priority of yours?

HOLDER:

Yes, Senator Kohl. This is one of my top priorities. One of the three things I mentioned on the day of my announcement was a need to increase support of our state and local partners not only because of what they traditionally do in helping us fight violent crime, but because also when it comes to the national security component, it is now such a big part of what the justice department does.

They are, in essence, I guess what we've come to call force multipliers. They can help us on the national security side by looking at that car that has somebody in it that doesn't look quite right. They have tools that they can use to analyze data information.

They can help us not only in the traditional way in which we thought of them. They could also help us on the national security side, so I think this has to be a priority for us.

KOHL:

Thank you. Mr. Holder, I was very disappointed with the sharp cutback of antitrust enforcement at the Justice Department during the 8 years of the Bush administration. When we conducted antitrust oversight hearing in 2007, we found sharp declines in the numbers of antitrust investigations initiated by the department. Many mergers among direct competitors and highly concentrated industries pass review without any modifications, including the XM Sirius, Whirlpool or Maytag -- Whirlpool and Maytag, and AT&T-BellSouth mergers, to name just a few.

The serious decline in antitrust enforcement has been very disturbing. Vigorous and aggressive enforcement of our nation's antitrust laws is essential to ensuring that consumers pay the lowest prices and gain the highest quality of goods and services.

What's your view with respect to the importance of strong antitrust enforcement?

HOLDER:

It's a critical part of what the Justice Department does. It's especially true now where consumers in this nation are beset upon by so many different things -- the economic downturn or economic condition more generally. I think we have to make sure that we do all that we can to ensure that the American people, the consumers of this nation, have a system that is designed to be free, to be competitive.

And, so, the antitrust enforcement will be something that we will devote a lot of attention to. We'll get an assistant attorney general who understands the mission of that division, the historic mission of that division, and I expect it will be more active.

KOHL:

One last question on resale price maintenance, Mr. Holder. For nearly a century, it was the basic rule of antitrust law that a manufacturer could not set a minimum price for a retailer to sell its product. This rule had this economy to flourish and greatly enhanced the competition for dozens of consumer products, everything from electronics to clothes.

However, in 2007, a five-four decision of the Supreme Court in the Leegin case overturned this rule and held that vertical price fixing was no longer banned in every case. I believe that this decision is very dangerous to consumers' ability to purchase products at discount prices and harmful to retail competition.

Do you agree with me on this principle that manufacture setting retail prices should be banned? Can we expect you to support that and provide a letter for us with respect to your position on this issue?

HOLDER:

This is something that we talked about in our meeting, Senator. And I have to say that that decision disturbs me. I'm not at all certain that, again, harkening back to our desire to protect the American consumer to make the market as open, as free as we can, that that decision by the Supreme Court is necessarily a good one, and, so, I would want to work with you to try to figure out ways in which we can bring the competitiveness back that I think perhaps the Supreme Court in that decision has removed from the system.

I'm very concerned, very disturbed, by that decision and the implications of what flows from it. So, I look forward to working with you on that.

KOHL:

I thank you very much.

LEAHY:

Thank you.

Senator, you want to finish your question or...

SPECTER (?):

I have -- but now I have two yes or no questions, no explanations.

Did you talk to President Clinton about the FALN pardon?

HOLDER:

No, I did not.

SPECTER (?):

Would you make available to make the paper you referred to with respect to the request to Roger Adams on the Rich issue? We haven't been able to get a hold of a copy of that paper.

(UNKNOWN)

The FALN.

HOLDER:

I'm not sure I understand that.

SPECTER (?):

It's the FALN paper.

HOLDER:

OK. I'm sorry.

GRASSLEY:

Would you make available to me a copy of the FALN paper you've referred to?

HOLDER:

That is a document that belongs to the Justice Department. It is not, from my understanding, mine to give.

SPECTER (?):

Well, you referred to it in your testimony.

HOLDER:

Yes, I have seen the document, but it is not my document. It belongs to the Justice Department.

SPECTER (?):

Do you have the document?

HOLDER:

I have the document, but I'd have to give it back to the Justice Department. I signed an agreement that I will let no one see the document including the people who have worked with me. The only person who's allowed to see that document is me and I'm supposed to give it back to them when I...

SPECTER (?):

Well, I'll ask the Justice Department for it. Would you ask them to?

LEAHY:

We -- I think we've gone through five of your two questions.

SPECTER (?):

We have...

(CROSSTALK)

SPECTER (?):

I have some more.

LEAHY:

OK. We'll stand on recess until the call of the chair.

(RECESS)

LEAHY:

Thank you.

We gave a little extra time to Senator Specter and I'm going to go back to Senator Feinstein. I'm going to try to keep the order the way it's supposed to be. I'll have five minutes for Senator Grassley.

GRASSLEY:

Right now?

LEAHY:

Yes.

GRASSLEY:

OK, thank you.

I'll continue where I left off...

FEINSTEIN:

(OFF MIKE) Mr. Chairman, is this supposed to be here? I don't know whether I'm in a dead zone but I just can't hear.

GRASSLEY:

Can you...

LEAHY:

Having been in hearings with the Senator from California, I know she's not getting deaf, so it must be a dead zone.

GRASSLEY:

OK.

LEAHY:

All the -- is it on?

GRASSLEY:

Mine is on, yes.

LEAHY:

Try to...

GRASSLEY:

Can I go ahead?

LEAHY:

Yes.

GRASSLEY:

OK. On the night before the pardons were issued, January the 19th, Quinn's notes reflect a telephone call with you and what you said you had, quote, unquote, "No personal problem with the pardon," but that you expected a, quote, unquote, "howl" from the Southern District once prosecutors, they found out about it.

Mr. Chairman, I would like to place some telephone notes in the record at this point...

CHAIRMAN:

No objection.

GRASSLEY:

And then, I have a chart that has these calls on them that you can look at.

You testified before the House that you do not remember saying you had no problem with the pardon, but you remember the comment about the howl from the Southern District?

HOLDER:

At this point Senator, I mean, we're talking about something that happened, what, 2001?

So, that's 8 year ago. I don't remember that. But I find that comment interesting because if I said that, that in some ways indicates that I'm working under the assumption that the Southern District knows about this.

I don't -- although I see quotes around, only part of it and then something that says when they find out which appears not to be from, I guess, from this piece of paper that I was just handed. So, I don't remember.

GRASSLEY:

OK. Well, as a prosecutor, would you agree that notes like these are taken at a time or just after a conversation where a much more reliable evidence and some of this memory on the conversation months or years later?

HOLDER:

As a general matter, I'd say that that's true. I wouldn't say that that's true of the particular piece of paper that I have in front of me.

I would want to know exactly what were the circumstances under which this was generated, what were the conditions. I mean there's a lot of questions I would want to know about this piece of paper. I would agree with you generally.

GRASSLEY:

Well, would you have in your possession any notes that would support a different account of the conversation?

HOLDER:

No, I didn't take any notes of any of the conversations that I had. I'm not in a habit of taking notes of conversations I have.

GRASSLEY:

Do you have any explanation why Mr. Quinn would have written these notes if they weren't true?

HOLDER:

No.

GRASSLEY:

OK.

HOLDER:

I take -- on the other hand, I don't know why he would have taken these notes but I -- one thing that sticks in my mind is this one that he took the note that said, supposedly, I could go straight to the White House. I know I did not say that.

And that appears in a piece of paper or note that he took which gives me some pause with regard then to other things that he perhaps wrote. I'm not saying he's making things up. Maybe, he misinterpreted things. But that one, I know I did not say. This, I simply don't remember.

GRASSLEY:

Well, could I assume that based upon the notes that you did say something to Quinn on the night before the pardon about the prosecutors on the Southern District howling that seems to suggest that you knew that they were unaware that the pardon was being considered and that they would complain loudly if they knew.

After all, if they knew the prosecutors would have been already out there yelling about it yet you testified before the House that you didn't ask to see the pardon petitions when Quinn first mentioned it because, quote, unquote, "My belief was that any pardon petition filed with the White House ultimately would be sent to the Justice Department."

It's hard to believe that you assumed the Justice Department had been reviewing the petition since November 2000, yes, November 2000; but by January 2001, the prosecutors were not yet howling about it.

Isn't it true that you knew on the night before the pardon that the prosecutors did not have a chance to weigh in and does in fact contradict to your testimony that you believe the White House would forward the petition to the Justice Department?

HOLDER:

No, actually, I think, as I said earlier, again, I've not seen this, you know, for some time and I think that the fact that you say, "Holder says," there's only part of that that's in quote, howl from the Southern District.

Again, I don't remember saying that. But if, in fact, I said that, I think that actually points the other way.

It shows that there's an expectation -- assumption on my part that the people in the Southern District in fact know about this.

Now, the part is when they find out, it does not have quotes around it so I don't know where that comes from.

GRASSLEY:

OK. My time is just about up.

Mr. Holder, during the house pardon hearing, you said repeatedly that you believed all along the president was extremely unlikely to grant the pardon. According to your testimony, that's why you failed to make sure the president heard both sides of the story.

Essentially, you didn't think Justice Department input was necessary to stop it because Rich was a fugitive and that would disqualify him. However, less than a year earlier, you had successfully supported the petition for another fugitive Preston King.

Mr. King's case is very different from Marc Rich but they were fugitives and President Clinton had just pardoned King.

In light of the recent history, why would you say that you thought merely being a fugitive would disqualify Rich?

HOLDER:

Well, because the King case was really fundamentally different. That involved a person, an African-American who had been discriminated against. I don't remember -- I think it was a selective service case or something. I don't remember exactly what the facts were. But that had the indicia of something, of a wrong that needed to be righted.

Mr. King being a fugitive was not in the same category, a fugitive as Mr. Rich. They were just fundamentally different types of cases.

I don't remember all the facts but I do remember it was something about a racial injustice that had happened to Mr. King.

I think it has something to do with a graft (ph) case but I'm not sure about that.

LEAHY:

Thank you.

Senator Feinstein.

FEINSTEIN:

Thank you very much.

Mr. Holder, when I -- my time was used up in the morning, we were talking about the use of independent contractors that the CIA utilizes to carry out interrogation techniques and I mentioned that I wrote a letter to Mr. Mukasey in February of last year asking as to why this does not satisfy the inherently governmental strictures that must be used.

The FBI uses its own people, its own agents for interrogation. The military uses their own agents for interrogation or soldiers for interrogation. But the CIA uses only contractors.

And it seems to me that the interrogation of detainees in a war fought by the United States is an inherently governmental function and I'd like to ask that you commit to re-review those decisions that I have the letters here which we will forward to you.

HOLDER:

I would be glad to, Senator Feinstein.

FEINSTEIN:

Thank you very much.

Let me ask this question. It seems that one of the issues surrounding the closure of Guantanamo is what to do with the 80 or so detainees that likely will not be tried but have been adjudged to be unlawful combatants and a threat to US security.

Do you believe that there are international treaties and specifically the law of armed conflict that would allow the detention of an enemy combatant for the duration of the conflict?

HOLDER:

I think -- I can't refer it to something specific but I think that's a generally accepted rule of war that during the course of a conflict, a person who is captured by the other side can be detained for the duration of the conflict but there are safeguards for that person.

There are ways in which that person has to be treated but I believe that is the general state of the law.

FEINSTEIN:

Well, if you assume, as I do, that as a law of armed conflict would cover this, then, and, that this is an unusual asymmetric war that's going to go on, that there should be some form of regular federal review of the case and do you have any thoughts on that and how -- should that be an annual review, which I would think would make sense to have a judge look at the case outside, thereby, provide some element of due process?

HOLDER:

Yes, that's one of the things I'd like to work with this committee on and one of the things I discussed with Senator Graham. I think that there has to be fairness at two spots: one, in making a determination if the person is an enemy combatant, is

dangerous; and then two, a review of that decision on some periodic basis.

I think a year is probably pretty reasonable because if we get to the point where we conclude that the person is not dangerous, then I think we need to go to the other phase which is to try to repatriate the person, take the person to some other country.

Given the fact that this is a war, it may go on for an extended period time. I think that kind of review has to be a part of what we do.

FEINSTEIN:

One more quick question. And I thank you for that.

The FBI is in the jurisdiction of this committee as well as the intelligence committee for its work on counterterrorism and intelligence-related activities.

The Senate Intelligence Committee received last week the answers to questions from one of its open hearings that was held in January of 2007. Now, that's two years to get a response, and we've had to fight to get the response.

The FBI regularly tells both this committee and the Intelligence Committee that it can't respond quickly because all information provided to Congress has to be vented through the DOJ, and that causes delays.

Similarly, the DOJ prevents the FBI from answering questions from Congress on its domestic intelligence and counterterrorism questions.

Now, we're not looking to get into the details of an investigation. We are looking to carry out our oversight responsibility. And, therefore, I would like to ask you if you would review this oversight because I think it's been a way to stymied oversight rather than a prompt, quick review which allows the committees to do their work.

HOLDER:

I'll commit to doing that. A two-year response is, obviously, unacceptable.

I'll work with Director Mueller and the folks in the Justice Department to see if there's a way in which we can decrease that amount of time.

I mean, two years is simply unacceptable, even -- I don't know exactly what's going. In the Justice Department, we can certainly do better, way better than that.

FEINSTEIN:

Thank you very much.

Thank you, Mr. Leahy.

LEAHY:

Thank you, Senator Feinstein. Thank you for coming back. I know that you have the additional burden as the outgoing chair of the Rules Committee to coordinate the inauguration -- is that correct -- on the 20th. So I know that you've been doing double, triple duty today, as well as taken over Intelligence. So, thank you very much.

And to those who had double and triple duty -- Senator Kyl, of course, is the Assistant Republican Leader for the Senate, and has also been in other committees today.

So, Senator Kyl, I appreciate you coming back. I yield to you.

KYL:

Thank you, Mr. Chairman. There seem to be an inordinate number of members of this committee and the finance committee that discussed and talked about the potential for fraud and money- laundering and organized crime. Again, I won't go through all of that.

But the question that I'd ask and wanted just to get confirmed for the record is that you indicated that under your leadership the Department of Justice would continue to aggressively enforce the law against the forms of Internet gambling that DOJ considers illegal.

HOLDER:

That's correct, Senator.

KYL:

And then we discussed the regulations that were issued recently, actually, jointly by the Federal Reserve Board and the Treasury Department in consultation with the attorney-general.

The regulations primarily try to go at the problem by thwarting the payments for unlawful Internet gambling -- in other words, to shut off the cash flow.

And I mentioned the fact that they were already beginning to spend millions of dollars in an effort to try to undo these regulations somehow and hope that you would -- and you indicated you would -- oppose efforts to modify or to stop those regulations, and, of course, continue to be vigilant in enforcing those regulations to shut off the flow of cash from this illegal activity. Is that your intention?

HOLDER:

Yes, that is my position. That's what I will do.

KYL:

Yes, thank you, and I appreciate that very much. And we could talk a lot more about the pernicious nature of Internet gambling, but in view of the time here, let me move on.

One thing we did not talk about, but I understand -- in fact, I know you were asked by Senator Leahy. I forgot who it was -- someone earlier about the liability protection for the telecommunications companies under the FISA Law.

My understanding is that you answered the question saying that you would honor the certificate issued by Attorney General Mukasey that allowed the companies to claim the liability protections unless there were compelling circumstances. Is that approximately correct?

HOLDER:

That's, I think, correct, yes.

KYL:

OK. Now, the certification by General Mukasey was based on an investigation of the previous conduct of the telephone communication --telecommunication companies prior to the revisions in the law in order to determine whether they were entitled to receive retroactive immunity. In other words, the lawsuits had been filed based upon their earlier conduct.

The new law provides explicitly a protection for conduct prospectively.

So, the question, obviously, that arises then is what conceivable compelling circumstances could you conceive of that would relate to this previous investigation that caused General Mukasey to issue the certification?

HOLDER:

Senator, I'm not sure that I can come up with what those compelling circumstances might be. I guess, maybe I was being a little too lawyerly in trying to get myself some wiggle room.

I can't imagine what set of circumstances there would be that would have us go back and undo those certifications. I can't imagine. I don't know.

KYL:

And you are aware that the Department of Justice, of course, has taken a position in the litigation involving AT&T in support of the liability protections that have been invoked by AT&T?

HOLDER:

Yes.

KYL:

And it would be quite unusual where constitutional issues are involved for the department just because of a change administration to take a different position.

HOLDER:

Yes, it would certainly not happen as a result of a change in the administration. That would not be a compelling circumstance. And I -- if you...

KYL:

I didn't mean to suggest that either.

HOLDER:

No, no, no. I'm just saying that if you, you know, put me to the task there like, Mr. Holder, tell me what the compelling circumstance might be, I don't think I could answer that question.

KYL:

I hope you'll consider this question not out of bounce. We also discussed the speech you made and you talked about activities before the Congress acted. I had one question to ask in that regard, but we hadn't discussed this.

You were deputy attorney general during the Clinton administration when the Department of Justice authorized the warrantless search of Aldred Ames, the spy, who is a US citizen, of course. This was in 1993.

Were you involved in that authorization by any means or by your recollection?

HOLDER:

I don't remember.

KYL:

Do you have any reason to believe that it was unconstitutional?

HOLDER:

No.

KYL:

Even though it was warrantless?

HOLDER:

No. I was talking to a member of my staff assigned and as I understand it, as I understand what he relayed to me, if there is a national security exception not covered by FISA that would have made that search appropriate, legal, I think.

KYL:

Yes, FISA was not involved.

HOLDER:

Right. I think that is what was relayed to me.

KYL:

OK. Well, my time is up for this round. So, I'll...

LEAHY:

I thank you very much, Senator.

Senator Feingold?

FEINGOLD:

Thank you.

Again, Mr. Holder, among the last minute administrative actions taken by the outgoing attorney general was to approve major changes to the attorney general guidelines governing domestic FBI investigations, changes that went into effect on December 1st.

As you may recall, I had a number of other senators on this committee who repeatedly raised concerns about these new guidelines with the way that Congress was supposedly consulted with the decision to push these through during the lame duck period, and also with the substance of the changes.

Will you take a close look at these new guidelines early in your tenure and consider whether changes need to be made, and will you engage in real consultation with Congress as you do so?

HOLDER:

The guidelines -- I will do that, Senator -- the guidelines are necessary because the FBI's changing its mission, going from a pure investigative agency to one that deals with national security matters.

I understand the concerns that you have expressed. I think the thing to do would be to see how these guidelines work in operation, but then to take -- ask some serious questions in whether or not the concern that you and others have raised have been borne out by the way in which these things have been used in practice.

So, yes, I would commit to doing it.

FEINGOLD:

Thank you. I think these concerns are really quite serious so I appreciate that.

And this is related to -- the FBI has developed a policy document that is hundreds of pages long to implement these new guidelines.

I asked FBI Director Mueller back in September whether those policies would be made public to the greatest extent possible. He said, "Yes." And I understand from a letter we recently received from the FBI general counsel that a process is underway to consider what portion of those policies can be made public.

As attorney general, will you support efforts to make as much of those FBI policies public as possible?

HOLDER:

Yes, I think that helps the FBI, it helps our overall law enforcement efforts to be as transparent as we can, understanding there are certain things that we can not share; but to the extent that we can, we are helped by doing that.

FEINGOLD:

Thank you.

In his first state of the union address, President Bush said of racial profiling, it's wrong and we'll end it in America. And not long after that, Representative John Conyers and I introduced the End Racial Profiling Act.

Senator Barrack Obama was a co-sponsor of the bill in the last two congresses. Will you support the enactment of this or similar legislation to end racial profiling in America?

HOLDER:

I'm not familiar with the bill. I apologize for that but I think that we have to do something to end that practice. It's not good law enforcement.

You make assumptions on the basis of the way a person appears and you either put somebody in the ambit of suspicion or you miss somebody because you're looking at that other person. There are a whole variety of reasons why we shouldn't be doing that.

And so, I am against, in every way, racial profiling.

FEINGOLD:

Well, my question was whether you support legislation because there had been some things done by the Justice Department administration in this regard.

My question is as to the need for legislation. Do you agree that there's a need for legislation?

HOLDER:

I like to work with you and see what the legislation says and see if there are deficiencies and what the department has done and get a sense -- this not an issue I focused on very recently -- and get a sense of whether or not legislation as opposed to something else might be the better way to do it.

I'm not saying that I'm opposed to legislation. I think we don't have a factual basis at this point.

FEINGOLD:

Fair enough, I do think there's a strong need for legislation, the law of the land, making it very clear from a legislative -- legal

point of view that this is not tolerable.

On the death penalty, as you know, in 2000, when you were the deputy attorney general, the Justice Department publicly issued a nearly 400-page report with every conceivable piece of data about federal death-eligible cases down to the district level covering the times since the federal death penalty was reinstated in 1988.

This comprehensive report was extremely helpful in understanding how the federal death penalty has been implemented. And in the past two years, I've repeatedly asked Justice Department officials whether they would prepare a similar report covering the time period since 2000.

And while the department provides some statistical information in connection with an oversight hearing held in June 2007, it never agreed to prepare a detailed report similar to the one Attorney General Reno issued.

Will you commit to making this information publicly available if you're confirmed just as you and Attorney General Reno did in 2000?

HOLDER:

Yes, that report was done by lawyers in my office and I thought it was a very useful examination of the system and raised some very disturbing questions about not only the racial identity of people who were in the death system -- in the federal death system but also the geographic distribution of those people.

So, this is an issue that I think need to be revisited. It's been about, as you say, eight years or so and it might be, I think, an appropriate time to do another study and then share the results as we did in that first study.

FEINGOLD:

Thank you for that.

And finally, I was encouraged by your testimony that DOJ should, quote, "reinvigorate its efforts to protect the public in areas such as food and drug safety and consumer product safety." As you know, private lawsuits play a significant role in protecting the public, but the outgoing administration has pursued a far-reaching policy of trying to pre-empt state court law to a federal regulatory action.

What is your view of this trend towards so-called regulatory pre-emption and do you think the position of the federal government in such case needs to be changed to restore common law legal rights of injured citizens?

HOLDER:

Well, I'm not an expert in that field of the law but I think what we need to do is approach from a pro-consumer perspective. I think we need to always be doing that, protecting the American people; but I think that's especially true now given the economic hardships that so many of our fellow citizens are facing.

FEINGOLD:

Thank you, Mr. Holder.

Thank you, Mr. Chairman.

LEAHY:

Thank you very much.

Senator Cardin?

CARDIN:

Thank you, Mr. Chairman.

Mr. Holder, when you are confirmed to be the attorney general of the United States, one of your principal responsibilities is to make sure the access to our legal system is available to all of our citizens.

Last year, this committee held a hearing on access to civil legal services. We looked at the legal service corporation. The last study was done in 2005 that showed that of those people who are eligible for legal services and applied for legal services, about 50 percent are turned away.

Over a million cases a year were denied because of lack of resources to have access to our system. That denies justice to the people who could not get those services. When we look at this circumstance, we find that we can do a lot better.

And I guess my question to you is this. Congress should have been appropriating more money. We're at about 50 percent of what we said was the minimum level of appropriations so Congress hasn't provided the money. We haven't re-authorized the Legal Service Corporation for a long time.

My question to you is I hope this will become a priority. I understand the difficulty of getting legislation passed in Congress in this area, it's not going to be easy and the jurisdiction rests primarily with the Help Committee. This committee has the responsibility of access to the legal system.

But I would hope that we could find a way to bridge this gap, working together with the Department of Justice and take advantage of an opportunity. I know we're in tough economic times and circumstances are even more difficult for people who are seeking help through our legal system.

HOLDER:

Yes, I think one of the responsibilities that the attorney general has, in addition to a few other people, is a systemic responsibility, not only to do the things that concern the Department of Justice directly, but also to take care of a system, a system of justice on the criminal side as well as the civil side.

I was one the co-chairs of President's Clinton's effort of Lawyers For One America where we try to stress the need for representation in civil matters. The statistics are appalling and consistent with what you say with the number of people, usually poor, and disproportionately women who are not represented in civil proceedings and they're not getting justice as a result of that.

CARDIN:

I want to bring up a matter that you initiated when you were the U.S. attorney for the District of Columbia, and that is Community Prosecution Project, where you worked with the community to get a better of what you're doing, and also a better understanding of the community needs.

The goal was to reduce crime, to increase neighborhood safety, and get better cooperation between the community and the prosecutors so that you could be more effective.

My question is whether we could use that as a model and try to develop smarter ways that we can involve communities so that we can keep our communities safer.

HOLDER:

I think you need a model and I think that it is something that we should experiment with in other parts of the country. We have seen the success of community policing and it was our thought that community prosecution would also work out.

I think that we saw positive results from what we tried in Washington D.C., and, we tried it in other places, in demonstration projects. Funding for it didn't continue into the new administration.

I think it is something that is worthwhile and worthy of looking at and potentially expanding.

CARDIN:

We're working on some legislation with some other members of the committee to try to allow some discretion in setting up these types of programs in other parts of the country. And we urge us to work together and see whether we can get some legislation passed in that area.

Let me ask just one more question dealing with the Juvenile Justice Delinquency and Prevention Act. I want to talk about one of the four core requirements, which the deinstitutionalization of status offenders. Status offenders are those who went through into minor issues.

And in the 1980s, we enacted the Valid Court Order Exception, which was supposed to be an exceptional circumstance where you could put a juvenile in a facility in order to protect that juvenile. It was never meant to undermine the purpose of the act to deinstitutionalize status offenders.

The number of the use of these orders has increased dramatically over time. I would urge as we look at the re-authorization of this act, to make sure that the core requirements that were intended are now carried out. And we have a realistic schedule so that we can phase out the need for this exception.

HOLDER:

I agree with you, Senator. We don't want to have a situation where we have juvenile status offenders who are made a part of the juvenile system. It does not do them well.

It doesn't -- we have limited space in the juvenile system. In any case, we shouldn't be using that space for status offenders. There has to be an alternative way in which we deal with them. And again, it's a question of who we are as a nation.

We can be -- we have to be, you know, smart, upfront if we deal with these kids who have these status offense problems in a constructive way. It's much less likely that we'll going to have to deal with them if there are juveniles later on in the system or as adults in the criminal justice system. But it all requires focusing attention on those kids when they're not really in serious trouble.

CARDIN:

Thank you.

COBURN:

Thank you.

First of all, I'd like to -- a unanimous consent to put into the record evidence of self-defense from gun ownership, various articles.

LEAHY:

No objection.

COBURN:

Since we only have five minutes, I want to go back to guns just for a minute. Do you have any plans to issue regulations or seek a change in the concealed carry laws of the states or have a federal regulation that might impact those?

HOLDER:

That has not been something that I have discussed with anybody in the administration. It's nothing that I've contemplated.

COBURN:

It's nothing you're contemplating.

And I understand President-elect Obama does have an opinion on "assault weapons," quote, "assault weapons." Can you tell me what your plans are and how you view that and whether or not you think that may or not be reinstituted?

HOLDER:

Yes.

I think you had asked me earlier about the regulations that I thought might still exist, post-Heller. And I had mentioned, I think, closing the gun show loophole, the banning of cop-killer bullets and I also think that making the assault weapons ban permanent would be something that would be permitted under Heller, and I also think would be good for my law enforcement perspective.

COBURN:

OK. Thank you.

I want to move to just another area that hadn't been covered. I also want to say, I'm still troubled about the FALN decisions with that as I kind of do some moral equivalency with the Oklahoma City Bombing and the people who were in the conspiracy but yet didn't actually commit the acts that took the lives.

I just have to tell you, I'm still troubled with your viewpoint on that and the fact that you don't believe it was mistaken judgment.

I want to ask you about the Governor Blagojevich. We have -- and the answer of the questions to the committee, you failed to mention a -- what evidently was a very short-lived and early relationship in doing some legal work for them in December 17th, 2008, in a letter to Senator Specter, you said you'd never did substantive work on Illinois' gaming matter and that the engagement never materialized.

Mr. Chairman, I have a copy of the letter, which I'd like included in the record, if I might. However, in response to a foyer request, the Illinois Gaming Board, it appears that from an April 2nd, 2004 letter that you had at least done enough research to submit a detailed first request for documents from the gaming board and then you had at least one telephone conversation with the chairman of the Illinois Gaming Board.

And I would like this document placed in the record as well, which I will submit. And tell me how that is not substantive work.

HOLDER:

Yes. I was going to say, the letter was drafted by an associate while I work with three capable young men and really only is of preliminary nature. We're asking for very preliminary documents.

We did not receive any documents in response to that letter.

The call that we had was, again, of a preliminary nature. That was something that we were trying to get things set up in terms

of acquiring documents, filling out what our jurisdiction was going to be, figuring out who we were going to report to, dealing with a conflict that existed between the State and my law firm.

Well, none of those things were ultimately resolved. We never got any of the material that we sought. We were never paid for any of the work that we did.

And that's why we have described it in a way that we did.

COBURN:

It's a reasonable explanation. Did you all ever send a bill for the hours worked by your associate?

HOLDER:

No, we did not.

COBURN:

I want to go to one of the things that has troubled me tremendously and that is that we have rules on our veterans who come back who -- and I'm actually asking for a commitment, because we have a rule that says a veteran who is incapable at this time of not handling his affairs is adjudicated mentally defective and cannot own a gun.

And there's no trial that goes through for that. There's no true protection of his rights. And this is not through statute. This is through regulation.

And the current law prohibits individuals who are adjudicated as mentally defective from possessing a firearm and I don't have any problem with that.

But by regulation, adjudicated as a mentally defective is defined as a person who is either a danger to himself or others, which I don't have any problem with, or who lacks the mental capacity to contract or manage his own affairs.

We have a lot of veterans coming back with closed head injuries who get better, but they ended up losing their rights to go hunting with their kids or their grandfather when they come back.

Do you believe that this definition that is used in regulation is appropriate?

HOLDER:

I'm not familiar with this area of the law -- of that definition. What you've described though is a bit troubling because I think you're right. People can get well and to the extent that they do, and have an ability, I suppose to demonstrate that they are well, rights then, I think, be perhaps ought to flow back to them.

What I'd like to do is press work with you on this...

COBURN:

I'd be happy to send you a letter stating this out much more thoroughly and ask for your opinion in response to that if we could get that.

HOLDER:

But I think you raised an issue that could be a legitimate one.

LEAHY:

Senator Coburn?

COBURN:

I will yield back.

LEAHY:

Did you have another question?

COBURN:

Well, I have some, but...

LEAHY:

OK. We're about to go under our -- well, once Senator Whitehouse is over, we're going to go do our third and final round. If you want -- if you have one more question, I'm trying to get flexibility here.

COBURN:

Actually, I'm doing fine, Mr. Chairman.

LEAHY:

OK.

COBURN:

Thank you for your graciousness.

LEAHY:

Thank you.

Senator Whitehouse?

WHITEHOUSE:

Thanks, Mr. Chairman.

Mr. Holder, I just want to touch on one thing briefly, because there's been so much discussion in this room about whether President Clinton's decision in the FALN matter was reasonable.

At the time in the pre-9/11 environment that prevailed then, there was substantial support for this, was there not?

HOLDER:

Yes, there was. The...

WHITEHOUSE:

I'm looking at a list here, which is -- it's described as a partial list of the supporters, and it's 15 pages long.

And if I could just mention some of the names that are on it: Former President Jimmy Carter -- there are 11 members of the United States Congress; there are five members of the New York City Council, which is interesting when you consider that the most grievous offense that the FALN committed was two bombings in 1975 and 1977 in New York; numerous members of the New York Legislature; the former mayor of the City of New York, David Dinkins; a formal resolution, actually, on behalf of the city council of New York.

From the religious community, the United Church of Christ supported this -- and it looks like one, two, three general sign ads so they repeatedly did this. The general conference of the United Methodist Church supported it. The Baptist Peace

Fellowship of Northern America supported it.

Back to New York City again, the presiding bishop of the Episcopal Church of New York City supported it. The general secretary of the American Baptist Churches of America supported it. The ecumenical officer and president of the Council of Bishops of the African-Methodist Episcopal Church supported it.

The Puerto Rican Bishops Conference supported it. The president of the World Council of Churches supported it. The general secretary of the World Council of Churches supported it. The deputy general secretary of the Young Women's Christian Association supported it.

I count five Nobel Peace Prize Award recipients who supported it; and one Nobel Prize for Medicine recipient who supported it; two organizations that had received the Nobel Peace Prize, Amnesty International and Physicians Against Nuclear Weapons; and two family members of deceased Nobel Peace Prize Winners, including, particularly relevant to all of us, Coretta Scott King of the United States.

The president of the National Lawyers Guild -- in fact the National Lawyers Guild, by resolution, supported it. And on and on we go.

So, I just wanted to put those names in the record.

We can all agree or disagree about this, but I think in context, it's important to recognize some of the leading legal, civil rights, Christian and governmental organizations who were in support at the time.

The other thing I wanted to touch on is we had a -- the chairman had a wonderful hearing recently with some of the police chiefs, and there's been a real conflict, I think, between homeland security and hometown security.

Homeland security has had buckets of money. And people have been able to buy, you know, scuba equipment and underwater vehicles and train up for every possible thing you can think off.

All of which is, you know, a good thing but a lot of it has come at the expense of hometown security -- cuts in police coverage, a reductions of community policing.

I ran a community prosecutors office when I was the Attorney General I'd love to hear you -- and the police officials who were present said that it had become very unbalanced, that in terms of the public safety effect in their own community, the people whose safety they were responsible for, they felt that they had a lot of resources for a very small risk with respect to homeland security and very small resources for a current, present, under the Bush administration, increasing violent crime risk in their communities, and it was extremely disproportionate.

From a sort of policy point of view, how would you propose to address that question? Do you see it as an unbalanced situation right now?

HOLDER:

Well, that's something that I want to work with the committee on and see whether or not if that imbalance exists. I don't want to get on the bad side of my -- our former colleague, Janet Napolitano...

WHITEHOUSE:

That's right. We can't get you in trouble with Janet Napolitano now.

HOLDER:

... who's the U.S. attorney with the two of us, and, you know, I don't want that to happen. But we really do need to put our money where there is the greatest harm, potential harm. And obviously, defending our nation and keeping our citizen safe is our primary objective.

But that has a couple of components to it. We not only have to worry about criminals and terrorists from foreign shores. We also have to worry about criminals who are here and among us.

And we cannot lose the progress we made during the '90s when we worked with you, when you were attorney general in Rhode Island, to see those crime rates really come down. We can't afford to see those crime rates creep back up. We have to do what we can to make sure that we maintain a lid on the crime that restarted in the '90s, but at the same time protect us from terrorists.

I think we can do both; but it really is a question with the limited amount of money that we have making sure that we're spending it in the appropriate places.

And I would like to work with this committee and with Janet -- Secretary Napolitano, in figuring that out. She and I are going to have a meeting, actually, I think, next week, an informal meeting to talk about those kinds of issues.

I don't know she'll be as generous as she seemed to indicate in the conversation that we were having when we started talking about actual money, but we'll see.

But maybe, as a former colleague, you might help me, Senator Whitehouse.

WHITEHOUSE:

Thank you Mr. Holder.

Thank you, Mr. Chairman.

LEAHY:

I see that these former U.S. attorneys are getting together.

Well, for those with the schedules, we're going to begin our third and final round.

I reserve my time for the moment and I will begin with Senator Specter. After we finish this round, this third and final round, we will complete our time with senator -- with Judge Holder and then we will set a time.

I was going to consult with Senator Specter. Before we do, we'll set a time for the panel tomorrow, which will be the completion of the hearing.

Judge Holder will not have to come back, obviously, for that. And depending what time we finish tonight, Senator Specter and I will consult and set a time for the morning.

Senator Specter?

SPECTER:

Mr. Chairman, I understand you are interested in concluding the night, and I'm agreeable to that, but not if it's going to cut it short on questions.

You and I have discussed this for a few moments a minute ago. In the attorney general hearings on Alberto Gonzales, retired

chair, Senator Kennedy had a total of 57 minutes.

He had two ten-minute rounds. He went into the third round, just 22 minutes, and went to the fourth round, which was 15 minutes.

And so far, there have been 15 minutes -- 10 and 5 -- and you're talking about another 5, but you may extend a little.

That is insufficient for the questions I have also for conformation.

LEAHY:

If Senator Kennedy comes back, we'll give him extra time, but the...

SPECTER:

I don't think it's funny, Mr. Chairman.

LEAHY:

Well, I...

SPECTER:

I don't think it's funny.

LEAHY:

I know. I was at the Ashcroft -- I have it here -- I was at the Ashcroft hearing, the Gonzales hearing and the Mukasey hearing.

In the Mukasey hearing, we only have -- the last hearing we had, we only -- we had two full rounds. The only third round was just you and I.

In the Gonzales hearing, there were three rounds, which we're having now. In the Ashcroft hearing, there were two rounds. Only you and I had a third round.

Now, we're not going to have a different system because it's a Democratic administration than we had with the Republican administration. You're recognized for your third round.

SPECTER:

Well, Senator Leahy, the Gonzales hearing was a republican administration. It's exactly the same thing. And the Republican was chairman of the committee.

And there were requests for more questions and I exceeded. I took on those requests.

And I have other serious important questions to ask, and so do others. I would like to find out from the senators who are here.

Senator Kyl, how many more questions do you have? How much more time do you need?

KYL:

Thank you, Senator Specter. I yield.

I would just suggest to the chair. I have several more questions. I'm trying to go through them right now to get it down to the very minimum.

We can finish tonight. I have no intention of dragging this out, but I would ask for the same consideration that Democrats were

given during the Gonzales hearing, nothing more than that.

I think if we stopped talking about this and just get on with the questions, we can finish. But we will need a little bit of additional time.

LEAHY:

How much more time do you need, Senator Grassley?

GRASSLEY:

I don't know how to say how much time. I don't think it's -- surely not as much time as I've used. But I do have the issues of congressional oversights, False Claims Act, and whistleblowers that I'd like to discuss with the attorney general.

LEAHY:

Senator Sessions?

SESSIONS:

Well, I thought we're probably going to a third round, and so I had -- I expected to have two more opportunities.

I didn't expect to finish tonight. Some things I want to work on overnight, but the ranking member -- I know he's been on top of this since the beginning.

LEAHY:

Yes. Just how much time you need it?

SESSIONS:

Fifteen minutes.

LEAHY:

If everybody could, I ask there would be some parameter we could be more precise about.

SESSIONS:

Fifteen minutes.

LEAHY:

OK. Senator Coburn, how much more time do you to finish?

SPECTER:

Well, Mr. Chairman, my suggestion is that you allocate it as a minimum, fifteen minutes more for each senator.

LEAHY:

One senator from Pennsylvania begins his question. Let's see where we're going. A number of questions have been asked two or three times already. We could sit here all night long and ask the same question over and over and over again, which doesn't seem to accomplish anything for anybody.

I would suggest the senator from Pennsylvania begin his questions. Let's see how we go.

SPECTER:

Mr. Holder, turning to the issue of the quest for independent councils to investigate Vice President Gore on allegations that he had raised hard money from the White House and violations of federal law during the tenure of Attorney General Reno, when

you were Deputy Attorney General, there was a strong recommendation by FBI Director Louis Freeh -- Charles LaBella designated by Attorney General Reno to make an independent evaluation as to whether or not there ought to be independent council, and the third attorney, Robert Conrad, who came in for the same purpose.

All three of those made strong recommendations for the appointment of independent counsel.

There were four witnesses who testified that Vice President Gore was at a meeting where there were discussions about raising hard- money. Lynn Pineda, who was one of the four witnesses said, quote, "The purpose of the meeting was to make sure that he, Gore, knew what the hell was going on," close quote.

Attorney General Reno discounted the testimony of one witness, David Strauss, who was chief of staff of Vice President Gore, who had a notation of 65 percent soft, 35 percent hard.

I couldn't remember what was said, but Attorney General Reno did not acknowledge that as competent evidence, which it was, under the hearsay exception of prior recollection recorded which is different from prior recollection refreshed. He didn't qualify for prior recollection refreshed, but he did for prior recollection recorded.

There were 13 memoranda from Harold Ickes to the vice president from August of 1995 to July of 1996 containing divisions as to hard money and soft money, also the federal contributions which the equivalent of hard money contributions.

Vice President Gore testified that, quote, "The subject matter of the memorandums would have already been discussed in his and the president's presence."

The Vice President further acknowledged that he had, quote, "had been candidate for 16 years and had a good understanding of a hard- money," close quote.

Now, the applicable law states that where there is a preliminary investigation which determines there are reasonable grounds to believe that further investigation is warranted.

It seems to me as it seemed to FBI Director Freeh and Charles LaBella and Robert Conrad that an independent counsel should have been appointed. And independent counsel was not appointed.

I chaired the subcommittee hearings that rendered this issue in great detail. And it seemed obvious that Vice President Gore was being favored and that if it hadn't been the Vice President, a superior, that independent counsel would have been appointed.

Should independent counsel have been appointed in that matter?

HOLDER:

No, I don't believe so, Senator Specter. Louis Freeh, Chuck LaBella are very good lawyers, and people who I respect and people who coincidentally are supporting my nomination to be attorney general.

There were -- they had their view of that matter. We had career lawyers at the Public Integrity Section who had a time for review.

Attorney General Reno and I looked at those conflicting recommendations or conflicting views of the case made the determination that we thought that what was expressed by the Public Integrity Section was stronger, was more reflective of both the facts and the existing law, which is not, in anyway, to take away from the Louis Freeh and Chuck LaBella.

These are people who are friends of mine, who are great lawyers. And I certainly respect the opinions that they shared with us.

In fact, they gave me pause. The fact that we had those kinds of recommendations coming from people that I respected, it made me think twice about where we were going.

But ultimately, our determination was that the Public Integrity Section lawyers made the better call.

LEAHY:

Well, the time of the senator from Pennsylvania is expired. Certainly, feel free to continue. I just want to make sure I understood one thing.

Mr. LaBella and Judge Freeh are both supporting you as attorney general, is that correct?

HOLDER:

That's correct. Mr. Freeh, I think, is going to be testifying tomorrow, and both have submitted letters.

LEAHY:

Please, go ahead, Senator.

SPECTER:

Mr. Chairman, I would appreciate it if my line of questioning was not interrupted.

HOLDER:

I'm sorry, Senator. I didn't...

SPECTER:

You didn't interrupt it. I'm not talking to you. I'm talking to him.

LEAHY:

I think the only reason I interrupted is because your time had run out and I was trying to give you a little extra time.

SPECTER:

Well, you could have accomplished that without breaking up collateral matters to interrupt the train of the inquiry.

There's no doubt that the chairman would have had other time to make any comments he wanted. He runs the place.

Were I to understand you to say that you think that was a proper decision, Mr. Holder, not to appoint independent counsel, that if you're confirmed and a similar situation arises, that you would not appoint a special prosecutor?

We don't have independent counsel statute, but we have the equivalent of a special prosecutor. You're saying that if you're confirmed, you'll stand by that kind of a judgment?

HOLDER:

I'm saying that I will stand by the judgment that I made then and also assure you and the American people that I'll look at the law, the facts, and make the appropriate determination. And if an independent counsel, a special prosecutor is warranted, I will do that.

And for some perspective, one of the things that people talk about is perhaps we were trying to favor Al Gore. But we certainly didn't favor Al Gore when we decided to make that rescue of Elian Gonzalez in Florida, a critical state as it turned out.

Vice-President Gore criticized the decision to make that -- to do that operation. Maybe that caused him the state. I don't know.

But Attorney General Reno and I certainly did not show him any favoritism then and we certainly didn't show him any favoritism with regard to the matter that we are talking about here. Our determination was based really on the facts and the law.

SPECTER:

Well, you have your judgment which you've expressed and you stand by it and I have my judgment. And I don't think it's a closed question.

I don't think at all -- the basis of that evidence, if it hadn't been the Vice President, if it hadn't been a superior, somebody to favor, if it had been John Doe, an independent council would have been appointed.

I think it's so clear that it raises a question on my mind as to your fitness for the job, for the record.

HOLDER:

With all due respect, Senator, you're a good lawyer. I'd like to think of myself as a good lawyer. Good lawyers frequently disagree about these kinds of things.

I don't question your integrity. I respect your opinion in the way that I would hope that you would respect mine. It was not done for any reason other than what I would consider a neutral assessment of the material that we had...

SPECTER:

You are an excellent lawyer, Mr. Holder. If you weren't such a good lawyer, I wouldn't be so surprised if you were a poor lawyer, an inexperienced lawyer, not a real professional like you say who doesn't know any better.

But my evaluation is that a man in your position knew better. That's the whole point, but you've expressed yourself and I've expressed myself.

HOLDER:

Senator, we're getting close to a line here. I will certainly understand a difference of opinion, but you're getting close to questioning my integrity and that is not appropriate.

That's not fair. That's not fair, and I will not accept that.

SPECTER:

What's not fair?

HOLDER:

To suggest that the decision that I made in the case along with Attorney General Reno supported by career lawyers from the Public Integrity Section was anything other than a call on the facts and the law. There was never any attempt on the part of any of those people, those career people -- the Attorney General or this Deputy Attorney General to do something that was inappropriate or that favored Vice-President Al Gore.

That was not the case.

SPECTER:

Well, you're telling me what you think about it.

HOLDER:

That's fine.

SPECTER:

And I'm telling you what I think about it.

HOLDER:

That's fine.

SPECTER:

And when I look at Marc Rich and the circumstances surrounding that, if you have a part of that guy who's a fugitive with a terrible record and you have Roger Adams calling you at 1 a.m., it looks to me like there's favoritism to cover for President Clinton.

And we talked about FALN, that's inexplicable to me. We went over all the facts as to how you have the professionals opposing clemency, to give you a report, opposed the clemency, then you want them to change their report in order for you to have cover. So I have to make a determination on my vote looking at the totality of your record which, overall, we appreciate.

Mr. Chairman may the records show that it's 5 minutes and 27 seconds, so, I now have the...

LEAHY:

Actually, it's 10 minutes and 31 seconds because it's five minutes plus your five minutes.

SPECTER:

May the record show that it's 25 and a half minutes so that on the Kennedy standard, I only have 21 and a half minutes left.

Thank you, Mr. Chairman.

LEAHY:

Senator Feinstein and Senator Grassley, you're on your third and final round and I appreciate the -- Senator Specter wants to make sure you are all given extra time. That's what I'm doing as I did for Senator Specter, and I appreciate you taking only 10 minutes instead of...

SPECTER:

Mr. Chairman, I'm not finished yet.

LEAHY:

Well, then, finish your questions within a reasonable amount of time. You're now on the third round of five minutes each. You've gone 10 minutes into it. You want more time in your third round because it will not be more than three rounds.

SPECTER:

Mr. Holder, when you came to see me for the so-called courtesy call, I showed you a letter which I had written to you. Attorney General-designate Gonzales and I have written a similar letter to you and handed it to you, but you had a chance to see it at that time and I gave you a notice about it. And this is the parameter and the scope of the congressional oversight.

And the essence of the letter is an inclusion by congressional research report about the scope of appropriate congressional oversight. And it says in part that DOJ consistently obliged to submit the congressional oversight regardless of whether litigation is pending so the Congress is not delayed unduly in investigating misfeasance, malfeasance or maladministration,

DOJ or elsewhere.

In the majority of events since this review, the testimony of subordinate DOJ employees such as line attorneys and FBI field agents and was taken informally or formally and include the detailed testimony about specific instances of the department's failure to prosecute alleged meritorious cases.

In all instances, investigating committees were provided with documents respecting open or closed cases that included prosecutorial memoranda, FBI investigative reports, summaries of FBI interviews, memoranda and correspondents prepared during the pendency of cases, confidential instructions outlining the procedures or guidelines to be followed for undercover operations and the surveillance and arrest of suspects and documents presented to grand jury is not protected from disclosure by Rule 6E.

Do you accept that as an appropriate legal standard for congressional oversight?

HOLDER:

Well, I'd say this, Senator. Congressional oversight of Justice Department activities is obviously very important, but I will respect the Congress' rule. In general, I work to keep the committee fully informed of the department's policies and programs.

Now, there are limits I think to what we can say about ongoing law enforcement matters, including Grand Jury testimony that might jeopardize an investigation. That would be a concern I would have and also a concern about the impact of revealing that kind of information and the chilling effect it might have on line lawyers. But we'll work to cooperate with you to make sure that you have access to the materials that you need so that the oversight that you conduct would be meaningful.

SPECTER:

Oh, I take that to be a no answer.

HOLDER:

Well, I'm not -- this seems a bit broad to me.

SPECTER:

Well, Mr. Holder, may I suggest and ask that you take a look at it. Study it more fully and give me a response in writing as to whether you would accept that as the appropriate range of congressional oversight or, if you disagree with any part of it, tell me which part you disagree with.

HOLDER:

I'll be glad to do that, Senator.

SPECTER:

Mr. Holder, there had been suggestions for a revival of the so-called Fairness Doctrine, and my question to you is do you think that as a matter of public policy, the so-called Fairness Doctrine ought to be reinstated?

HOLDER:

Senator, that's a toughie. I've not given an awful lot of thought to. If I could perhaps submit an answer to you in writing, I would have an opportunity to think about that. I wouldn't want to commit myself to something and not give you the benefit of what is my best thinking on that.

SPECTER:

Well, this is a subject which I did not take up when we had our so-called courtesy call and so that'd be fine. I will propound

some questions to you in writing on that because I want you to answer also the constitutional question if you would.

HOLDER:

Sure, that's fine. You've been very generous in sharing with me both at the meeting and in the address you did on the floor. It was laying out for me, I think, in a very generous fashion the things that I could expect at the hearing and I called to tell you that I appreciated them.

SPECTER:

Senator Leahy asked you about reporters' shield. You said you'd be willing to consider it. We had a reporter held in jail for 85 days on the allegation that a source was not disclosed at all times. The special prosecutor in the case knew where the leak came from.

I would appreciate it if you would be a little more definitive with your response. I don't want to protract the discussion now.

HOLDER:

Well, that's fine.

SPECTER:

Because I want to give my colleagues plenty of time.

HOLDER:

Well, maybe, let me just say this, Senator. Maybe I wasn't as clear as I could have been. I actually favor such a measure. All I was saying was that I'd want to work on what it actually look like.

There's a piece of legislation, I understand, there are going to be concerns, I can tell you I'm sure within the department. I want to work with you on that. But my position is that I think something can be crafted to deal with the issues that you have raised and the concerns I know I'm going to hear at the Justice Department. But I am in favor of the shield though...

SPECTER:

Well, the critical question is a national security issue, right? If you would take a look at that and give me, us, your judgment, I'd appreciate it.

HOLDER:

OK.

SPECTER:

The issue of what was the topic that we started with you and my sense is that there are two fundamental principles involved here. One is the right to counsel, Sixth Amendment, right to counsel, and an integral, indispensable part of that is freedom of communications to a lawyer.

The second principle is the state or the commonwealth, which I used to represent. It has the obligation of the burden of proof. And it seems to me that the prosecutor never did try to prove his case out of the mouth of the defendant.

And I don't know if you anticipated where your memorandum would lead, but it has led to some pretty tough situations with the Southern District case, denying counsel fees and finding the district federal judge a violation of the Sixth Amendment rights have upheld by the section.

I'd like you to respond to that in writing, too...

HOLDER:

Sure.

SPECTER:

... as opposed to an extensive dialogue here.

HOLDER:

I'd be glad to. But I will note that I think the progress that we made in this area in walking it back from what I think people in the fields have done was largely as a result of the work that you and Chairman Leahy did in expressing concerns about positions the Justice Department was taking.

But, frankly, I think we're inconsistent with that initial memo of my mine, so, I'd be glad to respond to the questions that you'll propound to me.

SPECTER:

Thank you, Mr. Holder, for being a patient witness.

HOLDER:

Thank you.

SPECTER:

A witness with a lot of stamina. It's an important attribute for this job. OK. Thank you, Mr. Holder.

HOLDER:

Thank you, sir.

LEAHY:

Are you finished with your questions? This is your last round. So, are you done?

SPECTER:

Yes.

LEAHY:

OK.

SPECTER:

I understood the parameters.

LEAHY:

OK. I just want to make sure you felt you had enough time.

SPECTER:

This is the last tango. We'll ask some more questions in writing, but that's...

LEAHY:

Senator Grassley?

GRASSLEY:

Yes.

SPECTER:

Oh, Mr. Chairman, I want to put into the record unanimous consent...

LEAHY:

Of course.

SPECTER:

... as a pro-forma matter the whole series of documents and also the editorials without taking the time to enumerate.

LEAHY:

Of course. Of course. Also, we have an enormous number of letters in favor of the nominee. We have some opposed to the nominee. They'd all be put it in the record, too.

Yes, go ahead.

GRASSLEY:

Yes.

LEAHY:

Senator Grassley?

GRASSLEY:

Mr. Holder, when we met several weeks ago -- and I thank you for coming and visiting with me for a long period of time -- I talked to you at length about my congressional oversight efforts and how I take this constitutional responsibility very seriously.

Oversight help makes government more transparent. The taxpayers have a right to know whether taxpayer's money are being appropriately spent. We've got a waste fraud and abuse rampant in any administration.

In my opinion, oversight is a particularly important issue for any nominee in your position because of the critical work that your department does and its subordinate law enforcement agencies particularly the FBI.

So, I hope you appreciate the role that Congress has in conducting oversight, over the activities of the executive branch including your department. Over the years, I've made congressional oversight a top priority regardless of which political parties is in the White House. I've requested documents, information and access to DOJ personnel for interviews.

And I've learned that oversight works best when the agency fully cooperates to Congress. Unfortunately, agencies are all too often untimely in responding to Congress and in the worst cases, totally unresponsive. This is unacceptable and I hope you agree.

Mr. Holder, I expect that you'll be responsive to my oversight work and that my questions and document request will be taken seriously and answered in a timely and complete way. I hope that I have your assurance that if you're confirmed, you'll assist me with oversight activities, be responsive to my request -- tell me -- make Justice Department as accountable in this coming administration as I've attempted to make it accountable in previous administrations, both Republican and Democrat but the idea is to make it more accountable to the American people.

That's an expectation on my part.

You can respond if you want to but would you pledge to be responsive to all congressional requests for information and provide this information to Congress in a timely manner?

And before you answer that, I'd like to point out a particular problem that I've had over a period of years, would you work and specifically in your position as attorney general being over everything in the department including the FBI -- would you ensure that responses are not held up due to lengthy, what they call, clearance processes as subordinate agencies such as the FBI?

HOLDER:

Yes, Senator, I will -- in response to this, I guess, the general assertion is to try to do all that we can, and, to make sure that we respond fully.

And in a timely fashion to the very legitimate questions, that, I know, that you have propounded to the department and to the extent that there is a problem with our internal processes, I'll look at those and try to make sure that we make them work better.

What I would hope that we would have is a relationship where, if you're not getting something -- and what you consider a timely fashion, that you will feel free to give me a call, to pick up the phone and say, you know, with regard to subject matter A, I sent this whenever I've not received a response so that you're not upset by our lack of response.

Please give me an opportunity to check on the internal workings of the department to make sure that we're doing it as quickly as we can. And if we're not, if I can't give it to you, at least I can give you an explanation.

GRASSLEY:

Then, in that regard, you will remember I gave you a notebook of things that were unanswered and I would hope you'd help us clear those up so that you taking over a department and a new administration have a clear slate. And there is no, you know, six months from now, there is no question, what your responsible for. Or what the previous administration was responsible for.

On the issue of whistleblowers, as you've might know or at least I think I've told you, I've been an advocate for whistleblower because I value candid, unflavored information they provide to Congress about the executive branch activities. And quite frankly, most of the time they come to Congress, it's a last resort. They probably don't even know about a whistleblower protection.

But they -- something is bad. They tend to be very patriotic people, for the most part. They want government to do just what's right.

Anyway, many whistleblowers who often come forward, they face tremendous retaliations in agencies.

And that retaliation maybe straightforward as being terminated; could be cloaked as a reassignment or a shifting in duties. Either way, retaliation is exactly why we pass a Whistleblower Protection Act and countless other laws.

These laws are a vital tool to ensure that whistleblowers are protected, but oftentimes that doesn't mean that the wrongdoers are disciplined by their agency.

This is especially true in law enforcement agencies like the FBI, I've found out.

So, you know, I just ask you to take a look at that. Take it seriously. They deserve the same protection in consideration whether an FBI or any place else. A whistleblower who raises concern to many, who'll bring concerns to Congress and cooperate with congressional oversight efforts should be protected, not retaliated against.

So, can you give me a commitment that you all do, that you shall not retaliate against Justice Department whistleblowers?

And instead work with them to address concerns that they raised?

Will you commit to ensuring that every whistleblower is treated fairly and that those who retaliate against whistleblowers are held accountable and particularly on that last point?

There's so many times, there is injustices has been done. The people that did it to them have never been held accountable, you know.

HOLDER:

Yes, I can make those pledges both to ensure that people are given the opportunity to blow the whistle and they will not be retaliated against, and then, to hold accountable, anybody who would attempt to do that. I've worked with people who, whistleblowers, both in government and more recently in private practice.

You know, I've seen their utility, their worth and frankly the amount of money that they return to the federal government. And they serve a very, very useful purpose.

GRASSLEY:

Can you give me, since you've been in government in the past, just as an example. How have you dealt with whistleblowers and in particular if they didn't agree with maybe a policy or something or a position on a particular matter with you, if you've have ever...

HOLDER:

Yes.

GRASSLEY:

... or maybe you haven't dealt with whistleblowers.

HOLDER:

No, I have dealt with whistleblowers. I don't think that I've ever dealt with a whistleblower that has had a problem with a particular policy.

I've not had that kind of interaction with somebody who was complaining about something. The relationships, the interactions that I've had with whistleblowers have generally been pretty positive even as I was saying in the work that I've done in private practice, dealing with the lawyers who are representing the whistleblowers.

I mean, I try to represent my clients as zealously as I could, but I could understand what they were doing. And I could see the worth to the federal government by the actions that they had taken.

GRASSLEY:

I had a couple other questions here, but I just hope that you would take some sort of positive approach, a statement, or something like that early on in your taking over the department, to make sure that that there's a friendly atmosphere. I mean, I wish a president of the United States previous than this one coming up would have done that because I think that the highest level of government, it would send a signal, you know, that if something is wrong, we want to find out about it.

After all, the public's business ought to be made public and if takes a whistleblower to get it done, do it. I'm not going to ask questions about the False Claims Act, but I think I expressed it to you in my office as author of that legislation, has brought in \$20 billion, that maybe wouldn't have been found without people in government knowing about it and bringing cases themselves. Some of them with the help of the Justice Department and it had some problems.

