COMMERCE, JUSTICE, SCIENCE, AND RELATED AGENCIES APPROPRIATIONS FOR 2012

HEARINGS

BEFORE A

SUBCOMMITTEE OF THE

COMMITTEE ON APPROPRIATIONS

HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

SUBCOMMITTEE ON COMMERCE, JUSTICE, SCIENCE, AND RELATED AGENCIES

FRANK R. WOLF, Virginia, *Chairman*

JOHN ABNEY CULBERSON, Texas
ROBERT B. ADERHOLT, Alabama
JO BONNER, Alabama
STEVE AUSTRIA, Ohio
TOM GRAVES, Georgia
KEVIN YODER, Kansas
CHAKA FATTAH, Pennsylvania
ADAM B. SCHIFF, California
MICHAEL M. HONDA, California
JOSÉ E. SERRANO, New York

NOTE: Under Committee Rules, Mr. Rogers, as Chairman of the Full Committee, and Mr. Dicks, as Ranking Minority Member of the Full Committee, are authorized to sit as Members of all Subcommittees.

MIKE RINGLER, STEPHANIE MYERS, LESLIE ALBRIGHT, DIANA SIMPSON, and COLIN SAMPLES,
Subcommittee Staff

PART 7

Printed for the use of the Committee on Appropriations

PART 7—COMMERCE, JUSTICE, SCIENCE, AND RELATED AGENCIES APPROPRIATIONS FOR 2012

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COMMERCE, JUSTICE, SCIENCE, AND RELATED AGENCIES APPROPRIATIONS FOR 2012

TUESDAY, MARCH 1, 2011.

DEPARTMENT OF JUSTICE

WITNESS

ERIC H. HOLDER, JR., ATTORNEY GENERAL OF THE UNITED STATES

Mr. WOLF. Good morning.

The hearing will come to order. I am going to welcome you, Mr. Attorney General. You are testifying today on the fiscal year 2012 budget request. Independent of recissions and scorekeeping adjustments, you are seeking new discretionary budget authority of $28.4 billion, an increase of $336 million or 1.2 percent above fiscal year 2010 and current CR levels.

Your budget request for fiscal year 2012 is in large part driven by rapidly growing requirements in your detention and incarceration accounts. You are requesting program increases of $461 million just to provide the necessary capacity for Federal prisoners and the secure housing of detainees in the custody of U.S. Marshals Service.

There are small yet important increases requested in the area of national security. We will have some questions on that. As in the case of last year, it was unclear what direction you are going to take in attempting or not to carry out the President's executive order related to the closure of Guantanamo Bay. Congress has not provided any of the resources requested in the past for these purposes, and the fiscal year 2012 request does not include new requests for prosecutions or for acquisition of the detention facility in the U.S.

We will also have some questions about gangs and other issues like that.

But before we go to your testimony, I want to recognize the ranking minority member, Mr. Fattah, for any comments he might make.

Mr. FATTAH. Let me thank you, Chairman Wolf, for scheduling this very important hearing.

And I want to thank the Attorney General for his appearance and participation this morning.

And moreover, I want to thank the Attorney General for the extraordinary leadership that is being provided by the Department, and we see it in the everyday headlines that showcase major arrests, in terms of Medicare fraud, organized crime, and gang pre-

vention. The work of the Department is obviously vital to our country, and we appreciate your appearance today and look forward to you addressing the appropriation needs of this Department. Given the national security duties relative to many of the agencies in the Department, it is critically important that you have the resources you need to carry out your duties. Thank you.

Mr. WOLF. I thank you, Mr. Fattah.

Mr. Rogers was going to be here to make a statement, and I think he is at the Republican Conference. So when he comes, we may break for that.

With that, Mr. Attorney General, we welcome you and look forward to hearing your testimony. And your full statement will appear in the record.

Attorney General HOLDER. Thank you.

Good morning, Chairman Wolf, Ranking Member Fattah, distinguished members of the subcommittee. I thank you for the opportunity to discuss the President's fiscal year 2012 budget for the Department of Justice and to provide an update on the Department's progress as well as the Department's priorities.

Today I come to you on behalf of my colleagues of more than 117,000 dedicated men and women who serve our Nation's Justice Department in positions and offices all around the world. Above all, I come on behalf of my fellow citizens. As our Nation's chief law enforcement officer, protecting the safety of the American people is my most important obligation. At every level of the Department, this is our primary focus.

As you know, in recent years, our Nation has confronted some of the most significant terrorist threats on the homeland since the September 11th attacks, and the Justice Department has played a vital role in combating these threats. Since 9/11, there have been hundreds of defendants convicted of terrorism or terrorism-related violations in Federal court. And during 2009 and 2010, the Justice Department charged more defendants in Federal court with the most serious terror-related offenses than in any similar period since September 11th.

Just last week, in Chairman Wolf's district, Zachary Chesser, a resident of northern Virginia and a United States citizen, was sentenced to 25 years in prison for attempting to provide material support to the terrorist organization al-Shabaab, communicating threats against Americans and encouraging violent jihadists to impede and obstruct the work of law enforcement.

Also last week, FBI agents arrested an individual in Texas for the attempted use of a weapon of mass destruction. Thanks to the around-the-clock work of hundreds of FBI agents, analysts and Federal prosecutors, this alleged plot was thwarted.

Beyond our critical national security efforts, the Department has made, I believe, extraordinary progress in fulfilling the pledge that I made before this subcommittee nearly two years ago, that we would restore integrity and transparency at every level of our work and that under my leadership, every decision made and every policy implemented would be based on the facts, the law and the best interest of the American people, regardless of political pressures or consequences.

I am also proud to report that the Department has taken meaningful steps to safeguard civil rights in our workplaces, in housing markets, in voting booths and in other areas; to protect our environment; and to bring our Nation's fight against financial and health care fraud to unprecedented levels. In fact, in the last year, the Department has announced the largest financial and health care fraud takedowns on record. And in fiscal year 2010, the Department's Civil Division secured the highest level of health care fraud recoveries in history, $2.5 billion, as well as the second-largest annual recovery of civil fraud claims.

Our Criminal Division saw similar success. In fiscal year 2010, the Criminal Division participated in efforts, including joint enforcement actions with our U.S. Attorneys Offices throughout the country, that secured more than $3 billion in judgments and in settlements.

In addition to our work to secure these recoveries, we have made strategic investments, and we have taken historic actions to combat gangs and both national and international organized crime networks. We have harnessed the new tools and authorities that Congress made available to us to investigate and to prosecute hate crimes. And we have responded to, and must continue to respond to, the recent nationwide surge of law enforcement shootings by ensuring that law enforcement officers have the tools, the training and the protective equipment that they need and deserve.

This is of particular concern to me. This is a very, very real concern of mine. That is why today, overall, I am here to ask for your support of the President's fiscal year 2012 budget for the Department of Justice. Among the priorities identified in this budget are strengthening national security; preventing and combating crime; maintaining safe prison and detention facilities; supporting effective intervention and reentry programs; and assisting our State, local and tribal law enforcement partners.

The budget proposal also places a premium on achieving new savings and efficiencies. It also reflects hard choices, such as program reductions that we have made in order to focus our resources on our highest priority programs, to respond to current fiscal realities and to act as sound stewards of taxpayer dollars.

The fiscal year 2011 continuing resolution has presented significant budget challenges for the Department, given that the current cost of operations and staffing is considerably higher than it was last year. I have announced financial restrictions that I consider difficult but necessary, including ordering a temporary hiring freeze and curtailing nonessential spending. My hope is that these measures will preempt more severe measures in the future.

But even with these directives in place, I submit to you that the Department's fiscal year 2012 budget request, which itself reflects many tough decisions, is essential to our national security and law enforcement work, among other priorities that matter deeply to the American people. With these investments and with your support and steadfast partnership, I am very confident that we can continue to build on our past successes and make good on our core promises of ensuring safety, opportunity and justice for all. Thank you.

[The information follows:]

STATEMENT OF ERIC H. HOLDER JR.
ATTORNEY GENERAL OF THE UNITED STATES
BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES

COMMITTEE ON APPROPRIATIONS
SUBCOMMITTEE ON COMMERCE, JUSTICE, SCIENCE, AND RELATED AGENCIES

MARCH 1, 2011

Good morning Chairman Wolf, Ranking Member Fattah, and Members of the Subcommittee. Thank you for the opportunity to meet with you today to discuss the President's Fiscal Year 2012 budget for the U.S. Department of Justice and the Department's key priorities. I would also like to thank you for your support of the FY 2010 Supplemental Emergency Border Security Act and the FY 2010 Supplemental Disaster Relief and Summer Jobs Act. Those acts provided important resources for our law enforcement and litigation operations. I look forward to your continued support and appreciate your recognition of the Department's mission and the important work that we do.

As you are aware, the FY 2011 Continuing Resolution presents significant budget challenges for the Department, as the current cost of our operations and staffing is considerably higher than last year. Given the Department's vast size and broad responsibilities, I have announced financial restrictions that will be difficult but that, given our funding constraints, are required. One of the measures that I announced was a temporary freeze on hiring. I also directed that components immediately curtail non-personnel spending unless it is necessary for essential operations. The actions that I have announced, including the general freeze on hiring, are designed to keep the Department solvent and operating as effectively as possible. We are taking these steps now to avoid more severe measures in the future, such as staff furloughs. Obtaining adequate funding in FY 2011, and obtaining the President's FY 2012 budget request, is critical to our national security and law enforcement work.

As I appear before you today, we remain dedicated to protecting the American people through the use of every lawful instrument to ensure that terrorists are brought to justice, held accountable for their actions, and can no longer threaten American lives. Over the past year, in partnership with government, law enforcement and industry leaders, we enforced the law and defended the interests of both consumers and the United States, including ensuring the strength and integrity of our most essential health care programs through enforcement actions that helped control health care costs, reduce fraud, and improve the safety of health care for all Americans. The Department continued to ensure public safety against threats foreign and domestic by

prioritizing and dedicating resources to protect the American people. In addition, we collaborated with local law enforcement to investigate the tragedy in Arizona and continue to utilize every resource necessary to bring justice to the victims of the Arizona shooting. We have also led federal efforts to prevent and control crime by taking aggressive steps to combat the serious proliferation of violence along the Southwest border and to attack the nationwide problems of gang violence, related drug trafficking, hate crimes, and child violence and exploitation.

Today, I affirm the Department's commitment to protect the Nation through strengthening our national security; countering the threat of terrorism; fighting crime; and enhancing our litigation work to protect civil rights, consumers, financial markets, intellectual property rights, and the environment. While fulfilling this commitment, I will continue to improve the way federal dollars are spent through exploration of ways to assess the effectiveness of prosecution of violent and other crimes; reduce duplication and realign investigative resources; and promote effective, fiscally sound alternatives to incarceration consistent with public safety. I will continue to make targeted investments to make communities safer for all Americans and strengthen essential state, local and tribal assistance initiatives.

The President's FY 2012 Budget request for the Department is $28.2 billion. The request represents a 1.7 percent increase in gross discretionary budget authority over the FY 2011 Continuing Resolution level. The Budget addresses my key priorities of strengthening national security, preserving the Department's traditional missions, maintaining safe prison and detention facilities, assisting our state, local and tribal law enforcement partners, and identifying savings and efficiencies that promote fiscal responsibility. In addition to addressing my key priorities, the Budget enhances the Department's ability to focus on recovering assets obtained through financial fraud, drug trafficking, and other criminal activity. In FY 2010, the Department's Asset Forfeiture Program obtained over $1.6 billion in forfeited assets and distributed over $674 million to victims of financial crimes and our state and local law enforcement partners. The Department also collected and disbursed over $4.7 billion related to civil debt collection in FY 2010. Of this amount, $3.7 billion was returned to federal agencies, $494.5 million was returned to the Treasury, $391.2 million was paid to non-federal recipients, and $101.8 million was retained for debt collection efforts within the Department. This budget continues our emphasis on fiscal accountability and oversight.

Strengthen National Security

Preventing, disrupting, and defeating terrorist acts before they occur remains the Department of Justice's highest priority. National security threats are constantly evolving and adapting, requiring additional resources to address new critical areas. In addition, increasing global access to technological advancements has also resulted in new vulnerabilities that must be addressed.

The President's budget request demonstrates a dedication to protecting our national security and a commitment to using every instrument of national power to fight terrorism and keep America safe. The Department of Justice plays a critical role in the government's national security and intelligence efforts, and it is essential that the Department's budget maintain the capabilities we have developed even in these difficult fiscal times. Moreover, the budget requests $128.6 million in program increases and 170 additional positions to strengthen national security and counter the threat of terrorism. The requested increases provide the essential technological and human capital to detect, disrupt, and deter threats to our national security.

More specifically, the Administration supports critical national security programs within the Department, including $122.5 million in program increases for the Federal Bureau of Investigation (FBI) and $729,000 in program increases for the National Security Division (NSD). This figure includes resources for the FBI to enhance national security related surveillance capabilities and enhance its Data Integration and Visualization System; expand the Operational Enablers program and Weapons of Mass Destruction/Render Safe capabilities to deploy render safe assets throughout the country to diffuse, disrupt, or destroy weapons of mass destruction; and expand the Computer Intrusion Initiative to increase our capabilities to detect and counter cyber intrusions.

To address the growing technological gap between law enforcement's authority to intercept electronic communications and its practical ability to actually intercept those communications, $17 million in program increases are also being requested to improve the Department's lawful Electronic Surveillance Capabilities for the FBI, Drug Enforcement Administration, Bureau of Alcohol, Tobacco, Firearms and Explosives, and the U.S. Marshals Service.

Preserve Traditional Missions

At the Department, we continue America's greatest tradition of protecting the promise of justice and helping bring justice to those in need. Enforcing the law and ensuring the fair and impartial administration of justice for all requires resources to both investigate and litigate on behalf of the American people. The request provides $57.4 million in program increases to expand the Department's enforcement litigation capacity and its ability to protect vulnerable populations.

The budget upholds the Department's historic role in fighting crime, protecting civil rights, preserving the environment, and ensuring fairness in the marketplace, while responding to new challenges such as the Deepwater Horizon oil spill. In addition, the budget supports the continued robust efforts to crack down on financial fraud, which have already resulted in charges for fraud schemes that have cost victims more than $8 billion in estimated losses nationwide. The budget includes funding to continue the implementation of the Hate Crimes Prevention Act

of 2009 to help communities prevent and respond to violent hate crimes committed on the basis of gender, gender identity, sexual orientation, religion, and disability in addition to race, color, and national origin.

We have also requested program increases of $15 million for the Executive Office of Immigration Review, including funds for 21 new immigration judge teams, additional attorneys for the Board of Immigration Appeals, and funds to expand our Legal Orientation Program.

Maintain Safe Prison and Detention Facilities

It is important for the Department to maintain the appropriate balance of resources within core Departmental functions. Successful investigations lead to arrests, prosecutions, and convictions. With effective enforcement of federal law and administration of justice comes a greater need for prison and detention capacity. More than 5,000 new federal inmates and 6,000 detainees are projected to be in custody in 2012, and adequate funding for prison and detention operations is essential. The FY 2012 budget requests a total of $8.4 billion to maintain basic prison and detention operations.

The FY 2012 request, for instance, includes $224 million in prison and detention resources to maintain secure, controlled detention facilities and $461.4 million for program increases to ensure the growing numbers of offenders are confined in secure facilities. We are committed to safely housing inmates and safely staffing our prisons. The Department also continues its efforts to improve inmate reentry and recidivism rates, which includes $22 million for Second Chance Initiatives to enhance inmate reentry programs, specifically vocational training, education, and drug treatment programs.

In addition, the FY 2012 budget addresses the Federal prison population through sentencing reform. Sentencing reforms are anticipated to help stabilize the growth of the prison population and ensure fundamental fairness in our sentencing laws, policy, and practice. One outcome of these changes would be to address associated long-term costs. The stabilization of the prison population is essential for ensuring the safety of correctional officers and inmates.

We are also continuing our efforts to combat sexual abuse in correctional settings. Simply put, sexual abuse is a crime, not a punishment for a crime. Last month, we published a proposed rule pursuant to the Prison Rape Elimination Act (PREA) that contains national standards aimed at combating sexual abuse in adult prisons and jails, juvenile facilities, lockups and community confinement facilities. In addition to preparing the rule, the Department has been working to ensure that, once promulgated, the national standards are successful. The Department is uniquely positioned to serve as a force multiplier, enabling best practices to gain recognition and enabling correctional systems to benefit from the PREA efforts of other

jurisdictions. The Bureau of Justice Assistance has entered into a three-year cooperative agreement for the development and operation of a Resource Center for the Elimination of Prison Rape. The Resource Center, which was established with FY 2010 funding, will provide additional training and technical assistance to states and localities to assist in the identification and promulgation of best practices and promising practices. The Department's FY 2012 request will supplement our efforts by enabling the Bureau of Justice Statistics to continue its work conducting surveys examining the incidence and consequences of sexual abuse in confinement settings.

Assist State, Local and Tribal Law Enforcement Partners

The Budget requests a total of $3.0 billion for state, local and tribal law enforcement assistance. These funds will allow the Department to continue support to state, local and tribal law enforcement agencies that fight violent crime, combat violence against women and support victim programs.

The Department recognizes that many tribal law enforcement agencies face unique obstacles to effectively promote and sustain community policing. Unlike municipal police agencies, many tribes still lack basic technology to modernize their departments, such as laptops installed in police vehicles. The FY 2012 budget requests $424.4 million in total resources for public safety initiatives in Indian Country.

In addition to providing resources for public safety initiatives in Indian Country, the Department continues to maintain key partnerships with state, local and tribal law enforcement officials and community members to provide resources throughout the Nation for all Americans. These partnerships include the Community Oriented Policing Services (COPS) hiring program, which enables state, local and tribal police agencies to increase the number of officers available for targeted patrol and other proven strategies designed to prevent and reduce crime. In addition, many grant programs are provided through the Office on Violence Against Women (OVW), which provide communities with resources to combat sexual assault and other forms of violence against women through programs such as the Legal Assistance for Victims Program, Sexual Assault Services Program, and the new OVW Consolidated Youth Oriented Grants Program. New programs are requested in FY 2012 for the Office of Justice Programs (OJP), including the Race-to-the-Top style Juvenile Justice System Incentive Grant Program and the Byrne Criminal Justice Innovation Program. In addition, the budget includes funding to continue implementation of the Adam Walsh Act of 2006 to protect children from exploitation; to assist children exposed to violence; and for a smart policing initiative. These programs and our relationships with state, local and tribal law enforcement agencies maximize the Federal Government's ability to fight crime and promote justice throughout the United States.

Savings and Efficiencies

The FY 2012 budget funds the Department's critical missions in a fiscally responsible manner and seeks to achieve a balance in resources that addresses the Department's core missions and functions when and where they are needed. The budget includes an array of savings and efficiencies and compels the Department to work smarter and better, making the most of limited resources and devoting funds to our most critical mission areas. In order to eliminate redundancies and target resources, the Administration streamlines programs and redirects funding to improve the capabilities of Department of Justice law enforcement agencies. These offsets include administrative efficiencies and savings, task force and space consolidations, better utilization and reduction of office space, information technology program management efficiencies, relocation efficiencies, reductions to less effective grant programs, and rescissions of prior year balances.

As we move forward with tough choices necessary to rein in our deficit and put the country on a sustainable fiscal path, we must balance those efforts with the resources and actions required to carry out our law enforcement mission and protect the Nation.

Conclusion

Chairman Wolf, Ranking Member Fattah, and Members of the Subcommittee, I want to thank you for this opportunity to discuss the Department's priorities and detail new investments sought for FY 2012.

Today, I have highlighted critical areas that require attention and resources so that the Department can fulfill its mission to enforce the Nation's laws and protect our national security. I hope you will support the Department in the execution of these worthy efforts. We have made tough choices in this budget. We know we are operating in an age of austerity. We have made significant reductions in certain areas in order to focus our resources on national security and core law enforcement and litigation responsibilities. We ask you to support these priorities.

I am pleased to answer any questions you might have.

Mr. WOLF. Thank you very much.

And I understand from your staff that a member of your family could have a health care problem. If at any time you feel it necessary to leave, that would be terribly appropriate. What we would do is just recess the hearing, and we would reconvene in a month or two or whatever would fit in your schedule.

So I do want you to know, as a father of five kids and fifteen grandkids, to me, family is number one. If you feel at any time, just tell us, and we will recess the hearing.

Attorney General HOLDER. I appreciate it, Mr. Chairman.

FREEDOM OF INFORMATION ACT REQUESTS

Mr. WOLF. The Freedom of Information Act, I briefly discussed this, but I wanted this to be on the record. A review of recent responses to Freedom of Information requests by the Department conducted by the former Civil Rights Division attorney, Jay Christian Adams, showed that political and ideological factors may have influenced how quickly responses were provided.

He provides a list of information from the Department's Freedom of Information Act logs, including the requester and how long the Department took to comply: Fred McBride, from the ACLU redistricting coordinator, got same-day service. Kristin Clarke, NAACP Legal Defense Fund, who sought the dismissal of the New Black Panther party case, same day service. Jerry Seper of the *Washington Times*, 6 months. Jed Babbin of *Human Events,* 6 months.

In May of 2009, I made a Freedom of Information request pertaining to your efforts to secretly release a number of Guantanamo Bay detainees and resettle them into northern Virginia. The Department failed to provide the information I requested after many, many months, never even responded. The Freedom of Information Act requires the Department to respond to a request within 20 days and to provide the requested documents within a reasonable time frame afterwards. Why did Mr. Adams find that no conservative or no Republican or no one on the other side received the reply in the time period prescribed by law?

Attorney General HOLDER. I am not sure what research Mr. Adams has done. I have looked into the issues that were raised in a blog post or an article or something that he wrote. And the best I can determine, there is no ideological component with regard to the response times that the Justice Department makes to these requests. More complex requests take more time. Requests that are relatively simple in nature can be answered faster. But I can assure you that there is no ideological component with regard to how we respond to FOIA requests.

Mr. WOLF. I have never even received an answer.

Attorney General HOLDER. Well, I will certainly look into anything that you have submitted that is outstanding. We try to respond to letters, to FOIA requests. We have tried to make as part of this transparency effort that I talked about in my opening statement, we try to be very responsive when it comes to FOIA requests, whoever submits them. We have metrics that we use to gauge our success in that effort. And I think we have done pretty well reducing our FOIA backlog. To the extent there are still

issues, I would be more than glad to work with you on those. Our hope is to try to be responsive to the requests that we get.

Mr. WOLF. Could you get back to us by the end of the week?

Attorney General HOLDER. I will endeavor to work on this as quickly as we can and try to delineate those things that are outstanding.

[The information follows:]

FOIA REQUESTS

The Department has worked with the Chairman and Subcommittee staff to clarify and expeditiously respond to this request.

I have to say that in preparation for the hearing, one of the things I asked about was where we stood with regard to responses to the letters, I guess, that you had sent. I was told by the folks in the Department that we only have at this point two outstanding responses with regard to letters that you have sent us.

Mr. WOLF. The last letter was 11 months in answering and came in anticipation of the hearing. Eleven months is not a very good time for the Department. We will wait until the end of the week. And short of that, I think we are going to ask for an IG to look at it, because I think you have an obligation certainly to treat Freedom of Information Act requests fairly. So we will see how we go by the end of the week.

DEFENSE OF MARRIAGE ACT

Last Wednesday, you announced that you and the President have concluded that section 3 of the Defense of Marriage Act, as applied to the same-sex couples under State law, is unconstitutional. As a result, the Justice Department no longer intends to defend the law against two ongoing challenges. When an administration makes a determination that a duly enacted, overwhelmingly supported statute—I think it passed 360 to some here in the Congress—is unconstitutional, Congress has a reason to be concerned. After all, the Justice Department has a duty to defend the constitutionality of the laws of the United States and has a long history of doing so.

As the *Washington Post* noted in a February 23rd editorial "this does not mean that Justice Department officials must believe in the wisdom of the law or its policy implications, only that there are good faith and reasonable arguments to be made in defense. It is in short a very low bar. That is the approach taken by former Solicitor General Ted Olson in robustly defending a campaign finance reform law that Citizen Olson, a conservative Republican, would surely have rejected."

The Defense of Marriage Act was passed in 1996 by a vote of 342 to 67 in the House. The very fact that this law passed the House and the Senate and was signed into law by the President provides a strong presumption that the law is constitutional. In addition, I believe almost 40 States have passed a similar law.

According to CRS, the Department of Justice is legally obligated to defend all acts of Congress where a reasonable and good faith argument can be made that the act is constitutional. I realize "reasonable" in this case is defined by DOJ, but the fact that DOJ has defended this Act previously, section 3 in particular, fatally undermines your assertion that no reasonable arguments can be made in

its defense. Do you contend that your previous arguments in defense of this act were not made in good faith?

Attorney General HOLDER. No.

The situation that we face is a different one. The previous arguments that we made in support of the Act occurred in jurisdictions where there was an existing standard, the rational basis standard, a more permissive standard. Applying that standard, the feeling in the Department was that we could in fact defend the constitutionality of the statute. Two cases at issue exist in the Second Circuit, which does not have a standard with regard to these cases. We then had to make the determination what standard should apply.

We looked in the Department. I made a recommendation to the President that, given the discrimination that gays and lesbians have endured in our Nation's history and for other reasons, a heightened scrutiny standard was appropriate. Applying the heightened scrutiny standard, as opposed to the rational basis standard, we made the determination that the statute could not pass constitutional muster. The President instructed me not to defend the statute on that basis after I made a recommendation to him that we did not think it could pass constitutional muster under a heightened scrutiny standard.

Mr. WOLF. Your decision to abandon your duty to defend this law arose in proceedings in circuits where no controlling legal precedents exist. Considering the fact that DOJ has vigorously defended the law in the past, can you see why this would be viewed as a case of political opportunism?

Attorney General HOLDER. I cannot assess how other people would view this. I can tell you that what we did was apply the facts and the law in a neutral and detached way. We made the determination that the announcement that I made was appropriate. It was not a decision that I took lightly. We take very seriously our responsibility to defend statutes that Congress has passed. We have defended the very statute that we are talking about in those circuits where there was existing law and where we thought the statute could pass constitutional muster on that lower standard.

It is unusual, but it occasionally happens that the Department will refuse to defend a statute that Congress has passed. There were a number of instances where that has occurred in the past. In 1990, now Chief Justice Roberts declined to defend a statute that Congress had passed in the case of *Metro Broadcasting* v. *FCC*. So it is not unheard of, but it is unusual.

Mr. WOLF. The *Washington Post* editorial board pointed out in an editorial that the Justice Department is institutionally tasked with defending duly-enacted congressional legislation. This does not mean the Justice Department officials must believe in the wisdom of the law or its policy implications; only that there are good-faith and reasonable arguments to be made in its defense. It is in short a very low bar. That is the approach, as I mentioned earlier.

The Obama administration's tactic, it says, could come back to haunt it. What would the President say, for example, if a conservative Republican administration in the future attempted to sabotage the Obama health care initiative by refusing to defend it against constitutional attacks? Are there other laws down there

that you find difficult to make a reasonable defense on that we should expect?

Attorney General HOLDER. Again, we take seriously the obligation that we have.

We have sent letters to Congress in the past. During the course of this Administration, I have signed each one of those. On maybe 10 occasions, for a variety of reasons, some technical, we have declined to defend a statute that Congress has passed. We look at these on a case-by-case basis, mindful of the historic obligation that we have and that we have followed to defend statutes that Congress has passed. We have shown no unwillingness to do that. This is irrespective of what we think about the wisdom of the statutes that the Congress has passed.

Mr. WOLF. In the past, DOJ has encouraged Congress to engage attorneys in the defense of acts that the Justice Department would not defend. Do you encourage Congress to do that in this case?

Attorney General HOLDER. We did what I think was the responsible thing, which was to announce our position well in advance of the deadlines that have been set by the court that is involved so that Congress can make its own determination as to how it wants to proceed.

Mr. WOLF. Well, I think it is highly unusual for the Justice Department to pick and choose on something that has passed the Congress by a vote of over 360 votes, signed by the President, by a Democratic President, by President Clinton. There are similar laws in 40 different States. It almost looks like a political decision more than anything else that I can say.

Attorney General HOLDER. I will say that I think the legal landscape has changed in the 15 years since Congress passed DOMA. The Supreme Court has ruled that laws criminalizing private homosexual conduct are, in fact, unconstitutional. Congress has repealed the military's "don't ask, don't tell" act. Several lower courts have ruled DOMA itself to be unconstitutional.

So I think that the landscape has changed fairly fundamentally. And when one also looks at the historic discrimination that gays and lesbians have been subjected to, I think the decision that the President made, upon my recommendation, is appropriate.

Mr. WOLF. I think it is inappropriate, and I think it is a bad decision, but we will see how history treats it.

NATIONAL SECURITY FUNDING

Your budget request states that defending national security from both internal and external threats remains the Department's highest priority, yet the funding increases for national security programs are fairly modest, especially when compared to the increases for prisons, $461 million, and for COPS hiring, $302 million. The increase in the national security programs are $128.6 million and are almost all in the FBI's budget. This is less than half the amount you sought for such increases in the fiscal year 2011 budget, none of which have been funded. What are the biggest gaps in fulfilling the Department's national security mission, and how does this budget address those gaps?

Attorney General HOLDER. I think one of the things that we need to do is make sure that we have the intelligence capabilities that

we need, that we have bodies in order to do the very important work that has been set upon us. We have to have a very robust FBI. The FBI is really at the heart of our counterterrorism efforts. And it is for that reason that we have requested additional monies there.

Given the lean budget times, we have tried to formulate a budget that will respond to the needs and the responsibilities that we have while at the same time being mindful of the fact that we are not in the situation where, frankly, we were just a couple of years ago. I think the budget that we have submitted will allow us to fulfill our national security responsibilities in addition to the other things that you have mentioned.

Mr. WOLF. I am going to ask a couple more, and then, Mr. Fattah, I will be going to you so you can know.

GUANTANAMO DETAINEES

You have sought funding in previous years to prosecute Guantanamo detainees in U.S. courts and to acquire and fit out U.S. prison space for their detention and incarceration. The Congress has not provided the funding, and there is no request for any such activities in your fiscal year 2012 request. Can you update the committee on exactly what plans are and what budget requirements are, if any, for activities related to the Department's responsibilities under the executive orders on Guantanamo?

Attorney General HOLDER. It is still the intention of the Administration to close Guantanamo. Guantanamo serves as a recruiting tool for al-Qaeda. All of the intelligence tells us that. It has served as a wedge between the United States and some of its traditional allies. Countless numbers of people who are steeped in these issues, Republicans as well as Democrats, have indicated that the closure of Guantanamo will help us in our fight against those who have sworn to do harm to the American people and American interests around the world.

We want to close Guantanamo. We have also indicated that we will make decisions about how we want to do this. We have to deal with congressional statutes, restrictions that have been put in place, unwisely so, I think, as I indicated in the letter that I sent to Congress about those restrictions. The President in a signing statement indicated that he thought they were unwise and that he would work to have them repealed. I agree with the President's statements. We have to deal, however, with that reality in making determinations as we structure the budget request that we send up to you.

Mr. WOLF. Just for the record, I want to make sure it is answered. The thought that Guantanamo Bay is a recruitment tool—the first bombing of the World Trade Center took place before Guantanamo Bay was there. The bombing of the American embassies in Kenya and Tanzania; Khobar towers; USS *Cole.* Even in the previous Congress, there was no will, which was a Democratic Congress, to really close Guantanamo and most Members strongly disagree with the administration and you on moving Khalid Sheikh Mohammed to New York City. So what are the plans? You have been quoted on previous occasions. What are the plans now? What

should someone expect with regard to Guantanamo and with Khalid Sheikh Mohammed?

Attorney General HOLDER. Well, as I said, we are going to work to try to close Guantanamo. We put together a task force that included law enforcement personnel, people from the Intelligence Community, lawyers, to look at the 242 people who were in Guantanamo when this Administration took office. I think the count now is about 170 or so. We have categorized each of those people, put them into appropriate dockets, in an attempt to close Guantanamo. Again, I start my day at 8:30 every morning with a briefing about the threats for the past 24 hours. It is a compilation of all that the Intelligence Community has found. I am not revealing anything to say that, not every day, but I think on a fairly consistent basis, indications are that the existence of Guantanamo is something that al-Qaeda uses in its recruiting effort. It is simply a fact.

You are right, those incidents that you talked about occurred before the existence of Guantanamo. But Guantanamo fairly or unfairly exists as a thing that is used against us by those who have sworn to harm us and who have in the past demonstrated a capability to harm us. And it is for that reason that we feel as strongly as we do, and are as determined as we are, to close that facility.

Mr. WOLF. Do you think it will be closed by the end of the President's first term?

Attorney General HOLDER. I don't know. We will do all that we can. We have to, obviously, work with Congress. Congress has put barriers in place to what I think we should be doing, so we will have to try to work through those restrictions and work with our allies to try to come up with a way in which we can do this.

TERRORISM RECIDIVISM

Mr. WOLF. I am concerned about terrorist recidivism among those transferred from Guantanamo back to their home countries or third countries. Your head of Legislative Affairs just recently again—this is another indication—recently replied to my letter of last March—that is 11 months—about these concerns. In the intervening 11 months, the situation has gotten worse.

In December, the DNI released assessment that 150 former Gitmo detainees are confirmed or suspected of re-engaging in terrorism or insurgent activities. That is 25 percent of all of those released and a substantial increase over previous reports. The number of confirmed recidivists increased from 27 to 81. Presumably these transfers were only done when adequate security measures were pledged by the receiving government.

What is the Department doing to make sure that these governments can now live up to the supervision, particularly in light of what has taken place in some of those governments around the country, around the world?

Attorney General HOLDER. Recidivism is obviously something that we take very seriously. And those people who go back to the fight—I guess that is the expression that is used—are people who we will hunt down and bring to justice.

Mr. WOLF. Have any Americans been killed by anyone who has gone back to the fight, as you say?

[The information follows:]

RECIDIVISM OF DETAINEES TRANSFERRED

The Department takes extremely seriously any incidence of recidivism of detainees transferred out of the Guantanamo Detention Facility, which is why all transfer decisions have been based on comprehensive reviews of intelligence and threat information. Since January 2009, the Administration has transferred 67 detainees in Guantanamo Detention Facility to foreign countries. Of these 67, three are confirmed recidivists and two are suspected recidivists. Prior to January 2009, 535 detainees were transferred and of these detainees, 79 are confirmed recidivists and 66 are suspected recidivists.

The Department is not the entity within the Government that maintains incident specific information related to these confirmed and suspected recidivists. The Office of the Director of National Intelligence may be able to provide additional information in response to your question. However, as stated, we take extremely seriously any incidence of recidivism of detainees transferred out of the Guantanamo Detention Facility, and are working across the government and with partner governments to minimize risk and keep the American people safe.

Attorney General HOLDER. I am not aware of that. I don't know.

Mr. WOLF. Wouldn't that be something to find out, though? If we had somebody and released somebody, and he then killed somebody. The Administration released several back to Afghanistan. To have somebody from Guantanamo Bay who has been down there serving with Khalid Sheikh Mohammed to be released back to Afghanistan, and the Administration—you were releasing people back to Yemen, only stopping after a number of people raised the issue, saying they are concerned. So I guess it could be checked for the records to see if any who have been released or have been captured or have been picked up have been involved with regard to the death of any Americans?

Attorney General HOLDER. As one looks at the rate of recidivism, I think there is an interesting statistic. With regard to those that have been released during the time of the Obama Administration, we have a recidivism rate of about 7 percent that compares to a rate of about 25 percent under the previous Administration. I think that is a function of the fact that we have been very careful in how we made determinations as to how people at Guantanamo should be treated.

And the numbers with regard to those who have been released during this Administration, we are talking about the possibility—I guess of the 67 people that have been transferred, there have been 2 that have been confirmed, and then 3 who are suspected of re-engaging. That is 3 possibles; 2 confirmed of the 67. As I said, that comes to about 7 percent.

Again, any kind of recidivism is serious and something that we take seriously. But also note that since 2009, there has been a congressional restriction that we have had to run by Congress the people who in fact were going to be released from Guantanamo. That has been done in every case in which this Administration has released anybody from Guantanamo. We have never heard an objection from anybody in Congress about that.

Mr. WOLF. Mr. Attorney General, I have objected, number one. And number two, I offered an amendment which was rejected. We hope to offer it again to make those releases public so the public knows. They are all top secret. We take a look at every one that is done, but most Members of Congress don't know who is being released, when they are being released. So you haven't heard any-

thing because there has been no disclosure and dialogue. The amendment that I had would have made it public.

So I guess I am going to go to Mr. Fattah. The last question is, can we expect any additional transfers in the near future?

Attorney General HOLDER. Well, there are congressional restrictions that we have in place. We still are endeavoring to close Guantanamo, and we will try to continue those efforts, but we will also be mindful of the obligations we have under existing congressional restrictions and communicate whatever we have to communicate to Congress.

Mr. WOLF. Mr. Fattah.

GUANTANAMO—RULE OF LAW

Mr. FATTAH. Thank you, Mr. Chairman. And obviously, a wide area of issues has been covered, but why don't we start where you left off on Guantanamo. Former Speaker Newt Gingrich appeared before a panel discussion here in the Congress almost a decade ago, after 9/11, and they were having this discussion about the United States and our ideals as a nation, as a country that operates under the rule of law. And the chairman would recall that under President Bush, the first President Bush—I think the chairman even joined in—there were complaints lodged against China for arresting people with no charges being made public and no trial. And so there were no charges. There were no trials. And we said that China was operating in a way in which it was in violation of international law and under the guise of a country operating under the rule of law.

The biggest concern about Guantanamo is that our own country—and I go back to Speaker Gingrich. I asked him this question. I said, given post-9/11, given Guantanamo, how do we talk about the rule of law in international company? How do we say it is okay now to arrest someone without charges, with secret evidence, hold them indefinitely and say that is a permissible fact, given our criticisms of China and criticisms of other countries acting in this way?

So I am less concerned about al-Qaeda using it as a recruitment tool. I am more concerned about our own justification for how we take someone, arrest them, don't make the basis of the arrest known, don't allow them to have an attorney, don't try them at any point and hold them indefinitely at Guantanamo, and how we then say as a nation that we are operating under the law.

So my concern is a little bit different from the chairman, and I think that it takes away our ability. When you saw President Bush, Sr., aggressively attack China for doing this, I wonder what we would do today, given our own actions.

But I do think that the chairman makes an important note that people have been released who have returned to activities that are of concern to us. They have been released under the previous administration with complete silence by those on the other side of the aisle in the House who now selectively want to attack this administration, even though the rate of recidivism, as you point out, is drastically different and Congress has approved of these releases.

So I think that there are politics in this and I think that we should try to get politics away from this question of national secu-

rity; let's actually focus on what is important to our country. And in that regard, I want to go to the chairman's original point.

FUNDING IMPACTS OF THE CONTINUING RESOLUTION

A significant part of the FBI's responsibility is in the area of national security. And I want to know, given the short-term CR, given the budget request for next year, where you see the level of agents in terms of—particularly given the fact that over 40 percent of their responsibilities are in the area of national security and it was the desire of the Congress not to have cuts in the area of national security—whether than any of these would be impacted?

Attorney General HOLDER. I am very concerned about the ability to run the Department in a way that is consistent with the obligations that we have if this CR were to continue. We have responsibilities on a national security front that we have addressed in the 2012 budget, even though the increases are frankly not as large as I would like them to be. There are nevertheless increases. We have tried, as I said, to come up with a budget that deals with the fiscal reality that we confront. I am particularly worried about the Bureau of Prisons and the responsibilities that we have there with regard to the intake that comes our way because prosecutors are doing what we expect them to do and agents are doing what we expect them to do. At the current levels that we have in the continuing resolution, we are going to run into a wall at some point.

But to get more particularly to the question that you have asked, I am also worried that, with regard to the hiring needed to stay in front of these national security issues that are the responsibility of the Department, we have to get beyond this continuing resolution. I have tried to take into account the continuing resolution, and I have put in place a hiring freeze and done other things. But that can only tide us over for so long. So I would hope that through my testimony, through the interaction that hopefully the Administration will be having with members of this committee and Congress as a whole, that we will have a resolution of the budget issues that now divide us so that we will have the monies that we need to protect the American people.

DEFENSE OF MARRIAGE ACT

Mr. FATTAH. The Defense of Marriage Act. Any time that in a court of law we are arguing that someone's rights should be restricted in our country, the basis of the scrutiny of the court is an important one. So the point that this should be handled under heightened scrutiny I think, at least for myself and I believe for a majority of the American people that would agree, that any time we are going to trample on someone's rights or restrict them, it should take a very high level of scrutiny by the court. And I think that when we have my colleagues quoting the *Washington Post* editorial, which is not a normal thing for Members who sometimes are on the opposite side of the administration, you can obviously see that there is a great deal of interest in this matter. But it apparently is the case that there have been times in the past where the Department—"past" meaning outside of this administration—where the Department has not gone into court with arguments that they cannot believe in as constitutionally legitimate in previous ad-

ministrations. And I want to make sure that we enter those for the record, and we will, Mr. Chairman.

[The information follows:]

Examples of the Department Declining to Defend Statutes

ACLU v. Mineta (2004). The Department declined to defend against First Amendment challenge a statute conditioning federal funding on agreement by mass transit agencies not to display advertising promoting the legalization of marijuana. The Department originally defended the statute in district court as a valid exercise of Congress' spending power, and relied in part on the ability of mass transit agencies to comply with the requirement in a viewpoint-neutral manner by barring a broader swath of advertising than that specified by Congress. The Department later determined that the statute should not be defended and declined to defend it on appeal.

Dickerson v. United States (2000). In the aftermath of the *Miranda* decision, Congress enacted 18 U.S.C. 3501, allowing for the admission of confessions taken without *Miranda* warnings. Subsequent Supreme Court decisions called into question *Miranda*'s constitutional statute, and those cases were relied on by proponents of section 3501 to defend its constitutionality. But the Department declined to defend section 3501 and instead argued in the Supreme Court that the congressional statute was unconstitutional. The Supreme Court appointed amicus to defend the statute; members of Congress also filed amicus briefs in defense.

HIV-Exclusion (1996). When Congress included in an authorization act a requirement that the military discharge HIV-positive military personnel, President Clinton announced his judgment that the provision was unconstitutional, and instructed the Attorney General not to defend the law in court. The President also directed the Secretary of Defense to enforce the statute pending a final judicial determination of unconstitutionality or repeal. Congress repealed the provision before any litigation commenced.

Children's Health Care Is a Legal Duty v. Vladeck (1996). The Department declined to defend against Establishment Clause challenges a federal statutory provision granting benefits to certain Christian Science health facilities under the Medicare and Medicaid Acts. Though the Department defended the provision in the district court, it later determined that the statute should not be defended and declined to pursue an appeal.

Turner Broadcasting Sys., Inc. v. FCC (1996). In this case, the Supreme Court upheld the constitutionality of certain "must carry" provisions of the Cable Television Act. That Act was enacted over President Bush's veto, which stated that the must-carry provision was unconstitutional. In the initial litigation challenging the must-carry provisions, the Department of Justice, appearing on behalf of defendant FCC, informed the district court that it declined to defend the constitutionality of the must-carry provisions, "consistent with President Bush's veto message." The Department urged the court to permit adequate time to provide Congress the opportunity to defend the validity of the statute. While preliminary proceedings were ongoing, the Clinton Administration reconsidered President Bush's previous position and the Department defended the must-carry provision, ultimately succeeding in the Supreme Court.

Wauchope v. Department of State (1993). In both the district and appellate courts, the Department defended a statute favoring citizen fathers over citizen mothers by giving fathers alone the power to pass citizenship to children born outside the United States. The Department declined to seek certiorari when the Court of Appeals ruled against it, on the grounds that the ruling was "consistent with modern developments in the Supreme Court's jurisprudence" regarding gender distinctions.

Metro Broadcasting v. FCC (1990). The Acting Solicitor General (John Roberts) effectively argued for the unconstitutionality of a federal statute providing for minority preferences in licensing. The United States took the view that strict scrutiny applied to the FCC minority preference program, despite Supreme Court precedent applying a more permissive standard to federal affirmative action programs. The Acting SG authorized the FCC to appear before the Court through its own attorneys to defend the statute. The Court upheld the minority preference program.

Morrison v. Olson, 487 U.S. 654 (1988). Pursuant to the Ethics in Government Act of 1978, the Attorney General requested appointment of an independent counsel to investigate possible wrongdoing of a Department official. Id. at 666-67. Despite the fact that the Department thus had "implemented the act faithfully while it has been in effect," the Solicitor General nevertheless appeared in the Supreme Court on behalf of the United States as amicus curiae to argue, unsuccessfully, that the independent counsel provisions of the Act violated the constitutional separation of powers.

INS v. Chadha, 462 U.S. 919 (1983). Pursuant to a provision of the Immigration and Nationality Act, the INS implemented a "one-house veto" of the House of Representatives that ordered the INS to overturn its suspension of Chadha's deportation. Id. at 928. Nonetheless, when Chadha petitioned for review of the INS's deportation order, the INS – represented by the Solicitor General in the Supreme Court – joined Chadha in arguing that the one-house veto provision was unconstitutional. Id. at 928, 939. Senate Legal Counsel intervened on behalf of the Senate and the House to defend the validity of the statute. Id. at 930 & n.5, 939-40. The Supreme Court invalidated the statutory one-house "veto" as a violation of the separation of powers.

League of Women Voters of California v. FCC, 489 F. Supp. 517 (C.D. Cal. 1980). The Public Broadcasting Act of 1967 prohibited noncommercial television licensees from editorializing or endorsing or opposing candidates for public office. The Attorney General concluded that this prohibition violated the First Amendment and that reasonable arguments could not be advanced to defend the statute against constitutional challenge. The defendant FCC, through the Department of Justice, represented to the court that it would continue to enforce the prohibition, if only for the purposes of "test litigation," but tha tit would not defend the statute's constitutionality. Senate Legal Counsel appeared in the case on behalf of the Senate as amicus curiae, and successfully urged the trial court to dismiss the case as not ripe for adjudication in light of the unlikelihood that any enforcement action would transpire. While appeal of that decision was pending, a successor Attorney General reconsidered the Department's previous position and decided

that the Department could defend the statute. The Supreme Court ultimately held that the statute violated the First Amendment. *FCC v. League of Women Voters of California, 468 U.S. 364 (1984).*

Gavett v. Alexander, 477 F. Supp. 1035 (D.D.C. 1979). In this case, a statute created a program pursuant to which the Army could sell surplus rifles at cost, but only to members of the National Rifle Association. The Army, in compliance with the statute, denied plaintiff an opportunity to purchase a rifle at cost because he was not an NRA member. Id. at 1040. Nonetheless, the Department of Justice concluded – and informed the court – that the NRA membership requirement violated the equal protection component of the Fifth Amendment's Due Process Clause because the discrimination against non-NRA members "does not bear a rational relationship to any legitimate governmental interest and is therefore unconstitutional." Id. at 1044. The Department reached this conclusion on the basis of advice from the Army that the membership requirement "serves no valid purpose" that was not otherwise met. Id. The district court afforded Congress an opportunity to "file its own defense of the statute should it choose to do so," id., but Congress declined to act on this invitation. Id. The court permitted the NRA itself to intervene and argue on behalf of the statute's constitutionality. The district court concluded that the statute was subject to strict scrutiny (because it discriminated on the basis of the fundamental right of association) and invalidated the enactment. Id. at 1044-49.

Simkins v. Moses H. Cone Memorial Hospital (1963). The Department not only declined to defend a federal statute and regulation providing for funding of so-called "separate but equal" hospital facilities but, as the court put it, "unusually enough, [] joined the plaintiffs in this attack on the congressional Act and the regulation" by intervening in a private class action. 323 F. 2d 959. The disputed issue in *Moses H. Cone* was whether a hospital's receipt of federal funds was sufficient under the state action doctrine to trigger the Fifth Amendment, and, if so, whether federal funding of segregated facilities (versus direct maintenance of such facilities) violated the equal protection component of that Amendment. The Department took the position that the requisite state action was present and that the federal provisions violated the Equal Protection Clause, arguing specifically that the federal government had "affirmatively sanctioned" the discrimination at issue.

United States v. Lovett, 328 U.S. 303 (1946). As required by statute, the President withheld the salaries of certain federal officials. The Solicitor General, representing the Unites States as defendant, nonetheless joined those officials in arguing that the statute was an unconstitutional bill of attainder. Id. at 306. The Attorney General suggested that Congress employ its own attorney to argue in support of the validity of the statute. Congress did so, id., and the Court of Claims and the Supreme Court gave Congress's counsel leave to appear as amicus curiae on behalf of the enactment. The Supreme Court held that the statute was an unconstitutional bill of attainder.

But as to the point about the Administration's decision, as I would understand it, the Administration has said that it will still require upholding the letter of the law, but you will not allow your attorneys to go into court and argue something that on its face doesn't meet the scrutiny that would be required? Is that where the Administration is on this?

Attorney General HOLDER. I think that is actually a very important distinction. We will not defend the constitutionality of the statute, but until the statute has either been changed by Congress or there is a definitive judicial interpretation of it or ruling with regard to it, we will continue to enforce the law because it is a law that does exist on the books. So we will enforce the statute, but we will not defend its constitutionality.

Mr. FATTAH. Thank you.

HUMAN TRAFFICKING

Could you talk a little bit about the work of the Department in the area of combatting human trafficking?

Attorney General HOLDER. This is something that is of great interest, not only to the Department, but to this Administration as a whole. We have made this a priority. We have an Administration-wide effort to deal with the problem of human trafficking. We have made budget requests in that regard. When one looks at the problems that exist, not only in this Nation but around the world, it seems to me that this is something that we have to make a priority. You have those people who are at greatest risk being taken advantage of, unfortunately—young people especially. It is something that I have really tried to focus on at the Department and also in conjunction with my colleagues in other executive branch agencies. The Secretary of State leads our efforts on the international side.

MEDICARE FRAUD

Mr. FATTAH. I referenced in my opening statement your recent activities regarding Medicare fraud and organized crime. If you could comment on the Department's recent efforts and successes in that regard and what appropriations requests in your fiscal year 2012 budget would be important in continuing those efforts?

Attorney General HOLDER. We have been particularly successful, I think, when it comes to our fight against fraud efforts. As I have indicated in my opening statement, when it comes to health care fraud and other fraud-related recoveries that we have made under the False Claims Act, we have recovered billions of dollars for the American people. With additional resources, we can increase the amount of money that we get back for the American people, and we have made budget requests in that regard.

When it comes to organized crime, this is something that continues to be an issue that has to be focused on by the Department of Justice. I was in New York about 4 or 5 weeks ago to announce a major takedown that we did of organized crime figures—the largest single takedown of organized crime figures in the history of this Nation. And it shows the breadth of organized crime activity from those things that seem relatively small in scale to things that are

larger and more traditionally seem to be in control—the attempts to control the docks and union activity and things of that nature.

So organized crime continues to be something that we have to focus on. There is a wide range of things that the Department of Justice has on its plate beyond that which is relatively new, the national security side. And what I have come to call these traditional functions are things I have tried to focus on, give attention to and make sure that we have adequate resources to try to address.

Mr. FATTAH. Thank you.

And I will catch up on the next round.

Thank you, Mr. Chairman.

Mr. WOLF. Mr. Culberson.

Mr. CULBERSON. I will wait until the next round.

Mr. WOLF. Mr. Bonner.

Mr. BONNER. Thank you, Mr. Chairman.

Attorney General, it is good to have you back here. Send greetings to your wife who is a citizen of my hometown.

Attorney General HOLDER. From Mobile?

Mr. BONNER. Yes, sir.

In a minute, I want to go to some questions specific to the Gulf Coast Claims Facility, the process set up by the administration. But I would like to pick up on the line of questioning that the chairman and the ranking member had.

DEFENSE OF MARRIAGE ACT

First, about DOMA, since it appears that the Department is not planning to defend DOMA and since, as you know, we are operating in a continuing resolution trying to finish the budgeting process for this fiscal year, could you give us any idea of how much money would be saved by the Department in not defending this, even though there is strong disagreement from many in Congress of this position? And would any of those monies be available in terms of returning to the process? Since you won't be defending it, those are monies that will not be spent by the Department. Would you have any idea how much money that would be?

Attorney General HOLDER. I am not sure we save any money, frankly. The people who would be defending the statute, were we to do that, are career employees of the Department of Justice who will not be spending their time doing that. They will be spending their time doing other things. I am not sure that I see any savings as a result of the decision that I announced with the President.

HYPOTHETICAL CAPTURE OF OSAMA BIN LADEN

Mr. BONNER. And then, as a follow-up to Guantanamo—again, that was the original line of questioning. A few days ago, the CIA director said that if we were to capture Osama bin Laden, that he would very likely end up in Guantanamo. Is there a conflict within the administration that the CIA Director would make that statement and yet you, in answering to Chairman Wolf, continue to advocate a position that it is this administration's view that Guantanamo should be closed?

Attorney General HOLDER. I think the Administration speaks with one voice. It is true that Director Panetta did indicate that in

his testimony. He issued a statement later that evening that was consistent with what the Director of National Intelligence said at the hearing with Director Panetta. And I think the Administration's position is—this is something that we have thought about, that we have tried to work on and prepare for. And were bin Laden to come into our possession, the national security team would consider its obligations and make a decision as to how he would be treated.

GULF COAST CLAIMS FACILITY

Mr. BONNER. As I said earlier, I want to switch gears to something that is parochial to me but really is important to the whole country. Because as you know—I think you were certainly involved in it—that was the impression—back when the President announced last year, in response to the worst environmental oil spill in American history, the creation of the Gulf Coast Claims Facility, and his naming through an agreement worked with BP and the administration—and again, it was our understanding that the Justice Department was heavily involved in this—to the appointment of Mr. Ken Feinberg to be the administrator of this. In the opinion of this Member, who represents Mobile, Alabama, and the coastal counties of my State, the GCCF has been a dismal failure.

Despite continued and direct engagement with Mr. Feinberg to address the systematic shortcomings of his organization, there appears to be no improvement on the horizon, and consistency and transparency remain problematic. Let me give you a quick example. Based on the GCCF's own web page, last week—there are two coastal counties, as you know, in my home State, Mobile and Baldwin Counties. Last week, based on their own numbers, they processed four claims. Unfortunately, based on their own numbers, there are 93,000 claims that remain unprocessed. At this rate, it will take 450 years—I don't think any of us will be here—to process all these claims. And that is assuming there are no new claims that are filed.

Now, the President said in creating this, again with the support of the administration, that this administration was going to stand by the people of the Gulf Coast. Can you—first of all, I want to give a shout-out to Tom Perrelli. He is the only person in this administration that I have confidence in that is going to put pressure on Mr. Feinberg and on BP to fulfill the promise that both the company and the administrator that this administration helped create made and that was to make the Gulf Coast whole. So I want to give a shout-out to Mr. Perrelli, and please let him know how much I appreciate his work.

But can you give us any insight into what the Justice Department's role is in making sure that this creation is going to fulfill the promise that the President of the United States made to the American people?

Attorney General HOLDER. I share the concerns that you have about the impact that the oil spill had on the Gulf Coast. I went down there shortly after, in fact went to Mobile and looked at some of the reconstruction efforts that were at that point underway, the rehabilitation efforts that were underway. The Justice Department does not operate or have any statutory responsibility for the GCCF.

Although, I will say for the record—I thank you for the kind words you said about Tom Perrelli. He is the Associate Attorney General at the Department of Justice and has spent a great deal of time pushing to have claims paid more quickly. We have tried to monitor the activity of the GCCF. Its performance as of January 27th, looking at the numbers I have here, there were about 480,000 claims filed with GCCF; 170,000 of those have been paid, totaling a little over $3 billion. We have expressed our concerns about the pace and Tom has, again, as you have indicated, taken a lead for the Department. We have expressed concerns that we do not think these are being processed as quickly as they can. We have tried to apply, I am not sure I would call it pressure, but we expressed concerns in a way that is consistent with the responsibilities that we have.

We don't have any formal relationship with GCCF. But Tom has used his time, his skills to try to speed up the pace at which people, who are very deserving, whose lives have been very negatively impacted—you have to go, you have to be there to see. It is one thing to read about this. It is a whole different deal to go down there and to actually see people who run hotels, restaurants. I was really struck by the fact that when I was there, it was warm—it was in the height of tourist season, and we went into a restaurant and my wife will kill me for this, I don't remember if it was outside of Mobile, a beach there, and we were the only ones in the restaurant. I talked to the owner of the restaurant; and he said, this was totally atypical, that on a day like this that time of year, they would have had a full restaurant. The only people that were in that restaurant at that time were the people traveling with me.

I made a pledge to the people there I was going to come back a year from my visit to see where we stood with regard to how the claims process was going and to show them that, A, we cared, and B, we did as much as we could to make sure that this process worked for them. And I will go back on that one-year——

Mr. BONNER. Please let me know when that is. I would love to go to lunch with you.

OIL POLLUTION ACT OF 1990

I believe that ultimately the Department will have to issue a ruling that defines exactly what OPA requires of BP. You may not have a direct oversight of the GCCF. Although it begs the question that if you don't, who does? Because clearly it is a monster that has been created by this administration with the promise of making the people whole. And again, the thought that we might have to go 450 years before the last claim is determined, whether it is legitimate or not, our people will not be able to wait for that, obviously. What do you think will trigger a requirement for DOJ to issue a ruling on OPA, and are you preparing to make such a ruling at that time?

Attorney General HOLDER. I am not sure I understand the question on the OPA.

Mr. BONNER. The Oil Pollution Act of 1990 that passed that holds the company responsible and that there will be substantial fines.

Attorney General HOLDER. We have filed a civil lawsuit, at least a couple of months or so ago. We are actively pursuing that matter

in an attempt to gain money from the people and the companies we think are responsible for the spill. There is, as I indicated when I was in New Orleans, an ongoing criminal investigation as well. So the Department is operating on both levels, both with regard to the civil enforcement powers that we have and also with regard to the criminal investigative powers that we have to hold responsible those companies, those people who were responsible for the worst natural disaster in this Nation's history.

We are being aggressive in that regard. We are pushing to make sure that we resolve this as quickly as we can. I think, under Mr. Perrelli's direction on the civil side, we put together this fund that BP has contributed to and from which claims can be processed. But beyond that, we are using our civil enforcement powers to sue to gain additional monies from the responsible parties.

We have made clear, and I pledge again today, that the American taxpayers are not going to have to pay a dime for the cleanup or a dime for making whole the people who have suffered in the region that you represent.

Mr. BONNER. Just one final question, Mr. Chairman. And I have some others that I will submit for the record.

GULF COAST CLAIMS FACILITY

Not to blindside you on this, because you have had a lot of issues to touch base on, but do you have a response to the Federal judge's ruling in New Orleans that Mr. Feinberg is not an independent administrator as he was originally presented to the American people that he would be and, in fact, that he is executing his responsibilities on behalf of his employer, British Petroleum, rather than in a manner that is in the best interest of the victim?

Attorney General HOLDER. The way this has been set up, he is paid by BP or works for BP. But the emphasis that we have placed, and Tom Perrelli has placed is on trying to make this claims process work. Our hope is that however the GCCF is constructed, it potentially can work, and should work better. The 450-year time period that you have indicated is obviously unacceptable. Something substantially, substantially shorter than that, is what we have to be looking at, and we will try to assist to the extent that we can by applying pressure where we can, by using our lawsuits to try to get money to people as quickly as we can. And to the extent we find issues with regard to how the GCCF is working, we will do what we can. We will certainly identify them and try to work to rectify them.

Mr. BONNER. Thank you. Mr. Chairman, the reason I asked that—and again, I know this is parochial to me because I am on the Gulf Coast, but why it is important to our friends in Pennsylvania or California or Georgia or wherever, Kansas, is if you go from Key West in Florida all the way to Brownsville, Texas, and you look at the economies of the five Gulf Coast states, you are looking at over $2.8 trillion of GDP impact to this country. Last year we were all worried about what was happening in Greece, which was about a $350 billion impact on the global economy. The five Gulf Coast States, by rough estimates, $2.8 trillion, and we were devastated by this oil spill last year, and we continue to be

devastated, and that is why I raised the questioning today asking for the Department to do everything it can.

It is very unusual for a conservative Republican Member to be asking any Justice Department, this Justice Department or any other, to intervene here. But we have got to hold the people who did this accountable, and we have got to make sure that the claims facility that was set up by the Justice Department and the administration to make those people whole, we have got to make sure they are doing a better job. And with that, thank you.

Attorney General HOLDER. I would disagree with you, Mr. Bonner. The questions that you have asked are not parochial ones. I think the statistics you just used about the trillions of dollars of impact, show that this is a national issue. It affects maybe most directly the people on the Gulf Coast. But the reality is this is a national issue, and that is why it requires a national response. And I can assure you that the Justice Department, Tom Perrelli and others, will stay focused on this issue.

Mr. WOLF. Mr. Honda.

Mr. HONDA. Thank you, Mr. Chairman.

And welcome, Mr. Holder. I want to thank you for your testimony here today, and I really do appreciate your attention and dedication to the many important civil rights and justice issues that we face today.

STATE CRIMINAL ALIEN ASSISTANCE PROGRAM

I wanted to ask you something about the budget dance that we seem to go through every year and is the proper funding for the State Community Assistance Program more commonly known as SCAAP. As you know, border States, like California, are disproportionately affected by this. And I notice for the 2012 request, the funding for SCAAP has been reduced greatly. And now I understand some of this programmatic shifting is going on. But at some point, we as a country need to come to a solution on this issue that goes beyond just partial reimbursement. And to this, I ask, do you have any suggestions or ideas on what Congress could do to permanently address this issue?

Attorney General HOLDER. We have requested I think $136 million for SCAAP. As we all know, that goes for the incarceration costs for inmates who do not have legal immigration status. And so I think one of the things that the Congress could do, working with the Administration as well, is to look at the whole question of illegal immigration and to try to address that in a comprehensive way. I think that would have an impact on the monies that we spend with regard to SCAAP.

I mean we have tried to make sure that this money is spent wisely. I have seen the Inspector General report that indicates that some high percentage of people, I think it was 58 percent or so of people were not identified as people who were illegal immigrants and their status was not totally known. And so that is something I think that has to be worked on.

The money that we are asking for this year is less than we sought last year. Again, that is just a tough decision, a tough budgetary decision that we had to make. We are of the view that this is in fact a national obligation and the states need to be reim-

bursed for the monies they expend in this regard. And the only reason we are seeking less money than we did last year is strictly on the basis of budgetary constraints that we have.

Mr. HONDA. I don't disagree with you about the efficacy of having a comprehensive immigration reform package that would include law enforcement and border protection and things like that. And it seems to me that over the past few years we have been approaching this whole issue, mish-mash, and spending a lot of money that doesn't seem to have a return on the kind of investment that we are seeking.

INDIAN COUNTRY JUSTICE PROGRAMS

And you know that California has large needs for Indian country Justice programs. And I consider refunding components of Public Law 106–559 of vital importance. And I know that in this 2012 request, the DOJ has created a new discretionary set-aside to fund all tribal assistance programs rather than separate appropriations.

How will the change affect the civil and criminal and legal assistance programs, and particularly ensuring that current funding levels remain?

Attorney General HOLDER. What we tried to do is actually prioritize the work that we have done with regard to tribal lands. It is something that I hope will be a legacy of this Administration, that we have taken seriously the responsibilities that we have on tribal lands, that we have recognized the unique needs and the unique problems that are faced there. We have in our budget funds that will go towards supporting what is certainly a desire on my part, and on the part of the President as well, to have as a legacy the fact that we are taking very seriously our responsibilities in that regard.

We have over $420 million in the budget. We want to work with you to make sure that that money is spent in an appropriate way. But I really want to emphasize that this is something that is a high priority for this Administration. I met in the Roosevelt Room with the President and with a number of tribal leaders; I have gone to a listening conference in Minnesota; Tom Perrelli has taken this on as a particular priority of his.

When one looks at the problems that women face on tribal lands with regard to violence that they are subjected to, when one looks at the rates of substance abuse, there are a whole host of issues that have to be dealt with. There are not sufficient law enforcement resources there. And the monies that we are seeking for tribal issues I think go a long way to backing up the promises that we made and the obligations that we think that we have.

Mr. HONDA. I appreciate the attention and the sense that you have regarding Indian country, because I think that that is an area where we at times turn a blind eye to, and I think that in terms of our relationship to sovereign nations it is an obligation that we need to fulfill.

GUN CONTROL—LONG GUNS

One other issue I would like to bring to your attention, Mr. Holder, is gun rights and gun control. As an avid outdoors person myself, I support the Second Amendment, but also support reasonable

changes to existing law that makes it easier to track criminals purchasing weapons.

One of the biggest gun issues facing California is, of course, the sales of the so-called long guns and drug and criminal violence at the border. I know that there is a public comment period through the ATF on new reporting standards on long guns. But I would like to know what steps the Department has taken to improve the situation and what more can be done to put reasonable safeguards in place?

Attorney General HOLDER. ATF currently has a proposal that has been made with regard to the purchase of long guns. It is, I think, a reasonable proposal that would require firearms dealers to report any instance where a person buys two long guns within a 5-day period that are above .22-caliber, that are semiautomatic, and have has a detachable magazine. The concern is, obviously, with the possibility that people are buying these as straw purchases, and that a lot of these weapons end up in Mexico. The proposal that ATF has made only applies to four States that border Mexico, but we think we could have a substantial impact on the flow of guns that go into Mexico.

I am greatly concerned that some of these weapons that find their way into Mexico might be used against the agents from this Nation who are down there fighting with their Mexican counterparts against the cartels. It gives me very great concern. I think it is a responsible thing to do. I think it is respectful of the Second Amendment. It is something that we require gun dealers to do with regard to the sale of pistols. And it seems to me that asking dealers along the border to report on certain long gun sales, and given the limited circumstances under which I said that we do this, I think that that is appropriate. I think it would go a long way to helping us deal with this issue.

Mr. HONDA. I understand there are quite a few statistics that we have at hand relative to the number of firearms that are confiscated across the border that can be traced to the United States into several different kinds of activities that we have here that are not unlawful but should have greater oversight and scrutiny. And if those statistics are available, I would be very interested in receiving them.

[The information follows:]

FIREARMS SEIZED IN MEXICO

There are no United States Government sources that maintain any record of the total number of criminal firearms seized in Mexico. ATF reports relate only to firearms recovered in Mexico that were subsequently traced by ATF based upon firearms identifiers submitted to ATF by the Mexican Government. All crime gun traces are performed by ATF's National Tracing Center (NTC), the country's only crime gun tracing facility. The Mexican government does not submit every recovered firearm to ATF for tracing. Mexico trace data (as of April 28, 2011) indicates that between FY 2009 and FY 1020, a total of 21,313 firearms recovered in Mexico were traced by ATF. Of these, 10,945 were manufactured in the U.S., 3,268 were imported into the U.S. from a third country, and 7,100 were of undetermined origin due to insufficient information provided. The Department is committed to reducing the flow of guns across the border into Mexico through straw purchasers. ATF has submitted to the Office of Management and Budget for review and approval under the Paperwork Reduction Act a request to require Federal licensed firearms dealers in Arizona, California, New Mexico and California to report to ATF sales of two or more long guns (above a .22-caliber, semiautomatic, and has a detachable magazine)

to the same individual within a five day period. If OMB approves the request, ATF plans to implement the reporting requirement without delay.

PATRIOT ACT

A few weeks ago Congress passed extension to a few key provisions in the PATRIOT Act. And I opposed those acts since inception, as I strongly believe they crossed the line in terms of civil and privacy acts of our citizens. I understand the need to keep our country safe from harm, but as a country we need to do better than to pass laws that give broad powers to civilians. We need to do better than that.

Many have called for hearings on this issue and a pragmatic approach to this issue. I would like very much to hear your thoughts on how we can bridge the gap between protecting the rights of Americans while giving the tools needed to protect us. And I think that that is probably an area that has come to fore because of the change in technology and the kinds of things that we understand technically as to what is going to be important and how to go about doing that.

Attorney General HOLDER. Well, we do support the renewal of those three authorities: the business records provision, the lone wolf provision, and the roving wiretap provision. But the Administration also supports increased civil liberties protections. I think, in particular, a good balance is struck by the bill that Senator Leahy introduced that supports the extension of those authorities but also dials in civil liberties protection. These are necessary tools for us to have in order to fight the threat that confronts our Nation. We think that we can do this in such a way that, with appropriate supervision within the executive branch and working with the Foreign Intelligence Surveillance Court, we can make sure that these tools are used in a way that is effective but also is consistent with the values that have made this Nation great.

The concerns you express I think are legitimate ones. We may end up in a different place, but the concerns you have I think are legitimate. And as I said, I think Senator Leahy's bill really strikes a good balance.

Mr. HONDA. What would be the critical steps that would need to be pronounced and clear in order for us to be able to execute some of the provisions that law enforcement may have, that may be at question by some other Members of Congress, the concerns we have in terms of privacy. What are some clear steps that need to be in place?

Attorney General HOLDER. I think that as we use these provisions and other provisions of the PATRIOT Act, we have to be mindful of the privacy interests that American citizens have. We have to make sure that we act in a way that is consistent. We have to make sure that we don't overreach. We can't let the threat that we face make us turn our backs on that which has defined this country and made it the great Nation that it is. And that is a balance that you have to strike, but it is something that we should always be mindful of. And I think that if we keep that in our minds, those of us who have to enforce these laws and take advantage of these tools, if we keep those kinds of thoughts in our minds, we will act in an appropriate way.

We want to work with Congress as well. Oversight, for instance, is something that makes a great deal of sense when it comes to the use of the PATRIOT Act. Generally these three provisions in particular: interaction with Congress about how these tools are being used, an airing of concerns that people have, and responses from those of us in government who are using these steps. I mean, that kind of interaction I think makes a great deal of sense and will make sure that there is no overreaching by those in the executive branch.

FISA COURT REQUIREMENTS

Mr. HONDA. One last question, Mr. Chairman. One of the things that seems to concern—well, it concerns me—is the decision that a person would make, whether it is executive or otherwise, to move forward without going through the legal process of securing permission to wiretap or to tap into the internet in the name of national security.

Does that condition exist in the current law? And if so, are there requirements of that person to report in a timely manner that action to somebody like the judiciary arm?

Attorney General HOLDER. All the surveillance activities that the Department of Justice and other intelligence agencies are involved in are done pursuant to statute and with the approval of the FISA Court or an Article III Court, if we are talking about just regular wiretapping, so that there is a statutory basis for those surveillance activities that we engage in, and then there is judicial approval of the request that we make so that there is supervision of these activities. There can be things done on an emergency basis at the direction of the Attorney General, but even those have to ultimately be submitted to the FISA Court for approval. So there is always judicial supervision of the things that we do.

Mr. HONDA. But the term "ultimately reported back," is there a time definite that needs to be observed?

Attorney General HOLDER. Yes, it is 72 hours. We are not talking about some extended period of time. I would have to look. But those things that I have done on an emergency basis, we try to report within the timeframe. I would have to check and get back to you on that. I think we are talking about 2 to 3 days within which we have to report back to the FISA Court.