I've got some legislation -- I'm going to show you that would correct some things that have, in a sense, we get it from our original intent, that I think I've got broad bipartisan support to get passed. And I'd surely appreciate very much your considerations for those, and anything specific I have on falls claims, I'll submit along with a lot of other things for a response in writing.

But just so, you know, I think, the False Claims Act, originally in defense and now on health care has been a very, very important tool for us to root out fraudulent use of taxpayer's money and gaining the system for personal benefit, you know. And so, I hope you'll use it. Help people that use it. Move cases forward, you know, things of that nature.

HOLDER:

Yes, I will do that, Senator. You have worked together before on False Claims Act matters and I'll continue to have that level of cooperation with you. You raised good points.

GRASSLEY:

Yes.

I believe I'm done, totally done, Mr. Chairman.

LEAHY:

Thank you, and I appreciate you giving that time as I said I've tried to arrange.

And I know that, Senator Kyl, you have some more questions?

KYL:

Thank you, Mr. Chairman...

LEAHY:

I appreciate your effort to keep them within eight.

KYL:

I really would have looked down here. Senator Specter raised the question of a compelling testimony for reporters. The Department of Justice guidelines relating to subpoenas for reporters have been around about 28 years, to my knowledge, and they were used when you were at the Department of Justice, were they not?

HOLDER:

Yes, they were.

KYL:

Among the people who have written about this, U.S. Attorney Patrick Fitzgerald has written, I quote, "That the Justice Department operates under rigorous regulations restricting the issuance of subpoenas to journalists."

Do you know of any serious problems with the Department of Justice guidelines?

HOLDER:

With regard to the subpoenaing of the reporters?

KYL:

Yes.

HOLDER:

Yes.

Nothing that comes to mind. I don't have...

KYL:

Just so you know, I'm not trying to cut you. This is a very controversial matter and some of us believed that the Department of Justice guidelines have served us very well. I'm not aware of any serious problems with them either. But there are proponents of the legislation who would obviously go beyond them.

We received several letters last year from members of the administration expressing concerns. I'm going to boil this down but Attorney General Mukasey and Director of National Intelligence McConnell wrote a couple of those letters. Their abuse letter express, I'm quoting, "Their serious concerns, especially with regard to the bills effect on our ability to protect the national security and investigate and prosecute the perpetrators of serious crimes." That was April of 22nd of last year.

Now, I'm just going to read one other, slightly longer paragraph.

They said, "We opposed this bill, because it will undermine our ability to protect intelligence sources and methods and could seriously impede national security investigations. Indeed, this bill only encourages and facilitates further degradation of the tools used to protect the nation. We have been joined by the secretary of defense, the secretary of energy, the secretary of homeland security, the secretary of treasury and every senior intelligence community leader in expressing the belief, based on decades of experience that by undermining the investigation and deterrence of unauthorized leaks of national security information to the media. This legislation will gravely damage our ability to protect the nation's security."

I'm not going to go into all of the issues. As I said, I'll boil it down a little bit, but let me ask you about just some that they've raised.

One problem they raised, I don't know whether this is inadvertent or not but the bill applies only prospectively. It does not apply to investigations once the harm has occurred so you could get into investigations pre 9/11 but after, on 9/12, you wouldn't be able to require testimony for acts that have already occurred.

Would you agree that a media shield bill should allow the government to investigate serious on both prospectively and with regard to harm that's already occurred?

HOLDER:

Senator Kyl, you've raised a series of concerns that I think have to be taken seriously. What I was trying to say earlier was that, I think that a bill can be constructed, that would handle or deal with the concerns you have raised and perhaps others that you're going to raise. And still deal with, what I think are, the salutary parts of the legislation.

There is a value on -- the concerns you raised are legitimate ones. On the other side, the notion of having a free press and protecting reporters and their sources, I think is something that also has to be put in the mix. I'm not saying that what you're saying is it is not substantial. It must be dealt with the concern about prosecuting people who leak national security matters, the concern about intelligence, all of those things have to be dealt with from my prospective before I would say, sign off on a particular bill.

What I was thinking is that I think the concept is a good one. And I think there is a way which we could find ourselves to a good bill.

KYL:

And I appreciate the Department of Justice guidelines recognized a concept. The question is, whether you go beyond that. I'm just trying to get your view on a few specific matters.

One, whether there's should be any difference between a prospective or investigation something -- trying to get information or investigate a terrorist act, for example, that hasn't occurred yet versus investigating one that's already occurred from which, of course, you might get very, get information.

As a general proposition, can you think of reason why there should be a distinction between the two?

HOLDER:

It's one of the problems in the draft of the bill that I believe exists. And General Mukasey and Director McConnell identified as well.

KYL:

OK, I do want to look at that and understand it a little better.

HOLDER:

OK.

KYL:

You've discussed already the need to try to protect, as much as possible, classified information. One of the concerns is the requirement that a media shield bill should deal with classified information in camera. That is to say, if it is going to be involved, at least protect it because it is classified.

Can you think of any reason why that general principle shouldn't be applied to legislation like this?

HOLDER:

OK. I want to look at the provisions of the bill, understand the concern which sounds like a very legitimate one, the one you've now raised and try to understand why that patch was not included in the bill or I should understand how the bill treats the concern you've just raised.

KYL:

I guess it's safe to say that some of that -- we've been working on specific of this bill for sometime, you haven't, and it is been difficult for you to express a specific -- a view about some of this specific issues that have arisen. That's the reason for your general reluctance to be too specific, correct?

HOLDER:

Yes, that's correct.

KYL:

Let me try just with respect for couple of other general principles. One of the things that General Mukasey and Director McConnell say in their letter is that the bill leaves out -- I'm quoting now, "Leaves out key non-fissile tools that are essential for protection of national security. The wiretapping provisions of Title III, 10 registered trap and trace authority and national security letters, all of these tools are important," they say.

I mean just as a general proposition, can you think of any reason why they wouldn't be allowed to be used?

HOLDER:

Again, speaking very generally...

KYL:

Excuse me. Why a media shield law would preclude our law enforcement from using those tools?

HOLDER:

Again, not having had the experience with the bill or in this area that you have, I'm not sure if I want to commit myself, but again that sounds like an issue that is very worthy of consideration...

KYL:

Rather than trying to pursue more specific, sir, let me ask you a couple of general questions. Would you work to address the concerns raised in this letter and the other letters that have been written as well as the views -- letters expressing the concerns of the Department of Justice?

HOLDER:

Yes, absolutely. I mean I don't want you to leave here thinking that you have got some press crazy here as potentially Attorney General...

KYL:

I don't believe that at all. I just -- these are really important and...

HOLDER:

They are.

KYL:

... rear people at the department have really been expressing a lot of views to us. Would you tell us that you will talk, not just to the political appointees but to the career people in the department who really work with these issues for a long time?

HOLDER:

Absolutely. But beyond that, Senator, I want to talk to you and to people who worked on this bill and who might have a contrary view of it. As I said before, I guess in my opening statement, you know, knowledge doesn't reside only in executive branch, the experience that you've had with this, the obvious knowledge that you have of these issues are the kinds of things that I need to be educated about, it may change my mind, frankly.

KYL:

One thing, just in that regard, that'd be very useful. I mean I presume eventually of this legislation is introduced and go somewhere. We'll have a hearing on it.

And I would request and would hope that you'll be willing to testify. Hopefully, your views will have been crystal -- I mean, we shouldn't act on this until you had an opportunity to study it to get your views crystallized and that you would be willing to testify in hearing relating to this subject on such...

HOLDER:

I'd be glad to.

KYL:

I mentioned Secretary Gates' letter. I won't -- it's a separate letter, actually. Actually, he has written two separate letters and without -- I won't go in any of those details. He simply talks about past investigations of unauthorized disclosures that have

greatly damaged our national security.

It talks about circumstances in which the bill would permit this kind of activity to occur. He says, "The restrictions -- the limitations to bill remain far too restrictive." And he also criticizes the fact that the definition wouldn't extend the protection to at least publicize to individuals who are not even journalists, as that concept is normally understood to quote him in here.

Secretary Gates will continue to serve in the Obama Administration and I would hope that you would seek his views and address his concerns as well, would you not?

HOLDER:

I'm sure he'll be asking me about this at our next cabinet meeting. Should I be confirmed, they'll be wanting to know, why am I in a fundamentally different place than he is, so. But, I will have that conversation with him.

KYL:

I'm sorry. I guess I didn't understand the preamble to what you...

HOLDER:

No, I was saying that on the basis of what you've said about the concerns raised by Secretary Gates and should I be confirmed, I might expect to hear from him at the cabinet meeting about, you know, why I was in.

KYL:

OK. Finally, and I don't know. I gathered Director Mueller will be around for awhile, but he too has wait in along with 11 other senior members of intelligence community.

And again, I won't quote from his letter, he expresses strong opposition but I would just ask you to agree to be sure and speak with him about the concerns he has and to try to address the concerns that he specifically talked about national security and foreign intelligence. Would you be willing to do that?

HOLDER:

Yes. I mean, as I said I'd...

KYL:

As we say in deposition, so you need to give an audible answer to the question.

HOLDER:

Thank you.

KYL:

The last question I have on this subject and will be the last question I have for you. I mentioned U.S. Attorney Patrick Fitzgerald before. He has written on this and one of the things he noted, and he's exactly right, in my view -- he said "A threshold question lawmakers should ask is whether reporters will obey the law if it's inactive." In other words, if you're trying to do a favor there then that should set out the guidelines by which people conduct themselves.

They, meaning lawmakers, should ask because the reporters committee for freedom of the press calls for a share law while urging journalists to defy the law when a court upholds a subpoena for source information.

So, here's the solution to it and I'm going to ask if you -- I think this would work.

His view is that any shield bill should require that a person seeking its protection first provide the subpoenaed information

under seal to the court to be released only if the court orders the information disclosed. That way, the individual gets both the protection of the law but also would -- his part of the bargain is if the court should rule that the law still doesn't apply and he has to disperse the information to the public would, therefore, have the benefit of or not the public but that the law would therefore have the benefit of that information if that's the way the court ruled.

Do you think it's sensible to have such a requirement in such a bill?

HOLDER:

Well, again I'm not as steep in this as I will be and should be, but it does strike me as somewhat reasonable. But I'd say that with me understanding it, perhaps I would have a chance to just become more familiar with the law, the responsive of that report that you've mentioned and see how that might have an impact on my thinking.

KYL:

There's no reason that you should be a steep in this as some of us who've been working hard for a long time. But certainly it is a very serious matter as all of these individuals have indicated. It will require some attentions on your part and I commend summing your confirmed to you that you begin studying up on this so that should that be consider here that we would have the benefit of your views on that and look forward to conversations with you about how to pose the subject.

Thank you.

KYL:

Thank you, Senator.

LEAHY:

That's it?

I'm not suggesting that you ask more. I appreciate.

KYL:

I narrowed it down to the best of my ability. It is much more. If I have anything else, I'll ask the question in writing or just it will...

LEAHY:

I appreciate you tying it down like that.

And Senator Sessions, I think you said you have one or two more?

SESSIONS:

I'll say, hopefully. I'll see if I can do better. I can't speak as fast as Senator Kyl though, you know. We, southerners, are a little slow.

In an April 2004 speech to the American Constitution Society, a liberal group, you were at -- where you asked the audience what it could do to bring about a liberal renaissance, which is a legitimate political effort to promote your beliefs.

And you singled out the media and criticized them for impeding liberal views and said, and quote, "In a short term, this will not be an easy task with the main stream media somewhat coward by conservative critiques and the conservative media disseminating the news in anything but a fair and balanced manner."

And you know what I mean there. The means to reach the greatest number of people is not easily accessible. So, we do have

this discussion of the fairness doctrine.

Do you think the government has the ability to interject itself in the free market of ideas and direct somehow that there'll be a balance between one view and another view on the airways?

HOLDER:

Well, the views I was expressing there were views that I had, as a private citizen, would not reflect what I would do if I were to confirm as attorney general. What I said in response to the question have been raised earlier about the fairness doctrine was that I just needed to know more about it before I could intelligently response to the question, but I did not mean to implicate the fairness doctrine in that speech.

SESSIONS:

That's important, I think. I just think that's a trail that is deemed to failure for some government bureaucrat trying to state what somebody can say on the public airways.

Also before the Constitution Society, you spoke about the Boumediene decision that for the first time granted habeas corpus rights to detainees, prisoners of war or illegal combatants, they were being held at Guantanamo Bay.

Justice Scalia will note in the sense that, quote, "It would almost certainly this decision will almost certainly calls more Americans to be killed," close quote. You said this, quote, "The very reason Supreme Court decision by only a five to four vote concerning habeas corpus in Guantanamo is an important first step, but we must go much further," close quote.

I thought that this decision was really a radical departure from the precedent. Never in the history of England, where we inherited habeas corpus rights, or in the United States at prisoners of war ever been given habeas rights; but Supreme Court held that.

What do you mean we must go much further? Do you have ideas that you would like to impose, apparently not required by the constitution but that would further constrict ability to hold those who are at war with United States?

HOLDER:

No, I guess what I said, "Go further," there, that was I think 2004 where I'm not sure -- I think 2004.

SESSIONS:

2008. That was a June 2008 speech I have asked.

HOLDER:

OK.

SESSIONS:

It would be '04 because the decision was after '04.

HOLDER:

Oh, after Boumediene. OK.

Well, I'm not sure what I had in mind there other than the concern generally that was expressed throughout the course of that speech about our government making sure that however bad the people where we had in Guantanamo, in the same way, I guess, that Senator Graham had mentioned earlier that these people were treated in a way that was consistent with our values, and so I might have been referring to that. I'm not just sure.

SESSIONS:

Well, I guess in my view as I'm thinking on prisoners of war particularly those who don't comply with the rules of warfare and validate to Geneva Conventions would be given the same rights as an American citizen accused of a crime and it never been done until this decision and we've tried to -- it was based on statutes, I think, rather than the Constitution and we're trying to wrestle with that and maybe make that situation better.

Let me ask this. I asked you earlier about your commitment to your statement where you said that you plan to quote, "Work to strengthen the activities of the federal government that protect the American people from terrorism," close quote. You pledged, quote "To use every available attack to defeat our adversaries."

In his book, which is a very important book, I think Jack Goldsmith, *The Terror Presidency*, who, as I said, is in -- been in Department of Justice -- he left the President Bush's Department of Justice. He opposed some of the things that they did, but not all.

He described the situation about where the Department of Justice refused to authorize a CIA covert operation to kill Osama Bin Laden in 1998 when you were in the Department of Justice as a deputy attorney general. He wrote this quote. "The White House and justice department lawyers opposed an unrestricted lethal operation against to Bin Laden and would authorize his killing only if it were necessary for self-defense and the course of legitimately attempting to arrest him," close quote and that's page 95.

He also noted at this time the CIA quote, "Had Bin Laden in its sights." And he discusses how this works.

And what he said was after previous hearings and complaints about covert activities that the CIA and their agents had become a condition to raid their authorizations very carefully and that George Tenet, then CIA director and other managers were insisting that this kind of operations be approved with unambiguous language.

And according to his book, the Office of Legal Counsel that is the Department of Justice's office of legal counsel, agree that the legal pro-evasion against assassinations had not applied to a military target like Bin Laden who posed an imminent threat to United States and who had openly declared war in the United States, I would add.

So far so good, Mr. Goldsmith, right? But then the ambiguities appeared. Quote, "White House and justice department lawyers opposed an unrestricted lethal operation against Bin Laden." And that's when he said, "We only authorized a killing in the course of a legitimate arrest."

And part of this whole thing was how agents had become intimidated and fearful of being prosecuted or having their careers ruined for conducting what they think is accurate policy.

That's the danger that we deal with. So, I guess my question to you is, to what extent were you involved in those decisions, and is this accurate, and did the White House and other Department of Justice lawyers basically put additional controls on OLC's opinion?

HOLDER:

Senator, I guess, I'm a little disturbed. I read that book and I was a little disturbed to read that portion of the book.

Well, I'm not at all certain it was appropriate. I don't know. I'm sure you got that cleared. I mean, I don't know. But I'm not very comfortable talking about that operation in this form, in this setting.

I was certainly aware of it. I didn't have the lead on the Justice Department's role in that. Maybe less transition, I would say

that there is clearly a need for people in the field to have clear direction, and we have to be aggressive. We have to understand the nature of the foe that we face.

No one should take from any of the statements that I've made today a notion that we're going to retreat from being aggressive and seeking out and getting people before they would get us. I don't mean to say that at all.

What I have said is that I think we can do that in a way that is consistent with or concerned about several liberties. There is not a tension between those two. We can be very aggressive using all the appropriate tools that we have that we would get, that we now have, or additional tools that we might seek from Congress and at the same time, be true to our values.

I'm not saying that -- so that's what the point that I was trying to make in my earlier testimony.

SESSIONS:

Well, I'm sure that's true, but these are concrete situations and, I guess, it appears from the book that OLC felt there was a legitimate basis. I would just note on his Web site, Bin Laden had declared war on the United States.

This is not a normal thug on the streets of Manhattan or something. This is a person who declared war on the United States. And they concluded, this will -- the United States is legitimate in defending itself, but the final decision that came down said that you could only utilize lethal force in the course of an arrest. Did you support that decision or the OLC opinion?

LEAHY:

I'm not trying to stop your answer. Obviously, answer it the way you'd feel pretty part of that.

Beginning into an area that many of us have been briefed on a very classified nature, and I don't want to put Mr. Holder in a difficult position of having to answer something that may go into a classified area.

He, obviously, is used to handle any classified material, and I'll let him make his own judgment. I'm not trying to put words in your mouth at all, but I would just caution senators to be careful in what areas they go into. In having said that, I yield the floor back to Senator Sessions and Mr. Holder.

HOLDER:

Senator, as I said earlier, I'm a little reluctant. I would be glad to answer your question in what I would -- in a more appropriate form. Maybe, I'm being overly cautious here. I don't know. But we are talking about something, I mean, it is out there. That was a covert operation that required the highest level of clearances.

Frankly, maybe I am free to talk about that now. I don't know. I just -- and I'm just not feeling very comfortable responding to that question yet. But I would be more than glad to find what ability I do have to talk about that, and would be more than glad to share with you with whatever I can.

SESSIONS:

Just one thing, I would like that either in a closed fashion or public if you can do so. Now, I think we need to know that.

The problem is that we have created a climate for intelligence agents, the military officers, the law officers who are out serving the country in some very difficult things in which they get ambiguous leadership and then not able to act. And apparently, Bin Laden was in the sights of the United States Government.

We were prepared to act, waiting only for legal clearance, and we get back one of these cover-your-rear-end ambiguous things, and the CIA guys, or whoever was involved in this, says they're not acting on it. And I think that is a danger and a

weakness that it could leave us more vulnerable than we need to be in the future.

With regard to the closed testimony matters, this committee has savaged anybody that it even tried to investigate leaks. The New York Times can print anything, and members of our -- as long as it would embarrass George Bush, and we want to get after, get after anybody that would suggest it was a breach of security.

So I'll think it on, but I'll leave this question as it is. I do not want to ask you to say something you should not.

LEAHY:

And Senate Sessions, I appreciate that. I also don't want to get into a debate. We are also going into the whole debate about what happened when we took out troops out of Afghanistan to go into Iraq when they had Bin Laden cornered.

I mean, these are all debates of mistakes, some mistakes, and maybe not, in the past. I'm more concerned about what would - what kind of an attorney general, whatever cold it'd be. And the concern's about what he's talking about, what are his plans if he is attorney general, how will he run the department, what is his philosophy, what would he do, because that 's ultimately what 100 senators have to vote on.

SESSIONS:

Well, that's what I'm trying to get at. You've interrupted me and used some of my time. That's what I was getting at. The OLC, what would you do in the future? OLC, according to this, I had felt that it was justified. I think it was justified. Somewhere in the White House, it said that Justice Department lawyers, that you admitted you were -- a preview of these discussions, sent an ambiguous message and it makes me worry about the future. That's what I'm asking you about.

HOLDER:

And all I would say, Senator, is that I agree with you that there has to be -- to the extent possible, unambiguous direction given to our people in the field.

And it means that lawyers have to -- who are involved in that process, have to understand that the words that they use, the direction that they give has to be as precise as possible so that there is not that degree of ambiguity in those directions and -- that would might have somehow end up having an inhibiting influence on the people in the field.

They've got to understand what it is they can do, what is this they can't do, and that has to come upon the people who are making those decisions -- the folks, the people at OLC or in other parts of the Justice Department. So I understand. I hear the concern that you express, and I understand that.

SESSIONS:

They, Washington Post said -- ask that Senate Judiciary committee should press you on the rationale for supporting the pardons of that occurred in -- I've asked you a little bit about that previously and we sort of run out of time.

You did indicate you thought the president's decision on the FALN was reasonable.

I was United States attorney for 12 years, assistant to the United States Attorney for two and a half, Attorney General for two. In my opinion, it's not reasonable. It's not close. I mean, that's all I can tell you. And I don't believe it was a close question and it worries me that you say that was a reasonable decision.

In one article, a letter by a Deborah Devaney, one of the assistant United States attorneys who prosecuted that case and published in the Wall Street Journal in 1999, writes, quote, "As one of the FALN prosecutors, I know too much. I know the chilling evidence that convicted the petitioners, the violence and vehemence with which they conspired to wage war on all of

us," close quote.

She goes on to say, quote, "In the first prosecution, some of the petitioners were captured in the back of a van with weapons use to commit arm robberies." And then she goes on to say, "Yet the President," -- perhaps you didn't know your role at that time, "Yet the president has seen fit to reward these conspirators simply because they were unsuccessful in their murderous attempts."

Well, it goes on. It was opposed by the prosecutors in the case. The pardon attorney, Margaret Love, had rejected it previously. Roger Adams gave you the opinion you wanted in the first paragraph, but didn't spend four pages explaining why this was a very problematic decision. Anyone can read that as his personal objection to it, and I think he conveyed that to you.

The FBI director, Mr. Freeh, opposed it and he had labeled FALN one of the three greatest domestic terrorist threats to the United States in 1998. And Mr. Adams did tell you, did he not, the pardon attorney of Mr. Freeh's view on that?

HOLDER:

Yes. I was aware of the FBI's view on that matter.

SESSIONS:

They had killed six people. One of the persons offered the -- on commutation of Senate had planned an elaborate escape attempt using a helicopter and got an extra 15 years for that, which is certainly not excessive for this kind of offender.

There were over 130 groups and dozens of people injured, six people killed, and then there was no contrition. The defendants were so unrepentant that two of them -- two of the 16 who were given clemency refused to accept it because they had to promise not to continue to be violent. So, to me, this is really a pretty all gust statement that this was reasonable.

I would also note that the -- fifteen, it says on my...

LEAHY:

It's five minutes plus 15 on there. For a five-minute run, you're down to 20 minutes, so I was wondering...

(CROSSTALK)

SESSION:

You asked how much...

LEAHY:

I'm trying to be fair.

SESSIONS:

I know. You asked me how much time, I said 15. I'll wrap up.

LEAHY:

It's a five plus the 15. It shows on here. He has five minutes to begin with. Now, it's 15 minutes beyond that part. It's been 20 minutes.

SESSIONS:

I believe you're right, Mr. Chairman, as usual. I believe you are right. I apologize. I was looking at the time, but incorrectly.

In the sentencing commission, there are evaluations of what the sentencing would have been for these people had they've been sentenced under the more recent sentencing guidelines. And without parole, there were 30-year plus sentences, and that's without parole; whereas, these people were sentenced, summed up in one or two at 90.

Tell me again. Was this your personal view that this would be appropriate? And is that what you conveyed to the president?

HOLDER:

I looked at the situation, took into account the fact that these people were not directly involved in incidents that led to death or injuries. I took into account the body of people, I guess, Senator Whitehouse, among -- he mentioned at least a few of them, people who were weighing it in favor of the clemency.

The conditions that were put on it, that is they had to renounce violence and some travel restrictions, weighed what the view was in law enforcement, from the U.S. attorneys, from the investigative agencies, and obviously took into consideration what the pardon attorneys were saying, both of them.

And it seems to me that the clemency, it also took into account significantly the length of the sentences that these people had already served, and the sentences that had been imposed by the trial judge, initially a trial judge initially -- it seemed to me that the clemency grant given, taking all that into consideration, was appropriate. And that was what I conveyed to the president.

SESSIONS:

Well, thank you, Mr. Chairman.

I do think -- particularly find the rich pardon that you've acquits in and leans toward to be problematic in light of the tremendous controversy this one caused by a year or so before.

And I had to go before hearings, the resolutions of the senate found it deplorable, and I would have hoped that you would have been more forceful with the president on the rich pardon.

And if you had done so, you would have helped protect him and his legacy, which was the smirch about this. Richard Cohen, his ally, has been opposed to your confirmation, because you didn't resist that pardon effectively and it just troubles me.

Thank you, Mr. Chairman.

LEAHY:

I think, I would note, parenthetically, that tens of millions, some would say hundreds of millions of dollars of Republican-controlled Congress went on for six years to try to besmirch President Clinton's reputation in a number of areas.

I'd also note that I do wish that President Obama had some of the advantages, I mean, than President Bush did when President Clinton left him, than President Bush, the largest surplus in America's history for paying down the national debt and creating enormous number of jobs.

President Obama will inherit the largest deficit of any nation on earth, in history, and the largest deficit and the tripling of the national debt.

I realized that prior to that cause was all these hearings that might be besmirching President Clinton's decision and legacy. But the fact is, I think of all us, Republicans and Democrats, wish we're inheriting the economic situation that President Clinton left his successor, rather the one that's being left to President Obama.

I'm not going to take the 20 minutes. Everybody has been taken over their five minutes here, but I'll just cover quick points.

Am I correct that as deputy attorney general, you had no final decision-making power to grant clemency or pardon? Is that correct?

HOLDER:

That's correct.

LEAHY:

And am I correct that your memo, the FALN, did you remember that the White House made no recommendation of clemency for the prisoners on where they provide analysis with multiple options for each prisoner? Am I correct?

HOLDER:

That's all I've been able to find. If the options memo which lays out the whole pot -- the range of possibilities that the president could consider. But I have to say, Mr. Chairman, I do think that in some formal fashion I conveyed a recommendation to him. I just don't -- well, I can't find it.

LEAHY:

Am I correct that none of the FALN members offered clemency by President Clinton were present when individuals were killed or injured?

HOLDER:

That's correct.

LEAHY:

Am I correct that the prisoners were released under strict supervision of Federal Probation Authorities and none have caused any future harm?

HOLDER:

That is my understanding.

LEAHY:

Am I correct that the clemency offers were conditioned on the prisoners' willingness to renounce violence, and each of them had already served either 16 -- somewhere from 16 to 19 years in prison. Am I correct?

HOLDER:

That's correct.

And two of the -- as Senator Session's noted -- two of the individuals who were offered clemency would not exceed to that demand, that is to renounce violence and they've, therefore, did not get out of prison.

LEAHY:

They stayed in prison?

HOLDER:

They stayed.

LEAHY:

The clemency provided by President Clinton was supported by various members of Congress, numerous religious, Human

Rights, labors, Hispanic, civic, community group, including former President Carter, Archbishop Desmond Tutu and Coretta Scott King, am I correct?

HOLDER:

That's correct.

LEAHY:

Am I also correct that your nomination to be attorney general has been enthusiastically endorsed by the nation's top law enforcement organizations and numerous law enforcement officials, including many who were among the biggest critics of the FALN clemency. Am I correct on that?

HOLDER:

I think the Fraternal Order of Police testified in the hearings that were held and criticized the FALN pardons, and the Fraternal Order of Police has endorsed my nomination.

LEAHY:

And as we put into the record their endorsement of your nomination, and, of course, we'll have, among others, former director of the FBI, Louis Freeh, no shrinking violent when it comes law enforcement matters, who enthusiastically and strongly supports you.

Senator Coburn?

COBURN:

Thank you.

SESSIONS:

Mr. Chairman, Senator, we kind of have a little...

I take a personal privilege there. May I have this two minutes, one minute?

LEAHY:

One.

SESSIONS:

One minute.

LEAHY:

Start the clock.

SESSIONS:

I think it is true that President Clinton did sight your recommendation in his later basis for granting the pardon on number one...

LEAHY:

Which part is that, Senator?

SESSIONS:

The FALN. No, Marc Rich...

LEAHY:

Rich's pardon, yes.

HOLDER:

That's right. Excuse me.

SESSIONS:

And Osama Bin Laden and Khalid Sheikh Mohammad weren't directly involved in the murders. They were conspirators to that, and they probably and morally are more accountable in my view and equally co-accountable as those who actually carried out the attacks in the United States. Wouldn't you agree?

HOLDER:

I would, but the FALN people are not in the same category as Khalid Sheikh Mohammad or Bin Laden in that they were not the heads of the organization. That is not my understanding of the people who were with the, part of risk.

Again, I want to emphasize, these people were criminals. They were terrorists. I'm not giving them a pass. They served substantial amounts of time. And I want anybody...

SESSIONS:

You recommend it against the law enforcement people that they not serve the full time when they were sentenced, and they wouldn't even file papers. I don't think any of them actually even asked for a pardon. They were hardcore about it.

Excuse me. OK, my time is up.

LEAHY:

Senators, five minutes has gone to 24 minutes.

Senator Coburn?

COBURN:

Thank you. And I promise not to take 24 minutes.

First of all, I'm sorry you...

LEAHY:

I'm going to need a doctor if you do.

COBURN:

And I know the Chairman wants to get home to his grandchildren and I know you all would like a break and have a dinner, so I'm going to be very short.

Three points for the record. One, the only thing I would say about the FALN is that clemency was granted after the Oklahoma City bombings. And so, there is a lack of sensitivity there. It wasn't to the same degree, but the intent was.

Number two, as far as the comments by my colleague, Senator Whitehouse, your soon-to-be boss when you're sworn-in as attorney general made great efforts on Homeland Security committee to take away the parochialism of the Homeland Security grants. And only three members of this committee voted with you to make it on the basis of risk instead on the basis of parochialism.

So, I hope you'll look at that as you see this necessity of trying to rearrange the money that you have in terms of looking at risk instead of parochialism that makes us all look good.

I want to get you on record. We talked about this in the office. Your boss and I passed a bill called the Transparency and Accountability Act. It requires the submission of where you spend your money, the contracts, sub-contracts, the grants and the sub- grants. Is your intention to comply with that on a timely basis so the American people can see that?

HOLDER:

Yes.

COBURN:

Thank you.

And then my last question about guns. Promise, I'll never ask you another one in the committee hearing. And all I want is a yes or no, because I think people need to hear where you're going on this. There's some uneasiness among the second amendment crowd in this country, and what I'm trying to do is clarify that.

Will you commit to protect and preserve the rights of those 40 states that have a -right-to-carry law by opposing legislation that would encroach upon those rights?

HOLDER:

In the opposing state legislation? I'm not...

COBURN:

No, opposing federal legislation that would encroach upon those rights.

Let me say it again.

HOLDER:

Yes, I understand the question. I'm just not sure how -- what the appropriate role would be for the federal government in the situation that you described. I don't...

COBURN:

Well, if we're passing a law, that's obviously going to do that as the supreme enforcer of the law in this land. As the head law enforcer, it should be upon you to challenge that and accord when it, obviously, is going to violate the Heller decision.

So, what I'm asking you is to specifically state that if we pass something that violates these state laws, in other words, are going to limit these state laws, take away second amendment rights as being defined by the Heller decision, will you in fact intercede on the basis of that Heller decision to defend the rights of the state to have carry laws?

HOLDER:

Well, I wouldn't support any law that violated the dictates of Heller.

Now, I don't know -- the question you asked is hypothetical. It's hard to answer hypotheticals without having all of the facts. But I will state, as I said, I think earlier, Heller is the law of the land. It has to be taken into account with regard to any legislation that might be considered.

COBURN:

Well, let me just pin you down just a little bit closer so I can get comfortable.

HOLDER:

OK.

COBURN:

Do you believe the states presently have the right to establish carry laws in the states?

HOLDER:

I think...

COBURN:

Either concealed carry, or not concealed carry law.

HOLDER:

Without agreeing or disagreeing with them, I think states do have those rights.

COBURN:

Yes, the states do have. Will you work to protect that the states will continue to have that right?

HOLDER:

Senator, yes, I guess -- I mean, in favor...

COBURN:

You're making my second amendment crowd really nervous. They want to hear you say, "Yes, they have that right and they ought to be able to maintain that right." That's what they want to hear you say.

HOLDER:

And I guess what I'm saying to that same crowd is that I have no intention -- this administration has no intention of doing anything that would affect a states regulation of firearms, who can carry a firearm, under what circumstances. There is nothing that we have discussed, nothing that is in planning, nothing that I can imagine that we're going to be doing in that regard, so.

LEAHY:

Well, if the Senator yields to me.

COBURN:

I'd be happy to.

LEAHY:

Just to ask for a clarification. The State of Vermont has very simple laws on guns. During hunting season, deer hunting season, and your semi-automatic are restricted to a certain number of rounds to give the deer a chance.

We post signs outside the limits, city limits of Montpelier, our state capital, saying that if you're going to hunt deer inside the city limits of Montpelier like for example, crossing the Statehouse Lawn or something, you are limited to shotguns. That's the only place you are.

Anybody, unless they are a felon are allowed to carry a loaded concealed weapon above the certain age without a permit. Nobody does. We like the fact that we can. The vast majority of us in Vermont like myself, own numerous firearms.

Do I understand you to say you're not going to be on a crusade to have the federal government come in and override the laws of the State of Vermont?

HOLDER:

That would be true. I've made and I express...

LEAHY:

They are a lot less restricted than laws of Senator Coburn's state.

HOLDER:

Maybe I've not expressed this well, but this is not an agenda item. It's not a focus. It's not an expectation that I have for this administration. I'm not sure how I can say it any plainer than that.

There are things that we want to do with regard to crime prevention and to reduce crime. But the concern that you have raised is not on any of the menu items that I have seen or could imagine.

COBURN:

Thank you for your answers. It's not the one I wanted to hear, but thank you for the answer.

Mr. Chairman, we will submit additional questions, and thank you for being patient.

And thank you, Mr. Holder, for the fine job you've done today.

HOLDER:

Thank you, Senator.

LEAHY:

We will -- the witness is dismissed with our thanks.

HOLDER:

Thank you.

LEAHY:

And with me, you're dismissed with my admiration and my gratitude.

HOLDER:

Thank you very much. I think I've been very...

LEAHY:

I'm very clear I'm going to vote for you. We'll reconvene tomorrow morning with the panel at 10 o'clock in the Senate Judiciary committee hearing. With that, we stand recess.

HOLDER:

Thank you, Senator.

CQ Transcriptions, Jan. 15, 2009

List of Panel Members and Witnesses PANEL MEMBERS:

SEN. PATRICK J. LEAHY, D-VT. CHAIRMAN

SEN. EDWARD M. KENNEDY, D-MASS.

SEN. HERB KOHL, D-WIS.

SEN. DIANNE FEINSTEIN, D-CALIF.

SEN. RUSS FEINGOLD, D-WIS.

SEN. CHARLES E. SCHUMER, D-N.Y.

SEN. RICHARD J. DURBIN, D-ILL.

SEN. SHELDON WHITEHOUSE, D-R.I.

SEN. BENJAMIN L. CARDIN, D-MD.

SEN. ARLEN SPECTER, R-PA. RANKING MEMBER

SEN. ORRIN G. HATCH, R-UTAH

SEN. CHARLES E. GRASSLEY, R-IOWA

SEN. JON KYL, R-ARIZ.

SEN. JEFF SESSIONS, R-ALA.

SEN. LINDSEY GRAHAM, R-S.C.

SEN. JOHN CORNYN, R-TEXAS

SEN. SAM BROWNBACK, R-KAN.

SEN. TOM COBURN, R-OKLA.

WITNESSES:

DEL. ELEANOR HOLMES NORTON, D-D.C.

FORMER SEN. JOHN WARNER, R-VA.

FORMER FBI DIRECTOR LOUIS FREEH

CHUCK CANTERBURY, NATIONAL PRESIDENT, FRATERNAL ORDER OF POLICE

JOHN PAYTON, PRESIDENT, NAACP LEGAL DEFENSE AND EDUCATIONAL FUND

FORMER DEPUTY ATTORNEY GENERAL ERIC HOLDER, NOMINATED TO BE ATTORNEY GENERAL

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CQ CONGRESSIONAL TRANSCRIPTS

Congressional Hearings

Jan. 16, 2009 - Final

Senate Judiciary Committee Holds Hearing on the Nomination of Eric Holder to be Attorney General, Day Two

LIST OF PANEL MEMBERS AND WITNESSES

LEAHY:

Good morning. Glad to see all of you familiar faces in this -- in our hearing room. I'm thinking Senator Specter and I have spent a significant portion of our lives in this -- in this room. I look around and I'm missing one of the -- one of the senators I sat here with for over 30 years, Senator Biden, who has now left the Senate for other duties of sorts.

And so I welcome all of you. Yesterday, we met in the Senate Caucus Room from 9:30 to 7:15 so every senator, Republican and Democratic alike, would ask Eric Holder whatever questions they had. It's a historic room for an historic nomination.

Senator John Warner of Virginia, once again, showed the bipartisanship and leadership he's shown for over 30 years in the Senate. He noted the problems facing the Department of Justice and the country so great that he was urging everybody to put aside partisanship and work together. He presented and endorsed Eric Holder to be attorney general, described his outstanding qualifications, integrity and independence.

Congresswoman Norton was eloquent in her statement of support for Eric Holder, a former judge for nominated by President Ronald Reagan and then a prosecutor in the District of Columbia.

LEAHY:

So we asked -- everybody asked questions they wanted to. The senators of both parties have done so. Much of the questioning was substantive. We touched on many important issues. And the senators

were -- technically, the third round was a five-minute round, but we went 20 and 25 minutes and longer for some of the senators until everybody said they'd asked all of the questions they wanted.

Having heard Mr. Holder's testimony, I'm more convinced than ever he's a person who will reinvigorate the Department of Justice, serve ably as a member of the president's national security team, pursue the Justice Department's vital missions with skill, integrity, independence, and a commitment to the rule of law.

As I said before, he's a prosecutor's prosecutor. And I'm not going use all my time because I want to get to the -- to the witnesses. But I'll yield to Senator Specter.

SPECTER:

Thank you, Mr. Chairman. The attendance is substantially less than yesterday. I can't imagine why considering the impressive array of seven witnesses who are here. But I join the chairman in that I thinking all of you for coming. And outside witnesses are we important to give a fuller picture.

As I said yesterday, I had hoped to have initially 12 and then down to seven and only three witnesses have been permitted here. But I don't intend to press that point because I know that there is great disdain in the American public for disagreements or bickering in Washington, D.C.

So the chairman and I have had a very cordial relationship for 28 years -- actually, before that. I met him when he was the district attorney of Burlington. I had a smaller city, Philadelphia.

(LAUGHTER)

The district attorney. And we had the national convention in Philadelphia and I met this young fellow. He was not as tall then. He had a lot more hair.

(LAUGHTER)

And we have worked very closely together and we have had a disagreement about the handling of the scheduling and the handling of witnesses on a number of matters here. And I do want to help President-elect Obama. It's very important.

There are enormous problems facing this country, and we all ought to do everything we can. There is the constitutional that this committee has on advice and consent. We're at the consent part now.

And separation of powers is the rock bed of our republic. And independence is very important. And I have emphasized that yesterday in questioning of Mr. Holder. So we have an important role to perform here, and we appreciate your coming in.

In the interest of time, I'm going to yield back the balance of my two minutes and 37 seconds.

LEAHY:

Thank you.

The first witness who was there for a good part of the hearing yesterday is Louis Freeh. Judge Freeh is the former director of the Federal Bureau of Investigation. I read this from the notes, Judge. I don't think there's anybody in the room that needs to know that, but you are. Your career began in the Department of Justice in 1975 when you became a special agent for the FBI.

He has a long and distinguished career as a public servant under both Democratic and Republican presidents. He will appointed by President George H.W. Bush as a federal district court judge -- a lifetime appointment in the southern district of New York. He had been a career federal prosecutor in the United States Attorney's office for the southern district of New York serving as chief of the organized crime unit.

Now, he gave up that lifetime position to take appointment as the head of the FBI. And I -- I know -- I should note for the record I've known Louis Freeh and his wife Marilyn and family for years. And I am thrilled and I feel honored that's now a part-time resident of the state of Vermont.

And, Judge, please go ahead. We will start with you and then I'll introduce each one. And if it's OK with you, I thought we'd just go through and let everybody testify and then we'll ask some questions.

FREEH:

All right.

(Inaudible) good morning to you. It is a pleasure to be before you. I've been in front of this committee dozens and dozens of times over the years. And I'm very pleased to come here and speak in support of the nomination of Eric Holder.

We have presiding over the committee today not just two chairman, Senator Specter being a former chairman of the committee, but two prosecutors, two district attorneys who know firsthand the importance and the challenges of protecting our laws and our society but also adhering to the rule of law and being politically independent as you make important decisions, decisions which are subject to review and criticism.

So I think the country and the Senate could not have two more knowledgeable and experienced people to lead the inquiry. And I commend the committee and you, Mr. Chairman and the ranking member, for the fairness and thoroughness of your hearing.

You know, I was confirmed twice by this committee. I spent 25 years serving in the United States government, mostly the Department of Justice. I left the FBI director's job after eight years. One of the things I was proudest of is when I left Washington, no one in the Senate, no one in the Congress had called for my resignation while I was here. No one said I was politically partisan. No one said that I was not independent. And for me and the FBI, that was a great feeling.

I also left town without being further investigated which, as you know, is a great benefit to any federal-serving official.

When I was a prosecutor, Attorney General Thornburg, at the time, sent me down to Atlanta to work on a bombing case. It was a pretty egregious case. Someone had killed a federal judge and also the head of the NAACP in Savannah.

That was my first opportunity to meet Griffin Bell. Griffin Bell, in his typical humility, called me up. I was in the U.S. attorney's office in Atlanta. And he said, Mr. Freeh, he said, if I can help you in any way, I know a few people in town here.

FREEH:

When he was attorney general, and you probably have heard this story, he was in his conference room, the great conference room where both of you have visited. And he was presiding over a meeting. And his

secretary came out. He was a new attorney general. And she was very excited. And she said, "General, General, the White House is on the phone."

And he looked at her and he said in his typical Southern drawl, "I don't take calls from buildings."

The importance of that statement, I think, is very relevant to your inquiry here and to what I want to say about Eric Holder. The attorney general of the United States is the chief law enforcement officer of the United States.

Beyond competence, the elements of integrity, the elements of leadership, and I think most importantly, political independence is critical. Attorney generals, like district attorneys, like U.S. attorneys, like FBI directors, will make decisions from time to time with which people disagree. And that is an important facet of the service and an essential element of our democracy.

I made many decision when I was an assistant U.S. attorney, when I was the deputy U.S. attorney, certainly, when I was an FBI director that people disagreed with. And Eric Holder has made decisions with which I disagree. And I'll talk about those briefly in a moment.

But it's not the decision to me as much as the process and the principles and the integrity and independence with which that decision is made. My very strong belief with respect to Eric Holder is that he has tremendous integrity. He has great character. He's got good judgment. He has excellent competence as a lawyer, which I'll talk about because I also worked with him in the private sector, as you know.

But he does have political independence. He's not afraid to say no, in my view, to an attorney general and now, if he's confirmed by the Senate, the president of the United States. And I think if we look at those essential characteristics and elements, we can put into better perspective decisions which we made. And as I said, some decisions which he yesterday told you he regretted and with which I also disagreed.

The men and women of the Department of Justice -- and I can speak, I think, for the men and women, many of them in the FBI -- have tremendous respect for Eric Holder as U.S. attorney. And as you know, when you were district attorneys, if someone wanted to really find out

about what kind of a job you were doing, they would ask your assistants, they would ask the assistant district attorneys who worked for you, your chiefs. And they would give a pretty honest and pretty accurate view as to your qualities as a leader, whether or not you were strong, whether you were politically independent, whether you had the courage, the moral courage to take on difficult cases and make difficult decisions.

And with respect to Eric Holder, beyond the background investigations which the FBI, of course, performed with respect to him, the agents who worked with him, particularly when he was a line assistant, had told me time and time again that he was -- he was -- he was smart. He was honest. He was fair. He was not afraid. He exercised his office without fear or favor whether he was looking at a very powerful political subject of an investigation. As you know, he did prosecute one as U.S. attorney. And he didn't pull his punches when it came to fair and thorough investigations.

That reputational evidence, to me, is quite essential. The federal rules of evidence allow reputational evidence to be heard by a jury because our experience has found that it's very reliable. His reputation as a good prosecutor, an honest prosecutor, and an independent prosecutor are very, very well established. I've never heard anything to dispute that. And I think that that's an essential evaluation for you to conduct.

The letters that you read yesterday, Mr. Chairman, you know, those endorsements are not come by very easy, in my experience. The International Association of Chiefs of Police -- I'm on one of their boards -- they don't casually or routinely endorse people. It's not a coincidence that you have all those endorsements. You have them because his reputation and the experience of the men and women who have worked with him on the line and worked with him in the Department of Justice see him and have experienced him as a good, honest, tough, and independent prosecutor.

And I have another note here, Mr. Chairman, when I would submit for the record from Ron Noble who, as you know, is the director general in Interpol and assistant U.S. attorney, Senator Specter, in Philadelphia, a protege of Ed Dennis. He said he would fly over here if anybody wanted to speak to him. But he says that Eric Holder is exactly the kind of attorney that we should trust as our attorney general.

You know, I worked with Eric Holder probably more than anybody in this room. I saw him on a daily basis sometimes when he was deputy. We disagreed a lot. We argued over things. He would overrule me from time to time. I would challenge him occasionally, maybe more than occasionally on things. And we came out sometimes on different ends of a point or a position.

But in all of those dealings, what I saw was a smart, intelligent, skillful attorney, a great public servant, somebody with humility and somebody with independence who was not afraid to say no and call something as he thought it had to be called. And for me, that's very essential.

Let me talk just two minutes -- not two minutes -- but briefly about the Mark Rich and the FALN matter. You know, on the Mark Rich matter, I was the deputy U.S. attorney in the southern district of New York. That was a southern district of New York case.

One of the things I did while I was deputy U.S. attorney is I went over to Switzerland. I actually negotiated with the Swiss to get a warrant of extradition served on Mark Rich. The pardon of Mark Rich was a corrupt act. There is no other way that I could describe it.

And committees here have looked at it. They've evaluated it. It was a corrupt act. But it was not an act by Eric Holder. Let me give you just a quick picture of what was going on at the end of the Clinton administration when this pardon took place.

Nobody in the Department of Justice, nobody in the FBI had a clue about who was on the pardon list. The White House staff and its leadership, whoever was working this process, activity conspired to ensure that nobody knew what they were doing.

On the morning of Inauguration Day, the morning of Inauguration Day, I sent two FBI agents to stand at the west gate of the White House so they could read the list of pardoned officials when it was published because they wouldn't tell us who was being considered.

Eric Holder made some terrible mistakes, which he told you about yesterday, in allowing himself to be used and co-opted with respect to the facilitation of that pardon. But he did not understand, he did not authorize, he certainly did not execute this pardon.

And he's learned a lot from that. I think, as Senator John Warner told us, we can be sure from that experience that he will never allow himself again to be put in that position.

The FALN pardon, you know, I wrote the letter to the Department of Justice vehemently opposed to that. The FBI took a very strong position. We were continuing FALN investigations at the time of that pardon. But the pardon process functions as a quasi judicial process. Both the pardon attorney who prepares the materials for the deputy and, ultimately, the president of the United States function in a quasi judicial manner.

I did not agree. I do not agree with the decision with respect to that pardon. I opposed it personally. I opposed it as director. And I don't think it was a reasonable act to be done.

But there are many, many judicial decisions, some of which I made briefly when I was a judge, with which people disagreed. The process, however, that was followed was the process prescribed in the department and by the president. And I don't think it's fair or a good index of the character, judgment, and independence of Eric Holder to look at that without the context of 26 years of dedicated, independent, and brave leadership.

Briefly, in private practice, you know, I hired Eric Holder when I was general counsel at MBNA Bank of America. I had a very complex piece of litigation in Texas, and I hired him to handle it. I could have hired any lawyer in America -- and a lot of my colleagues from the southern district were wonder why I didn't hire them.

I didn't know Eric Holder in a social frame. I still do not know him in a social frame. I hired him for that case because his legal skills, his integrity, and his willingness to tell me independently whether or not the case was one that should be tried or settled in a very complicated scheme was someone who I trusted.

He litigated the case. He did a superb job. The judge ended up sanctioning the plaintiff's lawyers which, as you know, rarely happens in federal court. And by everybody's estimate, both by lawyers in the bank and co-counsel and the judge, he did an absolutely outstanding job.

Let me just finish by, you know, echoing what John Warner said. And I agree with you, Mr. Chairman, I mean, it was such a pleasure to see him and hear him yesterday. He nominated our oldest son to the Naval Academy. He was my senator for eight years. And just the template of what we want for public service and government.

And remember what he said. He said, you know, the theme and the phrase I keep hearing with respect to this man is he's a good man. And being a good man in the attorney generalship of the United States is critical. And beyond good, as I said, I think he has superb lawyering skills. I mean, where do we find for our attorney general someone who's had the trial and prosecutorial experience of someone like Eric Holder?

He's a man of integrity. He's a man of the law. And I think and I know he will exercise political independence. This committee will make sure that he does that. The media will make sure that he does that. The people in the FBI will make sure that he does that. And if he doesn't, you're going to hear about it.

I don't think you will because I don't think he will be anything except independent. But you have a great candidate here, and I really urge you to approve him for confirmation. Thank you.

LEAHY:

Thank you very much, Judge Freeh.

The next witness, Chuck Canterbury is a national president of the Fraternal Order of Police, one nation's largest and most prominent voices for law enforcement officers. He served in numerous capacities in that organization -- national vice president, national second vice president, of course, now, he's president.

Twenty-five years of experience in law enforcement, police officer in South Carolina -- it was in Horry County, wasn't it? He's also been appointed by President George W. Bush to serve on the Medal of Valor board. He serves on our nation's Homeland Security Council. He's certainly no stranger to this committee.

And, Mr. Canterbury, please go ahead, sir.

CANTERBURY:

Thank you, Mr. Chairman, Mr. Ranking Member Specter. We're very pleased to be here and graciously accepted the invitation. As the spokesperson of the largest law enforcement organization not only in the country but, obviously, in the state of Pennsylvania and, hopefully, one day in the state of Vermont, Senator, we're very pleased to be here to offer our strong up the for this candidate to be the next attorney general of the United States.

Also, very fortunate to have both of you gentlemen and the leadership that you provide for the law enforcement community across this country is greatly appreciated by my peers in law enforcement.

Upon hearing the news that President-elect Obama intended to tap Mr. Holder for this Cabinet position, we directed our legislative staff to probably conduct the most exhaustive examination of a candidate's record for anybody that we've ever endorsed for a position of attorney general.

We looked at his record of his 12 years at the Department of Justice in the Public Integrity Section, his role as the deputy attorney general, and that of the time he spent in the judicial branch as a judge. It was an extremely thorough review. His positions, his policy work, and the official acts were consistent with the goals of the FOP. And we have every reason to believe that he will be an exemplary U.S. attorney general with whom we will have a very productive relationship.

I think the FOP brings a unique perspective to this nomination because of our familiarity with his record in the courtroom and as a judge and as a U.S. attorney. As part of this review process, we talked to the rank-and-file officers in the District of Columbia, one of our largest groups, and talked to them about his time in superior court as a judge.

CANTERBURY:

To a man, every individual that we talked to reported that he was fair and tough and they spoke favorably about U.S. Attorney Holder describing him as able and aggressive as a prosecutor. And from the perspective of the line officers who work on real cases, those are the adjectives that you want to hear as a police officer.

The FOP has a better sense and a complete picture because of the interviews that we conducted with our membership with the men on the street that actually worked cases with Eric Holder.

I'd also like to add that we talked to a lot of our career employees, members of our organization who worked at the Department of Justice -- the best of the best. And many of them are members of our organization and they were anxious for us to endorse Eric Holder for this position. It's one that they felt was one of their own who could take the helm of the department and restore of integrity that we felt the department needed.

The FOP with also privileged to have the opportunity to discuss with Mr. Holder a number of different issues including his vision for the Department of Justice and the ability to have input and talk to him about the crime-fighting strategies and the policies that affect our members, the rank and file, the boots on the street.

I believe that the president-elect has made a great choice in Eric Holder to be the next attorney general of the United States. We want to emphasize that all the major law enforcement organizations have announced their support. I believe it's unprecedented that you have the chiefs, the rank and file, the sheriffs, all organizations standing together on this.

I urge the committee to complete their review of this nominee in as quickly as fashion as possible and favorably report this to the Senate floor. As you examine his record, I believe you'll find him not only well qualified but excess possessing the requisite character, knowledge, and skills to do this job and be an extremely effective leader for the department.

And, again, Mr. Chairman, Mr. Ranking Member, we thank you for the invitation and we urge you to move this along as quickly as possible. We believe that he will be a fine attorney general.

Thank you, sir.

LEAHY:

Thank you, Mr. Canterbury. And I thank you for -- your organization for all the time that you have spent up here for this committee, the (inaudible), Mr. (Inaudible) who's here often on critical law enforcement matters that we have before us. And I appreciate that.

Our next witness is John Payton. He became director counsel and president of the NAACP legal defense fund last March. This is after a very good long and distinguished career in private practice.

He's the sixth person to lead the legal defense fund in its 67- year history. It was started by Thurgood Marshal. Mr. Payton is recognized as one of the premiere litigators in this country. His civil rights experience includes Supreme Court arguments defending the use of race-based remedies in the University of Michigan's admission criteria. He worked in private practice here in Washington, D.C. for the law firm of Wilmer Hale.

He was corporation counsel of the District of Columbia. He served as president of the District of Columbia Bar. He's taught at Harvard, Georgetown, and Howard Law Schools.

Again, he's no stranger to this committee. And Mr. Payton, thank you very much, sir, for being here.

PAYTON:

Thank you, Mr. Chairman.

It is a pleasure to be here, especially, on the occasion of the nomination of Eric Holder. I'm here to support enthusiastically his nomination to be attorney general of the United States. The legal defense fund views it as a national imperative that the Department of Justice live up to its name by delivering justice and equality for all people in the United States.

The harsh reality today -- and it's a very harsh reality today is that the Department of Justice is in shambles. Mr. Holder, if he's confirmed, will inherit a department with its very credibility in question. The entire department has been decimated by scandal and controversy from the firings of the U.S. attorneys to the use of an ideological test for the Justice Department's honors program to the assault on the civil rights division.

The task at hand is nothing less than to reclaim the soul of the Department of Justice. As former Attorney General Edward Levi phrased it immediately after Watergate, a strikingly analogous set of circumstances, but I believe the core of the soul of the Department of Justice is its civil rights division.

Yes, integrity must be restored to all of the department's operations. And, yes, it must regain its independence from political influence. But the area in which the department has been most damaged is the civil rights division which has been plagued by problems that have shaken its very foundation.

Press reports and hearings from this committee have revealed the insertion of politics into litigation decisions. The weakening of enforcement, improper or possibly illegal personnel practices, and a substantial decline in cases filed to protect racial and ethnic minorities. Politics and ideology have triumphed over even-handed enforcement at almost every turn.

Career civil rights lawyers in the department have been demoralized and many have been literally driven out of the department. This Tuesday, the department's office of inspector general and the office of professional responsibility released their joint report on an investigation of allegations of politicized hiring and other improper personnel actions in the civil rights division.

The report was completed last July but only released this week. It is a shocking report. It shows, as the earlier report identified, an enemies list that was used to actually keep people from becoming members of the department. The entire Department of Justice honors program used the enemies list. Our organization, the legal defense fund, was on the list.

The second report is even more shocking than the first. It concludes that hiring in the special litigation section, the employment litigation section, the voting section, the criminal section, the appellate section, all were illegally infected with political and ideological considerations. And it makes a criminal referral to the U.S. attorney's office.

But as I said, the entire Department of Justice has suffered grievously. The challenge for the next attorney general requires very special leadership and very special commitment. It requires someone who can inspire and be an example.

Yesterday's hearing, I believe -- and I sat through almost all of it and heard the rest -- was a dramatic example and dramatic evidence of why President-elect Barack Obama has selected Eric Holder to lead the Department of Justice at this critical moment.

We face perilous times both internationally and domestically. The legal issues before us are complex and dynamic. I think there is no better person than Eric Holder to restore integrity and honor to the entire Department of Justice and the ethical standing and reputation for excellence of its civil rights division.

He has an exceptional resume which you heard about yesterday. Columbia, Columbia Law School, the honors program, lawyer in the public integrity section, a judge, U.S. attorney, deputy attorney general, partner at a very prestigious law firm.

Let me just add one other things to his resume. He began his legal career as a legal intern at legal defense fund. And ironically, in the recently past, that would have disqualified him from working at the Department of Justice.

I also know Eric from my own history and professional experience in this town. As you said, Mr. Chairman, I was a partner at a law firm for many years here. I was corporation counsel. I was president of the D.C. Bar. I've known Eric for almost that entire time. We are friends.

I think that his personal commitment to issues of justice and equality is exceptional. His experience and the strength of his commitment to fairness assure me -- and I'm sure they assure this committee -- that the odious practices identified in this week's report by the inspector general will never be tolerated on his watch.

Let me reiterate one final point. I don't think there is a better person to lead the Department of Justice at this critical moment than Eric Holder. And with his nomination, we can begin to restore the crown jewel of our nation's legal system.

I urge the Senate to confirm Eric Holder as the next attorney general of the United States. He'll make us all proud.

LEAHY:

Thank you, Mr. Payton.

And I do appreciate that. I'm actually -- with your testifying -- reminded me of something I was going to do yesterday. And because we went so late, I didn't. But we've -- Judge Freeh has talked about all the different

people who have written in in support of Eric Holder. Mr. Canterbury talked about the unique nature of all the different types of law enforcement being for him.

And I put letters from those different organizations in the record yesterday. But we've also received letter of support for Mr. Holder's nomination assigned by more than 60 civil rights organizations. According to the NAACP, the Leadership Conference in Civil Rights, the Southern Poverty Law Center, the Mexican-American Legal Defense and Education Fund, the National Women's Law Center, the American-Arab Anti-discrimination Committee, the Anti-defamation League, the AFL-CIO, the Asian-American Justice Center, and a whole lot more.

So I will put the whole entire list of support into the record along with a -- along with the letters.

So thank you very much.

Ms. Townsend, it's always good to see you.

And she was, until last year, homeland security and counterterrorism adviser to President George W. Bush, where she chaired the Homeland Security Council. Certainly one person that most people in the country, when you would be interviewed on television or others, would listen very carefully to on a subject that effects every one of us. She advised the president on homeland security policy, anti-terrorism matters. Certainly, have been in meetings with the president and has gone out of his way to praise the advice you've given him.

Previously, Ms. Townsend spent 13 years at the Department of Justice in a variety of senior positions including counsel to attorney general for intelligence policy -- which I believe was probably the first place we met -- acting deputy assistant attorney general, director of the office of international affairs, chief of staff to the assistant attorney general in the criminal division.

She worked with Mr. Holder during his tenure as a U.S. attorney and as deputy attorney general. He served as a federal prosecutor in the United States Attorney's office in the southern district of New York. She began her prosecutorial career as an assistant district attorney in Brooklyn, New York. That was probably after Eugene Gold.

The reason I mention him, he and I served on the board of the National District Attorneys Association. We, oftentimes, had meetings in his office.

So thank you for appearing. And please go ahead -- please go ahead and do your testimony.

TOWNSEND:

Mr. Chairman, thank you for the warm welcome I've received. It really is a privilege and an opportunity to be here today before the committee to testify in support of the nomination of Eric Holder to be attorney general.

You went through my resume, if you will, and I suppose to many here my appearance in support of Eric comes as something of a surprise given my most recent position. But as you noted, my 23 years of public service included 13 years at the Department of Justice where I worked both with Eric Holder and for Eric Holder at various points.

Eric's career, both as a superior court judge and as a career prosecutor in the public integrity section in the criminal division rightly earned him both the respect and the affection of career prosecutors not only here in Washington but around the country in the U.S. attorney's offices around the nation.

Not surprisingly, given his experience, I found Mr. Holder to be open-minded, fair, and respectful of the views and the opinions of career lawyers. Mr. Holder was never reluctant to hear discussions between career and appointed staff if there was a disagreement among them and, oftentimes, that was the case.

He decided those issues in accordance with the facts and his best judgment, giving serious consideration and respect to the advice of the career lawyers. In his interactions with the office of intelligence and policy review, he took his national security responsibilities seriously and he always made himself available whenever he was needed.

He carefully reviewed the detailed documents prepared for submission to the foreign intelligence surveillance accord when his approval was required and unfailingly deliberated on the questions and facts before signing such submissions.

In yesterday's testimony, Mr. Holder spoke about being at the department during the East Africa Embassy bombings and in 2000 during the Cole. One of the cases I thought I might mention to you because I think it's very relevant to the execution of his national security responsibilities was the successful prevention of the millennium attack of 1999 into 2000.

As the committee is aware, and as Director Freeh will recall, this was a very difficult time. We had very specific threat information. Both Attorney General Janet Reno and the deputy attorney general were personally involved in the Justice Department and FBI's investigations.

TOWNSEND:

We took risks to prevent that attack. We made considered legal judgments to prevent that attack. We applied the foreign intelligence surveillance act in a far more aggressive way that had ramifications beyond the disruption of the millennium attack. That case could have, if tradition had held, been prosecuted under criminal wiretap laws. I believed at the time, and recommended both to the director and the attorney general, that we use the foreign intelligence surveillance act legally and appropriately in that investigation.

Eric Holder was a part of that deliberation. They were persuaded that the use of the foreign intelligence surveillance act to disrupt that plot was correct. That plot was not only successfully disrupted. Individuals who were later criminally prosecuted, the prosecutors in the southern district of New York legally and appropriately used the tapes from the foreign intelligence surveillance and that was upheld on appeal.

That's the kind of man Eric Holder is. That was a difficult legal decision. It was a close call. And it was a decision that he was willing to take because he understood the seriousness of the threat.

But I wish to be clear. I am not here because I believe that, if confirmed as attorney general, Eric Holder will decide legal issues necessarily in the same way that I would. On the contrary, I expect that there would often be times where this is not the case. I am here because I believe Eric is competent, capable, and a fair-minded lawyer who will not hesitate to uphold and defend the laws and the Constitution of the United States.

I know Eric to be an honest, decent man of the highest ethical standards who both understands and appreciates the strong and proud traditions of the Department of Justice and will protect and honor them.

The attorney general position must be filled quickly. We remain a nation at war and a nation that faces the continuous threat of terrorist attack. We cannot afford for the attorney general position to sit vacant or for there to be a needlessly protracted period where the leadership of the department is in question.

For these reasons, sir, I humbly and respectfully recommend that the committee move expeditiously to confirm Eric Holder as attorney general of the United States.

Thank you.

LEAHY:

Ms. Townsend, thank you very much. I appreciate that. And I -- especially, as you stated, the areas where you disagree with Mr. Holder.

I think in my 34 years here, there has never been an attorney general from a Republican or Democratic administration, including attorneys general I voted for, that I haven't found something where I've disagreed.

Joseph Conner is the son of Frank Conner. Frank Conner was still a young man when he lost his life in a bombing at Fraunces Tavern in New York. The bombing was conducted by Puerto Rican nationalist group called the Armed Forces for National Liberation -- FALN.

Mr. Conner testified before the Senate Committee on Foreign Relations in 1999 about the clemencies granted to some FALN members. He worked with Senator Hatch to introduce the Pardon Attorney Reform and Integrity Act to Congress in 2000.

I was (inaudible) very much at reading your testimony, Mr. Conner, all of which will be placed in the record, of course. When you spoke about the fact that your father would never get to see his grandchildren.

My colleagues on this committee have to hear my stories ad infinitum about my grandchildren because it's one of the greatest joys of life to have your grandchildren. So we thank you for coming back to the Senate. You've been here before. And please go ahead, sir.

CONNER:

Well, thank you. Thanks for having me back. They say you love your children but you really love your grandchildren. So...

LEAHY:

Without taking up your time, I'd add that I've told people that I've discovered this hidden clause in the Constitution which requires grandparents to spoil their grandchildren then turn them back to the parent to have to deal with the consequences.

CONNER:

Oh, so that's what happens, I guess. OK. Thank you. Thanks for the insight.

My name is Joseph Conner and I'm here, as the senator said, for a second time once again addressing the unimaginable, immoral, really dangerous 1999 clemencies to 16 Puerto Rican terrorists of Los Macheteros and the FALN. We'll call them the FALN.

These terrorist proudly claimed responsibility for over 130 bombings in the U.S., including the murder of my 33-year-old father, Frank Conner, as he ate lunch at Fraunces Tavern in downtown New York. It was January 24, 1975. Despite the warnings and recommendations to the contrary from the FBI, the Bureau of Prisons, prosecutors, Janet Reno herself, then deputy attorney general or current attorney general nominee, Eric Holder yesterday flatly admitted recommending release of those terrorists.

Upon hearing those words yesterday, some questions popped into my mind. One was: Did he actually believe in their cause? Number two, did he recommend the release at someone else's direction, perhaps, the president? Or number three and maybe most disturbing, did he not know what they did?

It seemed that a lot of the issues that were raised, he claimed he didn't know about from the surveillance tape of them building bombs to the -- to their threat of judgment (inaudible) at their sentencing. And that was disturbing.

He admitted to have taken advice from people outside our government, dignitaries, if you will, folks like Desmond Tutu, Jimmy Carter, Coretta Scott King and ignored those people within our government -- the FBI, the Bureau of Prisons, the prosecutors. Something didn't add up.

When we look back at the people whose recommendation he did take, on what information were they basing their recommendation? Where they told the political prisoner -- I put that in quotes -- line that the pro-FALN people were passing? Or did they actually know the facts? Something tell us me if they knew the facts, they wouldn't be recommending this.

Putting aside his well-documented involvement in the outrageous pardon of Mark Rich, the attorney general nominee's egregious recommendation for playing Russian roulette by unleashing unrepentant terrorists on the American people against the advice of the FBI, Bureau of Prisons, prosecutors, even Janet Reno herself should disqualify him on its own merit.

It's almost ten years ago but, incredibly, we're revisiting today the same issues. The recriminations of the hearings and how sad that we have to go through this again. We knew the clemencies were wrong in 1999. After all, the Senate voted 95 to 2 to condemn them. Yet here we are contemplating the confirmation of the architect of that very release as a top law enforcement officer in our country. How can this be?

If anything, the devastating attacks of 9/11, we should be more resolute in our opposition to anybody who would be soft on terror or support any terrorist organizations.

If anyone needs to be reminded about what terrorism can do, give me a couple of minutes. It was a beautiful January on January 24, 1975. I had just turned nine. My brother Tom had just turned 11. That night, my mom was cooking us a dinner to celebrate our birthdays, and we were expecting our father home on time to celebrate with us.

Well, after we got home from school, we found out that there was a bombing downtown. We didn't know my father was in it right away. My mom didn't know he had a meeting that day. He wore an old suit when he wasn't expected to be with clients. But when she called up, he didn't answer. She knew then something was wrong.

After hours, we finally got the news that he'd be killed. He and three others were murdered that day intentionally and, as we may find out later from Rick who will give a bit more information, the bomb was meant to kill a lot more people than the four that it ended up killing.

My dad was only 33, as a mentioned. He was the only child of immigrants Thomas Conner and Margaret Maloney. His father was an elevator operator downtown and his mom was a cleaning lady at J.P. Morgan. She was so proud when she got him the job so he wouldn't be in a dangerous position. His friends were becoming cops and firemen or working in the subways. But he got a job in a nice office at a high school.

And his was an American success story. He went to college at night. He worked his way up to an officer position at J.P. Morgan. And he had two sons and he had made something of himself.

From a cleaning lady to an officer at the bank. It was an amazing story. Although my mom is remarried to a fine man and my brother Tom and I have families of our own, not a day passes without us feeling devoid that this was left in our lives. My father's death has become a wound. And it was reopened when the clemencies were offered, and it's been reopened now by this nomination.

These terrorists took away my dad's life. As we mentioned, he never got to see his sons graduate high school, college, meet his daughters-in-law, or be a grandfather.

You know, we ask why. My kids ask why. What happened. It seems that it was all done for politics. Was a direction from the president to further his wife's Senate future. Or was it something else? Was it a -- someone who believed in the cause of the terrorists?

Who were the FALN? Like I said, Rick will get into it a little bit more. But contrary to the disingenuous claims we heard yesterday, there was nothing non-violent about these people. These people blew up 130 bombs in the U.S. They killed five people. And they meant to kill a lot more.

They have devastated lives and maimed. The day after their release, one of them was on with Tim Russert. And when asked about the Fraunces bombing, one of the released, one of these people who was non-violent, had nothing to do with it said well, you know what, the restaurant didn't take the proper precautions.

Blaming someone else, never taking responsibility for what happened. And these people were released. On 9/11, my brother Tom and I commuted through the World Trade Center. We left -- I said goodbye to him in the World Trade Center and I went my way, he went his. At quarter to nine, I saw the tower -- the north tower explode out my window. I couldn't get Tom on the phone and I called my cousin Steve who worked at Counter Fitzgerald. Steve never answered. Steve was my father's godson. He was killed on 9/11.

Tom and I got home that night safely to our families. But there's consequences. Terrorism cannot be treated as a political tool. It has to be treated for what it does. It kills people and it hit our family very hard twice.

Despite what Mr. Freeh just said, the clemency process was not followed properly. We were never informed as a family of their release. Although, I understand we were supposed to have been through the Victim's Rights and Restitutions Act of 1990. The terrorists did not request clemency. They did not express remorse. They were not required to provide information solving other crimes. They were allowed 30 days to decide to accept the conditions. And they were given conference calls between prisons.

Now, clemency is an individual grant, yet they were treated as a group. And that's not right.

Supporters were given nine meetings with Mr. Holder and his group. You know how many we got? None. He never talked to us. Despite what he said yesterday, he didn't -- there was no consideration to the victims, at least, to the people I know.

Had we been properly notified, we would have told him what happened because it seems like yesterday from the conversation he didn't know about the threats to the judge. He didn't know about them building bombs. It was a very disturbing moment in the interviews yesterday.

The biggest issue that I read in the recently-released memos as they came from the Justice Department was how the public relations fallout might be if these guys committed more crimes. Not what might happen to those people who were injured by them, but what the public relations issues would be for Holder and his team if something went wrong.

I have a whole litany of questions I would like to put into the record. I know I'm kind of going late now. I can read them now or I can do it at another time. But I have a bunch...

LEAHY:

I've read them. And if you want to (inaudible), go ahead.

CONNER:

OK.

LEAHY:

I'm trying to give as much flexibility to all the witnesses...

CONNER:

I appreciate that. Look, I know I'm going long.

LEAHY:

OK. I know this is a difficult time. I'm not trying to cut you off. And your whole statement, of course, will be made part of the record. But if there's some of those questions you'd like to emphasize, please go ahead.

CONNER:

Thank you. Yesterday, a lot of issues came up that caused this -- my statement to change and my questions to change because he said some things that were just a surprise.

He admitted that he know so little about the terrorists. As he testified yesterday, he hadn't seen the surveillance video, didn't know they threatened the judge. How then could he know enough about the case to feel comfortable in releasing them? What does that say about the judgment there?

CONNER:

He said none of these terrorists were part of any attacks that killed or hurt people. Given his limited knowledge on the subject, how could he possibly know that? And given what Ricardo Jimenez said on "Meet the

Press," that's just not true. He took -- he took advice of others over his own due diligence from what I could see, and that's irresponsible. It borders on incompetence.

Now, I know he has a long record, and I know there's a lot of good people here who have spoken to his -- his -- you know his successes in the past, but it's not unprecedented that one mistake can -- can disqualify you.

Look what happened when -- when Clinton had Zoe Baird and Kimba Wood. They were both very qualified people, and both of them had to withdraw their nomination, because they did something like hire illegal aliens to work in their house and didn't pay taxes on them, which to me is far less egregious than what he did.

We talked about -- you mentioned yesterday that Cardinal O'Connor supported clemency. That's not true. I have a letter from the cardinal specifically saying he didn't, because I contacted the cardinal at the time.

We -- we came here in 2000 and introduced the Pardon Attorney Reform and Integrity Act, and we warned at the time about future terrorist that, and we hoped that that by instituting this act, which never was instituted, that there wouldn't be releases like this, that there would be a light shining on people so they would -- everyone would know what the pardon attorney was doing and what the Justice Department was doing before the clemencies were released.

And that's a transparency that we need, not -- not yesterday in the meetings when Mr. Holder was asked to produce a document recommending that you clemency. He didn't want to do it.

Now, this new administration is supposed to be the most transparent in our government history, yet his attorney general has no transparency.

I'll go now, but I urge the Senate to review Mr. Holder's record, put aside any politics, put themselves in the shoes of ordinary Americans, who had given them their trust in their vote, and decide if this man, who recommended playing Russian roulette with the American people by releasing unrepentant terrorists, should be charged with protecting our fellow citizens.

I think ordinary Americans would agree the answer is very clear. Thank

you.

LEAHY:

Thank you, Mr. Conner.

Mr. Hahn, Richard Hahn, is the president and CEO of R. Hahn & Company Inc., a security consulting and investigating company specializing in counterterrorism and homeland defense. He retired from the FBI after a distinguished career that spanned 33 years -- is that correct, Mr. Hahn? -- as a senior supervisory agent and as a special agent.

As a member of the FBI, investigated domestic and international terrorist organizations, specializing in events carried out by the armed forces and the national liberation of the FALN.

And he testified before this committee in 1999 -- 10 years ago -- about the FALNL and clemencies.

Thank you for coming back and testifying again. Of course, your whole statement will be made part of the record. Please go ahead, Mr. Hahn.

HAHN:

Thank you, Mr. Chairman.

(OFF-MIKE) My purpose in being here today is to make clear just who and what the FALN Macheteros were.

These organizations were no less terrorists than any of the terrorist organizations recognized by this government today. These were clandestine organizations with cellular structure and secret membership.

This makes knowing who did what acts inside the conspiracies difficult, not impossible. But despite this, through investigation some acts attributable to those who received clemency are known.

Former FALN member Freddie Mendez chose to cooperate with the government after being convicted on federal charges, but before being sentenced. Mendez described being mentored by FALN leader Oscar Lopez, one of those offered clemency.

Lopez taught Mendez how to detect and avoid surveillance, used dead drops for communications, the code words used by the FALN, how to operate safe houses, and how to build a bomb.

Mendez participated in the preparation of bombs in October of 1979 and which were coordinated with the Macheteros. On that occasion he was assisted by Oscar Lopez and Ida Luz Rodriguez and carried a bomb with Ricardo Jimenez to the Democratic Party headquarters in Chicago with the intention of placing it in their offices.

Three bombs were placed in Chicago that day.

He participated with Oscar Lopez, Dylcia Pagan, Ida Luz Rodriguez, Haydee Torres, Luis Rosa, Ricardo Jimenez and William Morales in the armed assault on a National Guard Armory in Oak Creek, Wisconsin, to steal weapons and explosives.

Employees were put on the floor, guns placed at their heads, and they were repeatedly threatened during the takeover.

He also participated in the armed takeover of Carter-Mondale campaign headquarters in Chicago for the purpose of intimidating campaign workers and delegates to the convention.

Mendez named participants in the planning and execution of this invasion as himself, Oscar Lopez, Carmen Valentine, Dylcia Pagan, Ricardo Jimenez, Ida Luz Rodriguez, Luis Rosado and Alicia Rodriguez.

It is noted that they carried rifles and a variety of pistols into the assault, and again workers were threatened, bound, gagged, and the offices ransacked.

Mendez was arrested in Evanston, Illinois, along with Carlos Torres, Haydee Torres, Adolfo Matos, Ricardo Jimenez, Dylcia Pagan, Ida Luz Rodriguez, Alicia Rodriguez, Luis Rosa, Elizam Escobar and Carmen Valentine.

Some of these conspirators had just participated in the armed takeover of a truck rental agency, not only stealing a truck, but robbing the patrons of personal effects.

The group had gathered in Evanston for the express purpose of robbing an armored car that serviced Northwestern University. All were wearing disguises and armed.

In a separate investigation of an FALN safe house apartment operated by Alejandrina Torres and Edwin Cortes, over 21 pounds of dynamite, 24 blasting caps, four handguns, over 3,000 rounds of ammunition were discovered and seized. Also found were disguised materials, false identification and terrorist training manuals.

Cortes and Torres were videotaped as they built firing circuits for bombs. They also were surveilled electronically and physically as they made plans and traveled to Wadsworth Veterans Hospital in Kansas with weapons and explosives to attempt to the escape of FALN leader Oscar Lopez.

A second safe house apartment in Chicago searched in April 1983 was found to contain a semiautomatic rifle, silencers, bulletproof vests and documents, including intelligence materials, from the police of Puerto Rico.

Cortes and co-conspirator Alberto Rodriguez were surveilled electronically as they plotted an armed robbery, and subsequently with Alejandrina Torres, as they planned bombing of military installations in Chicago.

Regarding other crimes of the FALN, as you know, they engaged in a campaign of bombings that started in 1974 and did not end until 1983. This campaign encompassed over 100 explosive and incendiary attacks, killed five and maimed scores of others, including several police officers.

Some of these attacks were designed to kill. In December 1974 the FALN called in a report of a dead body in a building in Spanish Harlem. A booby trap explosive device hung up on the opposite side of the main entry door.

Exploding as the door opened, a New York P.D. officer was blinded in one eye and severely maimed. Ironically, the officer, Angel Poggi, was Puerto Rican himself, and even more incredible, it was his first day on the job.

In January 1975 the bombing of Fraunces Tavern killed four and wounded 60. Credit was claimed within minutes by written FALN communique. In August 1977 the FALN conducted the daytime bombing of the employment offices of Mobil Oil in Manhattan, killing one and maiming several others.

The Macheteros have a similar history of terrorist acts. In 1978 the Macheteros ambushed a patrol car of the police of Puerto Rico in an attempt to steal weapons, uniforms and the patrol car itself. One of the officers was killed as he resisted the ambush. The other, stripped of his uniform, was left handcuffed to a tree at the side of the road. The Macheteros proudly claimed credit for this act in a written communique.

In October 1979 the Macheteros in concert with the FALN conducted bombings on the island of Puerto Rico while simultaneous bombings were conducted in the U.S. Credit for these were claimed by a joint communique to the press, which bore the logos and names of both the FALN and the Macheteros.

In December 1979 the Macheteros with other groups conducted a well-coordinated attack on a Navy transport bus at Sabana Seca, Puerto Rico. The bus was blocked on a public highway. Then another vehicle driven by the terrorists pulled into the opposing lanes of traffic, shot the bus driver and proceeded to rake the side of the bus with automatic weapon fire. Two died, and many more were wounded.

In January of 1981 the Macheteros bonded jet aircraft of the Puerto Rican National Guard, resulting in tens of millions of dollars in damage to the specialized aircraft.

In 1983 the Macheteros fired LAW rockets at the FBI office in Hato Rey, Puerto Rico, and that the U.S. courthouse in Old San Juan, Puerto Rico.

And finally, in the fall of 1983, the Macheteros engineered one of the greatest thefts in U.S. history, the theft of over \$7 million in U.S. currency from a Wells Fargo depot in West Hartford, Connecticut. Much of the money ended up in the hands of Cuban agents.

All of this is a matter of public record not only accessible to the Department of Justice, but to any motivated citizen, who wishes to find these facts. All this makes clear that these conspirators were not merely activists, but in fact were indeed terrorists.

In my opinion granting them clemency in the absence of any cooperation or understanding of who committed the most heinous of crimes remains a compromise of our justice system and reflects a failure of the government personnel with oversight of such matters to competently carry out their duties.

LEAHY:

Thank you very much.

Our last witness is Stephen Halbrook. He's practiced law for over 30 years. He's authored -- edited seven books and dozens of articles related to the right to bear arms.

He's also the author of an amicus brief in a recent Second Amendment case before the Supreme Court District of Columbia versus Heller, submitted on behalf of Vice President Cheney and 250 members of the House of Representatives.

Mr. Halbrook is known in my state, a state which actually, as I mentioned yesterday, has no gun laws except during hunting season. And then we have certain restrictions if you're going to hunt on the state house lawn. I also noted the fact that I own numerous weapons, and I -- I'm almost tempted -- well, I'll tell the story about Director Freeh and myself target shooting in my backyard in Vermont later on.

Go ahead, Mr. Halbrook.

HALBROOK:

Thank you, Mr. Chairman. Good morning, Senator Leahy and Senator Specter. It's a real pleasure to be here.

I did file the amicus brief on behalf of not only of 250 representatives, but also 55 senators, including majority members of this committee, in the Heller case.

Heller, as you know, held that the Second Amendment means what it says. The right of the people to keep and bear arms means that individual have that -- have that right.

I'm author of the book, "The Founders' Second Amendment," and numerous other publications. I've done a lot of litigation on this subject in the Supreme Court. I'm outside counsel for the NRA. I'm not representing them here today.

And this is an issue that we have an explicit constitutional guarantee. We live in an age when people invent rights, and they seem to be implicit in the Constitution. And I like Senator Leahy's "the right to spoil grandchildren is an implicit constitutional right" -- it's a lot more innocuous than other ones that -- that might be invented -- and fully support that concept.

As you know, Mr. Holder filed -- or rather joined in an amicus brief in the Heller case, denying that the Second Amendment protects an individual right and seeking to uphold the total ban on handguns by D.C. residents.

My -- my background, by the way -- I've appeared before this committee a number of times, going back to the 1982 committee -- subcommittee on the Constitution hearing and report which is entitled, "The Right to Keep and Bear Arms."

Serious concerns I think are raised about Mr. Heller's -- Mr. Holder's position. Throughout his career he's denied that the Second Amendment basically means anything in regard to private citizens, and he's advocated basically the criminalization of what many people consider to be their constitutional rights.

And I'm talking about, for example, the advocacy of making it a five-year felony to possess an unregistered firearm in the District of Columbia. That was when he was U.S. attorney. And there's been many other draconian proposals that he's -- he's set forth.

I listened carefully yesterday to Mr. Holder's testimony -- in particular, the question that, "If the Supreme Court reconsidered the issue of the meaning of the Second Amendment, whether it was recognized individual rights does refer to the right of the people after all or some kind of elusive collective right that doesn't protect anybody, and if the Supreme Court revisits that -- that issue, what position would you take?"

HALBROOK:

And Mr. Holder responded that, "First, it would depend on the facts even though facts really don't matter in the interpretation of a constitutional provision."

And he did say that steri decisis is one consideration that would be taken into account. I think the -- given that he has supported the so-called collective rights view for his career, it's most likely that he would, indeed, support a reconsideration of the meaning of the Second Amendment.

And, in addition to that, Mr. Holder, based on his career-long proposals for draconian firearm bans, would be likely to say that nothing really violates the Heller Decision if it, indeed, stands the test of time.

I'm not going to get into any policy questions, but I did take note yesterday that he advocated the reenactment of the so-called assault weapon ban as a permanent fixture. The Heller Decision did talk about firearms that are commonly possessed by law-abiding people for lawful purposes as being protected by the Second Amendment. It might depend on what a person arbitrarily chooses to call by this pejorative term "assault weapons" whether that test would be met or not. But there's a lot of meat in the Heller Decision that basically says that banning commonly possessed firearms would violate the Second Amendment.

He mentioned that the -- what he called the gun show loophole must be closed. And it reminds me of his prior advocacy of a federal law that would require background checks on all private intrastate transactions involving firearms, presumably making it a felony to give a firearm to your grandchild as a gift without a federal background check.

And, also, he has advocated the registration of all firearms that all of those background checks on private transfers would be registered with the Bureau of Alcohol, Tobacco, and Firearms and Explosives. So we would have a registration system of firearms.

He was asked yesterday about proposals to ban firearm possession by individuals who are in the age group 18 to 21 years old. And that was a proposal that he supported. Mr. Holder supported a Charter 1768 back in 1999. So you would have the phenomenon of a person who's serving in the armed forces, eligible to do so at age 18, eligible to vote, serve on juries, and it would be a federal felony for them to possess a firearm.

Now the attorney general not only prosecutes federal crimes and influenced courts on the meaning of constitutional rights. The attorney general also administers and enforces the Gun Control Act through the Bureau of Alcohol, Tobacco, Firearms, and Explosives.

For his entire career, Mr. Holder has denied that individuals have any Second Amendment rights. On behalf of law-abiding citizens, he has advocated that firearms must be registered, and the possession of an unregistered firearm be punished with five years imprisonment.

The millions of Americans who exercise their Second Amendment rights rightly feel uneasy about this nomination.

Much has been said about unjust prison sentences imposed on persons who possess crack cocaine, not to mention the rights of alleged terrorists held at Gitmo and other places. And we would hope for sympathy to be shown for Americans who bother no one and who merely wish to exercise their Second Amendment rights without being sent to prison because they possess a gun without the government's permission.

Thank you, Mr. Chairman.

LEAHY:

Thank you. It's interesting hearing what you're saying and listening to Mr. Holder yesterday. I have a home -- or a house in Virginia I use when I'm down here. My home is in Vermont.

I've often been struck that in your state of Virginia, your gun laws are considerably for restrictive than the laws are in my state of Vermont. For example, you couldn't just -- you couldn't carry a concealed weapon without a permit in Virginia. You could in Vermont. I mean, you could this afternoon if you were there.

I own at least a dozen weapons of different sorts ranging -- well, of all calibers and enjoy shooting in my backyard. Can't do that in Virginia. Mr. Holder -- I asked him would he support federal laws that would restrict Vermont's laws other than the obvious ones about felons who are restricted. And that's been upheld by the court in their purchase and use of weapons.

I asked him if he would support restricting Vermont laws. He said no. It's interesting.

And we have considerably less laws than you have in Virginia on firearms.

Now, Judge Freeh, we talked about your unique perspective. And, Mr. Halbrook, I'll let you go back to that if you care to after. But let me just -- the thought occurred while you were speaking.

Judge Freeh, you have this unique perspective and you did work closely with Eric Holder as you described as the FBI director. You said sometimes you agreed, sometimes you disagreed.

You certainly been very critical of the pardon of Mark Rich and you know that both I and Senator Specter have been very critical of that pardon. Of course, it was a pardon issues not by Eric Holder. It was issued by then President Clinton.

And the clemency grant of the members of the FALN, you were critical of that as was I. But the clemency was granted by President Clinton. But notwithstanding these disagreements, it he is confirmed as attorney general, he's going to be attorney general of all the country. Both you and I will be in the country served by this attorney general.

Notwithstanding your past disagreements, you do strongly support the nomination of Eric Holder; is that correct?

FREEH:

Yes, sir. I do.

LEAHY:

Thank you.

The question I always ask -- and I used to ask this of prosecutors in my office, and I think it's a mark of a prosecutor. I ask that they'll be politically independent, follow the rule of law, not feel they have to be subservient to any political party. I certainly prosecuted members of both Republican and Democratic Parties including a chairman of my own party.

The attorney general has to be independent of the president who nominates him. Do you have any question in your mind that he'd be politically independent?

FREEH:

No, I don't. The -- I mean, as you well put it, Mr. Chairman, the attorney general is not the president's lawyer. We've had, unfortunately, in that office, I think, at times, people who thought that was the case. But he is not the president's lawyer. The president has a White House counsel for those purposes.

And I know that Eric Holder understands that difference. I think he would be very quickly able to say no to the president if he disagreed with him. And I think that's the confidence and trust that we need in that position.

LEAHY:

In fact, a president -- would you agree with me that a president is ill-served by an attorney general who's unwilling to say no to him if he thinks that a president is wrong?

FREEH:

Of course, he is. It not only subverts the purpose of the attorney general, but it puts the president in a very vulnerable position.

LEAHY:

And you've dealt with him when you were -- when he was deputy attorney general and you were director of the FBI. We have another FBI director now, well-respected by this committee. Do you have any doubt that if the current director were to come into an Attorney General Holder and say, Mr. Attorney General, I think you're wrong on this and here's why -- do you have any doubt that he would get a fair and complete hearing?

FREEH:

No. He would get a completely fair hearing. And I think Eric would expect that from his staff. And I think the people in the career staff who did not do that would not be his trusted advisers and would not be serving the country in their function.

LEAHY:

And, Mr. Canterbury, obviously, the Fraternal Order of Police has had some disagreements, certainly, on the clemency issue of the FALN. And I recall your organization testified to Congress. In fact, we asked you to testify to Congress at that time.

But do I understand your testimony correctly that you believe that Eric Holder will be a strong attorney general, especially on law enforcement matters?

CANTERBURY:

Based on the totality of his record, we absolutely believe that. We still -- we sit here like we did in '99. We abhor the clemency that was granted. We thought it was wrong just like Director Freeh. We still think it was wrong.

But we also believe, based on the information and the record of Eric Holder, that given the position of authority of the attorney general versus a deputy attorney general and the fact that clemency was a presidential issue and not his sole recommendation. We believe that he would be fair, and we look at it from the totality of circumstances in his career. And we feel comfortable, after an exhaustive review of his decisions as a judge and as a prosecutor.

LEAHY:

You're supporting him and you are joined by virtually every national law enforcement organization there is.

CANTERBURY:

Every organization we know of, Senator.

LEAHY:

Sorry. I went 32 seconds over my time.

Senator Specter?

SPECTER:

This is a significantly different dimension on the hearing from other items that we have heard. And sometimes these matters on paper don't really reflect the kind of injury and the kind of scarring which isn't gone.

But I think it's very, very important to bear in mind what the victims have to say and how the victims feel about it. When I bumped into you yesterday in the corridor, you told me neither you or your family have come to closure. I can see it, as you described the wounds.

And I think it was really unfortunate that you weren't consulted, at least, given an opportunity to be heard about it.

Director Freeh, welcome again to this committee -- distinguished career, FBI agent, judge, director. You have come down harder on the characterizations of what Mr. Holder has done than anybody else in the hearing. You say that the Rich pardon was a corrupt act (inaudible). You said it was a terrible mistake. He allowed himself to be used and co-opted.

Pretty tough words. Tougher than Mr. Canterbury, who characterized it as abhorrent. You said that he will be independent because the committee will make sure about that. Well, my experience, 28 years on this committee, we've been more ignored by attorneys general than been able to influence them.

Every time we seek information, whether assigned jointly by Chairman Leahy and Ranking Member Specter or Chairman Arlen Specter and Ranking Member Leahy, we get nothing in return.

You say the media will make sure? Absolutely not. The media doesn't know what's going on. Sometimes they find out. But they can't stop it.

In a little bit of time, I'm not going to pursue that. I wanted to get into one question with you. With respect to the independent counsel and campaign finance, as I pressed Mr. Holder very hard about that, and I could only comment about -- about a bit of that because of the limitation of time.

SPECTER:

But there's a subject I want to take up. And this is going to be what I have to say, Mr. Chairman, so I may take a little longer, if I may.

And I chaired the -- I chaired the full committee on the Rich pardon. I know a lot about that -- more than we can get into. But on the independent counsel investigation, I chaired the committee.

And you made a statement, quote, "It is difficult to imagine a more compelling situation for appointing an independent counsel," close quote. Difficult to imagine a more compelling situation for appointment of independent counsel.

That's why it seemed to me that a man of Mr. Holder's status, intelligence, experience -- that it was inexplicable. Inexplicable is the word that I apply also to the Rich pardon. Also I apply it to the FALN situation.

The matter is still under investigation, as you've said -- FALN -- a situation where two of the people wouldn't even accept clemency, that the federal government, the United States government had no standing to convict them. They wouldn't accept clemency -- people involved in murders and bank robberies. You could have a parade of victims that would fill a stadium.

But on the issue of independent counsel, Mr. Chairman, I ask consent that the memorandum from Mr. Frey to the attorney general be included in the record.

LEAHY:

Of course, without objection.

SPECTER:

That was the memorandum I'm about to refer to now.

LEAHY:

Whatever memos that you wish to be included, they will be included.

SPECTER:

Mr. Freeh, this is a matter you and I talked about when I conducted the investigation in the year 2000. I now refer to a memo, and I talked to you about it a few moments ago before the hearing started -- no surprises, no gotchas, everything on top of the table.

This is the memorandum, which you wrote to Mr. Esposito, one of your top deputies, about a meeting he had with Mr. Lee Radick, who was the head of the public integrity section of the Department of Justice. And this is what it says in part.

Quote, "I also advised the attorney general of Lee Radick's comment to you that there was a lot of, quote, 'pressure,' close quote, on him and PIS, Public Integrity Section, regarding this case, campaign finance investigation, because the attorney general's job might hang in the balance, parenthesis, (or words to that effect). I stated that these comments would be enough for me to take him in the Criminal Division off the case completely," close quote.

This memo is dated December 9th, 1996, and the background was that President Clinton had been reelected, and Attorney General Reno had said she wanted to stay on publicly, and she hadn't been reappointed.

And then there's this meeting between your top deputy and one of her top deputies in effect saying ease off the campaign finance investigation.

And you complain in this memo -- I won't read it fully because of limitation of time -- that the FBI ought to take over. The FBI had been kept out of the investigation.

Now, that -- that is the backdrop of what is happening in the Department of Justice, where Mr. Holder is the deputy, where they're bringing the issue to the FBI to ease off so the attorney general's job will be saved.

Now, how do you evaluate that in terms of politics -- rank politics -- reappointment of a public official interfering with investigation, law enforcement and the rule of law?

FREEH:

Well, as I said, I couldn't think of a more compelling case to go to an independent prosecutor. But let me just put that in perspective. And -- and we have spoken about this before.

That was not a statement, of course, by the Attorney General. It was by her public integrity section chief.

SPECTER:

Now, wait a minute, Mr. Freeh. Do you think that Radick did that all on his own?

FREEH:

Well, I don't know. I never got a chance to cross-examine.

SPECTER:

Of course, you don't know, but -- well, I'll draw the -- my inference. Radick's doing his boss' bidding. Now, that happens occasionally.

FREEH:

Well, I would draw a different inference, but I would say the following. That statement was alarming enough, together with all the other information we had, that I renewed my recommendation that this case go to an independent prosecutor.

The attorney general disagreed. We had a very strong, perhaps the strongest disagreement in eight years over that issue.

Eric Holder, just to put it into perspective, was, of course, aware of this -- he was the deputy -- went out of his way with me and the attorney general to say that you know Louis has a different position we have to respect that position, and actually supported the fact that I was taking a different position, which is again how I adjudge him to be willing and able to speak up and be independent.

I didn't agree with the attorney general's determination, but she made that determination, subject to what she believed to be the right factors, and -- and we disagreed.

SPECTER:

Well, as the record will show, this memorandum you sent you sent us a copy to Mr. Holder. I will let the memo speak for itself, where Radick, one of her top deputies, talks about a lot of pressure on him and the public integrity section. I think it's an obvious conclusion that pressure is coming from the attorney general.

FREEH:

Yes, well, I don't agree with you, respectfully, Senator.

SPECTER:

OK. Why not? Why not?

FREEH:

Well, because there was never a conversation that we had where she indicated, and more importantly, any action that she ever turn up that we were aware of, and we were pretty aware of everything that was going on in the case, that it all indicated you know her aptitude or willingness or even consideration of trying to interfere with this investigation in any manner, so...

SPECTER:

Interfere?

FREEH:

Yes.

SPECTER:

Well, you weren't on the case in any real sense. This memorandum particularizes your request to her to get these people off the case. You were submitting to pressure to put the FBI in as the leading investigative agency. You weren't the lead investigative agency, where you?

FREEH:

Not at that time, no.

SPECTER:

Mr. Freeh, let me move to another very delicate subject, one which you and I discussed years ago and talked about a few minutes ago.

You turned down the White House request for a briefing on campaign finance reform. Would you testify to the circumstances of that matter?

FREEH:

Yes. Well, we had a criminal investigation called the campaign contributions case, and the subjects of that investigation, as you know, were senior people in the White House, including the president, the vice president and others.

And they -- at some point the White House wanted to be briefed on the criminal case, which was also the intelligence operation by the Chinese Ministry of Intelligence in the United States, to which we have documentation -- this committee has looked at it -- interfering with the electoral processes here in the United States.

So we decided...

SPECTER:

Interfering with the electoral process where?

FREEH:

In the United States.

So we decided that we could not brief the president and senior officials, who were also the subject of the investigation on the investigation. It seemed to me a pretty no-brainer with respect to conflict, also protecting the integrity of the investigation.

So the attorney general and I discussed it, and we made a decision not to brief them on the criminal aspects of the case.

SPECTER:

Was there any aspect of any other governmental function -- foreign policy or anything else -- beyond the criminal investigation?

FREEH:

There was, and that part of the case was briefed to them. In other words, Chinese intelligence operations, we briefed the national security adviser.

SPECTER:

But you declined to brief the president.

FREEH:

I don't think he asked me for briefing.

SPECTER:

Well, was it -- could it have been a part of the briefing that the president did ask you for?

FREEH:

Well, no, he didn't. He didn't ask me for any briefing at all, actually. It was the national security adviser, and we briefed them on everything except the criminal aspect of the case for which subjects in the White House were now under investigation.

SPECTER:

You say the White House asked for the briefing.

FREEH:

The national security...

SPECTER:

Griffin Bell said the White House doesn't ask for things.

FREEH:

The national security adviser.

SPECTER:

OK. Well, that's -- I'm concluding now. The inferences I draw -- and I'll give you an opportunity to disagree with me -- the inferences that I draw is that this investigation was right to the top -- the president, as you testify, the vice president, attorney general's job, the question about independent counsel as to the vice president, the president being involved.

I had told you, when we talked about it at the time -- you and I and Fred Thompson had a conversation -- that I thought you were on very shaky grounds and not responding to the president's request.

If you had evidence that might activate the impeachment process, you ought to go to the speaker of the house. You came to me. I'd just been chairman of Intelligence, and Fred Thompson was chairman of Campaign Finance Reform.

Well, I'll let these facts speak for themselves as to what kind of pressure there was and whether Mr. Holder was a party to a matter which succumbed to political pressure.

Thank you, Mr. Chairman.

LEAHY:

Thank you.

Senator Sessions?

SESSIONS:

Thank you.

LEAHY:

Senator Sessions was the only one that was able to claim any kind of direct connection to the nominee yesterday, because the nominee's wife is from Alabama. Her family is from Alabama.

SESSIONS:

And they are a remarkable family. She has a remarkable sister particularly, a historic figure in the civil rights movement.

And let me just say, Mr. Freeh, thank you for coming. And the matter that we're discussing here, as you can tell from Senator Specter's remarks, were pretty big deals at the time, were they not? I mean this is a very intense situation, a very difficult time for you and the FBI during all these periods of allegations in campaign contributions and so forth?

FREEH:

Yes, sir, they were.

SESSIONS:

I think -- I just want to say this. I believe Senator Specter felt the pressures. He felt the development of the investigations, and Senator Specter was asking the tough questions to find the truth, as he always tries to do, and felt that there was political efforts to block that, to block the truth from being discovered, which is not consistent with the highest ideals of American justice.

And it was a very difficult time. I remember it well. And so I might Mr. Holder. I think he has a lot of fine qualities. I think it's appropriate that this be inquired into. I thank you for your integrity and your testimony and in your work at the time.

With regard to the pardons, Mr. Freeh, your Department of Justice experience -- I think maybe the only panelist; maybe Ms. Townsend did, too, previously.

But there's a reason, is it not, that we have a pardon attorney. I mean there are -- thousands of people ask for pardons every year, commutations of sentences. We don't -- the president -- I think the last two or three presidents, who have served eight years, gave about 400 or 500. The vast majority are denied.

I know the case where a former public official in Alabama in his 70s and reaching the end of his life -- maybe 80s -- was convicted 40 years ago. He's contributed to his community ever since. He'd like a pardon. I doubt he'll get a pardon.

Thousands are turned down, see, more deserving than the ones that got approved. That's what upsets me, and that's what caused me to question my friend, Mr. Holder, a man I respect very vigorously, at the time that -- of the FALN pardon.

So everybody can make a mistake, and maybe -- somebody said the best spin you could put on this is that Bill Clinton could talk anybody into anything, so if he wanted it, maybe he just talked Mr. Holder into doing something he really didn't want to do and -- and tried to resist, but just couldn't resist. Maybe that's what happened, but it was a big mistake I think.

SESSIONS:

Mr. Hahn, yesterday I compared the fact that the people -- that some of these people didn't actually murder somebody or set off a bomb to the fact that neither did Osama bin Laden or Khalid Sheikh Mohammed. They didn't actually do it; they got people who flew the airplanes and caused all the destruction.

And Mr. Holder responded that this was not in the same category and that it was not his understanding that any of the terrorists, FALN terrorists, were, quote, heads of the organizations and leaders.

Do you -- what's your evaluation of that?

HAHN:

Well, first of all, Senator, in fact, Oscar Lopez Rivera is and was a leader of the FALN. So there's no question as to whether or not...

SESSIONS:

He was an (inaudible) and his (inaudible) failed to know that when he recommended the pardon.

HAHN:

Correct. And the second point, of course, is these are clandestine organizations with secret membership. Who did what acts remains unknown. So it could very well have been, in fact, Oscar Lopez Rivera told Freddie Mendez that he had participated in bombings both in the United States and Puerto Rico.

Now, that's president amazing since the FALN never claimed credit for any bombings in Puerto Rico, but other groups did. So did he act on behalf of other groups when he was there? We don't know the answer to those questions. So we really don't know whether or not Oscar Lopez or any of these other people may have been involved in acts in which people were killed.

SESSIONS:

Now, Mr. Freeh, that's not why you go through the pardon attorney process. You remember Kathryn Love -- I mean, Margaret Love, the former pardon attorney?

FREEH:

Yes, sir. I do.

SESSIONS:

For some reason, Mr. Holder removed her, I understand. She was, I thought, a woman of great integrity and handled the job -- she was a Democrat, but she handled the job exceedingly well. And -- but at any rate, those are the kind of facts that, if you go through the formal process, the pardon attorney gets. Does he not?

FREEH:

He does.

SESSIONS:

And you avoid mistakes when you do that. And you also seek out the opinions of the prosecutors who tried the case and the agents who investigated the case.

I just feel like that was a very unwise thing. And Mr. Conner, I mean, how that went along, thank you for sharing the human perspective on this. I appreciated the little opportunity to chat with you yesterday.

CONNER:

I appreciate that, Senator.

SESSIONS:

And, you know, one of the things I think I shared with you that will troubling to me was after such a big controversy over this pardon, the Senate voted 95 to 2 -- Chairman Leahy and all the members of our committee voted to deplore President Clinton's pardon. The Mark Rich pardon was done not much longer after that.

So, Mr. Chairman, I'll wrap up. So I guess I'll ask Mr. Hahn or maybe -- let me ask Mr. Freeh.

It strikes me that after all of that flap over the FALN pardon that the deputy attorney general who was handling these matters should have been even more resistant to the Mark Rich pardon which you have considered to be corrupt and should have done everything possible to resist it. And certainly shouldn't have said I'm leaning toward it but should have said it's the position of the -- Mr. President, you can do what you want, but it's the -- my position is you should not execute this pardon.

FREEH:

Yes. No. Senator, you're absolutely right. You were -- you were a lead prosecutor. You were responsible for an office. You know, I was -- as I mentioned before, the deputy U.S. attorney in the southern district. I went over to the Swiss authorities to negotiate for Mark Rich's arrest. I mean, there was nobody more outraged at that pardon than me and my colleagues in the southern district of New York.

But I did say earlier this morning, you know, the White House went to extraordinary lengths to deceive the attorney general, myself, the Department of Justice, and everyone about who was on the secret pardon list, whether it's a pay-for-play list or whatever you want to call it.

But this -- to put, you know, Eric Holder's position in victimization in perspective, as I said, I had two FBI agents on inauguration morning eight years ago next week. I had two FBI agents standing in the cold outside of the west gate of the White House because that was the only way we were going to see the publicly-posted list of people who were pardoned.

So the extraordinary lengths that they went to -- and Mark Rich's lawyer being a part of that cabal, I don't think it's fair to put that blame totally on Eric Holder. He takes responsibility. And he will never make that mistake again. But I think, as Senator Warner said yesterday, he's learned from that mistake and that should certainly not be the basis upon disqualifying him for a job which I think he's going to do with excellence.

SESSIONS:

Thank you. I think you framed the issue for the Senate very well.

And, Mr. Chairman, thank you for allowing us to have extra time.

LEAHY:

Thank you. And I'm, again, am going to put in the rest of the letters from victim's advocates and all the law enforcement in the record. I'm going to keep the record open to the close of business today. I thank all of you for being here. I know how busy you are.

Judge Freeh, you said that you were heading to Vermont this afternoon. I want you to know that my home this morning in Vermont, the temperature is 24. That's 24 below zero.

FREEH:

Thank you, sir.

LEAHY:

Thank you. We stand recessed.

CQ Transcriptions, Jan. 16, 2009

List of Panel Members and Witnesses PANEL MEMBERS:

SEN. PATRICK J. LEAHY, D-VT. CHAIRMAN

SEN. EDWARD M. KENNEDY, D-MASS.

SEN. HERB KOHL, D-WIS.

SEN. DIANNE FEINSTEIN, D-CALIF.

SEN. RUSS FEINGOLD, D-WIS.

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SEN. SHELDON WHITEHOUSE, D-R.I.

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SEN. ARLEN SPECTER, R-PA. RANKING MEMBER

SEN. ORRIN G. HATCH, R-UTAH

SEN. CHARLES E. GRASSLEY, R-IOWA

SEN. JON KYL, R-ARIZ.

SEN. JEFF SESSIONS, R-ALA.

SEN. LINDSEY GRAHAM, R-S.C.

SEN. JOHN CORNYN, R-TEXAS

SEN. SAM BROWNBACK, R-KAN.

SEN. TOM COBURN, R-OKLA.

WITNESSES:

DEL. ELEANOR HOLMES NORTON, D-D.C.

FORMER SEN. JOHN WARNER, R-VA.

FORMER FBI DIRECTOR LOUIS FREEH

CHUCK CANTERBURY, NATIONAL PRESIDENT, FRATERNAL
ORDER OF POLICE

JOHN PAYTON, PRESIDENT, NAACP LEGAL DEFENSE AND
EDUCATIONAL FUND

FORMER DEPUTY ATTORNEY GENERAL ERIC HOLDER,
NOMINATED TO BE ATTORNEY GENERAL

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CQ CONGRESSIONAL TRANSCRIPTS
Congressional Hearings
Jan. 29, 2014 - Final

Senate Judiciary Committee Holds Hearing on Oversight of the Justice Department

LIST OF PANEL MEMBERS AND WITNESSES

LEAHY:

Before we -- before we start, today's hearing, like most hearings in here, deals with a serious issue. I know the public will act accordingly. I appreciate so many members of the public coming in here. We try to have these hearings as open as possible. Senator Grassley and I make sure they're -- they're streamed live and so anybody can watch.

But I would also note at the outset the rules of the Senate prohibit any outbursts or clapping or demonstrations of any kind. This, of course, includes blocking the view of people around you. And please be mindful of those rules. And of course the Capitol police will enforce it.

But I welcome the Attorney General back to the Senate Judiciary Committee. I thank him for his service in restoring America's faith in the Department that has in the past, at times, lost sight of its core mission.

It's interesting that the Judiciary Act of 1789 and neither Senator Grassley nor I were here at that time. But the Office of the Attorney General has carried, since its inception, the responsibility to protect Americans and safeguard the rights and liberties that make our country great.

That's why it's the Attorney General of the United States, not the Secretary of Justice or anything else, but the Attorney General of the United States representing all of us.

For much of the past two centuries, the Department has faced many challenges, combating violent crime, fraud, corruption, enforcing our nation's laws.

For the last several decades, the mission of the Department expanded to include protecting the civil rights of all Americans. We have to continue this, even today, years after the Jim Crow laws and poll taxes. That's why I recently joined with Representative Sensenbrenner to introduce the Bipartisan Voting Rights Amendment Act.

We also face ever more complex threats to our national security, more sophisticated methods of criminal activity. The Department has adapted quickly to develop new tools and resources to respond to these threats.

But along with these rapid changes, the challenge is to (ph) remain true to our core values of liberty, privacy and a government responsive to the people.

LEAHY:

We live in a digital age. We all know that. The challenges are even more acute. Every day, Americans generate an enormous amount of information about their lives through simple, routine tasks, like using a credit card, sending a text message, calling a friend, searching for directions on the Web. This technology improves our life. The vast amount of data it creates is also remarkably revealing, vulnerable to exploitation. And I will ask at some point, is there in the U.S. Constitution that gives authority to Congress to pass a law that enables and powers an executive agency, such as the NSA or the Bureau of Land Management for that matter, to open, to listen, or to seize either the mail, the phone conversations, or electronic communications of U.S. citizens, simply by a blanket law?

In Vermont we treasure our privacy, and it -- this makes me wary of government over-reach or lax protection for consumers in these laws. I think it's -- the changes show a need for Congress and the department act (sic). We need to set appropriate limits of when and how the government can collect vast amounts of data on Americans, assuming we even have the power to allow, and to pass a law to allow any agency, any agency, to do this.

I'll continue to push for passage of my USA Freedom Act, as well as Legislation to Reform Electronic Communications Privacy Act (ph). I thank those Senators of both parties who join similar legislation.

We have to ensure the huge amounts of data that are collected, whether so many that they have the right to collect them, which is a big assumption, that there -- those are collected and shared and stored by businesses are kept safe from the growing threats of data breaches and identity theft.

And we're going to examine this issue in detail at the hearing next week. But it's also important that the department continues to fulfill its core criminal justice mission. I know the attorney general and I share an unshakeable commitment to keeping Americans safe, to supporting the men and women on the front lines of law enforcement, but also to help victims rebuild their lives.

We worked closely last year, and I appreciate that, to reauthorize the Violence Against Women Act, the Trafficking Victims Protection Act. The critical improvements protect all victims. After a three year effort, last year, the president signed into law my Dale Long Public Safety Officers Benefits Improvement Act, to make significant improvement to public safety officers' benefits and so important to our first responders.

I appreciate the attorney general's filing support for the goals of the Justice for All Reauthorization Act, the Second Chance Reauthorization Act, and forensics reform legislation: each of which are going to improve the effectiveness of our criminal justice system and I'd like to see them enacted this year. I know a lot of people in law enforcement would like to see them enacted.

I appreciate the attorney general's recognition of the bipartisan efforts currently underway in this committee to address the unsustainable growth of our prison population. At the rate we're going, there will be no money for law enforcement, it will just be in prisons even to the extent of having geriatric units in these prisons.

In a time of shrinking budgets all over the government, I think the problem that we have in expanding prison population presents devastating consequences for our other critical public safety priorities. If you do nothing and we just allow the federal prison population to consume more than a quarter of the department's budget with -- eventually, even more than that, that makes us less safe.

Incremental changes to mandatory minimums for non-violent drug offenders is a good place to start. And I'm optimistic that we're going to be able to pass a bipartisan bill out of this committee to do that.

So thank you to the attorney general for returning to the committee to discuss these important issues, but I also want to thank the men and women of the Department of Justice who work every hard every day to keep us safe. I've met with a lot of them. You're the face of the Department of Justice. You know, there are thousands of people whose faces will never be in -- in the news, but are out there every single day throughout the country and -- and abroad, keeping us safe. We pray for their safety, and we appreciate what they do. They deserve our gratitude and respect.

Senator Grassley?

GRASSLEY:

Before I read my statement, I would like to say to General Holder, obviously you and I were bitten by different political bugs, but -- and we have policy differences, maybe we've got more agreement than what you and I might realize at a particular time, but -- and I think those policy differences are legitimate, and we can live with them.

In my statement, I'm going to make some comments about some administrative action where I think there's no excuse for and Congress isn't being respected by your department. And whether it's you or people within your department, I think at the very least, we ought to have responses to things where there should be no political differences, just wanting information.

So I hope you appreciate the fact that if we disagree on policy issues, that it doesn't carry over to things that -- when Congress simply wants some administrative action on your part.

I thank you, Chairman Leahy, for this hearing. It's a very important hearing. Oversight's very, very important. And I thank the attorney general for coming here. You take some beating by coming here, but at least you're fulfilling a constitutional responsibility of -- of giving us information that we need in public.

I have to start by pointing out to the chairman that we still haven't received answers to our questions for the record from the last oversight hearing with the attorney general, which was almost 11 months ago.

As I've indicated, I think this is unacceptable. The department should show sufficient respect for this committee to answer its questions at least prior to the next oversight hearing, now 11 months elapse. We also haven't received replies to questions directed to other department officials who testify at various hearings over the past year.

This hearing also affords me the opportunity to call to your attention, General Holder, the many letters the department hasn't yet answered. It is unfortunate that we always have to start a department oversight hearing with the same request, to respond to unanswered questions from the Congress.

For instance, back in early November, I wrote you about the Justice Department consult to Health and Human Services on the Affordable Care Act. HHS says that in consultation with your department, it decided not to apply the anti-kickback statute to the Affordable Care Act. This is a clear violation of Congress' move to strengthen anti-fraud laws, and you've helped us strengthen a lot of anti-fraud laws. Since I haven't received an answer to my letter, I'm going to ask you about that today.

I've also written to you about the department's handling of cases in which the National Security Agency employees abuse their signals intelligence authority. In August, after news reports about these cases, I wrote to the NSA inspector general about them, in response, the inspector general indicated that since 2003, there were 12 documented instances of NSA employees abusing these authorities, in many cases by spying on loved ones.

It's good that the number of cases was very small, but even one case is too many. According to the inspector general, at least six of these cases were referred to your department prosecution, so in October, I wrote to you to request information about how the department handled these cases. I asked for a response by December the 1st. I haven't received one.

It's important for the public to know whether the department is taking these cases seriously. We need to deter this kind of behavior in the future, given NSA's powerful capabilities.

In addition, this committee has spent a considerable amount of time over the past six months considering various reforms to the NSA. In a speech on this a few weeks ago, the president directed you as attorney general to work with the intelligence community to develop, quote, "Options for a new approach," end of quote, to the bulk collection of telephone metadata. I'll be interested (ph) in the hearing how that is proceeding.

The president has also asked you to do a review of the FBI whistleblower protection and recommend changes on how to improve them. The assignment was contained in presidential policy directive 19, which claimed to create protection for whistleblowers with access to classified information. The president gave you 180 days to complete the review and it's now 10 months overdue. There's a lot of lip- service to whistleblower protection, but this is another example of how the actions don't match rhetoric.

I'm concerned about the president's directive. I recently had a whistleblower from the CIA contact my office. He was seeking to report alleged violations of the whistleblower protections in the president's directive 19, false statements to Congress, and concerns related to qui tam legislation. He tried to get permission to share the classified details with me, yet a CIA lawyer wrote a letter denying permission, claiming judiciary committee members aren't authorized to receive classified information from the CIA, which is, of course, false.

But it scares whistleblowers, and it intimidates them into silence. This is one of several things that suggest to me that even with the president's directive, we need stronger legislative protection for national security whistleblowers.

Another topic to discuss is the department's non-enforcement of Controlled Substance Act. In August, the department announced that it wouldn't challenge laws in Colorado and Washington, legalizing trafficking marijuana. The department apparently believes that so long as these states creative effective regulatory schemes, key federal enforcement priorities wouldn't be undermined. Those priorities include the diversion of marijuana into other states, increased use among minors, and more drugged driving fatalities.

GRASSLEY:

However, I am concerned that in many ways, this policy is based on willful ignorance of the realities in these states. Example: as a result of failure to adequately regulate medical marijuana, Colorado has been a sharp -- has seen a sharp increase in public health law enforcement problems related to these federal priorities in a few years. Just a few weeks ago, the -- a senior drug enforcement administration official told my and Senator Feinstein's Caucus on International Narcotics Control, that what was happening in the states is, quote, "reckless and irresponsible." At a minimum, it is important that the department set firm criteria to measure whether or when its federal priorities are harmed so much that the decision not to challenge these state laws is revisited.

This is all the more important now that I understand you will soon announce additional guidance that will permit (ph) marijuana distributors in these states to use the banking system to engage in what is, under federal law, money laundering.

I'm also concerned that this administration hasn't been faithful to the Constitution in a number of areas -- areas by unilaterally changing or ignoring laws passed by Congress. In my view, many of these actions are inconsistent with the constitutional requirement that the president, quote, "take care to faithfully -- that the laws be faithfully executed," end of quote.

However, your department of office -- your department's Office of Legal Counsel is involved with this because they provide an

independent check on executive action. The Office of Legal Counsel is responsible for advising the executive branch on constitutional questions. Moreover, it reviews the constitutionality of all proposed executive orders.