[The information follows:]

FISA COURT NOTIFICATION

Under the Foreign Intelligence Surveillance Act (FISA), the Attorney General may authorize emergency electronic surveillance or physical search of a foreign power or agent of a foreign power. The Attorney General or a designee must notify a judge of the FISA Court of the emergency authorization "at the time of such authorization." An application must then be presented to a FISA Court judge "as soon as practicable," but no later than 7 days after the Attorney General's emergency authorization.

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

Mr. WOLF. Mr. Rogers.

Mr. ROGERS. Thank you, Mr. Chairman, for yielding. I apologize for being late. General Holder, welcome to the committee.

Attorney General HOLDER. Morning.

PRESCRIPTION DRUG ABUSE

Mr. ROGERS. I want to focus your mind with me on a problem of an epidemic that is sweeping this country, and that is prescription drug abuse and methamphetamine abuse. Today, two people at least will die in Kentucky from overdoses; 82 a month. My State perhaps is Ground Zero for prescription drug abuse, but it is everywhere, it is not just there. It is sinister. Nationwide, in the last decade we have seen a 400 percent increase, in those reporting abuse of prescription pain relievers with about 7,000 new abusers every day; 7,000 new abusers every day.

There is a mechanism that we are fighting in Kentucky and other States and that is, as you well know, the prescription drug monitoring programs in Kentucky—it is called KASPER—where doctors and pharmacists can check in the central computer in the State to see if a person presenting a prescription has been doctor-shopping or has filled it in another location.

Thirty-eight States now have responded to a Department of Justice grant program that helps them set up that system in their State. Thirty-eight States now have that system and 10 more applied for those grants, including Florida, which I will come to in a minute. And KASPER works. We have seen a dramatic decline and a dramatic increase in prosecutions of fake doctors and pharmacists and the like. Other States have reported the same. And yet in your budget request, zero.

This is a program that has been in place for—in fact it was started by this subcommittee, Mr. Chairman, under your leadership. It has been in place for maybe 10 years or so. We have seen the number of States with authorized or operational programs triple from 15 to 45, an increase of almost 2,600 percent in the number of prescription reports. And yet for whatever reason, you did not request any funds to continue that program which has proven itself countrywide, why?

Attorney General HOLDER. The President's fiscal year 2012 budget, the budget that we have submitted, does propose to use $3 million of OJP's proposed research, evaluation, and statistics to set aside a fund for a limited number of prescription drug monitoring pilots in conjunction with an evaluation.

So the information I have is that nearly every State has decided to implement a prescription drug monitoring program and had an opportunity to apply for those funds. The problem that you talk about is indeed a serious one. It is one that is nationwide in scope, though I think you are right, there are particular areas in the country that have had to deal with this issue in a more concentrated way.

The fact that we have moved in the way that we have with regard to our budget is no indication that we are not mindful of the problem or less serious——

Mr. ROGERS. Zeroing out the program that is the only thing going that is getting at prescription drug abuse, zeroing that out tells me you are not serious about solving this problem; $3 million in an ill-defined request that you have made for a pilot and evaluation. These aren't pilots, these are operational. Ask your State po-

lice and your U.S. Attorneys; they will all tell you this is the only weapon we have against prescription drug abuse.

Attorney General HOLDER. I would respectfully disagree in that regard. We have our enforcement efforts that we take with regard to the prosecution of people who engage in the sale or misuse of these products. Those kinds of efforts will continue. So this is not the only tool that we have. And again, as I said, this is a problem that we take very seriously.

Mr. ROGERS. Well the head of ONDCP in the White House, Gil Kerlikowske, I spent last week with him in Kentucky. He was there 3 or 4 days talking about this problem, and he says that this is a valuable weapon in fighting this cause. I didn't discuss with him the fact that you had not requested any funds for it, I didn't want to embarrass him in public. But the ONDCP director has serious problems with your budget request.

Now, that gets me to Florida. There is a thing called a Flamingo Express, the Flamingo Road. Broward County, Florida, is where practically all of the prescription medicines that are illegally obtained come from; 98 of the top 100 prescribers of oxycodone, 98 out of 100 top ones come from Broward County, Florida. They dispense over 19 million dosages of this drug, which is about 89 percent of the total dispensed by the entire country. These are pill mills, these are drive-throughs. You drive through like a Burger King, with a truckload or van load of people from Kentucky or Tennessee or Ohio or any other State, particularly on the eastern seaboard. You load your van up, you take them to Broward County, you drive them through the drive-through, and you come back with a ton of prescription medicines that you then foist off on innocent children and other people. And two of them in Kentucky die every day.

Now, don't tell me that you are enforcing the law. What do you say about that?

Attorney General HOLDER. The budget request that we have made includes $322 million funding for 1,497 positions at the DEA Diversion Control Program. That is an increase of $2.2 million in base adjustments; 124 positions, including 50 special agents, 50 diversion investigators, 9 intelligence analysts, and $30.8 million to support regulatory and enforcement activities of the Diversion Control Program. I think that is an indication that we take this issue seriously. It is one that we are trying to address, which is not to say that our State and local partners have not been as successful as we might have wanted to be. Our efforts need to be continuing ones. The toll that these medicines take on the lives of people and the impact they have in certain areas is substantial. And we are using the tools that we have. We have sought additional tools in the budget to try to deal with the issue that you have raised.

Mr. ROGERS. Well, it is not working so far. This is an interstate problem; this is in your ball park. Individual States are doing what they can, but how can Kentucky, for example, prosecute somebody in Broward County, Florida? They can't do that. That is only in your bailiwick. That is why we have a national government. It is an absolute disgrace that is killing people every day.

Not only do dealers and addicts in my region make those frequent bus and van trips down there, but several budget airlines

have recently instituted direct flights from Charleston or Huntington, West Virginia, to South Florida. An airline has seen it profitable to ship these people down there, buy their drugs, and ship them back.

I am ashamed. You know what they call that? They call it the OxyContin Express. And you are seriously not dealing with the problem. And then in Florida there is an extra special problem. Florida, under a previous administration, applied for a grant PDMP grant, like 38 other States have done, and it was granted. And DOJ and this grant program that you didn't fund has given them $800,000 to start a KASPER-like program in Florida where it is most desperately needed, which would help us prosecute those crook doctors that are running these pill mills with drive-through service. And the State legislature authorized the program. But for some problem, it didn't get done until now.

Then a new Governor takes over, and he not only announces he is not going to fund the program, he is going to try to repeal the law in Florida that authorized the program. What do you think about that? The Attorney General of Florida says it is crazy. What do you think?

Attorney General HOLDER. We certainly have to work with our State and local partners. This is something that is of primary responsibility because of the interstate component of this that the Federal Government clearly has a role to play. We also have to work with our State and local partners because there is a local component to this as well as a State component.

It is only when we work together that we will be effective in trying to deal with the transportation of these drugs. And also we have to come up with ways in which we deal with prevention aspects so that people don't start to use these drugs. We must have treatment money as well to deal with people who, unfortunately, use these drugs and become addicted to them, and as a result, continue to use and fund the activities that you are talking about.

Mr. ROGERS. Well, there are certain things the State of Florida can do and certain things they can't do. And what they can't do is do the interstate prosecutions. I know just last week, a part of a thing called Operation Pill Nation, DEA arrested 22 people, seized over $2.5 million in assets during a takedown of rogue pain clinics in Florida. Those arrests had resulted after 340 undercover buys of prescription drugs from over 60 doctors and more than 40 pill mills. And I congratulate DEA for that, but it is a drop in the bucket.

Why can't we build up the forces, the DOJ forces in Florida, to get at this problem that is poisoning the rest of the country, particularly the eastern seaboard and the Appalachian States where I hail from? I would like to see you beef up the forces there, not in headquarters, but in the field. Make those buys, get rid of these doctors who are poisoning the country and killing people every day. What do you think?

Attorney General HOLDER. I think that the additional resources we are talking about are not all going to headquarters. I think the fact that you talk about a successful DEA operation is an indication of how seriously this is taken by this Justice Department, by the DEA, which is a part of this Justice Department. We recognize the

seriousness of the problem. I think that operation that you talk about is an indication, as I said before, that we not only have the program that you talked about in KASPER, but also have our enforcement arm that is, I think, in some ways as important, if not more important, than anything else that we are going to do to hold accountable those people who deal in these drugs, to put them in jail, and use that as a deterrent for others.

Mr. ROGERS. Let me make a specific request. Would you consider sending extra investigators, either through DEA or the U.S. Attorney's Office, or both, or any other of the Federal law enforcement agencies, would you consider shipping extra manpower to Florida to help shut down these drive-through pain clinics that are poisoning the country?

Attorney General HOLDER. We will identify the places where we can best deploy our resources to be most effective in dealing with the issue that you have raised and the other issues, narcotic-related issues we have around the country. We have to work with our State and local partners. DEA can't do it alone, but we try to deploy our resources in a way that we are most effective.

And I realize that what you are talking about is in fact beyond a regional problem, it is a national one, and that is why it has gotten the attention of the DEA in a way you previously described.

Mr. ROGERS. Well, there is a high-intensity drug trafficking area there.

Attorney General HOLDER. It is a HIDTA operation.

Mr. ROGERS. Which is the supposed best way to marry up Federal, State, and local law enforcement in one operation. Can we beef it up and put more assets into the HIDTA that covers that region in order to go after these people?

Attorney General HOLDER. I think we are always looking at the existence of these HIDTAs to see which ones are effective and which ones need more resources and which ones are not being particularly effective. So that kind of review is something that we do on an ongoing basis.

Mr. ROGERS. You didn't answer my question.

Attorney General HOLDER. Well, I am answering as best I can.

Mr. ROGERS. Would you look at beefing up that HIDTA?

Attorney General HOLDER. We do with regard to all of them and try to make the determination as to where we can use our resources the best.

Mr. ROGERS. Question: Will you look at that one?

Attorney General HOLDER. We will look at that one as we look at all of them, but I will look at that one. But I don't want to——

Mr. ROGERS. Do you not recognize that the problem is in Broward County, Florida; it is not in Denver or Miami or New York. It is in Broward County, Florida. Do you want me to spell that for you?

Attorney General HOLDER. You know the problem that you described is not one that is only in Broward County. There are parts of West Virginia that have been decimated by the use of the drugs.

Mr. ROGERS. Ninety-eight of the 100 prescribers of OxyContin are from Florida, 98 out of 100. Eighty-nine percent of all of oxycodone is dispensed by those in Broward County, Florida. If I

ever saw a target, this one has got an X all over it. Why can't you see that?

Attorney General HOLDER. I think what I have indicated is that as part of what we do, we will look at that HIDTA and see if it is effective, see if there are additional resources that are needed, as we do with regard to all of them.

The responsibility that we have is national in scope, and we try to make sure that we deploy our resources in a way that deals with these issues in an effective way.

Mr. ROGERS. All right, I am asking you: Will you look at that and get back to this committee in two weeks?

Attorney General HOLDER. I will do the best that we can. We will look at this and try to get back to you with a response as quickly as we can.

[The information follows:]

DEA Operations in South Florida Related to Rogue Pain Clinics

Although rogue pain clinics are operating in various parts of the United States, the largest concentration of these operations are based in Florida with a concentration in a tri-county area of south Florida (Broward County, Miami-Dade County, and Palm Beach County). Many of these clinics are operating under the guise of providing "pain management" or "medical treatment," but in reality are just storefronts for drug trafficking. The prescriptions issued and pharmaceuticals dispensed are not done so for a legitimate medical purpose by an individual practitioner operating in the usual course of professional practice. Instead of providing medical care, the physicians, health practitioners and clinic owners are feeding the addictions of thousands of drug seekers who flock to these clinics from the east coast and Midwest regions of the U.S. These clinics divert millions of dosage units of controlled substances that inevitably enter the illicit marketplace.

The Office of National Drug Control Policy has designated three HIDTAs (High Intensity Drug Trafficking Areas) in Florida: North Florida; Central Florida; and South Florida, which includes the counties of Broward, Miami-Dade, Monroe and Palm Beach. The mission of South Florida HIDTA is to enhance and facilitate the coordination of South Florida's drug control efforts among federal, state, and local law enforcement agencies in order to eliminate or reduce drug trafficking and related money laundering and violence and their harmful consequences in south Florida and other regions of the United States. The South Florida HIDTA (SFLHIDTA) encompasses a wide variety of drug and violent crime related initiatives, many of which are not directly or even indirectly related to the issue of pill mills, pain clinics, and diversion of controlled substances. For example, gangs, narcotics, violent crimes, and street violence rank among the initiatives of the SFLHIDTA.

While the SFLHIDTA is an important partner of DEA, the Diversion Control Program's Tactical Diversion Squads are uniquely structured to target and disrupt the diversion of controlled substances prevalent not only in south Florida, but in other parts of the country as well. These TDSs are dedicated solely to diversion related investigations and utilize the skill sets of Diversion Investigators, Special Agents and deputized state and local law enforcement officers. DEA's Diversion Control Program and Tactical Diversion Squads are the best way to combat the problem of prescription drugs in south Florida and beyond.

DEA's Tactical Diversions Squads

DEA's Tactical Diversion Squads (TDS) allow for the unification of separate and sometimes disparate Federal, State, and local information, authorities, and enforcement programs. They work with other Federal, State and local (S&L) law enforcement authorities in developing more effective enforcement programs against diversion. TDSs also help coordinate with various judicial districts to maximize the effectiveness

of multiple investigations and prosecutions of those involved in the diversion of controlled substances and chemicals.

Operation Pill Nation in 2010-2011 is evidence of the success of DEA's TDS program, and the FY 2012 Budget provides an additional $39 million towards DEA's Diversion Control Program, including 124 positions (50 Special Agents, 50 Diversion Investigators, and 9 Intelligence Analysts) and non-personnel funding for rent, task force officer overtime, administrative support, and training for Tactical Diversion Squads (TDS). (NOTE: TDS groups are funded from the Diversion Control Fee Account rather than appropriated funds). DEA's TDS members (special agents, diversion investigators, and state and local members) are focused on the diversion of controlled substances and the pill mill problem affecting both Florida and other parts of the U.S. As of March 2011, DEA had 37 operational TDSs, with a plan to increase that to 63 TDSs over the next couple of years. In fact, the President's 2012 budget includes a proposal to reassign Mobile Enforcement Team (MET) special agents to strengthen and expand Tactical Diversion Squads.

With the recent administrative, enforcement and legislative focus on south Florida, DEA's intelligence has begun to notice opportunitistic and entrepreneurial pain clinic owners moving operations from south Florida to other parts of the state and to other parts of the country, such as Georgia and Ohio. DEA already has an established TDS operational in the city of Atlanta and is gathering and collecting intelligence information on rogue pain clinics in that state. DEA's Diversion Control Program and Tactical Diversion Squads are the best way to combat the constantly evolving problem of prescription drug diverion, as evidenced by *Operation Pill Nation.*

Operation Pill Nation

In February 2010, DEA initiated *Operation Pill Nation* to address the prescription drug threat in south Florida posed by these rogue pain clinics. The operation involved a combined and concentrated effort that included federal, state and local resources. The goal of the operation was to identify, investigate and dismantle rogue pain clinics operating in the tri-county area of south Florida through administrative, civil, and criminal actions.

- The operation's objectives include targeting the pain clinic owners, the practitioners servicing the clinics, the pharmacies and pharmacists dispensing medications on behalf of the clinics, and the pharmaceutical wholesalers who were supplying controlled substances to the dispensing clinics in violation of the Controlled Substances Act and implementing regulations. Additionally, large-scale trafficking groups that were selling the prescription drugs obtained from the pain clinics are also being investigated as appropriate.

- In conducting *Operation Pill Nation*, DEA utilized 12 Tactical Diversion Squads (TDS) to work shoulder-to-shoulder with state and local counterparts to identify and dismantle the south Florida pain clinic operations. Eleven of the

TDS groups were deployed, on a rotating basis, from DEA offices across the United States to assist the Miami-based TDS. These TDS groups included Special Agents, Diversion Investigators and State and Local Task Force Officers. DEA also detailed Special Agents, Diversion Investigators and Attorneys from DEA Headquarters to assist in the operation.

- On February 23, 2011, as part of *Operation Pill Nation* in a coordinated effort, DEA Tactical Diversion Squads and Diversion Investigators from throughout DEA, as well as over 500 state and local law enforcement officers, conducted a massive takedown.

    - They served 19 search warrants at clinics and residences in south Florida.
    - Twenty-four individuals were arrested on various federal and state drug and money laundering charges, of which 5 were medical doctors and 6 were pain clinic owners.
    - Approximately 2.2 million dollars in US currency and a variety of other real property and assets were seized, including 58 vehicles.
    - Sixteen Immediate Suspension Orders and one Order to Show Cause were served, and 6 DEA registrations were surrendered.

TOTAL FOR OPERATION PILL NATION (as of 03/31/2011):

- ***Search Warrants:*** 21 Total
    - State: 10
        - Physicians: 2
        - Pain Clinics: 4
        - Clinic Owner Homes: 3
        - Clinic Owner Warehouse: 1
    - Federal: 11
        - Pain Clinic: 2
        - Clinic Owner Homes: 2
        - Clinic Owner Warehouse: 1
        - Clinic Employee Residences: 2
        - Safe Deposits: 4
- **Arrests:** 31 Total
    - State: 23
        - Physicians: 9
        - Pain Clinic Owners: 3
        - Clinic Employees: 11
    - Federal: 8
        - Physicians: 2
        - Clinic Owners: 2
        - Clinic Employees/Straw-Owners: 4
- **Administrative Actions:**
    - ISOs: 33 Served (62 DEA Registrations)
        - 32 Physicians (61 DEA Registrations)
          (18 Physicians (27 DEA Registrations) Surrendered after being served the ISO)
        - 1 Distributor (1 DEA Registration)
    - OTSCs: 4 Served (6 DEA Registrations)

    - 4 Physicians (6 DEA Registrations)
      (1 Physician (2 DEA Registrations) Surrendered after being served the OTSC)
  - Surrender for Cause: 39 Received (52 DEA Registrations)
    - 29 Physicians (40 DEA Registrations)
    - 6 Pharmacies (8 DEA Registrations)
    - 4 Distributors (4 DEA Registrations)
- **Assets:** Approximately $16,417,708 (*amount will change upon receiving the final count*)
  - US Currency: Approximately $11,941,681
  - Vehicles: $3,400,589 (75 vehicles)
  - Jewelry/Electronics: Approximately $75,438 (*additional items may be added*)
  - Real Property: Approximately $1,000,000 (estimated value of *6 Residences)*
- **Closed Clinics:** 37
- **UC Buys:** 340 Total
  - Clinics: 43
  - Physicians: 64
- **Dosage Units Purchased by Physicians:** Approximately 21,250,014 dosage units of oxycodone were purchased by the targeted physicians in the two years prior to the administrative actions being served

Mr. ROGERS. And will you tell us what you can and can't do in Broward County, Florida, on this problem and tell this committee, with the chairman, in two weeks?

Attorney General HOLDER. We will do the best that we can in the review that we will conduct and try to be as responsive as we can be. When you say things, what we can do and can't do, these are issues that if I had the ability to come up with a solution within two weeks, of course I would share it and implement it. But the issues that we are dealing with are ones that are longstanding and they are difficult. They are difficult.

And we will do the best that we can. We will be as responsive as we can. But we are serious about this issue, we are dead serious about this issue, and understand the consequences of what it is that you are talking about. This is a national problem.

Mr. ROGERS. Well, my time is up.

Mr. HONDA. Mr. Chairman, would the gentleman yield?

Mr. ROGERS. But I am going to stay with you. I am going to keep after you on this, because my people are dying and I can't sit here and let that happen.

Mr. HONDA. Would the gentleman yield?

Attorney General HOLDER. Well, one thing I would say is they are not your people, they are my people. These are American citizens, and we are doing the best that we can, in as many places as we can, to deal with the drug issues in whatever form they exist. I have seen lives ruined. I have sent people to jail, as a judge, who have dealt in these substances. I have tried to deal with this on the treatment side and on the prevention side. This is something that has decimated parts of our country. And we are trying to deal with this in as serious and productive a way as we can. So they are your people, but they are also my people.

Mr. HONDA. Would the gentleman yield?

Mr. ROGERS. I yield.

Mr. HONDA. Thank you, Mr. Chairman. I share your concern and I share your passion for the needs that our local folks face, because they are in fact lives that we feel responsible for.

In California, we have a variety of counties that are methamphetamine farms where these drugs are being manufactured. I understand the need for interdisciplinary interagency cooperation. That is why I brought up the issue of SCAAP and the border issues and things that plague us locally, but it is a national issue too. And yet we have this great demand that we expect from our agencies.

In today's testimony, I heard the gentleman talk about the cuts they had to make and shifting priorities around within that constraint. If this committee or subcommittee is willing to put forward any kind of resources that would enhance or build upon whatever additional resources the Department needs, I would be willing to stand shoulder to shoulder and request this.

Mr. ROGERS. Reclaiming my time, I am afraid I have imposed too much time from the Chairman already, so I yield back.

Mr. HONDA. Thank you.

Mr. ROGERS. Thank you, Mr. Chairman.

Mr. WOLF. Before I recognize Mr. Schiff, let me just say I agree with Mr. Rogers. We had a hearing here about 7 or 8 years ago, and there was a young man—I can still remember he was with his

father; his father was a minister and he had a blue suit coat on, I can still see it. He was sitting in the back and his dad had said his son had been addicted to OxyContin. And I remember seeing Mr. Rogers on the floor a couple months later. And I said, "How is the young man doing?" And he said, "He died, he overdosed."

And there was a *New York Times* piece. Mr. Rogers makes a very good point. You know where this is, you could have said sure, Mr. Rogers—I mean if I were in your job, I would have said, "Boy, I am going to have a team down there tomorrow. If I can deal and save one person, I am going to do it, because that is why I am the Attorney General and that is why I am here."

Now, Mr. Rogers, they are your people, they are our people. But you could have just said, "Yes, I'll have a team go down there." Maybe you can't do it, maybe you can, but you can look.

Let me read you what the *New York Times* says. "More than 20,000 people die of prescription drug overdoses, including an estimate of seven a day in Florida." I mean you are a father; can't you feel the pain and the suffering and the agony? I can still see that young boy. You know, we will try to put the money back in, but you could have said, "Yeah we are going to look at this." Maybe you can, maybe you can't. But he is laying it out.

And if you read this—and we will share this with you—it is in several locations. It says here, "addicts, driving cars with out-of-state plates, camp out most nights and wait for clinics to open at 10 a.m. 'When we go into these clinics, there is a gun in there,' he said. 'How many times have you gone into your doctor's office and there's an armed guard outside?'"

If any member here had a problem in their district and came to me and said, "Hey, Wolf can you help us?" I would say "Yes, anything we can do to try to help." And if you can save a young person from not being—but they know where it is. It is Broward County. They are flying down there. There have been articles in the paper. And the West Virginia thing, you are accurate. The Senator from West Virginia is concerned because they are going from West Virginia down there.

So just send somebody down there and look at it and take a look, and if you can beef the thing up—and if it is happening in Mr. Honda's district, do the same thing; and if it is happening in Mr. Fattah's district, do the same thing.

Anytime we can sort of deal and help people, I think we ought to do it. With that, I just hope you can help Mr. Rogers. I still remember that young man, he is gone now, the pain and suffering and agony his dad must feel.

And if there are 20,000—according to the *New York Times,* 20,000 a year die of prescription drug overdoses. And this is kind of the center, kind of summum bonum of all this going on. Let's get down there and see what we can do. Don't wait two weeks to come back. Tell us tomorrow or by the end of the week. With that——

Attorney General HOLDER. Let me just say this. This is something that I have had personal experience with. I sat as a judge in the D.C. Superior Court, and I saw the impact of drugs, and I have seen lives ruined. I have seen futures destroyed. I have seen what should be the future of this city, Washington, D.C., sent away, incarcerated for selling drugs or because of the use of them.

As Attorney General, I would hope that in the limited time that I have, I will use all the tools that I can to fight drug abuse in whatever form. To the extent that it exists, there is a particular problem in Florida as a supplier of prescription drugs, of course I am going to focus on that; of course we will send resources down there. And that is one of the reasons I am here, to ask for the resources to do the kinds of things that I know DEA agents are capable of. It is one of the things we have in our budget, the request for those funds.

You are not talking to a bureaucrat here, you are talking to a father of three kids, you are talking to a former judge, you are talking to a person who has been in law enforcement all my life. I have seen the impact not only of prescription drugs, but of crack, powder cocaine, heroin. We have to deal with this problem in all of its forms so that we can make this Nation as productive as it can be, so we give futures to the children of this Nation, all the children of this Nation.

I don't mean to imply that this is not something that—because Mr. Rogers has raised it—that I am not taking it seriously. Of course I am going to take it seriously and of course we are going to review what is going on with that HIDTA down there. I feel this pain. I have seen this.

Mr. FATTAH. Mr. Chairman, let me just object before we go to Congressman Schiff. There is probably not another member who has been more passionate and focused on this than Chairman Rogers. And we live in a different culture here, Mr. Attorney General. When the chairman of the Appropriations Committee asks the question—and obviously the answer is yes—to any of us, you have a different responsibility. You are the Attorney General of the United States of America. So I don't want anyone to misconstrue here. You have to exercise the authority of your office fairly across the country on a whole range of priorities. And so I understand the chairman's passion. I also know with a certainty that not only can you spell it, you know how to find it on a map. But there is also a reality when we put a burden on the Department, when we cut funds, when we require a reduction in funds, that there are going to be limitations and we have to give up some of the redundancy.

Now Health and Human Services has a similar program to the one that the chairman has referred to, which is in the President's budget, for a multimillion-dollar appropriation to do similar work. But I think that the one in Justice might be a better way to go, and maybe we can find some way to eliminate in the redundancy in the funding, this one versus the other one.

I think it is improper to ask the Attorney General to somehow skewer the operations of his office. In terms of focus, he is focusing on the entire country. That is his job. We as Members of Congress have parochial responsibilities.

I know for a fact that when Philadelphia had a problem, I went to the chairman, Chairman Wolf, and he arranged for a considerable amount of resources to be focused on a problem there. We live in this type of environment in which we respond to Members' concerns. But a member of the President's Cabinet has a different responsibility, and I just want to make sure we are clear about it,

and that we understand there are differing roles here. I thank the chairman for giving me a moment.

Mr. WOLF. Well, if I were the Attorney General and somebody asked me to go into their district to look and see, and I thought I could save one person, I would do it. In spite of the fact that you can look at this in an analytical global way, and you are a good person—I understand, we will help you in prisons, we will do all that—frankly, I haven't been happy with the lack of action you have taken on prison rape.

I mean Bobby Scott and I have the bill and we are pushing and pushing and you are sort of taking this global, analytical—if I was the Attorney General, or I could go down and help one region, whether in north Philadelphia or northern Virginia or in that area, I would do it. Maybe you don't see that role there, but I would do it. And I would hope you can.

And if any member along here on the other side of the aisle has something like this, that you could just kind of help their district, forget Republican and Democrat, but just help people, that is what government is all about, helping people individually to make a difference. With that, Mr. Schiff.

Mr. SCHIFF. Thanks, Mr. Chairman. And welcome, Mr. Attorney General. I just want to say at the outset, as someone who worked in the Department for six years, how much I appreciate the job you are doing and how I think we have really turned the Department around from some difficult days the Department went through. I appreciate the thoughtfulness you bring to the job and your sincerity and commitment to fulfilling your responsibilities. I think you are doing a magnificent job.

Attorney General HOLDER. Thank you.

Mr. SCHIFF. I also want to compliment one of the task forces that was established. I think it was a multiagency task force between the Justice Department and the Defense Department and other agencies with respect to the GITMO situation, that painstaking work in looking at each of the detainees, gathering as much information, seeking further information where needed, to try to make intelligent decisions about how each detainee ought to be handled, whether a detainee could be repatriated, whether a detainee should be tried in Article III Court, or detainee should be brought before a military commission or whatnot. It was painstaking work and involved a lot of difficult decision making, but I think they did a remarkable job and their work will probably never be known unless there is a problem. But I want to express my appreciation for the hard work they put into it.

And I hope that we can support the work the administration is doing to try to resolve each and every case of the detainees in Guantanamo in a sensible way without imposing funding restrictions here that will impede your ability to do that.

I don't envy the difficulty of the job you have to do in the best of circumstances, but even more so under the rather difficult financial situation we are in right now. I think the conversation we have been having over the last half hour with respect to prescription medication will, unfortunately, be played out across many departments because we simply don't have the resources. We would like to give every problem the attention it deserves.

I think we are seeing already in the budget fights an effort to rob Peter to pay Paul. As much as there is a problem that has to be addressed with respect to prescription drugs, as you point out there are problems that have to be addressed with respect to crack cocaine and powder cocaine and heroin, a whole panoply of drug abuse problems throughout the country.

As my colleague Mr. Honda pointed out, methamphetamines. We were the world producer of methamphetamine in California. And I don't envy the task of trying to address all of those problems and prioritize in a year of declining budgets.

DNA BACKLOG

I want to raise one of the subsets of potentially declining budget and ask what the impact will be, and that is the area of DNA. Let me say, first, congratulations for eliminating the offender backlog, which had been a subject of discussion and concern for years and years, and it is finally done. We don't have an offender backlog at the Federal level. That is phenomenal. A lot of States and municipalities are still struggling with that, but I am glad the Federal Government led the way in terms of its own backlog.

There remains, though, a casework backlog and the OIG report indicates some of the periods in the casework backlog. What I wanted to ask you about is, I think the budget request is $110 million or thereabouts for DNA. Traditionally this committee has plused-up what the administration has asked for, 250, 160 million. I don't know whether that is going to be possible given the budget situation. If we can't, if the most we are able to do is meet what you have asked for, will that be enough, number one, to avoid a future backlog in the offenders' samples, and will it be enough to continue to make progress in reducing the casework backlog?

Attorney General HOLDER. Those are all good questions. The FBI's DNA database program cleared its backlog of over 312,000 samples in September of 2010. We have had to make hard choices about our budget request in fiscal year 2012. We were actually asking for $137 million for DNA programs in fiscal year 2012, which is a 27 percent decrease from the fiscal year 2011 CR level. And that represents a very difficult choice given the usefulness of DNA not only in closing cases and in finding the guilty, but also in absolving people, clearing people who might otherwise be charged with crimes. We will do the best we can with the limited resources that we have. But we understand that DNA is a vital tool, and we want to have a 21st century criminal justice system. I think in many ways DNA is the foundation for an effective 21st century criminal justice system, so we will do the best that we can with the resources that we have, understanding that in these tough budgetary times we don't have all the money here that, frankly, I would like to have.

Mr. SCHIFF. Well, if you could keep our committee informed, as we go along through the year, whether you start to develop another backlog in offender area, and also what progress you are making in terms of the casework backlog, that will help us understand whether we are devoting the right amount of resources to the problem.

And I realize that the DNA may be the showcase for a broader problem in forensics generally, as State labs that do ballistics and do fingerprint analysis are aging along with the people who do the work. And the DNA problems may be sort of the canary in the coal mine of the need to make a new investment in the infrastructure of forensics in the country.

One thing I think that would be useful for the Department to do—and this was also highlighted by the OIG report—and that is in trying to evaluate how the States and municipalities are doing with their backlogs. There is no common definition of what a backlog is. My own experience in Los Angeles with LA county and LA city backlogs is, you can easily play with the numbers by defining away your backlog.

And so I think it would be helpful if the Federal Government can develop a sort of best practices definition so that we can compare State to State, municipality to municipality, and make sure that we are all talking about the same thing. I think that will help keep local jurisdictions honest in terms of where they really are with their backlog problems.

To me it is just devastating when we see a situation like we have seen in Los Angeles where you have a multi-multiyear backlog, when you finally take the kits off the shelf and analyze them, rape kits for example, you find people that you take off the street who committed subsequent rapes in the interim while the kit has sat on the shelf. And those are all victims that didn't have to be victims.

The other DNA point I wanted to raise with you is familial DNA. California recently solved the Grim Sleeper case. We had run the sample, the offender's sample, got no hits. Law enforcement tried everything else, and finally resorted to familial DNA. The State of California is one of only two States that has a protocol for doing a familial DNA search. The familial DNA search turned up the son of the suspect. And that led us to the suspect. Without the use of that familial DNA search, that serial murderer would still be on the street.

The Federal Government doesn't have a policy that permits familial DNA searches of the national database. We were lucky in the Grim Sleeper case that the son was the hit in the system lived in the same State, in California. Had he lived somewhere else, we would not have had a match and the Grim Sleeper would still be at large.

So I would love to see the Federal Government have legislation on this that I will pursue with your office. I would love to see the Federal Government adopt an appropriate policy where, as a last case resort, the Federal Government can do a national database familial search, and also establish requirements for States that want to take advantage of that capability to have protocols in place to make sure that it is not abused and privacy rights are respected. I would love to hear your thoughts on that subject.

Attorney General HOLDER. I think it would be very interesting to see exactly what California has put in place. As you indicate, that very serious case was in fact solved because of the use of familial DNA. It is something that I think we certainly should want to examine on the Federal level, being mindful of the privacy con-

cerns that have to be a part of that. I would be very interested to see how California balanced that and see whether or not that is something that we could use on a Federal level.

But I would be interested in working with this committee and other Members of Congress in examining that and potentially working on legislation that would allow us, if legislation is needed—it may be some administrative thing, I don't know, but if there are ways in which we can increase our use of family DNA.

GUN CONTROL—REPORTING OF LONG GUN SALES

Mr. SCHIFF. Let me turn to one last topic, if I could. This was raised by my colleague Mr. Honda, and that is the problem with extensive numbers of American weapons going into Mexico and being used in drug crimes. We have been rightfully frustrated by our neighbors to the south with all the drugs that are exported from those countries and imported in the United States. They have a justifiable frustration with the flow of weapons, now leaving our country and going into theirs, that are being used to kill their law enforcement and they are being used to kill innocent people on the street and are creating an environment of almost complete lawlessness south of the border.

I was pleased to hear your support for what ATF has proposed. I think adding a requirement of report of long gun sales will be helpful. But even that will be of limited value.

I wonder if you could share some of your thoughts on the difficulty of investigating and prosecuting these cases of gun sales south of the border, which are against the law. We are not talking about criminalizing something here that is not already a crime. Why are these cases so tough and is there anything that can be done to very substantially change the dynamic, make a substantial dent in this problem?

Attorney General HOLDER. One of the problems that we have is that people have their Second Amendment rights here in the United States and can legitimately, lawfully, buy weapons, and that is fine. The concern we have are for those people who act as straw purchasers, and who buy weapons in their own names but then transfer them or sell them to people illegally for use in Mexico. And that is one of the reasons why the ATF proposal is a good one. These are cases that are difficult to investigate because the sale on its face can appear to be a legitimate one. We don't know what the ultimate destination of that weapon might be. And to the extent that we can look for multiple sales within a relatively short period of time, and along the border States, I think we are focusing our attention in an appropriate way, respectful of the constitutional rights that American citizens have to purchase and to hold weapons, while at the same time trying to meet the obligations that we have to our very valiant Mexican neighbors who have lost substantial numbers of people against the cartels.

I have to tell you the concern that I have is that with the increased number of DEA agents that we have in Mexico, ATF agents, FBI agents, I am concerned that these weapons that are illegally brought into Mexico and purchased in the United States will ultimately be trained on them, and that is is a tragedy that I hope that we can avoid.

Mr. SCHIFF. Well——

GUN CONTROL—STRAW PURCHASERS

Mr. FATTAH. If the gentleman would yield for a second. The Department earlier today, just a few hours ago, has made some arrests in the death of a U.S. agent, an ICE agent, who was killed. The gun was purchased in the United States, in Texas, and apparently—at least by the arrest—allegedly by an American citizen who was working in conjunction with Mexican cartels to make these purchases. So the wisdom of what the ATF is trying to do is borne out in this instance. And your fear about American law enforcement being the victims of these guns has also been borne out, unfortunately.

Mr. SCHIFF. Mr. General, do you have any sense of what proportion of the weapons that are being used, the weapons of American origin that are being used in Mexico by the cartels, are the result of straw purchasers as opposed to either theft or acquisition? In other words, is the vast majority of these weapons lawfully acquired by American citizens, then unlawfully sold or smuggled out of the country?

Attorney General HOLDER. I don't know what the percentage is. I have seen a variety of numbers used in that regard. I am not really comfortable with quoting those numbers because I am not sure what methodology was used. But I think we can safely say a substantial number of the weapons that we find in Mexico were lawfully purchased in the United States through the use of straw purchases. And that is one of the reasons why, as I said before, the ATF proposal makes a great deal of sense.

[The information follows:]

AVAILABLE STATS FOR GUNS TO MEXICO FROM THE U.S.

The Department is unable to provide the specific number of firearms confiscated in Mexico that were purchased legally in the United States. The difficulty is determining whether a seized gun was purchased "legally". A firearm may have been initially purchased legally but then subsequently purchased illegally before being transported to Mexico.

Mr. SCHIFF. Thank you, Mr. Chairman.

Mr. WOLF. Mr. Austria.

Mr. AUSTRIA. Thank you, Mr. Chairman. And thank you, Attorney General, for your service to our country and for being here today. I know it has been a long morning so I will try to keep my comments relatively short.

I want to thank Chairman Rogers for bringing up a very important issue because I can tell you when I talked to my sheriffs and my county prosecutors, one of the biggest drains on their budget is the prescription drugs and the meth labs. And I think we need to hear more about the Department's efforts as far as enforcement and also meth lab cleanup. So I know there has been a considerable amount of time spent on that today. I appreciate that. I also want to let you know in Ohio we are hearing the exact same thing from our locals.

OFFICE OF JUSTICE PROGRAMS

Mr. Attorney General, I would like to ask you about the Office of Justice Programs, OJP. The President's budget request for OJP is 22.1 percent below the fiscal year 2011 amount. And it appears that most of the savings comes from the elimination of different programs, different projects. And I understand that some of these may be congressional projects. But with that, I would think it would lower the burden on OJP to administer and provide oversight for these grants. But there is a 30 percent increase for salaries and expenses to OJP.

And my question is, why is there a substantial increase for OJP's salaries and expenses when the administrative and oversight burdens for OJP will be reduced?

Attorney General HOLDER. Well, I think that what we have proposed is a budget that unfortunately reduces monies in some areas, increases it in others. We have, for instance, increased the amount of money that we seek for COPS grants, I think from about $298 million to $600 million. So there are different places where there is going to be an increase in funds sought, decreases in other areas.

We want to make sure we administer these funds in an efficient way, in an appropriate way. And the numbers that we have set up with regard to the administrative costs I think is consistent with that desire.

Mr. AUSTRIA. But it seems to me if you have less administrative and oversight, less projects out there, those type of burdens on OJP, that the administrative costs would move parallel to that.

Attorney General HOLDER. I think it is a question not only of the amount of money that is involved, but the number of projects that we might be trying to administer. Even if the amount of money goes down, the number of projects that we might be ultimately supervising could be the same. As I said, COPS money goes up; that is still a program, but it has additional funds in it. We might have another program that continues to exist, although the money allotted for this year goes down. So it is in some ways difficult, I think, to draw a direct connection between the amount of money that goes to a particular component within the Department of Justice and what is the appropriate administrative amount.

THOMSON FACILITY

Mr. AUSTRIA. Let me move on to another subject, Mr. Attorney General. I understand that this budget request includes a request for operating the maximum security Thomson facility in Illinois. And I also understand that it became the government—I understand that because the government is currently operating under a CR, which we expect throughout the remainder of fiscal year 2011—the Federal Government does not own the Thomson facility. If the Department is not able to purchase the Thomson facility in fiscal year 2011, how do you plan to do so in 2012? Will the purchase and operation timeline just slip back a year? And the other part of the question is, can you assure this committee that if purchased by the Federal Government, that the Thomson facility will not house detainees being currently held in Guantanamo Bay, or what is the plan there if you do intend to house them?

Attorney General HOLDER. The money we have in the 2012 budget is to start up the running of the Thomson facility. The hope would be that in the 2011 resolution that ultimately is reached, we would have the money allotted that we had in the budget for the purchase of the Thomson facility.

We will actually save money. Thomson is something that is needed by the Bureau of Prisons to house maximum security prisoners. That is a big need that BOP has. We can get that facility, put it into operation and save the taxpayers money because it is an existing facility as opposed to one that we would have to construct. And that is why you have money in the 2012 budget—I think it is $60 million or something like that—for operational expenses.

But the money that we need to purchase it is actually in the 2011 request, and as I said, it is our hope that we will be able to use the 2011 money to acquire Thomson for the need that we have.

Mr. AUSTRIA. Are there any plans with Gitmo as far as the detainees there as far as future use with the Thomson facility?

Attorney General HOLDER. There are no present intentions. We have these congressional restrictions with regard to the movement of people from Guantanamo to the United States, or obtaining facilities in the United States. Our need for that facility is, as I have indicated, to house maximum security prisoners. We have overcrowding with regard to that category of prisoners in the Bureau of Prisons now.

DEFENSE OF MARRIAGE ACT

Mr. AUSTRIA. One last question, I know Chairman Wolf has already asked you about the Department's recent decision not to defend the Defense of Marriage Act. And the I agree with the chairman's concerns on this. And by taking this position, in my opinion, the Department of Justice is no longer fulfilling a usual role of defending Federal statutes. And it raises the question and it seems to me to be a considerable power grab by the executive branch. And if this practice continues, the legislative branch will have no choice but to start defending the Federal statute ourselves. And we are actually looking at ways now how to respond to that, whether it be through legislative branch attorneys or whatever means that might. And I know there are suggestions that whatever dollars are being used right now by the Department of Justice to be moved to whatever area, whether it be the legislative branch attorneys to defend Congress' statute.

What are your thoughts on that? Because it seems like we are going down an area now because of the decision that was made that is opening up different areas, and I just want to get your clarification as far as your position on that.

Attorney General HOLDER. Sure. What we did I think is correct for the reasons that I detailed before, but it is something that is exceedingly rare. We understand the obligation that we have to advance reasonable arguments in defense of statutes that Congress has passed. As I have indicated, there have been in other Administrations, other Departments of Justice, decisions made not to defend statutes that Congress has passed. But that is something that happens rarely. I have a list of 13 cases in which that has occurred outside of this Administration.

Our intent is to continue to defend wherever we can and with reasonable arguments statutes that Congress passes. The recommendation that I made and the decision that the President made with regard to DOMA is something that I think is unique.

Mr. AUSTRIA. Has there been any internal dissent from career Department of Justice attorneys regarding this shift of policy towards DOMA? And if so, can you give us some details on that?

Attorney General HOLDER. I generally don't share internal Justice Department conversations, but I can say that we certainly had a fulsome conversation about this decision, all sides were heard. The recommendation was ultimately mine to the President, and the President made his decision having been fully briefed on both the pros and cons of the potential decision.

Mr. AUSTRIA. Thank you, Attorney General.

And thank you, Mr. Chairman.

Mr. WOLF. Thank you.

Mr. Culberson.

Mr. CULBERSON. Thank you, Mr. Chairman.

VOTING RIGHTS ENFORCEMENT

Mr. Attorney General, I appreciate you appearing before us today. In the time that I have got within this first round of questioning, I wanted to zero in on the right of the people of this country to vote. It is enshrined, of course, in the 15th Amendment, the right of citizens of the United States to vote shall not be denied or abridged by the United States.

And, in fact, the very first Civil Rights Act to have been passed in the United States was the 1957 Voting Rights Act. And in going back over and thinking about your testimony today, I went back to my library and pulled out the wonderful Robert Caro series on Lyndon Johnson, which I highly recommend to anybody. It is a fascinating series of books and points out that when Johnson was majority leader, he discovered that the one area that the Southern Senators who had been consistently filibustering the passage of any civil rights legislation by Congress for 82 years—there had been this block of Southern Democrat Senators filibustering civil rights being granted by statute to minorities in the South—that Johnson found one gap that even the Southern Senators would be willing to permit. And that was the right to vote. Because in Johnson's estimate, in the field of voting rights—quoting Caro, "even the most outspoken of white supremacists had a sense that there was something wrong with denying the right to vote. When the right to vote came up, he says the tone of voice of the Southern Senators was somewhat less defiant, sometimes in fact ashamed."

So Johnson zeroed in on that and recognized as the majority leader the one area where he could pass a civil rights act would be to ensure by statute the right to vote, and to ensure that that right was guaranteed by a right to trial by jury. Johnson realized if he was somehow able to get that part of the Civil Rights Act out of the bill, he would be able to pass the 1957 Civil Rights Act and limit it to a single right, voting, and to guarantee jury trials to defendants in voting right cases.

And it was really his proudest achievement. And I also went back and discovered, in another part of my library, the very first

Newsweek magazine, introducing Lyndon Johnson to the nation after the assassination of President Kennedy. In his first speech to Congress, the new President gave his greatest emphasis to the most controversial measures, the civil rights bill and the tax cut.

And, of course, the Attorney General is given the responsibility to enforce the Voting Rights Act, to enforce all of the laws that protect the rights of Americans to vote. And what I wanted to zero in on is the absolutely incredible and deeply disturbing evidence that the Department of Justice has been applying different standards to different groups of people in the enforcement of the Voting Rights Act and, in particular, in the Black Panther case.

And, Mr. Chairman, I would like to if I could, put in the record the report of the U.S. Commission of Civil Rights, the interim report that they entered on the U.S. Department of Justice in the New Black Panther Party litigation. I would like to make it a part of the record if I could, sir.

Mr. WOLF. Without objection.

[See Appendix I on page 685.]

Mr. CULBERSON. In the brief time that I have got, Mr. Attorney General, I won't have a tremendous amount of time to go through it. But I would like to ask you, sir, if you would—and I will follow up with your office in more detail—respond to, there are apparently still a number of subpoenas, interrogatories, requests for production that you have not complied with yet that the Commission on Civil Rights has sent you. Have you fully complied yet with all of the requests of the Civil Rights Commission in this case?

Attorney General HOLDER. You have got an iPad up there. You know, they wouldn't let me bring mine. You have got yours.

Mr. CULBERSON. They wouldn't let you? Oh, sure you can. Absolutely.

Mr. WOLF. For the record, nobody asked. If you would have asked, you could have brought yours.

Attorney General HOLDER. I was only kidding.

Mr. WOLF. Sure.

Mr. CULBERSON. Well, I am a big iPad fan.

Mr. WOLF. You are welcome to come next time with this.

Attorney General HOLDER. I am sorry.

With regard to the request that the commission has made, we have submitted I think 4,000 or 5,000 pages of testimony. We made available the Assistant Attorney General for the Civil Rights Division who testified. We offered towards the end of the time before the report was issued a couple of other witnesses that they requested.

Mr. CULBERSON. Have you fully complied yet with all of their requests? The report that they issued says you have not. And it is really distressing.

Despite the subpoena, according to the report on page 41, despite the subpoena issued to DOJ, you have not, Mr. Attorney General, turned over the direct evidence regarding your management level communications and decision making about the national Black Panther Party litigation. You haven't complied yet.

Attorney General HOLDER. We have turned over all of the information that we thought was appropriate with regard to the re-

quests that were made, and I think we did cooperate fully with the commission.

Mr. CULBERSON. Well, I know that Mr. Wolf has also sent a letter with Lamar Smith last year. And, Mr. Chairman, I would like to work with you and your staff. And I hope, Mr. Attorney General, that you will be responsive to the chairman in supplying the committee and the commission with the evidence that they need in order to find out whether or not—for example, as Mr. Coates had testified that there are career people in the Department of Justice who feel strongly it is not the Voting Section's job to protect white voters. The environment there is that you better toe the line of traditional civil rights ideas and you better keep quiet about it, because you will not advance; you will not receive awards; and you will be ostracized.

That is deeply distressing. And no matter who the Attorney General is, whether it is under the Bush administration, the Reagan administration, the Clinton administration or the Obama administration, you have got an absolute obligation to enforce all of the laws and certainly the Constitution, the 15th Amendment, the Voting Rights Act, in a way that is absolutely impartial regardless of who the defendants are.

The nature of the charge, as the Commission found, paints a picture of a Civil Rights Division in the DOJ at war with its core mission of guaranteeing equal protection under the law for all Americans. During the Bush administration, the press reported ideological conflict within the division. If the testimony before the Civil Rights Commission is true, the current conflicts extend beyond policy differences to encompass allegations of inappropriately selective enforcement of the law, harassment of dissenting employees and alliances with outside groups at odds with the rule of law.

How do you respond to that? That is a devastating indictment. No matter who the Attorney General is and no matter who the President of the United States is, that is a devastating indictment. How do you respond to that?

Attorney General HOLDER. I want to assure you and the American people that the Justice Department under my leadership and as part of the Obama Administration enforces all of the laws without regard to the race, ethnicity or political persuasion of anybody who might be involved in a particular matter. The Civil Rights Division under my leadership, under Tom Perez's leadership, has done a good job in making determinations about how it uses its resources. But those resource allocations are not made on the basis of the race of the complainant, the ethnicity of the complainant, the political persuasion of the complainant.

Mr. CULBERSON. But in particular in this case, in the Black Panther case, I don't know how you can say that. And it is just not accurate because the Voting Rights Section of the Department of Justice under the Bush administration was preparing to file a permanent injunction. The defendants in this case—I mean, they had them on videotape. The whole country saw those thugs; one guy with a billy club intimidating voters and running them off from the polling place in Philadelphia, and the defendants had even admitted liability.

The DOJ, under President Bush, had a permanent injunction lined up. They were prepared to file. The judge was prepared to enter it. And as soon as the Obama Administration came in, you withdrew that, settled for significantly less—withdrew the permanent injunction, got a temporary injunction against one of the guys, I think the guy with the billy club. And it simply doesn't square with the facts.

The United States Commission on Civil Rights has investigated this carefully and determined that you are not complying with their subpoenas or requests for documents. You didn't respond to Chairman Wolf when he was in the minority along with Chairman Smith, who is now chairman of the Judiciary Committee. The Department is, I hope, going to comply with Mr. Wolf's request for information.

I mean, Mr. Coates, explained it very well when he said that imagine if a couple of Ku Klux Klansmen had stood outside a polling place in uniform—and these Black Panther guys are in some kind of a uniform—and the Ku Klux Klansmen had intimidated voters—one guy was carrying a billy club—wearing his white hood, can you—the Department of Justice would have been all over those guys. There is no difference between those two cases other than the type of uniform and the type of voters that they are harassing. Your job is to enforce the law without regard to race.

Clearly in this Black Panther case, you basically reversed course, which is the first time that Mr. Coates had ever seen that happen in his 13 years with the Department. He never had seen an administration reverse course in pursuing one of these civil rights cases. And what is disturbing enough about the Black Panther case, but what I am driving at, sir—and I hope that you will be responsive to Mr. Wolf and Chairman Smith—is this case reveals a pattern in the Department of refusing to enforce the law if white voters are being harassed, or in the case of Pima County, the Civil Rights Commission points out you didn't pursue a case of harassing Hispanic voters.

Attorney General HOLDER. Well, as I said, the way in which this Department of Justice conducts itself is to enforce the voting rights laws and all the laws without regard to the characteristics that you——

Mr. CULBERSON. But that doesn't square with reality. How do you respond to the Pima County case and the Black Panther case and the evidence that Mr. Coates and I believe Mr. Adams—Mr. Adams actually resigned. You had a senior official at DOJ resign because one of your division chiefs, Mr. Perez I believe, had given, in Mr. Adams' opinion, false and inaccurate testimony before—Mr. Adams resigned because the Assistant Attorney General had given inaccurate testimony to the commission.

What I am driving at, sir—and just the generalities aren't sufficient. We are going to really pursue this. This is not acceptable. These statutes—I mean, this is the greatest achievement—Lyndon Johnson considered the Voting Rights Act of 1957 his greatest achievement. He considered the Voting Rights Act of 1964 the signature achievement of President Kennedy. These laws lie at the heart of what makes this the greatest nation in the history of the world, that we are never going to deny anybody the right to vote

or deny anybody the right to privileges within the Constitution based on their race. Yet there is clearly evidence, overwhelming evidence, that your Department of Justice refuses to protect the rights of anybody other than African-Americans to vote.

Mr. FATTAH. Chairman, if the gentleman will yield.

Mr. CULBERSON. That is the evidence before the commission.

Attorney General HOLDER. I would disagree very vehemently with the notion that there is overwhelming evidence that that is in fact true.

Mr. CULBERSON. Could you prove the Commission wrong, please? That is what I am driving at.

Mr. FATTAH. If the gentleman would yield. I would like to enter something into the record—it might be helpful to illuminate this issue. This is by the Republican vice chair of the Civil Rights Commission. And she submitted this for the record, Vice Chair Thernstrom: I cannot support the majority report on this investigation. This investigation lacked political and intellectual integrity from the outset and has been consistently undermined by the imbalance between the gravity of the allegations and the strength of the evidence available to support such charges. I would like to enter this into the record.

Mr. CULBERSON. Sure. Reclaiming my time.

Mr. WOLF. Without objection.

[The information follows:]

B. DISSENTS

Statement of Vice Chair Abigail Thernstrom

New Black Panther Party Report:
Dissent of Vice Chair Abigail Thernstrom
December 19, 2010

I cannot support the majority report on the New Black Panther Party investigation.

This investigation lacked political and intellectual integrity from the outset, and has been consistently undermined by the imbalance between the gravity of the allegations and the strength of the evidence available to support such charges. Some commissioners offered serious, principled critiques of the process, and questioned the evidentiary record. Their views were contemptuously ignored by the commission's majority.

The majority charges that racial double standards govern the enforcement of the Voting Rights Act in the Holder Justice Department. If that can be convincingly demonstrated, it will be a grave indictment of this administration.

But that evidentiary showing awaits further investigation by the Department of Justice and Congress. I applaud that investigation, and hope that it will shed more light on this important question than the tendentious report provided by the commission's majority.

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Mr. CULBERSON. We will put it into the record.

Mr. FATTAH. The Attorney General has been asked this question and answered it four times, and I have the ranking member of the full committee, and I would like him to be——

Mr. CULBERSON. I understand. If I could, reclaiming my time. But I just would ask, Mr. Attorney General, if you could help us disprove these allegations. That is my concern, is that the evidence—and, Mr. Fattah—sure, Mr. Fattah. Absolutely. Put it in the record.

Mr. FATTAH. I don't want to cut him off. I just don't want him to ask and have answered the same question four times.

Mr. CULBERSON. But he is just not answering it. My problem is——

Mr. FATTAH. That is the answer you are going to receive from the Attorney General. We should——

Mr. WOLF. I have not cut anyone off and hope for the rest of this Congress——

Mr. FATTAH. I would never ask that you cut anyone off.

Mr. WOLF. So I think we owe Mr. Culberson the opportunity to ask the line of questions. I hope I never have to test the gavel for the next two years. I think every Member who cares deeply about an issue ought to be able to talk about whatever they want to.

Mr. FATTAH. I totally agree. And we can ask any question we want. We have to accept the answers that were given.

Mr. CULBERSON. Absolutely. And forgive me, Mr. Attorney General. My time is limited. And forgive me for interrupting you, sir, but really, your answers are very vague and general and not responsive to what I am driving at. And that is, I am asking you specifically, would you help Mr. Wolf, Mr. Fattah and myself and my good friend, Adam Schiff, who I know cares about this deeply, as all the members of the Committee do, to disprove these very serious allegations of the Civil Rights Commission report?

Attorney General HOLDER. Let me say, I think I have answered very directly the question that you have asked, and let me be very clear. This Department of Justice does not enforce the laws in a race-conscious way. Any allegation that has been lodged in that regard is simply false. Now, I think that directly answers the question that you have put to me.

Mr. CULBERSON. Okay. And you will help us prove that with documents, responses, interrogatories that the Commission has sent and you have not answered? You will answer all of those for our committee?

Attorney General HOLDER. If the Budget Committee is going to be doing the oversight, sure, we will respond.

Mr. CULBERSON. Sure, we do oversight. It is not just the authorizing committee, but we have a very important oversight role. That is why Mr. Rogers' questions were so important. This isn't just the funding committee. We are not just the money committee. We are a key part of oversight.

Attorney General HOLDER. Sure. Whatever committee in Congress, whether it is Judiciary or this committee, we will certainly respond and work with you in dealing with the issues that are of concern to you. I would be more than glad to do that because I am confident that a neutral and detached examination of the record

will substantiate what I have just said in as clear and direct a fashion as I can.

Mr. CULBERSON. I hope so. Thank you very much.

Mr. WOLF. Mr. Dicks.

Mr. DICKS. Thank you, Mr. Chairman.

I congratulate you on becoming the chairman of the committee and Mr. Fattah as the ranking member. Mr. Attorney General, we are glad to have you here today, and I think my questions are going to be a little less contentious, I hope.

IMPACT OF DOJ BUDGET CUTS

A number of big cuts would fall on the Department of Justice: $581 million—this is in H.R. 1, the bill that we passed two weeks ago. A number of big cuts fall on the Department of Justice: $581 million from State and local enforcement assistance; $191 million from the Office of Juvenile Justice; and the wholesale elimination of the National Drug Intelligence Center and the Weed and Seed Program, just to name a few. Even with the House vote to restore funding for the COPS hiring program, these cuts will surely lead to a loss in jobs, more than 3,800 by some estimates, at a time when the Nation can ill afford the additional unemployment. Can you discuss these cuts and your view of what would be the impact of them?

Attorney General HOLDER. I understand the concerns that we all have about the budgetary constraints that we have. What we have tried to do is responsibly come up with a budget request that is mindful of the fiscal issues that our Nation has to deal with while also trying to make sure that the Justice Department has the capacity to do the things that the American people expect of it. Some of the cuts that have been proposed and a few delineated go too far and will hurt the Department and its ability to be a good partner to our State and local counterparts. That is a very, very important component and a part of our job.

Mr. DICKS. Just to add to that point. At the same time, the States are under the enormous pressure—I think all the States are going to have to cut something like $125 billion from their budgets, and they have to do it. So this is going to have a double effect on the State and local governments.

Attorney General HOLDER. That is exactly the point I was going to make, given the problems that our State and local partners have and to the extent that we can help on the Federal side. It is not our responsibility to balance the State budgets. I understand that.

On the other hand, to the extent we can help the law enforcement capabilities of our State and local partners and do it in a responsible way, which I think we have laid out in our 2012 budget, I think we should try to do that.

Mr. DICKS. Additionally troubling are that these specific cuts are targeted at the criminal justice sector, meaning that we will have fewer police officers, prosecutors and other public safety personnel working to keep our constituents safe. It also means that there will be significantly fewer resources available for youth mentoring, after-school programs, programs to prevent domestic abuse, programs in which I know you have a personal interest, and all at a time when State and local, as I mentioned, State and local govern-

ments are making severe cuts to their own budgets. Funding for many of these very important programs is disappearing before our eyes, and that will have very serious effects on all of our districts.

So I hope that you can work with the leaders of—on both sides of Capitol Hill to try to make sure that when we get the final product here, that we have something that the Department can live with that won't have a negative effect on law enforcement.

Attorney General HOLDER. I would hope that we have that ability, and I think in this hearing today we are having what I think is a good exchange. But hopefully it will just be the beginning of a process that will allow us to talk about our views of how we should construct this budget, obviously listening to the thoughts that the members of this committee have, and come up with a budget at the end of the day that will best serve the American people.

We don't claim to have all of the answers. What we want to do is to have interaction on this committee that, as I said, at the end of the day, produces a good budget for my Department.

Mr. DICKS. Thank you.

Thank you, Mr. Chairman.

Mr. WOLF. Thank you, Mr. Dicks.

PRISON RAPE

Prison rape. I, along with Bobby Scott in the House, with Senator Kennedy and Senator Sessions in the Senate, passed the prison rape bill, which I think is very important. The fact is I hope to spend a little time on prisons and prison reform. But I want to begin with regard to this.

Congress affirmed its duty to protect incarcerated individuals, and I have been disappointed that the Department has been very slow in acting, from sexual abuse when they enacted the Prison Rape Elimination Act. Since then, the National Prison Rape Elimination Commission has studied the causes of sexual abuse in confinement, developed standards for the reduction of such crimes, set in motion a process once considered impossible, the elimination of prison rape. On January 24th, the DOJ published the long-awaited proposed rules outlining national standards to prevent, protect and respond to prison rape. When do you expect the regulations to be finalized?

Attorney General HOLDER. The rule is up for comment now. I would hope that this would be finalized by the latter part of this year, given all of the administrative things that have to happen, and the regulatory process it has to go through.

Mr. WOLF. I have a letter from somebody who I know you know very well, Judge Walton. And I will just read a portion of it and perhaps you can answer as I get to that. He said "I write in my capacity as former chairman of the National Prison Rape Elimination"—I assume you both served as judges together?

Attorney General HOLDER. Yes, we served together on the Superior Court.

Mr. WOLF. Yes. "We are aware of the upcoming House Appropriations Subcommittee hearing. We offer the following short list of program items for your consideration. I note that our collective concern is predicated on more than your suspicion that interested par-

ties have pressured the Attorneys General's PREA Working Group to alter the commission standards. The Attorney General apparently supports changing the commission standards, which in our view will weaken inmate protection and diminish institutional safeguards."

"More importantly, the Department of Justice is currently using cost estimates that are unknown, unavailable. Everyone, especially the commission, needs to know the basis of the additional cost calculations and subsequent analysis, which has not been made public. Please inquire when this vital information will be released? When will you be releasing the information in time for the commission?"

Attorney General HOLDER. Releasing the information——

Mr. WOLF. Information with regard to cost? Because he goes on to say, "it is essential that the data be available on an expedited basis for the commission and others who are present and preparing comments during April 4th. If the data cannot be properly released, please ask the Attorney General if the comment period will be extended to ensure an opportunity to review the crucial data before submitting comments."

Attorney General HOLDER. Well, I will certainly look into that. And to the extent that information has not been made available that would help in the formulation of good comments, I will do all that I can to make sure that information is made available. I just have to look into that.

[The information follows:]

RELEASING INFORMATION REGARDING JUDGE WALTON LETTER

The Department's cost estimates were provided in the Initial Regulatory Impact Analysis (IRIA) that the Department made public at the same time as its proposed rule. The former commissioners requested additional information regarding the calculation of cost estimates contained in the IRIA. The Department subsequently posted to the regulatory docket in early March a set of worksheets that were used in preparation of the IRIA.

Mr. WOLF. He went on to say, "please inquire if the Attorney General agrees with the commission that regular and independent audits are a bulwark against adverse court decisions and public criticism." Do you agree with that?

INDEPENDENT AUDITING OF BOP

Attorney General HOLDER. I certainly think there has to be some kind of monitoring of this to make sure that in fact the aims of the regulations that ultimately are adopted are in fact taking place. So, yeah——

Mr. WOLF. Who do you see to monitor that?

Attorney General HOLDER. Excuse me?

Mr. WOLF. Who would you have monitor that?

Attorney General HOLDER. These are things that will have to happen. I mean, we will have to work our way through that. I don't know what the process would be. But my thought is that some kind of monitoring of the progress——

Mr. WOLF. I think the Department has been late in this. During this period of time, men and women have been raped in the prisons. We raised this with you last time you came before the committee. This is important. This is the responsibility of the Attorney

General. And I thought this was one issue that you would embrace and be enthusiastic in working with the Congress to kind of deal with the issue. I am almost surprised that it has almost been like pulling teeth you almost can't get out. I would like to ask that the IG audit this. Because if you have the corrections people auditing themselves, you will not be sure that it is really being done. What is your position with regard to asking the IG to audit it every year for the first 3 years and then 3 years thereafter?

Attorney General HOLDER. Well, I would say that first off the passion that you have for this, I think, is laudable. And the reality is that this is something that we have taken very seriously at the Department of Justice, something I have taken very seriously at the Department of Justice. The commission had five years to do its work. There were a number of extensions that the commission had. We got one year once the commission submitted its report to us to try to get a final rule done. We missed that deadline. It is going to take about 18, maybe 20, months in order to do that. The commission had five years, as I said, to do its work.

The passion that you have is shared by the people who have worked on it at the Department of Justice. This is something that we are trying to eliminate. We want to do it in such a way that we put in place a regulation that will stand the test of time and ultimately will be effective in stopping these heinous practices that subject people to physical abuse. And that is what we have tried to do and also have been mindful of the restrictions that have been placed on us about costs.

Mr. WOLF. The question here is who will audit whatever is done or not done? Who do you view as auditing it to make sure that the act is carried out appropriately? Who do you see as auditing this?

Attorney General HOLDER. Well, I think that is something we will have to work on. To audit the Nation's prison systems is something that is going to be very substantial, and you are talking about something that could be cost-intensive. So how we do this is something that I would be more than glad to work with the committee on and with you in particular about coming up with a mechanism so that we make sure that the monitoring is done in an appropriate way.

Mr. WOLF. By an objective group? I don't think the people who are involved in it can audit themselves.

Attorney General HOLDER. We will have to make sure that the audits, the monitoring, is done in a way that is credible. And we will have to work on that, sir.

Mr. WOLF. Judge Walton goes on to say, "of cross-gender searches, DOJ's standard is regressive on security pat-down searches. Virtually all State prison systems presently prohibit male staff from searching women inmates in the absence of other circumstances. This view is supported by a 1999 study conducted by the National Institute of Corrections, a DOJ component. We are informed and now confirming that a similar ban exists in most jails. Bureau of Prisons policy and practices, however, routinely permit cross-gender pat searches of female inmates by male correctional officers. Please inquire of the Attorney General why he opted to adopt BOP's practice rather than the practice which is prevalent in

a majority of correctional institutions and supported by a robust body of case law."

Attorney General HOLDER. What is out there is a proposed rule, and there will be comments that will be made, among those obviously from Judge Walton and other members of the commission, members of the public, interested parties. And we will take those into account before a final rule is actually put in place. It would have been nice if Judge Walton had shared that with me. I didn't get it from him. But I will take it into account and maybe you can share that letter with me.

Mr. WOLF. We are sharing it. We will—it is underlined. I have notes that we will share this with you.

Attorney General HOLDER. Sure. That is fine. And we will take into account all of the comments that come from a variety of sources and in particular from those people who are on the commission.

Mr. WOLF. Well, the commission spent a lot of time, and I think we really want to——

Attorney General HOLDER. Five years.

Mr. WOLF. And it is done well. Well, they are not professional people. They were taken from different areas, and they spent a lot of time. And we want to make sure that it is audited very appropriately and this is very, very successful once it is completed. I think the Department has been very slow with regard to that.

HUMAN TRAFFICKING—USA TASK FORCES

Human trafficking. Last year I asked you about what could be done immediately to institute greater cooperation between State and local governments, the FBI and the U.S. attorneys in order to close down the sites where trafficking is taking place, remove the victims of trafficking and finally prosecute the offenders. It would be beneficial for all of the U.S. attorneys to have task forces with regard to this. What are your thoughts about—particularly in areas where this is a problem, which unfortunately seems to be in most parts of the country. Do you think it is good idea that every U.S. Attorney have the task force to deal with the issue of Federal, State and local working together? And if you do, how many currently have task forces?

Attorney General HOLDER. I think that there is a variety of ways in which we need to deal with this, and I think that is something that is worthy of attention by the U.S. Attorneys' Offices and I think we need to work with our State and local partners in that regard. We have done things very quietly. We have had meetings with interest groups who have raised concerns about the use of various media and advertising that have been used to traffic, especially young women, girls actually. And as a result of those interactions and the pressure that we brought to bear, I think we have seen significant changes in the past year. Those efforts that we are doing, again quietly, are I think bearing results.

Mr. WOLF. What I think the question was: do you think it is a good idea for U.S. attorneys in areas where this is a problem to have a task force whereby State and local and social services are working together? And Neil MacBride has one here in northern Virginia. I think they are bringing everyone in together. I believe

they established it at our request, but I appreciate he moved very quickly on it. He felt it was a very important thing. How many other U.S. attorneys have a task force like Neil MacBride does?

Attorney General HOLDER. That I do not know. But one of the things I have told all of the U.S. Attorneys is to look at one of the issues you have to confront in your district. How can you improve the quality of life for the people in your district? How are you going to protect the people in your district? And Neil has done exactly what you have indicated, and I think he has done it well. I think we can learn from what he has done there and see how we might extrapolate, learn from, replicate what he has done.

Mr. WOLF. Could he be the only one that has a task force?

Attorney General HOLDER. I don't know, and I will check on that and get back to you.

[The information follows:]

HOW MANY U.S. ATTORNEY OFFICES HAVE HUMAN TRAFFICKING TASK FORCES?

There are currently 39 funded human trafficking task forces around the country, each of which has participation from the U.S. Attorney's Office that covers the area in which the task force is located.

TRAFFICKING VICTIMS PROTECTION REAUTHORIZATION ACT

Mr. WOLF. The Trafficking Victims Protection Reauthorization Act requires DOJ to create a new model State law to further a comprehensive approach to investigating and prosecuting human trafficking and to do so by drafting provisions that criminalize sex trafficking without proof of force, fraud or coercion, and whether or not the victim is a minor. Where is the DOJ in the process of drafting this model legislation?

Attorney General HOLDER. I will have to get back to you on that, Mr. Chairman. That is something that obviously I think is worthy of our efforts, and I will check and see exactly where we are with regard to the drafting.

[The information follows:]

TRAFFICKING VICTIMS PROTECTION REAUTHORIZATION ACT STATUS

The Department has drafted a model state law as required under the Trafficking Victims Protection Reauthorization Act (TVPRA) of 2008. The model state law is currently posted on the Department's website at: *http://www.justice.gov/olp/model-state-criminal-provision.html.*

WILBERFORCE ACT

Mr. WOLF. Section 237 of the Wilberforce Act established a March 2009 deadline for the submission of a status report to Congress—that is March 2009—on the Department's long-delayed progress in commissioning a full report on unlawful commercial sex in the United States. Without a complete understanding of the horrific nature of this criminal industry—you know, you should be the Attorney General that shuts this down. The work should go forth. Holder is against this. Holder will go anywhere, do anything and eliminate this. This could be your legacy, if you will. So that is why I think every U.S. Attorneys' Office ought to do what Neil MacBride is doing.

But to go back to the question, without a complete understanding of the horrific nature of this criminal industry, how can Federal,

State and local policymakers properly deal with what many have described as the slavery issue of our time? Can you give us an update on the status of this critical report?

Attorney General HOLDER. I am sorry, Mr. Chairman——

Mr. WOLF. Section 237 of the Wilberforce Act established a March 2009 deadline for the submission of a report. I am asking you to give us a status of where it is. It is late. Can you give us the status of it?

Attorney General HOLDER. Okay. This is different. I will get back to you with regard to where we stand in that regard.

[The information follows:]

WILBERFORCE TRAFFICKING VICTIMS PROTECTION REAUTHORIZATION ACT STATUS

Pursuant to Section 201(a)(1) of the Trafficking Victims Protection Reauthorization Act of 2005, OJP delivered the first biennial report on severe forms of trafficking in persons, sex trafficking and unlawful commercial sex acts in the United States to both houses of Congress on October 1, 2009.

Mr. WOLF. The manager's statement to the Wilberforce Act calls on the Department to review and report on the organization of its anti-trafficking prosecutions. Has this review been completed?

Attorney General HOLDER. We are in the process of trying to compile a nationwide anti-trafficking strategy and come up with a guide for use by the task forces that will be in place or that are in place—I will come up with a number for you—so that we have a robust enforcement effort with regard to this issue. And I will come up with, as I said, with the number of task forces that are presently in existence and also detail for you where we stand with regard to the report in the legislation.

HUMAN TRAFFICKING

Mr. WOLF. An undercover video recently showed that Planned Parenthood clinics in New Jersey, New York and D.C. and Virginia all turned a blind eye to the conditions that clearly marked patients as trafficking victims. Moreover, the clinics advised the pimp on how he could avoid being caught by falsifying or omitting key information on the very paperwork that is required to ensure minors. As you know, the Trafficking Victims Protection Act defines severe forms of trafficking in a person that is, quote, sex trafficking in which a commercial sex act is induced by force, fraud or coercion, in which the person induced to perform such act does not obtain the age of 18. Have these been looked at with regard to the trafficking law?

Attorney General HOLDER. It is my understanding that the FBI actually has looked at that matter. I believe this is true. If I am incorrect, I will send you something. But I understand the FBI has looked at that and a prosecution was declined in that matter.

Mr. WOLF. I am going to end and ask some other questions that I am not going to go into. But I would really hope—because when you speak out, Mr. Attorney General, the U.S. attorneys, they listen. You are their leader. And I think for you to say this is a priority for Attorney General Holder and no young teenage person, no young person should be sexually trafficked, no one should be brought in from another country. You could—and we are prepared to help you any way we possibly can—really make a tremendous—

you could literally eliminate it for the next two years. If you put everything into it, you could literally break the back of this. And I would urge you—and the committee will do anything we possibly can to help you—to be the Attorney General that literally almost eradicates sexual trafficking from this country.

Attorney General HOLDER. As I said, this is something that is a priority of the Department. It is a priority of mine. If you look at the fact that craigslist has dropped their adult ads, that is a significant thing.

Mr. WOLF. That is.

Attorney General HOLDER. And that happened as a result of meetings that occurred in my office and the work that some organizations we met with——

Mr. WOLF. I thank you for that.

Attorney General HOLDER. And we have had other meetings about other publications that are continuing to do this. That is a prime way in which young girls are trafficked. Again, this is not something that we have done very loudly or sought any attention about—we only try to achieve results. I think you are right—the U.S. Attorneys are maybe a group of 90-some people who do tend to listen to me. Not many others do, and I hope that in my interaction with them I have made clear this is in fact a priority. And we will work to make sure that we have in place mechanisms that will effectively get at this issue.

I think what Neil MacBride has done in the Eastern District of Virginia is very good. I am familiar with what he has done there, and we are in the process of developing ways in which other U.S. Attorneys can come up with mechanisms doing exactly what he has done or doing something that will respond to the unique needs of their districts so that we overall have a good national enforcement effort here. But as I said, we will continue doing the quiet things as well.

HIGH-VALUE DETAINEE INTERROGATION GROUP

Mr. WOLF. Sometimes the more public, the better. I am going to just ask you and then go to Mr. Fattah. It is about the High-Value Detainee Interrogation Group. I had over and over sent letters to the administration, and every one I talked to who is a career person thinks it is a good idea. I have asked that High-Value Interrogation Team be colocated at the Counterterrorism Center. Any comments with regard to that? Because if you are there when the information is coming in, you are more attuned and ready and know who you have to pick and pull. And to have them colocated there—they are not there. I know where they are. They are not there. Doesn't it make sense to colocate the HIG at the Counterterrorism Center in McLean?

Attorney General HOLDER. I think the key is to make sure that they are communicating in real time to the extent that that is possible.

Mr. WOLF. But the purpose of the Counterterrorism Center was to bring everyone together so they would be face to face, the stovepipes would be broken down. That is the advantage of it. And I think Leiter is doing a good job. But to have the HIG team colocated there, would that not make sense?

Attorney General HOLDER. I think as I said, communication really is the key. I have seen the letter that you sent to Mr. Brennan, and I have seen his response back to you. And I would align myself with what he indicated.

Mr. WOLF. That they don't have space? Is that the reason?

Attorney General HOLDER. That there is the need to make sure that, as I have said, it is as close to real time as possible and that communication exists between the HIG and NCTC. And I agree with you that Mike Leiter has done a good job there. And I think that the interaction that exists between the HIG and NCTC is actually good.

Mr. WOLF. How many times has the HIG or the MIT interrogation team been deployed since Christmas day last year?

Attorney General HOLDER. I will have to check on that and get back to you. They have been deployed. I don't know the exact number.

[The information follows:]

AMOUNT OF TIMES HIG/MIT HAS BEEN DEPLOYED SINCE THE CHRISTMAS DAY PLOT

That number is classified and will be provided under separate cover.

Mr. WOLF. Mr. Fattah.

Mr. FATTAH. Thank you.

I know that the U.S. Attorneys listen to you because I know that our U.S. Attorney in the Philadelphia area, Zane Memeger, was out last night in a neighborhood interacting in a community around issues to improve the quality of life there in terms of guns and youth violence. And it made a significant impact.

VOTING RIGHTS ENFORCEMENT

I want to get a couple of things in the record since this fiction about you making decisions about which cases to proceed with and which cases not to proceed with based on race. You decided to drop the prosecution for the late Senator Stevens. You were applauded by, I think, a lot of Members on the other side. You didn't do that on the basis of his race, right?

Attorney General HOLDER. No.

Mr. FATTAH. And I want to make sure I enter this news story in the record about that decision.

[The information follows:]

The Washington Post

A Section
Holder Asks Judge to Drop Case Against Ex-Senator; Justice Dept. Cites Prosecutors' Behavior During Stevens Trial
Carrie **Johnson** and Del Quentin Wilber
Washington Post Staff Writers
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During the corruption trial of former Alaska senator Ted Stevens, federal prosecutors were chastised by a judge for letting a witness leave town. They got in trouble for submitting erroneous evidence and were reprimanded for failing to turn over key witness statements. An FBI agent has since complained about the prosecution team's alleged misconduct.

Yesterday, Attorney General Eric H. Holder Jr. announced that he had had enough. The Justice Department asked U.S. District Judge Emmet G. Sullivan to drop the case after learning that prosecutors had failed to turn over notes that contradicted testimony from their key witness.

The discovery by a fresh team of lawyers and their acknowledgment that the material should have been shared with Stevens's defense team led Holder, a former public corruption prosecutor, to conclude that the department's biggest public corruption case in a decade could not be salvaged.

Holder's decision invites tough new scrutiny of a unit that polices corrupt officials, and it could foreshadow a shakeup in the way the government prosecutes those crimes, according to lawyers who work on such cases.

Current and former department lawyers predict an overhaul that will sweep aside senior leaders in the Public Integrity Section, two of whom were cited for contempt of court by the Stevens trial judge. That ruling triggered an internal ethics probe that has produced an awkward situation in which prosecutors and FBI agents who worked side by side on the case are pointing fingers at each other, sources said.

The Public Integrity Section in recent years has lagged in personnel and investigative firepower, veterans of the office say. Its work has produced acquittals and second-guessing from judges, which may intensify after the Stevens debacle.

Stevens issued a statement saying he is "grateful that the new team of responsible prosecutors at the Department of Justice has acknowledged that I did not receive a fair trial and has dismissed all the charges against me."

Holder's decision could also benefit another Alaska politician, Rep. Don Young (R), who is the subject of a corruption probe. Inconsistencies by witnesses in the Stevens case could make prosecutors reluctant to use those same witnesses -- oil services company executives Bill Allen and Rick Smith -- in any case against Young.

And other ongoing investigations of members of Congress -- probes that have already been slowed by problems with collecting evidence and protecting lawmakers' constitutional privileges -- could grow more painstaking with additional oversight by department brass who want to avoid a repeat of the Stevens case.

Defense lawyers who represent public officials already are seeking to exploit the government's problems to help their clients accused of political corruption, three of those lawyers said yesterday.

Stevens, 85, was convicted in October, eight days before Election Day, of seven counts of making false statements on financial disclosure forms to hide about $250,000 in gifts and free renovations to his Alaska house. The Justice Department filing yesterday means that he can no longer be prosecuted on any charges stemming from those allegations.

On Capitol Hill, outrage was palpable among Republicans who believe the case cost them a Senate seat. Senate Minority Leader Mitch McConnell (R-Ky.) told reporters, "No question that, if this decision had been made last

year, he'd still be in the Senate."

Former U.S. attorney Joseph diGenova, a Republican, praised Holder for making a tough call and reminding government lawyers that "the power to prosecute is the power to destroy. The significance of this misconduct is monumental."

Holder's decision to drop the Stevens case comes less than two weeks after a federal jury in Puerto Rico resoundingly acquitted the commonwealth's former Democratic governor, Anibal Acevedo Vila, of conspiracy and money laundering charges. Justice Department prosecutors charged Acevedo Vila last year, not long before indicting Stevens, in the midst of a tight reelection campaign that he ultimately lost.

Bradford Berenson, who worked on Vila's defense team, said public corruption cases demand acute judgment and sensitivity. "Too often they are tempted to indict marginal or ambiguous cases, and that's where they get into trouble, trying to present highly technical infractions to a jury," Berenson said.

Guy Singer, a former prosecutor, said Holder's decision "does not necessarily signify a belief in Senator Stevens's innocence, but it indicates serious concerns about the way the case was handled by both prosecutors and agents."

In his statement yesterday, Holder cautioned that an internal ethics review continues and that no determination has been made about the conduct of individual prosecutors. Calls and e-mails to several prosecutors in the case were not returned yesterday.

Sen. Arlen Specter (R-Pa.) last week announced his intention to investigate the way the government conducted the case. Judge Sullivan had been preparing to conduct evidentiary hearings in his own review of allegations of prosecutorial misconduct. After the Justice Department asked for the dismissal yesterday, Sullivan told both sides to appear in his courtroom Tuesday. He is likely to grant the request.

In February, Sullivan held three prosecutors -- William Welch II, Brenda Morris and Patricia Stemler -- in contempt for failing to comply with a court order. Welch is the head of the public corruption unit, and Morris was the lead prosecutor. Six members of the prosecution team eventually withdrew from the case.

Brendan Sullivan, Stevens's lead attorney, told reporters yesterday that "the conduct of the prosecution was stunning to me. They were hell-bent on convicting a United States senator."

Holder assigned a team of top department lawyers to review the case and said yesterday that he made the decision after a thorough review of the evidence.

In a three-page memo that accompanied the announcement, prosecutor Paul M. O'Brien said he discovered evidence that two prosecutors did not turn over notes from an interview in April 2008 with the case's key witness, Bill Allen. Those notes contradicted a critical piece of testimony Allen later gave at trial.

Allen is the former head of Veco, a now-defunct oil services company, and a close friend of Stevens's who allegedly gave him many of the gifts and funded most of the renovations to his house. At the interview in question, according to the notes, Allen said he did not recall talking to a friend of Stevens's about sending the senator a bill for work on his home, O'Brien wrote.

Under oath at trial, however, Allen testified that he was told by the friend to ignore a note Stevens sent seeking a bill for the remodeling work. "Bill, don't worry about getting a bill" for Stevens, Allen said the friend told him. "Ted is just covering his [expletive]."

Staff writer Paul Kane contributed to this report.

http://www.washingtonpost.com [http://www.washingtonpost.com]

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Mr. FATTAH. And also you decided not to prosecute anyone in relationship to the destruction of the alleged videos of torture of prisoners by agents of the CIA or consultants or employees. That wasn't done on the basis of race, was it?

Attorney General HOLDER. That was not.

Mr. FATTAH. And you decided not to pursue a prosecution of former Majority Leader Tom DeLay, and his ties to Abramoff. Was that done on the basis of his race?

Attorney General HOLDER. No.

Mr. FATTAH. So, now, this fiction about the New Black Panther Party, these were two individuals at one polling place in the entire Nation on election day who were out there. And this fiction created by Fox News is that they were intimidating voters. There were no allegations by any voter that they were intimidated, number one. These people said they were out there to protect these voters so they could cast their vote. Now, they should not have been there. They were rightly arrested. And the Department dealt with the adjudication in this matter, as you dealt with all the other cases.

But I think that the allegation—and I think the most unethical thing a person can do is make allegations based on absolutely nothing—that you would make a decision based on race flies in the face of all of the facts available. I think it brings the Congress into disrepute, in fact, to even raise it, without evidence. Now, if we look at what this holdover Civil Rights Commission has done, they ran this ridiculous investigation that the Republican vice chair says lacked integrity, to continue these allegations out in public. But the facts are as they are, and I think that the work of the Department in making decisions, and these are some fairly politically sensitive matters, without regard to race or political affiliation, just based on the facts—that is what we want prosecutors to do, to exercise their discretion and to do it on the side of justice. So I want to commend you for doing it. And I want to thank the chairman for allowing me to enter the Vice Chair's——

Mr. WOLF. Sure. Without objection.

Mr. FATTAH [continuing]. Statement into the record.

[The information follows:]

B. DISSENTS

Statement of Vice Chair Abigail Thernstrom

New Black Panther Party Report:
Dissent of Vice Chair Abigail Thernstrom
December 19, 2010

I cannot support the majority report on the New Black Panther Party investigation.

This investigation lacked political and intellectual integrity from the outset, and has been consistently undermined by the imbalance between the gravity of the allegations and the strength of the evidence available to support such charges. Some commissioners offered serious, principled critiques of the process, and questioned the evidentiary record. Their views were contemptuously ignored by the commission's majority.

The majority charges that racial double standards govern the enforcement of the Voting Rights Act in the Holder Justice Department. If that can be convincingly demonstrated, it will be a grave indictment of this administration.

But that evidentiary showing awaits further investigation by the Department of Justice and Congress. I applaud that investigation, and hope that it will shed more light on this important question than the tendentious report provided by the commission's majority.

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Attorney General HOLDER. If I could just say one thing in that regard, and I appreciate your comments. The decisions made on the New Black Panther case were made by career attorneys in the Department. And beyond that, if we are going to look at the record, let us look at it in its totality. The Department, just last year, requested additional relief on behalf of white voters in a Voting Rights Act in Mississippi, the case of the *United States* v. *Ike Brown*, where the person we were suing was black. So we have done these kinds of things irrespective of the race of the person who is either the complainant or the person who has done the inappropriate thing.

We have simply tried to follow the law, apply the law in a race-neutral way. And any assertions to the contrary are simply not consistent with the facts.

HUMAN TRAFFICKING

Mr. FATTAH. Now, the reason why I love our chairman—Frank Wolf has done a great job—is in part because of the passion he brings to this question of human trafficking. And the Department has done some work in this area that I want to make sure we get in the record. Over the last two fiscal years, you have had a record number of prosecutions in human trafficking cases and particularly in this area of children, investigations related to 1,200 children. You have had over 600 convictions in State and Federal court with 25 years to life sentences imposed. I went over and visited, in Virginia, the Center For Missing and Exploited Children, which is funded by your Department. And you have a number of agents co-located there, FBI, ATF and the like, working day in and day out, doing amazing work to recover children who have been kidnapped or who were being exploited or being used for child pornography purposes. So I really want to commend the Department. And this is some $30-plus million dollars being well spent. I don't think the public is as aware as we should be about the number of children that go missing every day.

And we talk about human trafficking as if they are just young girls being brought from some other place for untoward purposes. But in many instances, we have children right here in our own country, and it is terrible under any circumstance, but these children are being taken. And if it were not for the work of your Department to track them down and to prosecute the people who are violating the law and also rescue these children, it would not happen. So as a father of four myself, I want to thank you for that, and I yield back.

Attorney General HOLDER. If I could, in that regard, I think what the ranking member is talking about is the Innocence Lost National Initiative. As of November 2010—and the statistics that he has are correct there. There are 39 Innocence Lost task forces and working groups around the country and have worked successfully to recover more than 1,200 children. Investigations have led to 600 convictions with the multiple 25 years to life sentences that he indicates. And I think that is an indication of the kind of attention and resources that we have devoted to this issue. We always want to get better at it, and we want to work with the committee and in particular with the ranking member and with the chair so that

we make sure that all that we are doing is funded appropriately and that it gets the attention that it needs. It is a very serious problem.

Mr. WOLF. Mr. Dicks.

COMPUTER INTRUSION INITIATIVE

Mr. DICKS. Thank you. I want to thank the gentleman from Texas for letting me go first. In your statement on page 3, you talk about you want to expand the Computer Intrusion Initiative to increase our capabilities to detect and counter cyber intrusions. I serve on the Defense Subcommittee and am heavily involved in intelligence oversight. This cyber issue I think is one of the most dangerous issues to face the country.

Attorney General HOLDER. You are right.

Mr. DICKS. And I just would like you to describe what the Justice Department is doing with your Computer Intrusion Initiative.

Attorney General HOLDER. I think you are right. This is one of the most dangerous things that we have to confront, both on a national security basis, where people are trying to hack into our computers, glean national defense information or where they might be used in an offensive way against our country. There is also the commercial side, where trade secrets are stolen, and intellectual property is stolen, as a result of computer intrusions. This is something that we have devoted a great deal of attention to.

Cyber crime, in both the forms that I have described, is really something that requires 21st century enforcement efforts. It is something that we have devoted time and attention to. It is a priority for this Administration. This is something that not just the Justice Department is working on. This is something that we discuss in meetings that we have in the Situation Room with the President. We are really focused on the whole question of cyber crime.

We have a very effective part of our Criminal Division, the Computer Crimes Section, which I think does a very good job. Our budget for fiscal year 2012 asks for an increase of $318 million and 42 positions to enhance the FBI's ability to direct and investigate cyber terrorism matters and also to strengthen the National Cyber Investigative Joint Task Forces and also to improve our forensic capabilities in this regard. This is an area that really is important, and I think that your characterization of this as very serious and something we need to do is exactly right.

Mr. DICKS. One thing I would mention, I saw a recent report. And some people say this isn't—it is still understated that cyber attacks and taking people's intellectual property has reached over $1 trillion worldwide. Now, that is a big number when you talk about that kind of an impact. And we worry about our financial institutions, our utilities. I think the Defense Department is doing a pretty good job. The major concern I have is with the Department of Homeland Security and its coverage of the rest of the government besides defense and the business community in the country and working with the Administration on what they are doing.

And do you think there is a need for a regulation here so that the government—I am told by the Department of Homeland Security that they cannot direct a company to take certain actions, like

a utility, for example, if they were vulnerable to a cyber attack; there are certain things they could do, and if they didn't do it, that the Department of Homeland Security can't do anything about it.

Attorney General HOLDER. I think one of the things we need to do is try to work with partners on the private side and establish relationships such that when we identify a threat, they take action consistent with that threat. I think that is probably the best way to do it.

But I think the point that you make about the commercial side is, again, exactly right. I went to Hong Kong to give a speech about that a few months ago and then went to China to talk to the Chinese authorities there about the problems, the issues that we have with them about the way in which these cyber intrusions are occurring and the theft of our intellectual property. They announced a program of short duration to deal with the issues that we raised. But I think working with people in private industry—having a good interaction between government and those on the private side, to allow them to come up with ways in which they are responsive to the issues that we identify—probably the best way to do it.

If ultimately there is the need for regulation, that is certainly something that we would want to work with Congress on. But I think your identification of this issue and all of the ways in which you have described it is something that really has to be focused on. As we have made tough choices with regard to our budget, it is one of the reasons why we have sought the pretty substantial increase in this area because I think this is an area that is deserving. Even in hard budget times, this is an area that is deserving of more resources.

Mr. DICKS. And I will just end on this. Sometimes people don't even know that they have been intruded on, and this is—and you don't know necessarily where it is coming from because the way they set these things up can be very deceptive. So I just think—and I think the vulnerability has not been publicly stated as much as it should, so the people will take it and the companies will take it serious. Thank you.

Thank you, Mr. Chairman.

Mr. WOLF. Thank you.

Mr. Culberson.

VOTING RIGHTS ENFORCEMENT

Mr. CULBERSON. Thank you, Mr. Chairman.

Mr. Fattah said—I want to make sure I understood, Mr. Fattah. I hope you weren't referring to my questions as bringing discredit to the Congress, I hope.

Mr. FATTAH. Never.

Mr. CULBERSON. Thank you, my friend. Because we do work arm in arm on this. But these are not—I think I heard you say made-up allegations or something.

Mr. FATTAH. I said they were fiction.

Mr. CULBERSON. Fiction. Well, they are on videotape, and you have sworn testimony from a whole variety of witnesses. And I know you are upset in Philadelphia. This happened in your backyard. But this is on videotape. You have got sworn testimony from a whole variety of witnesses. And in particular—and this is now a

part of the record. I want to bring to your attention—this is sworn testimony in a litigation brought the Department of Justice under President Bush, a gentleman by the name of Bartle Bull, who worked in the Lawyers' Committee For Civil Rights Under Law in Mississippi in the 1960s, and was publisher of the *Village Voice*. He was the New York campaign manager for Bobby Kennedy's presidential campaign in 1968. This guy goes way back; Charles Evers' campaign for governor of Mississippi. The guy's civil rights credentials are impeccable. And he was interviewed by Department of Justice personnel about what happened on election day. He watched these two uniformed men confront voters, attempt to intimidate voters, position themselves in a location that forced every voter to pass in close proximity to them. They brandished a nightstick, were wearing uniforms. He says, "in my opinion, these men created an intimidating presence at the entrance to a poll." Direct sworn testimony in the litigation that was going to lead—until you dismissed it—to a permanent injunction against these guys. This is testimony, sworn testimony: "In all of my experience in politics and civil rights litigation and in all my efforts in the 1960s to secure the right to vote in Mississippi, I have never heard or encountered another instance in the United States where armed and uniformed men blocked the entrance to a polling location. Their clear purpose and intent was to intimidate voters. To me, the presence and behavior of the two uniformed men was an outrageous affront to American democracy and the rights of voters to participate in an election."

His sworn testimony is, Mr. Fattah and Mr. Attorney General, that this would qualify as "the most blatant form of voter intimidation I have encountered in my life in political campaigns and many States, even going back to the work I did in Mississippi in the 1960s." So it was on videotape. You have got sworn testimony from all sorts of witnesses that these guys were intimidating and harassing people. They admitted liability and were ready to accept the judgment of the court. The Civil Rights Division had actually prepared a permanent injunction.

And as soon as the new administration came in, they withdrew it. And that in itself is a terrible affront to American justice and the Civil Rights Act that was the greatest achievement of President Lyndon Johnson and President Kennedy, the Voting Rights Act.

What I am really driving at and what is most disturbing to me, to Mr. Wolf, and to a lot of Americans, is the double standard. There is a pattern of a double standard here that Mr. Adams, Mr. Coates, that a number of people in the Department have testified to. And on the Ike Brown case, Mr. Attorney General, you mentioned a minute ago that you said—I am flying through my iPad here. You have got to get one of these. Frank is about to get one. They are spectacular.

On page 52—if I can get to it quick enough by flying through—I don't think I can pick pages. They talk about the Ike Brown case, Mr. Attorney General. You mentioned a minute ago that it was your belief that it was professional people and the career attorneys that had handled this. And as I recall, on page 52, that the attorneys who actually—at the time, the attorneys who made this decision—and I will find it here in a second—that they were—that you

say they were career attorneys general. But by the time they made the decision, they were actually political appointees.

So there is a lot of conflict between the official position of the Attorney General and the Department and the sworn testimony of attorneys who work in the Civil Rights Division and that there is—that we have got sworn testimony that there is a pattern of behavior of refusing to enforce the law in a race-neutral manner. This is a big concern to the committee.

Mr. FATTAH. If the gentleman would yield for one second.

Mr. CULBERSON. Certainly.

Mr. FATTAH. I don't want you to take any personal offense for what I said earlier. I was not saying you were bringing the Congress to disrepute. I am saying that the allegation that the Attorney General is acting on the basis of race is fiction. If you look at all of the decisions to decline prosecutions, the ones I just named, Tom DeLay, former late Senator Stevens and so on, that they are not based on race. The only race involved here—the only issue of race is the singling out of this particular decision. Right?

Now, I happen to know—and I know you are from Texas. This is pretty close in for me. This happened in Philadelphia. Is that the essence of the allegation that among a million polling places, there was one where this took place. That this rises to national significance is bogus on its face. Secondly, that anyone was intimidated—as I told you, no one has alleged that they were intimidated. But they should not have been at a polling place. It was a Federal election, and the Justice Department took appropriate action. I totally agree.

Now, I am willing to yield you back your time because the committee has dealt with a lot of issues today. If you think this is the most significant one, I want you to better pursue it. I am just telling you, I am not making any personal affront to you. I know that you are sincere. I just think that to anyone who believes that the Department of Justice is operating on a basis of race, I just think this is without foundation.

Mr. CULBERSON. Okay. Thank you. Reclaiming my time.

And I appreciate that very much, Mr. Fattah. And we all work together arm-in-arm on this committee, Mr. Chairman and Mr. Attorney General, in a cordial and friendly way. And we all are committed to making sure our laws are enforced in a racially neutral way, in a way that is fair and blind. No matter who the President is or who the Attorney General is, I would be pursuing these questions. But I would hope that this committee will pursue in greater detail and in more depth and perhaps, Mr. Chairman, in a separate hearing, these very, very serious allegations of a pattern of behavior at the Department of Justice. Sworn testimony indicates there is a pattern of behavior of refusing to enforce the laws in a racially neutral manner, ignoring the voter intimidation in Pima County, Arizona; ignoring voter intimidation in Philadelphia; the Ike Brown case, where attorneys in the Department were harassed. We have got sworn testimony. And the reason it is relevant, if I could in conclusion, Mr. Chairman, point out that the Department of Justice is asking for a $145 million increase in the Civil Rights Division funding for this year, Mr. Chairman. And that includes funding for 815 staff positions. That is a 14 percent increase in manpower and

an 18 percent boost in spending. I want to make sure American taxpayers are getting their money's worth, Mr. Chairman; that that money is being spent in pursuit of cases in an absolutely blind and racially neutral manner. No matter who it is, if they are intimidating voters, if the voter registration rolls—that is another question, Mr. Chairman—section 8 of the National Voter Registration Act. We have got sworn allegations that it is not being enforced. The States are being allowed to keep garbage lists, and the DOJ is charged with cleaning up those lists.

I think it is worth very careful inquiry, Mr. Chairman, to determine whether or not these—Mr. Fattah says it is false. We have got sworn testimony it is true. We need to pursue that in great detail.

Attorney General HOLDER. If I could speak on just a couple of things. First, the people in the Black Panther case did not admit to guilt. They did not appear and a default judgement was entered against them.

Mr. CULBERSON. But they did not contest liability?

Attorney General HOLDER. When you say admit, that is an affirmative action.

Mr. CULBERSON. They did not contest it.

Attorney General HOLDER. I think that the quote that you read from that gentleman, that this was the greatest affront in the history that he had ever seen, that——

Mr. CULBERSON. Personal opinion.

Attorney General HOLDER. Think about that. When you compare what people endured in the South in the 1960s to try to get the right to vote for African Americans and to compare what people were subjected to there to what happened in Philadelphia—which was inappropriate; it is certainly that—to put it in those terms I think does a great disservice to people who put their lives on the line, who risked all for my people, like my wife's sister, who went to the University of Alabama. When George Wallace stood in the door and said that she as a State resident could not attend the University of Alabama, Vivian Malone, who I am proud to say was my sister-in-law, persevered. To compare that kind of courage, that kind of action and to say that the Black Panther incident, wrong though it might be, somehow is greater in magnitude or is of greater concern to us historically, I think just flies in the face of history and the facts.

And I just want to assure again the American people that the allegations that somehow, some way this Justice Department does things on the basis of race is simply false. It is simply false. Anybody who makes that contention is not telling the truth, is not familiar with the facts or has a political agenda. It is simply not true.

Mr. CULBERSON. I am very glad to hear it, Mr. Attorney General.

And I know the chairman is as interested as I am, and as Mr. Fattah and all the members of the committee are, to ensure that is not true. I am glad to hear you say it, and I am confident that you will provide proof to the chairman of the committee that everything Mr. Coates and Mr. Adams and these other folks said in sworn testimony, that everything they said is false. I am confident that you will prove that they are—I hope that you can prove that

your statement is accurate, and I hope that the committee will pursue it.

Mr. FATTAH. Mr. Chairman, I want to reiterate the statement of the Republican vice chair who was involved in this supposed investigation that keeps being referred to here. She says that this investigation lacks political and intellectual integrity from the outset and has consistently been undermined by the imbalance between the gravity of the allegation and the strength of the evidence available to support such charges.

I just want to put that again in the record because this is—it is obviously an important issue to my colleague. I think it would be important for the committee in that the Attorney General has no burden to disprove allegations that even the hearer of these supposed statements says are weighted and imbalanced and lacked integrity from the outset.

[The information follows:]

B. DISSENTS

Statement of Vice Chair Abigail Thernstrom

New Black Panther Party Report:
Dissent of Vice Chair Abigail Thernstrom
December 19, 2010

I cannot support the majority report on the New Black Panther Party investigation.

This investigation lacked political and intellectual integrity from the outset, and has been consistently undermined by the imbalance between the gravity of the allegations and the strength of the evidence available to support such charges. Some commissioners offered serious, principled critiques of the process, and questioned the evidentiary record. Their views were contemptuously ignored by the commission's majority.

The majority charges that racial double standards govern the enforcement of the Voting Rights Act in the Holder Justice Department. If that can be convincingly demonstrated, it will be a grave indictment of this administration.

But that evidentiary showing awaits further investigation by the Department of Justice and Congress. I applaud that investigation, and hope that it will shed more light on this important question than the tendentious report provided by the commission's majority.

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Mr. WOLF. Before I recognize, Mr. Serrano, I do want to comment, though.

I think Mr. Culberson makes a legitimate point. Mr. Fattah and I both are from the City of Philadelphia originally. My first year of college I went to the University of Mississippi in Oxford. I saw discrimination. I saw segregation. I saw things that I didn't like. I was the only member of the Virginia delegation to vote for the Voting Rights Act, and there were many editorials criticizing me from the *Richmond Times Dispatch* and other newspapers. And I think it is important—we are not looking for finding punishment to go through the Justice Department to find out who did this but going future, going future. And that is why I think it is important and I appreciate Mr. Culberson raising this. Going forward there ought not to be any discrimination based on race. Period. I will tell you that we have had telephone calls from career people at the Justice Department who do not want to come forth with their name.

I am not so anxious to go back to find out what took place a year ago, two years ago and who is to blame and who puts this right. But going forward from here on end, from this day forward—because I believe in the Voting Rights Act strongly; not by rhetoric or by words, but by deeds. And we will make sure that it is enforced in an appropriate way. So I think what Mr. Culberson did was appropriate. We are looking forward, and with that, let me just go to——

Attorney General HOLDER. I just want to say there have not been, there is not and there will not be any enforcement of the civil rights laws on the basis of anything other than the facts and the law. Race does not, has not, will not enter into those considerations.

Mr. WOLF. Mr. Attorney General—you are a man of character and I take you at your word, period. But I will also sometime sit down with you off the record—because we are not looking to kind of ferret out and hurt somebody—and give you some of the things that I have been told by telephone calls from career people at the Justice Department. So let us work at a time whereby I can tell you that—I just ask that you protect their—because some are feeling intimidated that if they come forward, that they are going to be punished with regard to that.

Mr. Serrano.

Mr. SERRANO. Thank you so much. I apologize for the fact that I was here this morning, that I left to be ranking member on a hearing. That hearing has long finished, and you guys are still going. So, congratulations and thank you.

I had a very totally different question, but one cannot help but think that we Americans have a responsibility. We are living during a time—I have been around long enough, both politically and personally, to remember the 1960s, and it has been a while since I have seen the anger driven, not necessarily by Members of Congress or elected officials, but by nonelected officials, who obviously don't know that Hawaii is a State, otherwise they wouldn't question birth; who won't take a man at his word as to who he is or what he is; and who somehow have just gotten used to the fact that there have been some historic, dramatic and very important

changes in this country that give rights and opportunities to a lot of folks.

I have no doubt, Mr. Attorney General, that you take your job seriously because I know where you come from, not only because you are from New York City, but I know who you are. I have dealt with you for many, many years on other issue, some of which you took a lot of heat for during your confirmation, but which I knew indicated to me that you were looking for what was right to do and to do it correctly.

And I think the danger we run at times as elected officials is that we make statements and not knowing that there is a crowd out there that listens to those statements and begins to believe that there is a problem beyond the question being asked. So you can bet your life that tonight there are a couple hundred thousand and millions of Americans who are angry at government who believe that the Justice Department is functioning under the issue of race only and in an unfair and improper way.

So I just would hope that as we continue to move forward in this country—and we will move forward—that we get over some of these situations. I take very seriously your comment about your sister-in-law. I take that seriously because I lived that time. I am old enough to remember that time, how painful that was, how difficult it is. Now it is hard for people to remember that.

Everything happened and you are here and I am here, and Mr. Fattah is here. So it was all simple. It wasn't simple. It was very, very difficult to register. I remember the Justice Department you head now under other leadership, dealing with the fact that people in New York were not allowed to vote because they didn't speak English, only to have Paula Dwyer and other folks go to the courts and say, well, you taught them how to be American citizens in Spanish in a territory, how can you deny them the right to vote now because they don't speak English the way you want them to. And those seem now—seem to have simply happened, but they didn't. They were long fought battles.

And I know in closing that you are too serious a man and too humane to take that history not seriously and do anything that would be improper or allow anything knowingly to be improper and that would be against the best interest of this country. And I know that and I just felt that I had to say that for the record.

Attorney General HOLDER. Thank you, Congressman. I really appreciate your comments.

Mr. SERRANO. Now to a local issue.

9/11 HEALTH BILL

You know that one of the biggest issues we all participated in and there was a lot of pressure on is the James Zadroga Health 9/11 Bill which allows folks to be covered who were there at 9/11. The budget that you presented after saying all these nice things about you, in my opinion may not allow for the reopening of that account properly to service all of these folks, the appropriated amounts.

We understand that the appropriated amount I believe is $6 million. It took about three times that the last time that something similar was done. So my question to you is having fought such a

difficult battle on behalf of people who really deserve help, how do we now deal with the fact that we may not implement it properly?

Attorney General HOLDER. We certainly need Congress' help in that regard. The money is there and appropriately so, after a great deal of struggle for money to be paid to the victims. We need Congress' help so that we have an appropriate amount of money to start up and run this program. We want to work with Congress to make sure that we have the appropriate amounts and do that as quickly as we can so that people who for too long have been denied relief for heroic actions that they took on the most traumatic day in the history of my hometown, so that they will receive the benefits that they deserve. And we want to work with Congress to come up with those amounts and come up with a process that makes real this promise that we have all made by putting this fund together.

Mr. SERRANO. I hope so and I stand ready to assist you in any way that I can.

REDISTRICTING

One last question and one that is dear and near to all of our hearts on this panel, it should be to the American people, redistricting. Is everything in place for the fact that I suspect with everything that we are hearing out there and with the growth of certain communities and loss of key seats, New York is losing two, Florida is gaining two, as an example, the Hispanic population's growth, the African American population, other groups throughout the country, do you feel confident that everything is in place for what I suspect will be a lot of challenges that will somehow end up with your Department?

Attorney General HOLDER. We are mindful of the role we play in a variety of contexts in the redistricting effort and I think we are prepared for what I think you are saying correctly could be something that I think certainly would be contentious in a lot of places and may have legal implications in many, and we are ready to proceed. We have configured the Civil Rights Division and other parts of the Department in a way that we are going to be prepared to deal with the issues that we will have to confront.

Mr. SERRANO. Thank you so much. And once again, thank you for the job you are doing on behalf of our country.

Attorney General HOLDER. Thank you.

BUREAU OF PRISONS

Mr. WOLF. Prisons, an area that you really have a unique opportunity to do some fairly dramatic things that can make a big difference. The Bureau of Prisons is nearly 40 percent over capacity, and the Federal prison population is expected to grow by an additional 14,000 inmates over the next year at the cost of $27,000 per inmate per year. The Federal system—we are actually number one in the world, which is not a good thing you want to be number one in with regard to the number of people that are in prisons.

Most State correction systems began their reform process by providing outside experts with correction data to conduct comprehensive analysis. I believe it is imperative that experts at the Bureau of Prisons and others outside government fully understand that the drivers are population, cost, and recidivism so we can address over-

crowding, improve reentry programs, reduce the recidivism rate, increase public safety and control costs. I asked the Bureau of Prisons if they would make available the BOP data that will be necessary. And it is important that we get it early because we, through the efforts of Mr. Mollohan of this subcommittee last year—we were able to convince Pew and others to put together that forum. They came up with other really good ideas that the States are moving out on, but the Federal Government is not. So it is important that we get that data quickly so we can apply whatever the recommendations were for the States for the Federal Government.

Can you tell us—we have asked the Bureau of Prisons to give it to us, that we get it as quickly as possible with as much information as they have. They are now saying, well, they have to go to U.S. Attorneys, and we need something quickly to deal with this issue so that Pew and State governments can look at that data and come back and make some recommendations.

Attorney General HOLDER. Yes, we will endeavor to get that information to you as quickly as we can. I will see what the nature of the information is. And if there are any holdups, I will try to make sure that we streamline the process and get the information to you because I think the contention that you have just raised, the concerns that you have expressed, certainly throughout your career and certainly in my interaction with you, I think are appropriately placed.

[The information follows:]

INFORMATION FOR PEW AND COUNCIL OF STATE GOVERNMENTS

The Bureau of Prisons (BOP) has compiled a data file with the information and is prepared to transmit it pending the resolution of issues regarding access to the data by outside consultants; BOP staff is working with your staff on such resolution. BOP is prepared to work with your staff and outside consultants to formulate the relevant questions, develop appropriate parameters, and then write the programs to run against the data. The BOP has social science researchers who have many years of experience working with the data and are familiar with the latest sophisticated statistical methods needed to ensure that any conclusions drawn from the data are well founded.

We really have to look at ways in which we can use our prison system better than we are doing it. This whole question of reentry is something we have tried to focus on. We have worked with you in that regard. We have asked for a 10 percent increase with regard to the capacity issue. But we want to do more than that. We want to try to work on the prevention side. We want to work on the rehabilitation side. And we also want to work on the whole question of reentry programs and to try to cut down the recidivism rate, which ultimately and obviously protects the American people.

It is a very interesting thing that I don't think too many people understand, but you all do and we need to get it out there, is that we can actually save money and increase public safety at the same time through the use of these rehabilitation and reentry programs. And so we look forward to working with you and the other members of the committee in that regard.

Mr. WOLF. Texas is doing it, and Mitch Daniels from Indiana is doing it. I am going to have some questions with regard to work on that.

FEDERAL INMATE GOOD CONDUCT TIME CREDIT

But let me follow back to where we were. Congress mandated that Federal prisoners serve 85 percent of their time. BOP supports a change in the Federal Inmate Good Conduct Time Credit, which provides inmates clear incentives that encourage positive behavior. The change would increase good time credit availability by 7 days a year. I understand that your hope was that this proposal would be enacted by Congress. In fact, you have assumed, I understand from the staff, such a change will occur before October 1. That is in your budget request. Have you submitted a formal legislative proposal?

Attorney General HOLDER. If not, we will submit one as quickly as we can. We believe that will save us about $40 million by having the good time credit set at the level that we have indicated. It is an interesting thing, what I was saying before, about how we can save money and increase public safety. And this is one of those examples, what you have seen in the States, as you have indicated especially, where you make available to people who are in prison, vocational programs or the opportunity to get out of prison sooner if they will avail themselves of drug treatment programs, vocational programs, educational programs. It saves money in terms of time that they serve in jail, and actually it decreases the recidivism rate. So we will work on getting you an appropriate proposal in that regard.

PRISON REFORM

Mr. WOLF. I think the earlier, the better. I am not sure—I hope this committee—I would be open to carrying something, and I think the gentleman would, the authorizers obviously would have to tell us that it is okay. But I think the earlier you get something up, I think the better it is.

There is an area that I think we can make a tremendous difference in, having a robust work program in our Nation's prisons is an important priority, quite frankly, of mine. The statistics I received from the Bureau of Prisons tell us that inmates who participate in work programs are 24 percent less likely to offend again, 14 percent more likely to find work outside prison, and 23 percent less likely to have misconduct in prison.

What are you doing with regard to prison reform? And in the interest of time, we ought to be boldly moving out. I have a proposal—I think you have the authority to do it—of putting industry into the prisons, the prison industry, to get products that are no longer made in the United States, which unfortunately are a lot of products. So you are not competing with organized labor. You are not competing with the furniture manufacturers. You are competing with somebody in Bangladesh or China or Mexico. I call it repatriation, bringing back, if you will, whereby then the men maybe can recreate that industry back in the United States.

For instance, years ago, if you were a judge in the District of Columbia—Lorton was the armpit of the Nation. It was brutal. I used to go down to Lorton. I was in a program then. It was brutal. Brutal. We tried to bring in a television manufacturer. Emerson was somewhat a little interested in it. It was the last manufacturer of

an American television set. They have since left. I think they are now down in Mexico. They were a little open to it. So we came in and said, let's manufacture Emerson television sets or portions of the television set in Lorton. The pushback from the District government and others was significant, and you know what happened in Lorton, the men would be so afraid—I have had some men tell me at Lorton, they couldn't sleep at night; they were afraid somebody would have put a shiv in them and kill them.

Why don't you do something and be bold and bring back in industries that are no longer operating in the United States so you won't get across the breakers with the labor unions, you won't get across the breakers with the people that are manufacturing furniture or something like that, and really energize prisons—because you can't put a man or woman in prison for 15 or 20 years and give them no work. Very few people in the Federal prisons are working now. In fact, what has the loss been with regard to Prison Industries? How many jobs have you dropped in the last four years in prisons?

Attorney General HOLDER. I don't have those numbers, but the program is not nearly as robust as it once was, and I think that is something that is ultimately really short-sighted.

The ability to provide work opportunities, skills to people, through the Federal Prison Industries is something that I have supported, you have supported, and I think that over the long term is good for our Nation.

Just one thing here. I was handed a note with regard to that proposal, that legislative proposal that you talked about. I was indicated you should get that this week, that we talked about in the previous question.

Mr. WOLF. Well, you have an opportunity. I assume you are going to be here for the next 2 years. You have an opportunity to——

Mr. FATTAH. I am sorry, Mr. Chairman.

Mr. WOLF. I didn't mean that in a——

Mr. FATTAH. It sounds like a sentence almost.

Mr. WOLF. No, I assume there is an opportunity.

Attorney General HOLDER. He is talking about my two years more here in this job as a sentence.

Mr. WOLF. I see from that—you can be like Esther for such a time. You can literally transform, if you are going to be here for that period of time, would it not make sense to bring back some of the work that is being done now abroad and put it into the Prison Industries?

Attorney General HOLDER. I wouldn't disagree with you. To the extent that we can come up with employment opportunities, work-unit opportunities for people who are incarcerated in the Federal systems, State systems as well, those are the kinds of things I think that we need to encourage.

Mr. WOLF. Will you make it a priority?

Attorney General HOLDER. I have tried to make this a priority, that is to work in ways in which we deal with rehabilitation, reentry, prevention, all of these things apply to it. But with this one in particular, I will do what I can and work with you in that regard.

As you know, this is not something that is universally supported. But it is something that I think we should be behind and something that we should be putting resources and opportunities in.

Mr. WOLF. What is the law now—when you access income from the Prison Industries? Is that returned to the Treasury or can you use that?

Attorney General HOLDER. I don't know. I will have to check on that. I hear some whispering behind me.

Mr. WOLF. Maybe they can whisper louder, and we can hear them.

Mr. LOFTHUS. Prison Industries income stays with Federal Prison Industries for the benefit of Federal Prison Industries.

Mr. WOLF. So, therefore, the more prison industries you have, the better: One, you lower the recidivism; two, you have revenue. But I would really hope that, in addition to eliminating sexual trafficking, this would be one of your legacies with regard to the prisons and with regard to the prison reform issue. Do you want to——

Attorney General HOLDER. I am not sure which one I just got. I will have to work on it.

COUNTER-RADICALIZATION

Mr. WOLF. Okay. The last two questions, and I will go to Mr. Fattah or then Mr. Schiff if he has a question. What should we be doing with regard to radicalization?

Attorney General HOLDER. That is an issue that is of great concern. As one looks at the threat that we have endured these past, 12, 18 months or so, we have seen an increase in the number of American citizens who have for whatever reason decided to try to do harm to their country and to their fellow citizens. We try to determine what is it, what are the common factors that we see there that change people? The guy who was going to do the Times Square bombing, Shahzad, what happened to him? Ostensibly, he was just a normal guy who kind of goes off the deep end.

We have substantial outreach efforts that the Department of Justice has done through its United States Attorneys Offices so that communities, Muslim communities, do not feel isolated. We talked to our British counterparts about the issues that they have dealt with there and ways in which they are trying to have a robust and effective counter-radicalization program. Our FBI is doing a really substantial amount and I think a good job in reaching out to Muslim communities.

I have certainly tried to use the soapbox that I have to talk about these issues and to go to Muslim groups and make them understand that they are American citizens; they are a part of our American community. And it seems to me that one of the things we have to do is not let these communities become isolated, feel that they were being set upon, that they are being pointed at, to understand that they are just like the rest of us. They want the normal things for their kids. They want to feel safe in their homes. And we have to deal with those concerns. We also have to deal with the use of the internet in a way that is being used to radicalize people. But this counter-radicalization effort is something that the President has focused on and has told his national security team that he wants an effective robust program, and he has tasked a variety of

us with that responsibility. John Brennan is the one who on a weekly basis—we meet with him on Tuesday afternoons with the President—is constantly bringing that up.

Mr. WOLF. Your answer triggered it. Did it trouble you or did you speak out on the issue when CAIR ran those posters urging people not to cooperate with the FBI? Did you see that poster? It was really kind of shocking.

Attorney General HOLDER. That is the kind of thing——

Mr. WOLF. Did anyone speak out at the Justice Department criticizing CAIR for that?

Attorney General HOLDER. We have had a troubled history with that organization. And we have to counter that by countering—or saying negative things about those kinds of posters. But then also doing things on the affirmative side.

Mr. WOLF. Sure. That was I thought a very counterproductive thing for CAIR to——

Attorney General HOLDER. It clearly is. It is counterproductive, and it is not in the interest of the Muslim community for that to be seen as the way in which they are going to interact with Federal law enforcement.

INTERNET RADICALIZATION

Mr. WOLF. One other issue, too, that you triggered. What is the connectivity of all of these cases? Do all of them involve to a certain degree the internet? Is the internet—I know it is a difficult issue, but just on the surface, has there been an internet connection on 100 percent, 50 percent?

Attorney General HOLDER. I am not sure I can give you a percentage, but a substantial number of them, when you look back and then do the things we are capable of doing—I don't want to go into too much—the things that we can do, you can kind of see attempts by these people to touch base with or to look at these jihadist web sites.

Mr. WOLF. Would it not make sense to take down al-Awlaki's site. He is preaching hate. Major Hasan was radicalized by that. We have 13 people who were killed. His name has come up in other cases. Would it not make sense in that case to take that site down? Because the 13 families who will never have a loved one return to the house, and we know what he is preaching now. I think he has crossed the line. Would it not make sense to take al-Awlaki's site down?

Attorney General HOLDER. We try to do what we can with the tools that we have. And cyberspace is huge. And if you try to knock down a site here, people pop up over there. And so what we are trying to do is come up with ways in which we are identifying those sites that are problematic, trying to counter the message that you see on those sites and then take physical action where we can.

Mr. WOLF. Well, my sense is from talking to people, there are ways of taking his site down. They could perhaps go back up again, but there are different degrees. But certainly the hatred that he has been spewing and the death that we have seen as a result of that, I think the administration should take down the site. I know that some are going to say that we gain information from it, but

that would make it very difficult to meet with the families of the 13 who would say that he was radicalized through that site.

EQUIPPING FEDERAL AGENTS WITH WEAPONS IN MEXICO

The last issue before I go to Mr. Fattah and Mr. Schiff, are you considering having our law enforcement people carry weapons in Mexico in light the attack on two U.S. Immigration and Customs Enforcement agents on February 15th.

Attorney General HOLDER. I think we have to consider——

Mr. WOLF. I saw you at the funeral if my memory serves me.

Attorney General HOLDER. Yes. I went to Texas. We have to take into consideration everything so that our people are protected while they are doing the great work that they do. And that is one of the things that I think we have to look at and talk to the Mexican government about.

Mr. WOLF. So that is under consideration?

Attorney General HOLDER. It is something I am certainly considering, and I want to hear from the people who are there. We have to protect our people. And the information that Mr. Fattah shared about the guns that were used in the death of ICE Agent Zapata is of great concern. So we have to make sure that those kinds of incidents are not repeated. And to the extent that that involves the potential arming of them, I think that is something we have to consider.

Mr. WOLF. Do our DEA people in Colombia carry weapons?

Attorney General HOLDER. I am not sure about that. I am not sure. I think they do, but I am not sure about that. I don't want to answer the question not being sure.

Mr. WOLF. And I assume if they did, that would be because of the permission of the Colombian government.

Attorney General HOLDER. Right.

Mr. WOLF. So that is the determining factor—whether or not the government of Mexico permits?

Attorney General HOLDER. It is something we would have to work with the Mexican government to try to address. What happened, what tragically happened two weeks ago—I think potentially has changed the factual situation that we have to confront and may require a different policy.

DEA—COLOMBIA BEST PRACTICES

Mr. WOLF. Have you looked at the success in the Colombian situation, the DEA and try to replicate that in the country of Mexico? Are there any similarities that this was successful because of this, this and this? And therefore, if we applied it, because 34,000 or 35,000 individuals have been killed in Mexico, and I am sure every family down there lives in fear. Have you—has anyone looked at what was done in Colombia with regard to the DEA and the comparable training and different things like that?

Attorney General HOLDER. Yes, we have. In fact, that is one of the templates that we try to use, given the success we encountered over a long period of time, and it was not easy. But given the success that we ultimately achieved in Colombia, we have tried to see if there are lessons that we learned there that we can apply in Mexico. We have tried to do that through a variety of means,

through the way in which we deployed our people through the Merida initiative and the ways in which aid goes to Mexico. We have talked about and we have examined and shared with our Mexican counterparts what occurred in Colombia.

Mr. WOLF. Have there been any meetings between DEA and Mexico and Colombia, perhaps down in Colombia to show what was done and what worked and what didn't work?

Attorney General HOLDER. I am not sure if there had been meetings in Colombia, but I know that certainly the lessons that we learned and the experiences that we had in Colombia, certainly have been shared with our Mexican counterparts. There have been briefings in that regard of which I am aware.

Mr. WOLF. Mr. Fattah.

Mr. FATTAH. I am going to yield to Congressman Schiff.

Mr. SCHIFF. Thank you, Mr. Chairman.

VOTING RIGHTS ENFORCEMENT

I didn't want to interrupt earlier in the discussion of the New Black Panther issue, but I did want to make a brief comment on it. And I will be economical in my comments. I know it has been a long morning for you. But having spent part of this weekend visiting the Martin Luther King Museum in Atlanta, I am struck by the incongruous nature of this whole discussion.

One of the things I found most kind of shocking about the exhibits I saw there was the long list of laws in the 50 States that were discriminating against Americans based on their ethnicity, denying them their ability to vote, denying them their ability to enjoy all the other attributes of citizenship. And to look at that history and then consider the discussion we have been having to me seems a little shocking in its disproportionality.

It seems to me the commission investigation has been highly politicized, and my colleague, Mr. Fattah, read the vice chair's statements. I also would like to read briefly from a couple of the other commissioners, Arlan Melendez and Michael Yaki and ask that their statement also be included in the record.

[The information follows:]

Commissioner Arlan Melendez and Commissioner Michael Yaki
Regarding

Race-Neutral Enforcement of the Law?
Department of Justice and the New Black Panther Party
An Interim Report

December 12, 2010

INTRODUCTION:

The Commission's investigation into, and this Report concerning, the New Black Panther Party ("NBPP") have been a tremendous waste of scarce government resources. They have wasted our own resources at the Commission[1] but those of the Department of Justice as well. In addition to squandering time, money and attention, the majority has further squandered the reputation of the United States Commission on Civil Rights as it spent more than a year on an Ahab-like quest to hobble the Obama Administration[2] and to attempt to rehabilitate the disgraced record of the previous Administration's Department of Justice.

Our dissent does not attempt to make definitive claims about the motives or actions of the United States Department of Justice ("Department") past or present. We have no special insight into the hearts or minds of the people working at the Department. Where we differ from our colleagues is that we did not enter into this investigation having already made up our minds that there was wrong-doing by the Department. Therefore, we did not interpret all evidence in light of any foregone conclusions or ignore any evidence that flatly contradicted any conclusions.

We cannot prove, and do not bother to try to prove, that the Obama Administration is not rife with covert NBPP sympathizers. Since there are reasonable explanations for the Department's actions, we do not feel the need to adopt bizarre explanations that envision the Obama Administration doing favors for a black-supremacist group.[3] It will suffice for us to detail and explain the short-comings with the original case, as well as short-comings in how the case and the broader issue of civil rights enforcement were discussed in the Commission hearings and in this Report. It is in this light that our comments such as, "X should have been called as a witness," should be read. Since we did not approve of the investigation at all, we

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[1]Ryan J. Reilly, *Conservative Civil Rights Commission Spent $173K Exclusively On Black Panther Query*, TPMMUCKRAKER, Oct. 25, 2010. The figure cited in the article underestimated the cost to the Commission on account of Commissioner and Commissioner Assistant salaries not being included.

[2] Ben Smith, *A Conservative Dismisses Right-wing Black Panther 'Fantasies'*, POLITICO, Jul 19, 2010, ("My fellow conservatives on the commission had this wild notion they could bring Eric Holder down and really damage the president.") *available at* http://www.politico.com/news/stories/0710/39861.html

[3]J. Christian Adams, Pigford and New Black Panthers: Friends at DOJ, Dec. 2, 2010. ("Did Perrelli's zeal to have the case dismissed have anything to do with the New Black Panther's endorsement of candidate Obama during the primaries?") *available at* http://biggovernment.com/jcadams/2010/12/02/pigford-and-new-black-panthers-friends-at-doj/

would rather that no witnesses had been called. However, since an investigation was going to be done over our objections, it should have been done in a fair. thorough, and impartial manner.

Our dissent should also not be read as a defense of the NBPP. The NBPP is a hate group whose views are as ugly as they are outlandish. We would not even bother to include this disclaimer were it not for the fact that a good deal of this Report relies on sources who maintain absurd beliefs in the out-sized significance and influence[4] of what is in reality a tiny fringe group. Among the many ironies surrounding this NBPP hullabaloo is the fact that the NBPP's exaggerated sense of its own importance (or menace) and its conspiracy theory mentality is matched (or even exceeded) by the Commission's majority and its ideological allies in the news media and in government. A further irony is the fact that, but for the constant promotion of this partisan investigation by FOX News and the USCCR, the NBPP might well have vanished into even further obscurity these last two years. We must posit that the USCCR majority has given the NBPP more media attention than it ever could have garnered or purchased on its own.

I. The Philadelphia Incident

Byman & Fischetti

Despite the presence of a videographer and multiple eye-witnesses, the details of what actually took place at the polling place at 1221 Fairmont Street in Philadelphia on Election Day 2008 remain unclear to this day. The original Justification Memo ("J Memo") sketches out a rough account of the events. Roving Republican poll monitor Wayne Byman was apparently the first person to note the presence of the NBPP members outside the polling place.[5] The J Memo suggests that Mr. Byman did not speak to the NBPP members, but merely reported their presence to another Republican poll watcher, Joe Fischetti.[6]

We were unable to question Mr. Byman about his experiences on Election Day 2008 because he was neither deposed nor called as a witness at a Commission hearing. We believe this to be at odds with the Report's claim that, "[t]he Commission attempted to interview and take the deposition of as many people as it could locate who were identified as having been

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[4]Christian Adams "Friends in High Places" http://biggovernment.com/jcadams/2010/12/02/pigford-and-new-black-panthers-friends-at-doj/

[5]12-22-08 J Memo, p. 5.

[6] In his questioning of Larry Counts, General Counsel Blackwood mentions a conversation he, Mr. Blackwood, may have had with Mr. Byman, in which the latter claims to have spoken to Mr. Counts. Larry Counts Deposition, p. 18. In a series of email exchanges prior to the drafting of the J. Memo, Christian Adams expresses the importance to the case of finding an African-American poll-worker who was harassed, as well as his inability to find any. He mentions believing that he thought he knew someone who was an African-American Republican who had been harassed by the NBPP, but having interviewed that person he was mistaken. It seems likely that the person Mr. Adams spoke to was Wayne Byman. See, DoJ Doc. Request #29, p. 144-45. ("Under the Statute, a black poll watcher for you being abused or insulted is critical, and thus far, I don't have one. I thought it was [redacted], but we interviewed him and it wasn't.") Since we have no record of any conversations with Mr. Byman and the account of his contact with the Counts is at odds with both the Mr. Adams's e-mails, the J. Memo's account and Mr. Counts's sworn statement, we can only repeat that it is unfortunate that the Commission did not see fit to call Mr. Byman as a witness.

at the polling site."[7] Unfortunately, Mr. Byman was not the only person who was clearly identified as having been at the polling site whom the Commission failed to use as a witness for this Report.

The J Memo notes that Joe Fischetti was the next Republican poll watcher to arrive on the scene.[8] According to the J. Memo Mr. Fischetti saw the Panthers and also spoke to Larry and Angela Counts, whom he identified as Republican poll watchers. According to the J Memo, the Countses expressed their fear of the Panthers to Mr. Fischetti. Also according to the J Memo, Mr. Fischetti claimed that the Countses were hiding inside the polling place out of fear of the Panthers.

We cannot confirm whether the J Memo accurately reflects Mr. Fischetti's account or even whether Mr. Fischetti's account accurately reflects the events that took place. This is because the Commission also failed to depose Mr. Fischetti or call him as a witness to one of the Commission hearings. The J Memo merely states in a cursory manner that Justice Department employees subsequently questioned the Counts and that the answers given in this subsequent interview corroborated Mr. Fischetti's account. As this Report notes, the account of events in the J Memo differs sharply with the account of events described in the Commission's depositions of Mr. and Mrs. Counts.[9]

Angela & Larry Counts

This Report infers that the discrepancy between the J Memo's account and the sworn statements that the Counts made to the Commission were due to the Countses' persisting fear of the NBPP. We cannot say whether this is the case or not. We wish only to note other outstanding issues regarding the differing stories about the Counts' experiences on Election Day.

The first issue is that the DoJ employees who interviewed the Countses, J. Christian Adams and Spencer Fischer, failed to learn that the Countses were not actually Republicans, but were in fact registered Democrats.[10] Their purpose for working as poll watchers for the Republicans was not political or ideological, but rather that it was an easy job for which each would be paid $200 (plus some free meals) for remaining inside the polling place for the entire day. The failure on the part of the litigation team to uncover this very basic and significant fact about Mr. and Mrs. Counts is perhaps the result of the rushed nature of the trial team's investigation, which we will discuss at greater length later. Furthermore, the actual Party status of Mr. and Mrs. Counts raises doubts about the narrative that the trial team and some of its witnesses provided.[11]

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[7] Report, p. 11.
[8] 12-22-08 J. Memo, p. 5.
[9] Report, p. 10-11.
[10] Angela Counts Deposition, p. 4; Larry Counts Deposition, p. 5-6.
[11] In the exchange of emails noted above, Mr. Adams repeatedly stresses how crucial it was for him to substantiate rumors that the NBPP harassed a Republican poll worker or workers and called him/them "race traitor(s)." See, *supra* note 6 ("Under the Statute, a black poll watcher for you [Mike Roman, a Republican political consultant] being abused or insulted is critical, and thus far, I don't have one") The vagueness in the

Another is issue is how, when, or even whether, the NBPP might have had contact with the Countses. In none of the documents available to the Commission is a time of arrival for the NBPP members even proposed (much less confirmed).[12] According to Mrs. Counts' deposition, she and her husband arrived at 6:00 a.m. and no one, was at the polls, including the NBPP members.[13] The Countses testified that from that point on, until the end of the day, they remained inside the building. No witness has reported seeing the Countses outside of the building, nor did any witness allege that either of the NBPP members entered the polling place.

While it is true that some witnesses have alleged that the Countses were frightened by the NBPP members, none of these witnesses have provided an account of when and how the Countses supposedly were threatened. The J Memo's account of the interview of the Countses does not make it clear whether the Countses theoretically were afraid of the NBPP because they themselves were threatened by the NBPP members, or whether they were concerned about the alleged threat of white supremacists, or whether they thought that the NBPP members might cause some sort of disturbance into which the Countses might be inadvertently drawn. Inasmuch as the DoJ interviewers were convinced that the Countses were Republicans (or were desperate for them to be Republicans), and so failed to establish that the two were actually Democrats, it is also appropriate to note that the interviewers also failed to correctly establish, what, if anything, transpired between the Countses and the NBPP and what the former might have been concerned about on Election Day.

The J Memo mentions that Mrs. Counts had wondered whether someone might "bomb the place."[14] It is somewhat difficult to understand where this idea of bombing the place might have come from. Despite their violent rhetoric and penchant for displaying weapons in public, it is difficult to conceive that anyone would think that the NBPP had an interest in bombing a building or a polling place in an overwhelmingly African-American neighborhood. Perhaps the mention of a bombing was somehow associated with the rumored white supremacists whom the NBPP claim were at, or were going to be at, the polling place. However improbable the claim was that white supremacists were going to show up at the Fairmount St. polling place might be, there is at least an internal logic (and historical precedent) for a fear that white-supremacists might target groups of African-Americans with explosives, as opposed to black-supremacists doing so.

Lastly, no account has been provided as to how the NBPP members supposedly concluded that the Countses were either Republicans or were at least working for the Republican Party, if in fact they had contact with the Countses at all. Some have argued that the NBPP was attempting to bully those whom they "apparently believed did not share their

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chronology and what was said to whom (if anything), is only marginally resolved in the J. Memo that prepared shortly thereafter the noted email exchange.

[12] In DoJ Doc. Request #3, p. 6, the police incident report lists 10:40am as the time the officers intervened at the Fairmount St. polling place.

[13] Angela Counts Deposition, p. 6-7.

[14] J Memo, p. 6.

preferences politically."[15] It is not clear how this motive on the part of the NBPP was ascertained or how members of the NBPP would act, or did act, on this motive.

This is especially true in light of the fact that NBPP is a radical political organization and that some of its members—including Minister King Samir Shabazz—believe that President Barack Obama is "a puppet on a string""[16] If Mr. Shabazz believed that then-Senator Obama was going to be "the next slave master,"[17] what bearing would this have on Mr. Shabazz's alleged efforts to intimidate Republican poll-workers? The explanation seemingly embraced by the trial team was that the Countses were Republicans and the NBPP members were Democrats. Unfortunately for the majority, this explanation is at odds with the facts. Perhaps, had the trial team investigated the case more thoroughly, it would have avoided these erroneous conclusions.

Mauro, Hill & Bull

At some point after Mr. Fischetti left the polling place, Mike Mauro and Chris Hill arrived at the Fairmount St. Polling Place.[18] The record is ambiguous as to the order of events which took place after the men's arrival on the scene. The declarations which these men provided the trial team make no mention of people whom they believed to be voters stopping in front of or turning away from the polling place.[19] As a result, it is difficult to establish whether these alleged would-be voters were noticed and spoken to by Mr. Mauro and Mr. Hill either before or after Mr. Hill confronted the NBPP members and entered the polling place.

It is unclear why none of the declarations concerning alleged voter intimidation by the NBPP make any mention of the people whom Mr. Mauro and Mr. Hill claim to have seen be intimidated by the NBPP presence. The J Memo mentions that Mr. Mauro and Harry Lewis observed people they assumed to be voters stop before entering the polling place.[20] No mention of Mr. Hill's[21] or Bartle Bull's[22] similar stories are mentioned in the J Memo. The absence of these additional allegations of instances of intimidation is puzzling. In crafting a

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[15] DoJ Doc. Request #23, p. 10. (Declaration of Bartle Bull). Mr. Bull, in his declaration, states that the views of the NBPP members were "made apparent by the uniform" that the two were wearing. Inasmuch as Mr. Bull seems to have read an endorsement of Candidate Obama, for instance, into the uniform of King Samir Shabazz, it would seem the message the uniforms were meant to convey (if any) was ambiguous. The J. Memo also attributes to the NBPP members a desire to intimidate voters into supporting their preferred candidate. J. Memo, p. 11.

[16] See generally, the Anti-Defamation League's account of the NBPP: http://www.adl.org/main_Extremism/new_black_panther_party.htm?Multi_page_sections=sHeading_5

[17] Id.

[18] They were accompanied by an additional attorney-poll watcher, probably named Justin Myers. J. Memo, p. 6. For reasons undisclosed to me/us, Mr. Myers was not called to testify at our hearing, despite the fact that he was identified as an eye-witness on the scene. Another attorney-poll watcher named Harry Lewis was also on the scene. It may have been Mr. Lewis who had arrived with Hill & Mauro, and Mr. Myers arrived with videographer Stephen Robert Morse—or Morse may have arrived with a different man. The record is not clear and neither the J. Memo nor the Commission's investigation bothered to clarify.

[19] See DoJ Document Request #23, p. 6-12.

[20] J. Memo, p. 6.

[21] 4/23/2010 Hearing, p.97-99.

[22] Id., p.99.

justification for a voter intimidation case, one would think that including every credible witness statement concerning intimidated voters would strengthen the argument. Perhaps the absence was due to concerns about the credibility of some of the claims, or perhaps it might simply be due to the trial team having failed to ask all the witnesses about supposedly-intimidated voters as it moved in undue haste to put to the case together.

Also unclear from the record is what happened between Mr. Hill and the NBPP members. In his declaration,[23] Mr. Hill states:

> When I attempted to exercise my rights as a credentialed poll watcher, and enter the polling place, the two men formed ranks and attempted to impair my entrance into the polling place. They formed ranks by standing in such a way to make them a significant obstacle to my entrance . . . . I was forced to avoid their formation in order to enter the polling location. I did not make physical contact with either of them.

In the first segment of the video shot by Stephen Robert Morse, the two men do appear to be standing close together, although it would be a stretch of the imagination (or a lack of familiarity with military formations) to claim that they were in any sort of "formation"—at least at the time the video had recorded.

This account of the NBPP "forming ranks" and thereby forcing Mr. Hill to go around them, even if credible, is at odds with the account that he provided to FOX News's Rick Leventhal[24] as well as the account that he provided to the Commission: "[H]e and Mr. Jackson attempted to close ranks. I went straight between them through the door to find our poll watcher."[25] At a later point in the hearing, Mr. Hill describes his encounter with the NBPP thusly, "Not on my watch, ma'am. I was standing there. I saw these guys. They attempted to intimidate me. I'm Army Infantry. I don't intimidate."[26]

It is impossible to determine, based on our scanty and gap-laden record, whether Mr. Shabazz was immediately hostile to Mr. Hill and others, or whether Mr. Shabazz's invectives came as a result of Mr. Hill walking in between Mr. Shabazz and Mr. Jackson while the two NBPP members were standing "shoulder to shoulder, or close to shoulder to shoulder."[27] Mr. Hill stated that his encounter with the NBPP, in Mr. Hill's words, "got my Irish up."[28] The timing of events is, of course, important, since any instances of would-be voters pausing or turning away from the polls might have been a result of Mr. Hill storming between the

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[23] See DoJ Document Request #23, p. 7.

[24] http://www.youtube.com/watch?v=94b78rnWMP4&feature=related ("As I walked up they closed ranks next to each other—you know, I'm an Army veteran. That doesn't scare me—So I walked directly in between them and went inside.") Mr. Hill goes on to tell Mr. Leventhal that after he left the building, Mr. Shabazz turned to Mr. Hill and said, "We're tired of white supremacy." Considering Mr. Hill's confrontational tactics, this remark by Mr. Shabazz might have been based less on a generalized hatred of white people and more in response to Mr. Hill's provocations."

[25] 4/23/2010 Hearing Transcript, p. 47.

[26] Id., p. 98.

[27] Id., p. 33.

[28] Id., p. 109

NBPP members and the resulting fracas that ensued. Mr. Hill himself mentioned that the unidentified female poll watcher in the video claimed that it was Mr. Hill, and not the NBPP, that was intimidating voters.[29]

Unfortunately, the videographer, Mr. Morse, was not yet present on the scene in time to record any of the Republican poll watchers' interactions with the NBPP or with members of the public. The only video footage that the Commission received that is not publicly available, and that records the actions of Republican poll watchers, comes from a longer version of the video that shows the police arriving at Fairmount Street.[30] In the video edited and released by Election Journal, the police arrive, they approach the NBPP members, and then they order them to step away from the polling place. The video fades as the police officers and the NBPP members walk over to the police car.

The longer cut of the video was given to the Commission as part of its document requests from DoJ. In the video, the cell phone camera continues recording after the police begin to walk the NBPP members to their police car. Mr. Morse tries to follow the police, but almost immediately one of the officers turns to the camera and points while saying, "You stay over there." Someone off-screen, to Mr. Morse's left, says, "I got him, I got him," to the police officer. Someone then, seemingly Mr. Hill (although the audio is poor and the voice is coming off-screen) says, "Put it [the camera] down. You've got enough." The screen begins to shake, and to Mr. Morse's right, Bartle Bull is heard to shout, "Don't you threaten him with your hands. You're threatening him."

At this point the person to the left says, "Put the phone away." Mr. Bull, shouting even louder than before, says, "Don't you use your hands!" At this point, the person seems to have tried to grab Mr. Morse's arm or phone as the image on the screen moves erratically and Mr. Morse excitedly or fearfully exclaims, "I'm a [expletive] professional videographer. I was paid [unintelligible] to come from L.A. today."

The person to Mr. Morse's left seems to back away a bit and one can now see his arm and part of his shirt, which resemble the shirt that Mr. Hill is wearing earlier in the same video. The person who seems to be Mr. Hill says, "That's enough, you're gonna cause us more issues." To which Mr. Morse replies, "No I'm not!"

At this point, there is much cross-talk between the three of them. Also, at least two other voices from off-screen. Someone says, "We're on the same team." Mr. Morse says, "I work for Joe." One or two speakers are continuing to tell Mr. Morse to stop recording. One of them says, "You're [expletive] up the story. Don't [expletive] up the story." Shortly thereafter, Mr. Morse says to his interlocutors, "You guys are lawyers, I'm a videographer."

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[29] Id., p. 53 ("And all I heard her say was, 'The white guys in suits are trying to stop people from voting."). In the video footage that records the police arrival, the same woman can be heard saying to the police with regards to the NBPP members, "They're not stopping anybody." *Available at* http://www.youtube.com/user/ElectionJournal#p/f/4/1FOKnJ0oXYY

[30] 4/16/10 DoJ Documents, Bates No. 0002177. For reasons never shared with us, this polling place video was not screened as part of the video evidence presented at the first NBPP Hearing, despite the fact that several witness were featured in the video.