Last night during the state of the union address, the president signaled that he will use the executive orders aggressively to advance his agenda this year. Transparency should be brought to the Office of Legal Counsel's analysis of proposed executive orders so that the American people can see whether they are subject to a rigorous constitutional review.

Thank you very much, General Holder, for listening.

LEAHY:

Please go ahead, Attorney General.

HOLDER:

Well, Chairman Leahy, Ranking Member Grassley, members of the committee, I want to thank you for the opportunity to appear before you today to discuss the recent achievements in the ongoing priorities of the United States Department of Justice.

I'd like to thank the members of Congress for coming together earlier this month to pass a bipartisan budget agreement that restores the department's funding to pre-sequestration levels. Now, we are reviewing this legislation to determine its impact on specific programs and components, but we anticipate that it will provide for the hiring of additional federal agents, prosecutors and other essential staff. This will allow us to invest in innovative programs to keep supporting state and local law enforcement agencies, and to continue building upon the outstanding work that my colleagues have made possible over the past year.

Now, as I've often said, the department's top priority must always be the protection of the American people from terrorism and other national security threats. Since I last appeared before this committee, we have continued to strengthen key intelligence-gathering capabilities to refine our ability to identify and to disrupt potential terrorist plots and to ensure that those charged with terrorism-related offenses can be held accountable to the fullest extent of the law.

As President Obama noted in his speech at the Justice Department roughly two weeks ago, in carrying out this work, it is imperative that we continue striving to protect our national security while upholding the civil liberties that -- that all of us hold dear.

On Monday, we took a significant step forward in this regard when the department acted to allow more detailed disclosures about the number of national security orders and requests that are issued to communications providers, the number of customer accounts targeted under those orders and requests, and the underlying legal authorities.

Through these new reporting methods, communications providers will be permitted to disclose more information than ever before to their customers. Allowing disclosure of this aggregated data will resolve an important area of concern to communications providers, as well as to the public.

And in the weeks ahead, as we move forward with the timely implementation of this and other reforms directed by the president, my colleagues and I will work closely with members of this committee and other congressional leaders to determine the best path forward.

We also will continue enforcing essential privacy protections and other safeguards concerning data possessed by the government, as well as by the private sector. The Department of Justice takes very seriously reports of any data breach, particularly those involving personally identifiable or financial information, and looks into allegations that are brought to its

attention.

Now, we -- while we generally do not discuss specific matters under investigation, I can confirm that the department is investigating the breach involving the United States retailer Target. And we are committed to working to find not only the perpetrators of these sorts of data breaches, but also any individuals and groups who exploit that data via credit card fraud.

Now, beyond this important work, the department will continue to build on the progress that we have seen in confronting really a wide variety of other threats and challenges, from combating drug and human trafficking to address cyber attacks, protecting Americans from violent crime, and taking really common-sense steps to reduce gun violence.

Earlier this month, the department strengthened the federal background check system by clarifying federal rules concerning mental health-based prohibitions on firearm purchases.

Under the leadership of our Civil Rights Division, we are working diligently with our federal agency partners to implement the supreme court's ruling in *United States versus Windsor* to make real the promise of equal protection under the law for all American families, and to extend applicable federal benefits to married same-sex couples.

And we are vigorously enforcing federal voting protections, and working with congressional leaders from both parties to refine and to strengthen the proposal that Congress is currently considering to help ensure that every eligible American has access to a franchise.

In addition, last year, as part of our ongoing efforts to hold accountable those whose conduct sewed the seeds of the mortgage crisis, the department filed suit against Bank of America and the ratings firm S&P.

In November, the department reached a \$13 billion settlement with JPMorgan Chase and Company. This was the largest settlement with any single entity in American history to resolve a federal and state civil claims related to the companies mortgage securitization process.

Now, I think that these results demonstrate that no firm, no matter how profitable, is above the law. And they reinforce our commitment to integrity and equal justice in every case, in every circumstance and in every community.

This commitment is also reflected in the new Smart on Crime initiative that I announced this past August to strengthen our federal criminal justice system, to increase our emphasis on proven diversions, rehabilitation and re-entry programs, and to reduce unnecessary collateral consequences for those who are seeking to rejoin their communities.

As part of the Smart on Crime approach, I mandated a significant change to the Justice Department's charging policies to ensure that people accused of certain low-level federal drug crimes will face sentences that are appropriate to their individual conduct, and that stringent mandatory minimum sentences will be reserved for the most serious criminals.

Alongside other important reforms, this change will make our criminal justice system not only fairer, but also more efficient. And it will complement proposals like the bipartisan Smarter Sentencing Act, introduced by Senators Dick Durbin and Mike Lee, which would give judges more discretion in determining appropriate sentences for people convicted of certain federal drug crimes.

So, I look forward to working with Chairman Leahy, the distinguished members of this committee, and other leaders who have shown a commitment to common sense sentencing reform, like Senator Rand Paul, to help advance this and other legislation.

I want to thank you all once again for your continued support of the United States Department of Justice. And I would be happy to answer any of the questions that you might have.

Thank you, Mr. Chairman.

LEAHY:

Thank you. And thank you for mentioning the sentencing -- what Senator Durbin and Senator Lee have done, and Senator -- all nine others -- we're all working together to try to get something that not only makes sense, but can -- can pass.

The old one-size-fits-all -- we've realized, one, it doesn't make us safer. Two, it doesn't deter crime. But, three, it means we're spending a huge amount of money on -- on things that don't make us better, and has taken money away from good law enforcement that we need.

Last week, the Privacy and Civil Liberties Oversight Board issued a report that concluded the NSA's phone records program should end, and I agree with that. For (ph) the recommendations you and the director of National Intelligence will develop coming months, but executive action's not enough. I think Congress has to act to ensure that this legal theory -- that's what I consider it -- legal theory is not used by any administration to spy indiscriminately on its citizens.

Now, DOJ's current interpretation of relevance in Section 215 -- to allow the government to acquire virtually any database that might someday, down the road for some reason, somehow find useful.

First, is there anything in the Constitution that allows us to pass a -- such an overbroad law to search anywhere we want? And is there any meaningful limiting principle for the government's interpretation of Section 215?

HOLDER:

Well, I think that there -- you can look at what the government has been able to do in terms of surveillance, whether it is wiretaps, mail covers. There are a number of statutes that Congress has passed that allows the government to engage in that kind of surveillance activity.

I think the difference between those kinds of, I think, universally-recognized programs and what we have seen under Section 215 -- the metadata program -- is that these other materials -- the other programs are really kind of predicate-based.

The metadata program is really an accumulation of material without necessarily a predicate, though I will say that to query the database, there has to be a predicate. And that makes it, I think, consistent with what has been passed by Congress before, and constitutionally upheld by -- by the courts.

LEAHY:

Well, and -- apparently (ph) we can pass something. And -- and, as you mentioned, some of it has (ph) been constitutionally upheld, but we could also pass a -- Congress could pass a law, for example, that would allow any police officer to seize anybody and lock him up incommunicado for five years. You could pass such a law.

You're a former judge, you're Attorney General of the United States. I think you would agree with me and everybody else -- that would not pass constitutional -- constitutional tests at all.

So I ask, again, the question, does the Constitution give us a right to pass a law to allow NSA or Bureau of Land Management or anybody else to collect such untrammelled metadata on American citizens?

HOLDER:

Well, I'd say that 15 judges in the FISA Court, two judges -- one in California, one in New York -- have looked at this question and made the determination that the 215 program is, in fact, Constitutional. One judge in Washington, D.C., has decided it is not.

But I think that really only deals with one-half of the question. I believe they are correct that it is Constitutional. It is an appropriate use, in a Constitutional sense, of the government's power.

But the question is, and as -- what the president has posed to us, just because we can do something, should we do it? And that's what Director Clapper and I are going to be wrestling with over the next 60 to 90 days to modify the program in the way the president has indicated.

LEAHY:

You anticipated another question I was going to ask. As you do that, are you going to be consulting with the Privacy and Civil Liberties Oversight board?

HOLDER:

Yeah. We will be touching base with them. Obviously, there is a report that we can look at.

But I think we want to make this a pretty wide ranging interaction with those people who have been critical of section 215 and the other surveillance program, so that we have as much information, both pro and con, before we make recommendations back to the president.

(UNKNOWN)

There are news reports this past week that the NSA and a British intelligence agency are working together to collect detailed personal information from smart phone apps.

I have some questions I'll ask you in a classified form, but what protections are in place to ensure the NSA doesn't do an end-run around U.S. surveillance rules, including the Fourth Amendment, obviously, by just going to another foreign agency and say, hey, we're -- we're prohibited from collecting this information on Americans. Would you do it for us?

HOLDER:

Well, under Executive Order 12333, the intelligence community is not permitted to ask a foreign government to collect information that we ourselves would not be able to collect.

And so any attempt to have a foreign government acquire information that we are not permitted to gather ourselves would be a -- would be inappropriate and a violation of that Executive Order.

LEAHY:

The FAA recently approved six test sites for the use of unmanned aero-systems -- drones. FAA is developing plans to allow drones to be operating in commercial airspace by next year.

We've also hear, though, on this Committee, that drones are already being used for a number of areas of homeland security, law enforcement purposes. That raises significant privacy concerns.

I can almost feel what my reaction would be if I saw a drone flying around over my farmhouse in Vermont, and what I'd be inclined to do, not knowing where it was coming from or what it was.

What -- what plans does the Justice Department have to use drones within the U.S. for law enforcement purposes? And what

kind of safeguards are being developed? I -- the Orwellian aspect of them I find very chilling.

HOLDER:

With regards to the use of these unmanned aerial systems, at this point, the only component within the Department that is using them in an operational way is the FBI.

And I think we have to understand that, if used appropriately, they can serve a useful purpose. I don't think you'll (ph) remember the young child who was held hostage in a tunnel -- I think it was in Georgia or Alabama or some place. Use was made of a -- a drone in that case and proved decisive in resolving that situation in a good way.

The Inspector General in the Justice Department has recommended that we come up with a uniform system of rules and regulations within the Department to control how these devices are used. And that is something that I support and something that we will be developing.

LEAHY:

And that I'd like to work with you on developing, and I think other members of the Committee on both sides of the aisle, because (inaudible) the fact that we have the technology, I can see it in the hands of some -- boy, this is a great -- this is the latest and greatest whiz-bang, let's just go spy in everybody's backyard and everything else.

And that -- I think the reaction of the American public would be pretty significant, as compared to the very specific targeted law enforcement, the missing child thing that you -- that you mentioned.

And lastly, and I apologize, Senator Grassley, but we talked about the federal prison population. This is something of concern to many of us here. It's grown by more than 500 percent in the last 30 years. And that's money that -- eating up money that can't be used to hire more prosecutors or agents or providing assistance to state and local law enforcement.

In fact, the Inspector General said the Bureau of Public -- Bureau of Prisons' budget is at the top of its list of management challenges for the Department, the top of the list.

What -- what is this increasing prison population doing to your other priorities?

HOLDER:

Well, the budget now -- the Bureau of Prisons' budget takes up roughly a third of the Justice Department's entire budget and it precludes us from doing a variety of other things that I know members of this Committee are interested in and those are interests that I share.

Our ability to help our state and local partners with regard to grants is impacted. Our ability to hire more prosecutors, more agents, more support personnel is impacted.

We have to fund the prison system to make sure that the people who work in those systems are safe, that we provide Constitutional care to people who are incarcerated.

But unless we take, I think, a fundamental look that has been suggested by you, Senator Durbin, Senator Lee, Senator Paul, unless we take that fundamental look, we're going to have a prison system that impedes our ability to do the kinds of things the American people expect the Justice Department to do.

And I'm very concerned about that. And that's why I announced that Smart on Crime initiative back in August. And I think what I announced is consistent with what members of this Committee have suggested as well. And that's why I want to work with

you to try to get a handle on what is, I think, a growing and potentially very dangerous problem.

LEAHY:

Please do, because you have broad bipartisan support across the political spectrum to find our way out of this. And we need -- we need the advice.

Senator Grassley?

GRASSLEY:

Yeah. Before my time starts, could I follow up on -- I have the same concern you do about privacy being violated by drones.

But I want to -- I want to point out that, with airplanes in Iowa and Nebraska, EPA has some authority to -- to spy on certain animal feeding operations. But they were spying on people they didn't have the right to regulate with airplanes.

We're going to have a bigger problem with the government abuse of privacy with drones now. So I just raise that as an issue, not for you to comment on or not for you to comment on.

In -- General, in my opening statement, a couple of questions on something I've already discussed with you. I mentioned that I wrote you back in October concurring -- concerning the Department's handling of cases referred to in the -- in which the National Security Agency employees intentionally or willfully abused surveillance authority.

But I never received a response. We need to know whether the Justice Department is taking any action or even whether you consider the case as serious. Can you tell me whether anyone at the NSA has been prosecuted for this conduct? And if they haven't, why maybe they haven't been prosecuted?

HOLDER:

I think the concern that you raise is a very legitimate one and we will get a response to you in greater detail.

But the fact that -- and though there were those referrals. But the fact that members of the NSA who have access to this information, access to these -- these techniques, these capabilities, would misuse them for -- and I think you were right, as you said in your statement -- for -- using it for essentially personal use, look to spy on people with whom they had relationships -- it's totally inappropriate.

We will get you a fulsome response to indicate how those cases were dealt with by the Justice Department. But I share the concern that you (inaudible).

GRASSLEY:

Is it possible that you could do that soon?

HOLDER:

Yes, we will do that soon. I will put -- I will write that one down and make sure we get back to you on that.

GRASSLEY:

Now I referred to Presidential Policy Directive 19, released 15 months ago. This follows up on my interest in making sure whistleblowers have protection.

It mandated that you deliver a report to the president within 180 days, that would be April last year, to assess the effectiveness of FBI's procedure of handling whistleblowers.

Now why I raise this issue? Because we've had whistleblowers' rights violated, like Robert Culbus (ph), Jane Turner, getting a runaround for years, even after -- even after the Inspector General has found in their favor. However, to date there has been no public announcement that your review has been completed.

Why have you not issued the report nearly 10 months after deadline? What have you learned from your review? Will you provide a copy to the Committee of the review?

HOLDER:

Well, I have to check on the status of that review. I'm not sure at what shape it is in and whether it is ready for dissemination. But I will look at that.

Again, I share the concerns that you have about whistleblowers. I think that people who have concerns about the way in which government is conducting itself have to have the feeling that they have places that they can go and report these things in a way that does not do damage to the government itself.

And so if there is not that feeling, that they have mechanisms, established means to share those concerns, we then end up with people sharing things in, I think, an inappropriate way, perhaps with newspapers, other media. And so, the concern you have is a very legitimate one and this is another one where I will have to get back to you and let you know where we stand.

GRASSLEY:

When you mentioned the concerns of the government, I appreciate that, because government's got certain responsibilities.

But when you got one individual against the government, it seems to me it's pretty easy to see how that one individual's going to be run over if we don't see that they get their constitutional rights protected.

I had a question on drones, but I think you've answered that. I'll go to the Office of Legal Counsel's review of executive orders that I spoke about.

I mentioned my concern that the president's been using executive orders to circumvent the will of Congress and the American people. I'm sure he doesn't feel that way. You probably feel he hasn't either. But I'll tell you it's a big concern for people that come to my town meetings.

It appears that he may continue to do this. He said so last night. In the interest of transparency, and with transparency comes accountability, would you disclose to the public the Office of Legal Counsel's analysis of all proposed executive orders so that the American people can see whether they are subjected to rigorous constitutional review?

It seems to me that would be one of your responsibilities. It seems to me you would want the president to only do those things that are legal and constitutional. And if you wouldn't make these public, would you tell me why?

HOLDER:

Well, first, let me say that with regard to the use of executive authorities, what the president has talked about was a desire in the first instance to work with Congress to try to pass legislation. But in the absence of that, to use the power that he has as president in the way that he described.

And what he has described is consistent with what other president's have done over the years. I think if one looks at a various number of studies that I have seen, this president has used far fewer executive orders than -- than his predecessors.

GRASSLEY:

But -- but I'm not questioning whether or not he can do it. I might have some question about the legality and constitutionality of it. And if he's got the constitutional authority, if he's got the legal authority, we can do it. We're just trying to determine whether or not he's exceeded that authority. And you're -- you're people making that determination. Is there anything wrong with the public saying what the basis of it is, you know?

HOLDER:

Well, I mean, I think we can certainly look at the requests that are made. We'll have to see exactly how the president proposes to use these executive authorities. And to the extent that we can share the OLC determinations or whoever in the Justice Department is looking at and making these determinations, I would be inclined to try to share that with Congress in an appropriate way.

GRASSLEY:

Well, will you at least -- if you can't share it with me, will you tell me why you can't share it with me? Because I -- I just don't want a big black hole here.

HOLDER:

Sure. I mean, the concern we generally have with regard to the dissemination of OLC opinions is that we want to have full conversations, fulsome discussions about these matters where OLC lawyers write both pros and cons about a particular issue that they are addressing.

GRASSLEY:

We're probably only interested in the -- in the outcome, not the debate within your agency, just what's the outcome.

HOLDER:

Yeah. Well, the memos -- the memos will contain all of the arguments with a conclusory couple of pages or whatever. We'll try to find ways in which we can share this information with you so that you and other members, the American people feel that the president is acting in -- in an appropriate way to the extent that he makes use of this authority at all.

Because as I said, his -- his primary inclination and desire is to work with Congress to pass necessary legislation that I think all the American people want to see to happen.

GRASSLEY:

I think the chairman would give me a couple minutes because he took two and a half minutes.

LEAHY:

I'm not sure about that.

(UNKNOWN)

(OFF-MIKE)

GRASSLEY:

The last question or maybe a half a question after this one would be this simple. This is a discussions I had with the secretary of Health and Human Services in another committee. They announced that it -- that it does not consider Affordable Care Act plans to be "federal health care programs."

That exam stem (ph) from the anti-kickback laws and undermines the clear intent of Congress and health reform law to make kickbacks a violation of the Vollslings (ph) Act. So you got my interest on the Vollslings (ph) Act as well.

Secretary Sebelius said that she made this decision after consulting with your department. I asked Secretary Sebelius why these plans are any different than -- than Medicare Advantage. She claimed advantage plans are different because payments are made directly from the Medicare trust fund.

So I wrote to you about this last November. I'd like to know when I might be able to expect a response, but more importantly whether you agree with Secretary Sebelius that the Affordable Care Act plans should be exempt from the anti-kickback laws.

It doesn't seem to me like you'd want to exempt anything from anti-kickback laws. And -- and was the department's advice to the HHS documented in writing? And if it was, I'd like to have a copy of it.

HOLDER:

I don't want to sound like a broken record, but that is something I'll have to exam and see what we have there. But I will say that we have been very aggressive in enforcing the anti-kickback laws and recovered record amounts of money over the last few years. And I'd have to look at the particulars with regard to the Affordable Care Act to see the applicability of those provisions.

GRASSLEY:

But presumably this is action according to the secretary that your department's already taken, so there ought to be some sheet of paper around there that you can give to us.

The half a question I was going to ask. You got one more day to decide whether or not the Boston bomber's going to be subject to the death penalty. What's your decision?

HOLDER:

We'll be announcing that by the deadline.

LEAHY:

Thank you. Incidentally, the amount of money that Department of Justice has collected, fines and anti-kickback, I believe you set an all-time record in the amount that you have. And I compliment you on that. Senator Durbin?

DURBIN:

Thanks a lot, Mr. Chairman. I just want to say for the record it was the Grassley amendment that brought us into this world in terms of bringing members of Congress and their staff into the Affordable Care Act which we are now under. And if it was not complete when it came to anti-kickback and such, then we certainly want to make sure that it is. I would like to...

GRASSLEY:

(Inaudible) colleagues didn't know that. Why'd you have to tell them?

LEAHY:

Well, every -- every -- I think every -- every staff -- every staff member -- every staff member in the Congress who are now paying considerably more for their health care know that it is the Grassley amendment that did it.

DURBIN:

Mr. Chairman, if I could address two questions related to the wheels of justice. Each year when you appear, Mr. Attorney General, I ask you the same question and you give me the same answer about racial profiling guidelines. And you say really soon we're going to work on this.

This year I would like to ask you, how quickly can we expect new racial profiling guidelines when it relates to the issues of

religion, national origin and whether it applies to national security and border security cases?

HOLDER:

Well, I don't want to repeat the words really soon given what you said. So I will say that they are forthcoming. And that -- from -- in the Holder lexicon, forthcoming is shorter than really soon. We are working with those. There has been a review that is underway.

We are really -- and I mean this very sincerely. We are truly in the final stages of this. The proposal is now just being circulated for comment within the department. And my hope would be that it would be out of the department very soon.

There will obviously be some White House involvement because we're talking about a 2003 executive order, but I would hope that we would have an ability to talk about the modifications that I think are appropriate in a forthcoming way.

DURBIN:

Thank you. Wheels of justice question number two. A hundred fifty-five detainees remain at Guantanamo. I want to say for the record this has been the subject of a lengthy debate here in Congress. The president made his intentions clear when elected to close Guantanamo, and yet resistance in Congress has thwarted him from accomplishing that.

For those who want an establishment of the record, over 500 people have been convicted of terrorism and terrorism-related crimes through our judicial process since 9/11 in federal courts. In contrast, there have been six convictions and one plea agreement from Guantanamo's military commissions. Two of those convictions have been overturned.

The most dangerous terrorists who have been convicted through our judicial system reside in our prison system and the worst of the worst in maximum security. We spend on average \$78,000 a year in facilities like Florence, Colorado, maximum security, to hold the most dangerous criminals in America, including the most dangerous terrorists, and there has never, ever, ever been an escape or a question that they would escape.

We are spending for the 155 detainees in Guantanamo on average not \$78,000 a year, \$2.7 million a year per detainee. It is an outrageous waste of taxpayer's dollars. Now we are going to start a process to start reviewing the 155 detainees in the hopes that we could dispose of some, dismiss some, transfer some.

It took a long time to get started. The wheels of justice unfortunately went very slowly. The president issued an executive order in March of 2011. The first Period Review Board Hearing at Guantanamo took place in November of last year. And earlier this month, the board recommended the transfer of the first detainee in question.

The second Period Review Board Hearing occurred yesterday. I'm glad to hear this progress has been made, but with 155 detainees, 71 of them were eligible for evaluation. Mr. Attorney General, we can't live long enough to go through this process. At \$2.7 million a year per Guantanamo detainee, can we get this process moving in an orderly, faster way?

HOLDER:

I think we can. The president has indicated from the day that he took office that he wanted to close the Guantanamo facility. He put me in charge of an initial review that was done within a year that categorized all the people in Guantanamo, those who could be tried in military commissions, those who could be -- or Article III courts -- those who could be released and those who had to be detained.

We did that. We did that. And I will say, with all due respect, congressional restrictions that were placed on us thwarted our attempts to close Guantanamo in a more timely fashion. You're right. We are now in the process of going through this review board -- the review board process that is largely based on the work that we did in that earlier task force that I was the head of.

HOLDER:

We are trying to do all that we can to close Guantanamo, and I am actually grateful for the loosening of the restrictions in the latest Budget Act that makes it more -- makes it easier for us to effectuate that closure.

But this is something that, for the fiscal reasons you talk about, but also for the national security reasons that the continued presence of Guantanamo poses, that that facility simply has to be -- has to be closed.

DURBIN:

The sooner the better, from my point of view. But I wish more members of Congress felt the same way.

You were in Chicago in November of last year at the installation of the U.S. Attorney for the Northern Districts, Zach Fardon, who was the unanimous choice of Senator Kirk, myself, and our bipartisan review panel. And you made some encouraging statements about commitments that were going to be made to Chicago to deal with the violent crime problem and murder issue.

Giving credit where it's due, Mayor Emanuel and his Superintendent of Police Mr. McCarthy have made extraordinary progress in this regard. But we need this help.

Can you be more specific in terms of the resources and personnel that you will make available to help us fight these problems with violent crime?

HOLDER:

Well, we're looking to come up with ways in which we can increase the number of federal agents who are in Chicago on either a temporary basis or a permanent basis. Also looking for grants that we can make available to the city.

I am going to be speaking to Mayor Emanuel tomorrow. The purpose of the conversation, at least one of the things we're going to be talking about, are the specific needs that he can identify that we might be able to help with.

I will also be talking to Zach Fardon, U.S. Attorney Fardon, to get his perspective on this, as well.

I think that we want to do as much as we can, but I don't think that that should obscure the fact that the city administration, working with the new U.S. Attorney, I think has made pretty significant progress. And I don't think they necessarily get all the credit that they deserve for a pretty dramatic decrease in crime in Chicago.

But there is federal assistance that we want to try to make available.

DURBIN:

My time is up, but I hope with the new appropriation bill you'll be able to also find some Assistant U.S. Attorneys to help Mr. Fardon in this effort in the Northern District.

Thank you, Mr. Chairman.

LEAHY:

(OFF-MIKE)

Thank you very much.

Senator Hatch?

HATCH:

Thank you, Mr. Chairman.

Welcome, Mr. Attorney General. I appreciate your service. And I'm going to try and ask a series of questions that I've tried to couch them so you can answer yes or no, so I can get through a lot of stuff. To the extent that you can, I'd appreciate it.

But before asking some questions about the NSA surveillance matter, I'd like to express my concern about the Department's refusal to fully enforce the Controlled Substance Act. Marijuana is now widely available across the Utah border in Colorado. Federal, state, and local law enforcement have finally seen success in (ph) going after marijuana growers on public lands in Utah.

There's a direct link between the U.S. marijuana trade and large- scale drug-trafficking organizations that threaten the safety and wellbeing of our country. Now legalization in Colorado threatens the success that we have been seeing in tackling the problem.

The controls on legal marijuana are unlikely to deter drug cartels from wrapping (ph) up their operations on public lands in Utah and elsewhere, especially since demand in Colorado is widely -- wildly exceeding supply.

And I really think this policy shift sends a mixed and dangerous message to both the law enforcement community and fellow citizens.

Now do you share my concern that legalization in one state can encourage more illegal marijuana production on public lands by drug cartels and others in bordering states?

HOLDER:

Well, I'll do it very quick because I can't give you a yes or no. I share those concerns and those concerns are expressed in the eight priorities that we set out.

Let me just -- three of them -- preventing the diversion of marijuana from states where it's legal under state law in some form to another state; preventing the growing of marijuana on public lands; and preventing marijuana possession or use on federal property.

These are three -- these are three of the eight things that would precipitate federal government action and enforcement of the CSA (ph).

HATCH:

OK. Now General Holder, the debate about NSA surveillance is in full swing. The illegal and selective leaks last summer were hardly the best way to start this debate. And I think they undermine rather than enhance it. But here we are.

A lot of attention is being focused on the NSA's collection and analysis of so-called telephone metadata, as you've mentioned. It's worth reminding ourselves what that information is and what it is not. It includes the telephone number calling, the number being called, and the date, time, and length of the call. Is that correct?

HOLDER:

No, that's correct.

HATCH:

It does not include any information about the identity of the caller or the content of the call. Is that correct?

HOLDER:

That's correct.

HATCH:

OK. The Privacy and Civil Liberties Oversight board issues its report last week -- excuse me -- concluding -- I apologize -- concluding that the PATRIOT Act does not provide legal authority for the NSA's metadata program.

In an interview last week, you noted that at least 15 judges on dozens of occasions have said that the program itself is legal. That's correct?

HOLDER:

That's correct.

HATCH:

OK. To be clear, is it your position that the collection of metadata under section 215 of the PATRIOT Act is legal and that the oversight board's conclusion on this point is wrong?

HOLDER:

That is my view.

HATCH:

It's mine, too. Someone who is on the Intelligence Committee and who helped put this through.

In your judgment, has the NSA abused or misused its capability to collect and analyze telephone metadata?

HOLDER:

I think the NSA has acted in a way that's consistent with the law. But as I indicated, I think that is part one of the analysis. Part two is whether or not we are getting from the acquisition and retention of that data material that is sufficient to deal with the civil liberties, privacy concerns that others have expressed.

HATCH:

But they haven't misused or abused it.

HOLDER:

Yes. And that is what the president has asked us to look at.

HATCH:

OK. One more question about the Oversight board's conclusion on the legality of the metadata program.

In creating the board, Congress authorized it to do two things -- first, to ensure that the need for executive branch actions in protecting us from terrorism is balanced with the need to protect privacy. That's true?

HOLDER:

Yes, yes.

HATCH:

Second, to ensure that liberty concerns are considered in the development of laws and policies in this area. That's true?

HOLDER:

I believe that's true also, yes.

HATCH:

Now these responsibilities certainly call for recommendations on conclusions about policy. But I don't see how they include opining on legal issues such as the legality of the metadata program.

Did the Oversight board exceed its statutory mission in addressing this issue?

HOLDER:

I'll be honest with you, I'm not as familiar as perhaps you are as to what their statutory mission is. I will accept, as legitimate, the concerns that they expressed, though I do not agree with their legal determination, their legal analysis.

HATCH:

I think they exceeded its statutory mission. But so be it.

So we are clear, in my opinion, on the very limited information that the NSA collects and analyzes. We are clear that the metadata program is legal and that the NSA has abused or misused its authority to collect or analyze this information, as far as you know?

HOLDER:

There have been some compliance issues that have been identified by the courts or by the Justice Department, sometimes by the NSA. But those have all been corrected, once brought to the attention of the NSA.

HATCH:

OK. So my next question is how to know whether the program is valuable. The president's review group said, in its report, that the metadata program was not itself essential to preventing a specific terrorist attack.

Now is that the right standard? Must there be proof that this program alone prevented an actual attack in order for it to be valuable for national security and for it to continue?

HOLDER:

See, I'm not sure that -- I think we've fallen into a false analysis there. I'm not sure that's the only way by which you can judge the validity or the value of the program. There's a mosaic of things that we take into consideration in determining what -- if we are acting in an optimal way.

There are questions, I think, that can be legitimately brought and that we are going to consider about the continued need for section 215. But I don't think the only way that you can test the validity or the need for 215 is whether or not it has prevented X number of attacks.

HATCH:

On March 5, 2012, in a speech -- the distinguished Chairman is granting me a little more time here so I can finish this line of questioning.

LEAHY:

(OFF-MIKE) given two more minutes.

HATCH:

I'm very grateful to him.

In a speech at Northwestern University School of Law, you discussed oversight of surveillance programs under section 702 of the Foreign Intelligence Surveillance Act. The Justice Department and Director of National Intelligence conduct oversight reviews at least once every 60 days and report to Congress at least twice a year.

Now I understand that surveillance programs under section 215 of the PATRIOT Act and 702 of FISA are different. But would you say that the metadata program authorized under section 215 enjoys similarly rigorous oversight to that which you described for collection under section 702?

HOLDER:

I think there -- there is sufficient oversight of section 215 between what the Justice Department lawyers are looking at, as we are looking at materials that are presented to us by the FISA -- by the FISA Court.

And then with what NSA is doing internally.

I think there is a great deal of oversight and that oversight has yielded issues that have been identified as problematic.

HATCH:

And resolved.

HOLDER:

And then resolved.

HATCH:

That's right.

One of the president's proposals is for telephone companies rather than the NSA to -- to store the metadata. It has been represented that telephone companies do not support this idea.

But suppose they do. Today on the 22 individuals at the NSA that have access to this metadata, 22 people. But there are dozens of phone companies, each of which would have to maintain these records. You actually (ph) have some number of employees at each telephone company with some kind of access to these databases in addition to the 22 analysts in NSA who still have access to query these databases.

How could you possibly provide a comparable level of supervision and accountability when this data is stored in numerous different locations and is accessible by far more individuals than it is today?

HOLDER:

Yeah. One of the things the president has asked Director Clapper and I to do is to come up with an alternative way in which this information can be stored. And the issue that you have raised is one that has to be resolved.

I think the NSA has done a good job in the way in which it has stored this information. If we are to move to a different scheme, I think we have to answer the question of how can we put it in a different place and maintain the integrity that -- of the process that I think the NSA has done a pretty good job at.

HATCH:

I agree with that. And I have additional concerns about the security of that metadata at the phone companies. Verizon's own data breach investigation report found that -- that privileged misuse and abuse by insiders played a role in 13 percent of data breaches over the past year.

A company can only do so much to protect against outside threats to its networks. Just look at Target and Neiman-Marcus. Do you believe that the metadata would be more secure in the hands of the private sector than the NSA?

HOLDER:

I think that we have to try to find out if we can do that. If we can maintain the -- that whole question of maintenance of security, if we can do it in a different setting, than we presently do at the -- at the NSA. And that is one of the tasks the president has given to me and to Director Clapper.

HATCH:

But they're doing the job at NSA.

HOLDER:

I think they've done a good job.

HATCH:

Thank you Mr. Chairman, I appreciate the extra time. I appreciate it.

SCHUMER:

Thank you, Senator Hatch, and now I yield myself seven minutes, plus whatever else I might need.

It is very good to be here.

(UNKNOWN)

Objection.

(LAUGHTER)

SCHUMER:

I want to thank the attorney general for the good work he does. I know he is aided with great, great skill by two former Schumer (ph) employees, who work for you, Elliot Williams (ph), who's been gone for awhile, and Brian Fallon (ph), who we miss very much and is doing a very good job for you.

(UNKNOWN)

Thank you, Senator Schumer.

SCHUMER:

OK.

First, on autism spectrum disorders, I know you're familiar with the case of Avonte Oquendo. He's a child with Autism Spectrum Disorder, ASD. He wandered away from his school this fall. About 50 percent of all children with ASD wander, causing great hardship to their parents, and his remains were found three months later, about 11 miles from the school where he originally vanished.

The heart of New York went out to Avonte and his mother, Vanessa Fontaine, his grandmother, Doris McCoy (ph), I've met with them, and I know their grief and heart-ache, shared by many parents with autism. You can imagine, when a child wanders away, and many of them are non-verbal, very, very heart-wrenching situation and a dangerous situation, as unfortunately, Avonte's death showed.

So right after Avonte went missing, as you know, Mr. General, I called on the Department of Justice to expand a current grant

program that you have in place which has provided support for the use of tracking devices to agencies who work with patients diagnosed with Alzheimer's and families of those patients.

The program's administered by the bureau of justice assistance (ph). Now, we've been doing this for Alzheimer's patients. The justice department funds the program, so it seems almost obvious, you know, it's like a hand fits into a glove that we could do this. And -- and people with Alzheimer's, as you know, wander as well.

It seems like just a perfect fit to do the same thing for children with autism who tend to wander. Now, I understand that the program that's used for Alzheimer's is not available for families of children with autism. So have you been able to identify any other streams of assistance pursuant to my request?

HOLDER:

Well, I -- I think that the concern that you have is a very good one, a legitimate one, and the fact you brought it to our attention, I think, is something that is going to help a lot of kids who deal with this issue. And we have made the determination that the Byrne Grant program can be used for the purchase of -- of these devices, these transmittal, transmitted bracelets, I think they're called.

SCHUMER:

Sometimes they're bracelets, sometimes they're on the ankle. You can even sew them into the clothes, because occasionally the kids with autism want to take off the bracelets or the things on them.

HOLDER:

Right, but Byrne Grant money can be made and will be made available for the purchase of these devices.

SCHUMER:

Right, so localities, police departments can start applying?

HOLDER:

Yes.

SCHUMER:

Immediately?

HOLDER:

Yes.

SCHUMER:

That is great news. And that will really help in a lot of situations, so I really appreciate that. It's -- it's a big huge step forward.

Now, one other question on this. In order to ensure a permanent adequate stream of money for this, I've introduced legislation, we call it New York Avonte's Law (ph), named after this lovely boy. It will create a new specific DOJ grant that will be available to local law enforcement schools and non-profits that aim to assist children with Autism Spectrum Disorder. It will authorize \$10 million, that's I think how much we spend on the Alzheimer's, in order to help fund the purchase of voluntary tracking devices for children with ASD, training for parents, schools, and local law enforcement, as well as other innovative methods for families who wander.

What you're doing is great and will solve the problem immediately, but to ensure its permanence, we all know there'll be, at some point, a different attorney general, many years away. And so legislation would ensure this.

Now, I know the way it all works. You can't commit to specific legislation until you see the details. But do you agree with the general principle of trying to enact this in statute and assure the revenue stream for many years to come.

HOLDER:

Yes, I think that given the nature of the unique issues that kids with autism issues face, and given the way in which our nation has responded to adults with Alzheimer's issues, that they ought to be treated in much the same way. And so I can't commit, but I can say that personally, I think that a dedicated funding stream makes a great deal of sense.

SCHUMER:

Right, thanks. We'll get you the legislation and you can put it through the long, laborious, executive branch traps. I probably have to go through 47 different agencies, but get their support for this legislation, which we hope will be forthcoming.

OK. Now I'd like to turn to media shield. I appreciate the administration's support for the Free Flow of Information Act, which would protect confidential sources by providing clear and reasonable standards. Additionally, the department's revised guidelines governing the obtaining of evidence from members of the news media are a step in the right direction. However, they haven't been finalized, and it's more than six months after the department's sent its report to the president.

When will the revised guidelines be finalized in the code of federal regulations? When will they go into effect?

HOLDER:

I expect that we would have them available for comment within the next couple of weeks. I'd actually hoped that we would have them done by this hearing. It was a little glitch towards the end, but I think that we will get through that and we will have them available for public review and comment within weeks.

I will say that in spite of the fact that they are not yet issued, we are working under them as if they were in place, and we are also looking to -- to people the board that we are putting together as part of the review process. Mr. Fallon (ph) has been working on this.

SCHUMER:

Well, then, it's in good hands.

HOLDER:

Right.

SCHUMER:

Does that include, you know, that you mentioned this media review committee, has that been established? Has it been convened? Is it officially working, unofficially working? Give us the status of the review committee and the media -- news media dialog group, I think is what you called it, to quote "assess the impact of the department's revised new media policies." Has that been established?

HOLDER:

There will be two bodies: one within the department to assist the attorney general in making determinations about requests to access information connected to the news media, and another one that would involve outsiders who will assist us in, on a periodic basis, just to kind of give us a -- an update on it, on how are we doing with regard to the reforms that we have put in place, and to consider other ones.

Brian, Mr. Fallon (ph), has been working to come up with the appropriate people for that outside board. I think we've made a lot of progress there. I think we're on the verge of making an announcement, there.

SCHUMER:

How soon do you think?

I don't want to steal Mr. Fallon's (ph) news thunder here.

HOLDER:

We expect that the first meeting will be in February.

SCHUMER:

Thank you.

HOLDER:

Thank you, Brian.

SCHUMER:

OK. Thank you very much, Mr. General.

And I will do two things now: call on Senator Sessions and turn over the august process -- engage in the august process of turning over the chair gavel to the wonderful senior senator from Minnesota, Senator Klobuchar.

SESSIONS:

And you finished within your time. Very well.

Attorney General Holder, you mentioned gun violence and crime. I would just notice (ph) is watch your statistics that your prosecutions, total prosecution of gun crimes, have climbed 5.2 percent this year from last year and I think the prosecutions, vigorous prosecutions, do make a difference, and I would encourage you to keep those numbers up and as you go forward.

A lot of our members are discussing how to deal with the mandatory sentences. I would just say I was there when we had the revolving doors in the '60s and '70s and we, as a nation, turned against that. We've created a system that requires certainty and punishment, swifter trials. and the result is a very great drop in the crime rate.

So to my colleagues, we just have to be careful as we go forward. I know you've been a United States Attorney General (ph), Holder, and you've seen it as a judge and U.S. attorney, and I think we just have to be careful. We need to have good data as we go forward to analyze how we can find some areas where crime punishments could be reduced.

I do agree with you about the NSA and the metadata question. I think you've thought this through. I believe your position is sound. Attorney General Holder, when I became United States Attorney in 1981, the percentage of young people in high school, high school seniors, according to the University of Michigan's authoritative national survey, was 50 percent plus had admitted using an illegal drug previously, in the previous year.

That was a dramatic thing. And the nation energized itself. Nancy Reagan had the "Just Say No" (ph) program. In my district, and this was done all over America, groups formed: The partnership for use, the coalition for a drug-free Mobile (ph). We met, I was involved in it, with it, and we created and worked to create in the country hostility to drug use. Create an impression that it's not socially acceptable, and children shouldn't be using it, and it's wrong.

And the trend started the other way. By the time, within 10 years, less than 25 percent of the high school seniors under that study admitted using illegal drugs. I invested a tremendous amount of my time. Citizens all over America invested huge amounts of their time, volunteer efforts, financial contributions, to break the cycle of drug use among young people that were

threatening the very viability of our education system, and the future of so many.

SESSIONS:

It was just a very serious thing. So I have to tell you, I'm heartbroken to see what the president said just a few days ago. It's just stunning to me. I find it beyond comprehension. This is the Atlantic article surveying what The New Yorker, the president's interview with The New Yorker said. The headline is, "Obama On Pot Legalization -- It's Important For It to Go Forward." That's the president's quote.

He goes on to quote from that interview. He said the following things about mari -- smoking marijuana. Quote, "I view it as a bad habit and vice, not very different from the cigarettes I smoked as a young person. I don't think it's more dangerous than alcohol," he said. In fact, it's less dangerous than alcohol, quote, "in terms of its impact on the individual consumer."

And then he goes on to say, "Well, those who argue for legalizing marijuana as a panacea" -- "and it solves all these social problems, I think are probably overstating the case."

This is -- it's just difficult to me to conceive how the president of the United States could make such a statement as that.

So, first, do you support the president's view in that regard, as the chief law enforcement officer in America?

HOLDER:

Well, let me just say (ph) -- a couple misimpressions there with regard to guns. We are prosecuting the same number of people that we did from 2007 to 2013. There may be fewer numbers of cases, but that means, I think, that the cases we're bringing are more significant. One seventh of all the cases that we bring involve guns.

SESSIONS:

All right, I have a data on that. I'll submit if for the record and people can decide if the number of gun cases are down by going to the data from the Department of Justice.

But what about the president's view on this important subject? Do you agree with it?

HOLDER:

Well, I think that, as I -- I have not read the article, but as I have understood what the president has said in his totality was that he -- he thought that the use of marijuana by young people was not a good thing. One of our eight priorities is the prevention of distribution of marijuana to minors, if there is a...

SESSIONS:

What?

HOLDER:

If there's an indication that marijuana is being distributed to minors, that would involve -- that would require federal involvement. That is what the deputy attorney general said in his August 29th, 2013 memo to the field.

SESSIONS:

Do you think it's not -- it's a bad habit, but not much worse than smoking?

HOLDER:

Well, I mean, I -- you know...

SESSIONS:

I mean, your opinion. Give us your opinion.

HOLDER:

Well, no, I think that the use of any drug is potentially harmful. And -- and included in that would be alcohol. Young people...

SESSIONS:

But the president said, "I don't think it's more dangerous than alcohol," close quote. Do you agree with that?

HOLDER:

Well, as I said, I think that any drug used in an inappropriate way can be harmful. And our alcohol is among those -- among those drugs.

SESSIONS:

Is (ph) using marijuana against the law? Is that appropriate use?

HOLDER:

Well, I mean, as I said, for young people to do that, that is something that violates the federal law, and something that we said would be something that we would continue to use our federal law to...

SESSIONS:

Are you aware -- are you aware that Gil Kerlikowske, the -- the drug czar the president has appointed it -- it says -- said this in December: "Young people are getting the wrong message from the medical marijuana legalization campaign. If it's continued to be talked about as a benign substance that has no ill effects, we're doing great disservice to young people by giving him -- them that message," close quote. Do you agree with that?

HOLDER:

Well, I think that's right, and that's why we have said that the distribution of marijuana to minors will involve -- will entail a very vigorous federal response.

SESSIONS:

Are you aware -- isn't it a fact that if the laws are relaxed with regard to adults, it makes this drug even more available to minors?

HOLDER:

Well, I'm not sure that that's necessarily true.

SESSIONS:

Attorney -- Attorney General Holder, isn't it true that if marijuana is legalized for adults, it makes it more available for young people?

HOLDER:

Well, I'm not sure that that's true. And I say that only because, you know, the -- the alcohol -- people cannot buy alcohol I guess now until you're age 18 -- or age 21. But young people find ways to find alcohol because adults can have access to it. I'm not sure that we will see the same thing here, given what we have said with regard to...

SESSIONS:

Well...

HOLDER:

... law enforcement priorities.

SESSIONS:

Here is -- do you -- did the president make or con -- conduct any medical or scientific survey before he waltzed into The New Yorker and opined, contrary to the position of attorney generals and presidents universally prior to that? That marijuana is not as I've quoted him? Did he study any of this data before he made that statement?

HOLDER:

Well, I don't know, but I think, as I said...

SESSIONS:

Did he consult with you before he made that statement?

HOLDER:

No, we didn't talk about that.

SESSIONS:

Well, what about this study from the American Medical Association, October of 2013. "Heavy (inaudible) use in adolescents causes persistent impairments in neurocognitive performance and I.Q. And use is associated with increased rates of anxiety, mood and psychotic thought disorders," close quote.

Or this report from Northwestern University in December -- last December. Quote, "The study found that marijuana users have abnormal brain structure and poor memory, and that chronic marijuana use may lead to brain changes resembling schizophrenia. The study also reported that the younger the person starts using marijuana, the worst the effect."

Huh. Would you dispute that -- that -- those reports?

HOLDER:

I have not read the reports, but I don't -- if they are -- if they are, in fact, from the AMA, I'm sure they are good reports. But that is exactly why one of our eight enforcement priorities is the prevention of marijuana to minors.

SESSIONS:

Well, Lady Gaga said she's addicted to it, and it is not harmless. She's been addicted to it.

Patrick Kennedy -- former Congressman Kennedy said the president is wrong on this subject.

I just think it's a huge issue. I hope that you will talk with the president -- you're close to him -- and begin to push back -- pull back from this position that I think is going to be adverse to the health of America.

Thank you, Madam Chair.

KLOBUCHAR:

Thank you, Senator.

Senator Whitehouse?

WHITEHOUSE:

Thank you.

Welcome back to Congress, Attorney General. And thank you for the terrific work that you are doing as our attorney general. As a former U.S. attorney and a friend of the department, I not only have my own opinion, but I have other folks who are observers of the department, and we're very appreciative of the fine leadership you're providing the Department of Justice.

HOLDER:

Thank you.

WHITEHOUSE:

Let me talk with you for a moment about cyber.

Our efforts to address the cyber threat in the -- on the military side have been quite distinct, and have led to the establishment of a cyber command with two four-star generals in charge, one double-hatted to lead NSA.

On the law enforcement side, our administrative advancement to meet this threat has been, to put it mildly, incremental. And -- for instance, responsibility for cyber threats within the Department of Justice itself is divided between the Criminal Division and the National Security Division. And the enforcement responsibility is divided between the FBI and the Secret Service, although the FBI has a very dominant role -- and, by the way, does a terrific job.

In the spending bill that was just passed, thanks to Chairman Mikulski's exemplary legislative talents, there is a provision that requires the Department of Justice within 180 -- 120 days to put forward a multi-year strategic plan for this.

As you know, I have had this discussion with the Department of Justice. And the Department of Justice has said, "We can't talk about this because OMB's not in the room, and they will whip us unmercifully if we talk about budget stuff without their presence, because it'll look like we're submarining the prerogatives of the White House over budget issues. So, we brought OMB in. And those discussions have gone forward at a moderate pace.

I just wanted to flag for you this legal requirement that it be done within 120 days, because I'm really expecting that there'll actually be a report within 120 days. And I'm hoping that you and OMB will both put considerable effort into it. Because if you look out four or five years at the rapid rate in which the cyber threat is growing, in which it is morphing into more complex and varied threats, and at all the ways in which it can affect the lives of ordinary Americans, I think that we are both underresourced and inadequately structured to deal with that program -- that problem in the long haul.

So, what assurances can you give me about how you guys are going to handle this responsibility for a multi-year strategic plan on cyber within 120 days?

HOLDER:

Well, I don't want to be alarmist, but I think the concern that you have expressed over the years is well founded. This nation needs to be afraid where we could be after a cyber attack. When you see the proliferation of these cyber capabilities to criminal organizations, to nation states, our nation is at risk. Our infrastructure is at risk. And we as a nation have not, I think, adequately responded to it.

I think the 120-day examination that we have to do to come up with this -- this multi-year plan is, indeed, a good thing. And we'll take it very seriously and respond within that -- that timeframe, bringing into -- into it OMB, and, I think, bringing members of Congress who have expressed an interest -- you, for instance -- into this process, as well. At least to be a part, so that we have your views in formulating what this plan is like.

But we as a nation have not dedicated the attention, the resources to a problem that is 21st century in its inception, and will be with us for, I suspect, throughout the duration of the century. And it's only going to get worse. The danger to us is only going

to be heightened.

WHITEHOUSE:

I spoke to the FBI Cyber Division I guess yesterday morning, and used the example of the United States Air Force -- which, before the opportunity and threat of air warfare was fully appreciated, began as a sub-component of the Army's Signal Corps. And then, obviously, it had to grow, and then it became the Army Air Corps. And, finally, we got a U.S. Air Force. And I think a similar process needs to be planned for on this.

The other issue I wanted to raise with you is that many of us have been shocked by the discrepancy between the filings that political organizations have made at the Internal Revenue Service promising under oath that they weren't going to spend any money on political activities and at the same time filing declarations under oath at the Federal Election Commission that they had spent tens of millions of dollars in political activities.

I suspect that those discrepancies reflect false statements that can be prosecuted under 18 USC Section 1001. There have been no cases from the department in that respect because the IRS hasn't referred anything.

I think the IRS has been frightened of the power behind these big political machines, so they've basically chickened out and pitched it in.

But now they've decided to take a look at those rules. And I would ask you to assign somebody on your staff to track the IRS process, make sure that you are comfortable where those rules are coming out and make sure that if there are open and notorious conflicts between sworn statements by these organizations, it leaves room for the Department of Justice to step in and get in front of a grand jury and bring in some evidence and find out if they are, in fact, the prosecutable false statements that they appear to be on their face.

HOLDER:

I think that's something that's worthy of examination. The -- I think the problem exists in that, you know, to the Tax Reform Act, this is information that is called tax return information that is always guarded very zealously. There's a memorandum of understanding that exists between the department...

(CROSSTALK)

WHITEHOUSE:

(inaudible) look at it unless they've referred to you?

HOLDER:

Right.

WHITEHOUSE:

But when an open and notorious violation appears to be happening in place, I don't think there's anything in that law that prevents the Department of Justice from saying to the IRS, excuse me; why are you not referring this to me? I can see what is happening right here in the plain light of day. They said zero dollars in this filing under oath and \$20 million in this filing under oath. They cannot both be true. Somebody is lying somewhere. We'd like to look into it.

HOLDER:

Yes, I think the -- those referrals only occur in what I think are terms extraordinary circumstances and I think that is just a question of defining what extraordinary means.

And I think that an examination of this issue makes a great deal of sense.

And this is not medialogical (ph) issue. I mean, this is one that, you know, groups on the Left, on the Right, I think should be held to the full letter of the law. And...

WHITEHOUSE:

The crime of lying to a federal official has no partisan component to it.

And I appreciate that you'll take a look at it with that in mind. And I have gone a bit over my time, so I thank my colleagues and I yield my time.

KLOBUCHAR:

Very good.

(inaudible).

Senator Cornyn?

CORNYN:

Thank you, Madam Chairman.

Good morning, Attorney General Holder.

(CROSSTALK)

HOLDER:

Good morning.

CORNYN:

I want to introduce you to a constituent of mine and Senator Cruz, Catherine Engelbrecht of Houston, Texas. She founded two organizations known as True the Vote and King Street Patriots, dedicated to improving elections and furthering the ideals of our Founding Fathers.

She leads a coalition of citizen volunteers who work as election monitors, who provide resources for voter registration drives and are dedicated to rooting out election fraud.

Yet the federal government has targeted Catherine Engelbrecht and her organizations with harassment and discrimination.

In the spring of 2010, True the Vote and King Street Patriots both filed for non-private status. Like so many organizations, they just wanted to participate in the political process.

When the IRS failed to respond in January 2011, I wrote a letter about -- inquiring about the status of True the Vote's application. A few weeks later, the now-notorious Cincinnati office of the IRS began a series of gratuitous and invasive inquiries into Ms. Engelbrecht's organizations.

This investigation was so over the top that the federal government demanded, among other things, every Facebook post and every tweet that Ms. Engelbrecht had ever posted.

For more than three years, the IRS denied True the Vote and King Street Patriots the non-profit status they requested and subjected both Ms. Engelbrecht and her family and her business to this kind of harassment.

This kind of abuse of power was not limited to the IRS, however. According to CBS News, within two months, or within months of the True the Vote's filing, two arms of the Justice Department targeted Ms. Engelbrecht. The FBI made calls to King Street Patriots and attended some of its meetings. And the ATF has twice audited Ms. Engelbrecht's business.

Coincidence? Maybe. But where there's smoke, there's fire.

The IRS finally three years after they applied, granted True the Vote's tax-exempt status that it requested. But we now know that True the Vote was just one of the conservative organizations that was targeted for discrimination, harassment and intimidation by the federal government, the IRS in particular.

IRS officials at the highest levels targeted the leaders of conservative organizations based solely on their political beliefs. In Ms. Engelbrecht's case, the intimidation tactics were shocking, threatening to bankrupt an American family and the business they built simply because they dared criticize the federal government.

This is chilling. And it should be unacceptable in the United States of America.

The president, to his credit, agrees that this is a terrible abuse. He called the IRS scandal "intolerable" and "inexcusable." And he called for those guilty of this misconduct to be held accountable.

But when your department was asked to step in and investigate, no one has been held accountable for this abuse.

In fact, your department installed a political donor of the president's to lead the investigation. According -- appointing a political donor to investigate a political activity is, I think, calls the entire investigation into question. And I can't imagine how this would be designed to instill public confidence in the investigation.

Now FBI Director Comey, to his credit, said this investigation was an important one for his agency. Now, though, it's been publicly reported that the department will not pursue criminal charges against any IRS official even though the FBI's investigation has not yet been concluded.

And shockingly, the department made this decision, if it's true -- and you can certainly confirm it or refute it if it's not -- they made this decision without even talking to Catherine Engelbrecht.

I talked to her yesterday. She verified she's not heard a word from the Department of Justice or the -- or the FBI.

So I would like to know, General Holder, what you have to say to Ms. Engelbrecht and other Americans who've spent thousands of dollars defending themselves against harassment by the Internal Revenue Service for daring to exercise their constitutional right to participate in the political process.

And I'd like to ask you whether you will agree to make sure that your department consults personally with every victim of this type of intimidation by the federal government.

And if you can tell us, what kind of accountability can the American people expect from this abuse of power?

HOLDER:

Well, ooh, what I would say is first off that I don't remember the exact words that I used, but I think shortly after the president made the statements that you made, I expressed similar concerns.

And I actually -- I was the one who actually ordered the investigation into these matters. They're being handled by the Criminal

Division in the Justice Department, the Civil Rights Division in the Justice Department, the Treasury, inspector general and the FBI, as you indicated.

This is a matter that is an open inquiry. The matter is still going on. Press reports -- I think that you're referring with regard to how the case is ultimately going to be decided is a press report. I can tell you that the reporters who have made those assertions are not people privy to what is actually going on in the investigation.

It is something, as I said, that is -- that is open. The investigation is proceeding.

CORNYN:

So is there still a potential for criminal charges to be brought in connection with the investigation, since it's -- has not been concluded?

HOLDER:

Well, I would -- I mean, obviously, all the options that we have are on the table, given the fact that there has not been a determination, either to bring charges or to decline the case.

CORNYN:

Well, don't you think it's the responsibility of the department to actually contact the people with the most information about what exactly happened, like this victim of this abuse of power, like Catherine Engelbrecht?

HOLDER:

I'm not familiar with the woman who you referred to, but I have confidence in the career people at the FBI and the other investigative agencies to conduct a thorough, comprehensive investigation. And that's what I would expect of them.

And that is why matters like this take as long as they do. I'm...

(CROSSTALK)

CORNYN:

Well, would you please -- in conclusion; I know my time's up -- would you please commit here to me and publicly -- so to contact Catherine Engelbrecht and to get her side of the story?

Or somebody on your staff do so?

HOLDER:

The determination as to who gets interviewed will be made by the career people who are conducting the investigation as you have said. And I'm not only cast any doubt on what you have said. She seems like a logical person to talk to on the basis of what you've said. I don't really have any independent knowledge of what her involvement is or what her -- what the organization is about. But that is something that I will leave to the people who are, as I said, career professionals, to make determinations as to who needs to be -- needs to be interviewed.

CORNYN:

Well, I hope the department would talk to the victim.

(UNKNOWN)

Good. Thank you, Senator Cornyn.

I'm -- Senator Klobuchar, you're recognized. And I'm also turning the gavel over to her and following another matter.

But I also want to express again to the attorney general my appreciation, not only for being here, but being available to so many of us on this committee, on both sides of the aisle whenever we've called you. I appreciate that. It has not always been the precedent of the department. So I appreciate the fact you've always been available.

KLOBUCHAR:

Thank you very much, Mr. Chairman.

Welcome, Attorney General Holder. Thank you for being here.

You and I have talked about this many times. And I want to make sure my Republican colleagues are aware of the fact that the state of Minnesota has not had a full-time U.S. attorney for 882 days.

This came about because our U.S. attorney was appointed to head up the ATF after the mess with Fast and Furious. He did an able job. He is now, through the vote of this Senate, the director of the ATF.

KLOBUCHAR:

But during that time, for two years, he was a part-time U.S. attorney and, in fact, he was at the ATF much more than he was the U.S. attorney. During that time, our drug prosecutions have gone down remarkably. I've had federal judges call me repeatedly. I've had the FBI director call me in Minnesota repeatedly. And we now have a very good candidate who is supported by law enforcement, who is supported by a Republican congressman, who made it through this committee with no objections. But he is now on hold because right now, the Senate has decided not to take up unanimous nominees and it is being blocked.

We have a situation where over 100 people are working now for 882 days without a full-time boss. And I just think it is absolutely outrageous.

When Minnesota became a state, we got our U.S. attorney through President Zachary Taylor in two days. And we have not had a full-time boss for 882 days. This is the office that prosecuted the second biggest white-collar case, next to Madoff in the last few years

This is the case -- this is the office that dealt with what would have been the additional terrorist for 9/11, Moussaoui. This is the case -- the office that has handled numerous complex cases and has been one of the best U.S. attorneys offices.