To which Mr. Hill responds, "And I'm the ..." at which point he plays a brief recording of a bugle reveille. After a few more seconds, the clip ends.

Bartle Bull

As mentioned above, Mr. Bull's declaration makes no mention of his seeing people whom he thought were voters turning away at the sight of the NBPP members. The reason for this omission, as with the same omission in all of the other declarations, is unspecified in the record and unfortunately remains unclear.

As with Christopher Coates' testimony in this matter, much has been discussed both in the news media and in this Report concerning Mr. Bull's history of association with liberals and liberal causes. Particular emphasis has been given to Mr. Bull's time campaigning in Mississippi during the latter days of Jim Crow. In light of his experience, we are troubled by Mr. Bull's characterization of the 2008 Philadelphia incident as being worse than anything he had ever seen in Mississippi in the 1960s.[31]

Even if the NBPP actions in 2008 had lived up to the claims of the DoJ trial team, they would still be negligible when compared to the persistent fear and intimidation that millions of African-Americans endured for decades in the Deep South. Even if one were to give a narrow reading to Mr. Bull's claim, that is to say that he is comparing what he saw, in person, with his own eyes,[32] in Philadelphia, Pennsylvania, to what he saw in Midnight, Mississippi, the comparison still falls short. As Mr. Bull noted, in Midnight, Mississippi, white supremacists had left nooses hanging from trees and Mr. Bull had required that the vote be stopped until the nooses were removed.[33]

Additionally, Mr. Bull claimed that the NBPP uniforms had a clear and obvious link to the Fascist uniforms of the 1930s that would be readily apparent to the viewer. Leaving aside the fact that it is far from clear how many people in the contemporary United States would immediately recognize the uniform of the Italian Fascist Party (as opposed to Klan robes or even Nazi uniforms), in actuality, there is little in the NBPP uniform that even resembles the Italian Fascist outfit aside from the color of their respective shirts. A further irony, of course, is that Jerry Jackson and Minister King Samir Shabazz are themselves not even wearing exactly the same outfit.[34]

Lastly, there is great irony in Mr. Bull's having crossing paths with Mr. Shabazz on Election Day 2008. Mr. Bull stated that his motive for visiting polling places in Philadelphia in 2008 was a fear that hordes of fraudulent voters under the auspices of the Association of Community Organizations for Reform Now[35] would be trying to steal an election for a man

[31] 4/23/2010 Hearing Transcript, p. 116.
[32] Id., p. 117.
[33] Id., p. 116.
[34] Mr. Jackson seems to be wearing a leather jacket while Mr. Shabazz appears to be wearing a jacket of a different cut, made of some kind of synthetic material.
[35] Id., p. 123.

whom Mr. Bull refers to as "a hustler."[36] Mr. Shabazz, on the other hand, allegedly showed up at the polls to ward off an equally questionable threat of Election Day disruption by members of the Aryan Nation.

Stephen Robert Morse

Although the Commission screened the first of Mr. Morse's videos that was hosted by the website Election Journal, the Commission failed to screen all of footage in its possession that Mr. Morse had recorded. The Commission also failed to depose Mr. Morse or to invite him to testify at any of our multiple hearings. As Mr. Morse was obviously both present at the polling place and readily identifiable, this omission is worth noting as further indication of the majority's pre-investigation bias. Since then, much of the commentary around the NBPP incident has pointed to the one minute of edited video as an almost self-evident display of poll-worker intimidation.[37]

Since this investigation—at least as initially conceived—was meant to focus upon the alleged incidences of intimidation at the Fairmount Street polling place, we believe that it might have been illuminating to ask Mr. Morse to compare the intimidation that he allegedly experienced from Mr. Shabazz with the alleged intimidation, apparently at the hands of Chris Hill, , witnessed by Bartle Bull in the video mentioned above. Such an inquiry might have better clarified what key witnesses considered "intimidating behavior," as well as who was in fact engaging in the supposed intimidation.

II. The Initial Investigation/Litigation

As Commissioner Yaki noted at the September 24th, 2010 hearing, the NBPP litigation bears many signs of having been terribly rushed, especially as compared with other voting rights cases.[38] Communications between J. Christian Adams and Republican operatives reveal that, less than two weeks before the creation of the J Memo, the trial could not establish even a basic outline of the events that took in Philadelphia. The trial team had found their desired defendants, but could not find any voters or poll workers who were reportedly intimidated by them.

Ultimately, it seems that the account of the events that the trial team settled upon was provided to them by Republican political consultant Mike Roman.[39] On December 11, 2008—eleven days before the J Memo was issued--Mr. Roman offered to provide Mr. Adams with a "definitive chronology" and informed Mr. Adams that he planned to "make

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[36] *Civil Rights Attorney on Accusations vs. DOJ*, FOX News, Jul. 1, 2010, *available at* http://video.foxnews.com/v/4267253/civil-rights-attorney-on-accusations-vs-doj/ (Mr. Bull raises the specter of 400,000 "ACORN voters" in this interview as well).

[37] Despite the fact that Mr. Morse clearly fails to identify himself as a poll-watcher for the Republican Party, and instead claims to merely be a student and concerned citizen. The other puzzling thing about Mr. Morse's situation is that although the J. Memo describes him as "scared to death," of the Panthers, it was Mr. Morse who confronted Mr. Shabazz (in broad daylight surrounded by poll observers with cell phones). J. Memo, p. 6.

[38] See, 9/24/2010 Hearing, p. 118-26.

[39] Mr. Roman is, among other things, the operator of the website that hosted Stephen Robert Morse's NBPP videos. http://www.electionjournal.org/new-about-page/

contact with each [Republican voter in the precinct] to determine if they felt any intimidation at the polling location."[40] Mr. Adams described Mr. Roman's offer to interview witnesses for him as "fantastic."[41]

Mr. Adams concluded one of his emails to Mr. Roman with a comment noting that, if correctly understood, might help to explain the thinking behind the hurried NBPP litigation. Mr. Adams states, "A concern some have stated is that if something isn't done about the panther deployment in 2008, then there is nothing to stop deployment of armed hate groups at polls in future elections."[42] There is ambiguity in the statement's reference to 2008—does it refer to the year of the incident or that "something" that needs to be done? Nonetheless, the general tenor of Mr. Adams's emails with Mr. Roman and others is that of haste. Therefore, the latter interpretation is the more likely.

Regardless of the statement's minor ambiguity regarding the date, it is the conclusion of the statement that is most puzzling. Why is the NBPP litigation the *only* thing that will stop armed hate groups from appearing at polls? Obviously, an injunction against the entire Party might serve to deter NBPP members or even members of similar organizations from appearing at polling places with weapons. Although, since presumably §11(b) is not going to be repealed, it stands to reason that the choice to bring or not to bring one case does not preclude future cases.[43]

The spirit that seems to be motivating this, "Now or never!" line seems to be the theory, advanced by Bartle Bull to Megyn Kelly,[44] that there's a slow-motion putsch going on in the U.S. wherein community organizing groups, like the now-defunct ACORN, set up a conspiracy involving hundreds of thousands of illegal voters, primarily in minority neighbors. These hundreds of thousands of illegal voters carry out their conspiracy thanks to the assistance of a nation-wide deployment of hundreds of Mussolini-inspired NBPP members, this in turn earns them "friends in high places" who ignore their conspiracy and instead reward them with undeserved riches.[45] This cycle was apparently supposed to

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[40] DoJ Doc. Request #29, p. 143.

[41] Id., p. 141. In light of allegations—discussed at length below—that the Department would allow local police to have so much sway over the NBPP case, it is interesting that the Commissioners who were concerned about the local police's role, did not question Mr. Adams about Mike Roman's role in the case.

[42] Id.

[43] For example as is noted in the Report, the Bush Administration did not bring a voter intimidation case against a Minutemen militia member bearing a gun in Pima, AZ. That did not prevent the Bush Administration from later bringing a voter intimidation case against the NBPP.

[44] *Civil Rights Attorney on Accusations vs. DOJ*, FOX News, Jul. 1, 2010, *available at* http://video.foxnews.com/v/4267253/civil-rights-attorney-on-accusations-vs-doj/

[45] J. Christian Adams, Pigford and New Black Panthers: Friends at DOJ, 12/2/2010. http://biggovernment.com/jcadams/2010/12/02/pigford-and-new-black-panthers-friends-at-doj/ Since leaving the Department, Mr. Adams seems to have made a career out of promoting conspiracy theories about a nexus between community organizers, the NBPP and the Obama Administration. He has done this both as a blogger and as a lawyer for the King Street Patriots, *see e.g., at* http://www.kingstreetpatriots.org/king-street-invites-doj-to-true-the-vote-poll-watcher-training, http://www.kingstreetpatriots.org/king-street-patriots-special-meeting-august-9th, Tea Partiers: Minority Voting Drive Is The New Black Panther Party, Ryan J. Reilly, October 20, 2010, http://tpmmuckraker.talkingpointsmemo.com/2010/10/tea_partiers_minority_voting_drive_new_black_panth.php I/

continue on with increasing numbers of illegal voters added to the polls and increased wealth given to them as rewards. The recent 2010 election cycle, that featured neither armed hate groups at polling places nor ever- greater electoral success for Democrats and their supposed allies, would seem to suggest that Mr. Bull's and Mr. Adams's theories may not be well-founded.

We did not get an opportunity to question Mr. Adams about the J Memo or any other matter, because the Commission majority scheduled his hearing during the week of the July 4th holiday on very short-notice. And, as was the case with so many other seemingly-important witnesses, Mr. Roman was also not called to testify before the Commission.

The J Memo

The J Memo is filled with errors and omissions which are most likely the result of its hasty drafting and the biases of its authors. This can be seen on its first page when it describes the NBPP as "a well organized and well known group." It is true that today, thanks to the efforts of FOX News and the Commission's majority, the NBPP is much better known than it was before Election Day 2008. Presumably, the reason that the J Memo calls the NBPP "well known" is in order to provide a pretense for the trial team's claim that voters would have recognized Mr. Shabazz and Mr. Jackson as members of the NBPP (and thereby immediately associate the two of them with disturbing NBPP beliefs—which are also not terribly well-known). The truth is that most people—including the voters of Philadelphia, are and were likely to share Larry Counts's surprise that the Panthers had not long ago died away.[46] Without the immediate association of their clothing with certain ideas—as would be the case with people in Klan robes or Nazi uniforms—one cannot claim that the NBPP non-uniform, uniforms would be objectively intimidating.

As for being "well organized," that too is a stretch. The J Memo makes much of the militaristic nature of the NBPP— a characterization which this Report further repeats and emphasizes. It is true that the NBPP fetishizes military rank and title, but that does not instantly confer organization and discipline onto a group. Anybody can pin four stars onto his collar. That does not transform him into a general.[47]

The best example of the lack of discipline and organization within the NBPP can be found in the argument used to establish liability for the Party and its Chairman. Statements were made by members of the NBPP, both before and after the election, of a plan to send

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We find it both noteworthy and troubling that Mr. Adams should seek to associate himself with the website Big Government, which traffics in deceptively edited videos, including one that purported to show an Obama Administration official admitting that she discriminated against white people while carrying out her duties. It was quickly discovered that in the longer, unedited version of the video, the official's remarks make it clear that she was speaking both of a period in time prior to her work in government and that the actions she took were not discriminatory against white people. Brian Stelter, *When Race Is the Issue, Misleading Coverage Sets Off an Uproar*, N.Y. TIMES, July 26, 2010, B1. Mr. Adams's willingness to associate himself with people who have a history of mendacious race-baiting severely undermines the credibility of his accounts of racial bias at the Department.

[46] Larry Counts Deposition, p.14.

[47] Report, p. 34.

NBPP members to polling places. The number of members who were alleged to be "deployed" (to use the militaristic term favored by the J Memo) was three hundred or more.[48] Aside from the two NBPP members present at the Fairmount Street polling place, there is no record of any other NBPP members present at any polling place anywhere in the country.

If the NBPP is a hierarchical organization, and a command was given by its chairman to several hundred of its members to "deploy" to polling stations around the country, and only two "deployed," that means that the chairman's deployment had a 99% failure rate. That does not sound "well organized." It is interesting that the trial team and the Commission's majority are willing, on the one hand, to conclude from the lack of evidence of white supremacists at Fairmount Street that there were no white supremacists present, and yet, on the other hand, the lack of an NBPP presence beyond the Fairmount Street polling place is not grounds for concluding the NBPP did not have a national "deployment" plan. This inconsistency underscores the inference that the majority knew what it wanted to believe before it had the evidence to sustain such perceptions.

The simpler and truer explanation is that the NBPP and its chairman are prone to making self-aggrandizing and self-promoting statements in order to get attention and to impress the easily impressionable. The reality is that they are a marginal group of black-separatists who could not manage to meet the membership standards of the Nation of Islam. The disproportionate attention that has been paid to this group in the last year grossly exceeds their importance. To treat them as a Menace to the Republic instead of racist buffoons playing "army," is to view them as they imagine themselves.

In addition to all of the J Memo's profusion of militaristic mischaracterizations of the NBPP members,[49] [50] the J Memo also badly inflates the evidence in the trial team's possession. Having failed to find *any* voter who claimed to have been intimidated, the trial team resorted to the argument that *all* voters had in fact been intimidated—as any citizen would be who had to "run a gauntlet of billy clubs in order to vote."[51] Perhaps to leave room

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[48] J. Memo, p. 7.

[49] In addition to the variations on "deploy," (e.g. "not . . . deployed askew the entrance") the J. Memo describes the Panthers as "standing athwart," "in formation" wearing a "well-recognized military-style uniform. J. Memo, pp. 3, 10-11. These military characterizations of the NBPP seem to have been credulously adopted by Mr. Adams from statements made by Chris Hill, just as Mr. Adams relied on Mr. Hill's attestation concerning the significance of Mr. Shabazz's lanyard. J. Memo, p. 3; 4-23-2010 Hearing, p. 47. The McElderry Memo, also notes the Mr. Adams's peculiar use of the word "deploy" in the injunctive relief. McElderry Memo, p. 5.

[50] The J. Memo also inaccurately describes Mr. Jackson's conversation with FOX News reporter Rick Leventhal. The J. Memo states that Mr. Jackson told Mr. Leventhal that "no one had ever been at the polling station with a baton." J. Memo, p. 4. When asked about the presence of the nightstick, Mr. Jackson says, "Nobody here has a nightstick." When challenged by Mr. Leventhal that there's was a man with a nightstick, Mr. Jackson makes clear that he was only speaking in the present tense, saying, "I don't care about what 'was.' I'm talking about what 'is.'" Although this is a minor point, the fact that the J. Memo cannot even accurately manage to paraphrase a simple conversation casts doubt on its thoroughness in other places. An example of this is the failure to distinguish the armed, epithet-spewing Mr. Shabazz from the silent, unarmed Mr. Jackson. Instead they are described as "armed, uniformed men . . . making racial slurs." J. Memo, p. 12. As discussed further below, the failure of the trial team to consistently and accurately characterize the two men in their writing might be a partial explanation as to why they found it shocking that upon review other lawyers saw fit to distinguish Mr. Shabazz from Mr. Jackson.

[51] J. Memo, p. 11.

for the possibility that there had been voters who were harassed by Mr. Shabazz (despite the lack of evidence to that effect), the memo states, "*Many* of the threatening actions and statements by the NBPP members were specifically directed at poll watchers."[52]

None of the witnesses who testified before the Commission and who were in Philadelphia on Election Day have claimed to have witnessed the NBPP members say anything, threatening or not, to any voter, of any race. The only Commission witness to have made such a claim was the Department's former Voting Section Chief, Christopher Coates. Mr. Coates testified, "They were hurling racial slurs, including to white voters, 'How do you think you're going to feel with a black man ruling over you?' at the voters."[53] These assertions are puzzling since they are at odds with all available evidence. The fact that Mr. Coates believes white voters were the target of racial slurs hurled by both of the NBPP members—despite the absence of evidence to this effect—might help to explain his anger at the Department's decision to drop its case against Jerry Jackson and his angry outburst against Steve Rosenbaum.[54]

The Default

There is little to say about the default other than to note in passing that the Report finds it "particularly curious" that the NBPP failed to respond to the Department's lawsuit

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[52] Id., p. 12 (emphasis added). Note, the quoted passage attributes threatening actions and statements to both men. We do not dispute that Mr. Shabazz directed statements toward poll-watcher Hill, for example,, we simply wish to note that the evidence available only supports the claim that statement were only directed toward poll-watchers, and only by Mr. Shabazz.

[53] 9/24/2010 Hearing, p. 57.

[54] 7/6/2010 Hearing, p. 30. There seems to be a pattern of Mr. Coates' projection and supposed recollection of instances of white victimization. Mr. Coates claims that Robert Kengle said to him, "Can you believe we are being sent down to Mississippi to help a bunch of white people?" Id., p. 105. Mr. Kengle, in an sworn declaration sent to the Commission, denies that he said, "to help a bunch of white people." Kengle Declaration, p. 1. Mr. Kengle provides context for his comment to Mr. Coates, namely that there were many other potential cases which Mr. Schlozman and Mr. von Spakovsky were ignoring which Mr. Kengle believed were of relatively greater significance than the Ike Brown case. The race of the people involved was not what was of issue. Apparently Mr. Coates, like Mr. Adams, believes that race is always at issue in these decisions and any facially-justified explanations are mere pretense. Report, p.76 ("Adams testified: 'There was outrage that was pervasive that the laws would be used against the original beneficiaries of the civil rights laws. Some people said 'we don't have the resources to do this. We should be spending our money elsewhere.' And that was how they would cloak some of these arguments.'")

Unlike Mr. Adams however, Mr. Coates seems to believe he hears what Mr. Adams believes is only implied. For instance, concerning Julie Fernandes's alleged comment concerning "traditional civil rights," Mr. Adams describes her statement this way: "we were in the business of doing traditional civil rights work, and, of course, everybody knows what that means." 7/6/2010 Hearing, p. 62. In Mr. Adams' recollection, there was a meaning to Ms. Fernandes's statement which everyone understood (even if, like Mr. Adams, they disagreed with the implication), but it was subtext. In Mr. Coates's recollection, however, Ms. Fernandes explicitly told the audience what Mr. Adams said she only implied: "My recollection is that she used the term 'traditional types' of Section 2 cases and that she used the term 'political equality for racial and language minority groups.'" 9/24/2010 Hearing, p. 146.

It strikes us as unusual that Mr. Adams would say, "everyone knows what that means" in a case where Ms. Fernandes explicitly said what he thinks she implied. Had she explicitly proved Mr. Adams conjecture, no doubt he would have quoted her as having done so. Of course, the Commission was given the opportunity to ask Ms. Fernandes what she said. 11-12-10 Letter to Blackwood. However, the majority declined the Department's offer to allow Ms. Fernandes and others to come before the Commission. 11-15-10 Letter to Hunt.

despite the fact that Jerry Jackson and King Samir Shabazz were represented by a lawyer and Malik Zulu Shabazz is himself an attorney.[55] Based on the Commission's own unfortunate legal experience with Malik Zulu Shabazz and the ultimate non-responsiveness of the person purporting to have been representing the other two NBPP members, "disappointingly consistent" would seem to be a more accurate description of the phenomenon.

III. The Decision to Review

Members of the trial team and others claim that the Department's decision to review and reverse course in the NBPP litigation was unjustifiable and therefore based on impermissible motives and biases. Obviously, even if the review and reversal were completely justified—and we believe they were—it is impossible to prove conclusively that facially-justified actions were not taken for hidden impermissible motives. Because the stated justification for the Commission's investigation of the NBPP litigation was allegedly to look for an explanation for the review and reversal in the NBPP litigation (since the Commission's majority apparently found it inexplicable), it seems to us that offering a plausible account of the review and reversal is sufficient to satisfy what the Commission claimed it was interested in investigating.

The Obligation in Cases of Default

Critics of the Obama Administration inaccurately, yet loudly, claim that the Department had already "won" the case against the NBPP because the latter failed to respond to the suit, and that all that was left was to move for a default judgment against them. As made clear by the Assistant United States Attorney General ("AAG") Tom Perez however, the Department was under a greater and a continuing obligation:

> Although none of the defendants responded to the complaint, that did not absolve the Department of its legal and ethical obligations to ensure that any relief sought was consistent with the law and supported by the evidence. The entry of a default judgment is not automatic, and the Pennsylvania Bar Rules impart a clear duty of candor and honesty in any legal proceeding; those duties are only heightened in the type of ex parte hearing that occurred in this matter. See Pa. RPC 3.3(d). At the remedial stage, as with the liability stage, the Department remains obliged to ensure that the request for relief is supported by the evidence and the law. In discharging its obligations in that regard, the Department considered not only the allegations in the complaint, but also the evidence collected by the Department both before and after the filing of the complaint.[56]

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[55] Report, p.22, 40. Malik Zulu Shabazz seems to have an idiosyncratic view of his legal profession. He styles himself an "Attorney at War," Id., p. 129, and he also claims the title "Doctor" on account of possessing a "doctorate in jurisprudence" (i.e. a J.D.). See, *The Strategy Room* (Fox News Internet broadcast Nov. 7, 2009), *available at* http://video.foxnews.com/v/3917372/dr-malik-shabazz.

[56] Perez Statement, 5/14/2010. p. 5.

As we will discuss at greater length below, the Report contains many omissions and mischaracterizations of AAG Perez's statements to the Commission. The Report portrays the Department's internally initiated objections, review and subsequent handling of the NBPP default as mysterious.[57] AAG Perez's written statement provides many answers to questions regarding the objections, review and subsequent handling of the NBPP litigation. Despite the fact that AAG Perez provides answers to questions the Report purports an interest in, the Report does not cite AAG Perez's explanation. These omissions are telling. So long as the Commission's majority is willing to pretend that no answers have been offered, it can continue asserting that the Department is refusing to answer its questions.

Concerns about the Case

As has been noted above in our dissent and at the September hearing by Commissioner Yaki, the investigation and litigation concerning the Philadelphia incident proceeded much more rapidly than was typical of the Department's voting rights cases. This produced reasonable grounds for concern, as the development and analysis of fact and law might well have been cursory.[58] Added to that, as AAG Perez noted, the litigation was ex parte due to the NBPP non-responsiveness. Without active defense counsel examining the government's case, errors or omissions concerning fact or law—which might be more common than is typical due to the relative hastiness of the investigation and litigation—might go undiscovered. Lastly, due to the extraordinary politicization of the Civil Rights Division during the Bush Administration,[59] the long-time veteran career staff who were the acting-heads of the Division were properly suspicious of those hired or promoted during that period of politicization.[60] This is especially true of Christopher Coates, who was considered a

[57] Report. p. 17.

[58] The best example of the legal inadequacy of the J Memo is that it makes no mention of possible First Amendment concerns. The McElderry Memo supports our contention that the J. Memo inadequately addressed serious questions concerning Party/Chairman liability and defenses arising from the First Amendment. We differ from the McElderry analysis only in that we believe it takes certain presumptions of the trial team for granted and as a result, draw the wrong conclusions. We shall discuss this further below.

[59] See generally; An Investigation of Allegations of Politicized Hiring in the Department of Justice Honors Program and Summer Law Intern Program, June 24, 2008, *available at* http://www.justice.gov/oig/special/s0806/final.pdf. An Investigation of Allegations of Politicized Hiring by Monica Goodling and Other Staff in the Office of the Attorney General, July 28, 2008, *available at* http://www.justice.gov/oig/special/s0807/final.pdf; An Investigation into the Removal of Nine U.S. Attorneys in 2006, Sept. 2008, *available at* http://www.justice.gov/oig/special/s0809a/final.pdf

[60] The Report's section discussing the Vacancies Reform Act serves no useful purpose in the Report—other than to provide a legal patina for the obviously, intentionally ambiguous references to "actions of DoJ political appointees." Report, p. 37-38. *See e.g.* Jennifer Rubin, *Friends in High Places*, WEEKLY STANDARD, June 12, 2010, *available at* https://www.weeklystandard.com/articles/friends-high-places. Rhetorically, "political appointees" is meant to connote high-ranking officials and perhaps suggest a political influence, while not having to commit to providing evidence regarding any particular official or level in the Department hierarchy.

Similarly, there was a bizarre focus in this investigation on whether there was an exercise of executive privilege and if so, who invoked the privilege. See, Report, p. 73-75. Since the invocation of executive privilege is a rare thing, there should not be a presumption that the privilege has been invoked and a burden on the Executive to affirmatively note when it is *not* invoking the privilege. This investigation—presumably since it aimed to "bring Eric Holder down" was strangely focused on this privilege that would require involvement from high-ranking officials or the President himself. Since the investigation presumed these officials involvement,

"true member of the team" by one of the people most closely associated with the politicization of that period.[61]

The Report attempts to portray and explain away the objections raised against the NBPP. Since we do not believe the Report's treatment of these objections are adequate to satisfy them, we shall explain how the Report—and the Department memoranda it relies upon—are flawed.

First Amendment

Where the remedial memo errs in its treatment of First Amendment issues is in its presumption that the attire worn by the two NBPP members was the "recognizable uniform of a hate group."[62] As discussed above, neither the NBPP itself nor its varied garb was common knowledge during the 2008 election. As a result, the mere fact that either NBPP member was dressed the way he was did not amount to an objective case of intimidation (and thereby avoid falling under the protection of the First Amendment).

Steve Rosenbaum seems to be of this opinion because (as noted in the McElderry Memo, the Front Office, "does 'not seek to enjoin the wearing of the NBPP uniform at the polls.'"[63] This is an important point that the Report omits. The Report merely states that the Remedial and McElderry memos argue, "First Amendment concerns could be successfully addressed and would not preclude a default judgment." The McElderry Memo is operating on the assumption that the injunctive relief is no longer going to look like it originally did, that is to say, the Department is no longer going to ask to enjoin members of the NBPP from merely appearing at a polling place in uniform.[64]

The analysis that Ms. McElderry then pursues concerning First Amendment issues related to enjoining the wearing of uniforms is premised on there being a weapon present in addition to the uniform. She concludes that the question needs further study, but that an

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there seems to have been a presumption that they would have invoked the privilege that only they could have invoked. This seems entirely backward. See supra *note* 2.

[61] 9/24/2010 Hearing, p. 143-44. (Commissioner Yaki, quoting Bradley Schlozman). Mr. Coates, in turn, said that he considers Mr. Schlozman a friend. Id, p. 145.

[62] Remedial Memo, p. 3. As noted by the Southern Poverty Law Center's report on the NBPP, members of the original Black Panther Party are upset with the NBPP's appropriation of their Black Panther name and symbol. *See*, http://www.splcenter.org/get-informed/intelligence-files/new-black-panther-party In wearing Black Panther symbols, as they did, Mr. Jackson and Mr. Shabazz were not making clear to observers that they belonged to a racist-separatist group, but were rather (intentionally or not) sending the message that they might have been affiliated with (or sympathetic toward) the original (non-racist, non-separatist) Black Panther Party.

[63] McElderry Memo, p.5.

[64] See, Report, p. 17. ("deploying athwart the entrance to polling locations either with weapons or in the uniform of the Defendant New Black Panther Party, or both). Interestingly, Ms. McElderry seems to think that Mr. Adams's use of "deploy" is puzzling. Mr. Adams seems to use deploy in its proper way, as an action that a commander (in his imagining, Malik Zulu Shabazz) performs on their troops. But at other times the J Memo used "deploy" to mean 'standing in a military fashion' or as something that troops can do to themselves (e.g. "They were not milling about or deployed askew to the entrance." J. Memo p. 3). Some of Ms. McElderry's confusion may be the result of the fact that the original injunctive relief applied to low-ranking Mr. Shabazz and Mr. Jackson as well as to the Party and its Chairman, the latter two being presumed to be in a capacity to "deploy" their minions.

argument could be made that a weapon in the hands of someone in a uniform could be more intimidating than a weapon brandished by a person in street clothes. Her grounds for this conclusion are that a uniform may convey, "some kind of authority to take action," and so make observers more fearful because the observers would be lead to believe that the weapon is more likely to be used.[65]

We think the McElderry Memo errs slightly in its characterization of the NBPP uniforms. It is not clear (and based on her description, it seems unlikely) that Ms. McElderry had seen what the NBPP outfits look like. She takes as a given the trial team's assertion that they are "military-style." She then goes on to suggest that, being a military sort of uniform, it would strike the observer as conveying that "authority to take action." It is hard to believe that anyone looking at Mr. Shabazz at the Fairmount Street polling station would draw the conclusion that he was carrying the night-stick because he possessed some special (or in fact, any) authority to do so.

We strongly object to the gratuitous and poorly aimed charges of hypocrisy that the Report levels at Mr. Rosenbaum concerning the First Amendment. On the one hand, in the Jesse Helms case, the post cards were not merely "misleading,"[66] but implicitly threatened their recipients with criminal prosecution.[67] On the other hand, Mr. Rosenbaum, as is clear from the McElderry Memo—and even more clear from the injunction which he supported against Mr. Shabazz—does not think "wielding a nightstick at a polling site" is a form of conduct protected by the First Amendment. We would like to note that is bizarre comparison has been made elsewhere and we believe that its author, Hans von Spakovsky, should receive the recognition that he deserves.[68] Since we object to the insinuation of hypocrisy that *is* in the Report, we are relieved that the Report does not make the additional insinuation of racism found in Mr. von Spakovsky's blog post.[69]

Jerry Jackson

The Report fails to recognize a number of important distinctions regarding the treatment of Mr. Jackson in the J Memo, the Remedial Memo and the McElderry Memo. The Report describes the situation thusly:

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[65] McElderry Memo, p. 6.
[66] Report, p.25.
[67] The postcards which were largely directed to African Americans made false claims concerning voter residency requirements and warned recipients that it was a "federal crime to knowingly give false information about your name, residence or period of residence to an election official," See, *Democratic National Committee v. Republican National Committee*, 671 F.Supp.2d 575, 581 (DNJ 2009). The case cited makes reference to the earlier case that is under discussion. We would have preferred to cite the original case, but it seems not to be electronically available to the Commission at the time of drafting this dissent.
[68] Hans von Spakovsky, With Due Apologies to Abigail Thernstrom . . ., July 28, 2010, http://www.nationalreview.com/corner/233685/due-apologies-abigail-thernstrom-hans-von-spakovsky
[69] Id. (Was it because they were white? We don't know, but the contrast between how these two cases were handled by Rosenbaum is quite stark.")

> The nature of their joint liability is reflected in the fact that at no point in the internal memoranda of the Department was a distinction drawn between the potential liability of King Samir Shabazz and that of Mr. Jackson. The J Memo and the Remedial Memo prepared by the trial team, as well as the review prepared by the Appellate Section, did not even raise, let alone address, the issue.[70]

Instead of a source of reassurance, the non-existent treatment of the issue of joint liability is in fact a sign of the haste and sloppiness of the trial team's legal work. As mentioned above,[71] the J Memo does not bother to establish whether Mr. Jackson spoke to anyone other than Mr. Shabazz at the polling station prior to the arrival of the police. Since the McElderry Memo takes the facts as presented by the trial team, Ms. McElderry may have presumed that Mr. Jackson hurled racial slurs at voters or poll-workers. Since the two NBPP members are sometimes described as "armed, uniformed men," it is possible that she incorrectly assumed that both were carrying weapons. This would be consistent with her reading a presumed modifier of "with weapons" into the injunction's prohibition on both "deploying and appearing."[72]

The Report tries to strengthen its case for joint liability by repeating variations of "moving" or "acting" "in concert"[73] to describe the two NBPP members' behavior. This construction seems to have been derived from Chris Hill's description of the two men. At his hearing, Mr. Hill said of the two:

> Mr. Jackson took direction from Mr. Shabazz constantly. When he moved, Mr. Jackson moved, and it was a definite pattern. I don't know if they worked it out ahead of time, but they were definitely moving in concert. [74]

It is unclear what these synchronized moves were that made such an impression upon Mr. Hill. It is also unclear why the discipline and order on display for Mr. Hill vanished by the time Mr. Morse arrived with his cell phone camera. Even before Mr. Morse confronts Mr. Shabazz, it is apparent that the two NBPP are neither standing shoulder to shoulder, nor in any sort of military posture or formation. At Mr. Morse's approach, the two men do not "form ranks." Instead, Mr. Jackson remains standing in place while Mr. Shabazz walks around him.

If Mr. Hill either did explain or could explain the discrepancy between the NBPP members' video-recorded behavior and his eye-witness account, or if some of Mr. Morse's omitted footage contained images of the Panthers "moving in concert,"

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[70] Report, p. 25.
[71] Supra note 39.
[72] McElderry Memo, p. 5.
[73] Report, pp. 5, 6 (twice), 25.
[74] 4/23/2010 Hearing, p. 129. As we mentioned above and will discuss further below, it is interesting that those on the Commission who have expressed concern that Department dismissed its case against Mr. Jackson based on conclusions drawn by the local police, did not express equal concern that the trial team seems to have relied on Mr. Hill's conclusions about Mr. Jackson's relationship with Mr. Shabazz to have established the former's liability.

that would certainly be helpful to establish joint liability. It is also possible that the "acting in concert" that is found in the original injunction was meant as a work of catch-all in order to ensure that merely staying quiet and standing near a objectively intimidating person like the weapon-brandishing Mr. Shabazz is sufficient to trigger the injunction's issuance. Since the eventual injunction dropped that aspect, it remains unclear whether such a potentially broad and vague provision would have passed muster.

We are disappointed that the Report badly misconstrued AAG Perez's statement concerning the role the police report played in the decision to drop the case against Mr. Jackson. During AAG Perez's hearing,[75] he was repeatedly as he tried to explain why the local police report mattered to the Department. It was insinuated that the Department concluded that §11(b) did not apply to poll-workers because the local police officer, having seen Mr. Jackson's poll-watcher's credentials concluded that Mr. Jackson was not violating any voting rights laws.

AAG Perez, when he is finally allowed to speak without being interrupted, makes clear the obvious point that neither he nor the Department defer to local first responders to interpret federal law, but rather—as is obvious—local police can provide eye-witness accounts of what they themselves see and what witnesses on the scene tell them. We do not share the incredulity of some of our colleagues over the fact that the AAG and others at the Department would consider the contemporaneous reporting of a neutral third-party to be more credible that a series of contradictory accounts , made by a Partisan operative and recorded well after the events.[76]

As we have explained above, none of the poll-watchers alleged that Mr. Jackson said anything to them, much less anything threatening. This was probably heard by the police as well. The closest thing to a threatening action that has been alleged against Mr. Jackson (other than that fact that he was wearing his NBPP outfit) was that Mr. Jackson either formed or attempted to form "ranks" with Mr. Shabazz, leading Mr. Hill to either walk around the two or walk between the two.[77]

Despite the fact that AAG clearly told the Commission that the Department does not and did not rely on the VRA-expertise of local police officers, this canard was repeated during the Adams hearing.[78] It is unclear why this was done other than it

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[75] 5/14/2010 Hearing, p. 69-72.

[76] The fact that Mr. Adams and Mr. Coates also seemed to think Mr. Hill—despite his contradictory stories—was more credible that the police officers is also telling. The greater irony of Commissioner Heriot wishing that the Department favor the testimony of Mr. Hill over that of local police, is that Mr. Hill, in his on-scene interview with FOX News reporter Rick Leventhal was—like the local police—happy to distinguish between Mr. Shabazz and Mr. Jackson. In the interview, both Mr. Hill and Mr. Leventhal concur that Mr. Jackson is a poll-watcher, after which Mr. Hill says, while nodding, "And he lives here." Mr. Leventhal then says, "And he has every right to be here," to which Mr. Hill nods in agreement and adds, "And he can wear whatever he wants," which Mr. Levenahal repeats in agreement. Video available at http://www.youtube.com/watch?v=JwNDMdrqKcc.

[77] See, *supra* notes 23, 24, 25.

[78] 7/6/2010 Hearing, p. 89-90.

seems to have been a talking-point of sorts.. We find it especially hard to believe and more than a little disconcerting that Mr. Coates would devote a page[79] of his prepared remarks to suggest that AAG Perez said that the Department allowed the local police to make litigation decisions for the Department.

AAG Perez made it crystal clear: the Department interprets what the law requires. In the case of §11(b) the Department comes up with an interpretation about what conditions would need to exist for someone to be committing voter/poll-watcher intimidation. Hypothetically, the Department might interpret §11(b) to, among other things, apply to people displaying weapons or shouting racial slurs. They also might interpret §11(b) not to apply to people standing quietly, without weapons and who are wearing clothing that is not readily associated with a hate group.

Where the police (and any other credible witness) come into the process is by relating the facts as they saw them. In the case of the Philadelphia police, they saw some things, and they interviewed some people and questioned those people about what they saw. In the case of the NBPP, witnesses obviously told the police that one of the men was creating a disturbance by yelling slurs and waving a weapon while the other man just stood there. In addition to the ruckus that he was causing, the first man was standing near a polling place and was neither a voter nor a credentialed poll-watcher. The quiet man was also standing near a polling place but was a poll–watcher and was not causing a disturbance, so the police allowed him to stay. There is no indication that if Mr. Shabazz was credentialed but was also carrying on as he did, the police would have allowed him to stay at the polling place (nor that the Department would not have brought suit against him[80]). There is also no indication that had Mr. Jackson lacked poll-watching credentials, the police would have allowed him to loiter near the polling place.

The basic point is this: the police supplied an account of the facts which some in the Department found more credible than the account of the facts presented by Mr. Hill and the other Republican poll-workers. The Department lawyers then applied the law to the facts that they found most credible. This is not an inappropriate delegation of decision-making authority. This is elementary legal practice. We find it unbelievable that -experienced lawyers such as Mr. Coates and those on the Commission do not understand the distinction between "fact" and "law."

Not wishing to believe that any of them never learned this distinction or somehow forgot it, we must conclude that they are willfully mischaracterizing AAG

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[79] Coates Statement, p. 11.

[80] AAG Perez suggests as much in his statement, "A report of the local police officer who responded to the scene, which is included in the Department's production to the Commission, indicates that the officer interviewed Mr. Jackson, confirmed that he in fact was a certified poll watcher, and concluded that his actions did not warrant his removal from the premises." Perez Statement, p. 8. It is clear from this passage that Perez is saying that the police officer allowed Mr. Jackson to remain not simply because of his poll-watcher certificate, but also because the latter's actions "did not warrant his removal from the premises" (i.e. that if Mr. Jackson had behaved like Mr. Shabazz, the police would not have allowed him to remain and the Department would have treated him differently too.)

Perez. Evidence for this conclusion can be seen in the selective editing that Mr. Coates performed when reiterating what AAG Perez said at the latter's hearing. Mr. Coates says:

> In this case, however, the fact that one Philadelphia police officer did not require Black Panther Jackson to leave the area became such a compelling piece of evidence that it was cited by the Assistant Attorney General in his May 14, 2010 written statement to this Commission. There Mr. Perez stated that, "The Department placed significant weight on the responses of the law enforcement first responder to the Philadelphia polling place" in allowing Black Panther Jackson to escape default judgment and escape the entry of injunctive relief against his future actions. Based upon my experience, this reasoning is extraordinarily strange and an unpersuasive basis to support the Division's disposition of the *Panther* case.[81]

In so paraphrasing AAG Perez's statement, Mr. Coates removes the pertinent passage we quote in the previous footnote. The Report fails to point out Mr. Coates's misleading deletion from AAG Perez's statement. Mr. Coates claims that, like Mr. Adams before him, he was driven to testify before the Commission by the inaccuracies in AAG Perez's testimony and a need to set the record straight concerning the Department's actions. As a result, we find their distorted quotations of AAG Perez's written statement to be "extraordinarily strange and an unpersuasive basis to support" their claims of being honest and courageous whistle-blowers, as opposed to being simply "true members" of the von Spakovsky/Schlozman Team.

The Department's decision to not pursue the default judgments against Malik Zulu Shabazz and the Party itself are as easily explicable as the decision not to pursue a default judgment against Jerry Jackson. In fact, the argument is even easier, for as Diana Flynn notes in her email, "The most difficult case to make at this stage is against the national party and Malik Shabazz." Ultimately Flynn (and McElderry) side with pursuing the case even though they think it is weak and problematic. Their grounds for doing so focus less on the law, however, and more on the assurances from the trial team that the latter have strong evidence.[82]

The Report rests its argument for Party/Chairman complicity on the contradictory statements that members of the Party made before and after the election. The thinking seems to be, "Why would they say there's going to be a massive deployment if there wasn't going to be one?" As we mentioned above, the simplest answer is that the NBPP Chairman says whatever he thinks is most expedient at any given time and to any given audience, all in order to gain attention and followers. The more skeptical approach is simply to look at the claims: 300+ NBPP members deployed to polls in 15+ cities. Then look at the reality: two NBPP members, both at the same location in the same city. As was mentioned above, this is a less than 1% compliance rate. There need not be perfect and absolute control to

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[81] Coates statement, p. 11-12.

[82] "Voting does seem to have evidence in support of the allegations." Flynn email.

create a principal-agent situation, but at only two-thirds of one-per-cent, there's probably a better chance that more members of the NBPP will accidentally run into each other at a particular polling station than showed up to either allegedly provide security on Fairmount Street, or any of the other nonsensical argument that have been presented in the course of this investigation.

Lastly, the allegations that the relief in the NBPP case was greatly reduced need to be addressed and explained. In brief, and as AAG Perez explained in the frequently ignored statement that he provided to the Commission, the original injunctive relief sought was problematic partly because it was "one-size fits all." Instead of tailoring the relief to the individual defendants, the injunction aimed at an organization that has chapters in multiple cities was the same one for a single individual residing in a single city. The fact that the relief was shrunk down from nation-wide to city-wide is the product of the decision that the NBPP could not be held liable for what Mr. Shabazz did in Philadelphia.

As for the reduction in duration: a permanent injunction with no enforcement limits is at odds with the relief received in voting rights cases such as the Ike Brown[83] case and the US v. North Carolina case.[84] In both cases, the injunctions were set to last for roughly two election cycles. The same is true of the NBPP relief. If one wants to describe the injunction Mr. Rosenbaum approved for Mr. Shabazz as a "slap on the wrist," one needs to do the same for the injunction Mr. Coates approved for Ike Brown.

IV. USCCR Investigation

We believe that this investigation was, from the very beginning, an effort to direct the resources of the Commission toward the illegitimate and contemptible purpose of harassing the new Administration. There was a time when the Commission devoted itself to bipartisan investigations of serious instances of voting rights violations. In stark contrast to our admirable past, the present Commission spent this last year devoting most of its attention to a voter intimidation case in which no actual voters were intimidated[85], and to providing an avenue by which disgraced and disgruntled remnants of the previous Administration could attempt to settle personal and political scores.

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[83] Contrary to Mr. Adams's definite- and dire-sounding prediction during his testimony before the Commission, the Department did, in fact, ask the Court on July 13, 2010 to extend the injunction in Ike Brown. (*See* United States' Motion for Additional Relief Against Defendants Ike Brown and the Noxubee County Democratic Executive Committee, U.S. v. Ike Brown, et al., Civil Action no. 4:05-cv-33). We find it noteworthy that, as with other statements made by AAG Perez, the Report completely fails to mention the fact that the relief was extended. Rather, the Report claims that AAG Perez's statements about this highly-relevant topic were merely generalized and often non-responsive. This assertion is pure fallacy.

[84] Report, p. 84.

[85] We understand that §11(b) applies to both voters and those who assist them. Even with this caveat, it is still telling that the evidence regarding the intimidation of poll-workers is either thin or contradictory enough that the trial team and members of the Commission have had to exaggerate the notoriety of the fringe NBPP in order to claim they are the equivalent of the KKK and their mere presence is objectively intimidating.

Though we did not and do not support this investigation, we do believe that for sake of the integrity of the Commission, once it was embarked upon, the investigation should have been rigorous. Of course since the aims of the investigation were at their inception illegitimate, it is perhaps inevitable that the investigation and subsequent report would have to lack rigor—otherwise the illegitimacy of the whole project would be revealed.

As we have mentioned above, many witnesses, including many who were present in Philadelphia on Election Day, were not called to testify before the Commission. When witnesses were invited to speak, the Majority abused its powers and limited our ability to question witnesses. In the case of Mr. Adams, the Majority made little effort to schedule the hearing for a date when all Commissioners could be available. In the case of Mr. Coates, the Chairman abruptly called a break in the hearing[86] the majority left the room with Mr. Coates, and when they returned, the Chairman announced that he was going to "wind this matter down" and not allow any additional questions of Mr. Coates.[87] Considering the tremendous importance that the majority had placed on Mr. Coates's appearance and the substantial amount of the hearing that was consumed by Mr. Coates reading his lengthy statement, the abbreviated amount of time permitted for questions showed a lack of interest in true inquiry. Instead, the hearing seemed much more like a mere opportunity to allow Mr. Coates to personally get his opinions into the record as opposed to having them communicated by way of Mr. Adams or "anonymous sources" to the Washington Times or the Weekly Standard.

We also wish to highlight the fact that the Report operates on the bizarre evidentiary principle that unsworn statements and blog posts should be allowed to rebut sworn statements. Joseph Rich submitted a sworn affidavit[88] challenging statements made in Mr. von Spakovsky's earlier sworn statement. In response, Mr. von Spakovsky did not submit another sworn statement (as Mr. Rich would do again to rebut claims by Mr. von Spakovsky and Mr. Adam[89]). Instead, Mr. von Spakovsky resorted to a blog post.[90] Later, Mr. von Spakovsky went on to submit an unsworn statement[91] in the attempt to challenge the sworn statement made by Robert Kengle.[92] Since Mr. von Spakovsky was willing and able to submit a sworn declaration originally, we believe that his failure to do so in his purported rebuttals to Mr. Rich and Mr. Kengle was both deliberate and suggests that neither the Report, nor anyone else, ought to be confident in their veracity.

For all of these reasons, we dissent from this report and the investigation which preceded it.

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[86] 9/24/2010 Hearing, p. 134 ("We're out of time. At this point we are going to take a break.").
[87] Id. Vice-Chair Thernstrom was subsequently able to persuade the Chairman to provide a small amount of time for additional questions.
[88] Rich Declaration 9/23/10.
[89] Rich Declaration 10/20/10.
[90] Hans von Spakovsky, *Enough Is Enough, Joe Rich: An Uncivil Man from the Civil Rights Division*, PAJAMASMEDIA,Sept. 20, 2010, http://pajamasmedia.com/blog/enough-is-enough-joe-rich-an-uncivil-man-from-the-civil-rightsdivision; Report, p. 78, fn197.
[91] von Spakovsky Letter 10/28/10.
[92] Kengle Declaration; Report p. 75, fn188.

Mr. SCHIFF. They introduced their dissenting opinion by saying the commission's investigation into and this report concerning the New Black Panther Party has been a tremendous waste of scarce government resources. They wasted our own resources at the commission and those at the Department of Justice as well. In addition to squandering time, money and attention, the majority has further squandered the reputation of the U.S. Commission on Civil Rights as it has spent more than a year on an Ahab-like quest to hobble the Obama administration and to attempt to rehabilitate the disgraced record of the previous administration's Department of Justice.

That record they are referring to, the previous administration, included findings by the Office of Inspector General that under Mr. Schlozman, the Civil Rights Division had been highly politicized with career attorneys being replaced with people of ideological pedigrees rather than people of experience. In fact, the OIG found that people were hired with no background in civil rights, with no experience in it or in prosecuting cases for that matter and with no interest in it.

And I am very proud of how that Department has been turned around in this administration. And the claim that the Department now is going to intervene in some way on behalf of a racist hate group because it is a black supremacist group instead of a white supremacist group strikes me as beyond credulity. In any event, I think the Department has been a sea change for the better, and I wish you continued sailing in the right direction.

MIRANDA DECISION

One of the issues I wanted to raise with you involves Miranda and the intersection between criminal law and the national security environment. And I wanted to ask you, obviously, the Miranda decision is one of constitutional import that we have only a limited ability to influence. It is the court-drafted doctrine. Do you think it would be useful for the Congress to set out its understanding of how broadly the public safety exception to Miranda should be interpreted? Would it be useful in a Department's advocacy before the court to be able to point to the Congress believes that this ought to be interpreted broadly, as not only protecting a police officer in a grocery store, like in Quarles, but also protecting citizens in New York City in the event that there was a bomb in a vehicle or even that it also extends to vital emergency information that may be acquired that can protect the lives of troops out in the field? Would it be useful in should the case arise where you would have to argue about how soon Miranda was given for the Congress to weigh in and express its view that it should be interpreted broadly?

Attorney General HOLDER. You are right, Miranda is of constitutional dimension, and ultimately it would have to be the courts that would have to decide in a particular case whether the government had exceeded what it is allowed to do under the public safety exception to the Miranda rule.

I think that an expression by Congress, however, about its view of what the Miranda limits are, given the nature of the threat that we face and the need to use the public safety exception for interrogation purposes and, as you say, dealing with this new threat. And

it is not a grocery store robbery. It is a question of you know, Abdulmutallab, are there other planes that have other people with bombs on them. Given the nature of the threat, I think an expression by Congress is something that Congress might consider, and I think that would be useful for the courts to have but obviously has to be put before Congress to decide.

Mr. SCHIFF. Let me ask you one related question and that is in my view something that may be of more significant import in this context than Miranda matters, the presentment requirement, the requirement to bring a suspect before a magistrate within so many hours. I know there is disagreement in this subcommittee and indeed in the Intelligence Committee where I serve about in what circumstances someone should be Mirandized at all or somebody should be processed through the criminal justice system as opposed to the military tribals. But there are going to be cases I think that we can all agree that are going to be handled in the criminal justice system.

You know, a future Timothy McVeigh situation is more likely to be handled in the criminal courts than in Gitmo or in a brig somewhere. Given the fact that some terrorism cases are going to be handled criminally, would it be useful for the Congress to revisit the kind of rigid requirements that are present in the clause and provide that in terrorism cases, there is a longer period of time; if the Attorney General or your designate certifies certain requirements are met, that you can make an ex parte application of the court to get a greater period of time before you are required to present a suspect to a magistrate?

Attorney General HOLDER. That is an issue that I think is worthy of examination. I would be reluctant to say that we commit ourselves to one course of action or another, but it is something that I think we can look at and see whether or not there is a way in which we can have something that is consistent with our values, consistent with the constitutional obligations that we have, that makes us more effective in the fight against terrorism. But, again, given the tools that we now have, and restrictions we have with regard to Miranda and the presentment time period, we have done a pretty good job, as you correctly say, in dealing with those who have been brought into the criminal justice system.

Military commissions cannot handle cases involving American citizens. And what we have seen over the last 12 and 18 months are increasing numbers of American citizens who are engaged in these terrorist activities. Those will have to go into the criminal justice system, and I think we have to make sure that the system is capable of handling those kinds of cases.

INTELLECTUAL PROPERTY

Mr. SCHIFF. I look forward to working with you on that. And let me turn to a couple other quick areas. One is of deep interest to my constituents. And that is intellectual property. I have a lot of the studios and post-production, preproduction work in my district, and we lose countless, tens of thousands of jobs as a result of IP theft. This subcommittee over the last several years has increased the budget for the FBI to bring on new agents to work on IP cases.

I think over the last couple of cycles, we have added about 50 agents in this area.

One of the internal analyses, though, indicated that there is a DOJ study that although there was a substantial increase in the number of agents devoted, there wasn't a substantial increase in the number of hours that the FBI was devoting. In other words, there was more manpower; same amount of hours being devoted to the problem. And I think the FBI responded in part that they needed time to train these new agents. But at the same time, it also pointed to the fact that these IP dedicated agents were sometimes being used for other investigations. That is a concern given that this was really a focus of why these slots were funded. And I would ask you if you could look into this. I don't know if you have anything you would like to comment today, but given the magnitude of our economic challenges right now, this is an opportunity to crack down on the loss of American jobs and intellectual property.

Attorney General HOLDER. I think that is right. This is a priority. The Vice President is leading the task force. DHS is involved. The Justice Department is involved. Victoria Espinel at the White House is involved. And this whole question of the theft of intellectual property is something that I went to and gave a speech about in Hong Kong. I went to China to talk to the Chinese officials there about the concerns we have about what is happening in China. We have in the budget request from fiscal years 2009 and 2010, 51 agent positions in the FBI that were supposed to be dedicated strictly to IP enforcement.

[The information follows:]

MANPOWER AND WORK AT FBI REGARDING INTELLECTUAL PROPERTY RIGHTS

Through prior year appropriations, the FBI has received agents for the purpose of investigating cases involving Intellectual Property (IP) Rights. While some of the previously reported numbers have shown fewer agents working cases than appropriated, as Congressman Schiff noted, it did take some time to hire and train the agents. The FBI measures Special Agents dedicated to a program by counting agent work-years, the equivalent of one agent working full time for an entire year on one particular program or case classification. The FBI is now utilizing 50 Special Agents in support of IP investigations. This includes 45 field agents utilized in support of IP investigations and an additional five agents assigned to the National Intellectual Property Rights Coordination Center. Additionally, the FBI is taking measures to ensure the appropriate use of PRO–IP Act resources by providing guidance to all field offices detailing the importance of IP matters.

And I think that given the job-killing capacity or impact that this IP theft has it is wrong, it breaks the law, but there are also economic consequences to it—for that reason, I think it is a very legitimate concern. And it is a reason for us to prioritize this. It is what occasioned my trip to Hong Kong, to China and occasioned the Administration to set up a task force that is led by the Vice President.

Mr. SCHIFF. If you could take a look into the use of these agents to make sure that if they haven't been dedicated to IP, that they focus on IP. I think that would be welcomed.

ICE has been very aggressive in this area, and I want to applaud what they are doing. I know they are getting some pushback. I know they have been actively involved in seizing the domains of web sites that are responsible for a disproportionate amount of the trafficking. I raise this because I don't want the Department of Justice to be discouraged from undertaking similarly aggressive ac-

tion against pirates—I am not talking about the Somali variety, although I agree with that as well—by the pushback that ICE is getting, because there are many of us who completely support what ICE is doing and would love to see the Department of Justice equally aggressive in these actions.

PROJECT HOPE

Finally, I know you are familiar with Project HOPE out of Hawaii. This is the effort Judge Steven Alm is using, employing graduated sanctions to try to attack recidivism and have been very successful at it. I know there is a grant program, the SMART Probation Program in your budget, $7 million. And I wanted to see whether Project HOPE and similar efforts like that are the kind of thing you are contemplating with this SMART Probation effort.

Attorney General HOLDER. Yes, it is. I am familiar with Project HOPE. I know Judge Alm from the time we served together as U.S. Attorneys. He actually came, all the way from the State of Hawaii, here to Washington to share with me what he is doing. It is very impressive. And those are the kinds of things that we are trying to replicate. This whole notion of graduated sanctions really has made more effective the probation efforts that they have there, and those are the kinds of things that we want to try to replicate.

Mr. SCHIFF. I think in this case—I know the chairman has worked on it for many years—to the degree the Justice Department can help pilot and lead some of the most effective attacks on recidivism, it not only is better for society, but a lot of the States like my own have such phenomenal budget problems in part because their corrections costs are going through the roof and have for the last two decades. And I think part of putting our economy, both nationally and at the State level, back on a sustainable trajectory is trying to figure out a better way to deal with corrections and deal with recidivism and deal with public safety generally, because what we are doing now just hasn't worked when you look at how many people leave custody and then go back in. It has now become the exception rather than the rule, people not recidivating.

And I thank you for the time, Mr. Chairman. I yield back.

Mr. WOLF. Mr. Fattah.

Mr. FATTAH. Thank you, Mr. Chairman.

I will ask my last question for the record.

10TH AMENDMENT ISSUES

There was a recent Supreme Court case in which some challenge has been made to utilizing the 10th Amendment. It is a Pennsylvania case arguing that Federal arrests in a particular case may fall outside the scope of what would be constitutional given the 10th Amendment prohibitions to Federal action. I know there has been a lot of discussion on the 10th Amendment in health care. If you could furnish the committee with what it would mean if the court decides that people can raise these 10th Amendment issues in criminal cases, how that would affect ongoing issues and even cases that may have already been decided.

I know it is a hypothetical, but given some of the comments from some of the Justices, I think it is at least a reasonable question to ask about what effect this could have if there is a ruling that al-

lows 10th amendment issues to be raised, such as Federal prosecutions of criminals.

Attorney General HOLDER. We will formulate a response to that.

[The information follows:]

TENTH AMENDMENT IN FEDERAL PROSECUTION CASES

In *Bond* v. *United States,* No. 09–1227, petition for cert. granted October 12, 2010, the defendant argued that Congress exceeded its Article I authority and violated the Tenth Amendment in enacting the chemical weapons statute (18 U.S.C. 229) under which she was convicted. In his Supreme Court merits brief, the Acting Solicitor General agreed that defendant Bond had standing to raise her enumerated-powers claim, argued that her Tenth Amendment argument was the mirror image of her enumerated-powers claim, and noted that federal defendants regularly contend that Congress has exceeded its enumerated powers in enacting the statutes under which they are convicted. Because the courts of appeals have regularly decided these challenges, if the Supreme Court confirms that defendants have standing to raise enumerated-powers and parallel Tenth Amendment challenges to their convictions, we do not expect the decision to have a significant effect on federal criminal prosecutions.

Mr. WOLF. Thank you.

KHALID SHEIKH MOHAMMED

I have one last question. On several occasions, maybe two or maybe three, when asked about Khalid Sheikh Mohammed, you said decisions would be made within a week. It think it was within several weeks I think is the exact term. I think you said that about a year ago, and I think you said it again in the middle of the year, and I don't know if you said it again. I think you did. What is the status and what are your plans for Khalid Sheikh Mohammed?

Attorney General HOLDER. Obviously, I cannot predict timing very well. That is a matter that is under active review. We are trying to work our way through that, given a whole variety of things, among them the congressional restrictions that were put in place under the defense authorization bill and that are being considered with regard to the continuing resolution. And so we are working our way through that. And as soon as we have an ability to announce the decision, we are going to do so. I am not going to get into the business anymore of trying to predict time.

Mr. WOLF. I was going to say, do you think it will be in a few weeks, but I won't.

Attorney General HOLDER. My record in that regard is not a good one. So I am not going to add to it.

Mr. WOLF. Anyway, we appreciate your testimony. And with that, the hearing is adjourned.

Chairman Frank R. Wolf

FY12 CJS Questions for the Record – Attorney General Holder

Freedom of Information Act

The Freedom of Information Act requires the department to respond to a request within 20 days, and to provide the requested documents within a reasonable timeframe afterward.

1. **Why did Mr. Adams find that no conservative or Republican requestors received a reply in the time period prescribed by law?**

ANSWER

The Department's policy is to process records requests without taking into account any ideological or political affiliations of the requester. The attached letter to you dated March 30, 2011 sets forth in detail the Department's explanation regarding allegations that the Department responded more slowly to conservative requesters than to others.

2. **Are there any safeguards in your FOIA protocols to prevent potential internal biases from influencing responses or response times?**

ANSWER

The long-standing policy of the Department of Justice, which the Department's Office of Information Policy continually reinforces in written guidance, training, and counseling, is that the identity of the requester has no bearing on the processing of the FOIA request. Consistent with this policy, the Civil Rights Division's FOI/PA Branch processes FOIA requests in close consultation with the Department's Office of Information Policy, which has responsibility for advising all Federal agencies within the Executive Branch on proper compliance with the Freedom of Information Act. In addition, FOIA requesters may file an administrative appeal with the Office of Information Policy if they believe that there has been an adverse determination on their request, which includes a determination to withhold or redact any requested documents. The primary factors influencing the length of time needed to respond to a FOIA request at the Department of Justice are the complexity of the request and the volume of material that is responsive. The Department's initial letter to the requester acknowledging receipt of a FOIA request provides contact information and if necessary, the component will reach out to the requester directly to ensure that the Department understands the request, and to determine whether there is a different set of information that might fulfill the requester's need for information more quickly. When components utilize multiple processing tracks to distinguish between simple and more complex requests, they will typically provide the requester an opportunity to limit the scope of their request in order to qualify for the faster

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

March 30, 2011

The Honorable Frank Wolf
Chairman
Subcommittee on Commerce, Justice,
Science and Related Agencies
Committee on Appropriations
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

This responds to your questions during the Attorney General's March 1, 2011 testimony before the House Appropriations Committee, regarding allegations that the Department of Justice (Department) has politicized the manner in which it responds to Freedom of Information Act (FOIA) requests. During the hearing, you referred to allegations by a blogger that the Department's Civil Rights Division (Division) provides information in a timely manner to some, while delaying its replies to others, based on political favoritism. As discussed below, it appears that the allegations rest on comparisons of dissimilar requests.

President Obama and the Attorney General have emphasized the benefits of open government and the importance of responding to FOIA requests effectively and with a presumption of disclosure. While more remains to be done, the Department has made significant strides over the past two years. In responding to over 37,000 requests in which the Department analyzed responsive records for potential release during FY 2010, the Department increased its disclosures for the second consecutive year, releasing information in 94.5% of such requests—the highest release percentage since FY 2002.

With respect to the specific issues raised at the March 1, 2011 hearing, the Department's policy is to process records requests without taking into account any ideological or political affiliations of the requester. We are conducting a review of the Civil Rights Division's files regarding FOIA requests and requests for submission files under Section 5 of the Voting Rights Act of 1965. Our review to date has not found evidence to support claims that political considerations influenced the Division's response to FOIA requests.

The blog post you referenced did not note the significant differences between, on the one hand, the Department's practices in responding to FOIA requests, and, on the other hand, its longstanding procedures for implementing Section 5 of the Voting Rights Act of 1965. In fact,

the vast majority of the allegations cited in the blog post involved pending Section 5 submissions, which are not comparable to FOIA requests for the following reasons.

Section 5 provides, *inter alia*, that a jurisdiction covered by Section 5 can obtain preclearance of a change to its voting procedures if it submits the proposed change to the Department, and the Department does not interpose an objection within 60 days of the receipt of a completed submission. The Department's procedures for administration of Section 5 allow for public comment on proposed changes for which preclearance is sought. *See* 28 C.F.R. §§ 51.29-30. To facilitate public input, the Department's procedures provide for public access to Section 5 submission files, to the extent they are not exempt from inspection under the FOIA. *See* 28 C.F.R. § 51.50(d). Due to changes in the Department's technology systems and security policies, it became no longer feasible for the Voting Section to provide for physical inspection and copying of Section 5 submission files. Thus, since 2001, the Voting Section's practice has been to mail or email a copy of the file to each requester. Where redactions are needed, the Division's FOIA Office further processes the records.

The Voting Section prioritizes requests for Section 5 submission files when the jurisdiction's submission is pending before the Attorney General—*i.e.*, where the statutorily allotted 60-day review period has yet to expire, or where the Attorney General has requested more information or interposed an objection. This helps ensure that interested parties have a meaningful opportunity to receive and review a pending submission, and prepare and present a comment on that submission, as Congress provided in the Voting Rights Act of 1965, in time to be considered during the statutorily mandated 60-day review period. If the request letter cites the FOIA but seeks pending Section 5 files, it is treated as a pending Section 5 request and processed accordingly. Because of these procedures, it is not meaningful to compare the handling of requests for pending Section 5 records with the handling of requests for closed Section 5 files or FOIA requests for other types of records.[1]

For example, the blog post you mentioned alleges that Eugene Lee received responses to his FOIA requests only three days after submitting them. The Voting Section's log of document requests from members of the public, which we previously provided with our letter to you of August 12, 2010, includes three requests to the Division by Mr. Lee.[2] Two of these three requests, however, were requests for copies of pending Section 5 submission files that were handled under the procedure described above. On the other hand, Mr. Lee's third request was for a *closed* Section 5 submission file (which was processed by the FOIA office due to the need for redactions). It did not receive the same priority as pending Section 5 requests, and took 172

[1] The Voting Section also aims to reply promptly where practicable to requests for closed Section 5 submission files—*i.e.*, submissions with regard to which the 60-day review period has already expired—where the requester demonstrates a need due to factors such as a litigation deadline, or other Section 5 issues such as potential unprecleared voting changes or a related pending file, as well as other requests that are simple or do not involve voluminous records.

[2] In response to your July 29, 2010 letter seeking the "Voting Rights Section log of Freedom of Information Act requests," we provided the log maintained in the normal course of business by the Voting Section. That log contained both FOIA requests (designated there with a number in the column titled "FOIA No."), and also requests processed under 28 C.F.R. § 51.50(d) (designated there with "NA"), because the Voting Section maintains those data in a single system.

days to fill. Another example is the request of Raul Arroyo-Mendoza, who is also alleged to have received "same day service." Mr. Arroyo-Mendoza has made many requests over the last two years. While he received quick turnaround for requests relating to pending Section 5 submissions, he waited 18 months for the Division to complete processing on his request for a closed Section 5 submission file, which included voluminous records and required numerous redactions.

The allegations you mentioned include a claim that Chris Ashby received completed responses more slowly than Susan Somach because of political favoritism. However, our files indicate that Mr. Ashby's request was for closed Section 5 submission files, and thus was treated in the same manner as other requests for Section 5 submission files not pending at the time of the request. Ms. Somach, by contrast, often requested records relating to pending Section 5 submissions. In some instances, she asked for both pending and closed submission records in the same request. In all those instances but one, she received a prompt response under the longstanding practice relating to pending Section 5 submissions, while her requests for records relating to closed submissions took longer to process.[3] To take a specific example, in a request she made on May 19, 2009, Ms. Somach received responsive records on May 27, 2009 for the four requested pending Section 5 submissions. However, the processing of the records from the closed submissions requested on that same date was not completed until two months later, on July 29, 2009. One of Ms. Somach's requests for a pending Section 5 submission file took over a month: she did not receive a response to her request dated December 7, 2009 until January 29, 2010.

In certain cases, to be sure, FOIA requests may be completed in a matter of days. But this typically occurs when the requested records are easily identifiable, are not voluminous, and are releasable without requiring many redactions. Our initial review indicates that this was not the case in the instances referenced in your letter in which the Department has been criticized for delay.

For example, it is alleged that two FOIA requests for resumes—one submitted in February 2006 by a *Boston Globe* reporter and one submitted in 2010—received different treatment despite requesting "the exact same information," and, specifically, that a response to the 2010 request was unduly delayed. These two requests, however, were quite different in scope. The 2006 request was for copies of resumes and application-related documents for career attorneys hired into three of the Civil Rights Division's Sections from January 2001 to approximately January 2006. By contrast, the 2010 request sought nearly a decade's worth of resumes for the entire Division, including all 12 Sections as well as the Office of the Assistant Attorney General—in sum, nearly seven times as many new hires as the 2006 request. In accordance with the Division's usual protocol, the FOIA Office began processing that request immediately, sending an interim response the day after it was received.[4] That process requires a

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[3] The exception we have identified was a request for five pending submission files and one closed file. In that instance, the closed file consisted of a total of only nine pages requiring no redactions, and was included along with the pending files.

[4] Although the blog post referenced in your letter states that this request was originally submitted in the spring of 2010, our records indicate that it was first submitted on October 6, 2010, and received in the Division on October 13, 2010.

time-consuming line-by-line review of the resumes before public release, consistent with our obligation to protect the privacy of attorney hires.

In short, based on our initial review of the allegations that you referenced during the hearing, we are not aware of evidence that the Civil Rights Division allows politics or any improper factors to play a role in the handling of records requests.

We hope that this information is helpful. Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter.

Sincerely,

Ronald Weich
Assistant Attorney General

cc: The Honorable Chaka Fattah
Ranking Minority Member

processing track.

Defense of Marriage Act

Last Wednesday you announced that you and President Obama have concluded that Section 3 of the Defense of Marriage Act, as applied to same-sex couples under state law, is unconstitutional. As a result, the Justice Department no longer intends to defend the law against two on-going challenges.

3. Are there any other federal laws for which this Department of Justice would find it difficult to make a reasonable defense?

ANSWER

The Department of Justice (DOJ) has a long-standing practice of defending the constitutionality of duly-enacted federal statutes. The determination made with respect to Section 3 of the Defense of Marriage Act does not indicate any change in DOJ's traditional approach to this issue. Congress has established the procedure by which DOJ gives notice of a decision not to defend the constitutionality of a statute, and should any such determination be made in the future, DOJ would promptly apprise Congress of that decision in accordance with the law. The circumstances in which DOJ declines to defend statutes will continue to be rare.

Future administrations may not entirely agree with the Legislative Branch regarding the constitutionality of a federal law.

4. What should be the threshold determination for declining to defend such a law?

ANSWER

DOJ takes very seriously the commitment to defend acts of Congress. As a general rule, DOJ should defend the constitutionality of federal statutes. The exceptions to this general rule are rare. The Department has declined to defend statutes in certain instances where no reasonable arguments were available in their defense. The Department has also declined to defend statutes that unduly encroach on executive prerogatives, such as acts of Congress that raise serious separation of powers concerns. In addition, the Department has declined to defend statutes when the President has determined that the law is unconstitutional.

Border and National Security

You have been asked before about the risk of terrorists entering the country by being smuggled across the border from Mexico using the usual human trafficking networks that

continue to be very active there. Recently, a Tunisian imam who had called for the death of a Danish cartoonist and had been deported from Canada was caught being smuggled into the U.S. I understand he's being held as a witness in a human smuggling case against the driver of the vehicle, and he may not have had any intentions other than to reside here illegally.

5. **Doesn't our land border with Mexico constitute the greatest vulnerability in terms of entry of foreign terrorists into the country?**

ANSWER

Because of their contiguous land borders with the United States, both Mexico and Canada pose particular challenges to U.S. border security. These land borders have increasingly become a focal point in our national security strategy. Despite numerous, designated U.S. ports of entry along each border, as well as the use of monitoring equipment at various spots between these physical checkpoints, there continue to be many places from which persons can enter the United States undetected from either Canada or Mexico. Indeed, the flow of human smuggling and narcotics north into the United States, along with smuggling of illegal contraband and criminal monetary proceeds south out of the United States have had a devastating effect on the United States and Mexico, particularly along the Southwest Border. The violence perpetrated by organizations and elements associated with these criminal activities has required greater federal law enforcement attention to the region. The Department of Justice, working closely with our partners in the Executive Branch, Congress, and the Government of Mexico, have put together a comprehensive intelligence-driven strategy to protect our land borders.

6. **Is there evidence that this is a preferred method of entry into the country for those who would wish to harm us?**

ANSWER

Although there is no specific evidence to suggest that foreign terrorists have focused their efforts on entering the United States via Mexico, as detailed above, the Southwest Border region is a particularly vulnerable area and has increasingly become a focal point in our national security strategy.

DEA Budget Cuts/Meth Lab Clean-up

The DEA appears to be the biggest loser in your FY12 budget. They have program reductions of $47 million, and a rescission of $30 million, and no significant increases. This is particularly untimely in light of the ongoing struggle on the Southwest Border to combat the influence of Mexican drug cartels, and the DEA's growing counterterrorism role.

7. **What is the rationale for these reductions?**

ANSWER

While the FY 2012 President's Budget only requests a modest increase in the appropriation for DEA's Salaries and Expenses (S&E) Account, the budget requests a significant increase for our Diversion Control Program that is funded through the Diversion Control Fee Account (DCFA). The FY 2012 DCFA request of nearly $322 million represents an 11 percent increase over FY 2011. The DCFA request includes $30.9 million in program enhancements for the Diversion Control Program, including 124 positions to increase regulatory and enforcement efforts related to the diversion of controlled substance pharmaceuticals and listed chemicals. The Diversion Control Program directly attacks the problems that many Americans are most concerned about – prescription drug abuse.

DOJ and DEA understand the seriousness of the on-going efforts along the Southwest Border and are committed to working with other DOJ components and Department of Homeland Security (DHS) law enforcement agencies to cut off the flow of drugs and guns that flow between the U.S. and Mexico.

As you know, the entire federal government is being asked to tighten its belt and make tough decisions on programs that can be consolidated, reduced, or eliminated. Some of DEA's FY 2012 cuts are part of larger efforts throughout the Department of Justice to cut back on administrative, information technology, and facilities costs, and to consolidate task force efforts.

Many other FY 2012 cuts were necessary to offset the cost of DEA priorities that directly support DEA's efforts to combat Mexican drug cartels. For example, our budget includes $37.4 million in base adjustments that will allow DEA to continue Southwest Border efforts funded through regular and supplemental appropriations in FY 2009 and FY 2010. This includes ongoing funding for 240 positions (151 agents). On an ever increasing basis, the El Paso Intelligence Center (EPIC) is becoming the central reporting location for seizures of drugs, currency, and firearms along the Southwest Border and throughout the Nation. Recent additions at EPIC include the DHS-led Border Fusion Section, Immigration and Custom Enforcement's Border Violence Intelligence Cell, ATF's Gun Desk, and the FBI's Southwest Intelligence Group. The collocation of these interagency groups improves our ability to collect, analyze, and share intelligence, which ultimately strengthens our ability to disrupt and dismantle all kinds of criminal organizations, including firearms traffickers. As such, we are requesting $10 million in construction funding that will provide additional workspace for interagency participation at EPIC.

The primary cut in DEA is the elimination of Mobile Enforcement Teams. These are the teams that provide assistance to locals to combat violent drug trafficking organizations in specific neighborhoods. Their MET teams are in 16 DEA field divisions and the budget would eliminate all of them.

8. Why is this a low priority?

ANSWER

DEA and the Department are committed to working with our state and local counterparts in combating violent drug trafficking organizations that operate across the U.S. However, every federal agency is being asked to take a hard look at how it can reduce spending, and the Mobile Enforcement Team (MET) cut is one of the tough choices that had to be made. METs are less directly connected to DEA's core mission of disrupting and dismantling the world's largest drug trafficking organizations than are other DEA programs, and therefore they are proposed for elimination so that resource levels can be maintained for DEA's core programs. DEA will continue to assist state and local communities impacted by drug-related violent crime through DEA task forces and through violent crime task forces led by other DOJ components. With the elimination of these METs, DEA will reassign existing agent positions throughout DEA and will establish additional Tactical Diversion Squads (TDS) across the United States to combat the diversion of controlled substance pharmaceuticals and listed chemicals. These TDSs utilize the task force concept by combining federal, state, and local agencies and resources that focus exclusively on diversion investigations.

There has been a resurgence of clandestine Meth labs across the country. DEA, through a transfer from the COPS program, assists local law enforcement with cleanup of these labs. I understand that the current year funding for this activity has run out, and that even if the CR is extended the additional funding will be quickly expended.

9. What should local authorities do as they are trying to deal with these hazardous materials?

ANSWER

State and local agencies have a few options for dealing with these labs. One option is for them to use OJP/BJA Byrne Justice Assistance Grant funding for lab cleanups.

Also, the states of Alabama, Kentucky, Illinois, Indiana, and Oklahoma already have Container Programs set up that allow state and local law enforcement officers to expedite the removal of seized chemicals from clandestine laboratory sites to temporary secure containers pending removal by a contractor. These programs lower the cost of clean-ups. DEA can provide technical assistance to any other states that want to implement the Container Program.

In an attempt to stop the diversion of ephedrine-based products, states such as Oregon and Mississippi have enacted legislation scheduling ephedrine and pseudoephedrine products. Oregon has experienced a sustained reduction in methamphetamine labs by more than 90 percent, and Mississippi recently announced a reduction of 68 percent in the number of methamphetamine labs in that state during the first six months after their legislation was implemented. These are very encouraging results.

10. Is there any other assistance or training available to them through the Department?

ANSWER

DEA has a clandestine laboratory training facility at the DEA Academy in Quantico, Virginia. At this facility, DEA trains federal, state, local, and foreign law enforcement officials on the latest techniques in clandestine laboratory detection, enforcement, and safety. In FY 2010, the Clandestine Laboratory Training Unit conducted training for a total of 1,306 state and local law enforcement officers. DEA will continue these state and local clan lab training within the level of COPS funding that is available for clan lab cleanups and training in FY 2011:

On-the-road Clandestine Laboratory Training is an example. The Clandestine Laboratory Unit is conducting certification schools on the road. While this reduces the cost of individual schools, the quality of the experience may be reduced by having to rely on "make shift" facilities. The DEA Office of Training has also partnered with the FBI to provide Clandestine Laboratory Awareness training throughout the country in support of the National Improvised Explosives Forum (NIEF) schools. This school, where the similarities of drug labs to WMD/IED labs are discussed, is provided to Bomb Technicians and other first responders or industry personnel throughout the country.

Along with training provided by DEA, state and local agencies can also apply for Byrne JAG funding to support methamphetamine cleanup expenses.

In addition to the clandestine lab training facility at Quantico, DEA has two Tactical schools and one Site Safety School scheduled in 2011. Tactical training is designed for officers involved in clandestine laboratory raids but who have limited training and experience, and Site Safety School is designed to certify attendees as Clandestine Laboratory Site Safety Officers. Advanced assessment and investigative techniques are also taught at this school.

11. Can they enter into contracts directly with the contractors that DEA uses?

ANSWER

State and local agencies are free to enter into contracts directly with whomever they choose. We are referring state and local agencies to the network of hazardous waste contractors that DEA currently uses. DEA will also work with various state and local agencies to provide technical assistance whenever possible regarding this matter.

12. Does your FY12 budget include any funding in DEA or under COPS for the continuation of Meth lab cleanup assistance?

ANSWER

There is no funding included for state and local methamphetamine laboratory clean-ups in either the DEA or COPS request for FY 2012; however, state and local law enforcement agencies are able to use their Byrne Justice Assistance Grant (JAG) funding for clandestine lab cleanup. DEA will also continue to clean up the labs it investigates with funding from the Asset Forfeiture Fund.

13. Aren't there economies of scale, and assurances of quality that come from having the Department run this program?

ANSWER

We believe there are some economies of scale achieved through having a nation-wide network of contractors. But at this point, we do not know what rate the state and locals are receiving for clean-up efforts, or how the rate compares to the rate that we get on our nation-wide contracts. The average cost for a laboratory clean-up based on the DEA-administered contracts is $2,300.

14. Why should it be terminated as you are proposing in the FY12 budget request?

ANSWER

While DEA coordinated the clandestine lab cleanups for state and local agencies, funding was provided though the COPS appropriation. The entire federal government is being asked to tighten its belt and make tough decisions on programs that can be consolidated, reduced, or eliminated. The elimination of the funding for the COPS Methamphetamine Enforcement and Cleanup program represents just one of the difficult decisions the Department had to make in the formulation of the 2012 budget. However, state and local law enforcement agencies are able to use Byrne Justice Assistance grant (JAG) funding for clandestine lab cleanup.

Prison Rape Elimination Act

The ultimate goal of this effort is the elimination of prison rape. A key to the longer term success of this program then is continuous monitoring and evaluation. One idea in this regard is involving the Inspector General in program audits every three years.

15. Do you agree that this would be useful and would you support the inclusion of such a mandate in the appropriations bill?

ANSWER

As the Department noted in its proposed PREA rule, published in the Federal Register on February 3, 2011, independent audits can play a key role in implementation of the Department's PREA standards, especially given that the statute provides that only states, not localities or Federal entities, are subject to financial penalties for noncompliance. The Department's proposed rule clarified the requirements for an audit to be considered independent, but deliberately left undecided, pending further public comment, many aspects of the audit standard, including the frequency with which audits must be conducted and who will conduct audits for Federal agencies. The public comment period on the proposed rule closed on April 4, and the Department is currently reviewing over 1200 comments submitted. As the Department drafts the final rule, it will devote extensive attention to all aspects of the audit standard. Accordingly, it would be premature at this time to address specific questions regarding the audit standard, including the frequency of audits and whether to involve the Department's Office of the Inspector General (OIG). Whether or not OIG is involved in such audits, it would have full authority to conduct a program review of the issue of prison rape as it impacts facilities under the jurisdiction of the Department.

Your budget proposes to reduce funding for the Prison Rape and Prevention Program by 66 percent.

16. Why? Isn't this funding needed to provide grants to facilitate implementation of the standards established under the Prison Rape Elimination Act?

ANSWER

The Department's FY 2012 request reflects the fact that funds were appropriated in prior years pursuant to a multi-year grant in order to help facilitate implementation. In FY 2010, the Bureau of Justice Assistance awarded a $13 million multi-year grant to establish the Resource Center for the Elimination of Prison Rape (the Center). The Center will provide additional training, technical assistance, and resources to help the correctional field better identify and implement best and promising practices, consistent with the national standards that will be issued by the Attorney General. The Center's current funding is expected to provide support for training and technical assistance for a three year period, ending in 2013 or early 2014. Additionally, correctional administrators may use Byrne Justice Assistance Grant funding and other discretionary funding to support correctional system improvements.

Currently, the Bureau of Justice Statistics (BJS) is conducting an ongoing survey that will examine the official records of inmate-on-inmate and staff-on-inmate sexual victimization incidents. The FY 2012 funding request contains sufficient funding for this survey. In addition, BJS is conducting ongoing surveys based on interviews of adults in prisons and jails and youth held in juvenile facilities. These BJS surveys are scheduled in 2011 and 2012 and

are fully funded by appropriations in prior fiscal years.

U.S. Marshals Service

In August of 2010, the Investigative Operations Division of the U.S. Marshals Service launched an agency-wide gang enforcement initiative that lasted just over a month. This surge in enforcement was aimed at identifying troubled areas where gang violence was high.

17. How successful was that initiative?

ANSWER

The United States Marshals Service (USMS) fulfills a critical role in the Department of Justice's violent crime reduction strategy by acting as the federal government's primary agency for conducting fugitive investigations. One of the agency's primary missions is to make communities safer by locating and apprehending the most serious and violent offenders. Over the past ten years, the USMS has expanded its fugitive apprehension program to include state and local jurisdictions through the implementation of highly specialized multi-agency fugitive task forces, encompassing nearly the entire country. A key strength of the Task Force network is its ability to conduct innovative and effective short-term, targeted and pro-active enforcement operations to reduce violent crime. This expertise has proven extremely effective in assisting our federal, state, and local law enforcement partners' anti-gang and violent crime reduction efforts.

Beginning on August 23, 2010, the USMS launched an agency-wide operation, called *Operation Gang Surge*, which resulted in the arrests of 1,332 violent gang members. The purpose of this operation was to target hardened gang members, many of whom commit the vast amount of violent crime in our communities. This goal was accomplished by coordinating the efforts of seven USMS Regional Fugitive Task Forces and 75 district-based Violent Offender Task Forces across the country to identify troubled areas within their jurisdictions where gang violence was high. To ensure these efforts benefited state and local law enforcement, supervisors reached out to their partners in these agencies and offered all available USMS resources to assist in the investigation and apprehension of gang members they sought to target.

Operation Gang Surge was without question a great success. In addition to the more than 1,300 arrests, the initiative enabled law enforcement to obtain a wealth of gang intelligence and build new Gang Enforcement partnerships with external law enforcement agencies, as well as improve the quality of life for citizens within the targeted jurisdictions.

Operation Gang Surge evolved from another extremely successful USMS-led strategic gang enforcement operation that removed 163 violent gang members and gang member associates from the streets of Tulsa, Oklahoma, in July of 2010. Dubbed *Operation Triple Beam*, the primary focus of the initiative was to combat the escalating crime and violence associated

with gang activity in Tulsa. More than 40 law enforcement officers from the USMS, the Tulsa Police Department (TPD), and other federal, state, and local agencies combined resources to bring the most violent gang members to justice and remove deadly guns and drugs from the streets of Tulsa.

Operation Triple Beam yielded substantial results in reducing gang violence as demonstrated by a post-operation analysis conducted by the TPD. Statistics indicate that for the two-month reporting period following the operation, homicides decreased by 89 percent, firearm assaults decreased by 52 percent, and robberies decreased by 36 percent. These statistics clearly support the notion that the right violent gang members were targeted and arrested. In addition to arresting 163 of Tulsa's most dangerous gang members, authorities seized 46 firearms, $15,000 in U.S. currency, and illegal drugs with a street value of over $16,000. *Operation Triple Beam* now serves as a nationwide model for similar initiatives designed to address gang-related violence. The USMS is utilizing this model of targeting specific areas and gangs which are especially violent or embedded to realize the greatest results possible while providing long-term relief for the communities they affect.

18. Did you see a significant increase in gang member arrests?

ANSWER

Over the one-month *Gang Surge* operation, 1,332 violent-gang members were arrested and 1,612 warrants were cleared. *Operation Gang Surge* realized a 288 percent increase in U.S. Marshals Service (USMS) Task Force gang member arrests compared to the previous three-month average.

Although both the Department of Justice and the USMS take pride in the success of targeted enforcement operations like *Operation Triple Beam* and *Operation Gang Surge*, it is important to note that gangs have been a priority of the agency since the third *Operation FALCON (Federal and Local Cops Organized Nationally)* in October 2006. The USMS recognizes the need to reduce gang crime and actively supports the Department's priority of fighting gang violence. The USMS Gang Enforcement model is a focused and cost-effective approach utilizing existing Violent Offender Task Forces as the foundation. The approach joins anti-gang resources from federal, state, and local partners leveraging each agency's expertise in gang enforcement. The model has proven successful in removing violent gang members and the tools of their trade, weapons and drugs, from our communities. The USMS arrested more than 4,800 gang members in FY 2010.

19. To what extent is the Marshals Service coordinating with the Department of Homeland Security to ensure that alien sex offenders are identified and subjected to removal proceedings?

ANSWER

Two of the critical missions of the United States Marshals Service (USMS) under the Adam Walsh Child Protection and Safety Act (Act) are to assist state, local, territorial and tribal agencies in the location and apprehension of non-compliant sex offenders, and to investigate violations of the Act for federal prosecution. The USMS does not have a formal role in identifying alien sex offenders for deportation. Currently, this task remains the sole responsibility of U.S. Immigration and Customs Enforcement (ICE). However, the USMS has been developing procedures in conjunction with ICE to inform potential deportees of their obligation to register as a convicted sex offender regardless of their immigration status. This notice would be inserted into documentation that all potential deportees are required to review and sign and would be translated to the subject's native language. The USMS National Sex Offender Targeting Center is coordinating this effort to address concerns that this population of sex offenders has not received formal notification of their obligation to register. By notifying all potential deportees of the registration requirement, if a subject is subsequently granted asylum, released from custody in the United States under a supervised release program, or later reenters the United States (legally or otherwise), the suspect can be immediately apprehended and charged should they fail to register.

Bureau of Alcohol, Tobacco, Firearms & Explosives

CBS News reported last week that it has uncovered evidence which supports the allegation that the ATF is essentially participating in gunrunning to Mexico's drug cartels. It suggested that several gun shops wanted to stop the questionable sales, but were encouraged to continue selling by the ATF, so that ATF could continue gathering intelligence. This tactic is supposedly referred to as letting the guns "walk."

20. What is your response to these allegations?

ANSWER

I take these allegations seriously and have referred them to the Acting Inspector General of the Department for investigation. I have also made it clear to our law enforcement personnel and prosecutors working on the Southwest Border that the Department should never knowingly permit illegally trafficked firearms to cross the border.

21. Is it true that a Customs and Border Protection agent was shot in December with rifles purchased in Arizona earlier in the year as part of the ATF's effort?

ANSWER

There is an on-going investigation into the shooting death of Customs and Border Protection Agent Brian Terry. Accordingly, I cannot comment on that investigation at this time.

22. Has the report caused you to rethink this program?

ANSWER

eTrace is an important tool in ATF's work to dismantle gun trafficking. eTrace is an Internet-based system that allows participating law enforcement agencies to submit firearm traces to the ATF National Tracing Center. Authorized users can receive firearm trace results electronically, search a database of all firearm traces submitted by their individual agency, and perform analyses. In the last year, eTrace has gained strong new features. eTrace now accommodates data in Spanish, gives translations, and allows users to better sort and search additional data elements and images to improve weapons tracing. In the next 24 months, planned enhancements to eTrace will improve ATF's ability to monitor and map gun tracing data in real time and to share information with other federal agencies, as well as with state and local law enforcement.

Community Oriented Policing

The COPS hiring program began under the Clinton Administration, and sought to put an additional 100,000 police officers on the streets of the United States. To date, the program has funded over 121,000 police officers. Your budget request proposes to more than double this program over the current level.

23. Since the initial goal has already been surpassed, what is the goal of the new COPS hiring program, for which you have requested $600 million for FY 2012?

ANSWER

The goal of COPS has been, and remains, to advance public safety through community policing. To that end, COPS requests $600 million in FY 2012. This funding will be used to support the goal of hiring a cumulative total of approximately 11,900 community policing officers throughout the country over the next several years. The FY 2012 COPS hiring grants will directly assist state, local and tribal governments by helping them hire additional law enforcement officers for deployment in local communities to improve public safety.

From 1994 through 2008, COPS hiring grants funded more than 121,000 officers in over 13,000 of the nation's 18,000 law enforcement jurisdictions. In FY 2009, the COPS Office funded 4,699 officer positions under the COPS Hiring Recovery Program. In FY 2010, the COPS Office funded 1,395 additional officer positions. The COPS Office also has a Priority Goal to fund a cumulative total of 8,900 officer positions by the end of FY 2012. However, assuming an FY 2011 funding level of $298 million for hiring grants, the COPS Office anticipates funding a cumulative total of 7,436 officer positions by the end of FY 2011. By the end of FY 2012, the COPS Office anticipates funding a cumulative total of 11,920 officer

positions.

COPS hiring grants are only one piece that contributes to the overall success of the COPS program. The FY 2012 request also includes funding for much-needed training and technical assistance, for programs to improve police-community relationships, and for other innovative collaborations between law enforcement and the citizens they serve. Equipping police and communities with these valuable tools and knowledge resources is as integral to the success of community policing as the hiring of officers.

24. The $1 billion provided in the stimulus bill for this program supported the hiring of 4,699 police officers, at an average cost of $213,000 per officer. The budget requests $600 million in order to fund 4,500 new officers as well as a new $20 million student loan repayment program. How would you stretch the $600 million in order to fund 4,500 new officers?

ANSWER

By instituting both a maximum award cap of $125,000 per officer and a 25% local match requirement for all grantees, the COPS Office calculates that approximately 4,500 positions can be funded through the $600 million requested. Of the $600 million requested in FY 2012, $20 million will be used for grants to repay university loans of college graduates, which is an important incentive for attracting highly qualified and skilled personnel to law enforcement careers. The remaining $580 million will be used for hiring, with $42 million (7 percent) specifically set aside for hiring tribal law enforcement officers to meet the unique challenges in Indian Country.

25. In an austere budget climate, you are appropriately prioritizing core federal responsibilities and reducing support for state and local law enforcement. The one exception is COPS Hiring. Why is subsidizing the hiring of local officers a high priority worthy of a $300 million increase when federal law enforcement accounts, such as DEA, are being cut?

ANSWER

The Department faced many difficult decisions in the formulation of the FY 2012 budget. The budget provides for a continued investment in the support we provide to our state, local and tribal partners who fight violent crime, combat violence against women, and support victim programs. The Department of Justice maintains key partnerships with state, local and tribal officials and community members. These relationships maximize the federal government's ability to fight crime and promote justice throughout the United States. One such partnership is the COPS grant program.

The demand from state, local and tribal governments for support remains extremely high, especially with strained state and local budgets. The Police Executive Research Forum (PERF) recently confirmed that nearly two out of three police agencies responding to its survey said they were making plans to cut their budgets. Additionally, PERF noted that 44 percent of the police departments reported increases in certain types of crime (robberies, burglaries, and thefts) which they believe could be attributed to the economic crisis. A total of 27 percent stated that they had already implemented a hiring freeze for sworn law enforcement positions. COPS' own data verifies the need. In FY 2009, the COPS Hiring Recovery Program solicitation received over 7,200 applications requesting more than $8 billion in federal funding.

To meet this need, the COPS Hiring Program adds additional community policing officers to the beat by providing funds for the approved entry-level salary and benefits of each newly hired additional officer position over three years. The proposal for the COPS Hiring Program in FY 2012 includes a maximum award cap of $125,000 and institutes a 25% local match requirement for all grantees to guarantee local investment in the program.

The FY 2012 funding will be used to continue to support the efforts of state, local, and tribal law enforcement agencies in meeting the challenge of keeping their communities safe. In FY 2012, the COPS Office requests $600 million for the COPS Hiring Program. Of this amount, $50 million will be dedicated to advancing community policing through the hiring of non-sworn personnel, such as crime and intelligence analysts, to permit the redeployment of sworn law enforcement personnel to the streets. The infusion of hiring dollars for both sworn and non-sworn personnel will provide grantees with the capacity to develop and implement a comprehensive problem-solving approach towards crime prevention and create safer neighborhoods. Seven percent (or $42 million) of COPS Hiring Program funds will be dedicated to awarding grants for hiring tribal law enforcement officers.

Also within the amount requested, the COPS Office is proposing that $20 million be dedicated to a grant program that funds law enforcement agencies to repay student loans of recent graduates. Student loan repayment programs are a valuable recruitment and retention tool within law enforcement agencies.

26. When the three-year hiring grants begin expiring, what will happen if local governments cannot continue to support the cost of the officers? Is Congress going to be asked to sustain these positions to prevent layoffs, and compound its already huge investment in this program?

ANSWER

All agencies awarded hiring grants have submitted to the COPS Office retention planning information containing funding sources considered to be "substantive," and which would fully support the cost of retained officers. In their hiring grant applications, COPS asks agencies to indicate the planned source(s) of funding to be used for the retention of officer positions, if awarded. Applicants are able to select from a list of funding sources commonly used by agencies for this purpose (including general funds, tax increases, asset forfeiture

funds, etc.), or to select "other" and provide a brief narrative describing their planned funding source(s). During the application review process, the information provided by any agency that selected "other" is reviewed and, for any information provided that is questionable or unclear, COPS staff contacts agencies for additional clarification.

In addition, all hiring grantees are reminded of the retention requirement in their award notification letters, and the grant award condition regarding retention is listed on hiring award documents and explained in full detail within program manuals. Additional information on retention (for example, a Frequently Asked Questions document) is available on the COPS website, and the grants management training offered on-line includes a section on retaining officer positions. Furthermore, questions regarding retention are asked of hiring grantees annually through their programmatic progress reports, and COPS staff contacts any agency indicating potential problems in this area. As necessary, such grantees are offered program implementation guidance or technical assistance with regard to retention planning, and/or may be monitored through on-site visits or other follow-up activity.

The most recent data available on post-retention period activities for hiring grants can be traced back to an October 2002 report by the Urban Institute, Justice Policy Center. One focus of that report was the hiring grant retention rate for COPS-funded positions that had been expired for more than one full local budgetary cycle, and thus were eligible to be cut or eliminated by the locality. That report, while dated, did show that 80% of the agencies sampled retained these "programmatically expired" positions.

Juvenile Justice

The budget request proposes a new Race to the Top-style Juvenile Justice System Incentive Grant Program that will replace and consolidate other juvenile justice programs and goals. The funding requested is $120 million. In the process, you are eliminating block grants and formula grants, and dramatically reducing youth mentoring grants.

27. What are the advantages of this new style of program, and have the goals changed at all?

ANSWER

Since release of the FY 2012 budget, the Administration has heard a great deal from the States, from the juvenile justice community, and from Congressional offices about the proposal for juvenile justice spending in the President's budget.

Concerns have been expressed, for example, about the potential impact on states' compliance with mandates under the Juvenile Justice & Delinquency Prevention Act (JJDPA) and on other protections for system-involved young people.

Drawing on this feedback, the Administration has developed an alternative to its original

"Race to the Top"-style incentive grants program and is now proposing that the $120 million in the budget could be allocated as follows:

$110 million as formula funding, and $10 million in a demonstration program to encourage innovation and juvenile justice system improvements. The $110 million in formula funding would include

$80 million under Title II Part B of the JJDPA – Formula Grants Program and

$30 million under the Juvenile Accountability Incentive Block Grant (JABG) program.

This revamped approach would preserve – and add funding to – the important Part B Formula Grants program; continue JABG; and create a new discretionary funding program to encourage innovation and evidence-based reforms in the juvenile justice system which would showcase approaches other states may then consider embracing.

State Criminal Alien Assistance Program

The State Criminal Alien Assistance Program provides federal payments to states and localities to reimburse them for incarcerating undocumented criminal aliens. Your budget proposes to reduce funding for SCAAP from $330 million in FY 2010 to $136 million in FY 2012—a 59% reduction.

28. What is your justification for this reduction?

ANSWER

Addressing immigration enforcement and border-related crime can be a challenge for many state, local, and tribal jurisdictions because of the need to coordinate their efforts with the federal agencies responsible for leading the nation's border security efforts. The Administration favors focusing on "front-end" investments at the federal level, such as investigation and prosecution, to reduce and prevent illegal immigration and related criminal activity. Front-end investments directly contribute to state, local, and tribal efforts to address the problem of undocumented immigrants and border-related crime and violence.

The State Criminal Alien Assistance Program (SCAAP) does not directly address investigation or prosecution of border crime, but instead reimburses state and local jurisdictions for the cost of incarcerating undocumented criminal aliens. In addition, a large portion of SCAAP reimbursements are awarded to cover the costs of incarcerating offenders whose immigration status cannot be verified. It is fiscally prudent to look for the most effective ways to spend limited funds, which is through the reimbursement of only verified criminal aliens. Cutting payments of "unknowns" also responds to the criticism of oversight entities, such as GAO, about the payment of unknown cases, many of which may be concerning non-aliens. Furthermore, if unknown reimbursements are removed, it should

3/31/11

Juvenile Justice Funding for FY 2012

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    - $110 million as formula funding
        - $80 million under Title II Part B of the JJDPA – Formula Grants Program
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    - $10 million in a demonstration program to encourage innovation and juvenile justice system improvements.

- This revamped approach would preserve – and add funding to – the important Part B Formula Grants program; continue JABG; and create a new discretionary funding program to encourage innovation and evidence-based reforms in the juvenile justice system which would showcase approaches other states may then consider embracing.

encourage jurisdictions to work with DHS on identifying criminal aliens since only definite criminal aliens would be reimbursed.

You contend that 58% of the payments made under this program are for inmates whose status as an illegal alien is "unknown".

29. Why is the status of some many inmates unknown?

ANSWER

The Office of Justice Program's (OJP), Bureau of Justice Assistance (BJA) works with the Department of Homeland Security's (DHS) Immigration and Customs Enforcement (ICE) and all of the jurisdictions applying for reimbursement under SCAAP to determine the immigration status of offenders listed in SCAAP applications. SCAAP guidelines include clear instructions for applicants to review all information available to them (including criminal history records, interviews with detained offenders, and immigration enforcement data) in an effort to determine an offender's immigration status before including them in a SCAAP application. Once OJP receives a SCAAP reimbursement application, it shares the list of offenders included in the application with DHS in order to match the submitted records against the inmate data (name, date of birth, alien number, and FBI number) in DHS databases. The results of this match are provided to BJA and used to calculate SCAAP awards.

Many individuals who are in the country illegally have had no previous contact with DHS, which results in an "unknown" result when checked against DHS databases. In addition, many individuals with an "unknown" status are incarcerated for relatively short periods of time, which makes additional investigation to verify an individual's status difficult to accomplish.

Civil Rights Division

30. Your budget requests an increase of $34 million, or 11%, for the Civil Rights Division. This would represent a 42% increase above the FY 2007 level. Why is this increase needed? As you know, I have been very concerned by the Department's decisions with regard to the New Black Panther case.

ANSWER

The budget for the Department's Civil Rights Division (CRT) increased from $113.6 million in FY 2007 to its current FY 2012 request level of $161.8 million, which represents an increase of $48.2 million, or 42%. Over this six-year period, the need for additional funding is attributable to adjustment-to-base funding requirements of $18 million (mostly due to the increased costs associated with pay raises each year from 2007 through 2010, GSA rent

increases and lease expiration costs), a program transfer for the Office of Personnel Management's Election Monitoring Program ($3.4 million) and program increases in FY 2010 for human trafficking, unsolved civil rights era crimes, and other critical initiatives that resulted in the addition of 102 positions at a cost of $26.7 million. In particular, the FY 2010 program increases, which were the first increases the Division had received since FY 2001, addressed Division responsibilities that had become chronically underfunded. Among these were employment cases involving racial discrimination, hate crime and official misconduct prosecutions, and violence and intimidation directed against religious houses of worship.

The additional 102 positions, which included 60 attorneys, were needed to reinvigorate federal civil rights enforcement and to address the Division's many expanded responsibilities due to increased case loads and referrals from other agencies, as well as the enforcement authority under recently enacted federal statutes. These expanded responsibilities include the following areas: combating discrimination in housing, lending and foreclosure, including protecting the rights of our men and women in uniform and investigating rising numbers of fair lending referrals from regulatory agencies; increased investigations and prosecutions of bias motivated crimes, expanded voting rights enforcement responsibilities associated with the 2010 Census redistricting and defending constitutional challenges to the Voting Rights Act; pursuing human trafficking crimes; addressing unsolved civil rights era crimes; meeting the substantial increase in litigation demands for both pattern or practice and defensive litigation requirements; increased responsibilities in enforcing disability laws, and laws protecting institutionalized persons from unconstitutional treatment, as well as funding other critical initiatives.

(AG - Wolf 31 - Commission on Civil Rights Testimony - CRT)

Of concern recently is the testimony by Civil Rights Division attorneys before the Commission on Civil Rights about the hostility of some in the Department to race-neutral enforcement of the Voting Rights Act—particularly that a Deputy Assistant Attorney General instructed staff only to pursue cases on behalf of racial and language minority voters.

31. Are you concerned by this testimony?

ANSWER

The Department is firmly committed to the fair, vigorous, and evenhanded enforcement of all of the civil rights laws within its authority and makes enforcement decisions, including in the area of voting rights, based on the legal merits of the case, not the race, gender, ethnicity, or political affiliation of any party involved.

Regarding the suggestion that a Deputy Assistant Attorney General instructed staff only to pursue cases on behalf of racial and language minority voters, the Justice Department official referenced denies issuing any such directions. Specifically, she has informed the Assistant Attorney General for Civil Rights that she did not direct, nor did she intend by implication to

direct, any staff member of the Voting Section not to enforce any provision of law within the Section's jurisdiction. Moreover, the Division's record of voting rights enforcement under her tenure belies any suggestion that enforcement decisions are made based on the race, gender, ethnicity, or political affiliation of any party involved. For instance, the Department successfully moved for additional relief in *United States v. Ike Brown* (S.D. Miss.), a voting rights case filed to protect white voters, which involved an African American defendant.

When the allegations to which you refer first arose, the Department took them very seriously. Assistant Attorney General for Civil Rights Tom Perez spoke with the Deputy Assistant Attorney General in question, reviewed relevant material in connection with requests from the United States Commission on Civil Rights, and undertook additional inquiries within the Division consistent with his responsible management of the Division. The Deputy Assistant Attorney General to whom you refer also assured Mr. Perez that she has always made, and will continue to make, enforcement decisions based on the merits. Regardless of whatever incorrect inferences about Department policy some may have drawn from anything she said, the Department does not predicate decisions on the race of the alleged perpetrators or of the victims – and the actions of the Department are fully consistent with its publicly stated policy.

32. And if so, what have you done to counter this guidance and make it clear to the Civil Rights Division staff that race-neutral enforcement is the policy of the Department?

ANSWER

As indicated above, the Deputy Assistant Attorney General in question denies directing any Voting Section staff member not to enforce any provision of law within the Section's jurisdiction. The Voting Section's actions during her tenure, moreover, are consistent with the Division's policy of fair-minded enforcement. The Assistant Attorney General for Civil Rights thus determined that the Division's and the Department's policy was not in need of clarification. The Department maintains full confidence in the Civil Rights Division's continued commitment to the evenhanded enforcement of all the civil rights laws within its enforcement authority. This confidence is underscored by the fact that the Assistant Attorney General for Civil Rights has, from the outset of his tenure, recognized the importance and reaffirmed the policy of evenhanded enforcement. For example, in his very first address to Division employees in October 2009, the Assistant Attorney General for Civil Rights stated that the Division will "enforce the laws, all the laws, fairly and aggressively." He has delivered this same message on many different occasions.

Human Trafficking

33. What is the role of the newly announced ACTeams? Are these teams intended to take the place of the human trafficking task forces around the country?

ANSWER

The ACTeams are part of the Department of Justice's broader Human Trafficking Enhanced Enforcement Initiative and are designed to further strengthen the federal law enforcement efforts to combat human trafficking throughout the country. They are intended to build on the Department's record numbers of human trafficking prosecutions brought in each of the past three successive years by taking enforcement efforts to the next level. The ACTeams, which consist exclusively of federal agents and federal prosecutors, are charged with formulating and implementing a coordinated, proactive, inter-agency strategic plan to develop high-impact federal investigations and prosecutions, in close coordination with human trafficking experts at the Department of Justice and federal investigative agency headquarters of the Federal Bureau of Investigation, the Department of Homeland Security, and the Department of Labor.

ACTeams will not take the place of the current human trafficking task forces. The current human trafficking task forces, which are funded by Bureau of Justice Assistance grants to local law enforcement agencies and by Office for Victims of Crime grants to non-governmental victim service providers, play an important role in bringing together diverse governmental and non-governmental partners, to focus on an array of trafficking issues far broader than federal criminal investigations and prosecutions. ACTeams, by contrast, are composed exclusively of federal law enforcement agencies, and serve as a coordination structure among federal agents and federal prosecutors to strategically leverage federal law enforcement resources to strengthen federal criminal investigations and prosecutions. ACTeams will work closely with existing task forces, as well as with other federal, state, and local law enforcement agencies, and other government agencies, but the ACTeams will remain focused exclusively on developing significant federal human trafficking investigations and prosecutions.

The Hon. Chaka Fattah
House Appropriations Subcommittee on
Commerce, Justice, Science and Related Agencies
Questions for the Record
Hearing on the FY 2012 Budget Request for the U.S. Department of Justice

Earlier this year, the National Institute of Corrections (NIC), which is part of the Bureau of Prisons, issued a report to the Committees on Appropriations on the Estimated Effects of Potential Prison Reforms on the Bureau of Prisons (BOP). This report was the result of a directive in the FY 2010 Department of Justice Appropriations Act. The report indicated that increasing the "good time" credit by 7 days per year, if applied retroactively, would reduce the net BOP population by 4,033 inmates in the first year and by similar amounts in future years. The report also discussed other reforms, including sentencing changes that could be promulgated by the U.S. Sentencing Commission and increasing the end-of-sentence use of home detention for minimum security prisoners. The BOP budget request assumes savings of $41 million from a legislative proposal to increase "good time" credits. The budget also discusses a legislative proposal to provide sentence reductions for participating in education and vocational training programs.

1. **What is the expected impact of these two proposals combined on the net BOP population over the next 5 years?**

ANSWER

The National Institute of Corrections (NIC) issued a report on the Estimated Effects of Potential Prison Reforms on the Bureau of Prisons (BOP). The NIC report stated that, if enacted, the increase in good conduct time credit by 7 days per year was estimated to result in the release of an additional 4,033 inmates, resulting in a slower than expected growth in the inmate population (not a net decrease in the population). Two proposed bills have been transmitted to Congress.

The first bill modifies the current Good Conduct Time statute to allow inmates to earn an additional 7 days credit off their sentence for each year served in prison. The technical details are as follows:

· The bill amends Title 18 Section 3624(b).

· Presently, inmates earn up to 54 days for each year served; that translates to a maximum of 47 days for each year imposed (e.g., 470 days on a 10 year sentence).

· The change will allow up to 54 days for each year imposed; this will allow for an additional 7 days per year for each year imposed (e.g., 540 days on a 10 year sentence).

· The FY 2012 President's Budget request includes an estimate of $41 million in savings in the first year such statute was in effect, based on the anticipated "early" release of 4,000 inmates. We expect reductions of approximately the same number of inmates (4,000) for several subsequent years after enactment.

The second bill modifies one of BOP's general statutes to provide sentencing credit to inmates who participate in recidivism-reducing programs. The Department believes this will increase participation in core inmate programs that have been demonstrated to help inmates gain the skills important for successful reentry. The technical details are as follows:

· The bill amends Title 21 Section 3621.

· Inmates will be allowed to earn 60 days credit toward satisfaction of their sentence for each year during which they spend at least 180 days engaged in programs recommended by staff and proven to reduce recidivism.

· Credits awarded pursuant to this section, combined with Good Conduct Credits and any other sentence reductions, cannot reduce the time served below 67 percent of the imposed sentence.

· There is not yet an estimate of potential impact as it is difficult to predict to what extent the bill would increase the demand for programs, but it is expected to be significant. The BOP has estimated that population growth could be reduced by 1,500-1,800 fewer inmates than expected by the end of the first implementation year.

What impact do you expect these two proposals combined to have on crime rates, if any?

ANSWER

The Department of Justice does not have an estimate of the potential impact on crime rates. However, the Department believes the two proposals will increase participation in programs that have been demonstrated to help inmates gain the skills that are important for successful reentry. These programs include Federal Prison Industries (FPI), life connections, vocational training, and education. The Post Release Employment Project (PREP), a 12-year study of federal inmates, found that inmates who worked in FPI were 24 percent less likely to recidivate than similarly situated inmates who did not participate in the FPI program. BOP research has also found that inmates who participate in vocational or occupational training are 33 percent less likely to recidivate; inmates who participate in education programs are 16 percent less likely to recidivate; and inmates who complete the residential drug abuse treatment program are 16 percent less likely to recidivate and 15 percent less likely to relapse to drug use within three years after release.

Does DOJ anticipate submitting other federal criminal justice reform proposals in the near future? If so, what types of proposals are under consideration and when are they likely to be submitted?

ANSWER

The Department has submitted sentencing and corrections legislative proposals addressing both good behavior credits as well as credits for participation in programs with a proven track record of reducing reoffending. In addition, the Department is working with the U.S. Sentencing Commission on two reports: one addressing sentencing in the wake of the Supreme Court's decision in Booker v. United States and related cases, and one addressing mandatory minimum sentencing statutes. These reports, which should be completed later this year, may include recommendations for legislative change.

2. DOJ's FY12 budget proposes to cut $1.4 million by "consolidating task forces operating in the same geographic area or by eliminating low performing task forces." In addition, the budget proposes a cut of $39.1 million to eliminate DEA's 16 Mobile Enforcement Teams.

How many DOJ task forces currently exist, and how many would be eliminated by the proposed consolidations, in total and by component?

ANSWER

In FY 2010, the Department operated 918 violent crime, drug, gang, and fugitive task forces. The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) operated 176; the Drug Enforcement Administration (DEA) operated 255; the Federal Bureau of Investigation (FBI) operated 219; the Organized Crime Drug Enforcement Task Force Program (OCDETF) operated 9; and the U.S. Marshals Service (USMS) operated 82 in 256 locations. The FY 2012 Task Force proposal identifies up to 104 task forces for consolidation or elimination. 8 ATF task forces, 17 USMS task force locations, between 25 and 31 DEA task forces, and up to 48 FBI task forces will be consolidated or eliminated under the proposal, which includes only those violent crime, drug, gang, and fugitive task forces mentioned above. The proposal does not include FBI's Joint Terrorism Task Forces, the USAs' Project Safe Neighborhoods task forces, DEA's Tactical Diversion Squads, or other task forces operated by the Department and its components focused on issues such as Internet Crimes Against Children, Mortgage Fraud, Health Care Fraud, Cyber crime, etc.

Does DOJ anticipate that the reduced number of task forces will lead to reduced investigative activity, arrests and prosecutions at the federal, state and local levels? If so, please quantify the among of the anticipated reduction.

ANSWER

In light of the constrained funding environment in FY 2012, the Department made the difficult decision to reduce its task force footprint by consolidating or eliminating some task forces. Nevertheless, the Department will seek to sustain its high level of effort combating violent crime. The task force proposal does not eliminate federal personnel. These federal personnel will be redirected to higher crime areas or higher priority task forces and will continue to focus their investigative efforts on drugs, violent crime, gangs, and fugitive apprehension. Further, the funding that directly supports the overtime of State and local law enforcement officers participating on the Department's task forces is not affected by this proposal and that funding will be available to support officers reassigned to other Department task forces. Although the Department can not predict the impact the reduction in task forces will have on investigative activity, arrests or prosecutions, the reassignment of the agents to other task forces and the continuation of overtime support for state and local law enforcement officers should minimize any negative impact.

Beyond the proposed task force consolidations and eliminations, what specific steps has the Department taken or does it plan to take to reduce overlap and improve coordination among task forces, including those led by different DOJ law enforcement components?

ANSWER

Task forces are an effective mechanism for decreasing overlap and increasing coordination in the field. Each DOJ component has formed task forces that focus on that component's core mission and they invite other components and other law enforcement agencies to participate in these task forces. The Department has leveraged the Anti-Gang Coordination Committee (AGCC) to review all requests for new task forces related to gangs and violent crime. To avoid duplication, the review process examines the relationship of the proposed task force with existing task forces. The need for a new task force and the existence of possible duplication are raised at three stages of the review process. Initially the component must confer with the United States Attorney (USA) in that district and obtain the USA's concurrence. If the USA concurs, the component must submit the proposal to all other law enforcement agencies impacted by the new task force, including other task forces in the area. The component must receive the concurrence from the relevant DOJ agencies, state and local agencies, and other federal agencies such as Immigration and Customs Enforcement (ICE). Third, the proposal is assessed by the AGCC Task Force Committee whose members include the Executive Office for U.S. Attorneys (EOUSA), the Criminal Division Gang Unit, ATF, FBI, DEA, USMS, the Justice Management Division, and ICE. The AGCC Task Force Committee makes a recommendation to the Deputy Attorney General who ultimately approves or disapproves the proposal. Further, individual task forces take steps to reduce overlap and improve coordination. All of the task forces have access to resources that facilitate information sharing and deconfliction such as DEA's Special Operations Division (SOD), the El Paso Intelligence Center (EPIC), and the OCDETF Fusion Center.

What is the rationale for eliminating the MET program, and what impact do you expect the elimination of the program to have on drug crime investigations?

ANSWER

Due to budget constraints, the tough decision was made to eliminate the Mobile Enforcement Team (MET) program in order to focus funding on programs that are more central to DEA's mission. Every federal agency is being asked to take a hard look at how it can reduce spending, and the MET cut is one of the difficult choices that had to be made. DEA will continue to assist state and local communities impacted by drug-related violent crime through our task forces and other violent crime task forces led by other DOJ components.

3. **Has there been an increase in incidents of domestic and sexual violence in the United States over the last five years? Has the Office of Violence Against Women (OVW) experienced an increase in demand for services over that same period? If so, how has OVW responded to this increase? To what extent would the proposed increase in funding for OVW programs and the proposed carve-out of Crime Victims Fund resources help to address the gap between the demand for services and available services?**

ANSWER

The National Crime Victimization Survey (NCVS) measure of rape and sexual assault has not increased over the last five years. For additional details, please refer to figure 1 on page 2 of Criminal Victimization 2009 at http://bjs.ojp.usdoj.gov/content/pub/pdf/cv09.pdf, which shows the trend lines for the violent crimes measured by the NCVS.

The Bureau of Justice Statistics (BJS) publishes an annual estimate of intimate partner violence from the NCVS. The estimates of intimate partner violence against females have been stable over the past few years. The estimate for 2005 was lower than that for 2004 or any year since 2007 (for methodological reasons, 2006 has been excluded).

Following are the annual estimates, as published in the BJS Criminal Victimization bulletins:

2004: 466,600, 2005: 389,100, 2007: 554,260, 2008: 504,980, and 2009: 538,090.

The 2009 estimate is not statistically different from those of any year except 2005; the NCVS, then, indicates that intimate partner violence has been stable over the past several years.

Funding from OVW grant programs cannot fully meet the demand for services from victims in their communities. There has been an increase in demand for OVW grant funding over the past six years. In fact, the majority of OVW applicants do not receive funding at all. Please see the spreadsheet following this response showing FY 2005 through FY 2011 (projected)

grant program applications.

The Transitional Housing Assistance Program has become one of OVW's most competitive grant programs with requests for funding far exceeding the funding available each fiscal year. For example, in FY 2007, OVW received 215 applications. OVW was able to support 51 awards. In FY 2008, with eligibility limited only to continuation applications, OVW received 112 applications. OVW was able to support 58 awards. For FY 2009, OVW received 261 applications; OVW was able to support 58 awards. Moreover, OVW received an unprecedented response to its Recovery Act Transitional Housing Assistance Program. Specifically, OVW received 567 applications requesting a total of $285.4 million in grant funding – nearly twice the number of applications received for any other OVW grant program since its inception. A total of $43 million was available in Recovery Act grant funds, and 91 awards were made. For FY 2010, OVW received 223 applications; OVW was able to support 63 awards. This response underscores the need for safe and affordable transitional housing for homeless victims of domestic violence, sexual assault, dating violence, and stalking. OVW anticipates that a large number of Transitional Housing Assistance Program applicants will pursue grant funding during future grant cycles and the demand for program funding will likely continue to increase.

As with the Transitional Housing Program, most Legal Assistance for Victims (LAV) Grant Program applications do not receive funding at all. The LAV Program funds projects that address the civil and criminal needs of victims of domestic violence, dating violence, sexual assault, and stalking. In FY 2008, the LAV Program received 238 applications; OVW was able to support 66 awards. In FY 2009, the LAV Program received 231 applications; OVW was able to support 69 awards. For FY 2010, OVW received 296 applications; OVW was able to support 77 awards.

In terms of the FY 2012 request, the President's Budget request includes $431.8 million in grants funding for OVW, an increase of $13.25 million over the FY 2010 enacted level. This additional funding will allow OVW to fund more grants beyond the level that can currently be awarded. In addition, the FY 2012 President's Budget proposes $135 million for domestic violence, transitional housing and civil legal assistance programs within the Crime Victims Fund. Under this proposal, $100 million would be allotted for domestic violence shelters, transitional housing, and civil legal assistance, and $35 million would be for sexual assault services. Of this combined $135 million, $15 million would be targeted to tribal assistance. The proposed increase to the Crime Victims Fund will support domestic violence shelters, rape crisis centers and provide transitional housing assistance and other critical services to victims of domestic violence, sexual assault, and stalking. Providing support for programs targeting violence against women from the Crime Victims Fund will make available a reliable source of funds that will enable the Office of Justice Programs and the Office on Violence Against Women to help state, local, tribal, and nonprofit organizations improve and expand their programs. As the proposed carve-out of Crime Victims Fund resources may address some of the same needs as the OVW programs, OVW and the Office for Victims of Crime plan to work closely together to ensure that there is no duplication in grant-funded activities.

	FY 2005		FY 2006		FY 2007		FY 2008		FY 2009		FY 2010		FY 2011
OVW PROGRAMS	# Apps Rec'd.	# Apps Funded	# Apps Rec'd.	# Apps Funded	# Apps Rec'd.	# Apps Funded	# Apps Rec'd.	# Apps Funded	# Apps Rec'd.	# Apps Funded	# Apps Rec'd.	# Apps Funded	# Projected Apps
STOP Formula Program	59	59	56	56	58	58	57	57	57	57	56	56	56
Arrest Program	193	106	156	100	181	96	170	67	228	92	162	85	161
LAV Program	294	84	281	85	277	72	242	66	256	69	302	77	281
Rural Program	190	59	162	64	245	62	244	57	193	75	226	64	245
Disabilities Program	N/A	N/A	88	15	47	10	27	7	48	11	81	9	50
Campus Program	160	32	95	39	119	18	136	21	61	27	90	20	150
Supervised Visitation Program	128	40	95	30	93	33	88	29	92	25	73	29	52
Abuse in Later Life Program	N/A	N/A	30	10	35	10	53	10	58	11	35	9	35
Transitional Housing Assistance Program	290	116	172	45	215	51	112	58	260	58	244	63	300
Tribal Governments	53	37	36	36	107	82	66	65	38		74	61	75
Tribal Coalitions	10	10	10	5	19	12	11	11	16	9	16	13	15
State Coalitions	86	86	86	86	86	86	87	87	87	87	89	89	89
SASP Program - Grants to Culturally Specific Programs	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	25	5	50
Culturally and Linguistically Specific Services Program	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	213	46	100	27	125
SASP Formula	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	56	56	55	55	56
Tribal SASP	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	38	12	38
Grants to Engage Men and Youth in Preventing Violence	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	186	193	200
Court Improvements Program	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	45	21	40
Children and Youth Exposed to Violence Grant Program	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	286
Services to Advocate for and Respond to Youth Grant Program	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	232	23	150

4. **How will the proposed funding reduction for the Integrated Wireless Network program specifically affect the planned deployment of interoperable communication systems and infrastructure? Will delaying these deployments result in increased costs in future years compared to the original deployment schedule? If so, how much will costs increase over the full deployment timeline? What impacts are the delayed deployments expected to have on federal law enforcement operations?**

ANSWER

For FY 2012, the Department of Justice's (DOJ) Integrated Wireless Network (IWN) will absorb a reduction of $105 million in the President's budget. During FY 2011 and FY 2012, the Department will focus most of its resources on advancing ongoing strategic deployments rather than on significant new deployments. This will allow sufficient time to further detail a re-plan of the program capitalizing on establishing baseline capabilities in an expedited manner that meet federal security and radio spectrum usage mandates using the FBI's existing system as a platform for consolidation where possible. The cost of the program over the full deployment timeline is not expected to change significantly, and DOJ is currently working on reevaluating best practices, including other cost-effective technology, to ensure a flexible deployment strategy that can take advantage of new technologies when they become available.

5. **What processes and controls has the Department implemented to better control the costs and implementation of the FBI's Sentinel program and Next Generation Integrated Automated Fingerprint Identification System and the Department's Integrated Wireless Network?**

ANSWER

Overview

The Department of Justice (DOJ) uses several mechanisms to monitor the program health and progress of key developmental programs, particularly FBI's Sentinel and Next Generation Identification/Integrated Automated Fingerprint Identification System programs and the Department's Integrated Wireless Network. These include:

(1) Program reviews by the Department IT Investment Review Board; (2) Monthly progress reports to the Department's CIO Project Dashboard; (3) Monthly project updates to the OMB Federal IT Dashboard; (4) Monthly/Quarterly Program Reviews; and (5) TechStat Review.

1. DIRB Program Reviews. In FY 2003, DOJ established a Department Executive Review Board (DERB) chaired by the DOJ Chief Information Officer (CIO) to oversee high profile, high priority IT investments. The DERB was rechartered in FY 2006 as the DOJ IT Investment Review Board (DIRB), with the Deputy Attorney General as the chair, the DOJ CIO as the vice-chair, and members who include the DOJ Chief Financial Officer, Controller,

and other DOJ senior executives with IT subject matter and financial management expertise, augmented by non-voting DOJ representatives and component members.

The DIRB provides the highest level of investment oversight as part of the DOJ's overall IT investment management process. Individual programs are reviewed by the DIRB at least annually -- or more often according to major program milestones or based on the project status ratings assigned by the DIRB at each review. Programs rated "Green" (i.e., projects within budget, on schedule, and no major issues) are reviewed by the DIRB annually absent an intervening significant milestone. Programs rated "Yellow" (i.e., projects with an issue(s) described as significant yet manageable) are reviewed by the DIRB at least every six months to better monitor progress. Programs rated as "Red" (i.e., projects with an issue(s) described as major and needing corrective action) are reviewed at least every three months by the DIRB to closely monitor progress and verify completion of the necessary corrective actions and ensure that desired improvement is demonstrated.

Beginning in FY 2008, DOJ's annual appropriation act has included a general provision (Section 210) that states: "None of the funds made available under this title shall be obligated or expended for Sentinel, or for any other major new or enhanced information technology program having total estimated development costs in excess of $100,000,000, unless the Deputy Attorney General and the investment review board certify to the Committees on Appropriations that the information technology program has appropriate program management and contractor oversight mechanisms in place, and that the program is compatible with the enterprise architecture of the Department of Justice. "

To meet this requirement, the DIRB Program Certification process was implemented in FY 2009. The certification process requires the component head managing the program to conduct an in-depth review of the program in nine key areas, and report the results of the review to the DOJ CIO. The DOJ CIO, in turn, has his staff examine the program to validate the results of the component review and provide an independent recommendation to the DIRB regarding certification that appropriate program management and contractor oversight is in place, and that the program is compatible with the enterprise architecture. The results of the most recent certifications for the three programs specifically referenced in this question were as follows:

FBI Next Generation Identification (NGI)

On February 8, 2011, the DIRB met and determined that the NGI program has appropriate program management and contractor oversight mechanisms in place, and that the program is compatible with the enterprise architecture of DOJ. No qualifications were identified.

FBI Sentinel

On October 13, 2010, the DIRB met and determined that the Sentinel program has appropriate program management and contractor oversight mechanisms in place, and that the program is compatible with the enterprise architecture of DOJ. Four qualifications requiring

corrective actions were identified, and all four actions have been completed by the program.

DOJ Law Enforcement Wireless Communications / Integrated Wireless Network (LEWC/IWN)

On October 14, 2010, the DIRB met and determined that the Integrated Wireless Network program has appropriate program management and contractor oversight mechanisms in place, and that the program is compatible with the enterprise architecture of DOJ. Two qualifications requiring corrective actions were identified and are being monitored for completion by the DIRB through regularly scheduled reviews.

2. DOJ CIO Project Dashboard.

The DOJ CIO maintains a Project Dashboard to monitor the status of all DOJ's major IT investments, as well as selected other high risk or high interest development projects underway across DOJ. These projects include FBI Sentinel, FBI NGI, and DOJ IWN programs. Project Managers are required to provide monthly reports of Earned Value statistics, major milestones completed and pending, significant risks and mitigation plans, and major issues or challenges affecting project progress. These project reports are reviewed in-depth each month to ensure problems encountered are being appropriately managed, and that corrective actions are being implemented to address project schedule or cost deviations.

3. OMB Federal IT Dashboard.

In addition to the monthly reports to the DOJ CIO Project Dashboard, all of the major IT investment programs -- which include FBI Sentinel, FBI NGI, and DOJ IWN programs -- provide detailed project progress reports to the OMB Federal IT Dashboard. Based on the information reported, the DOJ CIO provides a CIO Rating that indicates the overall project health based on information reported to DOJ's and OMB's dashboards. When appropriate, projects may be required to provide additional information to explain project deviations, and describe corrective actions being taken to bring projects back within satisfactory cost or schedule ranges.

4. Monthly Program Reviews.

With regard to the Sentinel program, DOJ has instituted a monthly Department-level Program Review to more closely monitor program progress and issue management. That review is conducted by the Assistant Attorney General for Administration and includes the DOJ CIO, CFO and selected key staff, as well as the FBI CIO and CFO and representatives from the Office of Management and Budget.

5. DOJ TechStat Review.

As part of the 25-Point Implementation Plan to Reform Federal IT Management, OMB directed agencies to implement a review process modeled on the OMB TechStat process. The Department is implementing the DOJ TechStat Review as an in-depth technical review of

project issues and corrective actions for projects that are experiencing significant deviation from plan. These reviews are envisioned to be routinely conducted whenever a project reports deviations of more than 10% from the planned project schedule or cost. The first DOJ TechStat review of the Sentinel program was held on March 29, 2011. The purpose of the review was to ascertain the FBI's progress on the Sentinel Program based on the OMB/DOJ approved Improvement Plan. The results of the meeting are that the program is delivering results in line with expectations and remains on schedule and budget.

6. **What efforts have DOJ and its components made to coordinate with federal, state and local partners to address the domestic terrorism threats? Have the responsibilities of each type of law enforcement stakeholder been clearly defined? If not, what steps should be taken to better define roles?**

ANSWER

While the FBI is the lead agency with sole jurisdiction to address domestic terrorism threats, these matters are almost always worked in a collaborative environment with the cooperation and assistance of other federal, state and local partners. Formal Joint Terrorism Task Forces (JTTFs) are established in the locality of every FBI Field Office nationwide. The JTTFs are the existing interagency mechanism for determining whether threats have a nexus to terrorism in the United States and interacting and collaborating with state, local, and federal agencies. In addition, in various outlying territories, informal working groups and task forces augment the respective Field Division's efforts to provide comprehensive domain coverage. Memoranda of Understanding (MOUs) are in place between various partners which might otherwise have concurrent jurisdiction when the subject matter lines are blurred or co-mingled. These MOUs dictate how the FBI interacts with agencies such as DEA, ATF and the Internal Revenue Service, as well as with state and local entities. The responsibilities of individual stakeholders are already defined; in most circumstances, prosecution in domestic terrorism investigations is sought for established criminal violations (i.e., tax evasion, weapons violations, narcotics trafficking, assault, explosives violations, etc.) and the collective efforts of federal, state, and local law enforcement are coordinated through the JTTF.

7. **What steps has the Department taken, or does it plan to take, to address overlapping jurisdiction across DOJ and DHS law enforcement agencies, including jurisdiction related to child exploitation, gangs, fugitives, drugs, and explosives?**

ANSWER

Over the past few years, components of DOJ and the Department of Homeland Security (DHS) have worked together to address jurisdictional overlap issues, enhance working relationships, and improve intelligence and information sharing. Examples of these activities include the 2009 Memoranda of Understanding signed between DEA and DHS' Immigration

and Customs Enforcement (ICE), pertaining to drug investigations, and ATF and ICE, pertaining to firearms investigations. These MOUs have increased the level of Title 21 cross-designation between DEA and ICE, clarified investigative processes, and developed enhanced intelligence sharing relationships. Additionally, ICE is now a member of the Attorney General's Anti-Gang Coordination Committee (AGCC), which approves all new violent crime and gang task forces. ICE Special Agents in Charge have the opportunity to provide input on new proposed task forces. Furthermore, DHS components have increased their participation at the Department's major intelligence centers, including the El Paso Intelligence Center and the OCDETF Fusion Center. With respect to child exploitation, DOJ leads the National Strategy Working Group, which is made up of more than 50 representatives from across the federal, state, and local law enforcement spectrum. Several members of DHS are members of the Group, and DHS Co-Chairs the Law Enforcement Collaboration Subcommittee. This Working Group, and each Subcommittee, work to address issues common to all involved in the fight against child exploitation, and focus on increasing collaboration and cooperation across all groups engaged in addressing child sexual exploitation. The Department and DHS will continue to work together to address areas of jurisdictional overlap with the aim of combating a broad range of criminal activities.

Commerce, Justice and Science Subcommittee Hearing
U.S. Department of Justice
Questions for the Record
Robert B. Aderholt (AL)

Eric Holder
Attorney General

Meth Clean-up Funding: One of the most significant dangers to the communities I represent is the scourge of methamphetamine. Not only is its abuse a source of destruction and heartbreak, but its manufacturing process leaves serious environmental hazards for communities all across America. Meth is not like other drugs. Its lack of any natural process and its ability to chemically alter a person's brain make it extremely deadly.

In the past several years, Congress and numerous States have enacted legislation to limit access to the precursor ingredients needed in the manufacture of methamphetamine. As a result of these efforts, we initially saw a decrease in the number of the so called "Mom and Pop" labs that were larger and usually required several stages to conclude the manufacture process. However, recently a new method called "One Pot Cooks" or "Shake and Bake" labs have surfaced and as you point out in your budget justification, there has been an 89% increase in the number of US clandestine labs from 2007-2009. This method requires only one container such as a large plastic bottle where all ingredients are added at one time. These ingredients include: ephedrine, lithium, acetone, and ether as well as a nitrate such as fertilizer. At the same time that we have tried to limit access to ephedrine, we also enacted strict laws on the cleanup of methamphetamine labs. The average cleanup cost is between $7,000 - 10,000 per lab.

As your Budget Justification points out, the DEA, through its Hazardous Waste Program, has assisted local law enforcement with the costs of lab cleanup for many years. However, while you plan for similar funding in FY11, it seems clear both from the wording in your justification and from your communications with law enforcement in my state that you have no intentions of continuing this effort in FY12.

1. **Did DEA and the Justice Department fail to realize the potential threat and costs of these new methods of manufacturing when it chose to eliminate hazardous waste cleanup from its budget for FY12?**

ANSWER

The Department realizes that this is a costly burden for the states to assume and we are well aware of the trends you mention; the FY 2012 budget request does not reflect a failure to recognize these threats.

DEA will continue to clean up the labs it investigates with funding from the Asset Forfeiture Fund. In addition, state and local agencies have a few options for dealing with these labs. One

option is for them to use Byrne Justice Assistance Grant funding from the Bureau of Justice Assistance for lab cleanups. Also, several states (Alabama, Kentucky, Illinois, Indiana, and Oklahoma) already have Container Programs set up that allow state and local law enforcement officers to expedite the removal of seized chemicals from clandestine laboratory sites to temporary secure containers pending removal by a contractor. These programs lower the cost of clean-ups. DEA is willing to provide technical assistance to any other states that want to implement the Container Program.

As you know, DEA coordinated the cleanups for state and local agencies, but all the funding was provided though the COPS appropriation. The entire federal government is being asked to tighten its belt and make tough decisions on programs that can be consolidated, reduced, or eliminated. The elimination of the funding for the COPS Methamphetamine Enforcement and Cleanup program represents just one of the difficult decisions the Department had to make in the formulation of the 2012 budget.

2. **I understand there is some reluctance at the federal level to use forfeited or condemned dollars for the long standing Clandestine Drug Laboratory Cleanup programs local assistance effort. It would seem that funds seized during drug busts would be well suited for the clean-up costs of drug labs. Why are we not more readily using seized funds for this effort?**

ANSWER

The Asset Forfeiture Fund (AFF) is available to help defray the costs of removal and disposal actions that meet the statutory requirements for use of AFF monies (See 28 U.S.C. 524(c)). The AFF statute contains express authority to use monies in the fund to pay for costs associated with the seizure, maintenance, and disposal of property (1) seized for forfeiture, (2) under federal law, (3) by a federal agency participating in the AFF. Under this authority, AFF monies may be made available to federal law enforcement agencies participating in the AFF, including the Drug Enforcement Administration, for the removal and disposal of property seized for federal forfeiture at clandestine laboratory sites. The AFF has no authority to pay for the clean-up of a clandestine laboratory site if it is not federally forfeited. However, state and local law enforcement agencies are able to use their Byrne Justice Assistance Grant (JAG) funding for clandestine lab cleanup.

Prison Rape Elimination Act: You mentioned in your testimony that in early February the Department issued a proposed rule for the implementation of the Prison Rape Elimination Act.

1. **What is the timeline your Department is looking at for full implementation of this law? It's been eight years since the law was passed. It's time to get this done.**

ANSWER

On January 24, 2011, the Department issued a Notice of Proposed Rulemaking pursuant to the Prison Rape Elimination Act (PREA). The proposed rule reflects a significant investment of time and effort by the Department in order to craft a set of standards that are attainable, affordable, and effective. The proposed rule builds on the work by the National Prison Rape Elimination Commission, which was created by PREA and which required five years to produce its final report.

The proposed rule was published in the Federal Register on February 3, 2011, triggering a 60-day public comment period that ended on April 4, 2011. During this period, the Department received over 1200 comments, on a wide range of aspects of the proposed rule. The Department expects to publish a final rule by the end of the year, after reviewing all comments fully and revising the proposed rule as warranted.

The Department is also working to ensure that the final rule, once adopted, is effective. To assist states and localities in, complying with the final rule, we are funding a Resource Center for the Elimination of Prison Rape, established with a $13 million award in FY 2010, which will provide additional training and technical assistance to states and localities. In addition, the Office of Violence Against Women is developing a corollary to the 2004 National Protocol for Sexual Assault Medical Forensic Examinations taht customized to the conditions of confinement. Furthermore, the Department intends to issue a proposed rule in a separate rulemaking that would allow states to use Victims of Crime Act funds to assist programs that provide services to incarcerated victims.

2. **Does your budget request for FY12 include sufficient funding to fully implement PREA standards?**

ANSWER

The FY 2012 request for this program, in combination with funds already appropriated is sufficient to complete the planned Bureau of Justice Statistics surveys, including the National Inmate Survey, National Survey of Youth in Custody, and Surveys of Sexual Violence, and provide implementation assistance to state and local jurisdictions as mentioned in the response to the preceding question.

3. **Also, are all detention facilities under the jurisdiction of the Department of Justice, including private prisons such as CCA, covered by the PREA rules?**

ANSWER

The Department's proposed rule would apply to adult prisons and jails; community confinement facilities; juvenile facilities; and lockups. PREA mandates that the final standards be immediately binding on the Federal Bureau of Prisons and the proposed rule also would require the U.S. Marshals Service to implement the standards. The proposed rule would require any covered agency that contracts for the confinement of inmates with private

agencies or other entities, including other government agencies, to include in any new contracts or contract renewals the entity's obligation to adopt and comply with the PREA standards.

New Programs: The Department of Justice has requested funding for new programs to assist state, local and tribal law enforcement. You mention in your testimony that there will be a Race-to-the-Top style Juvenile Justice System Incentive Grant Program and the Byrne Criminal Justice Innovation Program.

1. **I understand that the Race-to-the-Top at the Department of Education was designed to launch innovative and competitive programs at the State level. However, it has been the target of a great deal of criticism from States that claim that the system is biased and will help a very small number of communities in our country. While obviously education and justice systems are very different, why do you think that this is a good model to use for the Juvenile Justice system? What criteria will the Department look to use for this program?**

ANSWER

Since release of the FY 2012 budget, the Administration has heard a great deal from the States, from the juvenile justice community, and from Congressional offices about the proposal for juvenile justice spending in the President's budget.

Concerns have been expressed, for example, about the potential impact on states' compliance with mandates under the Juvenile Justice & Delinquency Prevention Act (JJDPA) and on other protections for system-involved young people.

Drawing on this feedback, the Administration has developed an alternative to its original "Race to the Top"-style incentive grants program and is now proposing that the $120 million in the budget could be allocated as follows:

$110 million as formula funding, and $10 million in a demonstration program to encourage innovation and juvenile justice system improvements. The $110 million in formula funding would include

$80 million under Title II Part B of the JJDPA – Formula Grants Program and

$30 million under the Juvenile Accountability Incentive Block Grant (JABG) program.

This revamped approach would preserve – and add funding to – the important Part B Formula Grants program; continue JABG; and create a new discretionary funding program to encourage innovation and evidence-based reforms in the juvenile justice system which would showcase approaches other states may then consider embracing.

2. Also, what can you tell the Committee about the purpose of the Byrne Criminal Justice Innovation Program? Will this replace or supplement existing DOJ programs?

ANSWER

Many persistent crime and public safety problems (such as gang activity) cannot be addressed on a sustained basis by law enforcement alone. These problems require longer-term, comprehensive approaches where law enforcement, schools, social services agencies, and community organizations collaborate to address both public safety problems and their underlying causes. In addition, recent research indicates that crime reduction efforts that are tailored to address particular problems in a defined area often achieve much better results than more generalized efforts. Building on such research, the Byrne Criminal Justice Innovation Program (BCJI) will encourage communities to develop and implement comprehensive public safety initiatives in defined neighborhood areas. In addition, the program will utilize evidence-based strategies in order to expand knowledge of "what works" (and what doesn't) in this important area.

This new program will build upon the successes of the Weed and Seed Program and will support the Administration's Neighborhood Revitalization Initiative[1] by providing demonstration grants in selected communities to support innovative, place-based, and evidence-based approaches to fighting crime and improving public safety. BCJI will include a significant emphasis on interagency collaboration and enable OJP to work with new and existing partners to further stabilize communities in need. BCJI will also be coordinated with the Departments of Education and Housing and Urban Development, among other agencies, in support of the Administration's continued support for cost-effective, place-based policy solutions.

The Department anticipates that replacing Weed and Seed with BCJI will allow for numerous program improvements and efficiencies by:

· Promoting and improving collaboration with other federal agencies;

· Increasing flexibility of program and funding requirements to support federal and local collaborations;

· Encouraging a renewed emphasis on evidence-based and/or data supported approaches;

· Promoting long-term sustainability of program outcomes through strategic planning, training and technical assistance; and

· Using multi-disciplinary, community-based partnerships to improve public safety support at the federal, state, local and tribal levels.

[1] The Neighborhood Revitalization Initiative, a White House-led interagency collaborative

comprised of representatives from the Departments of Justice, Housing and Urban Development, Education, Health and Human Services, and Treasury, is developing and executing place-based interagency strategies to support local communities in developing and obtaining the tools they need to revitalize neighborhoods of concentrated poverty.

DOMA:

1. **DOMA was signed into law 15 years ago by President Clinton. It was defended under the Bush Administration for 8 years. The current Administration, under your watch, has defended it for two years. What has changed, legally, that has suddenly altered your position on the law's Constitutionality? Doesn't this create a dangerous precedent for future Administrations to pick and choose what laws they believe are constitutional?**

ANSWER

The Department of Justice (DOJ) has long-standing practice of defending duly-enacted federal statutes. Consistent with this practice, DOJ vigorously defended Section 3 of the Defense of Marriage Act (DOMA) for the past two years, in jurisdictions where the applicable standard of review was rational basis and reasonable arguments could be made in the statute's defense. More recently, however, new lawsuits were filed challenging the constitutionality of Section 3 of DOMA in jurisdictions without binding precedent on the appropriate standard of review for classifications based on sexual orientation. These new lawsuits required the Department, for the first time, to take an affirmative stance on whether such laws are properly subject to the more permissive standard of review under which DOJ had previously defended Section 3, or to a more rigorous standard of review. After careful consideration, the President and I determined that classifications based on sexual orientation warrant heightened scrutiny, and that, under that standard of review, the Department's previous defense of Section 3 was no longer tenable.

With respect to your second question, DOJ takes very seriously its traditional practice of defending the constitutionality of federal statutes. DOJ will continue to adhere to that practice and to the principles that govern it. The Department fully expects that future administrations will do the same, and that the circumstances in which DOJ declines to defend statutes will continue to be rare.