And I fear, knowing half the people that work there, that used to work for me when I was a prospector, there is the decline in morale, they need a boss, and I am angry at everyone about this, if you know, but it has to end, so I just ask my Republican colleagues, when Senator Grassley and I both have a U.S. attorney in Iowa and Minnesota. When Senator Grassley has repeatedly criticized this office in Minnesota because of these crime numbers and other things that I've mentioned, that we be allowed to get a U.S. attorney in Minnesota.

And so I would just like you to comment about that.

HOLDER:

No agree with you and I share that concern. And I -- I think that, the point that you made at the end is one that I think is extremely relevant, and hopefully the Senate will consider, that this is not simply a -- a United States attorney about -- for Minnesota.

We also have a United States attorney in Iowa who needs to be confirmed. We also have other people in the Justice

Department who are awaiting confirmation and who are on the floor. And who, traditionally -- these are people who are not very -- they are not controversial at all.

And they are simply waiting to go through the normal Senate process, which is usually by unanimous consent.

I would hope that we would get to the point where that process can be begun again so that we can have installed Senate confirmed people in these positions, because it really does matter having a Senate-confirmed position -- Senate-confirmed person either as the United States attorney and assistant attorney general. It matters.

So that is something that I would hope that we would be able to work our way through.

KLOBUCHAR:

I appreciate that. And I just would suggest to my colleagues so that no one ever allows this to go on so long to have a job share.

I will never do this again. And I understand the reason for it but because our Congress has not been able to do simple things like approve people for the ATF or approve people when you have a U.S. attorney -- U.S. attorney's office that clearly needs a U.S. attorney, we just can't take the responsibility to do that job.

And because of that, no one should ever allow their U.S. attorney to take another job at the same time, because we can't handle the responsibility of confirming a replacement or confirming that person for that job.

And so we deserve what we get, if that's what happens.

I'm gonna turn to something else which is sex-trafficking, something that Senator Cornyn and I have a very strong bill with a lot of support, bipartisan support to literally take Minnesota safe harbor model, which has been a very good force in our state, just getting started, but we had last month a 40-year sentence from the Ramsey County attorney's office against the head of one of these rings.

And if you could talk about the president's inter-agency taskforce, what's going on? The Super Bowl is approaching us this weekend, which is a concern which many have raised in terms of the uptick in the number of sex-trafficking ads in Dallas.

In 2011, there a 300 percent increase in people advertising things like Super Bowl specials. Just what the Justice Department is doing about this increasing problem, due in part to the number of ads and what we're seeing?

HOLDER:

Well, one thing, I -- I think you've said in -- is something that our country needs to take of, that where Super Bowls locate, you see a decided increase in human trafficking. You see young girls -- young women brought into these areas for illicit sexual purposes.

That is an ugly thing that this nation has got to confront, has got to deal with. But it really is just indicative of a larger problem, that is the scourge of human trafficking.

Trafficking is a top priority for the Justice Department, it is a top priority for me, as well. We need to stop -- we need to have effective mechanisms to investigate and hold accountable people who would engage in these activities.

We need to see the young women who are involved in this as victims, not as criminals and come up with rehabilitative services for them.

Or -- we have a proposal -- well, you -- the proposal, I think, that you have made with regard to getting trafficking experts together to look at this -- this problem and come up with ways in which we are more effective in dealing with -- with this issue.

It is one that I -- I fully support. We also have to deal, I think quite frankly, with the way in which this is advertised in the media. There are certain publications that make it known that young women -- ads that are published are available for these inappropriate sexual purposes and that is something that we need to deal with as well.

We, as a -- as a nation, are not dealing with this nearly as effectively as -- as we can. We have specialists in our U.S. attorney's offices who are trying to deal with the issue. But we need to help our state and local partners as well.

KLOBUCHAR:

Thank you.

One last thing. Synthetic drugs, something that Senator Schumer and Senator Grassley and Senator Feinstein and I have worked on this -- others in this room.

This is the -- you know, new drug on the scene. We've had several people die in our state. And I -- I did wanna thank you and the U.S. attorney's office for the prosecution in Duluth, Minnesota, a major pet-shop owner.

They've been going on, people literally laying on the streets from all these synthetic drugs and while the sentencing -- we're waiting the sentencing. It was a major prosecution, and the shop has been shut down. The guy in charge, they just found something like \$700,000 in bags and hidden in his bathroom.

And I just wanna thank you for that work.

HOLDER:

Yeah, I mean, that's an issue that, again, we need to confront. There is this myth, especially among young people, that somehow (inaudible) synthetic drugs are not dangerous.

We have to dispel that myth. Our DEA, Drug Enforcement Administration is really devoting a lot of time to dealing with these issues.

We've had a number of significant busts. But I think there -- also is an educational component to this that we really have to focus on young people about the dangers of these synthetic drugs that are marketed in such a way to make them think that there are no dangers in -- in using them.

KLOBUCHAR:

Very good, thank you very much. And I believe Senator Lee next.

LEE:

Thank you, Madam Chair and thank you General Holder for joining us today.

I appreciate the support you expressed earlier for the Smarter Sentencing Act. I've -- I appreciated the opportunity to work with Senator Durbin on that and welcome the support of my colleagues as we try to move forward in a way that makes our law enforcement efforts more effective and make sure that we don't continue to escalate our federal prison population at a rate of about 10-fold as we have over the last 30 years.

I wanted to talk to you first a little bit about metadata. Regardless of how you read *Smith v. Maryland*, and regardless of whether you think under *Smith v. Maryland* and its progeny, a constitutional case can be made for the collection of this data

as it relates to American citizens.

Wouldn't agree that at some point when you amass an enormous volume of metadata on American citizens, and you retain, within the federal government, the capacity to search that data, targeting, potentially, specific Americans.

That gives the U.S. government a -- a lot of power to peer into things that are, by their nature, very private?

HOLDER:

Yeah. And it's one of the reasons why, in the interim, before we come up with whatever our proposals are gonna be, the president has indicated that in querying that database, we should only do so through use of judicial authorization.

And so that ultimately may be something that we want to enshrine in -- in the program. But that is what the president has asked -- asked us to do in the interim, unless there is an emergency situation.

LEE:

Right. So you -- you would make that tantamount to a -- to a warrant, in other words? Because right now, what you have are internal operating procedures, internal regulations that can be changed. Whereas if we put that in law, that would provide greater protection.

HOLDER:

I -- I think we wanna try to work out what the mechanism might be so that we would afford the appropriate amount of protection, while at the same time, not having a negative impact on the operational abilities of people who need to, potentially, get access to that information on a pretty quick basis.

But I think, one -- one thing we should understand, is that although there might be billions of recurrence (ph) in that -- those metadata bases, I -- I think the number for last years, was in terms of the number of queries that were made of that data base was about 300 or so.

LEE:

I understand that, I understand that. And -- and I -- I think, for purposes of this discussion, even though if we were to assume that all -- all of the men and women serving us within the NSA, even if they are acting in good faith and -- and abiding by their own rules, at some point there was a very grave risk of abuse.

And I don't know whether that might happen a day from now, a year from now, 10 years or 20 years from now. But, you know, we -- we've seen this movie before, we know how it ends. And everyone know that it's not pleasant. This will ultimately be abused, unless we put in place some very significant restrictions.

I heard you mentioned a few minutes ago, in response to some of the questions asked by Senator Grassley, that it's the president's preference to work with Congress. And that wherever possible, he'd like to get Congress to agree with him to pass legislation that he would like.

But, of course, the other side of that coin is something that the president referred to repeatedly last night in his State of the Union Address, which is that if he can't get Congress to act, he'll go it alone.

If Congress won't act the way he wants Congress to act, then he'll issue an executive order anytime he gets the chance.

This brings to mind a concern that I've had as -- as to whether or not sufficient analysis is being undertaken when these executive orders are issued. As you know, you know, the Supreme Court, has, since *Youngstown Sheet & Tube v. Sawyer*

and Justice Jackson's concurrence and certainly since *Dames & Moore v. Regan*, when -- when that Jackson concurrence was adopted by the majority of the court.

It has tended to separate out executive orders into three categories. You know, in category one, you have a situation where Congress acts, pursuant to authorization by Congress.

And -- and that's where his authority to act with an executive order is at its strongest.

Category two, is where you have the president acting in the absence of either a congressional authorization or a congressional prohibition.

Justice Jackson described this as sort of a twilight zone, where it's -- it's a little unclear, it's a little murky.

LEE:

Category three is where you have the president taking measures that are incompatible with congressional command.

And so, I would ask, number one, is this analysis undertaken each time the president issues an executive order? And number two, was -- was that kind of analysis undertaken when the president, for example, announced on July 2nd of 2013 that he would not be enforcing the employer mandate of the Affordable Care Act throughout the duration of 2014, even though by law, the employer mandate was set to take effect as of January 1st, 2014?

HOLDER:

Before the president exercises the executive authority that he discussed last evening, and again, I want to preface that with I think the pretty clear indication from the president that he wants to work with Congress on behalf of the American people.

In the absence of that kind of activity, as he's done with regard to raising of the minimum wage, he uses executive authority, or will use executive authority to raise the minimum wage for those who do business with the federal government.

Those kinds of activities by the president are done after consultation with the Justice Department and an analysis is done to make sure that the president is acting in an appropriate and a constitutional way. And those three categories that he talked about, that we all studied in law school from Justice Jackson, are, you know, among the things -- obviously are part of the analysis, you know, where the president's authority is greatest, a twilight zone, and where the president's authority is weakest.

LEE:

So in which of those three categories would you put the president's decision to delay the enforcement of the employer mandate? Is that category one, two or three?

HOLDER:

I'll be honest with you. I have not seen -- I don't remember looking at or having -- I haven't seen the analysis in some time, so I'm not sure where along the spectrum that would come.

LEE:

How about the executive order that he proposed last night with regard to minimum wage? Would that be category one, category two or category three?

HOLDER:

Again, from -- without having delved into this to any great degree, that would...

LEE:

But you're the attorney general. I assume he consulted you.

HOLDER:

Well, there have been consultations done with the Justice Department. From my perspective, I think that would put us in category one, given the congressional involvement in the matter, the ability of the president to regulate things that involve the executive branch and how contracting is done. It seems to me that the president is probably at the height of his constitutional power in that regard, as to what...

(CROSSTALK)

LEE:

So you're saying there is a federal statute that authorizes him to issue the executive order regarding the minimum wage?

HOLDER:

No, I think that there's a constitutional basis for it. And given what the president's responsibility it in running the executive branch, I think that there is an inherent power there for him to act in the way that he has.

LEE:

And with regard to the employer mandate?

HOLDER:

Again, as I said, I've not had a chance to look at it, you know, for some time exactly what the analysis was there. So I'm not sure that I would be able to put it in what category. But again, I would think, given that we're talking about a statute passed by Congress that -- that delegates -- devolves to the executive branch certain authorities, I would think that you're probably in category one there as well. But again, I have not looked at the analysis in some time.

LEE:

OK. I appreciate your candor on that. And I see my time has expired. But as I conclude, I'd just like to point out that this is very, very important. And it's one of the reasons why, as one of my colleagues suggested earlier, it would be very helpful for you to release legal analysis produced by the Office of Legal Counsel or whoever is advising the president on these issues.

It's imperative within our constitutional system that we not allow too much authority to be accumulated in one person. And it's one of the reasons why we have a Constitution is to protect us against the excessive accumulation of power. And I think the president certainly owes it to the American people, and you owe it to the president as his attorney general, to make sure that when he does act by executive order, that he do so clearly, and clearly state the basis of his authority so that the American people can be aware of what's happening and on what basis he's claiming that authority.

I look forward to hearing your explanation. Perhaps you can submit something to us in writing after this hearing about his basis for making some of these decisions, particularly with regard to the delay of the employer mandate.

Thank you.

Thank you, Madam Chairman.

HOLDER:

Let me just say I have great respect for your legal analytical skills. You're clearly your father's son. But I also want to assure you and the American people that the president will not act in a way that is inconsistent with the way other presidents have

acted in using their executive authority.

He has made far less use of his executive power at this point in his -- his administration than some of his predecessors have. And he will only do so, as I indicated previously, where he is unable to work with Congress to do things together. That is the desire of the president, to work with Congress to deal with the issues that confront the American...

LEE:

General Holder, I respectfully but forcefully disagree with the assertion, if this is what you're saying, that because the number of executive orders issued by this president might be comparable to the number of executive orders issued by previous presidents, that that means that he hasn't made more use of it than other presidents have.

When you look at the quality, not just the quantity, but the quality -- the nature of the executive orders that he has issued, he has usurped an extraordinary amount of authority within the executive branch. This is -- is notprecedented. And I point to the delay -- the unilateral delay, lawless delay, in my opinion, of the employer mandate as an example of this.

And so at a minimum, I think he owes us an explanation as to what his legal analysis was, particularly given the fact that it's difficult to imagine who's got standing to challenge this. And it's difficult to imagine who -- who, if given -- if acquiring standing to challenge this, who would do so in a timely enough manner so as to avoid a mootness problem in the case.

So, it's all the more reason why it's important in this case. Thank you very much.

HOLDER:

We have to separate, then, I mean, with regard to the notion that there's a usurpation or that the president has acted in a lawless way. I think that is totally inconsistent with what the president has done and what his desires are to do.

KLOBUCHAR:

Very good.

Senator Blumenthal?

BLUMENTHAL:

Thank you, Madam Chairman.

I want to begin -- I hadn't planned to begin this way, but I want to begin by respectfully taking issue with my colleague, Senator Lee. And say that the use of executive orders in the past has been very sparing and cautious. And in fact, in my view, the numbers of executive orders, which have been far less than any recent president, reflect that very sparing and cautious use, in my view, too cautious and too sparing.

And I applaud the president's apparent determination to use his authority more aggressively and more vigorously in areas that matter so much to the well being of the American people, particularly when it comes to economic opportunity as well as to immigration and veterans issues.

The basic concept here is that the president is using his authority. Whether you adopt the construct of three categories or any other method of analysis, at the end of the day, the president is simply executing the law and using authority that has been granted to him by Congress for the well being of the American people, to protect their health and safety and to advance the national interest.

And in my view, and I've expressed this use through the subcommittee that I chair on regulation, in some instances the delay

in using that authority has been more on the side of caution than on the side of how aggressively it should be used.

So, I think your position that any use of executive power will be in accordance with the law and its legal authority clarifies the point that I think has been missed in a lot of the reaction to the president's speech, where some of his critics have said that he's going to be legislating or bypassing the Congress. In fact, he's using legislation that has granted him authority.

Let me just say on the issue of sex trafficking, I welcome your comments on that score. I've proposed a resolution -- bipartisan resolution with my colleague Rob Portman, who is not a member of this committee, basically saying that there should be more vigorous enforcement of these laws, particularly around the time of the Super Bowl, because the trafficking on websites like backpage.com tends to increase during this time. So I welcome your comments.

And let me just add briefly, to take Senator Leahy's comment. I want to thank you and the Department of Justice for really over these past years, viewing these legal issues on their merits, on their legal merits, putting politics aside. The Justice Department went through a dark period, in my view, under a previous administration when politics all too often became a part of the analysis. And I want to thank the career Justice Department employees who work so hard and long under you to make sure that the rule of law is preserved.

Let me turn to a part of the president's speech where I might have hoped he had said more on the issue of preventing gun violence. The mention by the president was very brief. But I hope, and I hope you will join me in the view that the president remains completely committed to ending gun violence in this country, adopting common sense sensible measures like background checks and mental health initiatives; a ban on straw purchases and illegal trafficking.

The bill that was before us unfortunately failed to pass, but I'd like your commitment on behalf of the administration that he remains resolutely and steadfastly in support of these initiatives.

HOLDER:

Yes, we do still have that commitment. The worst day that I had as attorney general of the United States was the day that I went to Newtown to thank the first responders, crime scene search officers who were there. And they took me on a tour of that -- of that school. And if people had the ability -- if the American people, legislators, members of Congress, had had the ability to be with me on that day, to walk through those classrooms and see the caked blood, to see the tufts of carpet that I didn't quite understand when I first saw it -- the carpet picked up.

HOLDER:

And then I realized that that was -- those were bullets -- where bullets had gone through and picked up the carpet. If people had seen the crime scene search pictures of those little angels, I suspect that the outcome of our -- that effort that we mounted last year would have been different.

Our resolve remains the same. My resolve is as firm as it was back then. And I think what we should also understand is that the vast majority of the American people still want those common sense gun safety measures that we advanced last year. Our commitment is real and we will revisit these issues.

BLUMENTHAL:

And on the subject of the use of the president's authority, my hope is -- and I would argue that he take whatever action is possible, as he has done in a number of steps already and as you have done in trying to clarify the mental health issues that have to be reported to the NICK (ph) system, my hope is that additional measures, executive actions are contemplated under that authority.

HOLDER:

The president -- it is his intention to again try to work with Congress, but in the absence of meaningful action to explore all the possibilities and use all the powers that he has to frankly just protect the American people.

BLUMENTHAL:

Thank you.

One last subject. I have a lot of subjects that I could explore with you, but I am hoping that the administration will also explore very vigorously what it can do to stop sexual assaults on campus. I applaud the president's initiatives, and you are part of the task force that he has appointed.

The report of the Council on Women and Girls very recently emphasizes how pressing and pervasive this problem is on our campuses. I am attending an initiative in Connecticut to try to raise awareness about it, and I'd like your commitment that you will work with me and others on this committee on this issue.

HOLDER:

Look forward to working with you on that very important issue. I mean, the statistics are very alarming. Twenty percent of all young women are either sexually assaulted or an attempt made at a sexual assault. Usually -- who are in college. Usually this happens in their freshman or the early part of their sophomore years.

We are going to try to use those kinds of statistics and the work of this task force that the president has put together to try to deal with that issue. And we look forward to working with you and other members of Congress in trying to come up with meaningful ways that we can deal with an issue that has too often been, if not ignored, not given the attention that it deserves.

BLUMENTHAL:

And just so no one thinks that this issue merely involves rhetoric, there is a legal basis for action in Title IX and other federal statutes for the federal government to be involved in protecting women against the ongoing assaults and other kinds of harm that they suffer on our campuses.

HOLDER:

Yeah. And the Justice Department is using all the tools that we can. We worked out an agreement with the University of Montana using our civil rights statutes where that problem was not being adequately addressed. And we worked out -- to the credit of the university, we put in place a consent decree.

And other universities as I now understand it are talking to University of Montana to see what measures they have put in place. And it is our hope that this kind of thing will expand and cover more college campuses.

BLUMENTHAL:

Thank you very much. Thank you for your testimony today and for your and the Department of Justice's service to our nation. Thank you.

HOLDER:

Thank you.

(UNKNOWN)

Thank you, Senator.

Senator Graham?

GRAHAM:

Thank you.

Good morning, Mr. Attorney General. People on both sides of the aisle are asking you to do some very worthy things. This is a great area for you to be involved in. Tell me how sequestration over the next decade affects your ability not only to do more but do what you're -- you're tasked to do today in terms of fighting crime and terrorism.

HOLDER:

Were sequestration to remain in place, we would not simply -- we'd simply not be able to do the kinds of things that the American people expect of us. We have 4,000 fewer people in the Justice Department now than we did in January 2011 as a result of sequestration or the expectation of sequestration that forced me to put into place a hiring freeze.

And we have fewer investigators, fewer prosecutors. Our ability to do the job is just very negatively impacted by -- or has been negatively impacted by sequestration.

GRAHAM:

It's one thing to become more efficient. Eventually it becomes lack of ability. And so I hope we'll all remember that.

Over the next decade, do you see threats to our homeland increasing, decreasing or staying about the same regarding terrorist activity?

HOLDER:

That's an interesting question. I would say that in terms of the threat from core Al Qaida, the threat I think is -- is likely to be less severe. I am more concerned about home-grown violent extremists who get radicalized in a variety of ways that you're very familiar with and what they might try to do where you have one-offs or two people as we...

GRAHAM:

So there are two threats, home-grown terrorism, which I agree is definitely on the rise. The likelihood of being attacked by someone here who has been radicalized as an American citizen I think is -- Boston is maybe the future. But you got to remember that Pakistan, Taliban are the ones that trained the guy in New York. So it's not just core Al Qaida.

HOLDER:

No, the affiliates -- no, you're right. The affiliates are...

GRAHAM:

They're out -- they're to get us. And I just want people to understand that privacy is important, but understanding the threat too is also important.

About the IRS, do you agree with me that the allegation is that the IRS agency targeted people who were political enemies of the president -- perceived to be political enemies of the president and made it harder for them to organize and express themselves? Isn't that the basic allegation?

HOLDER:

It's certainly what generated the -- my desire to have an investigation done.

GRAHAM:

This is not the first time that's happened in Washington. I mean, there's some...

HOLDER:

I'm old enough to remember the (inaudible).

GRAHAM:

Right. And things do happen, but I guess how we handle it is important. Senator Cruz has written you a letter that please pay good attention to because Senator Cornyn suggested that the victim, the person trying to organize in Houston -- is that where the lady's from (ph) -- hasn't been talked to. Is that possible?

HOLDER:

Well because the investigation's not completed (inaudible).

GRAHAM:

OK, but -- but how could you investigate a matter if you don't talk to the people who are claiming to be the victim of the offense? It'd be almost impossible to say that as a thorough investigation, wouldn't it?

HOLDER:

Well you're certainly going to have to talk to the victims. My only question -- my only point was the investigation's not over, so it's impossible...

GRAHAM:

No, I understand. But at this point in the investigation, could you -- how many victims of the Tea Party organizations that claim to have been abused by the IRS, how many people have been actually talked to, the victim themselves by anybody in the Justice Department?

HOLDER:

This is an ongoing matter, and I'm not necessarily sure I want to get into the specifics of what we have done or what we may do.

GRAHAM:

Well if the answer were none, that would be stunning, wouldn't it, at this late date?

HOLDER:

Well you say -- you say late date. The investigation's been going on for some time. I'm not sure how much longer it's going to go, so I'm not sure if we can say we're at a late date.

GRAHAM:

And I don't mean to belabor this, but do you know if any of the victims have been talked to by the Department of Justice about what they alleged happened to them?

HOLDER:

Well again, I don't want to get into -- I've been briefed on this matter on a couple of occasions. I don't want to share the (inaudible).

GRAHAM:

Well finally, the idea of a special prosecutor seems to make sense here. The gentleman that you've appointed, I'm sure he's a fine man. He made a donation to the president and that bothers some people. I understand why it would.

Don't you think we'd be better off just to have somebody clearly disconnected from the politics of President Obama? Certainly doesn't have to be a Republican, but just somebody that doesn't -- that can't be seen as maybe having a political allegiance to close this matter either through prosecution or dismissal? Do you think the country would be better served if we did that?

HOLDER:

I think the investigation's being done by career people who have constitutional rights to engage in political activity. The men and women of the Justice Department have from time immemorial put aside whatever their political leanings are and conducted investigations in a way that rely only on the facts and the law.

GRAHAM:

Right. You've got political appointees and you got career people. And I respect both, but we've got a country to run here, a democracy. And when a group of people apparently with great reason believe that their own government made it difficult for them to organize and express themselves politically, that sort of goes to the heart and soul of the democracy. And it would better for us all if somebody with an independent viewpoint looked at that.

HOLDER:

I don't think there's any basis to believe that anybody who was involved in this investigation would conduct themselves in a way that is inappropriate or would be shaded by their political activity.

GRAHAM:

The person you appointed, what do I tell someone in South Carolina the person investigating the abuse of power by the Obama administration against conservative groups was a donor to the president?

HOLDER:

I would say people have constitutional rights (inaudible).

GRAHAM:

I totally agree. I'm just saying from a perception problem, for lack of a better word, you know -- to me it just is a no-brainer. I mean, I'm glad that someone outside the Nixon administration eventually looked at Watergate. And I'm not saying this is Watergate. I'm saying on its face this is not a good moment.

So let's go to Benghazi. Can we expect any prosecutions any time soon against alleged perpetrators in Benghazi?

HOLDER:

We have been working very hard in connection with that investigation. We're doing -- the work we're doing is in a very challenging environment. We have identified people who we believe are responsible for...

GRAHAM:

Is one of them a Mr. Gatala (ph)?

HOLDER:

I don't want to comment on anybody specifically (inaudible).

GRAHAM:

Well let me just say that Mr. Gatala (ph) is commonly identified in the press as one of the planners of the attack, a man who participated in the attack in Libya. That's what the press reports are, and I have reason to believe they're right.

He has been interviewed by CNN, Times of London and Reuters. Why can't we grab him if the press can talk to him openly in

a hotel in Libya?

HOLDER:

I will say that we are determined to hold accountable the people who are responsible for that attack. And we will take and use all measures of the American government in order to effectuate that -- that desire.

GRAHAM:

A few more questions. Did -- the FBI interviewed the survivors of the attack in the State Department on the 15th, the 16th and the 17th of September. I've asked for those FBI interviews because I want to know what they said about a potential protest.

The deputy director, now retired, of the FBI said that none of the survivors told the FBI agents in German the 15th, 16th and 17th of September there was anything other than a terrorist attack. They never mentioned a protest. Would you allow us as members of Congress to have access to those interviews?

HOLDER:

I'm not aware of what happened in those interviews. I'm not aware of the -- you say these three days of interviews. I'm not conversant with what happened during the course of those interviews.

GRAHAM:

When did -- when did you first get notified about what happened in Benghazi? And did you believe it to be a terrorist attack?

HOLDER:

I -- that I have to think about. I'm not sure when I first heard about the attack. I'm sure it's some time shortly after.

So probably within...

(CROSSTALK)

GRAHAM:

Did the FBI ever brief you after these interviews? Do you remember being briefed by the FBI about what they've learned in Benghazi?

HOLDER:

After the attack? Or?

GRAHAM:

Yes.

(CROSSTALK)

HOLDER:

I've been briefed by the FBI on a number of occasions with regard to the -- both the attack and the investigation into the attack.

GRAHAM:

If the last interview was done on the 17th of September, can you look back in your notes and recall and tell us when's the first time you were informed by the FBI about what they had found about the attack?

Is that possible?

HOLDER:

I'm not sure I understand. When?

GRAHAM:

OK. My time is up, but the point I'm trying to make, when did the attorney general of the United States, were you made aware of the fact the FBI had interviewed the -- the survivors of the attack? When did they tell you about the interview, and about what they found?

HOLDER:

I'd have to look at my -- at the records on that. I mean, what we tried to do initially was to work with the Libyan government to get the FBI into Libya to look at the crime scene. We then -- that was our primary concern, our initial concern.

And then, from there, interviews were done of people who were in the facility at the time -- and who survived -- survived the attack.

GRAHAM:

If you could go back and look and let us know in writing when you were first made aware of the FBI's results, that's be -- I'd appreciate it.

Thank you.

KLOBUCHAR:

Thank you very much, Senator.

And Senator Franken -- and I do want to note that Senator Franken and I both jointly recommended Andy Luger as the attorney. We started out our process way before Todd Jones had even been confirmed, despite some pushback in doing that.

And so, it's now been 189 days since we recommended him.

Senator Franken?

FRANKEN:

Thank you, Madam Chairwoman.

Yeah, I would associate myself with the chairwoman's remarks. Andy's an outstanding nominee, and we passed him through the committee here. I hope he gets to the floor as fast as possible.

Mr. Attorney General, thank you for your service.

I want to talk to you about a matter that's a little pressing right now. It's very urgent right now.

Minnesota and a number of other states are experiencing a severe shortage in propane. And the cost of propane is skyrocketing.

And this is a real crisis. I wrote the president about it over the weekend, urging him to take immediate action. I just spoke an hour or so ago with Secretary of Energy Moniz.

One of the things that the administration can do is to work with the industry to make sure propane is getting to the regions of the country that really need it. I think there are about 25 states that are in crisis here.

But one of the potential challenges with getting companies in a room to address the crisis is maybe a concern over antitrust violations, however unintended.

And I know this issue may yet be on your radar, but will you commit to working with me to make sure that any of those issues can be addressed and avoided in the midst of this crisis?

HOLDER:

Yes, we'll -- we will certainly do that. We'll try to do all that we can to make sure that the relief that people need, with regards to the provision of propane, occurs. And we'll look at what we can do to be as flexible as we can.

FRANKEN:

Yeah. To allow these companies to meet.

I was pleased to see that you visited a veteran's treatment center in Roanoke last week. We have some very successful veteran's treatment courts in Minnesota and across the country. But not nearly enough to meet the demand.

Can you tell the committee what you learned from your visit to a veteran's treatment court and why you think it's worthwhile for the federal government to invest in -- in these programs?

HOLDER:

Well, first, I think that we as a nation owe a debt to the people who have served and have done so putting their -- obviously, putting their lives at risk. They oftentimes come back with issues that were generated as a result of their service, that puts them in conflict with the law; they become into -- they -- they break the law. And they should be held individually responsible.

But I also think we need to come with with ways with which we deal with those underlying issues that generated or caused that involvement with the law.

And what I saw in Roanoke, and it's something that I think we want to try to expand, well, it was a very difficult thing. I mean, you talk to these veterans, and they said, "It would be a lot easier simply to plead guilty, do 30 days in jail, a year in jail, and be done with it," as opposed to going through a six-month program where you have to report every week, where you're subject to random drug tests, where you have to prove that you have a good living situation, that you have employment.

It's very rigorous.

But, the recidivism rate is tiny, compared to what other people go through.

And so, we save money by not incarcerating people unnecessarily, and we enhance public safety by decreasing the number of recidivist crimes.

What I saw in Roanoke I think was -- it was very heartening to see, and it's something that we need to support and expand.

FRANKEN:

I really appreciate that response. This is a very important issue to me and to a lot of members of both the House and the Senate, on a totally bipartisan basis.

I have a bill, the Justice and Mental Health Collaboration Act, which would authorize federal funding for veteran treatment courts, along with a whole bunch of other things.

I mean, we do have too many people incarcerated for -- who haven't committed violent crimes, who are there because of

mental health issues or there for addiction, who would be better off not being in prison, and we're paying way too much money to keep incarcerated, and who have risks of recidivism because of being put in prison instead of being put in treatment.

This is about mental health courts, this is about veteran's courts.

And I'd like to submit records of support that I've received from the American Legion, the Wounded Warrior Project and Amvets. And I'd like to submit articles from the Star-Tribune (ph) and Minnesota Public Radio Web site that discuss this issues, Madam Chairman.

Do you object?

KLOBUCHAR:

I have no objection. They're in the record.

FRANKEN:

Thank you.

Attorney General Holder, on Monday, the department announced that it would let companies disclose the number of certain surveillance orders they get and the number of customers affected by those orders. I think this is a step forward for transparency, and I want to thank you for your work on this.

But I, respectfully, I don't think that that's enough, enough transparency.

The disclosures do not apply to the largest, the surveillance programs that's been declassified, the 215, the call records programs that affects hundreds of millions of Americans.

And, what's more, company disclosures are optional and voluntary. And unless the government tells the American people how many of them have had their information collected under all of these programs, the public will not know the full scope of surveillance.

I have a bipartisan bill with Senator Dean Heller of Nevada that would force the government to give the American people a good idea of how many of them have had their information collected under all these programs and how much of it has been queried, how much of their information has been looked at.

Senator Heller introduced this bill with me, and Chairman Leahy has cosponsored it, along with several other colleagues on this committee. But the government has opposed this measure, and it's refused to disclose this information on its own.

And this is surprising to me, because I think it's common sense that if the public knew this information, it would be able to make a better decision for itself as to the -- both the purpose, the efficacy of this program, and to what extent.

And I think it would -- and I think the president said last night, it would gain trust.

So, my question is, when will the government give the American people a good idea of how many of them have had their information collected and -- and viewed or queried or accessed under this program?

HOLDER:

Well, one of the things that we want to try to do, and I think you liked the action we took on Monday was a first step -- it was only a first step. There is, I think, a need for a greater transparency, for people to understand the nature of the programs that

are being run.

We always have to understand, though, that the value in these programs, a substantial part of the value of these programs, that they are done -- they are intelligence programs, and, therefore, they have to be kept secret.

So how we strike that balance is something that Director Clapper and I will be working on in conjunction with other people.

We would certainly invite your involvement in that process. So that we ultimately come up with a system that is effective and keeps the American people safe, but at the same time gives the American people a degree of assurance they're only doing that which is necessary to make those programs effective.

And, to the extent that we can share information, as we did on Monday, about what actually is being collected in terms of numbers -- to the extent that we can do that, I think that's something that we want to try to -- we want to try to encourage.

FRANKEN:

Thank you.

My -- my time has expired. I'd like to submit some questions for the record.

Thank you, Madam Chair.

KLOBUCHAR:

Thank you very much.

Senator Cruz?

CRUZ:

General Holder, thank you for being here.

I'd like to talk to you about abuse of power and the integrity of the Department of Justice.

Eight months ago the inspector general at the Department of Treasury concluded that the IRS had improperly targeted conservative citizen groups, tea party groups, pro-Israel groups, pro-life groups. The day that was made public, President Obama described what had occurred as, quote, "intolerable and inexcusable."

And he said, "Americans have a right to be angry about it, and I'm angry about it."

Likewise, that same day, you said the IRS' targeting of conservative citizens' groups was, quote, "outrageous and unacceptable."

That was eight months ago.

CRUZ:

In the eight months that have transpired, Lois Lerner, the head of the office that targeted conservatives improperly has gone before Congress and pleaded the Fifth, which, as you know, means she raised her hand and said, "If I testify, I may incriminate myself in criminal conduct."

For a senior government official to plead the Fifth is a major occurrence. In the 280 days since that inspector general report, nobody has been indicted, not a single person. In the 280 days since that inspector general report, it's been publicly reported that no indictments are planned. Today in this hearing, you were unwilling to answer a question whether even a single victim

of the targeting has been interviewed in the 280 days that have transpired.

And most astonishingly, it has now been publicly reported that the lead lawyer heading the investigation was number one, appointed from the Civil Rights Division, which has historically been the most politically charged division in the Department of Justice. And even more astonishingly, is a major Democratic donor, and donor to President Obama, indeed, between 2004 and 2012, she has personally given \$6,750 to President Obama and the Democratic Party.

I must tell you, I find it astonishing that the Department of Justice appointed a major Obama donor to head this investigation. So the first question I want to ask is, did you know that the lawyer in charge of this investigation was a major Obama donor?

HOLDER:

Well, first off, the characterization of this lawyer as the lead lawyer on the case, I think, is not correct. This is an investigation being done by the Civil Rights Division as well as by the Criminal Division of the Justice Department. And if I had to assign a lead in this, I would say that the Criminal Division of Public Integrity Section has actually got the lead. It's also involving the FBI as well as the inspector general from the -- from the Treasury Department.

CRUZ:

General Holder, with all respect, you did not answer the question I asked, which is, did you know that this lawyer was a major Obama donor?

HOLDER:

No. I don't know anything about the political activities of any of the people who are involved in this investigation.

CRUZ:

Now, previously, when you were asked about this, you -- you made a reference to the fact that she has a First Amendment right to be involved in politics. And -- and that's surely right. Now, no one's talking about restraining her First Amendment right to be in politics. But the Department of Justice ethics guideline says that if a lawyer, quote, "believes your impartiality might be questioned you must either disqualify yourself or see the ethics officer." And indeed, it goes on to say, "in a case where your impartiality might be questioned, you may obtain a formal opinion that the department's interest in your participation in this matter outweighs the concern that the integrity of the department's operation would be questioned."

Now I have to tell you, the fact that a major Obama donor is playing this leadership role has resulted in the integrity of the department being questioned. Is it your position that out of the 117,000 employees at the Department of Justice, the only lawyer available to head this investigation was a major Obama donor?

HOLDER:

Well, first we've got 112,000 people. But beyond that, the people who are in -- assigned to this case were done -- these assignments were done by career people within the department to make sure that the best people with the greatest amount of experience would handle this matter.

The -- your repeated reference to her as the lead lawyer, as I said, I think, is not necessary -- is not borne out by the role she's actually playing. I don't have any basis to believe that the people who are engaged in this investigation are doing so in a way other than investigations are normally done. That is by looking at the facts, applying the law to those facts, and reaching the appropriate conclusions. I don't have any basis to believe that anything other than that is occurring.

CRUZ:

Well, I will say a lot of American citizens have a basis to believe it, given that 280 days have passed. No one's been indicted.

280 days have passed and many, if not all of the victims have not even been interviewed. 280 days have passed and apparently the anger and outrage that both the president and you expressed has utterly disappeared.

Indeed, last night, in the State of the Union address, the president did not so much as mention the words IRS, so that anger and outrage sees very little manifestation in actual action. Now, I would also point out...

HOLDER:

I would actually hope that the president would not discuss an on-going investigation. I don't know if you've ever conducted an investigation, Senator, but the fact that it's taken, and I'll just take you at word, 280 days, is not unusual for complex investigations.

We want to make sure that what we do is comprehensive and that at the end of the day, we get it right.

CRUZ:

Well, many of the victims have not...

(CROSSTALK)

HOLDER:

... to do things on a short basis. I ask people simply to do them right.

CRUZ:

Many of the victims have not been interviewed.

(CROSSTALK)

CRUZ:

Has the investigation examined the meetings between the head of the IRS and White House political operatives to determine the degree of political influence that was exercised from the White House over this political targeting?

HOLDER:

As I said to, I think it was maybe Senator Graham, I am not going to discuss an on-going investigation and what steps have been taken in connection with that investigation.

And that is not something I'm only doing for this inquiry, this would be an answer you would get from me for any investigation that the Justice Department was involved in.

It is not appropriate for an attorney general or any Justice Department person to discuss an ongoing criminal investigation.

CRUZ:

Has any investigation been done about whether individual donors to Governor Romney have been audited and targeted by the IRS at a greater rate than donors to President Obama?

I will tell you, as I travel the country, I have heard from dozens of financial supporters for Governor Romney who told me that they had never been audited in their life, and within a week -- a month of it becoming public that they were raising money for Mitt Romney, they discovered they were being audited.

Now that's -- those are anecdotal stories, but it would be relatively simple to examine the prosecution rates of Obama donors versus Romney donors, and if there were a sharp differential, if it were the case that Romney donors were being audited at a

much higher frequency, that would raise substantial basis to investigate further. Has the investigation inquired as to that?

HOLDER:

Senator, you know, I'd -- I will say, I will give you the same response to the questions that you're asking that are in many ways very similar. I am not going to discuss what we have done in an on-going investigation. This is a matter that is presently being investigated. Interviews are being done, analysis is being conducted, and it would be inappropriate for me to talk about the matter in the way that you have asked.

CRUZ:

Well, my -- my time has expired, but -- but -- but let me say this in -- in conclusion, which is I sent you last week a letter laying out this record, laying out the abuse of power, laying out the obvious conflict of interest.

In my view, the integrity of the Department of Justice has been severely compromised. Predecessors of yours in both parties, Democrat and Republican, when faced with serious charges of abuse of power for partisan gain, have made the right decision and appointed special prosecutors. Elliot Richardson appointed Archibald Cox to investigate allegations of President Nixon's abuse of power. No one would've trust -- trusted John Mitchell to investigate Richard Nixon. Likewise, Janet Reno in - - appointed Robert Fisk to investigate allegations against President Clinton.

I would call upon you to carry out the tradition of independence that attorneys general have honored that office with for centuries and protect the integrity of the Department of Justice, given the political sensitivities, given the fact that individual citizens believe they are being persecuted by the federal government for partisan reasons, it would further justice and further the integrity of the Department of Justice for you to appoint a special prosecutor with a meaningful degree of independence to investigate and find out what happened. And I would suggest that any special prosecutor should have integrity beyond reproach and not be a major Obama donor.

HOLDER:

Well, let me just say this. The stat -- a lot of what Attorney General Reno did with regard to the appointment of independent counsels was pursuant to a statute that no longer exists. The regulations that now exist were put in place under my supervision when I was the deputy attorney general in the Clinton administration, and so I am familiar with both the regulation and when it ought to be applied.

I don't think that there is a basis for us to conclude, on the information as it presently exists, that there is any reason for the appointment of independent counsel. I have faith in the career people who are handling this matter to do so in a way that is free of any kind of partisan or ideological tint and to come to an assessment of the facts and the law, based only on the facts and on the law.

And the notion that somehow this has caused a loss of faith in this Justice Department, I think, is inconsistent with -- with facts.

KLOBUCHAR:

I elect (ph) Senator Coons.

COONS:

Thank you, Senator Klobuchar.

And thank you, Attorney General Holder, for your testimony today and for your service.

I wanted to first focus on an area of -- of shared concern and interest. The Department of Justice as -- as questioning has

highlighted today, has a broad range of responsibilities towards promoting justice and public safety for our country. One of particular interest to me is strengthening and sustaining the vital connections between federal, state, and local law enforcement, and in your opening statement you emphasized your gratitude for the appropriations this year, which makes possible a strengthening of that relationship.

In Delaware in particular, the Justice Reinvestment Initiative (ph) is one example of this partnership that's making a real difference. And sustained federal support's going to be critical to ensuring that newly enacted state reforms actually translate into a reduced recidivism, save lives, and save dollars.

Can you just comment at the outset for me why it's important for the federal government to invest in state and local enforcement, training, information sharing, funding assistance? Why does this make a difference?

HOLDER:

Well, I think there are at least a couple of bases. One, to try to increase the capacity of our state and local partners. The reality is that the vast majority of criminal law enforcement is conducted by people who are in our state and local law enforcement agencies. And so helping them just do their jobs makes a great deal of sense.

HOLDER:

But I also think that what we see is innovative practices being done by our state and local counterparts, that we want to try to support experiments almost, and see which things work and then try to push those out to other parts of -- of the country.

If we want to have a truly safe country, with safe communities, with really innovative law enforcement practices, the federal government, I think, has the unique capacity through our funding mechanisms, to funnel money to agencies that have particular crime problems that they're dealing with, or have innovative solutions to crime problems that many communities around the nation are facing.

COONS:

Well, thank you. I'm a strong believer in the capacity of the federal government to find specific programs and to combine research, training and funding assistance to sort of catalytically leverage those either unique practices or important and special programs. And I want to draw your attention to two of them that we've discussed before.

The Victims of Child Abuse Act has in the past funded child advocacy centers, that are a really important tool. And Senator Klobuchar discussed with you earlier the critical importance of strengthening our enforcement against sex trafficking. I think these child advocacy centers have played a central role in that.

HOLDER:

Right.

COONS:

And, second, the Bulletproof Vest Partnership Act, which has made possible the deployment of cutting-edge vests that protect local law enforcement officers, particularly in smaller or more rural departments, where they could not sustainably field them theirself.

Regrettably, both of those were zeroed out in the president's F.Y. '14 budget. And through action on the Appropriations Committee, funding was restored, and I think we are continuing to work in partnership to ensure that they are actually carried forward and deployed.

I know that you have spoken in support of these programs in the past. And budgets are difficult. And they are also an

important tool to convey our values and our priorities.

Would you just comment on how these specific programs can help state and local law enforcement, particularly in ways that are not possible if done alone at the state or local level?

HOLDER:

Well, I think child advocacy centers are things that I have been familiar with since my time as the United States Attorney here in Washington, D.C. They are a primary tool -- a good tool for people in law enforcement to successfully prosecute cases that involve children who are -- who are victims. But beyond that, it also helps the healing process for young victims who -- so they don't get revictimized by the process that they go through, and then once through with the process, can try to get on and to heal.

For too long, we did not understand the unique needs that children had. And child advocacy centers, I think, have really gone a long way to increase our sensitivity in that regard.

We don't have budget numbers yet for fiscal year '15. We have them in a macro sense, but we don't have the micro numbers with regard to the Justice Department. But I will be advocating on behalf of these child advocacy centers. I think they are proven to work. And, given who they assist, I think that, as we're trying to decide what our priorities are, the protection of our most vulnerable citizens -- our children -- has to be a place where put -- we put our money.

With regard to the vests, I think -- we've talked about this before -- a concern -- you've raised a very legitimate concern that we not make the provision of vests dependent on the size of the community. Officers who are on two- -- three-man police forces are just as at risk when they're making a stop on a highway in the middle of the night as is somebody who works on the New York Police Department.

And to the extent that we can, we want to get as many of these vests out there as we can.

COONS:

The recent report from the Presidential Commission on Election Administration confirms an issue I've raised previously, that there's a widespread lack of compliance with Section 5 of the National Voter Registration Act -- the so-called Motor Voter law.

In fact, the report very specifically says that DMVs, which are supposed to play an absolutely central role in registration, are the weakest link in the system. Many state DMVs disregard the law. Others have erected impediments to the seamless transfer of voter registration data from motor vehicle to voter registration.

Do you see this report as a call to action for enforcement of Section 5 of the NVRA by the Department? And what's your plan to make sure this important law is enforced?

HOLDER:

Well, I think we need -- we need to look at that report. I think that that -- that was a very thoughtful and potentially consequential piece of legislation. And for it not to be enforced, and for it not to be paid attention to would go against what I think is really important, which is to somehow -- and in an appropriate way, without any fraud -- expand the franchise, and make it easier for people to get to vote.

And so, to the extent that issues have been identified in that report, we'll look at them. And that'll help shape our enforcement efforts. Or, just to bring -- and when I say "enforcement efforts," that doesn't necessarily mean we're going to have to bring cases, but just to bring to the attention of departments in various states that are not doing, is that we bring to their attention sometimes just best practices. We can hopefully modify things that are inconsistent with -- with the act.

COONS:

Let me, if I might, ask a last question about FISA reform.

The president has publicly recently instructed you to develop options to reform the Section 215 of bulk collection program in ways that would better respect and defend civil liberties in this country.

Is it the Department's position that Section 215 can be used for suspicionless bulk collection of metadata beyond phone records, including location information, financial records, or other Internet records? And how do you -- how do you view the best way, moving forward, to ensure (sic) the public that the framework for making these decisions is right? Do you support more disclosures of the legal rationales for various aspects of the surveillance program?

HOLDER:

Yeah. I mean, I think that we have to ask some pretty frank questions about the bulk collection component of Section 215, and make a -- a decision as a nation about whether or not we are getting from that program sufficient amounts of good information. Sufficient amounts of usable information, to balance the, I think, very legitimate concerns that people have expressed about the wide -- potential wide-ranging nature of -- of the program.

I come into this -- I'll be honest with you -- with an open mind. I -- you know, there are certain programs -- Section 702, for instance -- that I think has to be guarded almost at all costs.

I -- with regard to 215, I think that the metadata part of 215 -- I think that we have to ask ourselves some difficult questions, and not simply do things, as the president said -- simply not do things because we can do them. The question is, should we do them?

As I said, I think 215 is legal, but that does not answer the question that the president has posed to us.

COONS:

Well, thank you, Mr. Attorney General. I -- I join a number of colleagues in urging and hoping that the investigation into IRS actions is done in a balanced and professional and appropriate way. And I assume it is, unless demonstrated otherwise. And what I've heard is that there were progressive groups, as well as tea party groups, that were perhaps allegedly on the receiving end of reviews of the 501(c)(3) applications. And it's my expectation that we'll hear more in an appropriate and timely way about the conduct of this investigation.

HOLDER:

Well, let me assure you and the American people that the investigation of the -- what we call the IRS investigation -- will be done in a non-partisan, non-ideological way, that we will make determinations only on the basis of the good investigative techniques that we always employ in the Justice Department.

And let me also express confidence in the men and women who are part of the team who are investigation the case now. I have -- as I said, I see no basis to question their impartiality. And we will try at the conclusion of the investigation to share as much information as we can about the conclusions that we have reached, either through prosecutions or declamations, however the case -- however the case ends up.

COONS:

Thank you.

KLOBUCHAR:

Very good.

Last, but not least, Senator Flake.

FLAKE:

Thank you.

I appreciate you being here. And I just want to say, I share the concerns that some of my colleagues have expressed about some of the -- for lack of a better term, extra constitutional actions taken with the president with regard to the ACA.

But you've been asked those questions. Some answers have been given, some not. I don't think I'll plow any new ground by going over that.

Also, I share the concerns about the investigation -- the timeliness of it. Hopefully, we can move forward quickly. And I'm concerned about the -- whether there are leaks, or whether there are statements by the FBI that shouldn't have been made about -- that there will be no criminal prosecution. I think that's concerning. When the FBI says something like that or leaks that out, I would hope that DOJ refutes that. And I don't think we saw that.

Let me -- let me just talk about an area that I don't think has been talked about. It's with regard to waste or inefficiency in the grant programs. DOJ administered about \$17 billion in grants just between 2009 and 2013.

Inspector General, Michael Horowitz, issued a report in December that -- that, I think, is some pretty tough medicine. He's saying that we need some -- some budget constraints. We need some things put in place to make sure that we're not squandering a lot of taxpayer resources.

DOJ -- it was reported by someone it squandered perhaps as much as \$100 million in taxpayer dollars over the past five years. The OIG audit questioned, for example, all of the more than \$23 million in grant funds awarded to be -- by the Department to Big Brothers Big Sisters of America. There just aren't the controls in place that there need to be to shed a light on where this money is going.

Mr. Horowitz highlighted the problem yesterday. He said that there is, quote, "virtually no visibility on how grant funds are actually being used by the recipient."

Quote, "Unless there is an OIG audit or investigation, or the granting agency dedicates resources to collecting and analyzing accounting information from a recipient, the government and taxpayers are virtually in the dark regarding how grant funds are actually used."

This is an ongoing problem. I just want to know what is being done to remedy this.

HOLDER:

Yeah. First, I think what we have to understand is that -- I don't think the inspector general indicated that he is concerned that these funds have necessarily been misused, as much as there are not mechanisms in place to assure that they are being used in an appropriate way. Which I understand -- that is a -- that's a serious -- it's a serious concern.

I think, as I -- as I remember the report -- that he had said that, I think -- over the past couple of years, I think that things have gotten better than they perhaps were at the beginning. I might be confusing reports, but I think that's -- that's what he said.

HOLDER:

But what we have to do -- I mean, the concern you raise is a legitimate one. And we have to have in place the mechanism so

that we know that the money that is given to grantees is being used in an appropriate way; first, so that we know that it's being done for the purpose that it was given, but also just to assess the effectiveness of the grants.

FLAKE:

Let me get beyond just platitudes on this.

DOJ said in 2012 that you would conduct an assessment of these programs to see where there's overlap and where money perhaps is being wasted.

The inspector general said that that assessment has not been completed or provided to him or to Congress.

Is that the case?

HOLDER:

Well, we'll have to, you know, get that assessment completed, share it with Congress and share it with -- with the inspector general...

FLAKE:

You mentioned with regard to the investigation of the IRS that it's perhaps routine to go 260 days -- or whatever the figure was used -- and I understand that. It probably is routine.

What I would suggest, if it's not routine, to go for a year, year and a half -- two years, before you come back with an assessment that you said that you'd do with regard to these programs.

Is that routine, to take a year and a half or so after you say you'll have an assessment?

HOLDER:

I wouldn't say it's routine, but I want to -- obviously, what we want to do is make sure that we have looked at these things and done a -- a good and -- and clean job.

If in fact that -- if it is 18 months, two years, I don't know what -- whatever the time frame is, that would seem to be on the excessive side.

FLAKE:

Speaking of which, it was brought up earlier in the hearing that the questions that were submitted after the last oversight hearing in March of last year that DOJ has not returned any -- any answers to those questions by this oversight committee.

Is that routine, to go nearly a year without answering specific questions that have been asked as part of the oversight hearing?

HOLDER:

I think what we generally try to do is make sure -- I think as Senator Grassley said -- to try to make sure that we answer all the questions before the next oversight hearing.

I don't know how many of the questions have not been responded to. I -- I just don't know. I'll have to look into that at the conclusion...

FLAKE:

I -- I think it was the case that none of the questions has been submitted (inaudible) -- nothing.

HOLDER:

So I see. OK, all right the answers -- I'm sorry (ph) -- the answers actually have been prepared. They are now under review by the Office of Management and Budget. And that's...

FLAKE:

So, nearly a year later, when we come to the next oversight hearing, we still haven't received answers to the questions from the last oversight hearing. I realize we haven't gone through regular order in this place for a while, but it's difficult to provide oversight when the answers don't come back.

HOLDER:

That's -- that's a fair criticism. And, we obviously are going to have to do a better job in the administration both at the department and at OMB to get answers to you in a more timely fashion...

FLAKE:

We'll have some follow up questions to this and I -- I'd like to have a commitment if I could that you'll get back in a more timely fashion.

HOLDER:

We'll do better.

I promise you.

FLAKE:

With regard to -- just one quick question on immigration.

Did you know, I was part of the group -- bipartisan group here that put together an immigration bill. I share the president's concern and his desire to get immigration reform done.

Let me just tell you, in all honesty, one of the most difficult questions I face at home from constituents and others about this new legislation we're putting forward, they say, why in the world do we want to create more laws when we simply aren't enforcing the ones that we have, or the department -- the administration takes it upon itself to interpret the laws that we have and use perhaps a little too much discretion in terms of implementing those laws. They -- they have very little confidence that the new legislation put forward when it becomes a law will be implemented as it was intended.

Do you understand that sentiment out there at least?

And, what can the administration do to help us?

We're trying to get this done. I'm on your side and those who -- who want to get immigration reform done, but I can tell you it's very difficult when we see things like release of individuals with multiple felonies into the community. I asked questions of Secretary Napolitano. Those answers never got back to us either.

I mean, that kind of stuff at home makes it very difficult to instill the confidence that we need that these laws will be faithfully executed.

HOLDER:

Well, I -- I think that if people truly understood how we enforce the laws, how completely we enforce them, how we use the discretion that we possess, they would have a greater degree of comfort in how the Justice Department -- DHS for that matter

-- conducts themselves, and not focus on necessarily on anecdotal things, but really on a more systemic -- have a more systemic view of how it is we do what we do, because I'm actually quite proud of the way in which we use the limited resources that we have to keep the American people safe.

FLAKE:

I -- I agree with that.

And, I would just tell you that, if people understood perhaps they would better understand if they -- if they had answers to these questions. What I'm telling you is, we're not getting answers to those questions. I'm unable to go back to my constituents and say, here's the reason that these people with multiple felonies were released into the community, because I'm not getting answers back from the Department of Homeland, or in some cases, from the DOJ.

So I -- I take your point, but just to tell you, it's very difficult when we don't hear back from the department a year later in conducting oversight hearings.

So I just would leave you with that, and appreciate you being here. And we'll have further written questions to follow up.

HOLDER:

And Senator, the concern you've raised is fair, that's a fair one. And, as I said, we will have to do better. And I'm not criticizing anybody in the Justice Department. I mean, we have to, as an executive branch, do better in response to the questions that you talked about.

FLAKE:

Thank you.

I yield back.

KLOBUCHAR:

Thank you very much, Senator Flake.

Thank you, Attorney General Holder. And I think the people who watch this hearing can see the range of work the Justice Department does, everything from -- I was jotting down some notes -- legal issues regarding surveillance, autism, propane fuel, sex trafficking, IRS investigations and drug policy.

So we thank you for answering such a broad range of questions at this oversight hearing today, and look forward to seeing you again soon.

The record will stay open for two weeks, thank you.

HOLDER:

Thank you.

CQ Transcriptions, Jan. 29, 2014

List of Panel Members and Witnesses PANEL MEMBERS:

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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.

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SEN. MIKE LEE, R-UTAH

SEN. TED CRUZ, R-TEXAS

SEN. JEFF FLAKE, R-ARIZ.

WITNESSES:

ATTORNEY GENERAL ERIC H. HOLDER JR.

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CQ CONGRESSIONAL TRANSCRIPTS
Congressional Hearings
June 11, 2013 - Final

Senate Judiciary Committee Holds Confirmation Hearing on the Nominations of Stuart Delery to be the Justice Department's Civil Rights Division Assistant Attorney General and B. Todd Jones to be the Bureau of Alcohol, Tobacco, Firearms, and Explosives Director

[LIST OF PANEL MEMBERS AND WITNESSES](#)

KLOBUCHAR:

Coming today we have a packed house. Today we're considering two nominees, Stuart Delery, to be the assistant attorney general for the civil division of the Justice Department, and B. Todd Jones to be the director of the Bureau of Alcohol, Tobacco, Firearms, and Explosives.

First I'll start with Mr. Delery. He is currently the acting assistant attorney general for the civil division, the largest litigating component within the Department of Justice. He graduated phi beta kappa from the University of Virginia and earned his J.D. from Yale Law School in 1993.

After graduating from Yale, he went on to clerk for Chief Judge Gerald Tjoflat of the 11th Circuit Court of Appeals and Justices Sandra Day O'Connor and Byron White on the United States Supreme Court.

Mr. Delery then went on to private practice at Wilmer Cutler & Pickering, now known as WilmerHale, where he was a litigator for 14 years. His practice ranged across complex corporate and securities litigation and administrative law matters.

In 2009, he left private practice for the Department of Justice, where he held a number of leadership roles, including chief of staff and counselor to the deputy attorney general, associate deputy attorney general, and senior counsel to the attorney general.

In these positions, he advised the Department's leadership on a range of matters, including civil litigation, appeals, national security litigation and policy.

As acting assistant attorney general for the civil division, he supervises approximately 1,000 attorneys representing the United States, the president and Cabinet officers and agencies. He supervises much of the federal government's civil litigation, which includes the defense of legal challenges to Congressional statutes, administration policies and federal agency actions.

At the Justice Department, he has devoted significant attention to the civil division's extensive docket of national security cases. He has also worked closely with the Office of the Solicitor General, to which he regularly makes recommendations concerning Supreme Court cases.

Mr. Delery also has a strong track record of pro bono service. For example, from 2007 to 2008, he supervised a team of lawyers that conducted an investigation on behalf of the District of Columbia's Office of Tax and Revenue into the theft of over \$48 million in District of Columbia funds by a long-time employee. The employee pled guilty to federal charges in 2008.

The Judiciary Committee has received letters in support of Mr. Delery's nomination from a bipartisan group of current and former government officials and a group of assistant attorneys-general for the civil division in the administrations of Presidents Reagan, George H.W. Bush, Clinton and George W. Bush.

KLOBUCHAR:

Now I'll turn to Todd Jones, whom I've known for a very long time. We worked closely together as members of the Minnesota Law Enforcement community when he was in his first stint as U.S. Attorney for Minnesota, when Bill Clinton was president, and I was the county attorney for Hennepin County.

For the past two years, Todd Jones has been doing the impossible: Filling two crucial federal law enforcement positions, as acting director of the ATF and U.S. attorney for the state of Minnesota.

I see his son, Anthony, back there, and I know it hasn't been easy. Todd also has his wife, Margaret (ph), and also is a father to, not just Anthony, but four other children, and a good one at that. We welcome Anthony here today representing the family.