QFRs
Representative Jo Bonner, AL-01
Appropriations Subcommittee on Commerce, Justice, Science and Related Agencies
Attorney General Eric Holder
March 1, 2010

1. **The Department of Justice is no doubt constantly concerned with and reminded about the threats posed to our nation by those who would seek to compromise public safety and security through the use of improvised explosive devices or other such weapons in a host of public venues. It is widely recognized that one of our strongest means of defense against such threats involves the deployment of law enforcement teams using trained, canine detection assets. Can you comment on what the Department of Justice is doing to insure development and deployment of such assets?**

ANSWER

The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) continues to be DOJ's lead canine component, training canines for all DOJ agencies. In addition, ATF continues to train explosives detection canines for other federal and international officers to provide them with a unique and valuable mobile detection tool. ATF-trained and certified explosives detection canine teams are routinely deployed on criminal investigations and national special events to ensure public safety. Since 2004, ATF explosives detection canine teams have been deployed on more than 23,000 missions, both domestically and internationally, to include major sporting events, political conventions, and other high profile events. Canines are paired with highly trained investigators, and together the teams can detect firearms, ammunition, and explosives. Domestically, ATF has over 30 full-time explosives detection canine teams, consisting of an ATF special agent and canine. ATF has assumed the financial responsibility for acquiring, training, and certifying the explosives and accelerant detection canines for a number of other federal, state, and local agencies. In addition to its own full-time teams, ATF has trained 126 active explosives detection canine teams and 65 active accelerant detection canine teams in the United States, as well as one accelerant team in Canada. These teams are under the immediate supervision of other federal, state, and local law enforcement agencies. There are also approximately 414 ATF-trained international officers with explosives detection canines overseas, trained through ATF's partnership with the Department of State's Office of Diplomatic Security, Antiterrorism Assistance Program. These canines are utilized to protect U.S. citizens and interests abroad. Another method by which DOJ is addressing the explosives threat to public safety is the Suicide Bomber Initiative (SBI). The SBI was developed by ATF in partnership with the National Tactical Officer's Association and is a comprehensive concept utilizing specialized canine training, tactical response, and unique technological components in an effort to detect and intercept body-borne and carried improvised explosives devices. The Department of Defense's Joint Improvised Explosive Device Defeat Organization (JIEDDO) provides funding for this initiative.

JEIDDO also provides reimbursable funding for Homemade Explosives Imprinting. ATF's Mobile Canine Training Team provides this training for the Military Working Dog Pre-

deployment Training Course at the Yuma Proving Ground in Arizona and in Las Vegas, Nevada. The purpose of this ATF training is to imprint/expose military canines to the homemade explosives to which they have a high probability of contacting should they be deployed.

2. **There is a federal mandate to purchase Project-25 (P25) compliant radio equipment to achieve government-wide interoperability goals. What is the Department of Justice doing to stop the three-year history of its components continuing to specify proprietary requirements when there is a federal mandate to purchase P25 compliant equipment and systems?**

ANSWER

The federal mandate does not specifically require the purchase of P25 compliant equipment; rather it requires federal agencies to move to narrowbanding. Equipment that is P25 compliant meets the narrowbanding requirement. The Department of Justice (DOJ) has made the decision to purchase P25 compliant equipment for its Land Mobile Radio (LMR) systems and, since 2006, DOJ and its components have purchased only LMR systems equipment that are P25 compliant.

Due to the mission-critical operational requirement that DOJ law enforcement components be able to communicate with their state and local counterparts -, which largely operate on wideband systems rather than P25 compliant equipment --, must purchase subscriber units that are dual band and backward compatible with state and local systems. These systems are generally Motorola systems, using proprietary protocols that Motorola has not licensed to other vendors. Moreover, Motorola is the sole manufacturer of dual band radios that are backward compliant with its legacy proprietary protocols. Consequently, until state and local entities upgrade to narrowband P25 compliant infrastructure, DOJ mission-critical demands require the purchase of subscriber units from Motorola.

3. **Which specific department/agency/group at the Department of Justice is tasked with procurement for the Integrated Wireless Network? Who has oversight responsibility of the program? Which individual at the Department is tasked with ensuring full and open competition of IWN procurement?**

ANSWER

The Justice Management Division (JMD), Wireless Management Office (WMO) is responsible for the Integrated Wireless Network (IWN) program. The JMD Procurement Services Staff handles most of the procurement actions in support of the IWN program and the WMO. In some instances, for example, when a law enforcement component has a specific need for products or services, the WMO tasks the law enforcement component directly to take the procurement action, although in such cases the funding is still managed through the

WMO.

Oversight responsibility for the IWN program is provided by the Wireless Communications Board (WCB). The WCB was created in early 1998 by the Assistant Attorney General for Administration in response to Office of Management and Budget (OMB) and congressional concerns about DOJ components' separate FY 1999 budget requests to narrowband their Land Mobile Radio systems per the 1995 National Telecommunications and Information Administration (NTIA) mandate. The WCB is comprised of representatives from all of the DOJ law enforcement components, as well as JMD's Office of the Chief Information Officer (OCIO). The WMO reports to the OCIO. The WMO is responsible for ensuring the Department's compliance with the intent of both Congress and OMB and with the NTIA mandate to narrowband existing federal Land Mobile Radio systems. The WMO also coordinates and directs the expenditure of funds for Land Mobile Radio through central management of the Law Enforcement Wireless Communications appropriation.

Each contracting officer is responsible for ensuring full and open competition. Any procurement using other than full and open competition must be approved in accordance with the Federal Acquisition Regulation (FAR). As explained in responses to Questions 2, 4 and 5, mission requirements and technical constraints have made it necessary to use other than full and open competition for the purchase of subscriber units and infrastructure equipment for DOJ's legacy systems.

4. **Over the past several years, the Department of Justice and its component agencies have issued contract solicitations for the Integrated Wireless Network program with requirements that clearly favor one vendor's proprietary technology over others'. These requirements essentially assure that only one vendor can compete for IWN subscriber radios. What justification can the Department provide for the issuance of RFPs that only allow responses from a single vendor?**

ANSWER

DOJ's contract for systems integration in support of the IWN implementation was awarded to General Dynamics using full and open competitive procedures. Contracts to maintain legacy systems, narrowband legacy systems, and purchase radios have been awarded using other than full and open competitive procedures where justified in accordance with the FAR. In those cases where Motorola equipment is needed for mission-critical reasons as explained in response to Question 1, DOJ has based its requirements on information gathered during market research and publicized its intentions. In other words, DOJ has been open and up-front regarding its needs, publicizing them as required by the FAR, and no vendor has protested DOJ's actions.

The DOJ's mission demands leave it no choice but to purchase Motorola radios unless:

(1) state and local entities upgrade to narrowband, P25 compliant systems;

(2) DOJ has funding sufficient to complete a replacement of its legacy systems;

(3) other suppliers of multi-band radios license the proprietary functionality from Motorola; or

(4) the P25 standard is complete across all required aspects of the LMR infrastructure.

DOJ's intention has been and will continue to use full and open competition based on P25 standards. However, until such time as any of the above-identified circumstances become reality, DOJ must continue to rely on equipment compatible with legacy systems, which is currently manufactured only by Motorola.

5. **Recently, several DOJ components have awarded IWN contracts under unrelated, existing contract vehicles directly to one vendor, otherwise known as sole-sourced contracts. Please provide the Department's justification for the award of sole-source contracts to a single vendor without providing for a full and open competition.**

ANSWER

As stated in the previous questions regarding P25 and IWN implementation, all contracts were awarded due to specific requirements that constituted a mission-critical operational obligation or were awarded following an open and competitive process. Without the conditions listed in the RFP response being met, the Department will have to continue the current contracts and procedures.

WEDNESDAY, APRIL 6, 2011.

FEDERAL BUREAU OF INVESTIGATION

WITNESS

ROBERT S. MUELLER, III, DIRECTOR, FEDERAL BUREAU OF INVESTIGATION

Mr. WOLF. Good morning. The hearing will come to order.

Director Mueller, you are here this morning to testify regarding the fiscal year 2012 budget request for the Federal Bureau of Investigation.

As you are coming before the committee perhaps for the last time as director, I would like to take this opportunity to personally express our deep appreciation for your outstanding service over the last ten years.

You took over as director immediately before 9/11 and since that time, I think you have done a magnificent job of guiding the FBI into the new and expanded role at the forefront of protecting the Nation from further terrorist attacks. There is no doubt in my mind that you will be remembered as one of the finest directors in the history of the FBI.

As we understand, your ten-year term will expire in early September of this year. I personally wish you could stay on. But, again, we acknowledge and congratulate you on your outstanding record. We thank you.

I want to thank you and your family, because of the time away from your family for your service. I wish you the best as you move on to new challenges. The Nation owes you and owes all the men and all the women of the FBI a debt of gratitude for their tireless efforts over these very difficult ten years.

For 2012, you are seeking an appropriation of $8.1 billion, an increase of $177 million or 2.2 percent.

I look forward to your testimony on the new increases you are seeking as well as on the FBI's continuing transformation activities to fulfill its role as the key domestic counterterrorism and intelligence agency.

This year, you have been operating under a series of Continuing Resolutions. The FBI along with the rest of the department is under a funding freeze and a hiring freeze.

I would like to hear how you are managing under these circumstances and what effects they are having on your operation.

Your request for fiscal year 2012 includes a number of important increases in the areas of national security, computer intrusion, surveillance, and weapons of mass destruction. The committee will be interested in hearing about the details of these increases and obviously we will have a number of questions.

We should all be clear, though, on the overall fiscal climate in which we are operating. The debate we are having in the House on the spending reflect a realization that our country must reduce spending and significantly scale back our deficits and debt in order to get our economy back on the right track.

The FBI's mission is certainly among, I believe, the most important activities that this subcommittee funds, but we will need your assistance in finding ways to economize as we mark up for next year's budget.

Before you proceed, I want to recognize my friend, my colleague, Mr. Fattah, for any opening statement.

Mr. FATTAH. Thank you.

Let me join in the chairman's remarks that you have had an extraordinary tenure as director of the FBI, I think unparalleled to any other director's service. And part of that is because of the time in which you served.

Post 9/11, our country has faced very significant challenges and the FBI has undergone extraordinary change from an agency focused on apprehending criminals domestically to now a very significant role in national security and protecting the country against terrorist threats.

And we have had a remarkable period in which even though these threats have been real, the FBI really has been at the forefront of protecting Americans and in dealing with this very new responsibility, at least in terms of the scope and breadth of it and the threats that face the country.

So I want to thank you for your service. We know that there is a point in time at which you will be moving to your next act. But in terms of our country, we want to thank you for your service and welcome you. I look forward to your testimony.

Mr. WOLF. Thank you, Mr. Fattah.

Your full statement will appear in the record. Proceed as you see appropriate.

DIRECTOR'S OPENING STATEMENT

Mr. MUELLER. Thank you, Mr. Chairman.

Chairman Wolf and Ranking Member Fattah, thank you for having me here today, but thank you also for your generous remarks and comments. I appreciate them as does the Bureau.

Today the FBI faces unprecedented and increasingly complex challenges. We must identify and stop terrorists before they launch attacks against our citizens and we must protect our government, businesses, and critical infrastructure from espionage and from the potentially devastating impact of cyber-based attacks.

We must root out public corruption, fight white collar and organized crime, stop child predators, and protect civil rights. We must also ensure we are building a structure that will carry the FBI into the future by continuing to enhance our intelligence capabilities, improve our business practices and training, and develop the next generation of Bureau leaders.

And we must do all of this while respecting the authority given to us under the Constitution, upholding civil liberties and the rule of law. And we must also do this in uncertain fiscal times.

The challenges of carrying out this mission have never been greater, as the FBI has never faced a more complex threat environment than it does today. Over the past year, the FBI has faced an extraordinary range of threats from terrorism, espionage, cyber attacks, and traditional crime. And let me just for a few moments discuss several examples.

Last October, there were attempted bombings on air cargo flights bound for the United States from Yemen and directed by al-Qaeda in the Arabian Peninsula.

Last May, there was the attempted car bombing in Times Square aided by TTP in Pakistan and these attempted attacks demonstrate how al-Qaeda and its affiliates still have the intent to strike inside the United States.

In addition, there were a number of serious terror plots by lone offenders. Their targets ranged from a Martin Luther King Day march in Spokane, Washington, to a Christmas tree lighting ceremony in Portland, Oregon, to subway stations in the Washington, D.C. Metro system. The motives and the methods for these plots were varied, making these among the most difficult threats to combat.

The espionage threat persisted as well. Last summer, there were the arrests of ten Russian spies known as illegals who secretly blended into American society in order to clandestinely gather information for Russia. And we continue to make significant arrests for economic espionage as foreign interests seek to steal controlled technologies.

The cyber intrusion at Google last year highlighted the potential danger from a sophisticated internet attack and along with countless other cyber incidents, these attacks threaten to undermine the integrity of the internet and to victimize the businesses and persons who rely on it.

Lastly, in our criminal investigations, we continue to uncover billion dollar corporate and mortgage frauds that weaken the financial system and victimize investors, homeowners, and ultimately taxpayers.

We also exposed healthcare scams involving false billings and fake treatments that endangered patients and fleeced government healthcare programs.

I should mention the extreme violence across our southwest border, which continues to impact the United States as we saw with the murders last March of American consulate workers in Juarez, Mexico, and the shooting last month of two Immigration and Customs Enforcement agents in Mexico.

Throughout the year, there were numerous corruption cases that undermined the public trust and countless violent gang cases that continue to take innocent lives and endanger our communities.

And as these examples demonstrate, the FBI's mission to protect the American people has never been broader and the demands on the FBI have never been greater. To carry out these responsibilities, we need Congress' continued support more than ever.

The support from this committee and the Congress has been an important part of the ongoing transformation of the FBI. A key element of this transformation has been the ability to recruit, hire, train and develop the best and the brightest agents, analysts, and

staff to meet the complex threats we face now and in the future and the ability to put in place the information technology and infrastructure needed to perform every-day work.

I am concerned that our momentum built over the past several years with your support is going to be adversely affected due to the constrained fiscal environment.

The FBI strives to be a good steward of the funds Congress provides and we continually look for cost-saving initiatives and better business practices to make us more efficient.

However, addressing the major threats and crime problems facing our Nation requires investments that cannot be offset by savings alone. If funded for the remainder of fiscal year 2011 at prior year levels, the FBI will have to absorb over $200 million in operating requirements and will have over 1,100 vacant positions by the end of the year.

The fiscal year 2012 budget that we are discussing today would actually provide a lower level of resources than the fiscal year 2011 request submitted last year and will leave unaddressed gaps in our investigative and intelligence capabilities and capacities in all programs.

I do note that the proposed Continuing Resolution that is currently being discussed would fully fund the Department of Defense while all other agencies would be extended for a period of time.

I ask that you consider fully funding the FBI in the CR. I have raised this with numerous persons up on The Hill. I can only say that under the proposed CR, the FBI would be the only major partner in the Intelligence Community that is not fully funded. And while our Intelligence Community partners would be able to proceed with planned initiatives and programs, the Bureau could not.

Approximately 58 percent of the Bureau's budget is scored under the defense-related budget function. Today FBI special agents, intelligence analysts, and professional staff stand side by side with the military in Afghanistan and elsewhere, working together to keep our country and our citizens safe from attack.

Full funding of the FBI—for which both the House and the Senate were in agreement on their respective marks—would enable these critical dependencies and collaboration to continue without interruption.

Lastly, we simply cannot afford to return to the pre-9/11 days where hiring and staffing in the FBI was a roller coaster that left most field offices under-staffed to deal with the terrorist and other threats we faced nor can we afford to return to the pre-9/11 days where funding uncertainty led to a degradation of the FBI's physical and information technology infrastructure, which contributed to shortcomings in our capabilities.

I again thank you for the opportunity to discuss these issues with you today, particularly discussing the FBI's fiscal year 2012 budget request.

Let me finish by thanking this committee, Mr. Chairman and Congressman Fattah, for your continued support on behalf of the FBI but most particularly on behalf of the men and women who make up the FBI. We appreciate the support you have given over the years and look forward to that continuing support.

Thank you.

[The information follows:]

STATEMENT OF ROBERT S. MUELLER, III
DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION
BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON APPROPRIATIONS
SUBCOMMITTEE ON COMMERCE, JUSTICE, SCIENCE AND RELATED AGENCIES

April 6, 2011

Good morning Chairman Wolf, Ranking Member Fattah, and members of the Subcommittee.

On behalf of the over 30,000 men and women of the FBI, I would like to thank you for the years of support you have provided to the Bureau. This Subcommittee has been instrumental in ensuring the FBI has received the critical resources it needs to: defend the United States against terrorism and foreign intelligence threats; uphold and enforce the criminal laws of the United States; protect civil rights and civil liberties; and provide leadership and criminal justice services to federal, state, municipal, and international agencies and partners.

Since 9/11, the FBI has shifted to be an intelligence-led, threat-focused organization, guided by clear operational strategies. The FBI is focused on predicting and preventing the threats we face, while engaging the communities we serve. This shift has led to a greater reliance on technology, collaboration with new partners, and human capital, requiring additional resources. The FBI is a full member of the U.S. intelligence community and serves as a critical and singular link between the intelligence and law enforcement communities in the United States. The FBI, as an organization, is in a unique and critical position to address national security and criminal threats that are increasingly intertwined. Our adversaries are evolving and using globalization to enhance their reach and effectiveness, creating new challenges in our efforts to counter their impact.

Today, the diversity and complexity of the threats facing the homeland has never been greater:

- In the past year, the United States has been the target of terrorist plots from three main sources: al Qaeda, al Qaeda's affiliates, and homegrown extremists. Homegrown extremists are a growing concern and priority of the FBI, as evidenced by the number of recent disruptions and arrests.

- The asymmetric intelligence threat presented by certain foreign governments endures as the damage from compromised sensitive information and financial losses from economic espionage and criminal activity remain significant.

- Technological advancements and the Internet's expansion will continue to empower malicious cyber actors to harm U.S. national security through criminal and intelligence activities. We must maintain our ability to keep pace with this rapidly developing technology.

- The FBI's efforts prosecuting financial crimes—including billion-dollar corporate and mortgage frauds, massive Ponzi schemes, and sophisticated insider trading activities—remain essential to protect investors and the financial system, as well as homeowners and ultimately taxpayers. There also continue to be insidious health care scams that endanger patients and fleece government health care programs of billions. Despite strong enforcement, both public corruption and violent gang crimes continue to endanger our communities.

These examples underscore the complexity and breadth of the FBI's mission to protect the nation in a post-9/11 world.

The FBI's FY 2012 Budget request includes a total of $8.1 billion in direct budget authority, including 33,469 permanent positions (12,993 Special Agents, 2,989 Intelligence Analysts, and 17,487 Professional Staff). This funding, which consists of $8.0 billion in Salaries and Expenses and $81.0 million in Construction, is critical to continue our progress acquiring the intelligence and investigative capabilities required to counter current and emerging national security and criminal threats.

Consistent with the Bureau's transformation to a threat-informed and intelligence-driven agency, the FY 2012 Budget request was formulated based upon our understanding of the major national security and criminal threats that the FBI must work to prevent, disrupt, and deter. We then identified the gaps and areas which required additional resources. As a result of this integrated process, the FY 2012 budget proposes $131.5 million for new or expanded initiatives and 181 new positions, including 81 Special Agents, 3 Intelligence Analysts, and 97 Professional Staff. These additional resources will allow the FBI to improve its capacity to address threats in the priority areas of terrorism, computer intrusions, weapons of mass destruction, foreign counterintelligence, and violent crime.

Let me briefly summarize the key national security threats and crime problems that this funding enables the FBI to address.

National Security Threats

Terrorism: The FBI is fully engaged in the worldwide effort to counter terrorism. We have taken that fight to our adversaries' own sanctuaries in the far corners of the world – Iraq, Afghanistan, Pakistan, Europe, Asia, and Africa. We have also worked to uncover terror cells and supporters within the United States, as well as disrupting terrorists' financial, communications, and operational lifelines at home and abroad.

Al Qaeda remains our primary concern. Al Qaeda's intent to conduct high-profile attacks inside the United States is unwavering. While the overall structure of the group has diminished, its power to influence individuals and affiliates around the world has not. Today, we still confront the prospect of a large-scale attack by Al Qaeda, but the growing threat from Al Qaeda affiliates, as demonstrated in the attempted Christmas Day bombing and the failed Times Square bombing, is unprecedented. Al Qaeda and its affiliates may also attempt smaller attacks that require less planning and fewer operational steps – attacks that may be more difficult to detect and prevent.

Threats from homegrown terrorists are also of growing concern. These individuals are harder to detect, easily able to connect with other extremists, and – in some instances – highly capable operationally. There is no typical profile of a homegrown terrorist; their experiences and motivating factors vary widely.

The added problem of radicalization makes these threats more dangerous. No single factor explains why radicalization here at home may be more pronounced than in the past. American extremists appear to be attracted to wars in foreign countries, as we have seen a number of Americans travel overseas to train and fight with extremist groups. These individuals may be increasingly disenchanted with living in the United States, or angry about U.S. and Western foreign policy. The increase and availability of extremist propaganda in English can exacerbate the problem.

The Internet has also become a key platform for spreading extremist propaganda and has been used as a tool for terrorist recruiting, training, and planning, and has been used as a means of social networking for like-minded extremists. Ten years ago, in the absence of the Internet, extremists would have operated in relative isolation, unlike today.

In short, we have seen an increase in the sources of terrorism, an evolution in terrorist tactics and means of communication, and a wider array of terrorist targets here at home. All of this makes our mission that much more difficult and requires continued support.

The FY 2012 Budget request includes 63 positions (34 Special Agents) and $40.9 million to address these national security threats, including funding for surveillance resources to combat International Terrorism and foreign intelligence threats, as well as funding for the High-Value Detainee Interrogation Group (HIG), Terrorist Screening Center operations, and increased information analysis and sharing capabilities.

Intelligence: Since 9/11, the FBI has dramatically shifted our intelligence program and capabilities to address emerging threats. We stood up the National Security Branch, created a Directorate of Intelligence, integrated our intelligence program with other agencies in the Intelligence Community, hired hundreds of Intelligence Analysts and Linguists, and created Field Intelligence Groups in each of our 56 Field Offices. In short, the FBI improved and expanded our intelligence collection and analytical capabilities across the board.

Today, we are collecting intelligence to better understand all threats – those we know about and those that have not yet materialized. We recognize that we must continue to refine our intelligence capabilities to stay ahead of these changing threats. We must function as a threat-driven, intelligence-led organization. The FBI recently restructured its Field Intelligence Groups, where each group now has clearly defined requirements for intelligence collection, use, and production. With this new structure, each office can better identify, assess, and attack emerging threats.

We want to make sure that every agent in every field office approaches a given threat in the same manner, and can better turn information and intelligence into knowledge and action. The FY 2012 Budget request includes $2.5 million to help with this endeavor.

Cyber: A cyber attack could have a similar impact as a well-placed bomb. To date, terrorists have not used the Internet to launch a full-scale cyber attack, but they have executed numerous denial-of-service attacks and defaced numerous websites.

Al Qaeda's online presence has become almost as potent as its physical presence. Extremists are not limiting their use of the Internet to recruitment or radicalization; they are using it to incite terrorism. Of course, the Internet is not only used to plan and execute attacks; it is also a target itself. Osama bin Laden long ago identified cyberspace as a means to damage both our economy and our morale – and countless extremists have taken this to heart.

The FBI, with our partners in the Intelligence Community, believe the cyber terrorism threat is real and is rapidly expanding. Terrorists have shown a clear interest in pursuing hacking skills. And they will either train their own recruits or hire outsiders, with an eye toward coupling physical attacks with cyber attacks.

The FBI pursues cyber threats from start to finish. We have cyber squads in each of our 56 Field Offices around the country, with more than 1,000 specially trained agents, analysts, and digital forensic examiners. Together, they run complex undercover operations and examine digital evidence. They share information with our law enforcement and intelligence partners. And they teach their counterparts—both at home and abroad—how best to investigate cyber threats.

But the FBI cannot do it alone. The National Cyber Investigative Joint Task Force includes 18 law enforcement and intelligence agencies, working side by side to identify key players and schemes. This task force plays an important role in the Administration's Comprehensive National Cybersecurity Initiative. Its goal is to predict and prevent that which is on the horizon, and then attribute and pursue the enterprises behind these attacks. The task force operates through Threat Focus Cells—smaller groups of agents, officers, and analysts from different agencies, focused on particular threats.

Together, with law enforcement, the Intelligence Community, and our international and private sector partners, we are making progress, but there is

significantly more to do. The FY 2012 Budget request includes 42 positions (14 Special Agents) and $18.6 million to enhance the FBI's investigatory capabilities and protect critical technology network infrastructure from malicious cyber intrusions as well as improve analysis of digital evidence.

Technology and Tools: The FBI has greatly improved the way we collect, analyze, and share information using technology. Intelligence provides the information we need, but technology further enables us to find the patterns and connections in that intelligence. Through sophisticated, searchable databases, we are working to track down known and suspected terrorists through biographical and biometric information, travel histories and financial records. We then share that information with those who need it, when they need it.

For example, the FBI has developed the Data Integration and Visualization System (DIVS), with the goal to prioritize and integrate disparate datasets across the Bureau. The FBI currently has investigative data that is stored and accessed in multiple systems. As a consequence, our personnel are spending too much time hunting for data, leaving them less time to analyze and share that data to stay ahead of threats. Furthermore, this stove-piped architecture and inefficient process increases enterprise costs and impedes the speed, effectiveness, and responsiveness of intelligence and investigative analysis.

DIVS provides single sign-on, role-based access controls to analyze and link all FBI data that the user is lawfully allowed to see and will provide the means to efficiently feed FBI Secret data to the FBI Top Secret system. DIVS will not only significantly improve users' efficiency in searching multiple databases, it will ultimately help reduce or eliminate unnecessarily redundant data systems.

In addition to creating new technologies, like DIVS, one lesson we have learned in recent years is the need to ensure that as new technology is introduced into the marketplace, the FBI and its law enforcement partners maintain the technical capabilities to keep pace. In the ever-changing world of modern communications technologies, however, the FBI and other government agencies are facing a potentially widening gap between our legal authority to intercept electronic communications pursuant to court order and our practical ability to actually intercept those communications.

As the gap between authority and capability widens, the Federal government is increasingly unable to collect valuable evidence in cases ranging from child exploitation and pornography to organized crime and drug trafficking to terrorism and espionage – evidence that a court has authorized us to collect. We need to ensure that our capability to execute lawful court orders to intercept communications does not diminish as the volume and complexity of communications technologies expand.

The FBI's FY 2012 Budget request includes 23 positions (3 Special Agents) and $20.5 million to advance DIVS development and to strengthen the FBI's and our law enforcement partners' ability to successfully conduct lawfully-authorized electronic

surveillance, consistent with existing authorities, by establishing a Domestic Communications Assistance Center (DCAC).

Weapons of Mass Destruction: The FBI carries responsibility for responding to certain Weapons of Mass Destruction (WMD) threats in the United States, and the WMD Directorate carries out that critical charge. The Directorate was established to be a unique combination of law enforcement authorities, intelligence analysis capabilities, and technical subject matter expertise that exists nowhere else in the U.S. government. The creation of the Directorate enabled the FBI to focus its WMD preparedness, prevention, and response capabilities in a single, focused organization rather than through decentralized responsibilities across divisions.

The global WMD threat to the United States and its interests continues to be a serious concern. The WMD Commission has warned that without greater urgency and decisive action, it is more likely than not that a WMD will be used in a terrorist attack somewhere in the world by the end of 2013. Osama bin Laden has also said that obtaining a WMD is a "religious duty" and is reported to have sought to perpetrate a "Hiroshima" on U.S. soil.

Globalization makes it easier for terrorists, other groups, and lone actors to gain access to and transfer WMD materials, knowledge, and technology throughout the world. As noted in the WMD Commission's report, those intent on using WMDs have been active and as such "the margin of safety is shrinking, not growing."

The frequency of high-profile acts of terrorism has increased over the past decade. Indicators of this increasing threat include the 9/11 attacks, the 2001 Amerithrax letters, the possession of WMD-related materials by Aafia Siddiqui when she was captured in 2008, and multiple attempts by terrorists at home and abroad to use explosives improvised from basic chemical precursors. The challenge presented by these threats is compounded by the large volume of hoax threats that distract and divert law enforcement agencies from addressing real threats.

The FBI must be poised to handle any WMD event, hoax or real. Therefore, the FY 2012 Budget request includes 13 positions (including 6 Special Agent Bomb Technicians) and $40.0 million to acquire the necessary aircraft required to respond to a WMD incident and render a device safe.

Criminal Threats

The FBI faces many criminal threats, from white collar crime to Organized Crime to violent crime and gangs to the extreme violence along the Southwest Border. While all of these threats remain, I would like to take the opportunity to focus on two of these threats – investigations along the Southwest border and violent crime occurring in Indian Country (IC).

Southwest Border: The U.S. border with Mexico extends nearly 2,000 miles, from San Diego, California to Brownsville, Texas. At too many points along the way, drug cartels transport kilos of cocaine and marijuana, gangs kidnap and murder innocent civilians, traffickers smuggle human cargo, and corrupt public officials line their pockets by looking the other way. Any one of these offenses represents a challenge to law enforcement. Taken together, they constitute a threat not only to the safety of our border communities, but to the security of the entire country.

The severity of this problem is highlighted by the following statistics:

- $18 - $39 billion flow annually from the U.S. across the Southwest Border to enrich the Mexican drug cartels.
- 2,600 drug-related murders in Juarez, Mexico in 2009.
- 28,000 drug-related murders in all of Mexico since 2006.
- 93 percent of all South American cocaine moves through Mexico on its way to the United States.
- 701,000 kilograms of marijuana seized during the first five months of 2010 in Southwest Border states (Arizona, California, New Mexico, and Texas).
- 6,154 individual seizures of marijuana, cocaine, heroin, and methamphetamines during the first five months of 2010 in the Southwest Border states.

The FBI has 13 border corruption task forces, but to address security along the Southwest Border, we have developed an intelligence-led, cross-programmatic strategy to penetrate, disrupt and dismantle the most dangerous organizations and individuals. This strategy begins with the deployment of hybrid squads in hotspot locations. The primary goal of the hybrid squad model is to bring expertise from multiple criminal programs into these dynamic, multi-faceted threats and then target, disrupt, and dismantle these organizations. Hybrid squads consist of multi-disciplinary teams of Special Agents, Intelligence Analysts, Staff Operations Specialists, and other professionals. The agent composition on the squads provides different backgrounds and functional expertise, ranging from violent gangs, public corruption, and violent crimes.

The FBI's FY 2012 Budget request includes funding to continue these efforts, which were initially provided through Supplemental funding in FY 2010.

Indian Country: The FBI has the primary federal law enforcement authority for felony crimes in Indian Country. Even with demands from other threats, Indian Country law enforcement remains a priority for the FBI. Last year, the FBI was handling more than 2,400 Indian Country investigations on approximately 200 reservations and over 400 Indian gaming facilities throughout 28 states. Approximately 75 percent of all FBI Indian Country investigations involve homicide, crimes against children, or felony assaults. American Indians and Alaska Natives experience violent crime at far higher rates than other Americans. Violence against Native women and children is a particular

problem, with some counties facing murder rates against Native women well over 10 times the national average.[1]"

Complex jurisdictional issues and the dynamic and growing threat in Indian Country requires additional FBI presence. Currently, the FBI has 18 Safe Trails Task Forces focused on drugs, gangs and violent crimes in Indian Country. The gang threat on Indian Reservations has become evident to the tribal community leaders, and gang related violent crime is reported to be increasing. Tribal communities have reported that tribal members are bringing back gang ideology from major cities, and Drug Trafficking Organizations are recruiting tribal members.

In order to address this situation, the FBI's FY 2012 Budget request includes 40 positions (24 Special Agents) and $9.0 million to bolster existing Safe Trails Task Forces and to provide additional investigative resources to address a significant Violent Crime threat in Indian Country.

Offsets

The FBI, like all federal organizations, must do its part to create efficiencies. Although the FBI's FY 2012 Budget request includes $131.5 million in program increases, it is offset, in part, by almost $70 million in program reductions. These offsets include $26.3 million to reduce funding for the FBI's Secure Work Environment program, which enables the FBI's national security workforce the ability to access and Top Secret information within the FBI and with Intelligence Community partners; almost $1 million to eliminate and consolidate FBI Violent Crime and Gang Task Forces; a $15 million reduction to Sentinel (the FBI's case management system); $6.3 million to reduce support of the relocation program, which strategically relocates staff to meet organizational needs and carry out mission requirements; almost $1 million to eliminate 12 FBI Resident Agency offices across the country; a $5.8 million reduction to the FBI's ability to develop new tools to identify and analyze network intrusions; a $2.6 million reduction as a result of surveillance program efficiencies; almost $1 million to reduce the amount requested to hire and support Special Agents and Intelligence Analysts; $5.7 million to delay the refreshment cycle of FBI desktop and laptop computers – delaying refreshment from four years to five or more years; and a $5.9 million reduction for administrative efficiencies, including funding for travel, equipment, conferences and office supplies.

Conclusion

Chairman Wolf, Ranking Member Fattah, and Members of the Subcommittee, I want to thank you for this opportunity to discuss the FBI's priorities and detail new investments sought for FY 2012. Mr. Chairman, let me again acknowledge the leadership and support that you and this Committee have provided to the FBI. Congress'

[1] Zaykowski, Kallmyer, Poteyeva, & Lanier (Aug. 2008), *Violence Aaginst American Indian and Alaska Native Women and the Criminal Justice Response: What is Known,* Bachman (NCJ # 223691), at 5, http://www.ncjrs.gov/pdffiles1/nij/grants/223691.pdf.

funding of critical investments in people and technology are making a difference every day at FBI offices in the United States and around the world, and we thank you for that support.

I look forward to any questions you may have.

Mr. WOLF. Thank you, Mr. Director.

With the markup on the CR, we directed the staff to make sure that if there is one agency that was protected, it was the FBI. And we will continue to do anything we possibly can to make sure that continues.

Mr. MUELLER. I appreciate that.

KILLINGS ON THE SOUTHWEST BORDER

Mr. WOLF. And also before I get into the—we have a lot of questions—there was a killing yesterday I saw where two Americans——

Mr. MUELLER. Yes.

Mr. WOLF [continuing]. Were coming across the border. Do you know much about that? Can you tell us——

Mr. MUELLER. It is still under investigation. We are still investigating the circumstances, so we are not certain. There are varying motives that need further investigation before we could comment on the circumstances of that particular killing.

Mr. WOLF. But they were American citizens, correct?

Mr. MUELLER. They were. And my belief is it was south of Tijuana.

Mr. WOLF. They were in line at the border crossing?

Mr. MUELLER. I believe that to be the case, and they were American citizens.

Mr. WOLF. You have presided over one of the most sweeping organizational changes probably in the history of our government and a change that had to be immediately responsive to an absolutely critical national need, preventing further terrorist attacks.

ASSESSMENT OF THE FBI'S TRANSFORMATION

Your testimony focused mainly on current programs and requirements, but I would like to ask you to step back. Give us an assessment and accounting of the FBI's transformation under your watch.

What has been the success and what needs more work?

Mr. MUELLER. Well, let me start with what I believe has contributed to the change in the Bureau. In the wake of September 11th, one of the principal steps that we took in my mind was prioritizing, and I mean really prioritizing. We identified the ten major priorities in terms of programs and ensured everybody understoods that our success was dependent on working with state and local law enforcement and everybody in the organization had to become proficient with technology.

The prioritization required we immediately move 2,000 agents from criminal programs to counterterrorism, our number one priority. And then the number two priority is counterintelligence, third is cyber.

And we have gone back and looked at those national security priorities and the criminal priorities each year, and believe that we have set up a structure so that the funding and the increased personnel goes to those priorities. And that was tremendously important.

I think the other substantial pillar of the change has been understanding that we had to develop the intelligence capacity to prevent not only terrorist attacks but gang activity and espionage be-

fore the acts occurred. And that is somewhat different than utilizing our investigative tools for investigating an incident after it happens.

In developing those tools, and developing those tools within the Constitution and the applicable statutes, bringing on 2,000 additional analysts and changing the way we think about approaching the threats that we face in the future with the advent of the intelligence program was the second pillar of growth. What needs to continue, is build up that intelligence capacity and capability.

In the future, I look at threats. I think the counterterrorism threat will remain there, certainly the theft of secrets threat will remain but what will be increasingly important is to become adept at responding to threats in the cyber arena and building up the intelligence capacity to address that cyber threat which requires human resources. But also the technical savvy and expertise will be a challenge for the next several years.

Mr. WOLF. Have any of the areas such as organized crime, sex trafficking, different areas like that been neglected—I mean, if you look at it knowing you had to prioritize but knowing when you prioritize there are some things you would like to do, you cannot do, what has been—maybe the word neglect is not the best word—what has been pushed behind that you would have liked to have kept forward?

Mr. MUELLER. One of the hard decisions we as an organization had to make in the wake of September 11th is where do we move 2,000 agents from? Ultimately, we took them from the drug program as well as from smaller white collar criminal cases.

And in each case, we sought to work with other federal agencies, like DEA, to pick up where we had left off, and when it came to smaller white collar crimes we had to work with local district attorneys and state's attorneys general to cover that. And those are the areas that we had to draw the resources from initially.

When it comes to gang activity and violent crime, I was firmly of the belief that we needed to enhance our efforts in these particular areas because of the devastating impact on the communities which are affected by these type of activities.

Particularly, having prosecuted homicide cases here in the District, I became familiar with the adverse impact of violent crime on our communities. And so we have built up. We have way over 100 gang task forces around the country. That has been a priority.

We have not had a backfill of the 2,000 agents that we moved from the criminal programs to the national security programs, but I think we have done a better job prioritizing our criminal programs and focusing on those areas where there is a substantial need for the Bureau to operate.

Mr. WOLF. I guess today coming in, they had a report out that drug use among high school students is going up. We are not going to say that is because the FBI or someone has taken their eye off the target, but, I mean, it has gone up.

People living in inner cities are impacted by gang violence almost to the degree that it would be a terrorist attack equivalent. I saw the headlines the other day in one of the local papers, I think in Prince George's County, the number of deaths have been going up.

If you are living in the inner city, living in a neighborhood that is impacted by whether it be MS–13 or whatever, that is an act of terrorism for you, particularly if you have children and you are worried about them.

We have even seen in my congressional district MS–13 as you know. So that is not meant as any criticism, because God bless you all. Your men and women. And you have been focused on the number one issue.

But do you think there has been as a result of the fact that this has been such a priority for the Nation, that maybe perhaps areas of drug use and drug violence and gang violence have been able to get out of control a little bit?

Mr. MUELLER. I am not familiar with the latest figures on usage by, what is it, high school students?

Mr. WOLF. It was high school students.

Mr. MUELLER. High school students. I know that it fluctuated some. It had gone down for a period of time. I had not realized it had gone up.

Mr. WOLF. It was in today's paper.

Mr. MUELLER. As we both know and understand, gang activity has increased over the years and not just within the United States.

I know you are very familiar with MS–13, a gang that originated in Los Angeles, spread throughout the United States, and now is an international operation involving not just the United States, but El Salvador, since it originated there, Guatemala, Honduras, and Mexico.

It has grown beyond the capabilities of any particular localized jurisdiction to become an international problem. That is one where we have addressed it with gang task forces around the country and also put resources down in El Salvador where we work with our counterparts there on fingerprint capabilities. We have got agents that are stationed down there that work solely on MS–13 and we also work with our counterparts in Guatemala, Honduras, and Mexico. But that type of gang activity has gone from a neighborhood to a city to a state to the United States, and is now international. Our focus now has to be on that area where we have unique jurisdictional capabilities and addressing those gangs that have spread over the last five to ten years, not just domestically but also internationally.

Mr. WOLF. We were told by DEA that most of the gangs in Mexico have operations here in the United States; is that correct?

Mr. MUELLER. I believe many of them do, yes.

Mr. WOLF. And I think the FBI is uniquely set up in such a way to deal with that because they go from state to state.

As you know, we did the northern Virginia task force because they were leaving Arlington, going to Fairfax, leaving Fairfax, going to Prince William. Same thing holds true, leaving Arizona, going to Pennsylvania, leaving Pennsylvania, going to Virginia.

And so I just wonder if at times because if you are living in a neighborhood and you are impacted by gang violence, that is really an act of terrorism.

Okay. As we go through the budget, we will certainly look at that. You want to say something?

Mr. MUELLER. Well, let me just add one thing. We have 164 Safe Streets Task Forces, which I am sure has probably doubled since September 11th because it has been a focus for us.

The other thing that I believe that has benefitted us is looking across state and FBI jurisdictional lines to have an intelligence picture of not just northern Virginia but northern Virginia, Washington, D.C., and Maryland. The crooks do not care where they commit their activity and, yet, we are divided jurisdictionally by states and also by FBI field offices.

What we have done in terms of developing intelligence capability and regional intelligence centers, which still is a work in progress, is to have a regional and intelligence focus. So if you have a source that is working in D.C., there is no reason why that source cannot also be working in northern Virginia or Maryland across jurisdictional lines. And that will, in my mind, benefit us and our operations and win us a much broader picture than perhaps we had had before.

COUNTERINTELLIGENCE V. CRIMINAL CAREER TRACKS

Mr. WOLF. Are you disadvantaged in the FBI if you have spent most of your time in organized crime or in fighting gangs and, therefore, not involved in the counterintelligence area and not involved in the terrorism area?

Is there any career track that is negatively impacted by the fact that you have had more time in one than the other? Is there any kind of you have to touch the bases to kind of move up and move ahead or can you just continue or if you are really good fighting gangs, MS–13, et cetera, but you have not had the time working with regard to al-Qaeda? Does that hurt you in the bureau?

Mr. MUELLER. No, I don't think so, although I think because the emphasis in the Bureau prior to September 11th was principally on its criminal program——

Mr. WOLF. Right.

Mr. MUELLER [continuing]. And deservedly so. We still have the emphasis on those programs, but there has been the consequent emphasis on counterterrorism in the meantime. And counterterrorism and the national security branch I think has been elevated because of the funding and personnel that have gone there.

But the heart and soul of this organization, and has been for 100 years, and the talents and capabilities that enabled us to be good criminal investigators, and are the same talents and capabilities that enable us to address the other priorities.

Mr. WOLF. I agree. I am just a little bit concerned, though, that if someone is emphasizing gang violence or organized crime and they have not spent enough time in counterterrorism that there not be a career negative for them, that they can still——

Mr. MUELLER. No, I do not think that is the case. And I will tell you that some of our best investigators on the counterterrorism side have had a tremendous amount of time on the criminal side. And——

Mr. WOLF. But does it go from criminal to counterterrorism and al-Qaeda work or do they go from al-Qaeda work, counterterrorism to gang work? I mean, are there more coming from the criminal

area into counterterrorism and fighting terrorism or are there more coming from counterterrorism and does the road go both ways?

Mr. MUELLER. Well in the past, since September 11th, it has gone from the criminal to counterterrorism——

Mr. WOLF. So——

Mr. MUELLER [continuing]. As we build up the counterterrorism.

Mr. WOLF. So if you look at an agent's career track, it has gone from here to there. What I am concerned about is I would not want to have it be a negative.

I mean, it is a criminal, gang, terrorism activity for someone who lives in the inner city to be threatened by a gang. I mean, the fear, whether it be in Philadelphia and Virginia, wherever, to be able to walk your children to the school——

Mr. MUELLER. Yes.

Mr. WOLF [continuing]. It is fear. But I just would not want it to be, and there may be somebody who is so committed, dedicated that if you have not punched your card over here for some time, that you hurt yourself career wise.

And if you look at the overall budget, knowing administrative costs, but looking at raw expenditures, how much of the Bureau's budget is going for counterterrorism and counterintelligence versus crime and the traditional FBI work before 9/11? Is there a percentage?

Mr. MUELLER. Yes. I would tell you that in September of 2001, I would say, and these are rough figures, approximately 7,000 of the agents in the field were working criminal cases and 3,000 national security. Now it is approximately 50/50. And it has been that way for the last three or four years.

Now, one of the challenges we face is that we will bring in agents who have particular career paths coming in to be cyber agents or intelligence agents, criminal agents or counterterrorism agents based on their background. And they spend some time in a small or medium sized field office where you are doing a number of things, but then they, because of the necessity to gain expertise in a particular field, may be in the field for a period of time.

But as an agent you rise in the structure, we need people who are able to supervise, not just the cyber, but all aspects of an office Assistant special agent in charge have to be able to supervise. You may have come up in counterterrorism but you will have to supervise different programs. So the challenge is giving them the training and leadership skills across all of the various programs that we have.

Mr. WOLF. Okay. To leave this subject, but to kind of wrap it up, in 2006, the committee had CRS do a review of the fundamental strategic objectives and performance measurement plans for your intelligence program.

I personally think the time is right for an updated look by outside experts, particularly with you leaving and the great job you have done.

Would you agree to work with the committee in pursuit of a quick snapshot updated evaluation of how the FBI is doing in the area of foreign intelligence collection and implementation of post-9/11 intelligence reforms?

Mr. MUELLER. Certainly I would work with the committee to look at it. As I think you are aware, I encouraged outside reviews so that we get a separate perspective. And I would be happy to work with the committee on such a review.

Mr. WOLF. Good.

DOMESTIC RADICALIZATION

Domestic radicalization: in your testimony, on the growing concern about the threat from homegrown extremists. According to the Congressional Research Service, there were 43 homegrown Jihadist terrorist plots and attacks since 9/11, more than half of those occurring since May 2009. So the pace is accelerating.

What are you doing differently to understand and respond to this?

The Christmas Day bomber, al-Awlaki was involved in the influence. He was at a mosque here in northern Virginia. Al-Awlaki radicalized the major at Fort Hood.

We have the Metro one that you just referenced. That person came out of northern Virginia. The other five Pakistani students who were from the Fairfax County area. You have al-Amoudi who is in jail with regard to his terrorist activity. You also have the valedictorian at the Saudi Academy for the plan with regard to the assassination of President Bush.

So what are you doing differently to understand and respond to this? And I stress again you have seen a tremendous uptick since May of 2009.

Mr. MUELLER. Well, let me speak for a moment about the uptick and the factors contributing to that uptick. There are two principal ones in my mind.

One is what used to be called core al-Qaeda as a centerpiece of the threat activity in the world operating out of Pakistan and the Pakistani-Afghan border has migrated now to other areas, particularly al-Qaeda in the Arabian Peninsula, including where al-Awlaki is now in Yemen as well as Somalia, al-Qaeda, and Maghreb.

Consequently, you have different focal points of terrorist activity. Some are more eager to attack the United States homeland than others, particularly those operating out of Pakistan and those operating out of Yemen.

Secondly, and perhaps more importantly, is the growth of the internet as a vehicle for radicalizing, and to a certain extent training, for operational capabilities that, in my mind, has brought the sermons of somebody like al-Awlaki into the bedroom of a teenager anyplace here in the United States without the necessity of a person traveling to a place to hear al-Awlaki or actually having to go buy a tape or get a tape of al-Awlaki.

So what we are seeing is a profusion of individuals who have been radicalized, not person to person, but on the internet. Our response has been to undertake differing activities to try to determine who is utilizing the internet to radicalize and who is being radicalized on the internet, some of which we could go into in closed session.

But it also goes back to the necessity for developing sources—sources who are in a position to identify those persons who are

being radicalized and are seeking the weapons, explosives, or other items in order to carry out their intentions.

Both with addressing the internet and also reallocating and reorienting our source coverage, we are attempting to address what is a phenomenon that has been growing over the last two or three years.

Mr. WOLF. A recent report by Bruce Hoffmann and Peter Bergen warns of complacency and the possibility that, "an embryonic terrorist radicalization and recruitment infrastructure has been established in the U.S. homeland." And I do not know what your comments or your feelings about that are. I think both of them are pretty competent people.

But do you in certain circumstances have the capability and the authority to take down certain websites or block certain internet communication channels if you are able to prove that they are being used by terrorists or for terrorist purposes? And I guess the word is capability. Do you have the capability, number one, and, secondly, do you have the authority? And maybe you could kind of split them out, both capability and authority.

Mr. MUELLER. I would say capabilities, yes, generally depending on the circumstances. There are a number of ways that persons using the internet are trying to avoid both scrutiny and attacks from others. But generally, I would say, yes.

In terms of authorities, there are, as we all know, First Amendment protections that one has to be cognizant of in addressing these cases.

There also is the circumstance where if you actually do take down an internet site on a particular server, because of the ubiquitous nature of the internet, it is nothing for a person to migrate that website to another website that may be elsewhere.

I would say to get more of the details, it would require a discussion perhaps not in the public arena.

Mr. WOLF. Well, I would like to have that with you because I think al-Awlaki's website ought to be taken down. And I am concerned that there are some companies in the United States that are providing the servers that are allowing al-Awlaki to do what he is doing.

I mean, can you feel the pain and the suffering of someone who lost a loved one at Fort Hood?

Mr. MUELLER. I have thought long and hard about that. Absolutely.

Mr. WOLF. And some of the comments that came out of the Department of Army with regard to that and some of the data, knowing what they had, and al-Awlaki basically in essence fired the weapon. He fired the weapon. And so I think he ought to be taken down.

And to have American companies providing the servers, being the servers that allowed that to take place because the first person if something happens to one of them, they are not going to call the Interpol. They are going to call the FBI if something happens to them.

And so there are going to be a number of these things. I know you are going to want to say we cannot get into it in an open set-

ting, but I would like to almost take an afternoon to just kind of go through it.

I think you ought to take those sites down. I know you cannot take every site down, but I have talked to people out there. The high-tech community is fairly prevalent in my district. And they say you can take sites down. Now, they can come back up again, but the guy is operating in Yemen and if you keep taking him down and taking him down and taking him down.

And I went to the Peter King hearing and I saw the radicalization that took place of those families and the pain of the Somali families that saw their kids drawn into this partially because of al-Awlaki. And so if you have the capability, then I guess it is the authority.

And what I worry about—and God bless you—I think you have been the best director the FBI has ever had period. And I put that comment in the record about your wife and your family. I mean, you have done an amazing job.

I worry that there is not anyone who has the responsibility. State Department says, well, we have got to be careful what our relationships are abroad and Defense says this. And you are sort of caught in the middle here. But there ought to be a policy of this Administration. And maybe we can write something in the bill that these sites ought to be taken down.

I know you cannot take every single site down, but that magazine is out there. It ought to be taken down. And that is like saying there is a house of prostitution and we know bad things are taking place or people are being—and I want to ask you some questions about sex trafficking that you know I care deeply about—but to say, "we know there is sexual trafficking taking place in that room. But if we go in there, they are just going to move to another place. So why bother?" I mean, hit them there, hit them there, hit them there, hit them there.

Just do everything you can because for the good of the families and both those whose kids are being radicalized, my sense is in talking to a number of people, the parents did not even know the children are being radicalized. And so they get a bad rap.

So I would urge you and we are going to look at it to see if we can say take them down, take them down because if we have the capability, then I think to sort of punt this thing and say because of this or that or we may offend somebody.

Mr. MUELLER. Let me if I——

Mr. WOLF. Sure.

Mr. MUELLER. Let me just say, first of all, we would be happy to sit down and go through with you and the committee the considerations that go into taking down a site.

The only other thing I would say in generally talking about this area of mutual concern, we share exactly——

Mr. WOLF. I know you do.

Mr. MUELLER [continuing]. The concern. There is intelligence considerations as well.

Mr. WOLF. I understand.

Mr. MUELLER. And what I want to do is identify those persons who have the intent and seek or have the ability to undertake terrorist attacks.

Mr. WOLF. But al-Awlaki has taken it beyond——
Mr. MUELLER. Absolutely.
Mr. WOLF. I mean, he has——
Mr. MUELLER. Absolutely.
Mr. WOLF. I have some others, but I am going to go to Mr. Fattah. But I am going to come back to this subject.
Mr. Fattah.
Mr. FATTAH. Thank you, Mr. Chairman.

BENEFITS OF INVESTMENT IN THE FBI

Mr. Director, I want to make sure that we put this on the record, that you have had an extensive career in public service from your days as a United States Marine leading a rifle platoon in Vietnam, winning the Bronze Star, your service as a U.S. attorney, and now as the head of the FBI.

And you are getting ready to leave in September. And somewhat like Secretary Gates, you are in a position to be maybe even more forthright on some of the challenges facing the country going forward.

So, when we look at the budget for the FBI, we cannot look at it in my view in isolation. We have to look at it opposite, for instance, the financial and human costs of the 9/11 incident. You know, it cost our country a great deal, thousands of lives and it cost our economy and was a real jolt to the airline industry, to New York. I was just there to see Freedom Square and what is going on there.

So I think that the Congress should not be looking at just the cost of additional agents. I mean, you are requesting some 40 additional agents in this national security space. But it is really the cost versus the exposure. We have to look at this in terms of the exposure that the country faces.

And this is not the FBI that you are going to be leaving. I mean, as we go into the 2012 fiscal year, you will have retired.

So, I think it would be helpful for you to talk about how we should be looking at our investment. You know, there is a lot of talk around here that spending in and of itself is wasteful. I think some spending is necessary and obviously so when it comes to protecting lives and protecting our economy.

So are you aware of some of the estimates of the cost of the 9/11 event financially to the country even though obviously the human cost was even more? But if you could share about the economic impact of that to the Nation.

Mr. MUELLER. I think everybody would agree that the human cost was unbelievable. But in addition to that, as you point out, there was a blow to the economy that cost the United States billions and resulted in lost opportunities. And you can never put a value on the persons who lost their lives and would have contributed for many years after that.

Going to the Bureau's budget, one of the frustrating aspects of this job has been the fact that we were expected to and needed to have built up an intelligence capacity that is absolutely essential to protect the public from attacks in the future.

But when it comes to the budget and the budget discussions, because of the history of the Bureau being perceived as a law enforce-

ment agency and lumped in with other law enforcement agencies, we have had to take the funding to build up the intelligence capacity out of the criminal justice side. And, there has not been a backfill.

So a number of the priorities that you and others wish us to pursue on the criminal side have, in our prioritization, unfortunately taken a back seat when it comes to the budget crisis.

And at a time like this when we are talking about a Continuing Resolution where each of the agencies within the Intelligence Community because, they are part of the DoD budget, gets their 2011, we are still stuck going back to pre-2010. So that has been tremendously frustrating.

I do think it is shortsighted in the sense that the terrorist attacks on the United States are for a variety of reasons—the loss of lives, number one—one of the most devastating things that can happen in the United States in this day and age.

And we, Homeland Security, and the Intelligence Community need to be at the forefront in defending our country here from such attacks.

Mr. FATTAH. Well, for instance, you mentioned in your opening testimony the attempted bombing of, or bombs at least being transported on cargo planes. Now, that incident centered in significant respect on the Philadelphia International Airport where one of the planes was and one of the others had moved through. That cost the industry a great deal of money.

So these issues of investing now on the prevention side and the intelligence side through your work can save us money on the other side. I wanted to mention that.

I do want to take some time and walk through a few areas. I sent you a letter probably about a year and a half ago about mortgage fraud. There has been a very significant ramp-up of focus on mortgage fraud, and there have been major arrests across the country including in the Philadelphia area. The mortgage foreclosure crisis had to do with the economy and unemployment, but there were also problems in the industry.

The FBI has had a very positive impact I think in cleaning up some of what it has cost lots of Americans, their homes and their piece of the American dream.

I want to thank you for that and I want to thank you for your work in closing these very old but still relevant civil rights cases, particularly in the south where civil rights workers were killed and these cases have languished for decades and you closed out them on your watch. I want to thank you for that.

I was over visiting the National Center for Missing and Exploited Children over in Virginia and the work of your team there with other entities has been remarkable. I do not think that many people in the country know that we have more than 1,000 kids who go missing every day in our country and the amazing work that the FBI and some of the other agencies have done, including the interactions with Interpol in recovering some of these young people who end up in other parts of the world. So I want to thank you for that.

But I do want to get into some of the budget issues. You have a request, one of the smallest requests, but I think one of the more important ones. You have a request in the President's budget of $16 million for education benefits. The CR has it at around nine. We think that there is a way to fix that problem.

I want you just to illuminate on what that small number represents in terms of benefits to agents.

Mr. MUELLER. Well, I believe you are talking about the sums requested to help persons with their education and retiring their bills?

Mr. FATTAH. Yes.

Mr. MUELLER. One of the programs I think that is beneficial to the workforce is to help persons who are striving to better themselves. I know over the years that the chairman and others on this committee have pressed hard for us to provide additional educational opportunities to our workforce in the same way that the military does for their workforce.

Those sums reflect, if I am speaking about the sums that you are talking about, our desire to do exactly that—to reward those persons who want to better themselves, and by bettering themselves better the organization.

Every dollar that we spend to provide additional education or to provide a relief to those who already have bills is a dollar very well spent.

Mr. FATTAH. Now, you talked about the 1,100 positions that you want to deal with that the President has not provided funding for you to backfill.

In terms of what this would mean in terms of programs, as you refer to them, on the criminal side or on the national security side, these are positions in which agents have retired and you are attempting to now backfill them?

Mr. MUELLER. Let me, if I could, give you an example. In 2010, there was a supplemental that gave us additional resources to address the mortgage fraud crisis. We obtained 200 additional positions in a one-time supplemental. Those individuals are brought on board. We were up to 98 percent in terms of our hiring ability which we had striven to meet for a number of years.

We had sought recurring funding to sustain this one-time funding that we received in the supplemental. And the $200 million that we are going to lose, the numbers of bodies we are going to lose, part of them is attributable to the fact that we are not getting the recurring funding to fund these bodies that were given to us to address the mortgage fraud crisis.

In 2011, we sought additional individuals to fight the mortgage fraud crisis in the budget. We are probably not going to get that.

When we started the 2012 discussions a year or so ago, we did not put additional resources in our request for additional resources for mortgage fraud because we had already been given those resources in the past and expected to get them in 2011.

So when I say that we are backsliding in terms of our budget position, that is an example of the problem we face where additional resources have been given to us in the past to address this crisis

and, yet, we are not going to have them in the future and, in fact, have to cut back.

Mr. FATTAH. All right. And the last question for this round. Mr. Director, you have over 30,000 employees. You have 12,000 agents. What is the average salary for an agent?

Mr. MUELLER. I would have to get back to you on that.

[The information follows:]

AVERAGE SALARY OF AN FBI AGENT

The average cost of a field agent, including benefits and availability pay, is $169,000.

Mr. FATTAH. All right. Thank you.

Mr. WOLF. Mr. Bonner.

Mr. BONNER. Thank you, Mr. Chairman.

ASSESSMENT OF THE FBI OVER DIRECTOR'S TENURE

Director, thank you so much for your life-long service to our country and for your stewardship of the FBI during a pretty challenging decade I think by any analysis of that. And that is kind of where I would like to start the conversation.

Since you became director, the word terrorism has probably been rewritten, at least in the dictionary definition of it, certainly the terrorist attacks on 9/11, the cyber terrorism, the escalated concern on the border, the illegal drugs that have come in, which is a form of domestic terrorism.

At the end of all of our careers, we have the opportunity to look back and think, well, if I could have it to do all over again in our routine for the day and could get anything done that needed to be done, I would like to do this to change my legacy of service.

Have you had an opportunity to look back over the last decade and think if we could have just done this differently, if we could have not had the controversy over Guantanamo or Patriot Act or whatever, then perhaps we could have made the country safer or done something different?

And I say that not with criticism because I started out with admiration for your service, but you will be leaving a legacy of service during probably one of the most challenging decades in the life of our country and, yet, the next director may well want to have the benefit of your experience.

Mr. MUELLER. There are two areas. I generally look forward, not back, but people are asking the same question. I would say there are at least a couple of areas where I would have done things differently.

One is understanding the challenges of developing information technology in an organization that is information driven.

The first efforts at developing a case management system failed. And in part in my mind, it failed because I did not ask the tough questions to understand the track that the technologists were going down and make certain that I understood what they were talking about and used common sense to question what they proposed doing.

So if I had it to do over again, I would recognize that on the one hand you have those who understand the business practices of an institution like the FBI and then you have those who understand

technology. Getting these together to upgrade your technology and modernize your business practices at the same time is a very difficult exercise that requires weekly, if not daily, management and assuring that the purported experts explain to you in English what is happening and how it is going to happen and so that you make certain that it is done the way it was drawn up. That is one area.

The second area, I was slow to understand that developing intelligence is not just developing databases or hiring analysts. It is a way of thinking about your mission in the sense that as important to knowing what is coming in through the door, it is important to know what we call your domain. Whether it be in your field office or in your state knowing what the threats are, determining what you know about those threats, but as important is determining what you do not know about those threats, and using sources and intercepts to fill those gaps so that you have a fuller picture of those threats before an incident occurs.

It took me a while, because I come from the background of being a prosecutor and I am used to getting a case in, investigating it, trying it, and hopefully convicting the person, to understand that we have to address the threats, analyze the threats, identify what we do not know about those threats, and fill in those gaps in order to prevent an attack.

The statistics we have used in the past, the number of arrests, indictments, and the like, do not give you the picture of what the threat is. By gaining the picture of the threat, you then do a much better job in allocating the resources and getting ahead of the threat in the future.

I would say the last thing, and one of the great things about being associated with this organization, is the men and women of the FBI in the past, in the present, and I am sure in the future. The hardest decisions you make are personnel decisions. I have made some good ones and I have made some bad ones. But overall, the quality of the people that serve in the FBI today is unmatched in any other institution.

Mr. BONNER. Thank you for that reflection. Now I am going to give you an opportunity to give us some constructive criticism.

Based on your service, what can Congress do? It is not always about money. That is what the purpose of this hearing is about, but it is not always about money. What can we do to be a stronger partner with the bureau because we all share the concern about terrorism?

There is not a person in Congress, Democrat, Republican, north, south, east, west, that does not have the same love of country and, yet, sometimes the people back home watch us kind of like stepping on an ant bed, just scrambling all over and fighting with each other and using a war of words at times.

What can we do to be a better ally of the FBI in combating some of the challenges, whether it is cybersecurity or homegrown terrorism or other things? What can we do from your experience over the past decade?

Mr. MUELLER. I come to realize painfully sometimes that organizational structures, as traditional as they may be, need to change with the changes in the world around us.

An example would be that the way we organize to address crimes as a bureau has been very localized because most crime in the past 100 years has been local crime. Consequently you can have a dispersed, distributed organizational structure that gives deference to the Special Agent in Charge in a particular region.

When it comes to counterterrorism on the other hand, that does not work because the threat is to the United States as a whole. I cannot look at one Special Agent in Charge, whether it be New York or Houston or what have you, and say you are responsible for preventing terrorist attacks.

So our structure that was built for the criminal side has had to change over the last ten years by building up the coordination and the intelligence capabilities in counterterrorism to not only give oversight in the country but also to be able to intersect and interchange information with CIA, NSA, and the others.

In the cyber arena, our organization is going to have to change as well for a variety of reasons, where victims can be in all 50 states at the same time, but you do not know who the contributor is.

When it comes to Congress, I do think that one should reflect upon the organizational structures and determine whether that structure fits the growth in the times.

You mentioned financial. As I mentioned before, we proceed as a law enforcement agency, although we are now an intelligence and national security agency and, yet, the same persons who looked at us from the criminal perspective for the past number of years are the ones looking to the financing and the context of our law enforcement responsibilities without necessarily taking in the broader understanding that we are a national security agency and need to have a firm foundation for our funding over the years.

Mr. BONNER. And I want to just ask one more question this round. From your testimony, you mentioned the elimination and the consolidation of the FBI Violent Crime and Gang Task Force and, yet, I assume that is not to suggest that the bureau is not still concerned about that.

Are these functions being taken up by other areas of the agency?

Mr. MUELLER. Well, we are looking at our gang task forces. We have no intention of eliminating the gang task forces around the country or the violent gang task forces around the country or violent crime task forces around the country.

What we are looking at is overlap between our task forces and other task forces, whether it be Department of Justice or Department of Homeland Security, to see where there are places that we could be better, more efficient in pulling together two or three task forces.

But the number three priority on the criminal side after public corruption and civil rights is organized criminal activity, which includes gangs. Since September 11th, that has been our number three criminal priority and will continue to be our number three criminal priority.

The number of gang task forces, I think I indicated before, there are something like 160 odd around the country, will continue.

Mr. BONNER. Thank you so much.

Thanks, Chairman.

Mr. WOLF. Thank you, Mr. Bonner.
Mr. Schiff.
Mr. SCHIFF. Thank you, Mr. Chairman. Director, thank you for the good work that you do.
Mr. MUELLER. Thank you, sir.

MIRANDA WARNING ISSUES

Mr. SCHIFF. I appreciate you have a hard job. I wanted to discuss with you the FBI guidance on Miranda warnings, and from a couple of perspectives. The first is that I think it is sound guidance, and but I think it is constrained by the presentment requirements under current law. And I have legislation that I introduced last year that I am going to be reintroducing to allow a delay in presentment in terrorism cases for up to forty-eight hours upon certain conditions subject to another renewal for an additional forty-eight hours. I would like to get your thoughts on that.

And also the potentially greater importance, I think, of the presentment issue even than the Miranda issue. I think presentment has a greater effect on potentially ending an interview than does the Miranda warning itself. And I would love to get your thoughts on that.

The second question on that issue is under the guidance you state where the desire for intelligence outweighs potentially the evidentiary use of the information. Under the right circumstances they should continue an unwarned interrogation. Have you given any guidance to your agents or discussed the possible need to wall off agents that are doing the interrogation for intelligence purposes from the agents that will carry forward with the criminal investigation? Because I would think you would have a potential problem segregating the fruit of the poisonous tree if you do not have that kind of a separation.

Mr. MUELLER. Let me address the latter point first and then go to the presentment point. I think you focused on, in terms of, what happens during an interrogation, particularly an intelligence interrogation, may well be important in certain cases where there is overwhelming evidence of guilt and you do not need whatever statements are given.

But yes, there is always a consideration given. This happens a great deal overseas, to have what is called a clean team. You do an intelligence interview. It is understood to be an intelligence interview. It will be an unwarned interview. And then you have another team come in, give the Miranda warning, and then make the argument in court that this clean team has been untainted by the information that was obtained in the intelligence interview and hope that the judge will allow that in. So that is always a consideration. We have done that around the world any number of times, that particular scenario.

I will point out that there is often a debate between the prosecutor, who wants to try the case, and others who are more concerned about the broader picture and the intelligence. That debate goes on, as you can well understand given your history as a prosecutor, in cases, not across the country but in the more important terrorist cases that we take down.

Going to the presentment issue, yes——

Mr. SCHIFF. You know, before you do that though, what would your legal sense be? Let us say you have one team that comes in. They interview the suspect with a criminal investigation. At a certain point they decide this person has such intelligence value that they are willing to sacrifice, potentially willing to sacrifice, the evidentiary information. They step out. There is no Miranda warning yet. The clean team is brought in to continue the interview. Where do you think that puts you in a legal footing? In other words, if the violation of Miranda, the violation of the Fifth Amendment occurs when the information is introduced, not from the continuing interrogation itself, even though you have the clean team walled off do you think a court may find that because the interrogation by the clean team went on that even the statements that might have come in by the criminal investigative team, via Quarles or elsewhere, are tainted by the fact the interrogation went on after that?

Mr. MUELLER. I guess I would, say if there is a period of time where the case agent gets in and does an initial interview looking for a criminal case. Unmirandized because they want intelligence and they are within the Quarles exception. Then that will stand or fall depending on the applicability of the Quarles exception to the questioning that was done under that exception. Then if another clean team comes, and Mirandizes him, and there are additional statements, then the court will look, in my mind, to those additional statements and determine whether or not there was sufficient attenuation that the statements that were Mirandized should come in, even though there had been statements given prior to the clean team coming in. That I think will be dependent on the case law in a particular jurisdiction. I am not familiar with all of the cases that come down one way or another in that scenario. I am not certain there have been that many cases where that has been tried.

Mr. SCHIFF. And you mention that overseas it happens frequently, have a clean team. Have you given any guidance to your agents about the necessity in a domestic arrest situation of having a clean team come in?

Mr. MUELLER. In the course of our training, yes sir, there is discussion about that. Often there is discussion with the prosecutors. Often the prosecutors may well want at least to discuss the possibility of a clean team. I will tell you the one thing that is troublesome in that, though, is particularly with our agents, that building rapport over a period of time is absolutely essential. If you have different teams you risk losing that rapport that may get you the information you need, particularly on the intelligence side. That is, in my mind, a weighty consideration.

I also believe that it is the people on the ground who are dealing with the individual who are often in the best position to know the way forward, as opposed to others a thousand miles, or two thousand, or even three thousand miles away trying to ascertain what is happening between a particular agent on a case who is knowledgeable of not only the case but the individual, and can respond to the individual. These decisions, in my mind and in some large part, should be driven by the input from those who are on the ground actually doing the interrogation.

Mr. SCHIFF. I wonder in that context, and I could see the point you are making about the importance of having an ongoing team, whether it might make sense to have a, you know, you have two people conducting an interview. One who steps out once you have reached the point of the end of the public safety exception. And then one who persists and is no longer part of the criminal case. Then at least you have some continuity. But I think that points up the importance of addressing the presentment issue. Because that seems to me the greater impediment. And how would you feel about under appropriate circumstances legislation that would lengthen the period of presentment?

Mr. MUELLER. As you are aware, I have to defer to the Justice Department in terms of a views letter and the Justice Department views. I would say more generally, to the extent that we can have more flexibility in these very difficult circumstances, I am in favor of flexibility.

FAMILIAL DNA SEARCHES

Mr. SCHIFF. Okay. Do I have time for another question, Mr. Chairman? Shifting gears, familial DNA, which two, now I think three states with Virginia, are now adopting policies to provide for familial DNA searches. In LA it was of great benefit to us in apprehending the Grim Sleeper. I would like to see, and I have legislation on this as well. I do not know whether it will require legislation. But I would like to see the federal government through CODIS have the capability of doing a familial search in the right circumstances, or responding to a state request for familial search. And I think we would want to make sure that there are privacy protections in place.

But in the Grim Sleeper case we were fortunate because all the DNA hits went unanswered. The DNA searches went unanswered. All the other crime leads went unanswered. We had a serial killer out there, and we did the familial search. It turned up the son of the suspect that led us to the suspect. We were fortunate, though, that the son had been in custody in California, in the same state where we were doing the search. Had he been in custody in a different state the Grim Sleeper would still be at large. Which I think points out the importance of having the capability under certain circumstances to do a national familial search. So I wanted to ask your opinion about, not necessary whether you support this form of the legislation, but whether you support having the capability of doing familial searches at the national level?

Mr. MUELLER. Well, certainly with the appropriate balance to privacy concerns, any additional tools that will enable us to identify a person, such as the Grim Sleeper, very few would be against, including familial searches. My understanding is that California and Colorado have legislation adopting it, and now as you indicated Virginia may be adopting it as well. There are two states, Washington, D.C. and Maryland, who have legislation opposing it, as I think you are aware. So the privacy concerns are triggering discussions.

As you sort your way through that, there is also the concern in terms of the software that enables CODIS, not being capable of doing the type of familial searches that one would want to do. My

understanding is both in Colorado and in California, the DNA laboratories have adopted a software package that enables them to do it. In addition to the issues, in terms of privacy concerns, there would be the funding factor as well. But in my mind we ought to have, and we are, having discussions on this. But we ought to try to sort our way through these issues so that under certain circumstances we make use of that capability.

Mr. SCHIFF. Thank you, Mr. Chairman.

Mr. WOLF. Mr. Austria.

Mr. AUSTRIA. Thank you, Mr. Chairman. And Director, thank you for your service to our country and your commitment as Director of the Federal Bureau of Investigation. We appreciate very much your hard work and I thank you for being here for this committee. And I apologize for walking in late. We have other committees going on, as I am sure you are well aware.