Todd Jones has an impressive background that has him well prepared to lead the ATF. After law school at the University of Minnesota, he entered the U.S. Marine Corps where he served on active duty as a judge advocate and infantry officer from 1983 until 1989. Two years later, he was called back to active duty during the first Iraq War.

In addition to his military career and having the rare distinction as serving as U.S. attorney under two different presidents, Jones also has a strong record as a line prosecutor in the Minnesota U.S. Attorney's Office and an outstanding career in private practice.

Today, we are here to consider his nomination to be the permanent director of the ATF, a nomination that is supported by the National Association of Former U.S. Attorneys, including those who served under both Bush and Clinton administrations, several former assistant U.S. attorneys, the administrator of the Minnesota Bureau of Criminal Apprehension, the Minnesota County Attorney's Association, the International Association of Chiefs of Police, the Fraternal Order of Police and the ATF Association to name just a few.

Given the ATF's important role in investigating crimes and terrorist incidents like the Marathon Bombing, there should be a top priority of the United States Senate to have a permanent director of the ATF. It doesn't make sense for the director to be serving in a temporary capacity and yet there has never been a permanent director in place since 2006 when it became a senate confirmed position.

I think that's wrong.

Something is wrong when the Senate fails to confirm the head of an agency for seven years. Something is wrong when we have ATF agents, over 2,000 of them, on the front lines of major investigations like the Boston Marathon Bombing while victims lay dismembered in the hospital, the agents were on the front line figuring out who did it and what happened. And yet, the Senate still will not confirm a permanent leader of this agency.

It seems that some members of the Senate don't want to have the ATF the benefit of a confirmed director. So for all the concerns that have been raised about the ATF -- some of them very legitimate -- confirming a full time permanent director

should be a critical step to making sure the ATF is doing its job and doing it well.

Todd Jones has never turned down a tough assignment. He has faced challenging situations throughout his career and taking over the ATF in the summer of 2011 was yet another example of that. As everyone knows, the agency was under a tremendous amount of scrutiny and understandable criticism for the failed fast and furious operation, and Jones was brought in to get the agency back on its feet.

Since then, he has worked to revamp the agency's practices and policies. He has begun making essential reforms that are critical to the more than 2,300 agents who perform under pressure day in and day out both on major investigations, like Boston and West Texas, but also on lesser known investigations like serial arsons in California, cigarette smuggling rings that fund terrorists and drug and gun trafficking undercover operations in Miami.

Before taking over the ATF, Jones served as both the head of the U.S. attorney's office in Minnesota, under two presidents, and before that, as Assistant U.S. Attorney. As an assistant, he was the lead prosecutor in a number of cases involving criminal drug conspiracies, money laundering, financial fraud and violent crime in the 1990s.

In the private sector, he became a partner at two very well respected Minnesota law firms, Robin's Caplan (ph) and Green Espol (ph). To highlight some of his accomplishments, during his tenure as U.S. Attorney in Minnesota, that office, with Todd Jones at the helm, prosecuted Operation Rhino, which involved the criminal prosecution of Omer Abdi Mohamed who recruited young Somali Americans to fight for terrorist groups in Somalia.

Mohamed was indicted in November 2009, and plead guilty in July 2011 to conspiracy to murder, kidnap and maim abroad. To date, the investigation has resulted in charges filed against 22 other individuals.

Operation Highlight which was a major drug trafficking investigation involving more than 100 local state and federal law enforcement officers, and resulted in 26 indictments, 25 guilty pleas and sentences of up to 200 months in prison.

Operation Brother's Keeper was a successful investigation and prosecution of a RICO involving a regional, 200 member, gang which took 22 dangerous criminals off the streets.

Operation Malverdi (ph) received national attention, and was a prosecution of 27 defendants associated with a Mexican drug cartel, including the apprehension of the cartel's regional leader and sentences as high as 20 years in prison.

Jones' office was also active in other areas like complex white collar crime, including the successful prosecution of a \$3.65 billion Ponzi scheme. That's \$3.65 billion, the second biggest Ponzi scheme in United States history after Bernie Maddoff.

Those are just a few of the examples of the cases that Todd Jones oversaw as U.S. Attorney in Minnesota.

He is well qualified and has a range of experiences and accomplishments that leave him more than ready to lead the ATF on a full time basis. Not on a temporary basis. Not on an interim basis. He is a talented, dedicated and hard working public servant who has served his country in both the military and in civilian agencies.

I look forward to hearing from both of our nominees today and having a discussion about their past experiences and their outlooks on the positions to which they have been nominated.

Thank you both of you.

And I'll turn it over to Senator Grassley, the ranking member.

GRASSLEY:

Thank you very much.

As the Chairwoman knows, and as I told her yesterday, I objected to holding this hearing today and requested the hearing be postponed.

As we sit here today there remains an open investigation by the office of special council regarding Mr. Jones' conduct as U.S. attorney. Generally when a nominee is subject to an open investigation the committee does not move forward until the issues are resolved. And of course this is a sensible thing to do.

When there's a pending investigation, the committee obviously doesn't have the full information about the nominee. In this case, there are allegations of gross mismanagement and abuse of authority in Mr. Jones' office, and there is a complaint that Mr. Jones retaliated against a Whistleblower. These are serious charges, and ones that are of particular concern to me as a known defender of whistleblowers.

The public interest demands resolution of these issues. Members of the committee are entitled to know that if these charges have any merit. One way for that to happen is for the committee to undertake its own investigation. That has not happened. Another is, to follow the usual committee practice, and wait for any third party investigating agency to complete its process and reach conclusion. That has not taken place either.

So, we're left today to take Mr. Jones' word. We have no way of independently verifying what he says or ascertain the truth of the matter.

In addition to the open complaint, there are numerous unresolved issues regarding Mr. Jones and his record while serving as U.S. Attorney and acting ATF director, that is why I requested a postponal (sic) of the hearing while the chairman did postpone the hearing one week, that did not cure the procedural defects with a nomination.

So it is unfortunate that we go ahead with this hearing before an open complaint is resolved.

In April, when the chairman started talking about a hearing for Mr. Jones, I was concerned about moving forward. There were a number of outstanding requests that I'd made to Mr. Jones. And I'd previously received a copy of an anonymous letter to the office of special consul, making vicious allegations against Mr. Jones. I sent a letter to OSC on April the 8th asking for an update on those allegations.

On April the 12th OSC responded that there were two pending matters involving the U.S. attorney's office, district of Minnesota where Mr. Jones is a U.s. attorney. The first matter was a prohibited personnel practice complaint, and the second was a whistleblower disclosure alleging gross mismanagement and abuses of authority.

On May the 28th, the Chairman sent out a notice for a hearing for Mr. Jones to be held the following week. The next day, on May 29th, I sent a letter raising my concerns about proceeding with a nominee who had open complaints and asked that the hearing be postponed consistent with previous committee practice.

On June the third, the chairman postponed the hearing one week, however, in doing so, the chairman expressed disappointment that the April OSC letter had been publicly disclosed. A continuing justification for holding this hearing today is that -- based on this disclosure -- the nominee should have an opportunity to respond.

But, of course, there is nothing confidential OSC letter. In fact, I'm not about to hide this issue from the public. It is relevant to our inquiry as to the qualifications of the nominee. And, if others want to hide this information, that of course would be their

decision.

Additionally, there were numerous allegations that Republicans were holding up the nominee for no good reason. The OSC letter clearly identify why Mr. Jones' hearing was not going forward at this time. That justification remains valid today. Again, this would be consistent with prior committee practice.

Furthermore, everyone knows that Mr. Jones appearance today is no substitute for a full investigation. We know the investigation is open, so even if we ask questions today, we can't rely on the information we receive.

GRASSLEY:

Then nomination hearing is nothing like the investigative process conducted by the Office of Special Consul. In a full OSC inquiry, there would be interviews with complaining witnesses, a review of documents and interviews with (inaudible) attorneys and law enforcement officials in Minnesota.

We have access to none of these at this point. We only have one witness, a nominee, who is able to offer up his side of the story. So where are the whistleblowers? Where are other assistant U.S. attorneys and staff members? Who's offering the other side of the story?

We did receive a token offer from the Majority for one witness. That offer came Sunday night, a little more than 36 hours ago. And then late yesterday we received from the Majority an offer to conduct some interviews this coming Friday, after today's hearing. Now that's quite perplexing to me.

We're going to begin the investigation after the hearing is concluded. When has a committee ever conducted an investigation after the hearing for that nominee?

On June the 4th, I suggested to the chairman that a mere one week postponement of the hearing would not allow sufficient time for open matters to be resolved. We had no reason to believe that the OSC investigation would be closed. It seems to me that if the majority did not want to wait until the OSC completed its investigation, the Committee would be obligated to fully investigate the matter for itself.

I therefore suggested that we begin the process by at least calling additional witnesses to testify at today's hearing.

On June the 5th, OSC provided the Committee with an update on two pending cases. It reported that while the whistleblower disclosure case had been closed, the prohibited personnel practice complaint was moving to mediation for the time being.

On June the 6th, the chairman reported to me that he had been notified by OSC that it had reached a resolution on the retaliation allegations against Mr. Jones and that that investigation was now closed.

This directly counterdicted (ph) the information I had received. I, again, suggested that additional witnesses might be necessary. On Sunday night, 36 hours ago, my staff was notified by the Majority staff that the chairman agreed to one Minority witness. Of course, by that time, there was no reasonable way that a witness could be contacted or arrange for travel on Monday for appearance on Tuesday morning.

Yesterday I contacted the special counsel, inquiring to her availability to testify to at least explain more fully the status of the complaints. Ms. Lerner replied, quote, "I'm unavailable to testify tomorrow about this matter. Moreover, it would not be appropriate for me to provide any additional information about the pending case," end of quote.

Ms. Lerner confirmed for the second time that the investigation remained open. She states, quote, "the reassignment of the

case for mediation did not result in the matter being closed," end of quote.

Based on all of this, I cannot help but conclude that the Majority's intent on jamming this nomination through the Committee no matter what. So here we are left with an open investigation of serious allegations of whistleblower retaliation and these are not unsubstantiated charges. In fact, of all the complaints received by OCS (sic), only about 10 percent are chosen for further investigation. This case was one of them.

Why did the career, non-partisan staff of OSC forward the case for investigation? Presumably because they thought it needed to be looked into. That says something about the likely merits of the case. There are also indications of a larger pattern here, one known to OSC.

First, Acting Director Jones, in a video sent to all ATF agents, stated, quote, "If you don't respect the chain of command, if you don't find the appropriate way to raise your concerns to your leadership, there will be consequences," end of quote. Now that throws a lot of cold water on anybody who might want to whistle blow under the law.

This video was seen by several employees in the U.S. Attorney's office of Minnesota, also headed by Mr. Jones in his other capacity. These employees anonymously wrote to the Office of Special Counsel asking for, quote, "a review of the patterns, practices, treatment and abuse that they have suffered," end of quote.

They reference the AT (sic) video, stating that they had, quote, "felt for the employees of ATF as we too have had the same types of statements made to us," end of quote. They then said Mr. Jones, quote, "had instituted a climate of fear, had pushed employees out of the office, dismissed employees wrongly, violated the hiring practices of EEOC, and put in place an Orwellian style of management that continues to polarize the office," end of quote.

Next, a former special agent in charge of FEI's Minnesota division, Mr. Donald Oswald (ph), wrote to this Committee voicing concerns about Mr. Jones. In that letter, he wrote, quote, "as a retired FBI senior executive, I'm one of the few voices able to publicly express our complete discontent with Mr. Jones's ineffective leadership and poor service provided to the federal law enforcement community without fear of retaliation or retribution from him," end of quote.

Of course, those are chilling words. He cautioned, quote, "Mr. Jones was and still remains a significant impediment for federal law enforcement to effectively protect the citizens of Minnesota," end of quote.

The concerns and allegations in Mr. Oswald's (ph) letter were corroborated by another assistant U.S. attorney in Mr. Jones's office, Mr. Jeffery Paulsen. Yesterday, Mr. Paulsen gave his consent that his whistleblower disclosure complaint be released to the Committee. It contains a detailed account of the mismanagement, abuse of authority and other problems within the office. It also details Mr. Jones's negative attitude towards whistleblowers and retaliatory action he took against Mr. Paulsen.

We received this document late yesterday afternoon. We're still reviewing the document. OSC requested of the chairman that the file be designated, quote-unquote, "committee confidential."

Last evening, my staff informed the chairman's staff that I would be asking questions based on this document. We asked the chairman's staff to let us know if he intended to designate the document committee confidential. To my knowledge, the chairman has not done so. I certainly do not think that it would be appropriate to hide this information. I see no reason, given Mr. Paulsen's waiver, why this should not be available as part of the full record.

In fact, I was told repeatedly that today's hearing, this very day, would be my one opportunity to ask Mr. Jones any questions that I wished, and I certainly intend to ask Mr. Jones questions about the allegations described in the complaint.

I have additional procedural problems with this nomination today. A minor, but one which illustrates another basic breakdown of routine protocol in the normal committee process was the delivery of certain routine nomination materials. When I received a routine file required of all nominees, I noted missing pages, two separate documents.

I requested these from the White House on May the 28th. One of the requested documents was delivered to my office last night at 9:58 pm. There was no explanation for the delay. I have yet to receive the other requested document.

Now it is no secret that there had been a number of controversial events that Mr. Jones has been involved in, in one degree or another. I've sent numerous letters to the Department requesting information, from or about Mr. Jones. In many cases I have received no response or an incomplete response, and here's a sampling.

On Fast and Furious, subpoenaed documents on October the 12th, 2011. A House Oversight Government Relations Committee requested records of the Attorney General's advisory (ph) committee related to Operation Fast and Furious during a period that Mr. Jones was committee chair. I reiterated that request on April the 10th, this year.

Secondly, ATF accountability for Fast and Furious. On October the 19th, 2012, January 15th, 2013, I requested information on which ATF employees would be disciplined for their roles in Fast and Furious.

Three, Fast and Furious interview request. On October the 7th, 2011, through January 2012, I requested staff interviews with Mr. Jones regarding Fast and Furious. I reiterated the request to Mr. Jones April the 10th, 2013.

Interview request on Reno, Utah, ATF U.S. Attorney's Office breakdown. My April 10th, 2013 letter also indicated that Mr. Jones's failure to act on Reno management issues was another area of question to be covered in the staff interview.

Five, interview request on Operation Fearless. On April the 10th, 2013 letter indicating that the botched Operation Fearless in Milwaukee was another area of questions to be covered in the staff interview.

Sixth document request of Operation Fearless. On May the 10th, 2013, I sent Mr. Jones a letter requesting a copy of the Office of Professional Responsibility and Security Operations report on the botched Milwaukee storefront operation.

Now, what has been the reply to all these requests? On June the 4th, 2013, nearly two months after my request for many of these items, I received a letter from the Department of Justice, stating, in part, "Mr. Jones looks forward to answering your questions about these matters during this nomination hearing before the Senate Judiciary Committee," end of quote.

I regret that the chairman has allowed the Department of Justice to dictate to us how our oversight investigation will be conducted. Furthermore, it is disappointing that the Department would -- was allowed to hijack this nomination hearing to suit their purpose, not ours.

But since we have held zero hearings dedicated to Fast and Furious in this committee, perhaps I should be happy that we now have an opportunity to ask questions at all. The same goes for other matters that I've mentioned.

On the St. Paul quid pro quo matter, I was able to have a staff interview with Mr. Jones. Just to remind my colleagues about this issue, I'll give a brief summary. February the 3rd, 2012, the Department of Justice and the city of St. Paul struck a deal.

GRASSLEY:

The terms of the quid pro quo were as follows. The Department declined to interview -- intervene in two False claims Act cases that were pending against St. Paul, and St. Paul withdrew its petition before the U.S. Supreme Court in *Magner*, a case that observers believe would validate the use of disparate impact theory under the Fair Housing Act.

But this was no ordinary settlement. Instead of furthering the ends of justice, this settlement prevented the courts from reviewing potentially meritorious claims and recovering hundreds of millions of dollars to the U.S. Treasury. The U.S. attorney in Minnesota at the time of the quid pro quo, Mr. Jones, was serving both as U.S. attorney and acting director of the Bureau of Alcohol, Tobacco and Firearms. Mr. Jones was interviewed by committee staff as part of the investigation March 8th, 2013. However, before agreeing to be interviewed, the department demanded that staff not be permitted to ask Mr. Jones any questions other than those involving the quid pro quo.

Questions remain about whether he was effectively manning both jobs as U.S. attorney and acting director. Further example, when asked by committee staff about his failure to attend the seminal meeting between the department's Civil Division and representatives from the city of St. Paul, which occurred December 2011, he stated that he did not attend because he had an event at ATF that precluded his attendance. When pressed further, Mr. Jones indicated the important event at ATF was a holiday party called "Sweet Treats" and he felt it was more important that he attend the event than it was to attend the seminal meeting on two pending False Claims Act cases in his district.

So there are many issues to cover in this hearing today and beyond. For his part, in a June 10th, 2013 article in the Minneapolis Star Tribune, Mr. Jones said, quote, "I'm looking forward to meeting with the committee and answering all their questions." Now, I hope that that's the case today, that I will finally get some answers. But even so, many questions remain for the nominee.

The first question is, given the open complaint and all the other concerns that I have addressed, why are we even here today? I don't think anyone can provide a good answer to that question. Proceeding today is premature. Frankly, it's unfair to the nominee; unfair to the nominee to force these questions today before the OSC process takes its course. But if the chair wants to insist on proceeding, it would be unfair to the public if we fail to perform our due diligence and examine all of these issues very carefully.

Thank you.

KLOBUCHAR:

Thank you, Senator Grassley. And you will have that opportunity now after we hear the opening statements, to ask the nominees questions. I'll point out that the nominee wanted to go forward with this hearing. I think he believes that the ATF deserves better. When their people are on the front lines investigating these crimes, they deserve better than not having a permanent director for seven years because the Senate won't confirm anyone. I just think that's wrong.

In response to some of the points you have made, I would prefer to have Director Jones answer these questions. But first of all to make clear, he came in after "Fast and Furious" -- after "Fast and Furious," and was asked to come in to clean it up. And I'm sure we can hear from him about some of the things that he did.

Secondly, on the issue of the St. Paul case, which has I know been well discussed during the nomination of Mr. Perez, Mr. Jones agreed to be questioned for an entire day by your staff, by -- and Goodlatte's staff in the House.

Third, I would note that as far as the complaint that you've brought up within the office, I would first note that Mr. Jones supervises 2,300 people with the ATF, 125 people with the U.S. attorney's office. As Mr. Delery will tell anyone here, it's not always easy to supervise lawyers and cops, but he has done his best job.

I think it's very important that that complaint be heard out and that's what's happening now. But to clarify the timeline here, Todd Jones was nominated in January. By March, the committee-required materials on his nomination had been received and made available to Senator Grassley and his staff. A planned April hearing over Mr. Jones' nomination was delayed after

the committee was notified of the complaints filed with the U.S. Office of Special Counsel.

Chairman Leahy intended to wait until after OSC had finished its work -- work that is meant to be confidential -- before holding this hearing. In later April after these allegations were unnecessarily made public, the chairman decided to proceed so that Todd Jones could publicly defend his reputation. Today's hearing was originally noticed for a week ago, but at the ranking member's request, it was postponed until today.

Last week, OSC notified the committee that the underlying complaint made against Mr. Jones of management failures was closed due to insufficient evidence, and that that the second allegations made of retaliation for raising the underlying management issues with Todd Jones -- as for that, as Senator Grassley points out, the parties agreed to mediation. That is the procedural status. Part of it was dismissed. The other part the parties have willingly both agreed to mediation, as often happens in employee matters across the government.

Satisfied that the issues before the OSC were being resolved, Chairman Leahy determined that today's hearing should move forward and he asked me to chair it. This past Friday, Senator Grassley notified the chairman that he intended to invoke a not-very-much-used Senate rule. In fact, as far as I know, we haven't seen witnesses to be called in hearings involving nominees that are not at the cabinet level. He decided to invoke a Senate rule to have outside witnesses testify at today's hearing.

Instead of saying "no" to that request, the chairman agreed to that request. I personally called Senator Grassley on Sunday morning to let him know that we had agreed to that request. And we found our own witness. Then Senator Grassley said he didn't have time to get the witness. Chairman Leahy sought to accommodate the ranking member by offering to invite outside witnesses, to be clear, to come before the committee today, and the witness wasn't ready. So that is what the procedural status is of that particular allegation.

The other thing I did want to note. I think we all know that crime rates are affected by many things -- by work of police, by work of prosecutors, by many things. But I will note as we look at the bigger picture here of -- of Mr. Jones, as U.S. attorney in Minnesota from 1998 to 2001, that would be his first term as county attorney -- as U.S. attorney under President Clinton, the violent crime rate decreased by 15 percent. And so far during his second tenure, which began in 2009, the FBI statistics show that the violent crime rate has already decreased by 9 percent.

I don't hold him responsible for those numbers. I just want to note that because of the work that goes on between the local, state and federal law enforcement in Minnesota, they've had some major successes.

I would also note that Tom Heffelfinger, who was appointed U.S. attorney by both Presidents George H.W. Bush and his son, George W. Bush, also serving two terms under Republican presidents, specifically rebutted the allegations in the former FBI facts (ph) letter and he said this: "One year in Minnesota is hardly long enough to learn how to shovel snow, much less long enough to learn what Mr. Jones' reputation is among local, state and federal law enforcement officials."

Ralph Boelter, the special agent in charge of the FBI Minneapolis office from 2007 to 2011, told the Associated Press that he had a good relationship with Jones. "We were in sync," he said. Boelter said he didn't experience anything like the behavior Oswald (ph) described. He said when he had an issue, Jones was attentive to it. He was sensitive to it. And he responded to it.

I think anyone involved in law enforcement knows there are going to be disagreements. There are going to be issues. People have different interpretations of decisions. There are outside forces at work. In this case, Todd Jones was supervising two major offices at the same time for nearly two years, and it is my belief that the ATF deserves a permanent head and I hope

we can now go forward with this hearing and with the testimony.

So with that, I'm going to swear in the witnesses here -- or the nominees.

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?

JONES:

I do.

DELERY:

I do.

KLOBUCHAR:

Thank you.

We will start with Mr. Jones.

JONES:

Good morning, Madam Chairwoman, Ranking Member Grassley, members of the committee.

Thank you for those generous introductions and the recitation of my entire professional career, and for the chance to be here today to answer questions. I am honored to be considered as the president's nominee as the director of the Bureau of Alcohol, Tobacco, Firearms and Explosives.

Permit me a moment to thank my family for their incredible love and support. As you mentioned, Senator, my oldest son Anthony is here representing the family, but my wife Margaret is the tie that binds our family together. She shouldered much of the burdens and joys that come with raising five kids. She is in St. Paul with my youngest son, Lucas, who just graduated -- finished his junior year of high school. My two daughters are there with her in St. Paul. My youngest daughter, Monica, recently graduated from the University of Minnesota and is moving to Seattle in the next week to start her career and her life. And my oldest daughter, Stephanie (ph), is on home leave from teaching in Nicaragua.

So, the core group is there in Minnesota. My son, Michael, my other son Michael is a graduate student in architecture in Seattle and hopefully he'll keep an eye on Monica when she gets out there. But as you mentioned, Senator, my oldest son, Anthony, is here. He works -- lives here in D.C. He works at the House of Representatives. We didn't get to see much of each other the first couple of years of his life because I was deployed pretty regularly in the Marine Corps. But if you choose to approve this nomination, Anthony is probably going to find himself with a new roommate.

Over the years, my family sacrificed a great deal to allow me to pursue a career in public service. And that career began in 1977 when I was fortunate enough to do constituency work for Senator Hubert Humphrey, who epitomized public service in the best Minnesota tradition and he inspired me to follow that path. And as was mentioned, after graduating from law school at the University of Minnesota, I joined the United States Marine Corps and that was a decision that changed my life and made me the person that you see sitting before you today.

JONES:

My formal leadership training began in the Marine Corps. And while I joined to be a trial lawyer, much to Margaret's chagrin, I was so energized by the experience, the challenges, the spirit and camaraderie of basic training that I stayed an infantry officer for the first several years of my active duty time. And during that time I learned the importance of concepts like unit

cohesion, readiness and training, and staying focused on the mission. The Marines taught me about leadership and leading people toward a common goal. And in the end, I learned it was not ever about me, it was about the team. It was about the unit. It was about the collective work together to attain that goal.

I've continued to employ those principles during the two times I've been U.S. attorney in the District of Minnesota. A job that it's been an honor and a privilege to serve in. And as the Senator mentioned, my team in Minnesota has tackled a variety of complex cases, from the largest Ponzi scheme, to national security work we do, investigating terrorist organization Al-Shabaab. And I've continued to rely on those experiences in my current capacity as acting director as ATF. And when I came to ATF in September of 2011, I found an agency in distress. Poor morale undermined the efforts of the overwhelming majority of ATF.

These hardworking, devoted public servants are committed, absolutely committed to the -- to the mission of professional law enforcement. I listened to them the first several months I was there. I learned a lot from them. I took firm, immediate steps to address their concerns and the strategic needs of the bureau. I built a new leadership team. I put 22 new special agents in charge. 23 headquarters executives conducted a top to bottom review of all of ATF policies and procedure, and we have overhauled nearly 50 orders and directives. And since my arrival, I have worked to refocus the bureau on its mission to combat violent crime, and to enhance public safety.

And I'm proud to say that the men and women at ATF have responded with professionalism and dedication. Senator, you mentioned some of the recent events ATF has been involved in, from Newtown to Boston. From West Texas to Stockton, California. And we will continue to do our job. And should the Senate confirm my appointment, I look forward to leading these men and women permanently, and to help them carry out this very important mission. And I look forward to answering your questions. Thank you.

KLOBUCHAR:

Mr. Delery, it looks like you have a happy family behind you there. So, please -- please start?

DELERY:

Thank you Madam Chairwoman. Ranking Member Grassley and members of the committee, I -- I'm deeply honored to appear before you today as the nominee to be assistant attorney general for the Civil Division. I thank you for your consideration. I'd also at the outset, like to thank the president for nominating me, and the attorney general for his support. I do have a number of family members here today and -- and with the chair's invitation I'd like to introduce them.

KLOBUCHAR:

Please do. I think I can tell who they are, though.

(LAUGHTER)

DELERY:

First is my partner, Richard Gervase. I -- I wouldn't be here without the support that he's given me over the last 20 years, since we were classmates in law school. And in addition to being a great father, he's a terrific lawyer. And I've been improved by his intelligence, judgment, integrity and sense of justice. Our children, Michael and Sebastian, are the joys of my life. And they are here today to see a little bit about how their government works. So I thank them for doing that. And I -- I owe a deep debt to my parents for the firm foundation that they gave me.

My father, Gus Delery, was an engineer who worked his entire career for Louisiana Power and Light, and he passed away back in 1996, but set a striking example for me of hard work, dedication and character. And I miss him. But, my mother,

Elizabeth Toey (ph) is here along with her husband Harry Toey (ph). And mom was the first women's athletics director at Tulane University. And I watched as she built a program from the ground up. And I've -- I've kept those lessons in mind, as I have learned myself how to be a leader. Both mom and Harry are the children of people who were in public service.

My grandfather, in addition to serving in the Army in both World War I and World War II, was a career lawyer in the Justice Department for more than 30 years, including in the Civil Division. And so I'm honored to be following in his footsteps. And Harry's father was a Congressman from New Jersey, a Republican in the 1940s and 1950s. I also have my sister here, Janet Delery who is a school teacher in Charlotte, North Carolina. And she made it here about 1:30 in the morning because of the storms. I'm very grateful that she persevered to be here. And finally one of Harry's daughters, Margaret Kirtland (ph) is here. She flew from her home in New Orleans to North Carolina to help mom and Harry get here today, and so I'm very grateful to her for doing that.

And then finally I have a number of other friends here. I'm very touched that they're here. And in particular, my colleagues in the Justice Department. Madam Chairwoman, I'm -- it's been a real privilege to work with the talented and dedicated lawyers and staff of the Civil Division over the past year. And it's an honor to be nominated to lead them now. The division's greatest resource is its people, who come to work every day with a single-minded dedication to protecting the interests of the country and its citizens. Whether by defending government programs and the national security, or safeguarding taxpayer funds from fraud, or protecting the health and safety for all Americans.

If I am fortunate enough to be confirmed, I will bring to this job a commitment to zealous advocacy in court on behalf of our nation, to giving candid advice -- candid advice, to hearing all sides of an issue with fairness and respect. And perhaps most importantly, to working tirelessly with our strong team of career professionals to defend and advance the interests of the United States. And so again I thank you for your consideration and I look forward to any questions that you may have?

KLOBUCHAR:

Thank you very much. Mr. Delery. I note that Senator Durbin was here earlier, and he's going to put some questions on the record because he has to go to a defense hearing that's important. And I know Coons is going to try to return and -- and others will be here. I guess I'll start with a question of you. I will explain to your family that if -- to your sons, if less of the questions are devoted to your dad, that doesn't mean it's a bad thing, all right?

(LAUGHTER)

KLOBUCHAR:

Mr. -- Mr. Delery, can you -- I think any of us can read the job description of assistant attorney general for the Civil Division, but having done this role on an interim basis, how do you see your role? What are your primary responsibilities? What direction do you want to take the division?

DELERY:

Well, Senator. Thank you for giving me a chance to talk a little bit about what the division does, and -- and the vision for it. There are really two main roles. The Civil Division defends the government when it is sued, whether that's in a constitutional challenge, or a suit for money damages for breach of contract, or -- or personal liability. But then we also bring affirmative cases to pursue money that's lost to the taxpayers because of fraud, waste and abuse. Or to protect consumers, and to protect the safety of the food that we eat, and the medicines that we take.

And so if -- if I'm fortunate enough to be confirmed, I will continue to pursue several priorities. One of them, the most important for the department and the division is protecting national security. We do play a role in -- in a number of pieces of litigation related to those issues. I will also continue to use the powerful tool of the False Claims Act, as well as other tools to pursue

fraud against the government. Last fiscal year, we had a record recovery of more than -- or just about \$5 billion under the False Claims Act that I know Senator Grassley, and other members of this committee have supported over the years. And I'll continue to make that a priority if -- if confirmed.

And then finally, our work related to health and safety. To pursuing cases like the one we brought a few months ago against executives of a peanut butter manufacturer because of a salmonella outbreak. We take very seriously our partnership on those issues with the FDA and will continue to work to protect the safety of the food we eat, medicines, the toys children play with, and the like.

KLOBUCHAR:

Very good. Thank you. We actually -- as you probably know, three of the victims from that peanut butter outbreak were from Minnesota, including a grandmother who one day just ate a piece of toast, and they lost her. And she was an incredible woman. So, I really thank you for going forward with that somewhat difficult case. Thank you for doing that.

DELERY:

Thank you.

KLOBUCHAR:

Mr. Jones, as I noted the ATF has not had a permanent director since 2006 when the law was changed requiring the director to be Senate confirmed. I think Senator Durbin has either put in, or talking about putting in a bill to put the ATF under the FBI because of the fact that we just can't continue like this. It's not fair to you. It is not fair to the agency. And I think it has to change. And one way we can show has changed is by confirming you as director. There are many reasons why the heads of certain agencies are made confirmable by the Senate.

And one of those is because we want the individual to be fully accountable to Congress, and also the men and women who work at that agency. First I'd like to ask you, why is it so important for the ATF to have a confirmed, full-time director? What will a confirmed director mean for the roughly 2,300 agents of the ATF?

JONES:

Thank you for that question, Senator. And I have given it a lot of thought while I learned over the last, almost two years, that ATF is a very resilient organization. And there are great public servants there. I think it's absolutely critical that they have a permanent director. Having been twice confirmed by this body as United States Senator I know that the imprimatur of this organization is one that's really important. It has impacted morale. It does send a message, not only to the employees within ATF that they have been so long without a permanent director, after having several actors over the last seven years.

It does impact morale. I think it's also a fundamental question of good government. Because as you mentioned, being a confirmed appointee, does carry a certain amount of gravitas, so that you can be a more effective advocate for resources, so that you can be accountable to this body, and to the organization that you work with, in this case the Department of Justice. Decisiveness is a critical quality for anyone who is in a leadership position.

JONES:

But decisiveness with credibility I think is also absolutely critical. And a series of actors, no matter how skilled, does diminish the credibility that you're going to have continuity of operations, that the vision is going to stay sure and that the mission will be accomplished.

So at its core, it's good government to have a confirmed director at all of the agencies in the executive branch that are subject to Senate confirmation.

KLOBUCHAR:

Thank you. All of us on this committee had concerns about what happened during the Fast and Furious operation. You were named acting director shortly after the Fast and Furious whistleblowers came forward.

The president named you because he felt you had the knowledge, experience and leadership to put the ATF back on the right path. Can you tell us the steps you have taken and the safeguards you have put in place to make sure operations like that can't happen again and that any major operation is fully vetted up the chain of command?

And after something like Fast and Furious comes to light, we all want to know what appropriate disciplinary action is being taken against the people who acted wrongly. Can you also talk about the steps you've taken to discipline or terminate people involved?

JONES:

Well with respect to your first question, Senator, I think that it's important to note that the inspector general did do an extensive report and made recommendations and identified problems. When I arrived at ATF in September of 2011, as I mentioned, it was an agency very much in distress. And the first thing that I did was go to the Phoenix field division and visit sort of the ground zero for a lot of the controversy that evolved.

But one of the first things that I did was look at who was in positions of responsibility, who was in leadership positions. And there's been a number of changes. None of the individuals who are identified in leadership positions during the Fast and Furious incident are currently in place.

We have, as I mentioned, 22 new special agents in charge. We have a number of assistant directors. Six out of the eight assistant directors who help me as a team lead ATF are new, and all of the have experience as former special agents in charge.

We are continuously in the process of implementing and following through and executing on many of their recommendations made in the IG's report, but we didn't wait for the IG's report to come out. We knew that there was a failure in leadership and oversight.

One of the first things we did was issue and clarify our firearms transfer policy with the underpinnings being that public safety always trumps investigative needs. We've reviewed our undercover order. We've reviewed our confidential informant order. We've instituted and continued to exercise a monitor case program.

But these are just some of the internal fixes. More than anything else, I think it was important to keep the agency's eye on what its underlying mission is, which is public safety. Because ATF plays such a critical role within the Department of Justice in the fight against violent crime, in the explosives arena, in the arson arena. And it's important that we do not have public safety as a result of continuous critical examination.

KLOBUCHAR:

OK. I'm going to have to one more question. And I hope to keep my questions under 10 minutes. If Senator Grassley could do the same, I'm sure we'll have a second round so we give the other senators a chance here to ask some questions.

There have been questions raised about a decreasing number of federal prosecutions in Minnesota with respect to violent crimes, including gang, drug and gun offenses. When I was county attorney in Hennepin County, I worked closely with you and your predecessors, the other U.S. attorneys, to make sure that we tackled the tough criminal cases.

I also worked with your successors, including Tom Heffelfinger, to make sure we made the most effective and efficient use of federal resources. I still remember after 9/11 that the U.S. attorney's office was focused in Minnesota, having caught one of the terrorists in our state on those terrorism-type cases.

And our office, the county attorney's office, started doing many more white collar cases at many higher amounts than we had done before. And I did that when Bush was president working with the U.S. Attorneys' Office. We took on significant more white collar criminal prosecutions. So I understand how this can be this ebb and flow depending on resources and depending on the types of crimes.

Gang, drug and gun cases were some of the areas that I was focused on as county attorney. I know they're important to you, so I'm hoping you can address the concerns that have been raised and explained why some of the numbers out of the U.S. Attorneys' Office may be down. Is it a trend? Is it an anomaly? Is it something else? Thank you.

DELERY:

Senator, I believe that the statistics that you cite only tell part of the story over the last several years. The Department of Justice in general, and particular the district of Minnesota, which is somewhat unique in that we cover the entire state and we have the full range of federal challenges. We've got Indian country. We've got a border with Canada.

We've got a major metropolitan center with all of the respective violent gun crime, gang, drug and financial fraud issues. It really has been a challenge in this period of diminishing resources. And not that the lack of resources is any excuse to look and be smart about how we utilize those resources. As you well know, our partnership with our state counterparts, the 87 county attorneys in Minnesota, is absolutely critical for us collectively to do our jobs.

And what we've essentially done is looked at what are uniquely federal issues that the state cannot handle, what are DOJ priorities like national security in Indian country, and where we have concurrent jurisdiction, as in the gun and drug area, we're making smart choices so that the worst of the worst, so that organizations who deal in drugs, so that armed career criminals are appropriately handled in federal court.

Over the last several years, as you mentioned earlier, we have had a string of very complex cases that have gone to trial. Tom Petters. There's a trial with Frank Vennes going on right now. Mortgage fraud causes, and of course our national security cases, two of which of those actually went to trial.

So the folks in the district of Minnesota, U.S. Attorneys' Office both in the criminal and civil division have been working very hard with a very active case load. And our bottom line is we are focused on impact cases. We are focused on cases that augment what state and local prosecutors do, and we're focused on cases that fit within the priorities of the Department of Justice. And as a result, our raw (ph) numbers have dropped. But we are making a difference.

KLOBUCHAR:

Thank you very much. I'll turn it over to Senator Grassley.

GRASSLEY:

Madam Chairman, before I ask questions, there's a couple things I want to clear up in your rebuttal to my statement.

She's absolutely right that there's been six years without a confirmed head, but remember that it was two years after the president was elected before a nominee was even sent up here. So we can't confirm anybody that isn't sent up here. And then when Mr. Craver (ph) was sent up here, the committee asked for additional information which was never provided. Therefore, he never had a hearing.

And of course if the committee asks for additional hearing - or additional information and that information isn't given, and you can't have a hearing without it, that obviously is either the nominee or the White House's fault. Mr. - then Mr. Craver's (ph) nomination was withdrawn at the end of the last Congress and Mr. Jones was nominated January 24 and we started talking about the hearing in April.

Then there's one other point that I would make, and that's in regard to what you said, and it isn't inaccurate what you said, but I want to point out that when this goes to OSC and it's in mediation, there's - there's a big difference between being resolved and the - and the president - or the chairman in his letter to me saying it is resolved. Because OSC, as I said in my statement, has made very clear that it's not resolved.

Thank you, Mr. Delery, for speaking about false (ph) things. Because I ask every attorney general nominee wherever they are in the department about it because I'm the author of that legislation, and I'm very glad to know that you're going to use it vigorously.

Mr. - Mr. Jones, you would not expect me to not be concerned about whistleblowers. I'm sure you know my reputation in that area. And - and not every whistleblower would necessarily be right, but every whistleblower is entitled to a hearing either when they're personally affected and retaliated against, or in the case of - of somebody bringing information forward, they ought to have that information considered.

And I've come to the conclusion a long time ago that whistleblowers are about as respected in their organization as skunks are at a picnic. So I think they need a lot of consideration because they give us a lot of valuable information.

On March 6, 2013, an employee of yours filed a complaint with a special counsel, alleging you personally undertook "a prohibited personnel action" against him in retaliation for his raising concerns about gross mismanagement within the U.S. Attorneys' Office. This employee has 30 years of federal - as a federal employee. Twenty-four of those years in the U.S. Attorneys' Office in Minnesota.

The employee alleges that after bringing serious concerns about mismanagement in the office to your attention, he was suspended for five days without pay and involuntarily transferred to a new section in the office. The complaint also raises allegations about the appointment of an attorney to a supervisory position despite concerns about her performance by federal and state law enforcement and judges on the federal branch.

The special counsel wrote to us yesterday stating that the complaint was referred for investigation April of this year, and that the investigation remains open with the possibility of mediation because of the - the majority scheduled your hearing despite the fact that this investigation is pending.

That's why I bring this matter up. You were quoted in the Star Tribune as saying, "I'm looking forward to meeting with the committee and answering all their questions." Based on that, I'm going to assume that you will answer the questions I ask you today.

GRASSLEY:

Mr. Oswald - first question. Mr. Oswald, former special agent charged (ph) FBI in Minneapolis, wrote a detailed letter this January alleging you mismanaged the office and had an "atrocious professional reputation with the federal law enforcement community," end of quote.

GRASSLEY:

A 24-year veteran of assistant U.S. attorney filed a complaint with the Office of Special Counsel against you, which

corroborates the account. Have you been interviewed by the Office of Special Counsel? And if so, when?

JONES:

Senator, to answer your last question first, I am aware that the OSC has requested information from our office in the District of Minnesota. Because those complaints are confidential as a matter of law, I have not seen the substance of the complaints, nor can I comment on them. I've learned more from your statement today than I knew before I came here this morning about the nature and substance of the complaint.

I can assure you that I have always taken very seriously the duty my office has to follow all the laws and regulations, not engage in prohibited personnel practice, and to be very sensitive to the issues surrounding those that you have so vigorously advocated for over the years with respect to whistleblower protection.

GRASSLEY:

So you have not been interviewed, then, by special counsel?

JONES:

I have not, Senator.

GRASSLEY:

Other than the FBI special agent in charge and the assistant U.S. attorney who filed the complaint at the Office of Special Counsel, are you aware of any other individuals in your office who have raised similar concerns? And if so, who?

JONES:

I am not aware of any other complaints, your honor -- your honor -- Senator. This is like a courtroom, so I'm...

(LAUGHTER)

GRASSLEY:

Well, I feel...

JONES:

I feel like a defendant.

(LAUGHTER)

GRASSLEY:

And as a farmer, I feel honored that...

(LAUGHTER)

Have you taken any adverse personnel actions against anyone who complained about how you were managing the office?

JONES:

You know, Senator, that's -- thank you for the question. I have had the opportunity to be in a management position both in the public and private sector. I have always tried to approach that position of responsibility with respect for those that I work for and a collaborative -- and a collaborative nature. But always with expectations. And I have...

GRASSLEY:

So I think the answer to my question is you don't feel you have taken any adverse action against anyone who complained

about how you were managing the office.

Are you aware of the anonymous complaint filed July 20th, 2012 signed by, quote, "employees of the U.S. attorney's office for the District of Minnesota," end of quote. Those -- those employees wrote -- well, are you aware -- well, no, let me go on.

Those employees wrote, quote, "Since he became U.S. attorney here in Minnesota, he has instituted a climate of fear; has pushed employees out of the office; dismissed employees wrongly; violated the hiring practices of EEOC; and put in place an Orwellian-style management that continues to polarize the office," end of quote.

Did you at any time learn who these individuals were? Did you take any adverse personnel action against them?

JONES:

Senator, I recently saw a copy of that anonymous letter. Again, I have not taken adverse actions against anyone that I've worked with. I was quite surprised by the nature of the allegations. Whether it's at ATF or the at the U.S. attorney's office, in both situations I came into a less-than-perfect environment and I, quite frankly, have been an agent of change and change is hard sometimes for individuals to deal with. And I've always had a focus on doing the right thing for the right reasons and sometimes folks are not happy about the direction overall.

GRASSLEY:

Now, I'm including in that statement about adverse personnel action an unwanted retaliatory transfer. Does that change your answer?

JONES:

Again, Senator, I'm not familiar with the OSC complaint. And I'm at somewhat of a disadvantage with the facts. I can say that Privacy Act considerations do fit into the picture. I have a certain awareness about disciplinary processes. But again, it has never been my practice to engage in retaliatory employment practices.

GRASSLEY:

Will you answer the complaints about the assistant U.S. attorney when the -- because that's why you're here today. How are we supposed to ask about these allegations if we can't ask you?

JONES:

Well, quite frankly, Senator, I am at a disadvantage with the facts. There is a process in place. I have not seen the OSC complaint. I do know that our office, working with the Executive Office of U.S. Attorneys is in a process of responding to the issues that you've talked about this morning. But I have not had the opportunity to either be interviewed or have any greater knowledge about what the OSC complaint is.

GRASSLEY:

Well, you know, I'm kind of uncomfortable asking these questions because we shouldn't have been moving forward with this hearing. But the chairman said this was the opportunity for us to have this interview with you and to get these questions answered. And, of course, you agreed to answer all the questions. So I would ask that you answer, but if you don't answer, you know, that's the way it has to be.

Do we want to go to the senator from Connecticut?

KLOBUCHAR:

That would be very helpful, thank you, because he has something else. I appreciate that, Senator Grassley.

I also wanted to put in the record the letters from law enforcement in support of Todd Jones, including the Fraternal Order of Police; the International Association of Chiefs of Police; former U.S. attorneys including Tom Heffelfinger, the Republican appointee under both President Bushes; members of Congress; Minnesota County Attorneys Association; several Minnesota county attorneys from across our state; the National District Attorneys Association; several former assistant U.S. attorneys; and the former magistrate judge for the District of Minnesota.

I did want to read one of the letters into the record, from Beth Hill (ph) to Todd Jones. Ms. Hill's son, Otall Saunders (ph), his wife and her 15-year-old daughter were murdered by two men in a brutal home invasion in St. Paul, Minnesota in 2007. Unfortunately, the case lingered for two years. When Mr. Jones returned to the U.S. attorney's office in 2009, Ms. Hill contacted him and asked him to review the case.

Mr. Jones's office investigated the case and obtained convictions against the perpetrators. In 2011, both of the men were sentenced to life in prison on three counts of murder. In her letter, she says, quote, "In my son's keepsake box, I have a handwritten note that you sent me in response to my plea to you for justice for Otall (ph), Maria (ph) and Britney (ph). You didn't promise me anything but a commitment to review my case when you came into the office. Your note gave me hope and the strength to continue to fight for justice for my children."

She wrote to wish him well and success in his new leadership role at ATF, writing, "When a job feels like you can't go on and the odds seem stacked against you, think about mothers like me who will rely on you to help stop senseless violence and move this country forward." I thought those were pretty powerful words. And I will also include that letter on the record.

We also have letters of support, as I mentioned, for Mr. Delery from former Justice Department officials from previous administrations, both Republican and Democratic, that will also be entered into the record.

With that, I turn it over to Senator Blumenthal.

BLUMENTHAL:

Thank you, Madam Chairman.

And thank you both for being here today. I thank each of you for your public service, particularly Mr. Jones, your service in the Marine Corps, as well as in the United States attorney's office in Minnesota; and Mr. Delery, for your service in the Department of Justice, as well as in private litigation.

Mr. Jones, as you well know probably better than any of us here, there's been a lot of debate about the ways to promote more prosecutions under existing law that is designed to prevent gun violence. And even for some of us who strongly favor improvements to that law, the question is: What can we do to promote more rigorous and vigorous enforcement of existing laws that relate to either illegal purchases or illegal possession of firearms?

And my own view is that inadequate resources are a major reason for the lack of sufficient prosecutions or the -- the failure to increase the number. And I'd like you to comment on what you view as the reasons or the ways that we can improve that rate of prosecution.

JONES:

Well, two things, Senator. One is you need a vibrant and healthy ATF. Part of the reason I'm here for this process is because they need a confirmed director. They've never had one. And for all the reasons we've previously mentioned, that is an impediment to give stability, direction and guidance...

BLUMENTHAL:

And I heard your testimony and I agree that a confirmed leader is absolutely essential to provide direction and vision and the kind of basic leadership, but in addition to that fact.

JONES:

Well, (inaudible) ATF is not completely healthy. Its biggest challenge is its human capital. It's been subject, as some federal agencies, to the ebb and flow of hiring. But one of our biggest challenges is in the next five years the attrition among our special agent community. The special agents are at the core of our criminal investigative processes. And because of the mandatory retirement age for federal law enforcement, we are going to have nearly a third of our special agent community become retirement eligible.

The resources and the opportunity to bring on new special agents, which does take time, hasn't been sufficient for one-to-one replacement. And so...

BLUMENTHAL:

What's the median age of your agents?

JONES:

Our special agent community is one of the more senior in federal law enforcement. I don't know the median age, but it is a very experienced workforce. And because of the nature of the work that ATF does in arsons and explosives investigations, it takes time to develop that expertise. We call it the "brain drain" and we do -- and we are aggressively, even in the current environment, looking at that knowledge transfer. But that human capital for continuity and maintaining our current status and abilities is probably one of the biggest challenges we face over the next several years.

BLUMENTHAL:

And would resources help you to attract more qualified potential agents -- special agents at the ATF?

JONES:

You know, that helps, but I think some of the other constraints that we've been operating under with hiring freeze, with some of our abilities to be -- schedule B (ph), for example, to bring on agents, that there's a lot of talent out there and there's a lot of talent inside the Bureau, but what we need to do is very quickly match that up so that we don't diminish our capacity.

BLUMENTHAL:

ATF, as you know, has a strong history of responding to high-profile incidents and investigations, as you did in Sandy Hook. And perhaps you can talk about the ATF's role, under your leadership, at Sandy Hook, which was particularly important to my state of Connecticut and to me, having spent a lot of time there with the community.

JONES:

Well, the tragic school shooting in Newtown, at Sandy Hook, was a seminal event for us personally and for ATF. ATF, of course, is one of several federal law enforcement components.

And so our immediate response, in addition to bringing agents from around the region down there was, of course, to ensure the safety of the school and the community, but more importantly, to work with other federal and state -- importantly, the state police and the local police department, as is our practice to focus in on the fire arms issues.

There's an examination of the federal firearms licensee that Mrs. Lanza purchased the weapon from. There was initial forensic work done with the weapons, but always in partnership with the Connecticut State Police, with the local police department, and with our brother agency at the Federal Bureau of Investigation.

BLUMENTHAL:

I want to thank your agency and the special agents who were there for not only the rigor, but also the sensitivity that they demonstrated from the very first hours that they arrived there and began interviewing everyone involved for a potential firearms violation, including some of the licensed firearms dealers in the areas, and others who might have knowledge, working very closely with our state police who led the investigation.

The investigation is ongoing, as you know, and again, my thanks to the special agents who were there and to your agency.

Thank you, Madam Chairman.

KLOBUCHAR:

Thank you very much, Senator.

Senator Flake?

FLAKE:

Thank you. And Acting Director Jones, in answer to a previous question, you stated that none of the individuals in leadership during Fast and Furious are now in place. What does that mean? Were they removed? Just gone by virtue of attrition? What does that mean?

JONES:

What it means, Senator, is that folks that -- individuals who were primarily in the executive service have either retired or resigned or have left the Bureau of Alcohol, Tobacco, Firearms and Explosives. The personnel processes can be somewhat dicey. The Privacy Act issues sort of preclude me from giving you a more fulsome description.

But from the former Acting Director down to the group supervisor in the Phoenix field division, they are no longer in positions of responsibility and leadership within ATF.

FLAKE:

But was anyone disciplined?

JONES:

Yes.

FLAKE:

Are you at liberty to share who and when?

JONES:

Not really, because of the privacy. I'm being very dicey. We can respond once I get some clearance. I'm being very careful and very respectful of the privacy issues that are involved with making disclosures with some specificity, but there was discipline imposed throughout the chain of individuals involved.

FLAKE:

Well, when you're at liberty to share that, we'd certainly need to know that. Can you tell us what disciplinary action was taken without revealing names?

JONES:

We have a range of options internally, ranging from termination from employment, which would then be subject to a different appeal process, to demotions from your grades down to moving people into non-supervisory positions.

FLAKE:

And which of those were taken? Which of those actions?

JONES:

I think a combination of all of them.

FLAKE:

So, termination?

JONES:

I -- I -- I think that the full range of our disciplinary tools were utilized in handling the issues that arose as a result of the IG report and our own internal affairs examination.

FLAKE:

So from termination to demotion, or removal?

JONES:

You know, one of the challenges, Senator, to be quite candid with you is, because of the leadership positions, the supervisory nature of the positions, there were individuals who were eligible for retirement, and so in some instances, the disciplinary process was cut off by the fact that individuals did submit resignations.

FLAKE:

Does that describe all those who were...

JONES:

Not all of them, Senator.

FLAKE:

So some of them actually were demoted or terminated?

JONES:

Some individuals who were on the disciplinary process that opted to retire, if they were eligible.

FLAKE:

It's important for us to have that information and for what can be shared to be shared. Because can I tell you, particularly coming from Arizona, which was the scene for a lot of this, there's a lot of mistrust and people don't think that anybody is held to account at any time. And it's difficult for any of us to say with any surety that they were without this kind of information. So we'll be following up.

But to the extent that information can be put out, in terms of disciplinary action, honoring any privacy rules we have, but I think it's important to do so.

With regard to -- let me just bring up one case. During your tenure as Acting Director of ATF, there was disagreement between the Reno ATF that was alluded to by Senator Grassley, disagreement between Reno ATF and the Attorney's Office for the District of Nevada that resulted in the ATF not being able to submit cases for prosecution for a full year, 2011 to 2012.

"Reno Gazette Journal" asserted that ATF's lack of action on this issue constituted a public safety threat. And yet, when the issue was brought to your attention, ATF whistleblowers said that you had mentioned that you had bigger things to worry

about and it wasn't 'til there was a letter from Senator Grassley that this huge issue was addressed and action was taken.

But then it was just, as I understand it, to transfer agents to other offices, which left the Reno office understaffed. Was this issue handled appropriately in your view?

JONES:

Well, this was yet again one of those issues that was, what I call, my inheritances. And let me assure you that public safety was never at risk in the District of Nevada. And as a U.S. Attorney, I was very dismayed when I first heard of a disconnect between the federal prosecution office and ATF.

One of our challenges has been making sure that we have accountable leadership and oversight. So I can assure you and the public in Nevada that we've got new leadership in the San Francisco field division. We have very good communications with the special agent in charge, very good communications with the Reno office, which is the satellite in Nevada, from the Las Vegas.

We have shifted agents, as I mentioned earlier. One of our resource challenges is where we're putting our limited resources based on the needs. In the violent crime front, we currently have two full- time and soon to be three agents in Reno. We've enhanced the working relationship and we're on a good path in Reno to fix whatever concerns historically existed there.

FLAKE:

So you believe you moved swiftly enough on that?

JONES:

Yes, I do.

FLAKE:

Thank you.

KLOBUCHAR:

Thank you.

Senator Franken?

FRANKEN:

Thank you, Senator Klobuchar, for chairing this and for this hearing. I apologize for getting here a little late. I've been in the Health Committee where we're doing the markup of the Elementary and Secondary Education Act III authorizations, so I'm going to also have to be leaving.

But first, Mr. Jones, I'd like to thank you for your service to the state of Minnesota. I know Senator Klobuchar feels the same way. After taking the bar exam, you didn't join the law firm, you joined the United States Marines and you've been serving our country in various capacities for much of your career since then. So I just want to start out by thanking you for that.

I also want to take this opportunity to acknowledge the many brave ATF agents who responded courageously and professionally to the bombing at the Boston Marathon and to the recent Texas plant explosion. Mr. Jones, your nomination to be ATF's permanent director arose out of the shooting of Sandy Hook, but these other recent events remind us that the ATF's role extends beyond gun issues.

Mr. Delery, thank you for meeting with me. I enjoyed our discussion a few weeks ago. Congratulations on your nomination, as

well. You've done some tremendous work at the Department on issues like marriage equality and holding credit rating agencies accountable for their role in the financial collapse. And so thank you for being here to answer the Committee's questions.

I'll go right to my questions now. Mr. Jones, since you were named ATF's acting director in August of 2011, you somehow managed to run that Bureau while also serving as U.S. Attorney in Minnesota. So you've basically been asked to do two full-time jobs at once.

If you're confirmed, you'll be able to devote your full attention to ATF. That's important. We've been without a permanent ATF director for about seven years. Can you explain what it'll mean for ATF to finally have a permanent, confirmed director in place?

JONES:

Thank you for the question, Senator. And I think it's absolutely critical. As I mentioned earlier, I think, at its core, it's a good government issue.

Not only does it send a positive message to the men and women within the Bureau of Alcohol, Tobacco, Firearms and Explosives, but it sends the right message to the industries that we regulate and to our state and local law enforcement partners that there is a permanent person that has been given the stamp of approval to lead the organization going forward.

JONES:

That hasn't diminished, really, over the last seven years with the men and women in ATF performing their job. But it has been a challenge to have the change in direction. When I was in the service, I remember leaders that I had that were good, and the lessons taken away from them. Just as importantly, I remember the leaders that were bad and the lessons that were taken away from them.

But having that steady hand on the tiller that can share with the men and women at ATF, the vision, the mission, the execution to help keep the American public safe in those areas where we have jurisdiction, I think is absolutely critical.

FRANKEN:

Thank you. Mr. Jones, ATF works closely with state and local law enforcement authorities to investigate arsons, bombings, gun crime, and -- and acts of terrorism. I've heard from some Minnesotan law enforcement officials who are concerned about the budget cuts from the sequester, that they could hamper this type of collaborative work. What is sequestration's impact on -- on ATF?

JONES:

Well specifically with ATF because it has been somewhat under resourced, we, as an organization are resilient. But it -- it -- it will hurt. The president's proposed 2014 budget, I think -- I believe gets us on the path to being healthy with the anticipated worst case scenario from the sequester -- potential sequester cuts. You're cutting bone. You're cutting bone, and you're impeding, I believe our ability to be as effective as we have been, as lean as we have been over the last four or five years.

FRANKEN:

Thank you. My time is just about up. Would it be OK if I asked one more question, Madam Chair? Mr. Jones, I'm -- was disappointed that the Senate was unable to pass the Manchin-Toomey amendment. Under criminal law, someone who can't pass a background check to buy a gun simply can go to a gun show, or to classified ads and get a gun anyway. The Manchin-Toomey amendment would expand the background check system to cover commercial gun sales. I've heard from a lot of Minnesotans who support the proposal, regardless of their views on other aspects of the president's gun violence

prevention initiative. And this committee heard a lot of testimony from law enforcement leaders who said that the background check saved lives. What -- what are your thoughts on this?

JONES:

I believe that the background check system, the NICS system that's currently in place, which since 1998 has kept legal firearms out of those -- the hands of nearly 1.5 million bad guys, has been effective. Is there room for improvement? Yes. Can we deal with the current system? We have. I followed with some interest the debate, and will defer to this body, and Congress generally to do what you do with respect to expanding, or not expanding background checks. I can tell you that the current system is very effective in working within the limits that it's currently working.

But there's always room for improvement. Including tightening up what could be characterized as, the gray market in firearms. Because of course the background check only applies to those who choose to go to licensed firearms dealers to purchase and obtain guns.

FRANKEN:

Thank you. Thank you Madam Chair.

KLOBUCHAR:

Thank you. Senator Grassley is going to go for five more minutes, and then we go to Senator Schumer, and then Senator Cruz?

GRASSLEY:

Since you said you can't offer any other answers to questions on the Office of Special Counsel Complaint, I'll go to something that you -- you should have heard about, the letter from the FBI official, the letter to the committee. Did you hear of complaints about your office by the former special agent in charge of FBI office, Mr. Oswald?

JONES:

The answer to your question, Senator is no. And I was quite shocked when I saw the copy of that letter. Because my belief during the one year that Mr. Oswald was the special agent in charge of the Minneapolis Field Division, my perception was that we had a professional working relationship. So I was very surprised when that letter was submitted to the Senate.

GRASSLEY:

In 2009 after you were confirmed by the Senate, did you remove the chief of the Narcotics and Violent Crimes section of the U.S. attorney's office? And that was one of the allegations that Mr. Oswald made.

JONES:

In 2009 when I became the U.S. attorney for the second time, I spent the first month talking to every single assistant United States attorney in the office. I received several resignations from individuals who had been serving in supervisory roles, and as every new United States attorney's prerogative is, I formed a leadership team that remains in place, and has been very effective in helping move the district forward with the goals and objectives of both the district and the Department of Justice.

GRASSLEY:

So, did you remove the chief of the Narcotics and Violent Crimes section of that office?

JONES:

I made management changes when I came into office for the second time in August and September of 2009.

GRASSLEY:

Did you remove that person?

JONES:

Did I remove that person?

GRASSLEY:

The chief of the Narcotics and Violent Crimes section of the U.S. attorney's office?

JONES:

I received the resignations of most of the supervisory AUSAs, as is a common practice, when I became U.S. attorney.

GRASSLEY:

You did appoint a new chief to the section?

JONES:

I did.

GRASSLEY:

How did you know the individual you appointed as chief to the section?

JONES:

How did I know them?

GRASSLEY:

Know that person -- to that section, the Narcotics and Violent Crimes section?

JONES:

I know -- many of the AUSAs I have known over 20 years in that office. So I know individuals by a reputation, and I know individuals personally.

GRASSLEY:

Did she have previous management experience?

JONES:

In terms of -- who are you speaking of in particular, Senator? I -- I -- I don't want to engage in guesswork here. If the question is, did an individual that remains as our Narcotics and Violent Crime chief, assistant U.S. Attorney Carol Kayser have previous management experience, I believe the answer to that is yes. She is a very experienced prosecutor from the northern district of Georgia where she was an AUSA doing asset forfeiture. Before that she was a -- the Cobb County state prosecutor in Georgia, and was brought into the U.S. Attorney's Office prior to my arrival under the previous administration.

And so she was very experienced, and had some management experience before making her the deputy crim (ph) chief for narcotics and violent crime.

GRASSLEY:

Go to Mr. Cruz?

KLOBUCHAR:

Thank you. Senator Schumer next. And then we'll go to -- to Senator Cruz. I just wanted to follow up on one questions since he was asking -- Senator Grassley was asking about management of the office. Before you were U.S. attorney, who was the

U.S. attorney before that?

JONES:

There was a two year period, nearly two year period where Frank Magill, now Judge Magill, was the interim U.S. attorney. But the prior presidentially appointed, Senate confirmed United States attorney was Rachel Paulose.

KLOBUCHAR:

And what happened to our Rachel Paulose?

JONES:

There was a period of challenges for the office, and eventually Ms. Paulose resigned as U.S. attorney.

KLOBUCHAR:

And she was appointed -- was involved when, I think Attorney General Gonzales was in, and then one of the first acts was to clarify the record when Attorney General Mukasey came in was to actually call me. I would just like the record to reflect that, to get some names of people who could take over for an interim basis. So when you and one of my suggestions was Mr. Magill. And so when you took over the office, it was only two years after this turmoil, as you've described it, which made the front page of many newspapers in the country, is that correct?

JONES:

That's correct, Senator.

KLOBUCHAR:

OK. Thank you. Senator Schumer?

SCHUMER:

Well thank you. First, I want to thank you, Director Jones, for your service, both in the U.S. attorney's office and now as acting director of ATF.

JONES:

Thank you.

SCHUMER:

You've had a long, distinguished career. You were passed unanimously for U.S. attorney by this committee a few years ago and now, of course, it's taken a long time to move your -- to get your nomination made -- approved by this committee, and by the Senate. And so I'd like to first say that I think having a vacancy at this agency is a big mistake. Such an agency has to have leadership to provide direction to many employees who work here and keep Americans safe. So let me ask you this question, what would happen to the FBI without a director?

Don't you think that could be used by terrorists to say the United States is weak on terrorism? Not doing all it could against terrorism if we didn't have -- if we had for years an acting director of the FBI? I do. I just wanted to know your opinion?

JONES:

Well I -- you know it's -- it's -- it's sort of comparing apples to oranges, because the FBI has always been part of the Department of Justice. It's only been 10 years since ATF has been part of the Department of Justice. And it's only been since 2006 that the director of ATF has been subject to Senate confirmation. So the analogs aren't quite right. But to your point, that continuity in leadership...

SCHUMER:

That's what...

(CROSSTALK)

JONES:

Has been absolutely essential. When I left government service in 2001 and when I came back in 2009, knowing 9/11 happened in the interim, the Federal Bureau of Investigation was not the same organization...

SCHUMER:

Right.

JONES:

...that I knew when I left after serving as U.S. attorney before. Much of that, and I've known Mr. Mueller for a long time, much of that is because they have continuous, outstanding leadership over a long period of time, which has allowed things to structurally settle, and for them to stay focused on those missions that are in their...

(CROSSTALK)

SCHUMER:

Look, it's my view having lack of an ATF director, signals the same thing. We don't have the continuity, gun trafficking, crime, the kinds of things ATF does is vitally important. And it's -- it's not good to have one -- to -- to have a vacancy for so long.

SCHUMER:

And I would hope that your confirmation would be moved. I'm not directing this at any particular person, but it somehow -- somehow it seems that in agencies that people don't like what the agency does, NLRB, EPA, or DC circuit, we somehow get vacancies there, and they're blocked for a very long period of time, and I would hope that would change.

I would hope that would change. Your record's exemplary, and you were approved by this body unanimously as U.S attorney, and I would just hope we could move forward with you.

I have a few specific questions. I know my time is running out. The Undetectable Firearms Act, this deals with 3-D guns, it expires at the end of this year. First I want to commend your agency working with TSA and Secret Service to keep us up to date on this.

Now, when the law was passed, there were very few guns that could be brought undetected through a metal detector, now that's changed. Aren't there guns that fire at least one shot that can successfully be brought through a metal detector, a gun itself, these 3-D guns with plastic parts by and large just -- from what I understand the only metal they need is a little spring and that's not detectable in our metal detectors.

Is that fair to say?

JONES:

Our firearm (ph) technology branch, as you mentioned Senator, working with Secret Service, and with TSA, and the FBI and other law enforcement organizations is in the process of testing variations of the 3-D gun and some other components that are somewhat troublesome, but the -- the fundamental material for that, that being various grades of polymer, does make it undetectable without metal components.

SCHUMER:

So, in light of this, do you think we have to re- authorize the Undetectable Firearms Act, and would your agency be prepared to submit some recommendations if any changes are needed?

JONES:

We are always available to provide technical guidance and advice, given our expertise. And, I think that the evolving technology that underlies 3-D printing, on a variety of fronts, certainly generates a sense of urgency, particularly since the Undetectable Fire Arms act sunsets at the end of this year for this body to examine this i the public safety context.

SCHUMER:

Well, once again, my time is expiring.

I want to thank you for your service.

I want to thank you for continuing under very difficult circumstances. And I want to thank you for your very calm demeanor in this -- in this hearing as well.

JONES:

Thank you.

KLOBUCHAR:

And we hope that continues.

Senator Cruz.

CRUZ:

Thank you, Madam Chairman.

Mr. Jones, thank you for being here. You are a currently sitting United States attorney. You've previously served as chairman of the attorney general's advisory committee. You're the acting director of ATF. You are perhaps uniquely situated to discuss the Obama administration's priorities and record concerning gun prosecution.

So I'd like to ask you a question.

Is it a priority for the Obama Justice Department to prosecute felons and fugitives who attempt to illegally purchase firearms?

JONES:

Senator, thank you for that question, and one of the priorities of the Department Justice (sic) has always been -- during my second tenure as U.S. attorney -- protecting the American public from violent crime including violent firearms crimes.

CRUZ:

Is that a, yes?

JONES:

That's a, yes.

CRUZ:

Would you describe it as a high priority?

JONES:

It is one of the major priorities.

CRUZ:

Yeah, so a major priority?

JONES:

Yes.

CRUZ:

I guess then, I would ask you to reconcile that comment -- that it's a high priority -- with the data. And, in particular, in 2010 out of 48,321 felons and fugitives who attempted to illegally purchase firearms, the Department of Justice prosecuted only 44 of them. Forty-four out of over 48,000.

And, at least for me, I have difficulty reconciling those hard facts with the assertion you have made that it is a high priority of the Obama Justice Department to prosecute felons and fugitives who try to illegally purchase firearms.

JONES:

During fiscal year 2012, Senator, the Department of Justice did approximately 85,000 federal criminal cases involving defendants, and one out of seven involved firearms offenses. The NIC's check does generate hits of people who are potentially prohibited and you are correct in that the number of folks who are prosecuted federally for what has been coined lying and trying is a small number, but the number does not tell the story about what the department has done with armed career criminals...

CRUZ:

With respect sir, my question wasn't about armed career criminals. My question was, whether it was a priority to prosecute felons and fugitives who try to illegally buy firearms.

Now this - this data focuses exactly on that. That's why I wanna -- you -- you could have said no, it's not a priority, and -- and I would suggest the data demonstrate (sic) it is not a priority of the Obama Justice Department to prosecute felons and fugitives.

In my view, that's completely unacceptable.

Do you disagree?

Do you think prosecuting just 44 out of over 48,000 felons and fugitives who tried to illegally buy guns, do you think that's an acceptable allocation of prosecutorial resources?

JONES:

Prosecutorial resources are thin, and there are a number of issues that U.S. attorneys across the country deal with, ranging from national security financial frauds, and we have tough decisions to make.

The reality is, as a first line prosecutor and someone who exercises their discretion on a regular basis, if given the choice between doing a lying and trying case -- which we have not done in Minnesota -- and doing an...

CRUZ:

So your office has done zero...

JONES:

We have not done a lying and trying case.

CRUZ:

Your office has prosecuted zero felons and fugitives who tried to illegally purchase firearms?

JONES:

We have not tried a -- we have not prosecuted lying and trying case.

CRUZ:

Is that a yes?

JONES:

We have done over 150 felon in possession, armed career criminal cases, we have done straw purchaser cases. On the spectrum of prosecutions that U.S. attorneys can do, lying and trying cases, both because of the dedication of resources and the potential deterrent impact and the sentence that's gonna be involved are not commonly done, which is underlying that 44 figure that you cited earlier, Senator.

CRUZ:

Mr. Jones, I have to admit that I find it remarkable that -- that you testified to this committee that it is a, quote, "Major priority," of the Department of Justice to prosecute felons and fugitives who attempt to illegally purchase firearms, and that then, you respond to his committee that it is an acceptable allocation of prosecutorial resources to prosecute just 44 out of over 48,000 and even more astonishingly, you informed this committee that you have prosecuted zero.

My question to you is, are there other things you would describe as major priorities of the Department of Justice that at the same time you have chosen to prosecute zero cases enforcing those so called major priorities?

JONES:

With all due respect, Senator, just so the record is clear, a major priority of this Department of Justice is protecting the American public from violent crime, including violent gun crime. I just want to make sure that, that's clear so that what my testimony is, is not twisted into something that it's not.

And your question, sir, was?

CRUZ:

Are there any other so called major priorities on which you have prosecuted zero cases?

JONES:

We've made hard decisions with our resources. Priority number one is national security. In Minnesota we have made major efforts on that front with Al Shabab. We have made major efforts on protecting our community from violent crime including gun crime. We have made major efforts protecting the safety of people's nest eggs in financial fraud. And so we have a veritable smorgasbord of decisions that we're making and all of our work has been consistent with the priorities of this Department Justice.

CRUZ:

Mr. Jones, I would note you chose not to answer my question.

I just want to have one final question with the Chairman's indulgence.

Which is that, the Grassley-Cruz legislation that was introduced on the floor of the Senate, that received a majority of votes in the Senate, 52 senators, including nine democrats -- it was the most bipartisan of all of the comprehensive gun legislation introduced.

It provided funding for prosecuting felons and fugitives who attempt to illegally purchase firearms, because in my judgment and in the judgment of the majority of the Senate, it is utterly unacceptable for this Justice Department to refuse to prosecute felons and fugitives who attempt to illegally purchase firearms.

In your role as acting director of the ATF or as U.S. attorney, did you support the Grassley-Cruz legislation, and do you support that legislation?

JONES:

I am not familiar with the specifics of that legislations, and I'm not in a position to answer the question, because I'm not familiar with the legislation.

CRUZ:

Very well, thank you.

KLOBUCHAR:

Thank you, Senator Cruz.

I wanted to include a few things on the record. First of all, discussion here just took place about prosecutions of cases and I discussed earlier how crime rates are very important, and in fact, we can attribute them to a lot of things, but I would note that the crime rate the state of Texas, the violent crime rate, is twice the rate -- Senator Cruz -- the violent crime rate in the state of Texas, is twice that of the state of Minnesota.

Between the years 1991 to 2011, during many of those years you were the U.S. attorney in the state, Mr. Jones, the data I have here is that the Minnesota violent crime rate in 2011 was a little over 200 per 100,000 inhabitants -- these are FBI statistics -- and the violent crime rate in Texas was about 400.

I also have the crime rates of every member of the committee that is here. I thought it was just interesting to look at. And I would note that the only two states that have lower crime rates per 100,000 inhabitants than Minnesota, are the states of Utah --unfortunately Senator Hatch isn't here -- and the state of Vermont.

And, while again, there's many things that contribute to crime rates. I would point out that this idea that somehow during your term that work isn't being done just is not supported by these numbers. And I would put that on the record.

I also would put on the record the fact that we have many people here from law enforcement in this room in support of you Mr. Jones. First of all, Jim Patsco (ph) the executive director of the Fraternal Order of Police.

We have the International Association of Chiefs of Police represented by Deputy Executive Director James McMahan (ph), and Director of State Association of Chiefs of Police Jean Vogulin (ph). We also have Prince George's County Police Chief Mark A. Magaw representing the International Association of Chiefs of Police. We have Washington D.C. Metropolitan Police Department Command Staff Representative of Chief Kathy Lanier.

We have Manassas Park Police Chief John Evans. We have Prince Williams County Police Chief Steven Hudson. We have the Maryland State Police, represented by Commander David Kloos on behalf of Superintendent Marcus Brown.

With that I'll turn it over to Senator Coons.

COONS:

Thank you, Madam Chair.

And I too am pleased to hear about the support for the nominee from the IOCP, the FOP and many other police and professional law enforcement organizations.

Mr. Delery, thank you for your presence here today. I look forward to your service. Forgive me, but my questions will also focus on Acting Director Jones. I suspect you have had a more comfortable confirmation hearing than perhaps you might have expected.

KLOBUCHAR:

I would note that Mr. Delery's young sons have been attentive throughout the entire questioning of Mr. Jones.

(LAUGHTER)

It's much appreciated.

COONS:

Particularly impressive.

Acting Director, if I might just first, given the comment about the support your nomination has received from the law enforcement community, fairly broadly, as someone who before coming to the Senate had a responsibility for a local law enforcement agency, just tell me about your perspective on the importance of collaboration and information sharing between federal, state and local law enforcement. And then, if you would, tell us something about your experience in the Miami undercover investigation and how that strengthens that experience for Minnesota and now in the ATF.

JONES:

Well, Senator, thank you for the question. And I think that one of the strengths that I've discovered over the last 20 or so months as the acting director is the reinforcement of my belief that there are outstanding working relationships with ATF and state and local law enforcement. It's absolutely critical, given the mission that ATF has on the arson front, which is oftentimes understated and under-known, but absolutely critical expertise. And that, of course, has us with close working relationships with state and locals.

And on the violent crime, particularly violent gang and gun crime front, we have nearly 600 task force officers that work with ATF special agents around the country, that we could not do that work without that collaboration and that cooperation. So, our relationship with the state and locals is absolutely critical and we've always valued that relationship because we cannot get it done without that level of work.

With respect to Miami, it was -- it's still an ongoing prosecution now, but it was an excellent example of a number of operations, surges, undercover storefronts that we have engaged in as ATF that took nearly 95 violent, violent criminals off the streets of Miami Gardens. Some of them went state; some of them went federal, and over 200 weapons. And it was a collaboration, again, not only with state and locals, but with our sister agency, the DEA.

COONS:

Some concern has been raised about the Magner case. That's been of real interest to me as well. And as the U.S. attorney for the District of Minnesota, who was your client? Who were you representing in that role?

JONES:

Well, of course, the Department of Justice represents the United States in courts of law around the country, both in civil and criminal matters. So, the client agency in that matter was the -- was HUD.

COONS:

And in making litigation decisions on behalf of the United States, in your view is it ethical and appropriate to take into account not only the judgment of an agency with enforcement responsibility, but also the consequences of a litigation decision that might impact the broader ability of the government to enforce civil rights statutes? Is that -- is that your view?

JONES:

That is my view. And I've expressed that before in sessions with Senator Grassley's staff.

COONS:

Speak, if you would, about whistleblowers. It is the protection -- the advancement of the concerns of whistleblowers is something that was of real primacy for me in my local government service. Some characterizations of communications internally within the ATF have been made to suggest that you have attempted to suppress whistleblowers, and I wanted to give you an opportunity to speak to that, to answer a concern as to whether or not you've led the ATF as acting director in a way that suggested that you would welcome or support whistleblowers or the contrary.

JONES:

You know, thank you for giving me an opportunity to again reinforce and sort of dismiss a misperception that I have engaged in conduct that suppresses whistleblower rights. Nothing could be further from the truth. I've represented whistleblowers in private practice. Some of my most satisfying experiences have been in the representations of those who have put themselves in the position of being whistleblowers. And I know first-hand from my former clients how difficult that can be in terms of your perception internally and the challenges on you personally.

And I have the utmost respect for both the underpinnings and the purpose of whistleblower protections. It is, again, a fundamental good government effort and it is absolutely critical to us doing our job effectively as public servants with responsibility for public agencies.

COONS:

A lot of the challenges that existed at the ATF that you were responsible for addressing or cleaning up when you became acting director were in part a result of an ongoing operation that came to light because of whistleblowers. Do we have a commitment from you that, if confirmed, you'll continue this view of welcoming and supporting whistleblowers within the agency as appropriate in order to ensure that this good government practice is a part of the ATF going forward?

JONES:

Well, you definitely have my assurance. The inspector general's report exemplifies the importance that whistleblowers played in the Fast and Furious issue. We have since I've been there enhanced our ombuds program internally. We have strengthened our relationship with the DOJ I.G. and their ombuds program. And any misperception that I do not believe in open channels of communication and respect for whistleblower protections I hope can -- has been and will continue to be diminished.

COONS:

Thank you for your testimony and for your service as a Marine, for your service as a U.S. attorney, and for your service as acting director. And I appreciate your testimony here today.

And to Mr. Delery and your sons, congratulations and thank you for your testimony as well.

KLOBUCHAR:

Thank you very much, Senator.

Senator Grassley?

GRASSLEY:

A common complaint that I've heard within ATF is that U.S. attorneys' offices are unwilling to pursue straw purchasing charges. According to one account, you reportedly said of gun and drug cases, quote, "We could do that all day, but we've chosen not to because that's not the best use of our resources," end of quote. How would you expect to encourage agents in the ATF to pursue gun crime when you wouldn't think it's a high priority for yourself as a U.S. attorney?

JONES:

Well, gun crime, Senator, is a high priority for me as the United States attorney. And I think our record...

GRASSLEY:

The statement I read that you said -- is that statement wrong?

JONES:

Without knowing the context or the specifics of the statement, it's difficult.

GRASSLEY:

It was in the Minneapolis Star Tribune.

JONES:

If what I recall you may be referring to, it's an overall -- it was an article that addressed what we discussed earlier as to why the drop in terms of the overall numbers in criminal prosecutions. And again, it really is driven by three things: our resources, our collaboration with state and locals, and what can we do that they cannot do, and focusing more on impact cases, as compared to be solely driven by the numbers. I believe that was the context.

Because in particular, in the drug and gun area in Minnesota, there's a pretty vibrant, as Senator Klobuchar knows, felon-in-possession statute. In each of the last three years, county attorneys in Minnesota have prosecuted in excess of 800 individual cases. And this is subject to a reporting requirement they have annually.

And so working in collaboration with them, what we have done sometimes formalizes what we call "exile-lite" in Minneapolis, but generally through out the state, is make sure that those most egregious offenders do some into federal court without impeding on the jurisdictional prerogatives of our county attorneys who do yeoman's work working with us to keep the streets safe.

GRASSLEY:

You were chair of the attorney general's advisory committee from 2009 to 2011. In that capacity, you were a member of the Southwest Border Strategy Group. In October '09, that group decided to distribute a draft strategy for combating Mexican cartels. The draft stated, quote, "Merely seizing firearms through interdiction will not stop firearms trafficking to Mexico," end of quote.

The draft strategy goes on to emphasize identifying the members of armed trafficking networks. The implication is clear. The strategy places a higher value on gathering intelligence about trafficking networks than on arresting straw purchasers.

Now, were you there at the October 26th, 2009 meeting of the Southwest Border Strategy Group? Did you approve of the strategy to deemphasize straw purchasing cases? And do you think it's a good strategy to go for big cases instead of putting a stop to straw purchasers whenever you can?

JONES:

To answer your first question, Senator, I was not there. I was brought in as the chair of the attorney general's advisory committee in September. And we were ramping up with a revitalization of that and a transition. So I was not at that meeting. I was not an active participant on the Southwest Border Working Group. I was a participant on the Northern Border Working Group, because that had more relevance to the District of Minnesota.

With respect to your last question about opinions about the firearms case. Public -- we've made it clear from the outset that public safety will never be sacrificed for prosecutive or investigative needs. Public safety is first and foremost in what we strive to achieve in our investigations.

GRASSLEY:

When you took over at ATF, you set out to clean up the shop. Rather than disciplining some of the ATF employees who were clearly responsible for Fast and Furious, you waited for an inspector general's report. It took a year. Now, over 18 months -- or after 18 months after the inspector general's report, ATF has not reported a single individual being disciplined for Fast and Furious. Nobody seems to be fired. Instead, several people were allowed to retire or terminate for other reasons.

GRASSLEY:

I want to ask you about a series of individuals. They were all criticized by the inspector general for that role. For each one, I'd like you to tell -- tell me whether the ATF proposed any discipline to hold them accountable for Fast and Furious. The Fast and Furious -- how about the ATF group supervisor David Voth? What was the situation with him? How was he disciplined?

JONES:

Special Agent Voth was subject to the internal disciplinary process and there were repercussions. Again, I am very sensitive here in this context about the Privacy Act concerns. But he was subject to the disciplinary process.

GRASSLEY:

The Privacy Act doesn't apply to hearings in Congress, but let's move on. How about the assistant agent for -- in charge, George Gillett?

JONES:

Former ASAC George Gillett has retired from ATF.

GRASSLEY:

Assistant Special Agent in Charge James Needles (ph)?

JONES:

Assistant Special Agent in Charge James Needles (ph) is in another capacity within ATF.

GRASSLEY:

So nothing's really happened to him. Special Agent in Charge, Phoenix, Bill Newell?

JONES:

There is still resolution pending that should be forthcoming.

GRASSLEY:

So after all these years, nothing's happened to him. Deputy director in Washington, Bill McMahon?

JONES:

Bill McMahon has retired from ATF.

GRASSLEY:

OK. Retired. Not -- not disciplined. Some of these individuals are involved in other controversies in addition to Fast and Furious. For example, I understand that the ATF's Internal Affairs Division founded fault with George Gillett and Bill Newell's involvement in the investigation of a fire at an ATF agent's home in 2008.

In a separate matter, Gillett sold his personal firearms to a suspect one week after his office opened a gun trafficking case on - on that person. This was one of multiple firearms transactions Gillett -- that are currently under investigation by the inspector general.

Another is a gun that Gillett bought that was recovered at a murder scene of a Mexican beauty queen alongside a gun from Fast and Furious. However, instead of Gillett being disciplined, when you took control of ATF in the summer of 2011, he was allowed to wait and retire in 2012. Why did you allow Gillett to retire rather than hold him accountable?

JONES:

Senator, with -- with all due respect, there are processes in place, and these processes do take time. And, you know, you mentioned the Privacy Act. The specifics of each of these cases -- I would like to just make sure that you understand that the American public understands that we did not stand idly by and not take corrective action, including disciplinary action, according to the rules of the road and the processes that are in play that sometimes are painfully slow.

But all of the individuals you mentioned did get their due process. Many of them were ably represented by counsel.

GRASSLEY:

Well, can you even tell us what discipline was proposed against Newell as a result of the October 2012 report?

JONES:

That is a matter that has quickly come into resolution. And as soon as we can disclose it to you, we will.

GRASSLEY:

ETF Deputy Director William McMahon was the official in Washington D.C. primarily responsible for supervising Gillett and Newell. The inspector general criticized him for his failure to do so, and the result in Fast and Furious.

Yet under leadership, the ATF -- your -- the ATF was going to allow McMahon to retire early at the age of 50. ATF allowed him to go on extended leave and continued to earn credit toward retirement while working a high-paying job for J.P. Morgan Chase in the Philippines at the same time. It wasn't until after I brought this unusual double- dipping arrangement to your attention that ATF attempted to correct the situation. ATF was not even aware that he was in the Philippines.

How was McMahon's status resolved? How is it possible that one of your senior leaders in headquarters could be overseas for months while drawing a federal paycheck without ATF knowing it and working for a private company, and what does that say about how you're running the agency?

JONES:

Senator, Mr. McMahon was one of the individuals terminated. He was not allowed to retire. He was terminated.

GRASSLEY:

He was terminated?

JONES:

He was terminated.

GRASSLEY:

He was able to...

JONES:

He was terminated. At the end of the process, he was terminated.

GRASSLEY:

Was that after I brought it to your attention?

JONES:

The issue that you raised about his leave status and his prior employment status were all subject to a process. We very much appreciate the information enhancing our level of knowledge about things that were already in play internally. But the end result was Mr. McMahon was terminated from ATF.

GRASSLEY:

You have stated that on November 3, 2011, you issued a memorandum saying that the ATF must take all reasonable steps to prevent criminal misuse of firearms. Will you provide a copy of that memorandum to the committee?

JONES:

I believe that that is a updated ATF order that we will provide.

GRASSLEY:

OK. What guidance have you issued to ATF on the issue of questioning suspected straw purchasers?

JONES:

I'm not quite sure I understand the question, Senator.

GRASSLEY:

Well, there -- you -- you've issued some guidance to the ATF on the issue of -- of questioning suspected straw purchasers. What does that guidance say? In other words, you've got people out there questioning straw purchasers. What guidance have you given to them for this questioning?

JONES:

Well as I sit here, Senator, other than the fact that we have special agents who are sometimes involved in the investigation of firearms trafficking that would lead them to question, as any other potential suspect, I'm not aware of any special guidance that would carve out straw purchasers.

GRASSLEY:

Well what about guidance issued to ATF about cooperating federal firearms licensees and their role that they should play in investigations?

JONES:

With respect to that particular issue, I -- I do know that after I arrived at ATF one of the issues that we addressed were

weaknesses and lack of clarity in our confidential informant order internally.

We did a review of that, as we did with the undercover order, and we revised appropriately based in part on things that did not proceed as they should in the -- in the district of Arizona. So we have greater clarity on the use of FFLs as confidential informants currently in place.

GRASSLEY:

Despite the congressional prohibition against keeping a national gun registry. I know that ATF keeps a suspect gun database. Is there any legal standard that ATF agents are required to meet before adding information on a purchaser to a suspected gun database?

JONES:

Well, what the Senator's talking about are eTrace or our tracing capability. Those are -- those are crime guns that are entered in with make, model and serial number. As you and many others are well aware, the Firearm Owners Protection Act of 1986 precludes anything -- a national gun registry. And it would be illegal to do that.

GRASSLEY:

I've also heard allegations from several states of ATF agents going to federal firearm licensees and taking pictures of every form 4473 in the store. Have you heard of this practice, and is this kind of activity by ATF agents acceptable to you?

JONES:

As I sit here, I am not familiar with the practice. I do know that our industry operations investigators, all 700-plus of them with the range of responsibilities they have with literally tens of thousands of FFLs, work very hard to do the appropriate inspections of FFLs. And that's difficult work.

GRASSLEY:

My staff says to me that, by note here, that we're not talking about tracing. We're referring to suspect gun database which was used extensively in Fast and Furious.

JONES:

As I sit here, I'll have to...

GRASSLEY:

Well, then I'll let you answer that question in writing.

JONES:

Yes.

GRASSLEY:

Thank you. The -- on October 12, 2012, the House Committee on Oversight and Government Reform subpoenaed "all agendas, meeting notes, meeting minutes and follow-up reports for the attorney general's advisory committee that refer or relate to operation Fast and Furious" during the time that you were chair.

The Justice Department has never produced any such documents or certified that none exist. Do any such minutes or notes exist? And if so, why haven't they been turned over pursuant to the subpoena?

JONES:

Well, I don't have any knowledge beyond the fact that relevant documents have been collected internally at the department,

and that that matter is probably a part of litigation. If anyone ever wants to ask Mr. Delery questions, I'm sure he can provide clarity about ongoing litigation involving production of documents pursuant to subpoenas.

GRASSLEY:

Well, let's just suppose you said you didn't know and that's maybe legitimate. Let me ask you if you would response to that question in writing.

JONES:

To the extent I have those documents still, we'll respond in writing, Senator. Yes, we will.

GRASSLEY:

Or if they're available, any place that you can put your hands on them. On April 12, 2013, I sent you personally a letter requesting that you provide any personal notes from the advisory committee that you may have taken regarding Fast and Furious. You have not provided any such notes or certified to me that you don't have any such notes. And so why have you not responded?

JONES:

Well, Senator, right out of the blocks, I don't have, as I sit here, any recollection of a letter that's got that specific request. But as I said before, all of my -- all of the documentation related to my tenure at the Attorney General's advisory committee is at the Department and I'm sure that review and production processes have taken place.

GRASSLEY:

U.S. Attorney for the District of Arizona, Dennis Burke, was also on the Attorney General's advisory committee during the time you were Chair. Have you ever discussed Operation Fast and Furious, whether by name or otherwise with Burke? If so, when?

JONES:

Senator, I did serve with Dennis Burke when I was Chair of the AGAC and, in fact, Dennis Burke was Chair of the Subcommittee of the Southwest Border. And our conversations were always at a higher level than the specific cases that were ongoing in the District of Arizona, so I have no recollection of discussing that case specifically with Dennis during my time as Chair.

GRASSLEY:

Burke testified that as a result of Fast and Furious, you raised the issue of title III wire tap approval with the advisory committee. What do you recall about those discussions?

JONES:

My general recollection was the pace with which and the volume of title III requests that the Office of Enforcement Operations, in an effort through the U.S. Attorney community to try and enhance their capability to review title III applications generally.

GRASSLEY:

We recently learned from a follow-up inspector general's report that Deputy Attorney General reprimanded Burke for his role in leaking documents related to Fast and Furious to the press.

The leak was part of an attempt to undermine the credibility of the primary whistleblower, ATF Special Agent John Dodson, which is a perfect example of what I tell you about so often. Or not just your agency, but every agency in town, a whistleblower's about as welcome as a skunk at a picnic.

What was your opinion of Burke's unauthorized release of information about ATF's agents' participation in an undercover operation?

JONES:

I think the circumstance with Dennis Burke is unfortunate. I know what the rules of the road are with respect to appropriate communications in the U.S. Attorney Manual. And I don't have an opinion one way or another about the facts and circumstances because, quite frankly, I know as much as you know on the public record about interactions between former U.S. Attorney Burke and the Deputy Attorney General.

GRASSLEY:

So then is that your answer to my next question, when and how did you learn that Burke was responsible for the leak?

JONES:

That is the answer. I know as much as you know and when you knew it, when it became part of the public record.

GRASSLEY:

Can you tell me did you ever discuss the document that Dennis Burke leaked with Mr. Burke? If so, please describe those discussions.

JONES:

I don't have any recollection of having those kind of discussions with Mr. Burke.

GRASSLEY:

Madam Chairman, I have some documents that I want to put in the record, if I can.

KLOBUCHAR:

All right.

GRASSLEY:

The first one deals with the letter dated June the 10th, 2013, from Carolyn Lerner at the Office of Special Counsel explaining that the investigation of Mr. Jones is in mediation, but is not a closed matter.

KLOBUCHAR:

In the record.

GRASSLEY:

The second one is a letter from Oswald (ph) that I've referred to, the former FBI Special Agent in charge, that I referred to several times, that should be made a matter of the record.

And then I have a whistleblower letter from the White House. The letter's addressed to Senator McCaskill and CC:ed to me, describing the administration's views of whistleblowing protection.

I'd like to quote, "We wish to encourage such individuals to expose waste, fraud and other improper behavior. The administration has been steadfast in its commitment to that very principle and to ensuring that individuals who make lawful disclosures receive legal protections they deserve. This administration," and this is highlighted, "this administration has also repeatedly made clear that it will not tolerate retaliation against lawful whistleblowers."

Editorial comment on that -- I believe every president, at least since Reagan, I've talked to every president about protecting whistleblowers.

And you know what one president said when I suggested that you ought to have a Rose Garden ceremony honoring some whistleblowers, and you'd send from the top of the administration down to the lowest level of public employment a clear picture that being a whistleblower is a patriotic thing to do if you happen to be right what you're whistleblowing about? And you know, one president, he told me, "Well, if we did that, we'd have 3,000 whistleblowers coming out of the woodwork."

Now isn't that a nice thing for a president to tell me? And it wasn't this president that told me that. And so, you know, I believe what the president said here, but it isn't getting down to the lowest levels. And I hope if you are confirmed, Mr. Jones, that you will do what the president has said his administration wants to do. And do that.

The only thing I would say in conclusion, Mr. Jones, if you had agreed to a staff interview, these things that we're discussing here could've been discussed in a private forum (ph). And I'd like to ask you why you didn't give the staff interview we asked?

JONES:

Senator, I look forward, if I'm confirmed, to having regular communications in an oversight capacity with you and your staff and members of this august body.

GRASSLEY:

That doesn't really answer my question why you didn't respond to our requests that you give us staff interview.

JONES:

I did have an interview with respect to a particular matter, but...

GRASSLEY:

What about the other matters that we asked you to have a staff interview with us? I mean, is it embarrassing for you to tell us why you wouldn't come?

JONES:

I'm a member of the Department of Justice and...

GRASSLEY:

They told you not to?

JONES:

No. I can't -- I didn't -- you know, under some circumstances, Senator, I do not have the freedom of action as I did as an individual citizen.

GRASSLEY:

OK, thank you, Madam Chairman.

KLOBUCHAR:

Thank you very much, Senator Grassley. I just wanted to end here by just going through summarizing some of the discussion today.

I appreciate Senator Grassley's focus on whistleblowers. I think it's very important and he's done a great service to our country in calling attention to this. And I also appreciate his willingness to question people, and I think that's what we're supposed to be here to do. So thank you, Senator Grassley, as well as the other Senators who've taken part in this hearing.

Senator Grassley, with that (ph), you have another question?

GRASSLEY:

No.

KLOBUCHAR:

OK.

GRASSLEY:

I would request of you that the record stay open a little longer than the normal one week, because I think there's a lot of things that can come up yet.

KLOBUCHAR:

OK, we will keep it open for two weeks. Is that all right?

GRASSLEY:

Huh (ph).

KLOBUCHAR:

No? What would you like?

GRASSLEY:

Until we get done with this whole...

KLOBUCHAR:

I -- I -- I think we'll keep it open for two weeks and if you and the Chairman want to have another discussion about it, that is up to you. But for now, I'll keep it open for two weeks.

GRASSLEY:

Thank you.

KLOBUCHAR:

I wanted to clarify a few things. First of all...

GRASSLEY:

Is it OK with you if I leave, because I got the prospective Secretary of Commerce coming?

KLOBUCHAR:

I think that's very important and she's a good nominee, as are these nominees. So we hope you have a good meeting with her.

I just wanted to conclude by going through just what we've heard today. There's a lot of attacks that have been made against Mr. Jones. And I know from coming from law enforcement, having experienced some of this myself, it is not easy to manage lawyers. It is not easy to manage police. There are judgment calls that are made all the time -- some are good, some are bad. Mistakes are made. You learn from them. You move forward.

And I think that's important to keep in mind here. And one of the most overriding things I think we should learn from all this is that these 2,300 agents deserve someone whose permanently in charge of them, no matter what the title of the agency is, no matter if people have political disagreements with work that's being done.

I think that the fact that we have an agency of the United States government that we currently do not have a permanent chair of, that we have left dormant for seven years, no matter why, no matter if no one would face a hearing, I think it's just wrong.

And I want to say that having Mr. Jones being willing to come forward for this hearing, knowing exactly what he was going to be subjected to, and with many of these things coming out just recently since he's been nominated, I think that is courage right there.

First of all, we've been talking about the criminal work in Minnesota. And I think he has explained his decision-making. Others may disagree on that. But I would note again, emphasizing that a lot of things go into this -- police work, FBI work, local, state, prosecution's effort, federal prosecution efforts -- that if you look at it as a whole, Minnesota has a pretty good track record with the violent crime rate having gone down 15 percent during Mr. Jones's first tenure as U.S. Attorney from '98 to 2001, a 9 percent decrease with the latest stats we have from 2009 to 2011.

And I would also note that the overall Minnesota doing a good job compared to many states, including most of the states represented by Senators on this committee.

Secondly, the support from law enforcement I've mentioned that's in the room, people who have worked with Jones over a period of time. I think that's important.

Some of the issues that were raised, I think it was Senator Coons who asked some questions about the St. Paul case. I think that's important to have on the record and we have those on the record. On Fast and Furious, obviously Senator Grassley and Senator Cruz, Senator Flake, all asked about this.

And I would say that if you were in the private sector and something went greatly wrong, one of the things you looked at was are the people still in place that were in charge when this happened? And as Mr. Jones has pointed out, I think he changed nearly two-thirds of the people in charge at the agency when he came in after Fast and Furious, that there have been disciplinary proceedings that are underway and have been concluded.

I understand why he can't attach a discipline to every single name of a person and I know he'll work with the Senators who were concerned about that. But I do think it's really important to note that he was brought in after Fast and Furious, after clear mistakes had been made in the agency, to make some changes.

KLOBUCHAR:

I don't think we should forget the good work that's been done by ATF in just the last few months with Sandy Hook, with the investigation after Boston and how quickly those terrorists were apprehended, and then also what happened in West, Texas, which was a horrible tragedy, a horrible explosion, and ATF was right there on the front line figuring out what went wrong.

And as I also pointed out, day in and day out there are cases that you don't read about in the news where solutions are found, where investigations are conducted. So that is -- the last part of course would be the whistle-blower case in Minnesota. I know that person, I have respect for him. I know there can be disagreements.

I am glad this is going into mediation. I think that's very important. But when you look at this whole -- everything together, I think anyone in law enforcement would be able to find a series of problems within agencies. And I think what you have to look at is, what has Mr. Jones done since he took over ATF? Is that worthy of merit? Is it worthy of future nominees decades from now to be able to show that if someone comes in, and is willing to take that responsibility instead of just keeping their job, keeping happy with their families, staying in the state they're in, and they're willing to take on a really hard job and do above average, as we like to say in Minnesota, in terms of trying to clean things up.

Is that to be rewarded? Or is that to be criticized? And so I just end with a quote that I gave my daughter in the car. It's kind of one of those cliché quotes, but I thought it was so fitting when I was trying to get her to do something the other day. And so I took out that old Roosevelt quote where he said, "It is not the critic who counts. Not the man who points out how strong man stumbles. Or where the doer of deeds could do them better. The credit belongs to the man who is actually in the arena, whose face is marred by dust and sweat and blood. Who strives valiantly. Who errs. Who comes short again, and again because there is no effort without error and shortcoming. But who does actually strive to do the deeds, who knows of the great enthusiasms, the great devotions, who spends himself in a worth cause. Who at the best knows in the end of the triumph of high achievement, and who at the worst if he fails, at least fails while daring greatly. So that his place shall never be with those cold and timid souls who neither know victory, nor defeat."

When I tried that quote on my daughter, she said, that's just about men. They only use the word, man. I think I've tried to get beyond that to say that Mr. Jones was -- was willing to take on a very tough assignment. Again I think we owe these agents to have a permanent director. I think we should get him confirmed, and I hope despite all of the work of Senator Grassley at bringing out these important questions, which we must do when we have a nominee before us, that we are able to move forward and get through this, and do this in a timely manner. I also thank you Mr. Delery for your fine credentials and the work you've already done with the Justice Department.

And your most amazing family seated behind you, who continue, I can tell -- if you can manage the Civil Division of the Justice Department as you clearly manage your -- your kids, you're going to do a really good job.

(LAUGHTER)

So, I want to -- that was positive to the boys. That's a very good thing.

(LAUGHTER)

I want to thank both the nominees, their families out there, everyone who has been willing to sit through this hearing, as well as the Senators who were willing to attend. I hope we can move forward with this nomination. I also want to thank Caroline Holland of my staff who headed up the work on this, as well as Senator Leahy's and Senator Grassley's staff. Thank you. As noted the hearing record will be open for two weeks, unless the chairman decides to change that.

And we will move forward, I hope, to a vote on this nominee. Thank you and the hearing -- and the other nominee -- and the hearing is adjourned.

CQ Transcriptions, June 11, 2013

List of Panel Members and Witnesses PANEL MEMBERS:

SEN. PATRICK J. LEAHY, D-VT. CHAIRMAN

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.

SEN. MAZIE K. HIRONO, D-HAWAII

SEN. CHARLES E. GRASSLEY, R-IOWA RANKING MEMBER

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.

WITNESSES:

B. TODD JONES, ACTING DIRECTOR, BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES, U.S.
DEPARTMENT OF JUSTICE

STUART F. DELERY, NOMINATED TO BE AN ASSISTANT ATTORNEY GENERAL FOR THE CIVIL DIVISION,
DEPARTMENT OF JUSTICE

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**NOMINATION OF JAMES MICHAEL COLE,
NOMINEE TO BE DEPUTY ATTORNEY GEN-
ERAL, U.S. DEPARTMENT OF JUSTICE**

TUESDAY, JUNE 15, 2010

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:09 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Leahy, Kohl, Cardin, Whitehouse, Klobuchar, Kaufman, Franken, Sessions, Hatch, Graham, and Cornyn.

**OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S.
SENATOR FROM THE STATE OF VERMONT**

Chairman LEAHY. Good morning. Today the Committee will consider the President's nomination of Jim Cole to be Deputy Attorney General. We are proceeding promptly on the nomination to fill this important position at the Department of Justice, just as we did when President Bush nominated Mark Filip to be the Deputy in 2007. The No. 2 position is vital to our national security and our system of justice.

It has been nearly a year and a half since Eric Holder was sworn in as the 82nd Attorney General of the United States. He has made great strides toward restoring the Department of Justice and the American people's confidence in Federal law enforcement. Morale has improved throughout the Department. Key parts of the Justice Department, like the Civil Rights Division and the Antitrust Division, are now recommitted to their historic functions. The Department has been aggressive in attacking crime, particularly violence related to drug cartels, and it has demonstrated a renewed commitment to aggressively combating fraud.

The Department has effectively confronted national security challenges as part of a coordinated effort across the entire Government. Its prosecutions of those arrested for threatening our national security are yielding important intelligence, but also very importantly convictions and extended sentences. These are difficult problems, but the Attorney General and the Justice Department have played constructive roles in confronting them with integrity and a commitment to our national security.

I would like to start by thanking Jim Cole and his family for their willingness to contribute to these efforts. He is an experienced prosecutor. He has a well-deserved reputation for fairness, integ-

(1)

rity, and toughness. He certainly has a great familiarity with the criminal justice system and the Department of Justice. He understands the issues of crime and national security that are part of the Deputy's job. He served as a career prosecutor within the Department of Justice for a dozen years, prosecuting complex and high-profile corruption cases, and helping to manage the Public Integrity Section.

He served as Special Counsel for a House of Representatives' investigation into allegations of improper conduct by the then Speaker of the House, and he was fair throughout. In the private sector, he has led internal investigations into fraud and corruption. He is leaving a successful career in private practice to rejoin the Department.

I do not know if you have told your family what a big cut in pay you are going to take to do that, but I applaud you for that.

His nomination has received strong endorsements from Republican and Democratic public officials and high-ranking veterans of the Justice Department. In a few minutes, we are going to hear from Jack Danforth, who was a Republican colleague from Missouri in the Senate, somebody I had the pleasure of serving with, as many of us did; a former U.N. Ambassador and former Attorney General of Missouri, and he will introduce him to the Committee. I know that Senator Cardin worked with him in the House on ethics investigations; he will speak about it.

So I think we are very fortunate to have him here. I hope we will have a strong bipartisan vote for him so we can continue to make sure the Department is on top of its criminal justice and national security responsibilities day in and day out, especially as this is the position that, in the absence of the Attorney General, acts as the Attorney General.

Again, I apologize for the hoarseness.

Senator Sessions.

STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. Thank you, Mr. Chairman.

Senator Danforth, it is great to have you, and, Mr. Cole. I enjoyed our discussion yesterday. Thank you for coming by. That was helpful to me.

There are number of critical areas that the Deputy will be involved in. Of course, you act in the absence of the Attorney General, and I am sure he will give you a great deal of the management responsibilities of the Department that has always traditionally fallen to the Deputy. He needs a strong right arm. I know he is a friend of yours, someone that you feel comfortable and he feels comfortable with.

I am not at all satisfied that the Department of Justice is restored. I am not sure it was so unrestored, actually. But I have some concerns about your appointment, and we will talk about those as we go forward.

First, I am concerned about the aggressive way you criticized the Government's response to the September 11th attacks and the creation of military commissions. Your statements show an adherence to the failed 9/11 enforcement approach to Islamic terrorism that

focused on indictments rather than intelligence and individual suspects rather than the individual terrorist networks. You were aggressive in that, and that is the position you took, and it was contrary to what the 9/11 Commission concluded and I think what this Senate has concluded fundamentally.

Your criticism of our efforts against al Qaeda were in a *Washington Post* article two months after 9/11. That article stated—“Washington criminal lawyer James Cole said the Bush administration is invoking an emergency as a pretext for actions ‘contrary to the spirit and letter of the Constitution.’”

I do not think that is an accurate or fair criticism of the administration at that time.

Just days before the 1-year anniversary of September 11th, you wrote an op-ed not honoring the victims of 9/11 or calling for justice against bin Laden, but faulting the then Attorney General John Ashcroft for his decision to support military commission trials of foreign terrorists. In your op-ed, you argued that, “[t]he Attorney General is not a member of the military fighting a war. He is a prosecutor fighting crime. For all the rhetoric about war, the September 11th attacks were criminal acts of terrorism against a civilian population.”

You compared the September 11th attacks to criminal acts like drug violations, organized crime, and murder, writing that, “[t]he acts of September 11th were horrible, but so were these other things.”

You even accused Attorney General Ashcroft of taking America down a dangerous road and abandoning core American principles by supporting military commissions.

From your prior statements, it appears that you would favor trying the September 11th plotters, whether it is Khalid Sheikh Mohammed or Osama bin Laden, in a civilian criminal court. I would also have to assume based on those statements and your writings that you would be in favor of providing Miranda warnings to foreign terrorist leaders when they are captured.

So I am concerned about what kind of signal that means. What is the President saying about his determination as to how to proceed against these enemy combatants who threaten the United States? Does your nomination suggest that it was a correct decision to advise the Christmas Day bomber that he could remain silent and be entitled to a lawyer?

The 9/11 terrorists, I think the American people believe, are war criminals, not common criminals. The attacks were orchestrated by an international terrorist organization, al Qaeda, that was harbored by a foreign government, the Taliban in Afghanistan, and against whom we have authorized the use of military force. They should be prosecuted, I think, consistent with history and propriety, via military commissions just as this Nation prosecuted the Nazi saboteurs who came to our country to bomb civilian targets during World War II.

As a matter of constitutional or international law and as a matter of history, these unlawful combatants are no different. So I also disagree with your claim in your op-ed where you characterized the civilian trial of Omar Abdel Rahman, the mastermind behind the first World Trade Center attack, as a successful model for how to

prosecute 9/11 terrorists. So that is a matter of discussion, a national discussion, which side should you take on that.

But I am not alone in my view. The lead prosecutor in Mr. Rahman's case, Andrew McCarthy, and the presiding judge, former Attorney General Michael Mukasey, disagreed with the notion that the Rahman trial was somehow a model for prosecuting terrorism cases. Former Attorney General Mukasey has written that, "[t]errorism prosecutions in this country have unintentionally provided terrorists with a rich source of intelligence." And he specifically cited the Rahman trial as having tipped off Osama bin Laden through the production of a list of unintended co-conspirators.

Mr. McCarthy has said, "[a] war is not a crime, and you do not bring your enemies to the courthouse." The top officials within the Department of Justice, I think, have got to reject this blind adherence to the pre-9/11 criminal law mind-set.

On that note, I should add that I am also concerned that many Department nominees have made statements much like the ones you have made and evidence the philosophy that you have evidenced on this matter. So this is something that we need to talk about and the Nation needs to get straight.

Briefly, let me say your role as compliance monitor at AIG in the years leading up to the 2008 financial crisis and the \$182 billion bailout of AIG is also troubling. You were entrusted to monitor that company and put effective controls in place. I think we can both agree that things were not effective, the Government's efforts were not effective.

Some well-respected whistleblower organizations have raised questions about your nomination in light of the AIG matter. They have cited internal whistleblower claims that you allowed AIG executives to revise your reports to the SEC. Maybe we can discuss that and get your side of that.

Mr. Cole, you were also repeatedly responsible for reviewing transactions structured by AIG Financial Products Group, the one that was at the center of the credit default swaps, and so we would like to ask about that.

Mr. Chairman, our nominee has a lot of experience in the Department of Justice. He has the confidence of the Attorney General. He brings a number of good qualities to this Committee and to the office if selected, but also there are a number of questions that I think do need to be raised and discussed, and thank you for giving me this opportunity.

Chairman LEAHY. Thank you. Before I yield to Senator Cardin, I will put in the record letters of support: One from Chuck Rosenberg, former U.S. Attorney, Eastern District of Virginia; Harry Rosenberg, former U.S. Attorney, Eastern District of Louisiana; Michael Toner, the former Chairman of the Federal Election Commission and former chief counsel of the Republican National Committee; Jack Sheldon, former U.S. Attorney, Northern District of Alabama; and Ronald K. Noble, the Secretary General of Interpol; and John Wood, former U.S. Attorney, Western District of Missouri; as well as other letters.

[The letters appear as a submission for the record.]

Chairman LEAHY. Senator Cardin.

**STATEMENT OF HON. BENJAMIN L. CARDIN, A U.S. SENATOR
FROM THE STATE OF MARYLAND**

Senator CARDIN. Well, thank you, Mr. Chairman. I asked for this time because I have had a chance to work side by side with Mr. Cole, and I wanted to share that with the members of the Committee.

Let me just point out to Senator Sessions, we are going to have a chance to talk about the military commissions and civil trials, but I think some of Mr. Cole's concerns about the military commissions have been confirmed by the Supreme Court. But we will have a chance to get into those issues as this hearing proceeds.

I asked for this time because in 1995 the House of Representatives had an extremely difficult challenge. The Speaker of our House was under a cloud of using tax-exempt organizations—at least alleged to have used tax-exempt organizations—to promote a political objective. And the bipartisan leadership of the Ethics Committee had to search for someone who we could hire as our Special Counsel, our special adviser, to bring the House of Representatives together, to bring the American people together, on an extremely difficult investigation. And we chose Jim Cole to be our Special Counsel. I then worked with Mr. Cole as one of the four members of the Subcommittee for over a year, as we investigated the situations concerning the Speaker of the House.

And I must tell you, you get to know a person after working with a person for that long of a period of time in such an in-depth way. And Mr. Cole is what you would call a professional in the truest sense of the word.

In the Deputy Attorney General, we want someone who is going to remove politics and represent the interests of the people of this Nation. That is what we were looking for in the Ethics Committee, someone who would be nonpartisan, who would give us the confidence that at the end of the day the American public would be satisfied that we carried out our responsibility on the Ethics Committee. And we could not have done that without Mr. Cole's work.

Rather than giving you my view, let me quote from the Chairman of the investigative committee, the Chairman of the Ethics Committee at that time, Porter Goss, as I think most of you know, a Republican from Florida who went on to become the CIA Director. Mr. Goss said, and I am quoting from him, that Mr. Cole was a "brilliant prosecutor" and "extraordinarily talented." Mr. Goss then went on to state that Mr. Cole and the members of the Subcommittee worked in a "spirit of bipartisan cooperation" that grew as the investigation proceeded.

I point that out because I do not think we could have come together as a House putting the interests of our Nation first without Mr. Cole's professional guidance. And that is exactly what we need as the Deputy Attorney General. So I am very pleased to very much recommend Mr. Cole, based upon my personal experience, to be the next Deputy Attorney General.

[The prepared statement of Senator Cardin appears as a submission for the record.]

Chairman LEAHY. Thank you very much, Senator Cardin.

Our first witness will be Senator John Danforth. He is a former U.S. Senator from the State of Missouri. He was also our Amba-

sador to the United Nations, and one of my very few claims to fame, in my tenure in the Senate, as I served as one of Ambassador Danforth's assistants, I was nominated by President George W. Bush to be a delegate to the United Nations, confirmed by the U.S. Senate, and was told to go up and do whatever Ambassador Danforth told me to do. To this day, he is the only famous person whose picture is in my office of the two of us sitting in the national security hearing of the national Security Council at the United Nations. He served with distinction there, as he did here in the Senate.

It is good to have you back home. Please go ahead.

PRESENTATION OF JAMES MICHAEL COLE, NOMINEE TO BE DEPUTY ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE BY HON. JOHN C. DANFORTH, FORMER U.S. SENATOR FROM THE STATE OF MISSOURI

Senator DANFORTH. Thank you, Mr. Chairman. It is very good to be back, especially since this is only a cameo appearance back in the Senate. But I appreciate your comments, and I am glad to know that my picture is on your wall. You have not told me whether there are flowers in front of the picture, but I am happy to hear that.

Mr. Chairman, I do have a prepared statement. If it is all right, I will submit it for the record. Let me say this about my friend, Jim Cole. I have known Jim for more than 15 years. We both joined the Bryan Cave law firm on exactly the same date. Immediately after leaving the Senate, I joined it in 1995, and Jim also came to Bryan Cave the same year.

We have worked together. I know him well. I have the highest regard for him as a person and as a lawyer. Jim has very extensive experience in the Department of Justice. I believe he served there some 13 years and then entered private practice.

I consider Jim to be a lawyer's lawyer. There is, at least I have seen no ideological or political bone in his body. He is a person who will call them as he sees them and will act in the most professional way.

Senator Cardin referenced the work that Jim Cole did as the Special Counsel to the House Ethics Committee. I remember that at the time that Jim was doing that work, I got a phone call from Adam Clymer, who at the time was a reporter for the New York Times, and Adam Clymer said to me, "Who is this Jim Cole? He is your law partner. I do not know anything about him." And Adam Clymer said, "He is so close-mouthed in conducting an investigation that when I"—Adam Clymer—"asked him where he was born, he would not answer the question." So I think that that, Mr. Chairman, is a mark of professionalism and an indication of the kind of person Jim Cole is.

We worked together particularly right after the Enron scandal broke, and there were allegations that Arthur Andersen had destroyed records. We were retained by Arthur Andersen and asked to examine their record retention policy and to create for them a new policy, which we did. And I can tell you again that Jim was very, very professional in doing this. No corner is cut by Jim Cole.

So it is a privilege for me to be here on his behalf and to tell the Committee that it is my hope that he is confirmed and that this Committee will move him forward with a strong bipartisan vote.

[The prepared statement of Mr. Danforth appears as a submission for the record.]

Chairman LEAHY. I appreciate you and what you had to say. I should also note that when Senator Danforth retired from the Senate, we did not let him totally retire. He was appointed by then Attorney General to lead the investigation of the FBI's standoff with the Branch Davidians in 1993. President Bush sent him in 2001 as a Special Envoy to the Sudan, and after that he was tapped to be U.S. Ambassador to the United Nations.

I have no questions of Senator Danforth other than to say I am delighted to have him back here.

Senator SESSIONS. I am, too, and you are so well respected and remembered, Senator Danforth, and we appreciate your service in the Senate and post-Senate for the good of the country. Thank you very much.

Senator DANFORTH. Thank you very much.

Chairman LEAHY. Anybody else?

[No response.]

Well, then, Senator Danforth, thank you very much. I know you have a pressing engagement in Pennsylvania. I wish you well in it.

Senator DANFORTH. Thank you, Mr. Chairman.

Chairman LEAHY. Mr. Cole, before you sit down, would you please stand and raise your right hand? Do you swear that the testimony you are about to give before the Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. COLE. I do.

Chairman LEAHY. Thank you very much. Please sit down.

Before we begin, Mr. Cole, you have members of your family here. Would you please introduce them? Because someday this will be in the Cole family archives, and they will all know they were here. Please go ahead.

Mr. COLE. Thank you, Mr. Chairman. It is my honor to introduce my family members. I have here today behind me my wife, Susan, who is, put simply, my best friend. She has also, unfortunately, had to put up with a great deal from me in my career, long times away from home trying cases, both for the Justice Department and in private practice, and putting far too much of the burden of our family on her. I will apologize to her in advance if I am confirmed because I may have to do a little bit more of that in the future. But she has been my rock and my support, and I thank her greatly for everything.

Also behind me is my daughter, Amanda, and my son, Jackson. These are two children that a parent could not be prouder of. My daughter currently finished the College of Charleston down in South Carolina and is living down there, a constituent of Senator Graham's at this point. And my son is on his way to college in Louisiana where, obviously, the huge issues about the gulf are swirling around, and he will be going to a school that has a tradition of public service and of helping in the community, and he looks forward to helping in that regard.

Also here today is my mother-in-law, Audrey Levin; my brother-in-law, Daniel Levin; and Marilyn Pearlman, my aunt. And I welcome them all. Thank you, Senator.

Chairman LEAHY. Thank you. Please go ahead, sir.