You know, this week we are obviously going through a very difficult time from a budget standpoint, as we look at our current situation with CRs, and a possible government shutdown coming this week. And we, you know, certainly want to assure that the FBI has the ability to meet its mission to protect and defend the United States. And you have listed I think ten priorities that you have with your mission, with the FBI. And I want to just ask you as we go through these short term CRs, and there is a lot of uncertainty as to what is going to happen at the end of this week as far as a government shutdown, how does the FBI ensure that these priorities are being met? Or do you prioritize? Is there areas that are a bigger threat, maybe cyber, or terrorism, that you prioritize your dollars during these difficult time periods? And if that is the case, are you taking away from other areas? And let me ask you, you know, how you manage those ten priorities and are assured that you are meeting those ten priorities during this difficult time budget wise?

TOP THREATS TO U.S.

Mr. MUELLER. Well, we would start from the top and continue prioritizing. Counterterrorism, counterintelligence, cyber, and the national security arena, and public corruption, civil rights, transnational, international organized crime, white collar crime, and violent crime on the criminal side. And we would be taking from the lower priorities and try to leave unaffected the counterterrorism, counterintelligence, and cyber.

But often Congress gives us dollars for particular positions. As with the example I used to address the mortgage fraud crisis. We obtained that funding, we brought additional people on for that particular purpose, and then we do not get the recurrence in the next budget. Then we most likely would have to cut back there. So it depends on what is happening in a particular budget cycle. In some part we are dependent on 2010 because that was the base. Then you have to look at 2011 that is going through the CR process now. And then we are here talking today about 2012. But a great deal of what we all want or need in the 2012 budget may now be determined by what happens in the CR for 2011.

So while we still apply the priorities, Congress' interest in particular areas, such as the mortgage fraud crisis, cyber, and ter-

rorism, may dictate particular reductions in programs regardless of the prioritization.

Mr. AUSTRIA. And certainly we want to ensure that you are able to. And also I think, you know, a concern we have is the families as well of the folks that are working under your agency, and the impact that this is having both on your agents that are out in the field, your folks that are working for the FBI, and their families. And I do want to continue to monitor that because we want to assure the safety of this country.

SENTINEL

Let me specifically talk if I could about your case management program, the Sentinel.

Mr. MUELLER. Sentinel, yes.

Mr. AUSTRIA. In February the Acting OIG testified that Sentinel, the case management system currently being developed by the FBI, was behind schedule. And I believe it was two years, at least two years, behind schedule, and $100 million over budget. Can you give us an update on the FBI's efforts to implement Sentinel? And what is your target completion date, if you have one? And do you expect any additional cost overruns?

Mr. MUELLER. Well, the overview is back in I think 2004/2005 when we entered into a contract with a contractor to produce the case management system. Given our previous experiences we divided it up into four phases. We went through phase one and it completed on time, on schedule, and under budget. Phase one was successfully deployed. Then we had problems with phase two when it was delivered due to coding errors and a number of things and we could not accept it on schedule.

We have since completed phase two, which was the foundation for the system. And we had approximately 10,000 users out there using it now. Phases three and four we put a partial stop order on because we were not satisfied with the performance on phase two. We then determined that in order to complete this on budget and at least close to schedule we needed to change our development approach. So we developed what is known in the field as an "agile" development approach which cut way down on the monies that we were spending on contractor's services. We are still using the contractor but we have cut way down and are utilizing an agile development process that is much less expensive, and in my mind much more respondent to the needs of the workforce.

My expectation now is that either in the fall or the beginning of next year we will complete this project and we will have, I cannot say every one of the original requirements done, but certainly a substantial amount of the requirements that we need to service the FBI as a whole.

INTERAGENCY COORDINATION ON THE SOUTHWEST BORDER

Mr. AUSTRIA. And one last question, Mr. Chairman. Just to kind of follow up a little bit on Mr. Bonner as far as what we can be doing, you touched a little bit on working with the other agencies, Homeland Security and other agencies. Obviously we have had testimony here in this committee and other committees about what is going on with the Southwest border as far as the drug cartels and

so forth. Are you able to brief our committee on, you know, the ability to work with other agencies? What you are doing and your assessment as to what is happening on the border?

Mr. MUELLER. Well in terms of working with other agencies let me, I will start and give just a brief response to an issue that periodically raises its head, is our relationship with the intelligence agencies, CIA, NSA, and the like. And I will say since September 11th that has developed, I could not ask for more in terms of development of those relationships. The number two person in our National Security Branch is a person from the agency. We have hundreds over working at aspects of the CIA, or National Counterterrorism Center, and the like. And we have a number from the various agencies working with us and I think our relationships are terrific.

On the law enforcement side, I am a great believer in task forces. Our success is in large part dependent on our relationship with state and local law enforcement. And the best vehicle for that is sitting side by side with somebody from another agency addressing a common threat.

On the southwest border we have a very close relationship with DEA, where we focus principally on the kidnappings, on public corruption in agencies and the like, where DEA focuses on the narcotics traffickers. And we also have a very good relationship with Customs and Border Patrol in terms of operational activity. We also have established an intelligence entity down in El Paso that encompasses our offices along the border, our headquarters, and our legal attache's office in Mexico City. And that is colocated with and in the same area as EPIC, the El Paso Intelligence Center, which is populated by DEA and the rest of the law enforcement and intelligence communities.

Mr. AUSTRIA. What areas can we be improving on or be more efficient?

Mr. MUELLER. There are overlaps, with some agencies, traditionally. When it comes to ATF, for instance, there have been overlaps in terms of our investigating explosives incidents here in the United States and that is an area in which the Deputy Attorney General resolved the issues and has given guidance to both of the agencies where I think we are eliminating some of that overlap. But there are other areas where there are overlaps that we all are trying to avoid. I do not see many benefits in the budget crisis but one of them is that you really have to prioritize, and consequently you may lose some of those overlaps when all of us are straining under our budgets.

Mr. AUSTRIA. Thank you, Director. Thank you, Mr. Chairman.

RADICALIZATION

Mr. WOLF. Thank you, Mr. Austria. Back to the terrorism issue, I do not believe that our government has a comprehensive policy to prevent radicalization. We have a number of questions we will submit for the record. But I plan to introduce legislation either late this week or next week to create a team B to bring fresh eyes to our nation's counterterrorism policies, including those intended to combat radicalization. Bruce Hoffman supports the proposal. Jane Harman supports the proposal. She is not here now, but we were

working with her just before she left to go to the Woodrow Wilson Institute.

It will be a strategic reevaluation of threat intelligence, possibly leading to a new way of disrupting terrorism by preventing the radicalization and recruitment process that sustains it. The work of a team B would not be meant to replace the analysis currently done by our intelligence agencies, but rather provide competing analysis. And again, and I know you have created a quasi-mini team Bs, I am talking about team B that looks at, almost similar to what was done in the Ford administration with regard to communism. Pipes led that from Harvard. They looked across the board. They had the exact same information that everyone in the government had and they looked at the evaluation with regard to the threat of communism.

So I know, just to take away one of your answers, I know what you have done in the Bureau and I commend that. But I am talking about a government wide policy that Bruce Hoffman thinks may be a good idea. What are your thoughts about that?

Mr. MUELLER. I would have to look at it. I am certainly not opposed. It sounds like an idea that is worthy of study, depending on who, how, when, funding and the like.

Mr. WOLF. Addressing funding, it would have the adequate funding.

Mr. MUELLER. Addressing radicalization is at the heart of the issue. We need to on the one hand to prevent persons from being radicalized but also on the other hand identify those persons who have been radicalized so that you make sure that you catch them before they are able to undertake a terrorist incident. What we have found over a period of time is that radicalization occurs in so many different ways. It can occur on the internet, it can occur by a peer. There are so many ways that people are radicalized. There is a great deal of work that has been done in terms of the variety of ways that people are radicalized, and a great deal of work has been done on the radicalization process. But any guidance that we can get to enhance our abilities to stop the next terrorist, I would welcome.

Mr. WOLF. Good. Well we are going to put the bill in next week. We may try to put it on this committee, or I do not know what we are going to do, but we are going to push it. And I think people who have looked at it, I think each agency has done some outside work. But I think if you bring it together in a comprehensive basis.

Last May I read of your concern in a *Fox News* report about the Bureau's October, 2002 decision to release Anwar al-Awlaki from custody upon his return to the U.S. despite an outstanding warrant for his arrest at that time. Several of the former 9/11 Commission members have publicly stated that the information from al-Awlaki's arrest warrant and October, 2002 reentry to the U.S. was not shared with them despite al-Awlaki's appearance in the 9/11 Commission Report as a possible supporter of the 9/11 terrorist cells. Former Senator Bob Graham said that the fact that this was not provided to the Commission was very unusual, and again it is one of the unanswered questions of 9/11. Could you discuss, now, or if it is inappropriate we can do it in a private sessions, why the information was not shared with the 9/11 Commission? And pro-

vide the committee with a detailed accounting in an appropriate setting?

Mr. MUELLER. I am vaguely familiar with this issue. I think it was perhaps a complaint out of Denver, if I am not mistaken?

Mr. WOLF. Correct.

Mr. MUELLER. And some time ago, a couple of years ago I think, I remember looking at the issue and believing that there was, certainly not much more at this time to be done. I will say that al-Awlaki in the meantime has taken on a significance that he certainly did not have way back when, although he was significant, number one. But secondly, and perhaps more importantly, we opened up to and gave the 9/11 Commission access to everything we could find that was related to terrorism, and particularly those persons responsible for 9/11. So if this was not provided to the 9/11 Commission, it was certainly not by intent. It may well have not been in one of the files that we provided to the 9/11 Commission. But I think you will find that the 9/11 Commission was appreciative of all the work we had done to provide them just about everything that we had in our files.

Mr. WOLF. Well the gentleman, and his name escapes me. He is at UVA now. He was Executive Director of the Commission.

Mr. MUELLER. I know who you are talking about.

Mr. WOLF. He has expressed some concern about it, also. And I think he later went on to be an advisor to Condoleezza Rice.

Mr. MUELLER. Yes, it is Zelikow.

Mr. WOLF. Yes. And he also had expressed some——

Mr. MUELLER. Well I would be happy to look into the matter. I can tell you that we tried to provide everything that we had that would be responsive to the interests of the 9/11 Commission at the time.

Mr. WOLF. If you can look into it, and maybe when we talk about that other thing we can go into it. In April, 2009 a letter from the FBI Assistant Director Richard Powers to Senator John Kyl the Bureau announced that it had severed its relationship with the Council of American Islamic Relations, CAIR. Mr. Powers wrote, "Until we can resolve whether there continues to be a connection between CAIR or its executives and Hamas, the FBI does not view CAIR as an appropriate liaison partner."

I strongly supported this decision in part because CAIR was found to be a co-conspirator in the Holy Land Foundation case. The Foundation's founders were convicted in November, 2008 on charges of, "providing material support to Hamas, a designated foreign terrorist organization," according to a Department of Justice press release. Hamas is recognized by the United States and the European Union as a terrorist organization. It is publicly committed to the destruction of Israel. Its 1988 covenant says, "The day of judgment will not come until Muslims fight Jews and kill them."

On June 12, 2009 I spoke on the House floor for nearly an hour laying out in great detail my concern about CAIR and sent the Bureau and others copies. I believe I sent you a copy, also. Since that time CAIR's troubling behavior has continued. In January, 2011 CAIR's California chapter found an old poster displayed on its

website stating, "Build a wall of resistance. Don't talk to the FBI." Have you ever seen that?

Mr. MUELLER. Poster? Yes, sir.

Mr. WOLF. The poster? This is a telling example of how CAIR has sought to prevent individuals from cooperating with law enforcement, or at the very least to present themselves as the only legitimate channel for doing so.

Last month before the House Homeland Security Committee Mr. Bihi, the uncle of Burhan Hassan who was killed in Somalia, testified about the disruptive actions of CAIR in the Somali-American community in Minneapolis following the disappearance of several Muslim Americans in 2009. Mr. Bihi states, "CAIR held meetings for some members of the community and told them not to talk to the FBI, which was a slap in the face for the Somali-American Muslim mothers who were knocking on doors, day and night, with pictures of their missing children asking for the community to talk to law enforcement about what they know of the missing children." According to FBI estimates approximately ten of these missing men, these are Americans living here who have now gone back to Somalia, have joined al-Shabbab, have died in Somalia. CAIR's actions were, I think, counterproductive for the families of these men.

For all of these reasons I continue to believe that CAIR is not an appropriate partner for the FBI or any other federal agency. I would assume that the Bureau's policy of not working with CAIR on a non-investigative, and I stress that, non-investigative matters remains in effect. Can you confirm that, please?

Mr. MUELLER. We have no formal relationship with CAIR.

Mr. WOLF. Thank you very much. Recent reports indicate that in 2009 from CAIR Executive Director Nihad Awad to Libyan dictator, Libyan dictator. And I have the letter here which I would like to give you before we leave, which I will submit for the record.

Muslim Peace Foundation (MPF)

611 Pennsylvania Ave., SE
396
Washington, DC. 20003

Date: 23 September 2009 AD

Brother Commander Colonel Muammar al-Gaddafi (May God Almighty preserve and protect him)
Commander of the World Islamic Popular Command
The Great Socialist People's Libyan Arab Jamahiriya

Peace be upon you, and the mercy and blessings of God:

I am pleased to send to Your Excellency in my name most solemn assurances of thanks and appreciation for the efforts you exert in the service of Islam, Muslims and all mankind through your initiative to teach Islam, spread the culture of Islam, and solve disputes, for which you are known internationally.

Today we ask Your Excellency that you have precedence in supporting and backing the launch of the "Muslim Peace Foundation" which is concerned with the concept of dialog and coexistence based upon the principles of mutual understanding and respect among the followers of the divine [i.e. Abrahamic] religions. The "Muslim Peace Foundation" was registered in Washington, the Capital, as a non-profit organization.

I will supervise this promising foundation with the assistance of a group of experts and specialists, and with the support of a number of leaders of American society, who call for cooperation, coexistence and peace, in addition to an advisory council including personalities, among them prominent members of Congress, clerics and university professors.

We anticipate -- with the help of God -- through scientific and practical awareness programs that this effort will be the most widespread and largest of its kind in the West. We have also pointed out in the attached founders' message that the advisory bodies in the Foundation have estimated an annual operating budget of 15 million dollars with an immediate budget for founding and launch limited to 5 million dollars. To continue this Foundation in the long run we are also endeavoring to set up a Waqf which will support the budget of the Foundation for many years, We hope to be able to announce the launch of the "Muslim Peace Foundation" with an official celebration at the start of the new year, in which will participate major personalities of the American and international public.

Your Excellency Brother Commander, may God grant you health and well being. We thank you very much for your generous support for this message. Peace be upon you, and the mercy and blessings of God

Your Brother/ Nihad Awad

ةيملاسإلا مالسلا ةسسؤم

Muslim Peace Foundation (MPF)
611 Pennsylvania Ave., SE
 # 396
Washington, DC. 20003
خيراتلا: 23 ربمتبس 2009 م

هاعرو ىلاعت هللا هظفح يفاذقلا رمعم ديقعلا دئاقلا خألا
ةيملاعلا ةيملاسإلا ةيبعشلا ةدايقلا دئاق
ىمظعلا ةيكارتشالا ةيبعشلا ةيبرعلا ةيريهامجلا

:دعبو ،هتاكربو هللا ةمحرو مكيلع مالسلا

هنولذبت ام ىلع ريدقتلاو ركشلا تايآ ىمسأب مكتماخف ماقم ىلإ هجوتأ نأ يل بيطيف
مالسإلا ةمدخ يف دهج نم
ةفاقث رشن يفو مالسإلاب فيرعتلاب مكتاردابم لالخ نم ءاعمج ةيرشبلاو نيملسملاو
دوهشملاو عازنلا لحو مالسلا
.ايلود اهب مكل

مالسلا ةسسؤم" قالطا ةدناسمو معد يف قبسلا دي مكل نوكي نأ مكتماخف نم بلطن مويلاو
ةينعملاو "ةيملاسإلا
عابتأ نيب لدابتملا مارتحإلاو مهافتلا ئدابم ىلع مئاقلا شياعتلاو راوحلا موهفمب
ليجست مت دقو .ةيوامسلا تانايدلا
.ةيحبر ريغ ةسسؤمك ةمصاعلا نطنشاو يف "ةيملاسإلا مالسلا ةسسؤم"
نيصتخملاو ءاربخلا نم قيرف ةدعاسمب ةدعاولا ةسسؤملا هذه ىلع فارشإلاب موقأسو
تاداىق نم ديدعلا معدبو
مضى يراشتسا سلجم كلذكو مالسلاو شياعتلاو نواعتلل وعدت يتلا يكيرمألا عمتجملا
ءاضعأ مهنم تايصخش
.تاعماج ةذتاسأو نيد لاجرو نيزراب سرجنوك

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نم ربكألاو عسوألا نوكيس
تاهجلا نأب هيط ةقفرملا نيسسؤملا ةلاسر يف انرشأ امكو .برغلا يف هعون
ةينازيم تردق ةسسؤملاب ةيراشتسإلا
ب ددُحت قالطنإلاو سيسأتلل ةيروف ةينازيم عم رالود نويلم 15 اهردق ةيونس ةيليغشت
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مطلع العام الجديد،
.يملاعلاو يكيرمألا عمتجملا تايصخش رابك نم ديدعلا هيف كراشيس ثيح
مكمعد ىلع ركشلا ليزج مكركشنو ةيفاعلاو ةحصلاب هللا مكعتم دئاقلا خألا ةماخف
مالسلاو ةلاسرلا هذهل يخسلا
.هتاكربو هللا ةمحرو مكيلع

Awad appears to be soliciting money for a CAIR project. Long before Qaddafi's brutal and murderous assault on his own people, which has dominated the news in recent weeks, his deplorable human rights record was well known. Political parties are illegal. Organizing or even joining a party can result in death. He has publicly executed dissidents. Freedom of the press is non-existent. According to various respected NGOs he has employed arbitrary arrest, political killings, and disappearances to maintain his grip on power.

In addition to human rights abuses against his own people Qaddafi has engaged in international acts of terrorism against the United States, including the 1986 attack on a discothèque in West Berlin, killing several U.S. servicemen and injuring over 200 others. Two years later was the infamous attack on Pan Am Flight 103, which exploded over Lockerbie, Scotland killing 270 people. In 2003 after denying Libyan involvement for years Qaddafi's regime formally accepted responsibility for the attack. It was this same Qaddafi that CAIR, Mr. Awad, wrote, "I am pleased to send Your Excellency in my name the most solemn assurances of thanks and appreciation for the efforts you exert in the service of Islam, Muslims, and all mankind through your initiatives to teach Islam, spread the culture of Islam, and solve the disputes for which you are internationally known." He went on further with details to set up a Muslim peace foundation, discusses the need to raise $15 million, and thanks Qaddafi for his general support.

Although CAIR's website states CAIR's operational budget is funded by donations from American Muslims, it is my understanding that Awad has made repeated attempts to solicit funding from Qaddafi and other foreign sources. Is the Bureau aware of CAIR's outreach to Qaddafi? And do you know if CAIR has at any point received any funds from the Libyan regime?

Mr. MUELLER. I would have to get back to you on that. I am not familiar myself at this point, but we may.

[The information follows:]

CAIR FUNDING FROM QADDAFI

The FBI can provide this information in a closed setting.

Mr. WOLF. Okay. In the same vein, is the Bureau aware of any attempts by CAIR to solicit funds from any government currently on the U.S. state sponsored list of terrorism? Sudan, which has been involved in genocide. Cuba, which we see has religious leaders in prison. Iran, which aids Hezbollah, which is responsible for the bombing of the Marine barracks in Lebanon. And Syria, who was also responsible. Or any other terrorist organization that would similarly be prohibited under the law? Do you have any indication that they have made any?

Mr. MUELLER. Not to my knowledge. I have to get back to you.

Mr. WOLF. Okay, if you would I appreciate that. And on that last issue, with regard to CAIR, I believe that engagement with a group like CAIR has the perverse effect to giving legitimacy to the very elements in the community that are being most counterproductive by discouraging cooperation with law enforcement to prevent terrorism. But we need the active engagement of the Muslim community. And so I have encouraged you and the FBI to meet with and

involve a large element of the American Muslim community. Bring them in, who have been outspoken in condemning terrorism. Can you tell us how the FBI is reaching out to all of the groups, to bring them in? Because somehow when CAIR is the only one given a dominant power, and I appreciate the fact that the FBI will not meet with them, I think it is important to empower the other Muslim groups to include them. And can you sort of bring us up to speed on what the Bureau is doing with regard to that?

Mr. MUELLER. Since September 11th every one of our fifty-six field offices and the leadership of those offices have had outreach to the Muslim community, as well as other communities. But in the wake of September 11th, especially the Muslim community. Understanding that the worst thing that could happen to the Muslim community in the United States would be another terrorist attack. And that we need the support of that community, and our business is basically relationships. So we have had outreach to all elements of the Muslim American, Arab American, Sikh American communities in our various field offices since September 11th. I, on a number of occasions, have met with diverse leaders from the Muslim communities over the years. We will continue that outreach for the future, and generally the future, not just the foreseeable future, anything but for the future. It is part of the way we operate and work, and it is absolutely essential to not only the Muslim community but to the United States that we continue that process.

Mr. WOLF. I had sent some names over asking that you and top people meet with them. Do you know if those meetings ever took place?

Mr. MUELLER. Yes. I would have to get back to you, but I did look at the list of requests. I believe we have responded. In certain circumstances we absolutely are meeting with the people, and there may be occasions when we are not but it may be because they are out of the country or some other reason. But——

Mr. WOLF. Okay, could you have your people tell us who?

Mr. MUELLER. Yes, absolutely. I would be happy to do that. My understanding is that we have tried to keep your staff apprised of what is happening in each of the cases that you have raised and we will continue to do that.

Mr. WOLF. Thank you. The High-Value Detainee Interrogation Group. The Interrogation Task Force created by the executive order led to among other things the creation of a High-Value Detainee Interrogation Group, or HIG. This function is housed administratively at the FBI and led by an FBI agent. Could you briefly describe the HIG concept and the FBI's role?

HIGH-VALUE DETAINEE INTEGRATION GROUP

Mr. MUELLER. Yes. We have believed in the Bureau for any number of years that we are successful in questioning and interrogating individuals by building a rapport over a period of time. But not everybody is successful at that. I do believe, and have often believed by my time as an Assistant United States Attorney, you have those who are good at doing questioning and those who may be not so good. So the effort in the HIG is to make certain that when we have a person who has a great deal of information relating to terrorism, that we have the best possible team that is doing the inter-

rogation. That means somebody who is a professional. It may well be someone in the Bureau who spent a lot of time as a homicide detective on the street and has done this for years. A person who is a professional in terms of this is all he or she does. Others who may be knowledgeable about this individual and the case, and others who have the background in terms of religion or region, and the like can additionally give context to the interviews. So you develop a course of interviewing this person that maximizes the opportunity of getting the information you want. We have had this concept for over a year now. It was formally encompassed in a directive from the President. Even before then we had put together these teams. They can be from the FBI, DOD, or individuals can be from the FBI, DOD, or CIA, where we get the subject matter expertise, and put together those teams to do interrogations of persons who have substantial information on terrorism.

There are two other areas that are important to the HIG. One is in developing and pulling together all of the literature and experience on interrogations. Remarkable as it may seem there is a dearth of material on what may well be the most effective of legal interrogation techniques. Pulling that together in the sense of having a body of persons who are looking at this and developing new ways of addressing interrogations is essential.

The third area that the HIG focuses on is training. Training for those who are going to be doing interrogations and how to do the most effective interrogations. So those are the three pillars. And it has been operating well, I think, over the last year.

Mr. WOLF. Well I think it makes a lot of sense. And I commend you and the administration for doing that. As you know, I have suggested over and over and over, and over and over to the National Security Council and others that you consider relocating the HIG staff with the National Counterterrorism Center. I know the reason has said, "You know, Wolf, this is a really good idea but we do not have the space." I drove by there. That is in my district. I mean, if you do not have the space and cannot find enough space, take out a couple of vending machines. But do you think it would be a good idea? Has every one, every expert— and I am kind of setting you up here. But every expert that I have spoken to, every single one says it makes sense to colocate the HIG at the Counterterrorism Center because when the information is coming in, and I think the people at the Counterterrorism Center are doing a very good job. There is no criticism meant here at all. But they are drinking out of a fire hose, the number of contacts that are coming in there per day. So by having the HIG team here, that was the purpose of the Counterterrorism Center, to get the stovepipes out and bring everybody together. Would it not make sense to colocate the HIG at the Counterterrorism Center?

Mr. MUELLER. Yes. I have said that before, and I have over and over, but not maybe the third over, requested and sought to colocate. And I will continue to push to do that. I know we had to, absent the ability to move in, find alternative space and we have done that. We are all together. But I will continue to press that.

Mr. WOLF. Well, thank you. And maybe we can carry language in this bill to, Director, but I appreciate that. What is the level of

the FBI resources devoted to the HIG this year? How many positions does the FBI——

Mr. MUELLER. I would have to get back to you. I think it is approximately thirteen including detailees in terms of the staffing. And in the 2012 budget we are asking for eighteen positions and $16 million.

Mr. WOLF. Okay. Well I am pretty sure we will be able to meet that need. And I do not want to get into too much detail, but I think you are right and the FBI is right and the administration is. It is critically important to quickly, effectively acquire this useful material. To what extent in an open forum can you express some of the experiences that HIG has gone through within the last year? Is there anything that you feel comfortable sharing in an open forum?

Mr. MUELLER. No probably I should not. But I will tell you that we have had teams both domestically as well as overseas where we may be doing the interrogation, but participating in it in some way are the agency, DOD, and others, where we have brought subject matter experts together to make certain we have the most effective interrogation team that we can or could put together.

Mr. WOLF. Okay. Maybe during the recess I could stop out? If you could have the HIG people contact staff and we can just stop by, and just talk to them?

Mr. MUELLER. Absolutely, or I would be happy to have them come up to give you a full briefing.

Mr. WOLF. No, that is okay. I will be out and I will just stop.

FOREIGN ESPIONAGE/CYBER THREATS

Mr. MUELLER. Okay. Happy to do it.

Mr. WOLF. One other area. And then I am going to go to Mr. Culberson. Can you just, without me getting into the question, sort of explain to the committee the threat, the cyber threat that we face? And secondly, can you explain to the committee in an open session, and also to the American people, and to the business community, what threat the Chinese government is insofar as cyber, and with regard to intelligence? And we are going to go to Mr. Fattah next, and then Mr. Culberson.

Mr. MUELLER. With regard to the last portion of the request in terms of a particular country, I would prefer to discuss that off the record.

Mr. WOLF. Okay. How dangerous is the overall threat?

Mr. MUELLER. Well the overall threat is exponentially growing each year. And the threat comes from many levels. You have government actors who are seeking to steal secrets from the departments of various government entities. You have the same government entities from other countries who are attempting to steal information from contractors or from the financial institutions and the like. Then you have individuals who are located in foreign countries who may have some loose affiliation with the government services or maybe not, depending on the time of day or their interests. They may be interested in robbing banks, and utilizing cyber capabilities, or assisting government agencies. You have a growing threat from terrorists who want to use cyber capabilities to disrupt the electrical grid and various infrastructure. And then you have

got the high school student across the street who becomes very adept at hacking into a particular business or a particular company, has the skills at a very young age, and does it for nothing other than fun or proving that he can do it, will move in and hack servers or databases in the government or large companies.

That is just stating a very small piece of the cyber threats that we see out there. And for us in the Bureau, our main role in this is determining attribution. You can have victims in every one of the fifty states, but you do not know where the player is. Is the player in Russia? Or China? Or Morocco? Or Turkey, where we found in years past individuals who are undertaking cyber attacks. Our challenge is at the outset. We do not know whether it is economic espionage, espionage, or a crime, so we must come together with those who handle this in the intelligence community, such as NSA, CIA, and the like, and put together a team like we have done at the NCIJTF so that at the outset we look at a cyber attack and try to determine attribution. We then determine whether it is a national security issue or a criminal issue, and then pursue the investigations thereafter.

Mr. WOLF. I am going to go to Mr. Fattah. But just to end, do you think we need almost the Counterterrorism Center, if you will, for cyber? Because there is so much in defense. There is so much, obviously, of what the Bureau does. You are also impacted with regard to banks, and impacted with regard to the private sector. And I know there was one person who came in and worked at the National Security Council. That person left. There seems, it just seems so spread out. Would it make sense, I do not know what, to have an agency? To have a, where is the NCIJTF?

Mr. MUELLER. It is in Northern Virginia. What I would welcome is——

Mr. WOLF. Is every agency there?

Mr. MUELLER. Yes. I would welcome you to visit the NCIJTF and I think you will be impressed in terms of the cooperation that you see for all of the agencies and the exceptional work they do.

Mr. WOLF. Okay.

Mr. MUELLER. And the NCIJTF reaches out depending on expertise in NSA, or other elements of DOD, or FBI, or Department of Homeland Security.

Mr. WOLF. Okay. Well maybe I will do both of them. Do you have somebody from the Federal Reserve there? And somebody from——

Mr. MUELLER. I am not certain that we would have somebody from the Federal Reserve but I know we know who in the Federal Reserve to call and talk to.

Mr. WOLF. But all of the agencies in the government who have an interest——

Mr. MUELLER. Yes.

Mr. WOLF [continuing]. Are all——

Mr. MUELLER. Yes.

Mr. WOLF. Well we will take a look at that. Mr. Fattah.

INDIAN COUNTRY

Mr. FATTAH. Thank you, Mr. Chairman. Part of your budget request is for additional support in Indian country. Native Americans, Alaska natives experience a much higher rate of crime. And

I should note that crime in totality has decreased over your tenure, over this decade, even though when you started we had about 280-some million Americans and now we have something slightly over 300 million. The population has grown but the amount of crime per capita has decreased in all of the violent crime categories that you monitor.

I know Indian country, is a priority for the entire Justice Department, and you have some additional requests. Would you like to comment for the record on those?

Mr. MUELLER. Yes. On 9/11, 2001, when we looked at prioritization, we understood we could not reduce our personnel assigned to Indian country. We maintained the same level, which was somewhat over 100 agents, which was inadequate then. It is, to a certain extent, inadequate today. We are requesting an additional forty personnel or positions in the 2012 budget, of which twenty-four of those positions would be for Special Agents. And again, it is realizing that this is an area in which additional resources will result in additional justice for those who are victims of crime in Indian country. So, that is part of our request.

Also, as we look at the future of addressing crime on Indian country, I have been of the belief that other elements of the government, the Bureau of Indian Affairs and other elements should also be funded and trained to pick up some of the work that is currently done by FBI agents. For a variety of reasons that has not happened. So as a result of the burden still being with us, and maybe appropriately so, that is why we put in the request for an additional forty bodies.

Mr. FATTAH. Well let me congratulate you for the arrest that was made in the Martin Luther King Day parade case in Spokane. Is there anything that you can say about that case? Do we think it is one person, just the person that has been arrested? Or is there some broader concern here?

Mr. MUELLER. Well, the persons who worked on that did a remarkable job in identifying the individual and when the story comes out it will be an interesting story. It is still in litigation so I cannot——

Mr. FATTAH. I do not want you to compromise your position in any way.

Mr. MUELLER [continuing]. Specify the work that was done by the agents in order to identify that individual. But there was one individual arrested but I cannot say at this juncture because the investigation is continuing.

DNA BACKLOG

Mr. FATTAH. Now the DNA backlog. I know you testified in the Senate I guess a couple of days ago about how that is being worked through. But if you would like to make some brief comment for the record today on the DNA backlog?

Mr. MUELLER. Well, we have reduced the backlog in terms of the samples from over a hundred thousand, to almost negligible amounts now, as a result of two factors. One is the additional resources from Congress to hire additional examiners for the DNA lab which handles the taking of the samples and putting it into CODIS. And secondly, technological advances enable us to much

more efficiently process the samples. So we have reduced that to negligible figures.

When it comes to forensic DNA, we still have backlog there. But our expectation is by certainly 2012, and hopefully the spring, that will be reduced to almost nothing. We have made substantial inroads into that backlog as a result of shifting some of the personnel from the injection of the samples over to working on the forensics aspect of the DNA process.

HEALTH CARE FRAUD

Mr. FATTAH. The Attorney General and you concluded at least the initial portion, and the arrest, and the indictments related to the largest Medicare fraud in the country's history a few months ago. There was a major announcement on this. And there has always been I think a blatant acknowledgment by everyone who has looked at Medicare that there was a lot of fraud there. But this was a very significant effort, I guess coupled with one that followed after that with the round up of people involved in Oregon. This is what we would think about as traditional organized crime. But these were two major operations. Healthcare is a big issue here in the Congress. This is an area where there are billions of dollars that could be saved dealing with fraud. And you have started to really aggressively focus in on this. Is this another area where there is more opportunity to pursue wrongdoers?

Mr. MUELLER. There is. And again, it gets down to a certain extent to resources. We leverage our capabilities by working with a number of healthcare fraud task forces around the country. The two incidents you have mentioned are just an example of the work that has been done by these task forces. I do think there is one significant figure, and that is for every one dollar in enforcement cost, you return seven dollars to the government in terms of forfeited funds. So it is worthwhile for the government to fund this because you get seven dollars back for every dollar that you give to us.

VIOLENT CRIME

Mr. FATTAH. And two last things. One is that I know you spoke to the chairman in response to an earlier question about these gang task forces that have had very successful operations, particularly in the suburbs of Philadelphia, an area that you are familiar with——

Mr. MUELLER. Yes.

Mr. FATTAH [continuing]. Because you were raised there, in the Villanova area. But in the entire Philadelphia suburbs there have been very significant activities by one of the gang task forces that led to significant arrests. And that is to be appreciated.

And the last question is, there has been a lot of talk about planes and challenges related to maintenance of planes. We had a plane leaving Philadelphia, and the FBI has now determined that the hole in that plane was a bullet hole. And obviously I am not sure that there is much else that can be said about it. I know that it is being investigated. But it is obviously of concern, and this goes to the protection of our whole civilian aviation program. We have a lot of activities to check passengers going on planes. But whether it is lasers at the pilot's eyes, or whether it is in this instance a

bullet hole in the plane, activities from the ground in and around planes obviously are a concern. So if you have anything to add about this issue? It is a localized one, but one of national importance.

Mr. MUELLER. No, that is something we are following. I know there was some, but I have not gotten briefed in the last couple of days. I know we were investigating and there was some question about the trajectory—whether it was from up into the plane or otherwise. So the trajectory, and the possibilities in terms of where it may have occurred, whether in Philadelphia or was it Charlotte, I think, on the other end? I know we are investigating those aspects.

Mr. FATTAH. Thank you.

Mr. WOLF. Mr. Culberson.

Mr. CULBERSON. Thank you, Mr. Chairman. Director Mueller, we admire you all immensely. It is a real privilege on this committee to help you in your work, and your agents. It is a great source of pride to all of us. We thank you for your service, sir. At the height of the Cold War—Director Mueller I am sorry I do not have your biography here with me—but at the height of the Cold War in the eighties if you think about the level of espionage directed against the United States by the former Soviet Union. Think about the scale of the penetration, the agents, you know, there were only big mainframe computers I guess at that time. So you think about the scale of espionage the Soviet Union was directing against the United States. How can we compare the level of espionage for hostile purposes, the espionage that hits the United States by the Chinese today? To follow up on Mr. Wolf's question?

Mr. MUELLER. Again, as I responded to Mr. Wolf, I would really have to discuss that off the record.

Mr. CULBERSON. Okay. We would very much like to do that. And Mr. Chairman I would be, if there is an opportunity for me to join you?

Mr. WOLF. Sure.

Mr. CULBERSON. In a briefing like that? Or frankly for the committee, I would like to do so. It is a source of great concern, the level of attacks on the United States by the Chinese. And I know by other countries, too. Not just cyber attacks, but also individuals attempting to get into the United States to commit another 9/11 attack if they can do so. And in prior years I have talked to about, and I want to thank you again for the work that the FBI is doing in particular watching the northern and southern Borders. And I know several years ago had congratulated the FBI's office in San Antonio for some work they had done in intercepting I think members of Hamas, is that correct? They were coming across the southern border?

BORDER SECURITY/TERRORIST THREATS

Mr. MUELLER. I think several years ago we had a discussion about an incident where we believed that there may have been persons associated with Hezbollah that had come across the southern border.

Mr. CULBERSON. Hezbollah? That the FBI office in San Antonio had apparently taken the lead in catching those folks?

Mr. MUELLER. I am not certain which office.

Mr. CULBERSON. Right.

Mr. MUELLER. That may well have been.

Mr. CULBERSON. Talk to us if you could, sir, about the, to the extent you can do so in an open hearing, that has, about the number of individuals from countries, special interest aliens from countries with known connections to terrorism that the FBI has, is aware of that have been apprehended by any federal law enforcement agency crossing the southern or northern border?

Mr. MUELLER. I can't give you here any figures. I think DHS will have to get back to you on the numbers. I can tell you that we are concerned about special interest aliens coming across the southern borders and the northern border as well. One tends to focus on the southern border, but we have to be aware of the challenges in the northern border, as well. In both borders we cooperate closely with Customs and Border Patrol, in terms of identifying these individuals and making certain that they are interviewed and evaluated, and then I have some say in what happens after they have been apprehended and where do they go after that. With a close relationship, we have agents that are stationed along the border whose principal responsibility is to, once identified, either by us or by others, to then interrogate and gather what intelligence we can and then perhaps weigh in on what should happen to the individuals in the future.

Mr. CULBERSON. The *Eastern Chronicle* just reported that there are 900 special interest aliens from 35 nations with suspected ties to terrorism that have been apprehended along the southern border between Texas and California, at least in the last 17 months, and quoted an independent analysis by a Vanderbilt political scientist, Carol Swain, and it found a 67 percent increase in arrests of border crossers from suspect nations that they had, border patrol has picked up. Could you just give us some examples to help heighten the awareness of the country and the Congress to (a) the scale of the problem, and (b) the type of people that are crossing. Are there any examples that come to mind?

Mr. MUELLER. Well, I don't think I have any in mind. Not one I could talk about in open session. I will tell you that we've had examples of individuals coming in from Somalia. We've had examples of other individuals coming in from suspect countries, but when you sit down, you interview them, you find that they may be from clans that are really, the persons are seeking asylum. They may come from a country that has been designated as a safe haven for terrorism, but the individuals once they come in, may well have no association whatsoever with terrorism. Nonetheless, they come from that same suspect country.

Mr. CULBERSON. What I'm searching for is some ammunition that you can talk to us about publicly and we can use in the debate to help heighten the awareness in the country, the importance of securing the border in, not only to keep out the drugs and the gangs and the violence, but terrorists.

Mr. MUELLER. Well, you know, what I can perhaps do, but it would have to be off the record is talk about specific incidents.

Mr. CULBERSON. Okay.

Mr. MUELLER. All I can tell you is that, needless to say ourselves, the Department of Homeland Security, and other intel-

ligence agencies are concerned about the possibility of special interest aliens coming across both borders, and we have had incidents where, apart from identifying the persons coming through, we've had some intelligence that there has been discussion about operatives coming from Pakistan or Somalia or Yemen, in utilizing the southern border to come into the United States.

Mr. CULBERSON. Has that happened yet?

Mr. MUELLER. There's been intelligence out there.

Mr. CULBERSON. But it has?

Mr. MUELLER. Again, off the, I can't——

Mr. CULBERSON. We'll talk off the record.

Mr. MUELLER. Yes, sir, talk about incidences.

MURDER OF JAIME ZAPATA

Mr. CULBERSON. Could we also, and forgive me, Mr. Chairman, for running late with multiple hearings on top of one another, if you've already discussed the murder of the federal agents in, ICE agent Jaime Zapata who was slain north of Mexico City. Have we talked about that yet? I wanted to ask what progress the FBI is making in hunting down his killers. His partner was wounded. I see that the FBI just arrested, charged and arrested ten alleged Mexican gang members with murdering the two Americans, a U.S. Consulate employee and her American husband, and a Mexican man who had U.S. ties to a U.S. Consulate in Ciudad Juárez. But in particular, Special Agent Zapata.

Mr. MUELLER. That investigation is ongoing and working from the moment it happened, our Legal Attaché Office was on the scene very shortly afterwards and has been working with our Mexican counterparts to make certain that those who are responsible seek justice. We have had access to the evidence from the scene. We have had access to the scene itself. We have been working with the Mexican authorities to make certain that everyone involved in that sees justice.

Mr. CULBERSON. We have in the, Brandon Analysis has, was had to help me calculate the number of deaths per thousand during the Mexican Revolution 100 years ago and today on a level of violence it's far worse today than it was at the height of the Mexican Revolution 100 years ago, and it appears as though there is literally a full scale war going on right across the border in northern Mexico, and the level of violence is just unprecedented, an extraordinarily dangerous situation that in addition to the threat from terrorists crossing the border, individuals with connections to, individuals from countries with connections to known terrorist organizations, the, talk to us about the scale of the violence. It certainly appears to be a war going on right across the border, and give us some sense of the level of violence that we see going on in northern Mexico.

Mr. MUELLER. I think the homicide statistics speak for themselves, in places like Juárez and elsewhere. I would not call it a full scale war. I would say there are full scale warring factions that utilize homicide as a mechanism of retaliation, staking out one's turf and retribution, that have contributed substantially to the number of deaths in Mexico, even though the military and the police, have undertaken substantial efforts to address it, and it's cer-

tainly not under control at this point. I know we are providing substantial support, particularly intelligence support to our counterparts in Mexico, and everybody's hope is that we'll see reductions down the road.

Mr. CULBERSON. Is the level of violence unprecedented? It's got to be——

Mr. MUELLER. I think it's fair to say it's unprecedented. You know the last couple of years have been particularly bad. Yes, I would say it's probably unprecedented. Now I can't go all the way back to the earlier wars, but I would say the violence is very difficult.

Mr. CULBERSON. Thank you very much, Mr. Director, for all that you do. Thank you, Mr. Chairman.

Mr. MUELLER. Thank you.

Mr. WOLF. Mr. Serrano.

Mr. SERRANO. Sorry that I was late. I was at another hearing. I understand that this is probably your last hearing before this Committee.

Mr. MUELLER. Yes, sir.

Mr. SERRANO. And I just wanted to tell you that I value the service you've given our country, and the way in which you handled it, and as I said to you when I first met you, and I've said to colleagues of mine throughout the years that I've been in Congress, I represent a District in the Bronx, but I also have great interest in what happens in the Commonwealth of Puerto Rico, and in the Commonwealth the FBI has had a mixed history. You've been very fair in maintaining an open dialog on Puerto Rico, and for releasing many of the documents that you were able to make public about a difficult time, the relationship between the FBI and the independence movement in Puerto Rico, and I want to thank you for that.

Mr. MUELLER. Thank you, sir.

Mr. SERRANO. I think there's much more information. It's a desire to, not to repeat history, and you played a major role in it. Also, I don't know if anyone asked you, but I know you continued a program, which was very impressive to me, of taking new agents to the Holocaust Museum. I don't know if that was brought up, but that's very impressive that you continued, then you grew, and you expanded that program to show people what happens when government misuses its power.

Mr. MUELLER. Louis Freeh deserves the credit for that, and he——

Mr. SERRANO. Tell him every time I see him on the, you know, but I wanted to thank you, sir, again and I'm so tempted to tell about our running day after election joke, but I don't know if you want me to say that or not.

Mr. MUELLER. You can go ahead.

Mr. SERRANO. I've got to tell you. This is great, ladies and gentlemen, Mr. Chairman. So I'm the most Nervous Nelly about doing things right, and not only do I do things right, but then I worry that somebody thinks I didn't do things right, you know? And I get a call from the Director the day after election. He says, "Congressman, I just think it's fair to inform you that we're starting an investigation on you." Of course, I had a heart attack. I fell down off

the chair. I said, "I didn't do anything wrong. What did I do? What's the issue?" "Just anybody who wins with 95 percent should be investigated."

Mr. MUELLER. I don't recall it exactly that way, but——

Mr. SERRANO. All I know is I fell off the chair and it's become an ongoing tradition, and he called me when I went to 94 percent. What was going on. It is a great story, but it shows that the FBI Director can have a sense of humor. But I do want to thank you and I want to ask you a question here. I've asked you this question before. You've given us the right answer, but it needs to be asked. You, after 9/11, and I was on the Committee then, we, in many ways Congress asked you, the FBI, to refocus your attention to terrorism, and we always wonder what happens to the ongoing investigations on white collar crime and drug issues and so on? Has that suffered at all, or has the FBI been able with its resources, to do that which has to be done in the area of terrorism, which is top priority, but also not have, you know, major drug dealers celebrating and saying, "They're not after us now."

TRANSFORMATION OF THE FBI SINCE 9/11

Mr. MUELLER. Well, as I think I've testified before in the wake of September 11th, we moved 2,000 agents from the criminal programs to the national security programs, principally counterterrorism. Of those, approximately 1,500 came from the drug programs. Another 500 came from doing smaller white collar criminal cases throughout the country. I met with Special Agents in Charge because I was relatively new. They were much more knowledgeable, but we had to prioritize, so we did. We have not had a back fill those 2,000 criminal bodies. Currently we have 50 percent doing national security and 50 percent doing the criminal programs. At the time, we worked closely with DEA so that no investigations would be dropped, and we worked with State and local law enforcement to set up programs, to the extent possible, for them to address smaller, white collar criminal programs. Over a period of time, when we had the variety of threats whether it be cyber or health care fraud or the mortgage fraud crisis, the Madoffs of this world, counter terrorism, or the Russians who we picked up last year who were living clandestinely here in the United States, we've had to prioritize and some things have suffered, and some things quite probably have fallen through the cracks. But I think where we are today is where we should be for the foreseeable future, and that is 50 percent doing the criminal programs, 50 percent doing the national security programs.

FY2011 CONTINUING RESOLUTIONS

Mr. SERRANO. Well that's, I think it's again, in keeping with my respect for you, that you would admit that some things may have fallen through the cracks, but there is a move to make sure that doesn't happen in the future or we continue to tighten up on it. You know, an issue that of course you don't discuss but there is a possibility of a government shutdown, assuming there is one and it lasts longer than, there should be no government shutdown but if it lasts longer than people think it will last, how will that affect

you? I mean, do you have to then with less resources concentrate just on some issues and then others stay aside?

Mr. MUELLER. We're going to have to look at it day by day. I can tell you that it is already adversely affecting morale at the Bureau because a number of our people don't know whether they will be here on Monday, don't know whether they'll get paid, and it is tremendously disruptive to somebody who has given their service to a place like the Bureau. I do expect that our investigations will continue unhindered. We will do everything we can to support that, whether it be training or coordination. New initiatives, will all have to be put on the back burner if there's a government shutdown, and we'll have to evaluate it day by day. It is taking a substantial amount of effort from our administrative people today to try to anticipate what will happen if there is a government shutdown, and that effort which could be spent elsewhere, will continue to have to be spent as a result of whatever shutdown there is in the days and weeks to come.

Mr. SERRANO. Yeah, and I can understand that because one of the issues that we're facing here is there's no such thing as unessential members of our staff. I mean, in your case, how do you tell, you look at a group of 100 agents and say, "You 50 are essential, and you 50 are not." Imagine what that does for the 50 who are not essential.

Mr. MUELLER. It's difficult.

Mr. SERRANO. Let me ask you a quick question on my other District. The FBI is building a new facility in Puerto Rico, and I understand the GSA, which we just had a hearing with GSA in the Subcommittee that I'm Ranking Member on, has $145 million dollars for the construction of the facility. Did the FBI consult with GSA about the funding, and is this——

Mr. MUELLER. I'm sure. Actually, I'm going to be down in Puerto Rico visiting that office in the near future, and that's one of the things on the agenda to talk about. But yes, I'm sure we do not do anything without GSA.

Mr. SERRANO. Okay. I can understand.

Mr. MUELLER. When it comes to buildings, I mean.

Mr. SERRANO. Okay. I have no further questions, Mr. Chairman. Thank you.

ELECTRONIC SURVEILLANCE

Mr. WOLF. Thank you, Mr. Serrano. I have some budget questions here. You've included a new increase request to establish the Domestic Communications Assistance Center. Other Department of Justice agencies have also requested FY 12 increases for this effort. What is this center, and why is it needed?

Mr. MUELLER. This goes to one of the issues that I should have mentioned in response to one of the earlier questions that we have to look forward to in the future, and that's what we call "going dark". By that I mean that we face an inability to intercept or obtain the results of interception of conversations given the growth in technology. Back in the 1990s, the statute was passed that required communications carriers to provide communications to the federal government pursuant to a court order and then you had people like AT&T, Verizon, and the like, who are the only commu-

nication carriers around. Today you have Google, Facebook, Microsoft chat and you have any number of ways that you can pass communications. We will go to court and get an order directing a company to provide us those communications. A company will say, "We don't have the capability of doing that." What we are looking for is legislation to address that increasing gap where companies do not have the capability of providing those communications to us, pursuant to a court order. This particular entity that is being established would have state and local participation, along with other federal agencies to address this particular issue of how we can assure that when there is a legitimate court order, whether it be from the FISA court, a Title III court, or from a State court, the companies that provide communications capabilities to persons have the ability to respond to those court orders.

Mr. WOLF. There are budget requests from other justice agencies for this same effort. Will the FBI have the lead role there?

Mr. MUELLER. Yes.

Mr. WOLF. Then you will have the lead?

Mr. MUELLER. Yes.

Mr. WOLF. And will they share some of the financial burden, too?

Mr. MUELLER. My hope, yes.

Mr. WOLF. Your hope? Okay.

Mr. MUELLER. I hope it's yes.

VIOLENT GANGS

Mr. WOLF. I have a number of questions on the violent gangs. But you know how I feel and Mr. Fattah feels. I really hope that you will embed a strong program with regard to the gang issue that continues after you leave. You know, we may do some language in the bill with regard to that. But I really worry, particularly the question that Mr. Culberson asked. The violence south of the border is pretty extraordinary, and I can remember taking my entire family driving through Mexico with all of my children. We went to, you know, Mexico City. We drove through the entire, not through the entire country, a large portion. You couldn't do that really today, and I worry that it's moving north, and the killing of the two Americans just at the border crossing. So I really hope that there can be——

Mr. MUELLER. I believe any one of my proposed successors would have gangs as one of the top priorities. I do not expect that my successor would change much in the way of priorities, and gangs is very high at the top. We have so many persons in the Bureau who have worked on this over a period of time and believe strongly that this is a function that the Bureau should have. I cannot really anticipate any diminished effort when it comes to addressing violent gangs.

FBI/ATF EXPLOSIVES INVESTIGATIONS JURISDICTION

Mr. WOLF. Coming then to the other side of the coin with regard to lack of resources, the issue of jurisdiction over explosives investigations has been a divisive issue within the Justice Department. There have been previous efforts to resolve and including instructions by the Deputy Attorney General. The OIG has also looked at the issues several times and continues to have concerns. The over-

lap and confusion, you were talking earlier about if there is a good spinoff from these budgetary matters it would be that we are not going to have any overlaps. The IG also looked at the issues and said, "The overlaps and confusion have also been identified by GAO as a potential source of cost savings, if we were to eliminate the duplication and combine capabilities." What is your assessment of the current arrangement, and what can be done to streamline operations and reduce confusion and also to save money, and is there an active effort? I know periodically you will see articles in the newspaper about an active effort in the Justice Department to resolve the issue.

Mr. MUELLER. Yes. I think the IG report and the like predated the Deputy Attorney General's action on those recommendations and he, several months ago, issued a directive that outlines the lanes in the road when it comes to explosive investigations, but also goes further in assuring that ATF has a presence on our Joint Terrorism Task Forces. Basically in brief summary, any explosion or explosive incident that may be tied to terrorism is handled by the Joint Terrorism Task Force. On the Joint Terrorism Task Force are ATF agents. Any explosive incident that has no ties to terrorism goes to ATF, and so it's a fairly clear guideline for both agencies. It's been in practice several months now, and as I travel around, I ask the question, "How are we doing?" and my belief is that it's gone a long ways in solving the problems that were pointed out by the IG.

Mr. WOLF. So you think the issue has been resolved?

Mr. MUELLER. Yes, I do. The actions of the Deputy Attorney General in this particular area has resolved that issue.

Mr. WOLF. If the head of the ATF were up here would he say, give the same answer, do you think?

Mr. MUELLER. Both of us probably didn't get everything we wanted, which is always the case. But I think he would also say that it has been resolved.

Mr. WOLF. Well, you can see in the, this Subcommittee has really made an effort to make sure that your efforts are completely funded. I know that. But when you do see this overlap with ATF as you're giving up certain things, they are a capable agency that can do this work. I think if they're doing their work, I'd rather see the FBI rounding up al-Awlaki or dealing with MS–13 or if there's somebody else always working on that area. But if you say the issue's been resolved.

Mr. MUELLER. Can I just comment briefly on that? I am not at all reluctant to give up jurisdiction in areas which I think should be with other agencies, and I've done it over a period of time, both at the Bureau, but also at the Department of Justice. In this particular area though, at the outset of an explosive incident, you do not know whether it has ties to terrorism. You take something like the backpack up in the Martin Luther King holiday in Spokane, Washington. Initially that is investigated by the Joint Terrorism Task Force, including ATF, and it turns out to be a domestic terrorist incident. So I would say that the guidance from the Deputy Attorney General leads to a presumption, where there is a list of factors that seem to indicate that it's a terrorist attack, then the Joint Terrorism Task Force would take it at the outset. If it is clear

it has nothing to do with domestic terrorism or international terrorism, then it goes to ATF. And I would say that because of our capabilities, our handling of devices with the context of a terrorist plot perhaps in mind and the experience we've had dealing with IEDs in Afghanistan and Iraq, as well as in the United States, that when it comes to a terrorist incident, we have the capability and the greater backdrop and context of terrorism to investigate those cases.

SENTINEL

Mr. WOLF. Okay. On the Sentinel issue, I think we just have to get into that because one of the biggest challenges and I'm sure the frustration has been the automation as you mentioned earlier of the FBI's case files. Last year you issued a full stop work order on the contractor, and I understand you brought the management of the project in-house. Can you describe what the problem was that led to that decision and was the contract not going to deliver the desired outcomes within the existing budget?

Mr. MUELLER. Well, the answer to the last question was yes. It would not deliver the desired outcomes under budget or within a reasonable time frame, so we sought alternate solutions. We got into this when the contractor delivered Phase Two to us. We found that Phase Two did not have the functionalities that we had paid for. The question is why didn't you pick this up earlier? The fact of the matter is, in the first phase and various iterations in between, you get to the deadline and it would be produced and prior to the delivery of the second phase, we anticipated that when we got it it would work fine, but we found that it did not. There were coding errors and other issues that required us to go back with the contractor and get those resolved. We then looked around and determined how we could be more efficient in handling the contract. We put in a partial stop work order for the balance of the contract, and developed thereafter what we call an "agile" development capability, which is a different way of developing a software capability. We've been using this now for maybe six months, and I am comfortable that the smaller team is responsive to the needs of the field and is providing to us at a much reduced cost, the functionalities that we need based on the original contract. Part of my frustration goes to the procurement policies of the government in the sense that in 2004, 2005 we entered into a contract for millions of dollars, with a set of requirements that are developed at and for the workforce of 2004, and yet is a five year contract, and over those five years a number of things changed. The technological capabilities in the workplace are advanced. Our business practices changed and inevitably the contracts change over a period of time. But when you have such a large, timely expensive contract like that, you cannot be adept and agile in responding either in the change in business practices or the change in technology. So the new way of proceeding with the contract gives us more flexibility to develop and adopt the technology going almost in every case, using the provider of the technology as opposed to a middle man, and it also is much more responsive to the business needs of today, as opposed to the business needs of 2004. I am cautiously optimistic that we're on the right path in terms of providing a case

management system under budget, or at the budget figures that we arrived at four or five years ago.

Mr. WOLF. Do you believe the FBI has the in-house technical project management expertise?

Mr. MUELLER. At this juncture, yes, and we also have persons from the outside that are monitoring every step.

Mr. WOLF. Well, here's the concern that I have. The OIG contends that your defined budget of $451 million does not reflect the true cost of the project because it does not provide the cost for maintaining the system for two years as the original budget plan did. Do you agree with this statement, and if those two year maintenance costs are included, what is the full life cycle cost of Sentinel, of it today?

Mr. MUELLER. I'm not that familiar with that particular issue. I will say that we've had some disagreements with the IG in terms of what is encompassed within the $451 million dollars. I'd have to get back to you on that particular issue.

[The information follows:]

SENTINEL FUNDING BREAKOUT

The FBI has estimated the cost of the Sentinel project to be $451,000,000, which takes into consideration the necessary precautions for any information technology development effort. This amount includes funding for development support, program management, operations and maintenance, risk management, and independent verification and validation. Additionally, Sentinel Agile development is currently within the alloted budget amount and is on schedule. A briefing of Sentinel's capabilities will be provided within the next couple of months.

Mr. WOLF. Okay, well who is the manager now of Sentinel? What is the person's name and his background? Who is the person that now has been brought in-house to head it?

Mr. MUELLER. Well, T.J. Harrington is in charge of the whole thing.

Mr. WOLF. What's his background?

Mr. MUELLER. Well, he's an accountant. I can get you the background.

[The information follows:]

BIOGRAPHY—THOMAS J. HARRINGTON—ASSOCIATE DEPUTY DIRECTOR

On August 13, 2010, Director Mueller appointed Thomas J. Harrington to the position of associate deputy director.

Prior to his appointment, Mr. Harrington served as the executive assistant director of the Criminal, Cyber, Response, and Services Branch, the largest operational entity within the FBI, which is composed of the Criminal Investigative Division, the Cyber Division, the International Operations Division, the Critical Incident Response Group, the Office of Law Enforcement Coordination, and the Office of Victim Assistance.

Previously, Mr. Harrington served as the associate executive assistant director for the National Security Branch (NSB). During his tenure in this position, he also played an integral role leading the Strategic Execution Team, which Director Mueller established in September 2007 to build on and accelerate the FBI's efforts to enhance its national security mission.

Mr. Harrington also served as the deputy assistant director (DAD) for Counterterrorism, Operational Support Branch. During his tenure as DAD, he had administrative oversight of the division, as well as managerial responsibility for the Foreign Terrorist Tracking Task Force, the Counterterrorism Operational Response Section, and the National Threat Center. He also played a major role in the establishment of the NSB in 2005.

From 1999 to 2002, Mr. Harrington managed the organized crime/drug and violent crimes/major offenders programs as the assistant special agent in charge of the

Philadelphia Division. While serving as a supervisory special agent in the Philadelphia Division, Mr. Harrington led the economic crimes squad and was the white-collar crime coordinator. Mr. Harrington was instrumental in the proposal and subsequent establishment of a a Russian/Eastern European criminal enterprise squad in Philadelphia.

Mr. Harrington began his career as an FBI special agent in September 1984. Following a period of training, he was assigned to the FBI office in Denver, Colorado. In Denver, Mr. Harrington specialized in white-collar crime matters, and more specifically, financial institution and securities fraud. In June 1991, he was assigned supervisory duties in the Criminal Investigative Division at FBI Headquarters in Washington, D.C. As part of his Headquarters assignment, Mr. Harrington oversaw the FBI's national insurance and securities fraud intitiatives.

Mr. Harrington is a 1978 graduate of Mount St. Mary's College, in Emmitsburg, Maryland and a 1990 graduate of the Stonier Graduate School of Banking, American Banker's Association, University of Delaware, Newark, Delaware. Mr. Harrington received the Presidential Rank Award for Distinguished Executive in 2006.

Mr. WOLF. How many project managers have there been over the life of the project, and where are those individuals now?

Mr. MUELLER. I would have to get back to you, possibly two or three.

[The information follows:]

LIST OF SENTINEL PROGRAM MANAGERS

Mio Lazarevich—3/16/06–6/15/07 (Phase I)
Dean Hall—6/16/07–10/14/07
Steve Shelton—10/15/07–10/15/10 (Phases 2&3)
Jeff Johnson—9/15/10–present (Agile)

Mr. WOLF. I think that is part of—you know, I was out in my district. And I went into one location. And we were doing a town hall meeting. And I looked at this guy. And I recognized him. I said, "You look just like." He said, "I am that person." He is gone. He is out. He is moving.

So I think you have had such a——

Mr. MUELLER. I think you are talking about—well——

Mr. WOLF. Well I think you have had such a turnover there. And the concern is did he come from outside?

Mr. MUELLER. Yes.

Mr. WOLF. Did he sign a contract that he will stay for the next five years? Because you have had one year, two years, three, and then they go. I remember the first gentleman you had I believe he was from Utah, if my memory serves me.

Mr. MUELLER. Yes.

Mr. WOLF. He used to live in Oakton. I can recall another person. And then I can recall the person that I saw a couple of months ago.

Mr. MUELLER. That probably was Zalmai Azmi. He would have been there for a period of time.

Mr. WOLF. Yes, it was. And I think they change so often. And I really worry about bringing someone in. I mean, is he going to stay? Is he in the——

Mr. MUELLER. For the life of this project, yes. But you are talking two different things. One is the CIO.

Mr. WOLF. Yes.

Mr. MUELLER. Chief Information Officer.

Mr. WOLF. But that is their responsibility too though.

Mr. MUELLER. Yes. The person I have in that responsibility now is Chad Fulgham. He is an Annapolis graduate. He was involved

in electronics in the Navy over a period of time. He went to Wall Street for a period of time and then came to us two years ago. He will remain for the period of this contract I believe.

But the fact of the matter is one of the hardest things for any of our agencies to do is keep qualified personnel as CIO, because with what we pay them compared to what they can make out on the street, it is tremendously different.

Mr. WOLF. Yes. I am not really totally sympathetic to that though. I think, you know, your people really do an incredible job. And they do it because they are dedicated to the country. If everyone just went to where they had the highest salary.

I was very disappointed once. One of your counterterrorism people came in. And I thought he was a wonderful selection. And then I found out he was going to work for the gambling industry. I mean, how depressing.

So, yeah, your people could go out and work for the gambling industry in Vegas. But that is not what they are. That is not who they are. So just because you can make—you could have made more money.

Mr. Director, you could have quit in five years. And you could have gone home and told your wife I am leaving. I am going to go with one of the biggest law firms on Wall Street. You could have named your price. You didn't do it, because you are a patriot. And your family stayed in there. And I know your people.

I mean at church I think you have ten agents that go to my church. When I am out in wherever I am in my district, men and women come up to me. They are good people. And I know. I will guarantee that if somebody said, okay, at 48 we can take you here. Most of them say, no, we are not going to go. They are committed.

The same way we have very many people in the American military in Afghanistan, and Iraq, and places like that who could go out. But they don't go out, because they stay. So I think it is not really that.

I think there has been too much of a change in the program. And I would hope, you know, and I want, you know, their names publicly. And I stipulate if you think they are good people they must be. But I think we are going to continue to check are they still there, or did they leave to go out for a bigger salary or a better salary? This has been really a difficult issue.

And I know you have put a lot of time in on it. And I know Glenn Fine has done more, you know, comments about it. But it really has to be done right. So I hope who they are stay and stay until they can salute to the next director or whoever it is and say, you know, job well done. This thing is finished. It is a good program. The American taxpayer got the money. The Bureau can do what they need to do with the effort. But I think you have had too many changes.

Mr. MUELLER. Well let me if I could say something about the work that Chad Fulgham and his predecessors have done. People tend to look at Sentinel and should, because it is a substantial project.

But in terms of our database structures, we have come from—through some difficult times. We now have the latest generation of work space. We have, over 25,000 people who are on BlackBerries.

We have internet access. We have come a long ways in a relatively short period of time technologically.

One focuses on Sentinel. I understand that. But one also ought to focus, on the advances we have made in all the other areas of technology that our current CIO and his predecessor are responsible for.

Mr. WOLF. But when Sentinel finishes, assuming it is finished well——

Mr. MUELLER. Yes.

Mr. WOLF [continuing]. What will the total cost be?

Mr. MUELLER. $451 million. That is my hope.

Mr. WOLF. That is a half a billion.

Mr. MUELLER. Yes.

Mr. WOLF. From the very beginning.

Mr. MUELLER. Yes.

Mr. WOLF. So in your overall——

Mr. MUELLER. But we don't have any new case management——

Mr. WOLF. Right. And I think it is appropriate. And the committee has always funded that. But I think the change, and the turnover, and the people that I have talked to over the years, I keep seeing different people.

And I just hope the people that are there now, I don't know if the gentleman is in the audience or not, but I hope that they stay with this until it is concluded and finished. And they can turn an ongoing program over for the American taxpayer. And so your men and women can do the best job with it.

But there has been a lot of turnover. And I know the Bureau people don't want to leave and go work for the gambling industry. Not only do they not want to go for—and you don't want to go downtown to work for a big law firm that is representing China or doing something like that, because your people are committed patriots. They do the best thing for the country.

FBI ACADEMY

On the training issue, your request for fiscal year 2011 included an increase of $74 million to renovate facilities at the FBI Academy, including the construction of a new dormitory and classroom space. This funding has not been provided. And given the current status of fiscal year 2011 appropriations, it looks like the funding may not be.

You testified last year that the academy was in a maximum-service capacity. How are you managing without the funding? And what are your plans for fiscal year 2012 and beyond?

Mr. MUELLER. It is like any infrastructure enhancement. It is needed. If you don't get the funding for it, you just delay. But your infrastructure crumbles around you. Quantico was built in the 1970s, I think. Most of the dormitories and the like are crumbling. So we are pushing money in to fix up the falling concrete, the disrepair. But we need the additional building to augment that.

Again, it goes back to when we are asked to build an intelligence capability in the Bureau, which means now having 3,000 as opposed to 1,000 analysts, including having to train those 2,000 additional analysts, including setting up a training program. That means personnel, but it also means building expenses and costs.

We have new agents classes. We have the analysts that need to be trained. We have state and local law enforcement. One of the gems of the Bureau, if you talk to state and local law enforcement, is the National Academy.

Mr. WOLF. I agree.

Mr. MUELLER. I refuse to cut anything out of the National Academy, because we are training state and local law enforcement. We are also training the middle managers of our counterparts overseas. It is one of the most effective programs in my mind for identifying the future leaders of police forces, whether it be in Asia, or the Middle East, or what have you. And giving us a leg up in the future.

So the training of the National Academy, the agents themselves and the analysts, all take space. And that is why we requested the funding for this building. If we don't have it. Then we will go along. I think, if I am not mistaken, we have occasions where we are using a motel to house people because we don't have the space down at Quantico.

FOREIGN LANGUAGE TRAINING/MATERIAL REVIEW

Mr. WOLF. You have had a difficult time finding or training enough agents, analysts, and linguists with critical language skills especially Arabic. Could you bring the committee up to date on the progress of hiring and training?

Mr. MUELLER. Yes. I don't have the statistics with me today, but we have done better over the last few years but not as good as I would want. I would have to get you the statistics on that.

[The information follows:]

RECRUITING AND TRAINING AGENTS, ANALYSTS, AND LINGUISTS WITH CRITICAL LANGUAGE SKILLS

The FBI Foreign Language Program aggressively recruits linguists throughout the United States, targeting heritage-speaker communities. Language-specific advertising is launched in local publications where a recruiting event is set to occur to inform the public of recruiting events. Rudimentary initial screening occurs on-site to triage eligible potential linguists candidates who are then fed into the formal applicant process for proficiency testing and security vetting. The FBI has also partnered with the Office of the Director of National Intelligence to recruit linguists. Recent FBI and FBI/ODNI efforts have produced over 1,000 candidates who have been added to the pool of applicants currently in process by the FBI.

The FBI Foreign Language Program maintains a robust training program for each of the three targeted employee groups. Special Agents and linguists are offered long-term training at the U.S. Department of State Foreign Service Institute and Special Agents may be selected for overseas training with international partners. Various other types of foreign language training designed to meet specific job criterion are provided through multiple commercial and academic vendors. Training opportunities are announced via an annual Open Season call for candidates. Critical languages, such as Arabic, are given priority placement with leadership concurrence.

The Bureau has increased the number of linguists in all languages by 74% since 9/11/2001. The number of Arabic linguists has increased by 243%, while the number of agents proficient in Arabic has increased by 134% during the same period.

Mr. WOLF. Because the OIG found last year that there were substantial amounts of unreviewed foreign language material that you had collected. And the question was is this directly related? And I think the answer is yes to your challenge of hiring those qualified.

Mr. MUELLER. I think that was several years ago. And I believe that we have responded to that.

[The information follows:]

OIG REPORT ON UN-REVIEWED FOREIGN LANGUAGE MATERIAL

The OIG Report provided documentary evidence of the difference between the volume of material collected and the amount of material processed by the FBI. The FBI acknowledges there are un-reviewed foreign language materials; however, the Foreign Language Program works closely with the Bureau's operational components to ensure the highest priority matters are always covered. The FBI's struggle to hire qualified linguists rests on the reality that: few of the critically-needed languages are taught in the United States education system to the proficiency levels required for FBI work; there is a finite population of native-speakers of the foreign language from which the FBI draws the majority (95%) of its linguists who can successfully complete the rigorous proficiency testing; and there are security vetting standards which the FBI requires to insure the accuracy of the final English-language product, as well as the safeguarding of national security information. On average it takes 12 applicants to yield one linguist and may take as long as 19 months, owning to the thoroughness of the background processing required.

Mr. WOLF. I think it was last year.

Mr. MUELLER. I will check on that, but I know we have a response to the IG on that particular issue. As is usually the case, and I can say in almost every instance, we move very quickly on the recommendations that come out of the report. And rare are the occasions where we don't agree on a particular recommendation.

CENTRAL RECORDS COMPLEX

Mr. WOLF. On records management, in the past this committee has supported the Bureau's efforts to improve management of its central investigative records and to automate those records so agents and analysts can share information more easily.

I understand the fiscal year 2012 GSA budget request includes initial funding for construction of a facility. Can you give us a quick update on the status of the program?

Mr. MUELLER. I would have to get you more of the details. I know we, again, are looking for the funds so that we can start the construction of that central records complex that we have been seeking for, I think it may have been at least six–seven years now.

[The information follows:]

CENTRAL RECORDS COMPLEX (CRC) UPDATE

GSA's FY 2012 Request to Congress includes $97 million to construct the Central Records Complex for the FBI.

Mr. WOLF. I think it has been, yes. And what has it meant that you haven't been able to do that?

Mr. MUELLER. We cannot be as efficient as we want. I know one of the issues that people raise is FOIA for instance. We have become far more efficient with FOIA, but we have records going back, probably not 100 years now, but many years. But we get probably more FOIA requests, than just about any agency in the country. And yet we are still paper records based.

And to the extent that we can get a centralized records facility that would enable us to automate, scan, and better access those records, we can be responsive to FOIA as well as to our own internal searches where we need to find information, on a terrorist case, an espionage case, or a white-collar criminal case.

Mr. WOLF. So you are continuing the work involved in completing the inventory and file destruction program to prepare for the eventual move?