**STATEMENT OF JAMES MICHAEL COLE, TO BE DEPUTY
ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE**

Mr. COLE. Chairman Leahy, Ranking Member Sessions, thank you for the opportunity to appear before the Committee today. I am honored by President Obama's nomination of me to be the Deputy Attorney General, and I look forward to describing for you the goals I hope to accomplish if confirmed by the Senate.

If confirmed, I will be returning to the Department where I served for 13 years as a career prosecutor. In a sense, this would be for me like returning home.

My earlier service at the Department spanned the terms of three Presidents, and I had the privilege of working for five Attorneys General, both Republicans and Democrats. My 13 years in the Department were filled with some of the most rewarding experiences of my professional career, and it was a privilege to work with and learn from people who strove every day to uphold the highest traditions of excellence in protecting the American people and upholding the rule of law.

I joined the Department in 1979, through the Honors Graduate Program straight from law school, and spent my early years as a trial attorney in the Criminal Division. I developed expertise in the public corruption area and prosecuted, among others, a Federal judge, a Federal prosecutor, and a Member of Congress. Eventually I served as Deputy Chief of the Public Integrity Section. I was proud to work in this field because it was—and it and still is—important to me that the American people know that public officials are serving the public interest and not their own.

In 1992, I went into private practice where I have engaged in both civil and criminal litigation. I have also been called upon to help companies establish or improve programs that monitor compliance with laws and regulations. For example, as Senator Danforth mentioned, he and I worked closely to develop document retention policies for Arthur Andersen after the Enron investigation uncovered serious deficiencies.

In 1995, as noted by Senator Cardin, I served for 14 months as the Special Counsel to the U.S. House of Representatives Committee on Standards of Official Conduct. I led an investigation into allegations that a high-ranking member had improperly used tax-exempt money for partisan purposes and had provided misleading information to the Committee. I take pride in the fact that my investigation led to a bipartisan resolution of the matter even though it took place in a very partisan environment. Our recommendations were approved by an overwhelming majority of the full House.

In 2005, I was selected by the Justice Department and the SEC to serve as an independent monitor at the insurance company AIG. I was first tasked by court order to look at 5 years of transactions to determine if AIG assisted any of its clients to, as they say, “cook their books” through the use of complex transactions. That work led to another appointment in 2006, in which I developed financial

reporting and regulatory compliance programs for the company. While the company resisted some of my efforts, I insisted on tough measures.

Should I have the honor of becoming Deputy Attorney General, my first and foremost duty will be to help the Attorney General keep Americans safe. We must continue to do everything in our power to protect Americans from the threat of terrorism, consistent with the rule of law. We must use all available lawful means to protect our national security, including, where appropriate, military, intelligence, law enforcement, diplomatic, and economic tools and authorities. We must strongly defend this country from attacks by terrorists, consistent with our core values.

I would also work closely with the Attorney General to reinvigorate the Department's traditional law enforcement mission. The Department of Justice must redouble its efforts to combat financial fraud, mortgage fraud, and health care fraud, to enforce civil rights laws and to thoroughly investigate and prosecute environmental crime. I believe that my experiences in the public and private sectors have equipped me well to address these problems, which are so costly to all Americans.

I very much look forward to serving with an Attorney General whom I respect and with whom I have a strong working relationship. I share the Attorney General's goals of protecting the American people against both foreign and domestic threats; ensuring the fair and impartial administration of justice; assisting State and local law enforcement; and defending the interests of the United States. I look forward to doing all I can to achieve these goals.

Perhaps most of all, I look forward, with your support, to coming home and again serving with the fine men and women at the Justice Department.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Cole appears as a submission for the record.]

[The biographical information of Mr. Cole follows.]

Chairman LEAHY. Well, thank you. Thank you very much.

We have had some notes back and forth here that General Petraeus, while testifying in another Committee, appeared to be in a condition of fainting but has, we are told, left under his own power, walked out. General Petraeus, of course, is one of those people who works around the clock and may have simply been exhausted and dehydrated. But I think it is safe to say that every single member of this Committee hopes that the general will recover and be well.

Attorney General Holder told this Committee that the United States is at war with a vicious enemy who targets our soldiers on the battlefield in Afghanistan and our civilians on the streets here at home. He emphasized that, in taking on this threat, we can and should use every instrument at our disposal to defeat terrorism, including military commissions and our Federal criminal courts. He has said repeatedly—and I agree with him—that prosecuting these enemies in Federal criminal courts is in many instances our strongest tool to gain not only intelligence but also convictions.

Now, it has been mentioned about your 2002 column advocating the use of Federal criminal courts in prosecuting terrorism suspects. You said the Attorney General is not a member of the military fighting in war; he is a prosecutor fighting crime.

Now, it is 8 years later. How do you view the efforts to combat the threat of terrorism and the role of the Justice Department?

Mr. COLE. Mr. Chairman, perhaps one of the most important duties of the Justice Department is to fight terrorism. We have an unprecedented threat against our country in this area, and as I stated in my article in 2002, it is an unprecedented threat that we had never seen before, and we must use every resource we have and the Attorney General must use every resource he has to fight this scourge and this enemy.

The point of the article that I wrote in 2002 was to state that we must do so consistent with the rule of law. That was the point of the article, and that was the core of the article. It was not really meant to address whether or not we are at war. It was meant to address how we deal with one of the most devastating problems presented to our country perhaps in its history.

The view that I have come to and have developed and is consistent with that article is we must use every tool we have to fight terrorism. That includes both military commissions and Article III courts. At the time I wrote that article, the military commissions had grave questions about whether they were constitutional and whether they were consistent with the rule of law. And subsequent to writing that article, the Supreme Court, I believe on more than one occasion, stated that those military commissions, as they were constituted at the time and subsequent efforts, were not making and meeting constitutional muster.

Chairman LEAHY. In fact, under both Republican administrations and Democratic administrations, we have used our Federal courts on terrorism matters. I am told over 400 individuals have been convicted on terrorism-related charges. We certainly—these were in our courts—obtained valuable intelligence, much of which I could not go into in an open hearing, but those of us who have been briefed know of the very valuable intelligence we have received

from these people. There are hundreds of terrorists locked up in our prisons, so that is 400.

Now, I will note that three people have been convicted in military commissions. Four hundred to three gives some kind of view here.

Do you agree that we should have all our tools available to us? Even though there have only been three convictions in military commissions, we should have those tools, but we should also have the Federal prosecutors and courts where we have proven that we were able to get 400 individuals convicted.

Mr. COLE. Yes, Mr. Chairman, I agree with you completely. We need all of the tools. The courts have been very effectively used. As you know, there have been hundreds of prosecutions, including of 9/11 attackers, successfully done in court. We have obtained, as I understand, an enormous amount of intelligence through that, and we have been quite successful.

The military commissions have now been improved to where they do meet constitutional muster, and we need both of those tools. Each one has its advantages and its limitations, and we need to be able to use whatever tools will best and most effectively do the job in each individual instance.

Chairman LEAHY. Every day we look in the news, and we see what has happened after the collapse of British Petroleum's Deep-water Horizon oil rig. Oil continues to go into the Gulf of Mexico. It is heartbreaking to see the contaminants wash up on shore, 11 people killed, precious resources being destroyed, families that have created businesses that they have spent generations building up their businesses, they played by the rules, they have done everything they are supposed to, and now because of BP's actions, something totally out of their control, they are losing that.

I agree with both the President and the Attorney General when they say that American taxpayers should not have to pay for the economy and recovery, but BP should. I introduced, along with Senator Whitehouse and others, the Environmental Crimes Enforcement Act, a bill to deter criminal wrongdoing by big oil and other corporations. It increases sentences for environmental crimes. Clean Water Act offenses can have an enormous effect on people, on their livelihoods, actually on their whole way of life. And if there is criminal conduct, then the sentences should reflect it. But also it makes restitution mandatory for criminal Clean Water Act violations.

If confirmed, will you support efforts to hold BP and other companies responsible for environmental disasters and accountable for their actions?

Mr. COLE. Mr. Chairman, as the Attorney General and the President have both said, not a penny of taxpayers' money is going to be used for reparations or anything like that. It will all come from BP. And I believe that is the right way that this should go.

We have seen through what has happened in the gulf the full nightmare of what can happen when environmental catastrophes occur. The economic toll, the environmental toll, all the loss of life—these are very, very serious matters, and they need to be dealt with seriously.

As I understand it, the Department has already begun to do that and has launched investigations in every avenue that it has to try and deal with this and to make sure that reparations are made and that people whose livelihoods have been destroyed are compensated.

Chairman LEAHY. Well, my time is up, but I also have a question about what you learned having been appointed to investigate AIG and the economic disaster they caused by their conduct.

Senator SESSIONS.

Senator SESSIONS. Thank you.

I have said repeatedly that BP is liable and should be held liable for their responsibilities to the extent of their existence. In other words, they are not too big to fail. They have to meet the requirements as the responsible party, which they signed. But I guess as a lawyer I was a little worried about your so confidently stating that they were going to pay for everything that they are—that occurred in this circumstance, rather broad language, having looked at the law and offered legislation myself to try to expand the responsibilities. Do you believe that BP should be required to pay things they are not lawfully required to pay?

Mr. COLE. Well, I think the law obviously, Senator SESSIONS, governs in this, but I know that there are considerations and efforts underway that if there are any limitations imposed by the law, people are starting to look at whether or not there are mechanisms to remove those limitations so that there can be, to the greatest extent possible, an assurance that BP will bear the costs for what happened.

Senator SESSIONS. Well, I think that is fundamentally correct, but as the second-in-command law enforcement officer in America, I think everybody wants to know that they are going to be treated fairly under your leadership, and I hope that you do not mean you would undertake any action to collect that.

I noticed, just an aside, you did a speech entitled "Role of an In-House Lawyer in a Corporation" in October of 2006, and you stated this: "The experience with Arthur Andersen taught the Government something. The consequences were too drastic and hurt too many innocent employees. The Government now tries to work settlements with companies that find themselves in that kind of predicament, and the company does not get indicted and, therefore, can continue to exist."

Well, we know that Arthur Andersen failed immediately upon being charged, as I recall that, and so I am not suggesting this is a totally improper statement, but it seems to go beyond strict enforcement of the law and try to preserve corporations who perhaps should be charged and suffer whatever consequences might result from their criminal acts.

Do you have any second thoughts about that quote that I just read?

Mr. COLE. Senator SESSIONS, I do not. The point of that was to say that there are reasons why you charge corporations and reasons why you do not charge corporations. And certainly the Justice Department, starting back when the Attorney General Eric Holder was Deputy Attorney General, has issued a series of memoranda

that guide prosecutors in determining when a corporation should be charged.

The issue is so sensitive because when you charge a corporation and you cause its demise through that charge, thousands and thousands of employees who had no role in the misconduct are hurt. Thousands and thousands of shareholders who had no role in the misconduct and whose savings were invested in that corporation are hurt. And it is those people who had no role who are hurt who are the ones you need to think about as well when you decide whether to charge a corporation.

Senator SESSIONS. Well, I think that is, I guess, a reality, but it has got to be carefully thought through, or else you are just picking and choosing winners. You are saying BP is too big to fail. They have got employees, too. This is a dangerous philosophy. Normally, I was taught, if they violated the law, you charge them. If they did not violate the law, you do not charge them.

Mr. COLE. Well, one of the issues, Senator, that is very much, as I understand it, in the forefront of the prosecution decisions in the Department is to prosecute the individual executives in these companies who are responsible for these criminal acts, because that is how you are going to get the most deterrence.

Senator SESSIONS. But are you now saying that you are backing off corporate indictments?

Mr. COLE. No, I am not at all. I am just saying there are many ways to be quite effective, and I think you have to balance the interests of how much damage you are doing to people who had nothing to do with the wrongdoing versus how much deterrence you are going to be placing on future conduct like this. And I think you have to make sure that you are effective in the prosecution, both of corporations and of the individual officers.

Senator SESSIONS. So how much empathy you have for the employees. Well, anyway, it is a tough decision. I guess we could go around and around, but I think you need to be careful. That philosophy has some danger to it. I think you fully recognize that as the experienced prosecutor that you are.

I also salute you for saying you want to reinvigorate traditional prosecutions in the Department. I hope that you will look at the numbers, you will look at the prosecutions, and make sure that they are working effectively and that they are high enough based on the number of prosecutors and investigators in the country. I am not sure that we are. We have added a lot of prosecutors and Assistant United States Attorneys around the country. They are paid big salaries. They need to be producing day after day.

My problem with your op-ed the year after 9/11 was that you did not suggest improving the military commissions; you basically flatly stated that these were crimes and they should be prosecuted as crimes. And at one point you talked about, I did not see that in that op-ed, but it was a position directly critical of the concept of military commissions.

Now, are you saying that you left something out you would have liked to have put in that op-ed and that if you draw up a good military commission, you do not think it undermines the Constitution of the United States?

Mr. COLE. Senator, my view is if you have a good military commission that conforms with the rule of law, it is a very useful tool. I commend to the Committee the speech recently by David Kris, the Assistant Attorney General for the National Security Division, that very, very excellently described the advantages of both military commissions and Article III courts and use in the fight against terror. Sometimes it is right to go with an Article III court. Sometimes it is right to go with a military commission. Now that we have military—

Senator SESSIONS. Could I ask you—and my time is up. If an individual is arrested with a bomb attempting to attack the United States, a non-citizen, that individual, as we had on Christmas Day, why wouldn't the best procedure be to presumptively charge them through the military commission process since we have authority that shows they can be brought back into the civilian process and tried as a normal criminal? And you would not then have to appoint lawyers. They would be treated as the enemy that they are. And you would not have to have speedy trial acts, certain discovery rules, and things that really put burdens on the Government in a time of war that would not normally be in our best interests.

Mr. COLE. Senator Sessions, there are instances here where if you would arrest someone like that, they may, particularly in the military commission realm now, get many of the rights that they get in an Article III court. And it is really not about what rights we are giving them. It is about the effective tool we have.

Senator SESSIONS. But if you hold them in a military commission, they do not have to be given a lawyer, they do not have to be warned of rights, and they do not have to be even set for trial. They can be held as a prisoner of war, can they not?

Mr. COLE. If they are detained and they are associated with al Qaeda or the Taliban, yes, they can be held as a prisoner of war. But you have to be able to establish that they are associated with the al Qaeda or Taliban to be able to do that.

Senator WHITEHOUSE. [presiding.] Senator Kohl.

Senator KOHL. Thank you very much, Senator Whitehouse.

Mr. Cole, many people, of course, have advocated for a long time that Guantanamo Bay needs to be closed. But there is another consideration that is particularly vital during these difficult economic times.

On June 7th, the Washington Post posted an article revealing that the United States has spent more than \$500 million on the Guantanamo Bay prison and support facilities. The Department of Defense spends \$150 million a year to operate Guantanamo. But knowledgeable people say it would cost half that amount to operate a comparable facility within the United States.

Of course, our Nation's safety is our first priority, but would you agree that the cost should be a factor as the administration decides how to proceed with closing the prison? And what role do you think cost should play in Congress' deliberation about what to do with respect to Guantanamo?

Mr. COLE. Senator, I think cost does play a role. I do not think it can be the determinative role because the primary issue in trying to decide how to close Guantanamo is the safety of the American

people. That is what is going to override, as I understand it, almost every decision that will be made in that regard.

But that is not the only thing. Cost is important. We have dire economic situations in our country, we have large deficits, and we need to be smart about where we use our dollars. So cost certainly plays into the decision on how to close Guantanamo and almost every other decision we face here in the United States.

Senator KOHL. Mr. Cole, as you know, the Inspector General recently issued a troubling report providing that the Justice Department does not have plans or policies in place to respond to a biological, chemical, or nuclear attack. It was concluded that in the event of such an attack, the Department is "not prepared to fulfill its role to ensure public safety." Clearly, this is not something that any of us want to hear.

What are your thoughts on this issue? And what immediate steps will you take to address this should you be confirmed?

Mr. COLE. Senator, I have not closely studied the report. I have certainly read about it. I was at least encouraged to see that it came to the conclusion that the FBI, one of the largest components in the Justice Department, did have a good WMD program for its employees. But it still leaves the concern about what other components in the Department need to do.

Certainly if I am confirmed, one of the first things I am going to do is look into this, look into the recommendations that the IG has made, and do whatever I can to make sure that we put in place appropriate protections for all of the employees at the Justice Department to make sure they are safe.

Senator KOHL. Mr. Cole, it seems that the antitrust enforcement loses out to other interests in internal administration deliberations. One example is that we have sought a letter from the Justice Department in support of our legislation to repeal the freight railroad industry's undeserved antitrust exemption. Despite the fact that Assistant Attorney General Varney has expressed her support for our legislation, no such letter has been forthcoming, apparently because of objections from the Department of Transportation.

Do I have your commitment to work inside the administration to secure such a letter? And, more generally, how will you ensure that antitrust enforcement and competition policy is seen as a priority in the deliberations between one agency and another?

Mr. COLE. Senator, certainly the antitrust issues are very important, and Assistant Attorney General Varney, as I understand it, has done quite an excellent job in her role in this area.

You state that there are a number of different agencies involved. I obviously am not privy to all the information that is going on within the Department, all of the considerations that may be involved in delaying this letter. Certainly, if confirmed, I would, once I get there, be happy to work with you and to work with the Department and work with all the relevant agencies on making sure that we have vigorous antitrust enforcement in all the areas, including the one you note.

Senator KOHL. As we discussed in my office when we met, that is a high priority that I have, and I would like to feel that you will also feel that it is a high priority to get that letter of support. I

know you cannot assure me of it this morning, but I am listening carefully to what you say.

Mr. COLE. I appreciate that, Senator. This is a very important issue and one which I will look into, if confirmed, when I get there.

Senator KOHL. Thank you.

For several years, I and others have worked to restore COPS funding following years of cuts by the prior administration. Will you work to ensure that the COPS program continues to be adequately funded? And will you support the bill that we have to create a permanent COPS office within the Justice Department?

Mr. COLE. Senator, the COPS program is a very important part of a holistic law enforcement approach to crime throughout the country and to helping State and local law enforcement achieve some real gains and goals in the fight against crime. It is something I know the Department supports in many, many different ways, and I cannot imagine that there would be any lack of support in this area within the Department. It is an important program and receives the highest priority there.

Senator KOHL. Thank you, Mr. Cole.

Thank you, Senator Whitehouse.

Senator WHITEHOUSE. Thank you, Senator Kohl.

Senator Hatch is not here. He is next in order. So we will go on to Senator Cornyn and then Senator Cardin.

Senator Cornyn.

Senator CORNYN. Thank you, Mr. Chairman.

Good morning, Mr. Cole. Congratulations to you and your family for your nomination.

I have questions pertaining to some of your writings and opinions relative to the war on terror, and I appreciate the fact that when you wrote this article back in 2002, the state of the military commissions was in flux, both here in Congress and in the Supreme Court. But you recognize now, I think you have said, that military commissions can be an appropriate venue for trying foreign terrorists who have committed acts of terrorism against the United States. Is that correct?

Mr. COLE. That is correct, Senator.

Senator CORNYN. Let me ask you a little bit, there seems to be some confusion about Miranda, about Miranda rights. As I recall, when you detain someone and you read them their Miranda rights, the first thing you tell them is their right to remain silent. Is that correct?

Mr. COLE. That is probably the first part of the Miranda rights, yes.

Senator CORNYN. And why in the world would you read a suspected terrorist Miranda rights if, in fact, the first thing you want from someone who has committed a terrorist act is to find out more information about their travels, their associations, their planning, and their knowledge of terror networks? Why would you tell them the first thing out of the starting gate is that they have a right to remain silent? Or do you not support reading Miranda rights to suspected terrorists?

Mr. COLE. Senator, Miranda is a constitutional requirement that comes, as the Supreme Court has said, not from statute but from the Constitution. There is an exception that the Court has carved

out in the Quarles case, which is the public safety exception. When you capture a terrorist and there is the ticking time bomb or another plot evident, you can ask all the questions you want to secure the public safety without Miranda warnings.

Senator CORNYN. I understand. I understand that point, and I agree with you. I guess the question I would have for you is: What is the consequence of a law enforcement officer not providing Miranda rights to a detainee? They may constitutionally do so, correct? And the only result if they fail to do it and a court decides they should have done it would be to exclude evidence produced by that—any statement they might make or any fruit of the poisonous tree. Is that correct?

Mr. COLE. That is correct. The reason to give Miranda warnings is to make sure you can use whatever statements you get. Now, my experience, frankly, in criminal law for 30 years is that frequently, after being given Miranda warnings and after being given a lawyer, defendants and people who are detained talk. And they talk a lot.

Senator CORNYN. Well, that is when—but you cannot compel them, correct?

Mr. COLE. You cannot compel them, no.

Senator CORNYN. Consistent with Miranda. But I guess the problem I have had during the public discussion about whether Miranda rights should be given to people suspected of terrorist actions, both here and on the battlefield, is a confusion in the approach. And I worry, as others have stated, that we are lapsing back into what the 9/11 Commission called sort of a criminal law mind-set as opposed to one that, to use your words, I think, uses all the tools available in the national security interests of the United States.

So just to summarize, you would agree with me that if on Christmas Day the Miranda rights had not been given to the man who attempted to blow up that airliner, that you still could have tried him either in a military commission or in a civilian court and gotten a conviction if you were able to use other evidence other than his own statement or any information that might have been learned from that statement. In other words, if you do not give someone—if a judge says you should have given Miranda rights and you do not, that does not mean you are unable to get a conviction in every case, does it?

Mr. COLE. It does not mean you are not able to get a conviction. It certainly creates a number of issues and a number of obstacles to getting a conviction that I know most prosecutors try to avoid. There are enough surprises at any trial that we try to avoid as many as we can in bringing any case.

Senator CORNYN. Do you agree with the Attorney General that the trial of Khalid Sheikh Mohammed is still—that trial in a civilian court in Manhattan is still an option?

Mr. COLE. At this point, Senator, I know that matter is currently under review in the administration based on what I read in the paper. These are decisions that have to be made based on all of the facts and circumstances that relate to the case. Not being a part of the Department of Justice right now, I do not know all the facts and circumstances that related to Khalid Sheikh Mohammed's prosecution.

Senator CORNYN. I appreciate that, and I understand completely your statement. But would you agree with me that we ought to take into concern that one of the considerations that ought to be taken into account is the security and safety of citizens at the courthouse and in proximity to the courthouse should that be the focus of another terrorist attack? Would that be a concern?

Mr. COLE. We definitely should take into account the safety of our citizens in almost every decision we make. That probably should be the first thing we take into account.

Senator CORNYN. And if instead of pleading guilty, as he indicated he would do, before a military commission, if he pled not guilty and used this as a propaganda tool to incite like-minded jihadists around the world, would that be a concern?

Mr. COLE. Senator, as I have read throughout the time since 9/11, we have tried and convicted in our Article III courts hundreds of terrorists, including Zacharias Moussaoui, who made the same kinds of threats—

Senator CORNYN. I understand. But I guess my question has to do with the mastermind of 9/11, Khalid Sheikh Mohammed. Do you think that providing him a platform for propagandizing like-minded jihadists around the world, should that be a matter of concern?

Mr. COLE. Well, I think it is—the issue of whether or not a forum is open is really one we are going to face whether or not it is an Article III or a military commission. Both of them have requirements of openness to the public to view. So those are issues that are going to come up, regardless of which forum would be chosen at the end of the day.

Senator CORNYN. And if I can ask just one last question, this has to do with if there was an attempt to try Khalid Sheikh Mohammed in civilian court in the continental United States and for some reason he was acquitted, don't you think it would make good sense and be good lawyering to determine what his immigration status would be, for example, whether he would be eligible to seek asylum in the United States should he be acquitted?

Mr. COLE. There is no question we should deal with that, and, again, I do not know, but I would imagine the Justice Department has already looked at that issue, as I think they have with any number of the detainees, as to what their status would be at any given moment, as to whether they could ever be transferred, released, or in any way let go. Separate issues between a prosecution and the ability to actually let somebody go.

Senator CORNYN. I hope—

Senator WHITEHOUSE. Senator Klobuchar.

Senator CORNYN. Thank you.

Senator KLOBUCHAR. Thank you very much, Mr. Chairman. Welcome, Mr. Cole. I enjoyed our meeting that we had in the office, and I enjoyed the focus that we had on some of the bread-and-butter issues of the Justice Department. It was my impression, being a prosecutor on the local level for 8 years, that it makes a big difference whether or not the Justice Department and the U.S. Attorney's Offices are functioning on a day-to-day basis and doing their jobs. I was very concerned when Attorney General Gonzales was head of that Department, some of the repercussions that it had on our own local U.S. Attorney's Office, and I just wanted your

thoughts on the morale issues. There were some serious concerns when Attorney General Holder took over, thoughts on that, as well as the focus on some of the bread-and-butter issues—white-collar crime, health care fraud, the drug crime, some of the bread-and-butter issues that I feel that the Justice Department, whether intentionally or not, had fallen away from during that period. Thank you.

What are your thoughts on it?

Mr. COLE. Oh. The Justice Department—and I think rightly so from an outsider's view—after 9/11 had to devote an enormous number of resources to national security. It was a new area and a new focus and certainly very important. And resources being limited no matter what had to be diverted. So a lot of the bread-and-butter issues were not given the attention that they needed to be given in the course of that run-up.

Now we again have limited resources, and I think it is one of the important issues for the Justice Department to make sure that we reinvigorate the traditional bread-and-butter functions of the Department to fight fraud, to fight health care fraud, to fight financial fraud, to fight public corruption, to fight every form of crime that it has fought, and just as importantly, to partner with State and local law enforcement to make sure that there is a coordinated fight against crime. This is not something that is done by one or the other. It is done together.

Senator KLOBUCHAR. When I was a prosecutor, I saw firsthand the effectiveness of some of these task forces on a multijurisdictional basis with local and State and Federal, and I will tell you that we have recently had big decreases the last 8, 10 years in crime, and the city of Minneapolis, which is our major metropolitan area, although just in the last few months we have seen some increases. So I hope when, as you get in there you will focus on some of those multijurisdictional task forces. I do think it is a smart way and it is also a way to coordinate resources.

But I wanted to ask you about something that you raised, which was the health care fraud. I am sitting right next to Senator Kaufman, who worked very hard on this issue. But could you talk about what is going on with the HEAT task forces and some of the work? I am interested in this not only because I think it is just horrific that billions of dollars are wasted on health care fraud, but also one of the things I noticed when we had the Justice Department here was that some of our most disorganized health care systems in the most disorganized parts of the country, like Miami, where the delivery systems are messed up, also breed fraud. Because there is not just Government that is not watching over them, but the private sector is not watching over each other.

Could you tell me your views on health care fraud, what is happening there, and give us an update.

Mr. COLE. Well, certainly I at this point am not privy to everything that is going on inside the Department other than what I learn through reading accounts of what is happening in the press. I have certainly been quite impressed with the Department's effort through HEAT to have a very broad-based approach to health care.

First of all, it is not just the criminal enforcement. It is also False Claims Act enforcement. It is the full civil and criminal pack-

age put together. And it is also not just scattershot. It is evidence-based. They are going to various jurisdictions and looking at where there is just off-the-chart billing that is going on in certain areas and focusing the resources in those areas initially. And it has created additional task forces as they have identified additional areas.

This seems to be a very intelligent, smart use of resources, and at least from what I have seen in the papers, a very effective way to go about policing this area that is costing billions of dollars to our citizens.

Senator KLOBUCHAR. Another area that you raised, Internet fraud. The 2009 Internet Crime Report by the Internet Crime Complaint Center was released in March. It revealed that complaints of Internet fraud were up 25 percent from over a year ago and that the total loss had doubled from 2008 to 2009.

I certainly found those cases difficult on a local basis to do. Sometimes it would be people in Nigeria committing these crimes. Sometimes it would be a multi-State fraud. And how is the Justice Department going to be able to assist with these and make this a major focus? Because I really believe that it is the crime of the future. We are already seeing it now. So it is the crime of the present as well. But crooks are using a computer, when they used to use a crowbar.

Mr. COLE. You have raised a very important issue, and it is certainly an issue that Senator Whitehouse had raised when we talked. This is—I think you are right. It is the crime wave of the future, and it is adaptable and changeable as technology adapts and changes. You buy a computer, in 6 months it is obsolete. All of our efforts to try and fight and all of the Justice Department's efforts to try and fight cyber crime and Internet fraud are obsolete so quickly because things change so quickly.

So it is an area that I think needs a great deal of attention to try and make sure we stay as far up on the curve as the Justice Department can in trying to fight this in really an ever-changing and adaptable foe in this area of crime.

Senator KLOBUCHAR. Thank you very much.

Senator WHITEHOUSE. Senator Graham.

Senator GRAHAM. Thank you, sir. Congratulations, Mr. Cole. Is your daughter here?

Mr. COLE. She is, Senator. Right here.

Senator GRAHAM. Do you like the College of Charleston? I will put a good word in for you. It will not help you at all.

[Laughter.]

If she made it, you will make it. I hope you have enjoyed Charleston. And thanks for the money you are spending in South Carolina.

Mr. COLE. It is my pleasure, sir.

[Laughter.]

Senator GRAHAM. We had a good discussion in our office about military commissions. I feel very comfortable that you understand military commissions have a role in the war, as do Article III courts. But I am going to express through our interchange here some frustrations, really not directed at you, but I have had some very extensive discussions with the administration about how Congress can help define some of the rules and how we can bring about

some legislative changes that will lead us to all be safe within our values.

Judges Lamberth and Hogan are two judges who hear habeas petitions from Guantanamo Bay detainees regularly, and here is what Judge Hogan had to say: "It is unfortunate, in my view, that the legislative branch of the Government and the executive branch have not moved more strongly to poverty uniform, clear rules and laws for handling these cases."

There are a bunch of quotes from judges basically asking Congress and the executive branch to give them some assistance. The Attorney General has mentioned it on more than one occasion that there are several areas where Congress could collaborate with the administration to provide some guidance.

Would you be willing to help us find that common ground?

Mr. COLE. I would be very willing to work with the Committee and to work with the Congress to help find that kind of clarity. My view has always been the more clarity, the better.

Senator GRAHAM. Well, the judges are asking this, and I very much believe in checks and balances, but our judges basically are sort of making this up as they go. And I think a uniform statute dealing with habeas right of Guantanamo Bay detainees not only would be helpful to the courts, it would make us a more secure Nation. It would allow us to potentially close Guantanamo Bay. The biggest problem we have with closure now is we have sort of lost the issue can we do it safely.

Could you comment very quickly? What rights would a detainee have if they were transferred from Guantanamo Bay to Thompson, Illinois, let us say, if that became the prison? Would they have more rights in Illinois than they would in Guantanamo Bay?

Mr. COLE. Senator, at least my understanding of the legal status here is I do not think that would change dramatically.

Senator GRAHAM. Could you get back with me? Because there is a real difference of view. I do not know the answer. I would love to get your thoughts after you get the job here, and I assume you will be confirmed.

Now, on Miranda warnings, the goal to me when you capture someone who just tried to blow up an airliner or blow up a van in Times Square, and we believe it is a terrorist activity, is to find out what they know about the ongoing war. You share that goal. Is that correct?

Mr. COLE. I do, Senator, yes.

Senator GRAHAM. And I have been working with the administration, Senator Durbin, and others to find some pretty common-sense exceptions to the Miranda rule by statute, built around the public safety idea, to give our intelligence officials and law enforcement officers a chance to find out more about the detainee before they start assigning lawyers to this person.

Would you support that endeavor?

Mr. COLE. I would very much, if confirmed, be anxious to work with the Committee and work with Congress to find a way to give more clarity and flexibility around the Miranda rule. It is a constitutional dictate, so we will have to have it, no matter—

Senator GRAHAM. Absolutely, and we could build off the public safety exception, have a statute that allows a couple of days for the

intelligence community to assess who this person is, then go to a judge and ask permission to continue to hold for intelligence-gathering purposes, but only if a judge said yes, sort of like a FISA hearing.

We have fleshed this out, but I am very frustrated. We are 2 months after the initial discussion almost, and nothing has happened, and the war is moving on a lot faster than some of the solutions to deal with the war. So I would appreciate any efforts you could lend to this cause of getting Congress and the administration moving quickly to deal with real issues about presentment.

You know, Mr. Kris that you mentioned before gave a speech yesterday that was a bit troubling to me. We have been working on two problems that Miranda presents—two problems with terrorist detention here in the United States: One, the Miranda warning to give some flexibility, and you are right, the Miranda warning itself may not be an impediment in every case, but I just want to give the option to the law enforcement and intel community. And second is presenting the detainee to a judge for charging within 72 hours. To me that seems to be a very small period of time to make an intelligent decision about how to handle this person.

So we are working on some statutory relief mechanisms that would live within our value system, have checks and balances, but provide more tools to the intelligence and law enforcement community fighting this war. And I look forward to working with you on that.

Finally, about habeas review, one case now before the Court, a habeas petition was granted because the Government could not prove at the time of capture the person was a member of al Qaeda. But they did have proof that the person was a member of al Qaeda shortly before the time of capture. One of the things that we are looking at is a presumption that once you are a member of al Qaeda, you are always a member of al Qaeda. But it would be a rebuttable presumption.

Do you think tools like that would be helpful to the judges and to your prosecutors trying to deal with these cases?

Mr. COLE. Senator, anything that can provide more clarity I think is always helpful, because the less that is known and the less certain you are, the more difficult it is to administer some of these laws that we have. All of the facts and circumstances are going to be new and fresh in each case, and I think anything we can do to provide clarity and provide certainty is always helpful.

Senator GRAHAM. And this is what the judge or judges are asking for. I trust their judgment, but we just need some uniform rules dealing with these cases that are unique and novel and a hybrid system of using the best of the civilian and military justice systems.

So I look forward to working with you on these issues, but time is of the essence. The war is ongoing. They are out there coming after us right now, and I do not want to confuse the two systems to the point that the enemy gets an advantage. There is a role, in my view, for an Article III system in the war on terror. There is an equally important role for the military justice commission. But when you capture these guys, the first thing I want to know is: Where did you train? Is something else coming? And our legal sys-

tem now does not give us the flexibility to make those good decisions, and quite frankly, we have just been lucky that these bombs did not go off. And we are going to run out of luck, and I stand ready as a Republican to work with the President to change our laws in a way to make us safer, live within our value system, and try to find a way to close Guantanamo Bay, if we can. And I look forward to working with you in those endeavors.

Mr. COLE. Thank you, Senator. I do as well.

Senator WHITEHOUSE. Before I call on Senator Kaufman, who is next, let me just add my own emphatic underline to Senator Graham's offer to work with this administration. In the 3 years that I have worked with him, I have come to the strong belief that he wants to work on these issues in completely good faith, and I know that he is very knowledgeable and expert in this area. So add that emphatic underline, and if you would be good enough to work with our side of the aisle, too, that would also be nice.

Mr. COLE. I would look forward to working with everybody.

Senator WHITEHOUSE. Senator Kaufman.

Senator KAUFMAN. Thank you, Mr. Chairman. And I also want to say before I start, Senator Graham has been so—he has not just worked hard, but so articulate and so thoughtful in what he is doing. And I just think it is a wonderful thing to see when bipartisanship really works, and on this issue, Senator Graham has been great.

And I want to thank you for agreeing to do what you have agreed to do. And I want to thank your family because, really, the biggest sacrifice here is going to be made by your family, because this is not a job where you get to come home every day at 5 o'clock. And so I really appreciate what you are doing. But I tell you, when you look back on it, it is a great thing to look back on. So I want to thank you for what you are doing, not just because you are making the sacrifice but because you bring so much to the job.

As you know, as Senator Klobuchar, get the bread-and-butter issues. These other issues are important, but clearly most Americans are concerned about what we are doing, what Justice is doing to make sure that they feel like they are safe and secure, not just from international terror but also from domestic crime and domestic fraud and those kinds of things.

So I want to spend some time, as you know, talking about my favorite subject, which is what are we going to do to make sure the people that were involved in this financial crisis pay the price? And as you said, with the reduced resources in many areas, the bread-and-butter issues get harder and harder, but this is an area where we have funded pretty well. We have got \$175 million coming just to go after financial fraud, and I would like you to spend just a few minutes talking about what kind of priority you think that is and kind of your thoughts moving forward when you are confirmed for Deputy Attorney General.

Mr. COLE. Thank you, Senator Kaufman. The area of financial fraud is something that has impacted every single American. The loss of money, the loss of savings, the loss of retirement accounts, the loss of faith in our capital markets has been devastating. And it is something that we need to make sure that people are held accountable for. This is so important, because only by making sure

that people know that there are consequences to having perpetrated this kind of fraud will we have a hope of deterring anybody from ever doing it again.

I harken back to some of the discussion I have had with Senator Sessions. One of the main ways to do this is to go after the individual executives who are responsible to make sure that they have skin in the game, that they are not just going to walk away because their corporation takes a plea. It is they who would go to jail. It is they who will suffer the consequences. And it is they who made millions and millions of dollars who will be forced to give that back. That to me is one of the keys that could come in in a successful program to deal with this.

Now, from what I see, there has been an increase of resources, and it is actually hitting the ground. I have talked to old friends in the Fraud Section in the Criminal Division, and they have told me they are hiring now, and that has been something that has been promised for years and is finally being done. And I find that a very, very important first step, getting boots on the ground to actually start dealing with this issue. There has been a lot of talk about it, but it is finally getting done, and I find that very, very encouraging.

Senator KAUFMAN. And talk a little bit about coordination. You mentioned coordination, that it is so important. Let us start with the U.S. Attorneys. Basically we all know there is a long history of U.S. Attorneys being protective of their turf. This goes back to Republican and Democratic administrations and Main Justice. And so you have cases actually being carried on in Main Justice, and they could be carried on in the U.S. Attorney's Office without true coordination. How do we get the U.S. Attorneys and Main Justice—because you are uniquely positioned, you and the Attorney General are the only people in the Justice Department that all the different sections of the Department of Justice report to. So having someone who can make sure—can you just talk a little bit—I know your experience with these things. Talk a little bit about how we make sure that the U.S. Attorneys—for instance, mainly U.S. Attorneys in the Criminal Division operate together. They share everything they are doing.

Mr. COLE. When I was in the Justice Department years ago, the most successful cases that I saw were those that were brought where the Criminal Division and U.S. Attorneys' Offices worked together. There is a great deal of expertise that can be mined out of the Criminal Division, and there is an enormous amount of talent in all the U.S. Attorneys' Offices.

This is much like everything else we do. We need to use all of the tools we have, and we need to make sure that we avoid turf battles. We need to avoid any sort of petty infighting. Sometimes there are important issues that come up, and they do need to be dealt with, and there are valid complaints and valid issues about who should have a case. But we are a very large organization, and the more that that organization—the more the Justice Department can work together, the greater the success.

Senator KAUFMAN. And how do you—I mean, kind of mechanically, how does it work? I mean, really, the only two people that can really enforce that and make sure it works are you and the At-

torney General. Moving forward, how do you see that actually happening?

Mr. COLE. Well, certainly, looking forward, it would involve the Assistant Attorney General for the Criminal Division, Mr. Breuer, who is an excellent prosecutor and lawyer. He would be interfacing with a lot of the U.S. Attorneys on these cases. The individual attorneys in the sections who have the expertise, as the U.S. Attorneys' Offices get more familiar with them and get to know them and get to see what the value-added can be and the resources that are added can be, then they start to be comfortable. They start to actually work together.

A few successes is usually the key to make everybody start to break through the dam and realize that there is gold to be mined from the cooperation.

Senator KAUFMAN. And, you know, there are a number of reports. The joint savings and loans, one of the key places to obtain information to bring cases was the bank regulators. Can you talk a little bit about how we get the bank regulators into this thing?

Mr. COLE. There have been a large number of Federal agencies that have touched this financial meltdown, and we need to really mine what we can from them, because they all have a perspective and they all saw a part of it that could be very helpful in trying to bring these cases.

We should make sure that we use whatever sources of information that can be found, and the Justice Department—if I were confirmed, I would push this—needs to use whatever sources of information can be found to get insights into how the financial problems occurred, who was responsible for them, all leading to an effort to try and bring those people to justice.

Senator KAUFMAN. And, finally, I just want to really thank you for what you are doing. I think it sends a clear message. This is not about retribution. This is about making sure that everyone gets treated fairly. But there are people on Wall Street—I spent time up there talking to folks and talking to reporters that cover Wall Street—who basically think they got through the financial fraud thing absolutely scot free. And they believe that they have—because these cases are so complex and because they have very, very good attorneys on their side, they genuinely believe that they can get away with this. And I think it is really important not just for retribution but important to where we go down the future that we are working together.

There was a good article in the Washington Post today about the people that are bringing the Securities and Exchange Commission. I think having you come on and do this job is an incredible sign. I think Lanny Breuer, I think the people that we are getting are really key so that we do not have another meltdown with, as you said, all the damage that was caused by that, by people that just think they can do it and without any fear of retribution. That is an important part of how our system works.

So, again, thank you very much for what you are doing. It is very, very important.

Mr. COLE. Thank you, Senator.

Senator WHITEHOUSE. Senator Cardin.

Senator KAUFMAN. Thank you, Mr. Chairman.

Senator CARDIN. Thank you, Mr. Chairman.

Mr. Cole, once again, thank you for your public service. Thank you to your family for the sacrifices that they put up. I know the sacrifices they put up when you were doing the investigation for the House, and we know this is a family effort, so we thank you all for your willingness to serve in the public.

Senator Danforth made an observation that I fully agree with, and that is, his observation is that you will call it the way it is, that you will do what you think is right, and you have an ability to avoid the pressures, outside pressures, and do what you think your job requires you to do.

I saw that in the investigation in the House with Speaker Gingrich. There were many times that some of us disagreed where you were heading, including yours truly, and you were persuasive in the way that you handled it to get us back on the path to resolve the case as it should have been resolved.

Do we have your commitment, as Deputy Attorney General, that you will continue to call it the way you believe is right and that you will not be influenced by partisan politics or popular sentiment, and that you will continue carrying out your responsibilities the way that you believe is right?

Mr. COLE. Senator, if I am confirmed, you have that as a firm commitment from me.

Senator CARDIN. Thank you. So let me test you on one area, which Senator Graham was talking about, which is the closing of Guantanamo Bay. It is a tough issue. It is a very tough issue. And I am not trying to make it easy to accomplish the goal of closing it. But one of the challenges—and I was recently down in Guantanamo Bay. It was not my first visit. I have been there several times—I have been there twice.

What do we do about those detainees that we cannot bring to trial, there is no place really to send them, and we are going to have to detain them for a longer period of time? President Obama and Attorney General Holder made a commitment—and Senator Graham was part of that—that there would be a process in place to review their status so that we could present to the international community that we are using due process of law to make sure that people who are being detained, there is justification for their detention, even though they are not being brought to a criminal proceeding and not being released.

I questioned Attorney General Holder as to when we might expect to receive that guidance, and the narrowest I could pin him down to would be more than a few days and less than a year. I would hope that you would tackle this issue and help us resolve it because in the eyes of the international community, Guantanamo Bay is an icon of abuse. And part of it is that people who may very well be terrorists are still entitled to the rule of law. And we need to make sure that is complied with in the way that we manage this, not just internally, but to the international community.

So I sort of charge you with your reputation to try to bring this to conclusion sooner rather than later.

Mr. COLE. Certainly it is a matter, if confirmed, that I would look into. It is, I think, a very important and high-priority matter, Senator.

Senator CARDIN. I want to bring up one other issue, and that is, this past Friday I was down in the Gulf of Mexico, saw firsthand the horrific damage that has been caused by the BP oil spill. It is hard to imagine just how vast this problem is. We saw oil everywhere. We saw it on Grand Isle, which is a beach community, not too different than Ocean City, Maryland, where there was nobody there other than people cleaning up the beaches. Normally, there would be vacationers. And I cannot imagine what would happen if we had to close Ocean City for a season. And you take a look at the sensitive islands where birds are nesting and see oil all over.

I guess the point I want to stress is that BP oil needs to be held fully accountable for the damages that they have caused. In their application for their permit, they said that they had proven technology to deal with any type of a spill. They did not have proven technology. They are trying to deal with this issue on the fly, and it should have been done in advance. There should have been ways to contain this oil in the event of a spill. That technology should have been onsite. And the best technology they have today may contain upwards to 28,000 barrels if they get fully successful before the relief wells are drilled. And yet we know it is now closer to 40,000 barrels of oil pouring into the gulf.

I guess my point to you is, if you are confirmed and you become Deputy Attorney General, we need to make sure that the people of this Nation are protected. There should be no Government bailout for the damages caused by BP oil. But we have to have aggressive law enforcement. The Department of Justice needs to be there and devote a significant amount of resources to help those small business owners, to help those property owners, to help the taxpayers, and to protect our environment for future generations, assessing accurately the amount of damage caused to our environment and holding BP responsible.

Will this be the highest priority within the Department of Justice under your portfolio if you are confirmed?

Mr. COLE. Senator, my understanding is it already is a very, very high priority in the Department of Justice. The devastation that has been visited upon the gulf is important to the President. It is important to the Attorney General. It is very important to the people who live down there, and that every effort, as I understand it, is being made to address all the issues that you have just outlined as very, very important prerogatives of this Government.

Senator CARDIN. Well, once again, Mr. Cole, let me thank you for being willing to serve the public. You have a very, very distinguished career, and your experience is what we need, and I wish you well.

Thank you, Mr. Chairman.

Mr. COLE. Thank you, Senator.

Senator WHITEHOUSE. Mr. Cole, like many of the graduates of the Department of Justice, I watched with real horror and dismay as the events in the Department of Justice under the Gonzales Attorney Generalship unfolded. One of the most horrifying was what happened at the Office of Legal Counsel. It is almost unimaginable to somebody of my vintage in the Department of Justice that the Office of Legal Counsel would be the subject of an Office of Profes-

sional Responsibility investigation. But that happened, and we have to deal with that.

The Office of Professional Responsibility investigation went forward, and it, too, ran into its own problems, and David Margolis reviewed the OPR investigation and had a variety of critical comments about that.

I have my own concerns about Assistant Deputy Attorney General Margolis' review, and I would like to have the Department clear this up once and for all and put this episode behind it.

The concern that I have about David Margolis' review is that I think he sets the standard for OLC attorneys far too low in his opinion, and I think his opinion under Department protocol becomes precedent. So I would like to ask you when you are confirmed, assuming you are confirmed—I expect you will be confirmed—to review that determination and make a departmental determination as to what the standard should be for lawyers at the Office of Legal Counsel.

Where it stands right now is that a regular day-to-day lawyer with the files under his arm and the rumpled suit, going to the court to bang out his cases every day, is held, when he makes representations about what the law is to the court, to a higher standard than the Office of Legal Counsel is held to when they give advice to the President of the United States. And I think that is wrong. I think that when a lawyer is before a court, the standard that they are held to has a couple of safeguards. One is the judge is going to do their own independent research, and so there is a good likelihood that any error or effort to mislead by the lawyer will be found. And, second, he has his distinguished opposing counsel, if you do not mind if I put you in the role of opposing counsel here for a moment, to explain to the court why that lawyer's argument is wrong and why he has overlooked certain cases.

OLC does not have those checks and balances. OLC's opinions are often secret. The President may not even be a lawyer. For all those reasons, I think that the standard for the Office of Legal Counsel, which, as you and I recall, was the gold standard—these were people who went on to be Supreme Court judges. These were people who were the top of the profession in the United States. The idea that they are held to a lower standard than the regular work-a-day lawyer who is slugging it out with 12 cases under his arm and paper files in the superior court every day to me just seems dead wrong.

So, please, if you would review that when you get there. I think there should be a formal departmental determination made as to what the standard is rather than just the Margolis opinion lasting as precedent. Will you do that?

Mr. COLE. Certainly it is a matter that I would be, if confirmed, happy to look into, Senator.

Senator WHITEHOUSE. The second issue that I want to ask you about is cyber. We talked a little bit about it, as you indicated, when we met. I have a very persistent and serious concern that the American public knows far too little about the damage that the United States of America is sustaining now, yesterday, tomorrow, through cyber attacks, both from infiltration into our computers in ways that allow later harmful actions to be triggered; from tradi-

tional crime, banks being robbed in ways that would make, you know, Bonnie and Clyde look like pikers; and probably the most significant industrial espionage piracy in the history of the world, the biggest transfer of wealth I think ever is happening right now, and we are on the losing end of it. And it is all more or less invisible to the public because if you are in dot.mil and dot.gov, it is classified so deeply that nobody hears about it; and if you are in dot.com, dot.org, or dot.net and you are a corporation, you have a proprietary interest in not letting that information get out. The banks do not disclose that they got hit for tens of millions of dollars because they do not want their competitors to know, they do not want their customers to know. The net result of all of that is that the public does not know.

So I would ask you to review with the Attorney General where our classification policy is on this so that we can make a decision about how much to disclose to the American people about what is actually happening to our country so that they can be engaged in a proper way in the legislative and public acts that need to follow. I think that we are way to the side of secrecy to the point where the secrecy is actually damaging our national security now rather than protecting it. Will you look at that?

Mr. COLE. Certainly, Senator. I think those are important issues and important balancings that need to be done, and certainly the right balance and the right position needs to be found between both the secrecy that is required and the import of getting out those messages to the public.

Senator WHITEHOUSE. You do not necessarily have to give up the name of the bank for the public to know that X gazillion dollars were stolen from an American bank by cyber criminals in this period. And that is the kind of information I think people need to know.

You mentioned earlier that lawyers, prosecutors, like as few surprises as possible, and as somebody who has had the privilege of preparing Federal cases and walking through that analysis, we do try to analyze very carefully how the case is going to go down its path and eliminate as many surprises as possible.

In that context, do you have views on the military tribunals—and I mean the new ones that have been cleaned up of their previous unconstitutional problems, but still do not have as much settled jurisprudence about the conduct of the tribunal and the rules that govern it as an Article III court has from tens of thousands, hundreds of thousands of criminal trials and the precedent that has developed in those over the years.

As a trial lawyer preparing a case and making the decision whether you are going to a military tribunal or to an Article III traditional criminal court, would that factor of the unsettledness of the law in one area versus the settledness of the law in the other weigh as a factor in that calculation? And should it?

Mr. COLE. Senator, I think it should weigh as a factor, and it is, in fact, one of the factors that Assistant Attorney General Kris had mentioned in his speech. But it is not the only factor, and there are any number of factors that will go into on any individual case the decision of where to bring it, either in Article III or a military commission.

But certainly the issues that will be coming up and the issues that will be presented, some of them may be more settled. Some of them may not. But certainly the state of the law and the state of the law in any given forum is certainly one of the factors that should be looked at in making that determination.

Senator WHITEHOUSE. My time has concluded. I think we are going to go into a second round. I would like to follow up on some of the discussions that we have had, and I know Senator Sessions has further questions. So, without further ado, Senator Sessions.

Senator SESSIONS. Thank you. Mr. Chairman, with regard to Dave Margolis, he was in the Department of Justice when I came as an assistant—when I was a young assistant. He had been there a long time, it seemed then, and he loves the Department—

Senator WHITEHOUSE. By the time I got there, he was there a really long time.

Senator SESSIONS [continuing]. Is a leader in this Department. He was always known as an independent guy. He had long hair and he wore jeans around, but everybody knew of and over the years came to respect so greatly his integrity.

I would submit for the record, in light of your comments, a list of a host of former Department of Justice high officials who wrote a letter defending him and his decisionmaking process and his integrity just for the record.

Senator WHITEHOUSE. Without objection.

[The information referred to appears as a submission for the record.]

Senator SESSIONS. I do not think you were attacking his integrity in any way, but—

Senator WHITEHOUSE. No. Just disagreeing with the conclusions he came to.

Senator SESSIONS. Well, I do not disagree with it, and it was a decision that the Office of Legal Counsel made after a great deal of research and effort, and it sought to give what the President said he wanted, which was maximum—what is the limits of my executive power. People have disagreed with how far that memo went, but I think it had a basis.

I would say that Mr. Cole's op-ed, when he basically said that military commissions are inconsistent with our spirit and our Constitution, was in error. If he had done that as OLC, he might have been subject to the same kind of second-guessing.

I want to get this straight. I know we are in a political world and everybody has got different views about how we ought to handle matters as a matter of policy, but there is a choice between taking someone and treating them as a criminal who has been arrested and an enemy who has been captured. You capture enemies. You arrest criminals.

We have authorized a military force against al Qaeda, and it is clear to me that anyone associated with al Qaeda that is captured can be treated as a prisoner of war. And we did not provide prisoners of war lawyers or speedy trials. They are just held until the war is over. Every nation in the world does that. That is consistent with our understanding of war.

So when you apprehend somebody who came right out of Yemen with a bomb on his person, coming from an al Qaeda group, deter-

mined to murder American citizens, that is not a normal criminal. That is an enemy that has been captured. It seems to me that it just makes common sense that the presumption would be that that individual would be held as a combatant, an enemy combatant. If they acted unlawfully, which he did in that case, he could be tried by a military commission. But if you wanted to talk to the individual about intelligence or other things, he could be held as a prisoner of war and not provided a trial by a military commission for as long as the war exists. Once the war is over, they would be released, if not tried.

It also seems to me to be clear that once a person is in military custody, they can be transferred to civilian custody and tried in Federal court. But if you treat them as a civilian from the time of the arrest, they have to be told they have a right to remain silent, even though there might be some public safety exception, which is very vague, maybe 50 minutes of questioning of what I have seen so far, that he has a right to a lawyer who will immediately tell him not to cooperate and not to talk. He would be entitled to a speedy trial, at least except for the exceptions that occur, and discovery of the Government's case. Then you have to have a trial in a public courtroom somewhere with jurors and security and guards on buildings, which led, I believe, the mayor of Alexandria to say, "[n]o more. I do not want another one of those." You cited the Moussaoui case, the 19th hijacker. That took 4½ years and was pretty much a circus. He had to be removed from the courtroom three or four times.

In a military commission they can be held as a prisoner of war. They can be given a lawyer and set for trial. They will not be tried without a lawyer. They can be sent to civilian court if that is the choice and that happens.

So the problem is that the Attorney General's commission has said that all the prisoners at Guantanamo—I think there are 170 or so now left. The presumption is that they will all be tried in civilian courts, and that presumption seems to be carrying over as to when people are arrested, as the Christmas Day bomber. And that is putting us in the Miranda situation that has to be done, in my view.

So I guess my question is: Will you evaluate that? Is it still the Department of Justice policy that everybody at Guantanamo is presumed to be tried in the civilian courts even though they may have been captured on the battlefield in the Middle East?

Mr. COLE. Senator, at least as I understand the protocols that were developed for the review of the Guantanamo detainees—and that review has largely been completed—had that presumption, but it was not determinative, as I think has been stressed time and time again, at least from the readings I have done. It is a decision that is made based on a myriad of factors, perhaps hundreds of factors. Each different fact involved in the case, each different legal issue is going to be evaluated and a determination of what is the most effective place to try any of these people who are determined to be tried.

Senator SESSIONS. Well, the Attorney General has said that, and I can accept that to a degree, except that the people being held in Guantanamo are held as military combatants, as prisoners of war,

initially at least, and still are, and they can be, as you said, transferred to civilian court.

Why wouldn't we treat everybody we capture, at least initially, as a prisoner of war, as a combatant that meets the evidence of that? Why wouldn't we treat them like that and then make our decision later as to whether to move them in Federal court, thereby eliminating a lot of the immediate problems that will arise instantly if you treat them as a civilian criminal?

Mr. COLE. Senator, you pose an important question. I think there is, I would imagine, a great deal of thinking and background that has been gone through within the Department of Justice that I am not privy to that certainly has led to some of these conclusions. I think the nature of what kinds of law enforcement forces we have within the United States that could operate and arrest the various people who are captured is part of it. I think the determination in the first instance upon arrest of whether or not somebody is part of al Qaeda or the Taliban or associated with them may not be a very clear determination that can be made right away, and there are issues that will come into play there as to whether they are, in fact, qualified to be treated as enemy combatants.

I think it is, from my own imagination, an incredibly difficult and important issue that you raise, and I would have to imagine that there has been a lot of background and thinking already done in the Department on it.

Senator SESSIONS. Thank you. I do not know that. Maybe there is. To me that would be maybe something we could all reach an agreement on how to treat a person initially arrested, and if they meet the standards of an enemy, I think we would be better off without any doubt—I do not think it is a close question. Without any doubt, we would be better treating them under the military commissions until we decide otherwise.

Senator WHITEHOUSE. A vote went off 6 or 7 minutes ago, so we will have to bring this hearing to a conclusion. The record will remain open for an additional week, I believe, and I will follow up on the questions that I had in the form of written questions for the record.

One thing I would like to mention in closing, though, is that there has been a certain amount of discussion about what took place down in the gulf, out at the Deepwater Horizon and this geyser of oil that is spouting into the gulf right now. And one thing that strikes me is that—are you familiar with the doctrine of regulatory capture?

Mr. COLE. I have heard it. I am not intimately familiar with it, Senator Whitehouse.

Senator WHITEHOUSE. The MMS was the subject of what would be described as “regulatory capture.” There was quite a good reference to that in the Wall Street Journal the other day on the op-ed page by a senior fellow of the Cato Institute. We do not often agree, but we do agree on this.

I think there is a role for the Department of Justice in protecting the Government of the United States against regulatory capture, against protecting components of the Government of the United States from becoming the tools or the servants or the puppets of the industry that they are supposed to be regulating. So I would

ask you to think—you have spent time in the private sector; you have spent time at the Department—in your role as Deputy Attorney General about how the Attorney General might best perform a role of assuring the American people that the Department of Justice can and will protect the public—and, frankly, the integrity of Government—when in some far off precinct of the Government, this phenomenon of regulatory capture has been allowed to occur. And I would appreciate it if you would give that some thought, and we can talk about it later. But I know we have to rush to the vote, so thank you very much, and thanks to your family—

Senator SESSIONS. Could I add one thing? Senator Grassley had some questions about your actions as monitor of AIG during the time that led up and including the time that they collapsed, and I did, too. I noticed that Whistle Blogger, Corporate Counsel, Wall Street Journal has been somewhat critical or questioning of how you conducted that, being the Federal Government person sitting in the middle of that company, supposedly monitoring it, when all these things occurred. So I guess the time is such we cannot ask that today. I appreciated the opportunity to talk with you about it yesterday a little bit. But we will submit written questions, Mr. Chairman. Thank you.

[The questions appear as a submission for the record.]

Senator SESSIONS. Thank you.

Senator WHITEHOUSE. I thank the Ranking Member, and the hearing is adjourned.

[Whereupon, at 11:58 a.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]