Mr. MUELLER. Yes.

Mr. WOLF. Okay. And that space will be backfilled in Washington?

Mr. MUELLER. We have moved people out to Winchester.

Mr. WOLF. How much of that is still in the main building?

Mr. MUELLER. There is some still down in a facility down south of Washington, D.C. I am not sure what percentage is left there, but headquarters, everyone is out in northern Virginia.

LEGAT OFFICES

Mr. WOLF. Okay. How many legats do you have now in how many countries?

Mr. MUELLER. Last I had was I believe it was 60 or 61. I had seen, you know, for many years it was 61. We may be at 60 now. And I don't know why we went from 61 to 60. I would have to check on that.

[The information follows:]

NUMBER OF FBI LEGAL ATTACHÉ (LEGAT) OFFICES AND NUMBER OF COUNTRIES COVERED

The FBI currently operates 62 Legal Attaché (Legat) offices and 13 sub-offices in 65 foreign countries.

NORTH AFRICAN/MIDDLE EAST PROTESTS

Mr. WOLF. And you had somebody in Yemen.

Mr. MUELLER. Yes.

Mr. WOLF. And you had somebody in Egypt.

Mr. MUELLER. Yes.

Mr. WOLF. How about Bahrain?

Mr. MUELLER. I think Bahrain may be handled out of Egypt. I would have to check on that.

[The information follows:]

LEGAL ATTACHÉ (LEGAT) OFFICE IN BAHRAIN

Although the FBI does not have a Legat office in Bahrain, the region is covered by Legat Doha, Qatar.

Mr. WOLF. Jordan?

Mr. MUELLER. Pardon?

Mr. WOLF. Jordan, did you have somebody in Jordan?

Mr. MUELLER. Yes, we do.

Mr. WOLF. Libya, did you have somebody in Libya?

Mr. MUELLER. We do not. We have handled that out of Algeria. We recently put one in Algeria.

Mr. WOLF. Because I don't want to get in too much detail, because there are a lot of things you would rather not—you want to ask but you don't want to. But I just wonder how closely are you following all the activity abroad in some of these countries to see who are the individuals that are involved in the activity there?

Mr. MUELLER. Very closely. I can say we have concerns with Yemen and our counterparts in Yemen. What is happening in Yemen has resulted in a reduction in cooperation when it comes to the counterterrorism side.

In Egypt we have to develop new relationships with the new entities that have been established. We want to be certain that what is happening in Libya, take stock of, to the extent that we have in-

formation in the United States that may bear on what is happening in Libya, the opposition forces, who they are, what they are doing. We also have a number of Libyans here in the United States whether it be students or visitors, and we are seeking that information.

We also want to make certain that we are on guard with the possibility of terrorist attacks emanating somewhere out of Libya, whether it be Qaddafi's forces or in eastern Libya, the opposition forces, who may have amongst them persons who in the past have had associations with terrorist groups.

Mr. WOLF. Yes. I saw yesterday's *Wall Street Journal.* It said, "The FBI has begun questioning Libyans living in the U.S. as part of an effort to identify any Libyan-backed spies or terrorists and collect information that might help allied military operations. The move reflects concerns among U.S. officials in the wake of an allied bombing campaign that established a no-fly zone in Libya to prevent the massacre of anti-government rebels that Libyan leader Muammar Qaddafi might try to orchestrate revenge attacks against the U.S. citizens."

So do you pretty much have a handle on who the individuals are that are involved in the rebels in Libya?

Mr. MUELLER. I am not certain at this point anybody really does. This is an ongoing effort, by us and at the same time by State Department, and the agency, and others to identify the individuals who may be part of the opposition.

Mr. WOLF. Okay. So there are no FBI agents on the ground today in Libya?

Mr. MUELLER. Not in Libya, no.

Mr. WOLF. Okay. Mr. Dicks and then Mr. Fattah.

Mr. DICKS. I just wanted to be here today to thank you for your great service to the country. And I have enjoyed over the years working with you in the intelligence capacity, and counterterrorism, and all the other things the FBI does.

Let me ask you on the subject that the chairman was just raising. There was a news article, a news presentation last night, about what we were talking to a number of Libyans in the United States about—you know, I guess we are concerned about a possible terrorist attack of some sort.

Can you tell us anything about that in open session?

Mr. MUELLER. Well I can say that there are individuals who were previously affiliated with the Libyan government who happen to be in the United States. They may have been here representing Libya in various international institutions and the like. To the extent that they have renounced or denounced Qaddafi, are willing to be interviewed and to give us information as to what may be happening in Libya, we will proceed with those interviews.

Also with regard to students or visitors from Libya here in the United States who may have information on what is happening in Libya, we have an outreach effort to them as well to obtain what information they might have that may alert us to any attempts at retaliation within the United States or elsewhere by pro-Qaddafi individuals.

The other aspect of it is that countries such as Libya may have foreign establishments, or may well have intelligence officers who

are part of those foreign establishments, or they may have intelligence officers that are operating with different types of cover in the United States. We want to make certain that we have identified these individuals to assure that no harm comes from them. Knowing that they may well have been associated with the Qaddafi regime.

BORDER SECURITY

Mr. DICKS. Have we had problems where some of these people have gone through other countries and maybe gotten into the United States illegally, and we have been monitoring them? Is that an issue? Is that something you are concerned about?

Mr. MUELLER. Yes. I think Mr. Culberson earlier asked about special interest aliens coming across the southern border. And I would say also that we shouldn't forget about the northern border.

Mr. DICKS. Right.

Mr. MUELLER. But, yes, that has been a concern. We work very closely with the Customs and Border Protection. Once these individuals are identified, we interview them and have some recommendations as to how they should be treated down the road. They may well come from a country like Somalia or elsewhere——

Mr. DICKS. Right.

Mr. MUELLER [continuing]. And have a legitimate claim to asylum here, and not in any way be associated with terrorism. But we need to know if that is indeed the fact.

So we do and will continue to work with Customs and Border Protection and Immigration Services to make certain that we try to identify those persons who may have had some association with terrorism if they are attempting to come through the southern border or even the northern border.

Mr. DICKS. Thank you very much. I appreciate it.

Mr. WOLF. Thank you. Mr. Fattah.

RELATIONSHIP WITH INTERNATIONAL LAW ENFORCEMENT COMMUNITY

Mr. FATTAH. I thank you, Director. With Chairman Young on the Defense Committee, I traveled to Brussels a while back. And we met with all of the EU law enforcement, your counterparts in the EU countries. And it is an amazing thing that they have worked out where they have a jurisdiction across these national boundaries, all across the 20-plus countries.

Because you do work in Europe and Africa, in fact, everywhere, I assume, your relationships with our European allies in the EU are strong, including with Interpol, because I want to move to a subject that connects up to this in a minute. But I assume that the relationships are very good.

Mr. MUELLER. Our relationship with Interpol is very good, and our relationship with EUROPOL is good. Some of the things that EUROPOL has done in terms of having a European-wide extradition process that is expedited and a European-wide arrest warrant are to be commended.

One of the issues with a multilateral organization, however, is the lowest common denominator. When it comes to sharing intelligence, many services to a certain extent, including our own, are

reluctant to put the intelligence into a database that could be accessed by you don't know whom.

So while we have very good relationships with EUROPOL, I would say we have better bilateral relationships, because you develop a level of trust in the bilateral relationship that is difficult to do when you are dealing with a multilateral corporation.

HUMAN TRAFFICKING/VIOLENT CRIME/GANGS

Mr. FATTAH. Well I am going to come to my final subject in a minute, which is human trafficking and how it plays out.

But I just want to run through a few other areas quickly. Given your decade, almost decade, of service and looking forward in a number of areas, I would be interested in what your view is about whether there are going to be continuing or declining problems. We see organized crime now, Eastern European, Russian, and the like playing out here in the United States.

Do you see this as a continuing or declining problem going forward for the country?

Mr. MUELLER. I think it is going to be an increasing problem, whether it be Eastern European criminal groups or Asian organized crime. That I think will be expanding.

Indeed, my own view is that while the statistics show that violent crime has been reduced over the last several years, I am not certain that we can continue that. There is a great deal of uncertainty as to what has contributed to that reduction in crime. It may well be——

Mr. FATTAH. I thought it was your tenure.

Mr. MUELLER. I was going say it was Chuck Ramsey in Philadelphia. And I think it is to a certain extent policing. But also given the economic climate, given the caliber of the weaponry that is out there, I am not certain we can sustain that reduction level in the future. I would be concerned about that.

But on the upswing, quite obviously as I mentioned, is cybercrime. It is going to be increasingly a growing problem.

Mr. FATTAH. When I traveled to Africa, we were told when we went to certain parts of the continent, we shouldn't have any ID, any credit cards, because of the significant counterfeiting problem emanating particularly in certain countries that I am sure you are aware of.

Do you see this as a declining issue, their ability to copy and produce almost any document?

Mr. MUELLER. To the contrary. Africa is getting wired. That is the only way to put it. The access to the internet where the cables are being installed will increase the capabilities of criminal groups operating there to expand across the globe. They will have the bandwidth that they did not have before to undertake criminal activities outside of the continent of Africa, affecting victims in countries around the world.

Mr. FATTAH. Now the street gangs here that we talked about already, both domestically grown and those that have expanded internationally coming our way through South America and other places, do you see this problem growing or declining going forward?

Mr. MUELLER. I don't know how much it will grow. It is as substantial as it is today.

Mr. FATTAH. There are perhaps over a million or so gang members.

Mr. MUELLER. Well if you are talking MS–13, or if you are talking about any number of gangs out there, MS–13, the 18th Street Gang, the Nuestra Familia, the Mexican Mafia, the Latin Kings, Crips, Bloods, across the board. The gangs have not substantially diminished. I haven't seen substantial growth. But it is just a continuous presence.

Mr. FATTAH. With regard to hate groups and the supremacists, I know you have made a number of arrests in these areas. Domestic terrorism has been a major concern from Timothy McVeigh and forward. Is that a problem that persists significantly as part of the FBI's focus?

Mr. MUELLER. Yes. We have not forgotten that the largest loss of life prior to September 11th was Oklahoma City. Our concern is certainly the groups that I think you allude to.

But also the lone wolf, the individual who is not necessarily affiliated with one of those groups or may at one time have been affiliated with one of the lesser groups and been rejected from the group. In part because they may be too violent. So they are off on their own and willing to undertake terrorist attacks that other members of the group may not want to undertake, because it draws the scrutiny of law enforcement to that particular group.

So the lone wolf is a real problem. We talk about the Holocaust Museum, von Brunn, an individual who harbored tendencies. He walks in and shoots a guard in the Holocaust Museum, a lone wolf that we could not have identified before and stop such an attack even though he had been in our files at some point in the past. That is our biggest problem and the biggest threat we face.

Mr. FATTAH. Now I talked to you, privately, about nuclear material. And I know that we have spent a lot of effort and resources on being able to detect nuclear material and to inspect cargo.

If you play out one of the incidents in any of the kind of game playing that you go through, it is a major concern, whether it is New York City, or Philadelphia, or Washington, D.C.

Does the Bureau have all of the resources that it needs? I know you have some requests that are particularly related to this area. But do you need additional resources as you see this playing out going forward?

Mr. MUELLER. Yes. I think this is probably a topic we ought to discuss off the record. But I will say we have the responsibility for render safe in the United States. And that we take that exceptionally seriously.

The resources we have asked for in 2012 will enable us to be responsive should there be an incident. But we would also be happy to give you a briefing as to how we operate in such an incident. And not just us but how we operate with, to a certain extent, DOD but most particularly with the labs around the United States in terms of addressing a render-safe situation.

Mr. FATTAH. Well I have visited the Los Alamos Lab and Sandia Lab. But this is a concern. And we will follow it up with the chairman and deal with this.

My final set of questions has to do with human trafficking and sexual trafficking. There have been a lot of arrests, a lot of concern

in this area. But it seems as though this is a problem that is continuing to be something that challenges the country where women, some domestically, I mean, American citizens and also women brought here from other places are essentially being put into a state of almost slavery. And this is a nationwide problem. It is taking place in places all over the country.

I would be very interested in what you could tell us about the work of the FBI in this regard and what, if anything, we can do to apply more resources to this problem.

Mr. MUELLER. We address the problem in two areas. One is civil rights. Under that program in which individuals who are brought to the United States in, I think I can appropriately say, conditions that are akin to slavery. You know, we have a number of cases in that arena over the last year. I can get you the statistics.

And then we have what is called the Innocence Lost Initiative, which addresses child prostitution throughout the country, particularly along the highways. Over the years, I think it may have begun in 2007, we have made a number of arrests of individuals who are providing those services and holding children in some form of a mental or financial constraints.

We have identified more than 1,000 children who have been involved in this kind of activity and been able to rescue them from that activity, which is probably the most satisfying aspect.

You know, even more satisfying than putting the person away is freeing up a child who has been caught in, I would call it some form of bondage.

Mr. FATTAH. Thank you, Mr. Director. And thank you again, for your service to the country.

Mr. WOLF. Thank you. Mr. Serrano, Mr. Dicks, any other questions?

I am pretty much finished. I just want to cover a couple last points. One to follow up with Mr. Fattah. I think more should be done on the situation of human trafficking, sexual trafficking.

We have convinced U.S. Attorney MacBride to have a task force. He has one now. Every U.S. Attorney's Office ought to have a task force. And if you could do anything about that.

Secondly, a group named Polaris gave me a list of 72 sites in the northern Virginia area where women are trafficked. I raised it with a number of people. And it just seems like they just sort of just say, well, you know this is interesting. I will get it over to you today. If your people can maybe come by the office, we can give you the list, addresses, places.

They ought to be closed down. Now some people say well they make the cases so difficult. And we close them down today and they go over there. Okay. Close them down today, rescue the young women that are in there, and do something about it.

If someone said in that location slavery is going on. And there is someone from the neighborhood's daughter in there, everyone would say let us go and deal with it. So I am going to give you the 72 locations. And hopefully the northern Virginia office can just look at it and talk to the Fairfax County Police.

They ought to be shut down if they open up the next day. Also they ought to be tracking down who owns the building. The fire department should be able to do a fire inspection. The health depart-

ment ought to do. But if there are women or children in there, then they ought to be shut down.

And so we will supply that to you by the end of the day. And you can just walk by. At least I can give it to you. And if you could have your people look at it.

Mr. MUELLER. You mentioned 72 sites. And you also mentioned task forces. We do participate in human trafficking task forces around the country, in excess of 71. We are participating in the task force in addition to what we talked about in terms of the other initiatives we have.

Mr. WOLF. Well that is good. Although, you know, I sense that people think the problem is in Albania when it is really in Annandale. And so I think in order to bring people back to it, I think every U.S. Attorney ought to have it. So I agree with what Mr. Fattah said.

Also, just to plant in the back of your mind, there is a facility in northern Virginia. It is not in my congressional district, the Joe Gibbs home. It is Youth for Tomorrow. They have a number of beds available whereby when you go into these facilities, and you take, and you shut them down, there has to be a place.

And so I would hope your people could find out about that. So as we tell the judges— so if they don't know what to do. We can't put a young woman in prison or in jail. So there has to be a place for rehabilitation. So I would hope that somebody could let the U.S.——

Mr. MUELLER. We will check on that.

Mr. WOLF. Okay. Check on that.

Thirdly, if al-Qaeda had to pick coming across the northern border, or the southern border, or coming in at Dulles Airport and going through an inspection, they are going to come through the northern border or the southern border.

So I think this, what Mr. Dicks and Mr. Culberson said, is a real concern. I mean they could affiliate with MS-13 and take them across.

Lastly or next to last, do we have a legal attaché in China?

Mr. MUELLER. Yes.

Mr. WOLF. Okay, good. Lastly, I think if the administration and the FBI ought to be very careful with some of these people who are now going on television, Libyans, and expressing great solidarity with the rebels. It is like Paul having a conversion on the road to Damascus.

These are people that were representing a fundamentally evil government. I will now say these ambassadors are flipping, because they don't want to go to jail, or they don't want to be deported. But people who are now, who may very well have been involved in the Lockerbie bombing, may well have been involved in the Berlin disco bombing discoteca, are now having this new feeling.

And I see the one ambassador, I won't mention his name, he is on television almost constantly. And nobody ever says to him, the media never says, well, Mr. Ambassador, how did you for 33 years continue to work for Qaddafi during this period of time? Did you ever have a conscience? And what was the moment that you had

your Paul-to-Damascus conversion? Was it when you saw what he did? I mean and frankly they are all fleeing for that reason.

So I really don't want to see this administration give political asylum to these people who automatically are just trying to—who have been involved in some pretty fundamentally evil activities up to this point.

Mr. MUELLER. I can assure you that the people who deal with this day in and day out understand that.

Mr. WOLF. Okay. I want to, again, thank you for your testimony. I think you have done an incredible job. And please thank the men and women of the Bureau. Also your people who work the Hill have done a very good job, so please thank them too.

Mr. MUELLER. Thank you. Thank you very much.

Mr. WOLF. Okay, hearing adjourned.

Chairman Frank R. Wolf
House Appropriations Subcommittee on
Commerce, Justice, Science and Related Agencies

Hearing on the FY 2012 Budget Request for
the Federal Bureau of Investigation

Questions for the Record

April 6, 2011

High-value Detainee Interrogation Group

1. What is the level of FBI resources devoted to the HIG this year? How many positions are currently funded by the FBI, and how many positions are detailed from other agencies?

   Answer: The only FBI resource devoted solely to the High- Value Detainee Interrogation Group (HIG) this year is the HIG Director position. All other FBI staff supporting the HIG are assigned to other operations and providing HIG support as a collateral duty. Other agency on board HIG support includes: 3 CIA positions, 11 DOD positions, 1 ODNI position, and 1 DHS position.

2. Your FY12 request includes an increase of $16.8 million and 18 positions to staff the HIG. Is this the full recurring budget and staffing level that you envision for this activity going forward?

   Answer: Yes - the President's FY 12 budget request will enable the High-Value Detainee Interrogation Group (HIG) to initiate and maintain full operations based on current workload projections. Out year increases could result from enhanced operations and utilization of the HIG.

3. What has been the experience so far with the HIG? How many deployments have there been and has there been an assessment of the results from these deployments? Is it achieving what it was designed to achieve?

Answer: The Office of the Director of National Intelligence (ODNI) previously reported to Congress on the progress of the High-Value Detainee Interrogation Group (HIG), as required in the Supplemental Appropriations Act, 2010 (H.R. 4899), Sec 308(c). That report assessed the results of the HIG's deployments and other activities for the first period of its operations, January to September 2010.

The HIG has successfully deployed interrogation teams both inside and outside the United States a total of ten times. The HIG held interagency planning sessions to review current intelligence on subjects, prioritized collection requirements, developed interrogation strategies, and then deployed teams to conduct those interrogations. This interagency approach was a success, resulting in intelligence on a range of classified topics. Accordingly, the HIG has had success in achieving that which it was designed to achieve: the collection of intelligence to prevent a terrorist attack against the United States and its allies.

Key components of the HIG's mission to collect intelligence to prevent a terrorist attack are: (1) to deploy the nation's best interrogation resources; and (2) to interrogate those terrorism detainees identified as having access to information with the greatest potential to prevent terrorist attacks against the United States and its allies. As expected, the HIG found during its first year that a detainee's specific detention context, interagency coordination, and other factors demand flexibility of the HIG in addressing and fulfilling these two pieces of its mission. The HIG's interrogation teams and their deployments are part of broader intelligence relationships and it therefore must be sensitive to a range of issues when carrying out its mission.

Other significant HIG accomplishments include the following:

· Designed and hosted three cycles of the HIG Basic Training course for interrogators and analysts, as well as sponsored several professional development seminars by renowned scientists on topics including deception, cognitive interview methods, skilled teams, and emotional and social processes.

· Initiated the first coordinated research effort focused on intelligence interviewing established in the last 50 years. Interrogation research is a key piece of the HIG's mission. This multi-faceted research program integrates operations, training, and research to examine the comparative effectiveness of interrogation approaches and techniques

· Established a HIG Research Committee, with membership from various stakeholder communities (relevant professional associations, scientists, policy makers, and NGOs) to provide a vehicle for the discussion and dissemination of HIG research plans, programs and policies to the public.

Computer Intrusions

4. Your request includes an increase for $18.6 million and 42 positions to enhance your investigative capabilities on the Internet, and to protect critical technology networks from malicious cyber intrusions. The increase amount you are seeking

is less than half the amount you requested in FY11, and have yet to receive. Is the threat receding?

Answer: The FY 2011 President's Budget request included $45.9 million in enhancements to combat cyber attacks against the U.S. information infrastructure. The FY 2011 full year appropriation does not fund this request, limiting the FBI's ability to evolve its cyber program, enhance personnel efforts against emerging cyber terrorist and critical infrastructure threats, and resource National Cyber Investigative Joint Task Force (NCIJTF) facilities and technology requirements.

The FY 2012 enhancement for Comprehensive National Cybersecurity Initiative (CNCI) was intended to address FBI requirements above and beyond the FY 2011 President's Budget, and the amount of the increase should not imply a receding threat. Program increases for computer intrusions in the FY 2012 Budget are needed to allow the FBI to: provide increased coverage of terrorists seeking to use cyber as a means of attack; enable the National Cyber Investigative Joint Task Force (NCIJTF) to have 24x7 operations; and add capacity to FBI-wide electronic surveillance and digital forensics programs. The FY 2012 Budget also requests an 8 percent increase in agents assigned to the FBI's CNCI program.

5. Would a portion of this increase would go to combating radicalization and recruitment on the Internet?

Answer: Resources included in the FY 2012 President's Budget will be used to thwart and investigate cyber terrorism.

Electronic Surveillance Capabilities

6. You have included a new increase request to establish a Domestic Communications Assistance Center. Other Justice Department agencies also have requested FY12 increases for this effort. What is the Center and why is it needed?

Answer: A Domestic Communications Assistance Center (DCAC, or Center) is needed to ensure that new or existing technical solutions reach the largest possible number of law enforcement agencies and to provide a centralized point for technical assistance for both law enforcement agencies and industry. The DCAC will contribute considerably toward closing the technical intercept capability gap for all law enforcement agencies – with State and local law enforcement agencies being among the beneficiaries. DCAC will support law enforcement agencies that lack the resources necessary to develop their own technical solutions or adapt existing solutions to their respective needs.

The Center will leverage the research and development efforts of Federal, State, local, and tribal law enforcement with respect to electronic surveillance capabilities – in effect making the most of existing resources and investments. It will also facilitate the sharing of technology and know-how between law enforcement agencies. The Center will allow law enforcement agencies to identify issues regarding a service, technology, or provider they believe appropriate for the DCAC to address and the DCAC would direct its resources to support the needs of the law enforcement community at large. Finally, the Center will enhance relations with the communications industry by developing consensus positions and common practices within the law enforcement community where practical and most beneficial.

7. As I mentioned there are budget requests from other Justice agencies for this same effort. Will FBI have the lead role here? Will other non-DOJ law enforcement agencies also be participating? Will they be contributing funding from their appropriations?

Answer: DOJ is leading the effort to mitigate the effects of advancing communications technologies and services on law enforcement's ability to conduct effective, lawfully authorized, electronic surveillance. DOJ is ensuring the interests of its component agencies are represented. The budget request was structured so that each component agency could devote personnel resources to the Domestic Communications Assistance Center (i.e., ATF, DEA, and USMS each requested $1.5 million; FBI requested $2 million). Executive agency responsibilities have not been delegated to the FBI, or to any other DOJ component agency. The remaining funding associated with the FBI ($8.5 million) is intended for operating expenses for the first year.

It is anticipated that other non-DOJ law enforcement agencies will participate. Indeed, their participation is vital. Through their involvement, these non-DOJ law enforcement agencies will gain increased access to tools and higher visibility within the law enforcement community. Resources associated with the Center will not be able to fulfill every request for lawful intercept assistance from every law enforcement agency nationwide, however, and non-DOJ law enforcement agencies are not expected to contribute funds for the Center. Rather, their contribution will be measured by the provision of subject-matter expertise that assists the federal, state and local law enforcement community.

Violent Crime/Gangs

8. Most of your increase requests for FY12 are in the National Security, WMD, and Cyber areas. Are you satisfied that the FBI is reaching the right balance in resources between its national security and traditional criminal investigative missions?

Answer: Yes, the FBI's FY 2012 request focuses on ensuring that the FBI possesses adequate funding to maintain its current capabilities and acquire additional functionalities to address its most critical operational gaps. The FBI's budget strategy is based on the FBI's understanding of future national security and criminal threats. From this understanding, the FBI has identified critical, enterprise-wide capabilities needed to perform its mission. This capabilities-based approach to planning the FBI's future resource requirements is necessary since it is not possible to project with certainty who will be the future adversary (e.g., nation, combination of nations, non-state actors, gangs, criminal enterprises or individuals). This strategy enables the FBI to address a range of national security and criminal threats regardless of who actually perpetrates the acts.

9. The Committee included a significant increase, $25 million above your request, to specifically address the gang issue in FY10. Could you tell the Committee how you have enhanced your Safe Streets Task Forces to address the gang problem and other violent crime? How many task forces are there now? Are you requesting any additional resources for the Safe Streets Task Forces in FY12?

Answer: With the FY 2010 $25 million enhancement to the gang and violent crime programs, the FBI made the following personnel staff increases: 16 gang Special Agents, 10 gang Intelligence Analysts; 13 gang general clerical support; 10 violent crime Special Agents; 8 violent crime intelligence analysts; 8 violent crime general clerical support; 6 Indian Country Special Agents, and 3 Indian county general clerical support. These positions were all created to increase the FBI's ability to combat gangs and violent crime through the Safe Streets and Safe Trails initiatives. Non-personnel funding was distributed as follows: Safe Streets Violent Gang Program - $8.7 million; Safe Streets Violent Crime Program - $2.3 million; and Safe Trails Program - $850,000. This funding was utilized to support specific violent gang and violent crime task forces, investigations, and intelligence initiatives.

At the end of FY 2009, prior to receiving the $25 million enhancement, the FBI operated 152 Violent Gang SSTFs and 43 Violent Crime SSTFs. As of April 27, 2011, the FBI operates 168 Violent Gang SSTFs and 42 Violent Crimes SSTFs. In addition to the FBI's personnel enhancements, the funding allowed the FBI to add 16 Violent Gang SSTFs, increasing the Violent Gang SSTF program by 10 percent.

The Administration is requesting an overall reduction of up to 40 SSTFs locations, and $898,000, to FBI's SSTF budget in FY 12. The proposal will consolidate Task Forces in the same geographical location reducing overhead costs incurred from having, for example, a Violent Crime SSTF and a Violent Gang SSTF in the same city. By focusing on consolidating overhead costs, the FY12 budget proposal will not reduce FBI personnel or state and local Task Force Officers.

10. What are you doing to improve gang-related intelligence sharing and the utility of intelligence products as it relates to gangs? There has been some criticism of the lack of coordination among various gang entities within the Department. Have those issues been addressed?

Answer: The National Gang Intelligence Center (NGIC) is a multi-agency center comprised of representatives from the FBI, DEA, ATF, US Bureau of Prisons (BOP), United States Marshals Service (USMS), ICE, US Department of Defense (DOD), National Drug Intelligence Center (NDIC), and US Customs and Border Protection (CBP). This fusion center integrates gang intelligence assets of all DOJ gang entities to serve as a central intelligence resource for gang information and analytical support. NGIC produces comprehensive gang intelligence products using the intelligence from all agencies represented at the center, as well as information obtained from state and local law enforcement. This information is shared with all law enforcement across the United States.

The Department of Justice manages the coordination of its anti-gang activities through the Attorney General's Anti-Gang Coordinating Committee (AGCC). AGCC members include FBI, ATF, BOP, COPS, CRM, Civil Rights, DEA, EOUSA, GangTECC/NGIC, ICE, NDIC, OJP, TAX, USMS, and Interpol Washington and meets quarterly to formulate recommendations in areas of policy, resource management, information sharing , and coordination. Through the AGCC, the Department is able to ensure that there are minimal issues of coordination among anti-gang assets and that duplication of investigative efforts is avoided.

SENTINEL

11. Last year you issued a full stop work order to the SENTINEL contractor and I understand that you have brought the management of the project in-house. Can you describe what the problem was that led to this decision? Was the contract not going to deliver the desired outcomes within the existing budget?

Answer: At the time of the full stop work order, Sentinel was operational, with two phases of the case management application completed, deployed, and supporting approximately 8,000 unique users on a monthly basis. The FBI issued a full stop work order in July 2010. This was preceded by a partial stop work order that was intended to shift resources to address and correct Phase 2, Segment 4 deficiencies so that the segment could be deployed to users.

The FBI had initiated three independent assessments in late 2009 to evaluate the quality, usability, and maintainability of the code delivered. FBI executive

management identified a significant number of deficiencies and system change requests and made a decision to delay the pilots scheduled for early 2010.

During the period between the partial stop-work order and the full stop-work order, the FBI gathered additional information that led to the decision to reexamine the program's path forward. The leadership determined that this was an appropriate step to mitigate unwarranted program costs and schedule overrun. FBI leadership deemed that an Agile development methodology would allow the FBI to complete all functionality. Utilization of the Agile methodology would provide the best outcome for success within the $451 million budget.

12. I understand that you have adopted a new in-house "Agile" program management approach to SENTINEL. What does this approach entail and why is it a better approach than proceeding with the previous management model?

Answer: Agile development methodology is built around short development cycles called Sprints. Sentinel is working on two-week Sprints. The stakeholders are able to see how the Sentinel system functionalities grow every Sprint. Agile provides accelerated decision making and continuous integration capabilities with iterative processes between the implementation of business requirements through architecture and application code development.

13. What is the current life cycle cost estimate for SENTINEL? Does your current planned work stay within this life cycle cost?

Answer: At the beginning of Sentinel Agile development, the planned estimate for completion was within the $451 million allocation, which includes operations and maintenance (O&M) and the life cycle development costs. As of the latest invoice cycle, Sentinel development and the O&M of the operational Sentinel system are still within the $451 million approved funding level. The current O&M contract, which started when Sentinel first went into operation in 2007, runs through 2012.

14. Will the new "Agile" approach get you the same functionality envisioned under the previous contract? If not, what are the differences in what the Contractor wanted more money to deliver versus what your new approach is envisioned to deliver within the existing budget?

Answer: Given advances in technology in the last five years, Sentinel Agile will provide all of the functionalities envisioned in the original System Requirement Specification, with revisions approved by the FBI Executive Management Committee.

15. Last fall, the Software Engineering Institute assessed the soundness of using an "Agile" approach to SENTINEL. They found that while it could work, it also involves risks. Among the risks they identified were that it uses an approach that is untested within the FBI on a mission-critical system; the high degree of undefined plan details; and a concentration of decision-making in a single program manager. Please describe what you have done to address or mitigate each of these risks? And do your results so far indicate that you have overcome these risks?

Answer: To ensure that Agile was implemented properly, an Agile expert was brought in to provide expertise across the team. While Agile is an untested approach, the FBI in conjunction with other stakeholders are using tested evaluation methods, specifically earned value management, for assessing the progress of the Sentinel Project. The risk of undefined plan details was mitigated though the implementation of a disciplined iterative review process to ensure that all development functionalities and details are delivered and reviewed. As the team was established, delegated decision makers have been empowered specifically in roles as product owner, team experts, and activity leads. The FBI has implemented team ownership with full accountability for Sentinel development to the Sentinel program manager. Currently, the program is on track and running under cost.

16. The Inspector General's latest report on SENTINEL from October lists a number of concerns and questions. Importantly, those concerns include skepticism about cost and schedule estimates, especially considering a large reduction in the manpower assigned to the project? Have you responded to all the concerns expressed by the OIG?

Answer: Yes, the FBI has responded to all OIG concerns and continues to work with the OIG to improve common understanding of the overall Sentinel program.

17. The OIG contends that your defined budget of $451m for SENTINEL does not reflect the true costs of the project because it does not provide the cost for maintaining the system for 2 years as the original budget plan did. Do you agree with this statement, and if those 2 year maintenance costs are included, what is the full life cycle cost of SENTINEL today?

Answer: Operations and maintenance (O&M) is included in the $451 million allocation. When Sentinel first went into operation in 2007, a five year O&M contract was started that runs through 2012.

18. Who is the manager of SENTINEL now that it has been brought in-house? How many project managers have there been over the life of the project, and where are those individuals now?

Answer: There have been three project managers since Sentinel development started. The original project manager left the FBI after delivering Phase I of Sentinel. His successor delivered Phase II of Sentinel and has been reassigned to new duties within the FBI. The current Sentinel manager is Assistant Director/Chief Technology Officer Jeffrey C. Johnson. He reports to the FBI CIO, Executive Assistant Director, who reports to the Associate Deputy Director.

Overseas Contingency Operations

19. Your FY10 appropriation included $101 million for overseas contingency operations in Iraq, Afghanistan and elsewhere that were previously funded through Supplemental War on Terror funds. I understand that your request for FY11 and now FY12 reduces this amount by $62.7 million. What activities are supported by this funding, and is $38 million sufficient to sustain them at current levels?

Answer: The response to this question is classified. The FBI will provide a response under separate cover.

20. That $62.7 million that has dropped out of your budget supported operations in Iraq and Afghanistan, as well as counterterrorism operations including training, domain management, and field operations temporary duty costs. If the FY12 budget were enacted at your request level, what would be the impact on your overseas operations in Iraq and Afghanistan? Would you withdraw some personnel?

Answer: The response to this question is classified. The FBI will provide a response under separate cover.

21. Please provide a full budget for your planned FY12 activities in Afghanistan, from all funding sources?

Answer: The FBI will provide a detailed breakout of Overseas Contingency Operations activities through the Department of Justice's FY 2012 Spend Plan, provided to Congress upon enactment of a FY 2012 budget. Decisions on the level of DOD reimbursable resources and State Department transfer funds in FY 2012 have not been finalized at this time.

Training

22. Your request for FY11 included an increase of $74 million to renovate facilities at the FBI Academy, including the construction of a new dormitory and classroom space. This funding has not been provided, and given the current status of FY11 appropriations, it looks like the funding will not be provided. You testified last year that the Academy was at maximum service capacity. How are you managing without this funding and what is your plan for FY12 and beyond?

Answer: The new Dormitory was to provide additional lodging for classes held at the FBI Academy, as well as enabling the FBI to bring in many training courses that are currently being held regionally. Without the new building, the FBI will continue to utilize local hotels near the FBI Academy and hold other events regionally.

The new Dormitory was a cost-saving measure and would have paid for itself over about a 5 year period by generating an estimated $15 million in annual savings from not utilizing hotels and conference centers. The effect of not having funding for the new building will be felt in the out-years, where the $15 million in annual savings will not be realized.

Without the additional capacity provided by a new dormitory that could be utilized for swing space, the FBI is moving forward with phased, limited-scope renovations of the original dormitories, starting with the Madison dormitory in 2012. Half of the rooms in the Madison dormitory will be out of service over a period of approximately three years. The additional annual cost to house students offsite in support of this schedule is estimated to be $1.8 million.

Without the appropriation of $6.3 million for renovations, the FBI Academy will continue to operate in facilities that are 30 years old and that have not undergone major renovations since their construction in 1972. The phased renovation approach utilizes the FBI's $8.8 million base for O&M and renovations. With this limited base, the FBI is attempting to slowly renovate the buildings and can only address the most pressing requirements of the facilities. Even though the focus is on the critical requirements, some cannot be addressed with these limited resources.

Ranking Member Chaka Fattah
House Appropriations Subcommittee on
Commerce, Justice, Science and Related Agencies

Hearing on the FY 2012 Budget Request for
the Federal Bureau of Investigation

Questions for the Record

April 6, 2011

1. The budget proposes the consolidation of a large number of task forces, involving federal agents and state and local law enforcement. What is the rationale for these consolidations, particularly since it would achieve relatively little savings in appropriated dollars?

Answer: Recognizing the constrained fiscal environment, the proposal would reduce the criminal task force footprint through the consolidation of up to 48 task forces within the same geographic area. The consolidation of task forces does not eliminate positions or adversely affect operations, but rather realizes $898,000 in savings from overhead and infrastructure support costs by realigning and consolidating positions into higher priority areas.

2. How many FBI task forces currently exist, and how many would be eliminated by the proposed consolidations?

Answer: The FBI currently participates in the following criminal Task Forces (TFs):

42 Violent Crime Safe Street Task Forces (SSTFs)

168 Violent Gang Safe Street Task Forces

22 Innocence Lost Task Forces

18 Safe Trails Task Forces

7 Major Theft Task Forces

13 Border Corruption Task Forces

The FY 2012 proposal consolidates up to 48 SSTFs (both Violent Crime and Gang SSTFs).

3. Does the FBI anticipate that the reduced number of task forces will lead to reduced investigative activity?

Answer: The FBI's pending proposal of Task Force consolidation was formulated in a way to reduce costs while avoiding degradation of Task Force investigative activity and overall effectiveness. The current proposal will consolidate Task Forces in the same geographical location without reducing the current number of FBI agents or Task Force Officers, but instead will reduce overhead costs incurred from having, for example, a Violent Crime SSTF and a Violent Gang SSTF in the same city.

4. Beyond the proposed task force consolidations and eliminations, what specific steps has the FBI taken to reduce overlap and improve coordination among task forces, including those led by different DOJ law enforcement agencies?

Answer: The types of taskforces that are included in this offset proposal for the FBI are Violent Crime and Violent Gang Safe Streets Task Forces. The mission of other DOJ components who conduct gang and violent crime investigations differs from the FBI's mission. The Bureau of Alcohol, Tobacco, Firearms and Explosives' (ATF) Violent Crime Impact Teams (VCIT) primarily focus on firearms-related violence, while Drug Enforcement Administration (DEA) Mobile Enforcement Teams (MET) are tactical, quick-response teams that are deployed pursuant to the request of a police chief, sheriff, or district attorney and work in concert with local police to dislodge violent drug offenders from the community. Department of Homeland Security (DHS)/Immigration and Customs Enforcement (ICE) Border Enforcement Security Teams (BEST) focus on criminal organizations posing a significant threat to border security; while their Community Shield teams seek to remove alien gang members from the United States. Conversely, the mission of FBI Violent Gang and Violent Crime Safe Streets Task Force (VGSSTF) is to address violent street gangs and drug related violence through long-term investigations that focus on violent gangs, crimes of violence, and the apprehension of violent fugitives.

Additionally, DOJ manages the coordination of its anti-gang and violent crime activities through the Attorney General's Anti-Gang Coordinating Committee (AGCC). AGCC members include FBI, ATF, BOP, COPS, CRM, Civil Rights, DEA, EOUSA, GangTECC/NGIC, ICE, NDIC, OJP, TAX, USMS, and Interpol Washington and meets quarterly to formulate recommendations in areas of policy, resource management, information sharing , and coordination. Through the AGCC, the Department is able to ensure that there are minimal issues of coordination among taskforces and that duplication of investigative efforts is avoided.

The AGCC oversees a process that determines the need for a new task forces (including violent crime and gang taskforces) which includes an assessment of the threat in the relevant jurisdiction, approval from the local US Attorney's office and all federal law enforcement components within that jurisdiction (including ICE), as well as relevant state and local law enforcement agencies. The AGCC then performs a second level of review of the proposal and

makes a recommendation to the Deputy Attorney General who must personally approve a new task force.

5. To what extent are law enforcement's challenges with electronic surveillance a result of statutory limitations that have not kept up with advances in communications technologies?

Answer: The FBI and other government agencies are facing a potentially widening gap between our legal authority to intercept electronic communications pursuant to court order and our practical ability to actually intercept those communications. We confront, with increasing frequency, service providers who do not fully comply with court orders in a timely and efficient manner. Some providers cannot comply with court orders right away but are able to do so after considerable effort and expense by the provider and the government. Other providers are never able to comply with the orders fully. Many recently introduced communications services fall outside the scope of the Communications Assistance for Law Enforcement Act (CALEA) and only develop intercept capabilities upon receipt of a court order. It has also been law enforcement's experience that even carriers that are currently obligated by CALEA to have technical solutions in place prior to receiving a court order to intercept electronic communications do not maintain those solutions in a manner consistent with their legal mandate (e.g., technical solutions are not upgraded as carriers' networks evolve). At this time, the Administration does not have a formal position on whether any legislative changes are necessary to close the gap between legal authority and practical ability to intercept communications, but we look forward to working with Congress to find a solution that restores and maintains the ability of law enforcement agencies to intercept communications and collect related data pursuant to court orders in a manner that protects public safety, promotes innovation, and safeguards civil liberties.

6. To the extent that law enforcement requires more flexibility to adapt to changing technologies, is the FBI in conversations with the authorizing committees about ways to acquire that flexibility while still preserving privacy protections?

Answer: The Department of Justice (DOJ) is leading the Administration's effort to mitigate the effects of advancing communications technologies and services on law enforcement's ability to conduct effective, lawfully authorized, electronic surveillance. DOJ and FBI officials have both testified before and provided briefings to the authorizing committees about this issue. At this time, the Administration does not have a formal position on whether any legislative changes are necessary, but it is looking at a variety of potential solutions to close the gap between the authority and the capability to intercept communications. We look forward to working with Congress to find a solution that closes that gap in a manner that protects public safety, promotes innovation, and safeguards civil liberties.

7. Does the advancement of communications technologies pose special challenges for maintaining a balance between privacy rights and law enforcement needs? If so, what are they?

Answer: The balance between privacy rights and law enforcement needs has always been implicated by the advent of new technologies. Law enforcement's main priority is to retain the capability to conduct electronic surveillance authorized pursuant to existing law and conducted in accordance with current privacy protections.

8. How will the Center work with industry partners and what protections will be in place to ensure that electronic surveillance solutions adhere to all legal requirements?

Answer: The Center will work with industry to establish a mutually beneficial relationship. For example, the Center could:

· Partner with industry to develop technical standards and requirements that industry can rely upon in its development of technical solutions;

· Centralize, coordinate, and expand upon existing industry liaison efforts by representing consensus law enforcement positions;

· Focus and prioritize fundamental law enforcement requests to industry;

· Organize regular law enforcement-industry forums for addressing technical, legal, and policy issues; and

· Develop, strengthen, and maintain strategic relationships with industry.

With respect to legal requirements, the Center will not be involved in the operational aspects of its constituent agencies. Agencies' internal processes, which are in place pursuant to existing law, will precede the involvement of the Center.

9. What is the current backlog of forensic DNA cases at the FBI Lab and how does that compare to the backlog as it existed a year ago?

Answer: As of April 27, 2011, the backlog of forensic nuclear DNA cases was 1,132. The backlog at the end of April 2010 was 2,708. This is a reduction of 1,576 cases (58%).

10. What is the current estimate for when the FBI Lab will be able to eliminate the forensic DNA backlog?

Answer: The FBI Laboratory projects that it will have eliminated its forensic nuclear DNA backlog by the end of calendar year 2011.

11. What is the status of FBI's efforts to implement each of the recommendations issued by the Department's Office of Inspector General last August related to the forensic DNA backlog at the FBI Lab?

Answer: The OIG provided five recommendations to the FBI Laboratory in its report entitled "Review of the Federal Bureau of Investigation Laboratory's Forensic DNA Case Backlog," dated August 2010:

1. Standardize FBI laboratory-wide definitions for calculating backlog within caseworking units.

2. Ensure the availability of an information portal for FBI Laboratory users to access a laboratory information management system.

3. Establish formal time tracking procedures and definitions in the FBI Laboratory to accurately capture time spent conducting forensic DNA casework.

4. Coordinate with the District of Columbia Metropolitan Police Department to resolve more than 200 instances of missing evidence.

5. Examine the effect of outsourcing agreements on the overall DNA forensic casework backlog and the time contributors wait for test results.

The OIG has closed recommendation 4. The FBI Laboratory has provided documentation in support of closure of recommendations 3 and 5, pending concurrence of the OIG. Recommendations 1-2 are resolved, but still open.

To close recommendation 1, the FBI must incorporate a definition of backlog and must show how its proposed measures will be tracked in all units. The FBI Laboratory's ability to track and report backlog information is dependent on its implementation of a Laboratory Information Management System (LIMS). This implementation is tied to coordination with other Department of Justice Forensic Laboratories (ATF and DEA), which will coordinate the same definition of backlog into their lexicon if all labs are using the same LIMS.

To close recommendation 2, the FBI Laboratory must demonstrate that Innovari (an electronic sample tracking system) can be operational for three years, or that another LIMS solution has been implemented at the FBI Laboratory. The Laboratory plans to review the capabilities and long-term operation and maintenance costs of Innovari versus a commercial solution and has not yet made a final decision to fully implement Innovari. To this end, a new Deputy Assistant Director was recently selected for the FBI Laboratory Division; this individual has extensive experience in implementing various IT-related systems in support of FBI headquarters and field divisions. His principal responsibility after assuming the office on April 25, 2011 is to lead this

review on behalf of the FBI, then to proceed with implementation of the best solution. The FBI is mindful of expended costs associated with Innovari, and will balance any potential cost-savings of using a commercial solution against those sunk costs.

12. The OIG report indicated that the FBI had spent $10 million since 2003 on developing a laboratory information management system, but expressed concern that the system under development at the time might not meet the needs of the FBI Lab. In its response to the OIG report, the FBI indicated that it had "initiated a comprehensive review to determine laboratory information needs." Has that review been completed? And if so, what did it conclude about the information management system the FBI developed for the Lab?

Answer: The FBI Laboratory has concluded the first part of a comprehensive review of the information management system known as Innovari, which is under development. The first part of the review included a User Acceptability Testing (UAT) evaluation of Innovari's current capabilities by Laboratory personnel who would use the system. Users provided their feedback and recommendations to Laboratory Executive Management in March 2011. Laboratory Executive Management is currently reviewing the UAT's recommendations and feedback. In the meantime, the Laboratory is proceeding with initial work to determine the best technological way to develop a mechanism whereby disparate legacy databases and the current evidence database can be linked and searched, with results reported back through Innovari or another system. This interface will need to be developed regardless of what system may be implemented in the future. The Laboratory is ensuring that, whatever interface is developed; it can be used with a variety of potential information management systems and is not Innovari-specific.

13. The FBI response to the OIG report indicated that the FBI Lab was considering additional outsourcing agreements with private labs to help reduce the forensic DNA backlog. How successful has the Lab's outsourcing strategy been in helping to reduce the backlog?

Answer: The 204 missing person cases outsourced to the Minnesota Bureau of Criminal Apprehension Laboratory (BCA), equal a reduction in the nDNAU missing person backlog of 18%. It is noted that nDNAU considers these cases closed for the purposes of internal tracking once they are submitted to BCA. Of the **204 cases, 139 are completed and 65 are under active examination. The 139 completed cases equal a reduction in the nDNAU's missing person backlog by 12%.** It is anticipated that the remainder of the outsourced missing person cases will be closed by BCA by the end of FY2011.

The 359 MPD cases outsourced to Bode Technology, equal a reduction in the nDNAU criminal backlog of 22%. Of these **359 cases, 345 are completed and 14 are under active examination. The 345 completed cases equal a reduction in the nDNAU's criminal backlog by 21%.** It is anticipated that the remainder of the MPD cases will be closed by the end of FY2011.

14. How does the cost of outsourcing contracts compare to what it would cost to increase the capacity of the FBI lab?

Answer: FBI has increased the capacity of the FBI laboratory through a number of technological enhancements. These enhancements have produced a 300 percent increase in reporting capacity in FY 2011 as compared to FY 2010 reporting levels (350 cases per month in FY 2011 as compared to 110 cases per month in FY 2010). These enhancements cost approximately $3.2 million. The average cost for the additional cases in FY 2011 is approximately $1,100 and the cost for contract cases ranges from $1,200 to $3,900. However, the FBI has not developed cost estimates for increasing FBI laboratory capacity in the future. Such estimates would be dependent on a number of factors including space requirements, staffing, equipment, and anticipated workload.

15. The Department of Justice's Office of Inspector General issued a report in September 2010 concluding that some FBI agents had cheated on a Domestic Investigations and Operations Guide (DIOG) exam. Has the FBI taken actions to determine the breadth of cheating on the exam?

Answer: The FBI has initiated internal investigations based upon information from the Department of Justice Office of Inspector General report. In addition, every credible allegation of unauthorized assistance relating to the DIOG test received by the FBI has been reviewed and addressed.

16. Did the FBI impose disciplinary consequences on those who engaged in cheating?

Answer: The Assistant Director In Charge (ADIC), two Special Agents in Charge (SACs) and Chief Division Counsel (CDC) investigated by the Department of Justice Oversight and Review Section have been adjudicated; however, their cases are pending appeal. Disciplinary consequences for individuals identified through the FBI's internal investigative process will be addressed upon completion and review.

17. Given the importance of agent familiarity with the DIOG, has the FBI required additional DIOG training and testing?

Answer: Yes, the FBI has required additional DIOG training and testing. Prior to the implementation of the Attorney General Guidelines for Domestic Operations (AGG-Dom) in December 2008, the Office of the General Counsel (OGC) provided in-person training to all 56 field offices and the appropriate headquarters components to introduce all employees to the conceptual changes being made (i.e., the combination of the two primary sets of investigative guidelines (FBI National Security Investigations and Foreign Intelligence Investigations (NSIG) and Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise

Investigations (General Crime Guidelines) into one uniform set with expanded flexibility in the area of assessments).

· In October 2008 and ending in December 2008, two web-based training overview courses-- on the AG Guidelines and Domestic Investigations and Operations Guide (DIOG)--were deployed prior to the AGG-Dom implementation and taken by over 36,000 employees, contractors and task force officers prior to the effective date.

· From approximately May 2008 through January 2009, the OGC and Corporate Policy Office (CPO) co-sponsored weekly Secure Video Telephone Conferences (SVTC) with field office personnel including Chief Division Counsels (CDC), to discuss the DIOG policy framework and important DIOG-related operational issues.

· In 2009, during two Special Agents in Charge (SAC) conferences, SACs were provided with in-person training by the FBI's General Counsel and the CPO.

· The new AGG-Dom and DIOG policy principles have been incorporated into the New Agents and New Analysts training curriculum.

· In October 2008 and February and May 2009, the OGC, CPO and the Office of Integrity and Compliance (OIC) sponsored three multi-day "train the trainer" DIOG sessions for field office CDCs, Assistant Division Counsels, administrative Assistant-Special-Agent-in Charge (ASAC), field executives, and other supervisory personnel as a means to develop a field-wide training cadre.

· From approximately June 2009 through December 2009, FBI agents, analysts, Task Force Officers and other personnel involved in operational support were required to complete a more intensive 16.5 hour training curriculum related to the FBI's implementation of the AGG-Dom through the DIOG (**Note:** Every field office and all FBIHQ DIOG sessions were supplied with bound copies of the DIOG and color-coded investigative summary charts to assist with the training).

· In November and December 2009, additional DIOG training was provided to FBI Legat personnel stationed overseas. This training took place as part of already scheduled regional training in Bangkok, Thailand, Frankfurt, Germany and Miami Florida

· As of March 1, 2010, 22,254 FBI agents, analysts, Task Force Officers and other relevant operational personnel completed the DIOG training and the associated exam.

· The CPO, in coordination with the Training Division, OGC and OIC is preparing an updated Virtual Academy overview course, along with updated FAQs, training aids, and summary charts which highlights key tenants of the DIOG and the changes from the original version. All operational personnel will be required to complete the new training course when the updated DIOG is published in May or June.

18. In the FBI's investigation of Medicare and Medicaid fraud, what kinds of fraud schemes are the most prevalent, and how has the FBI targeted its resources to address them?

Answer: The most prevalent Medicaid and Medicare fraud schemes involve durable medical equipment (DME), home health agencies, infusion clinics, independent diagnostic testing facilities, pharmacy/pharmaceutical related fraud, physical and occupational therapy clinics, and various other types of billing for services not provided. Due to the beneficiary population, Medicaid also has prevalent schemes involving dental services and transportation benefits.

The FBI investigates cases and assigns resources based on threat analysis. Sources of information used in the threat analysis includes intelligence sharing with our law enforcement partners, CMS, program integrity contractors, state agencies, and private insurance companies; the review of complaints and referrals; source information; and other data analysis. The FBI has also assigned resources to support the Medicare Fraud Strike Force (MFSF) initiative, a Department of Justice enforcement operation that targets judicial districts with the most serious and egregious health care fraud schemes. The MFSF has since been expanded from the original MFSF in Miami-Dade County. Since May 2009, when Attorney General Holder and Secretary of Health and Human Services Sebelius launched the Health Care Fraud Prevention and Enforcement Action Team (HEAT), the Strike Forces have operated under the auspices of HEAT. Currently, Strike Forces are operating in nine cities across the country including Baton Rouge, Brooklyn, Detroit, Houston, Los Angeles, Miami, Tampa, Chicago, and Dallas. Each MFSF is comprised of Department of Justice prosecutors, FBI personnel, Department of Health and Human Services-Office of the Inspector General personnel and state fraud investigators, and supplements enforcement activities in specific cities by targeting geographical areas which have high concentrations of health care fraud.

19. Are there particular aspects of the current Medicare and Medicaid programs that make them particularly vulnerable to fraud? If so, what are they and how has the FBI worked with the Centers for Medicare and Medicaid Services to minimize such vulnerabilities?

Answer: Some aspects of the Medicare and Medicaid programs that make them vulnerable to fraud are the types of services available to the associated beneficiaries, the concentration of overlapping beneficiaries, and the size of the programs. For example, reimbursement for durable medical equipment (DME) products can be particularly susceptible to Medicare Fraud. There have been many instances where scammers participate in a scheme in which they engage in identity theft of beneficiaries and then fraudulently bill for DME products (e.g. wheel-chairs) using those identities. DME products are frequently used by the elderly, who normally have Medicare, which makes them or their identity attractive targets for this type of fraud. Moreover, large numbers of individuals covered by Medicare will also be eligible for Medicaid. Those perpetrating fraud will often concentrate on this overlapping population of beneficiaries because it can produce significant fraudulent income with a lower risk of detection (i.e. having only one program/insurance company reviewing billings, as opposed to several). In addition, due to the

large size of the Medicare and Medicaid programs, a provider can generate significant fraudulent billings without necessarily being identified as an outlier, especially in larger metropolitan areas.

Through the joint Department of Justice (DOJ) and Health and Human Services (HHS) Medicare Fraud Strike Force, the FBI works with the HHS Office of the Inspector General and the Centers for Medicare and Medicaid Services to secure criminal convictions and obtain civil and administrative sanctions against individuals and organizations committing Medicare Fraud, including fraudulent DME providers. This initiative involves a multi-agency team of federal, state and local investigators designed to combat Medicare fraud through the use of Medicare data analysis techniques.

20. What are the current goals for the development of the Sentinel case management system and how do they compare to the program's original development goals?

Answer: The current goals for Sentinel Agile remain the same as the original development goals: to provide the FBI with a modern electronic case management system that meets all approved System Requirement Specifications. The change to Agile development methodology for Sentinel has not altered these requirements. It is standard practice in Agile development to address system requirements through functionalities. Sentinel Agile has 670 functionalities, which have been mapped to all of the approved Sentinel System Requirement Specifications.

21. Upon completion, will the Sentinel system have all of the functionality originally planned for the system? If not, what functional components will be lacking?

Answer: Sentinel will have all of the functionality originally planned for the system.

22. Given that the development of Sentinel was begun in 2006, is there a danger that the system will be technologically obsolete by the time the FBI has finished developing it?

Answer: The FBI has leveraged technology to meet the functionalities of the Sentinel program, thereby ensuring that the functionality provided to the FBI agents, analysts, and support staff is not outdated. When the FBI took over management of the development of Sentinel in the Fall of 2010, all requirements were reviewed and technology was assessed for the best way to provide an up-to-date case management system for the FBI. Initial functions within Sentinel became operational in 2007, and the FBI will continue to refresh and maintain the system to prevent obsolescence.

The Honorable Tom Graves House Appropriations Subcommittee on Commerce, Justice, Science and Related Agencies

Hearing on the FY 2012 Budget Request for the Federal Bureau of Investigation

Questions for the Record

April 6, 2011

1. On April 6, 2011, I wrote the attached letter asking you to represent in detail how your agency would operate with a 25 percent reduction in funds, a 20 percent reduction in funds and a 10 percent reduction in funds. Will you provide the Committee with a copy of the reply for the record?

Answer: On April 15, 2011, Ronald Weich, Assistant Attorney General, Office of Legislative Affairs, provided a response on behalf of all components in the Department of Justice. Attached is the letter.

COMMITTEE ON APPROPRIATIONS
SUBCOMMITTEES:
AGRICULTURE, RURAL DEVELOPMENT, FOOD AND DRUG ADMINISTRATION AND RELATED AGENCIES
COMMERCE, JUSTICE, SCIENCE AND RELATED AGENCIES
FINANCIAL SERVICES AND GENERAL GOVERNMENT

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http://tomgraves.house.gov

April 6, 2011

Hon. Robert S. Mueller, III
Federal Bureau of Investigation
935 Pennsylvania Avenue NW
Washington D.C. 20535

Dear Director Mueller:

I am writing today to request that your agency submit budgets to the Sub-Committee on Commerce, Justice, Science, and Related Agencies within the Committee on Appropriations that represent in detail how your agency would operate with a 25 percent reduction in funds, a 20 percent reduction in funds and a 10 percent reduction in funds.

As you know, as of this writing, we are months away from reaching our debt ceiling of $14.29 trillion. The Congressional Budget Office (CBO) projects that the gross federal debt will increase every year of the 2011-2020 period, reaching $23.1 trillion in 2020 and costing Americans over $1 trillion in interest payments alone by 2020.

According to CBO, at the end of the fiscal year of 2008, the debt held by the public was $5.8 trillion. Since then the public debt has shot to $9 trillion by the end of fiscal year 2010. While the government experienced lower tax revenues due to the economic recession, the response by the Administration and Congress to jolt the economy with higher federal spending coupled with the past imbalance between spending and revenues has led to an unsustainable debt.

Our fiscal situation is unacceptable. The responsibility for our debt is shared jointly by Democrat and Republican Administrations and Congresses of the past and finding solutions must be a bipartisan endeavor. That is why I am writing to you today to ask that your agency work with Republicans to begin reigning in spending and start our nation on a fiscally responsible course.

Thank you in advance for your willingness to work with the Sub-Committee on Commerce, Justice, Science, and Related Agencies on this important issue.

Sincerely,

Tom

Tom Graves
Member of Congress

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

APR 15 2011

The Honorable Tom Graves
Committee on Appropriations
U.S. House of Representatives
Washington, D.C. 20515

Dear Congressman Graves:

This responds to your letters to the Attorney General and to other Department of Justice officials dated March 31, 2011, requesting information regarding the Department's budget. We appreciate your concern for fiscal responsibility.

The Department of Justice carries out critical law enforcement and national security missions. While the Department's budget is categorized as "discretionary" spending, much of the Department's work is not discretionary at all. It is imperative that the Department address terrorist threats and instances of violent crime. In addition, the population of detainees in federal custody is 13 percent higher today than in 2008. In that same time period, over 11,000 inmates have been added to the custody of the Bureau of Prisons.

We would be pleased to work with you and other members of the Committee to identify the impacts of different funding levels on the Department's operations, as we did for the recent 2011 Continuing Resolution scenarios. Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter.

Sincerely,

Ronald Weich
Assistant Attorney General

WEDNESDAY, MARCH 16, 2011.

DRUG ENFORCEMENT ADMINISTRATION

WITNESS

MICHELE LEONHART, ADMINISTRATOR

Mr. WOLF. The hearing will come to order.

Today we welcome Michele Leonhart, administrator for the Drug Enforcement Administration.

We thank you for your appearance today. You are testifying for the 2012 budget request for the Drug Enforcement Administration.

For fiscal year 2012, the DEA is requesting a total of $2.36 billion, an increase of $92.6 million or 3.6 percent above the fiscal year 2010 and fiscal year 2011 CR levels.

Most of that increase is in the diversion control area, and that part of your budget is financed by fee collections. So the increase in your direct appropriations is actually much smaller, an increase of only $22 million or 1.1 percent.

Your budget request includes some notable cuts including a proposal to eliminate your mobile enforcement teams, a recision of $30 million from balances in your salaries and expenses account, and a general efficiency reduction of about $8 million. The committee will be interested to hear about the impacts of these proposed reductions.

On the diversion side, you are seeking a $31 million increase for regulatory control and enforcement activities, all supported by fee collections. I understand the fee collections are falling far short of estimates this year, so I have some questions about how likely it is that these increases will materialize.

Finally, we will have some questions about your ongoing operations in Afghanistan for counter-narcotics activities or overall part of the counter-terrorism effort. Your presence there was initiated there with emergency supplemental appropriations that relied since then on transfers from the State Department.

Before you begin your testimony, I want to commend you and your employees for the important and often dangerous work that you do every day both here and overseas to protect American communities from the scourge of drug trafficking. So please pass along to your people our appreciation for their hard work.

Before we recognize you to present your testimony, I would like to recognize my colleague, ranking member, Mr. Fattah, for any comments he would like to make.

Mr. Fattah.

Mr. FATTAH. Let me thank the chairman.

And let me thank you. I look forward to your testimony and the opportunity to ask a few questions. And like the chairman, I am interested in a number of the activities of the agency relative both

to your overseas work for instance in Afghanistan and West Africa, but also to talk a little bit about issues closer to home, both the situation with the southwest border and other issues. But we will get into that after your testimony.

Thank you.

Ms. LEONHART. Thank you.

Mr. WOLF. Well, you may proceed. Your full statement will appear in the record. Go ahead.

Ms. LEONHART. Thank you, Chairman Wolf and Ranking Member Fattah and Members of the subcommittee. It is my honor to appear before you to discuss DEA's fiscal year 2012 President's budget request.

First, I want to thank you for your continued support of our critical law enforcement mission. Your partnership is particularly appreciated in this difficult budget environment, when we are being asked to work harder and smarter and more efficiently, even as the challenges of drug law enforcement continue to grow.

I would also like to highlight a few of DEA's recent achievements and our priorities for fiscal year 2012, and these include our efforts along the southwest border in cooperation with Mexico, our bilateral operations in Afghanistan and the nexus between drugs and terrorism, and prescription drug abuse.

First about Mexico and the southwest border: the violence in Mexico is of great concern to all who care about freedom and stability in our hemisphere, and it presents fundamental challenges to Mexican governance, our border security, and the fight against dangerous drugs in the United States.

However, our partnership with the government of Mexico is now more effective than ever before, and together we have inflicted tremendous damage on all of the Mexican drug cartels. And these efforts are directly supported by the DEA-led El Paso Intelligence Center, also known as EPIC.

EPIC is a multi-agency tactical and strategic intelligence center consisting of almost 30 law enforcement organizations and now includes representatives from Mexico and Colombia. And our fiscal year 2012 budget request includes $10 million to expand that interagency participation at EPIC.

About Afghanistan and narco-terrorism: unfortunately, drug trafficking from Mexico is not the only challenge that DEA faces. Drug trafficking and the associated crimes of narco-terrorism and money laundering occur around the globe, and this is of particular concern because drug trafficking fuels terrorism. Nowhere is this more evident than in Afghanistan where narco-terrorists provide direct assistance to those fighting American soldiers. With 82 positions assigned to Afghanistan, DEA has a strong presence there and plays an integral part in the U.S. Government's overall strategy in the region. By working closely with our Afghan law enforcement counterparts, we are bringing to justice the most significant drug traffickers in Afghanistan and helping to build institutions capable of enforcing the rule of law.

Our efforts to target narco-terrorists have yielded results in Afghanistan and beyond, and recently DEA and the Department of Treasury announced the designation of the New Ansari Money Exchange under the Kingpin Act. This network is a major money

launderer for Afghan drug trafficking organizations. A week earlier, we identified the Lebanese Canadian Bank as a financial institution, a primary money laundering concern, and we also exposed links between this bank, international drug trafficking networks, and the terrorist organization Hezbollah.

Of no less concern, though, is the fastest-growing drug use problem in the United States. It is not meth or marijuana or cocaine. It is the abuse of controlled prescription drugs. DEA has been aware of this trend for years, and we have been responding accordingly.

The fiscal year 2012 President's Budget requests 291 Special Agents for the Diversion Program. That is an increase of 273 agents from what we had working on this problem in fiscal year 2005. Some of this increase has come through enhancements approved by this subcommittee, and some have come through redirection of our existing agent workforce that we have implemented internally. The increase requested for fiscal year 2012 will enable us to expand our tactical diversion squad which combines Special Agents, Diversion Investigators, and task force officers to focus on enforcement activities. By approving this request, you will help us intensify the work DEA has already begun: aggressively closing pill mills, cracking down on the domestic production of meth and targeting illegal internet pharmacies.

Enforcement efforts are an essential component of preventing the diversion of controlled prescription drugs and chemicals, but it is not the only thing that we can do. Careful consideration must be given to whether federal and state laws should be updated to require prescriptions for products that contain pseudoephedrine and ephedrine in order to reduce domestic meth production.

DEA is also combating abuse and diversion by sponsoring National Take-Back days. Last year, the first Take-Back resulted in the collection of more than 121 tons of unused, unwanted, and expired prescription drugs. We will conduct the second Take-Back nationally on April 30th.

Combined with the forthcoming implementation of the Secure and Responsible Drug Disposal Act, Americans will be able to dispose of prescription drugs in a safe and secure manner every day of the year.

So in concluding, the threat from dangerous drugs is a continuous fight we must undertake for the health, safety, and welfare of our Nation. Traffickers are in the business to make money, and they do not care who gets hurt along the way. DEA has unwavering commitment to putting these traffickers out of business and fulfilling our mission to enforce our Nation's drug laws. Our efforts are paying off, but we must and will do more. And as we do so, I know we will have many more successes to report to you in the year ahead.

Thank you for the opportunity to speak to you today, and I look forward to your questions.

[The information follows:]

STATEMENT OF
THE HONORABLE MICHELE LEONHART, ADMINISTRATOR
DRUG ENFORCEMENT ADMINISTRATION
BEFORE THE
UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON APPROPRIATIONS
SUBCOMMITTEE ON COMMERCE, JUSTICE, SCIENCE
AND RELATED AGENCIES

March 16, 2011

Chairman Wolf, Ranking Member Fattah, and Members of the Subcommittee:

Good morning, and thank you for inviting me to testify on behalf of the President's Fiscal Year (FY) 2012 Budget request for the Drug Enforcement Administration (DEA). I am honored to be appearing before you once again this year and I am proud to be doing so in the official capacity of DEA's Administrator. As the leader of DEA, an organization of almost 10,000 employees dedicated to a vital mission, I would like to express our collective appreciation for the support that this subcommittee has shown us over the years. Furthermore, I welcome the opportunity to continue our partnership and to share with you DEA's recent accomplishments and our future plans to help protect the American people.

DEA was established in July 1973 by President Nixon; his Executive Order created a single, unified command to combat illicit drug trafficking. Now, almost 40 years later, drug trafficking has changed in many ways. Today's drug traffickers exploit new and evolving technologies to communicate, launder ill-gotten gains, and facilitate the smuggling of drugs and weapons. President Obama has proposed a FY 2012 budget that provides the critical resources necessary to confront and dismantle these criminal organizations. For FY 2012, DEA requests $2,364,104,000 for its Salaries and Expenses (S&E), Construction, and Diversion Control Fee Accounts. Additionally, DEA will receive an estimated $486,390,000 in reimbursable funding from the Organized Crime Drug Enforcement Task Force program, the Asset Forfeiture Fund, and other agencies. Including fee funded and reimbursable positions, DEA will have a total of 11,119 authorized positions, including 5,318 Special Agents, who will staff 227 domestic offices and 82 foreign offices in 62 countries.

Despite a budget environment that is growing increasingly austere, I am happy to report that DEA continues to have tremendous success disrupting and dismantling the world's major drug trafficking organizations and I am proud of our many recent accomplishments. Our investigations range from those that target the world's "Most Wanted" drug traffickers who manage sophisticated organizations with operations that span the globe, to those that focus on local or regional traffickers who significantly impact the surrounding community, frequently bringing with them associated gang activity and violence.

One of our more high profile, international investigations was the recent extradition of Viktor Bout. After more than two years of legal proceedings, Mr. Bout, one of the most notorious international arms dealers in recent memory, was extradited on November 16, 2010 from Thailand to stand trial on terrorism charges in New York. Mr. Bout was arrested in Thailand in March 2008, putting an end to his massive weapons-trafficking business. Mr. Bout is being charged with agreeing to sell millions of dollars worth of weapons to individuals he believed were associated with the Fuerzas Armadas Revolucionarias de Colombia (FARC), a Colombian narco-terrorist organization. During a covertly-recorded meeting in March 2008, Bout stated to two DEA confidential sources that he could arrange to airdrop the arms to the FARC in Colombia, and offered to sell two cargo planes to the FARC that could be used for arms deliveries. Mr. Bout agreed to arrange this sale with the specific understanding that the weapons were to be used to attack U.S. helicopters in Colombia. Mr. Bout is now being held in a high-security prison pending trial.

DEA is also making a difference on the state and local level through investigations such as *Operation Baker's Dozen*, a major case coordinated by the Special Operations Division. This operation has resulted in several successful takedowns, including one targeting the California-based West Park Gang. This investigation culminated in May 2010 when law enforcement officers from DEA, the Federal Bureau of Investigation, Immigration Customs and Enforcement, and several local law enforcement agencies conducted the gang-related raids. These raids resulted in 35 arrests and the seizure of more than 30 pounds of illegal narcotics, $564,000, and 23 firearms. The arrests were based on charges of conspiracy to distribute methamphetamine, street terrorism, and firearms violations, and produced potential witnesses and information related to multiple ongoing homicide investigations. In February 2011, also under the umbrella of *Operation Baker's Dozen*, DEA announced that nearly 800 law enforcement officers from DEA, the Bureau of Alcohol, Tobacco, Firearms, and Explosives, and the Los Angeles Police Department carried out raids targeting the 38th Street Gang, an organization allegedly controlled by the Mexican Mafia prison gang. The takedown resulted in the arrest of 57 defendants, many of whom are named in a federal racketeering indictment that alleges large-scale drug trafficking, violent crimes, and extortion of both drug dealers and legitimate businesses. One-day seizure totals included seven kilograms of cocaine, 23 firearms, and $250,000.

I am also pleased to inform you that DEA has had much success in its long-term objective of denying drug traffickers the revenue they seek through their illegal activities. Between FY 2005 and FY 2010, DEA denied drug trafficking organizations a cumulative total of $15.8 billion in revenue through the seizure of both assets and drugs.[1] In FY 2010 alone, DEA denied drug traffickers $3 billion in revenue. But we not only take their money, we follow the money trail back to the command and control centers where we attack the masterminds directing the organizations.

DEA works many of its biggest cases hand-in-hand with our state and local counterparts, and we share a portion of this revenue with these partners. In FY 2010 alone, the

[1] Revenue denied is defined as the monetary value of currency, property and drugs seized.

Department of Justice Equitable Sharing Program shared $342 million in seized assets with state and local law enforcement for their participation in joint investigations with DEA.

FY 2012 President's Budget

The FY 2012 President's Budget supports DEA's base requirements and focuses on high priority programs. Since FY 2007, DEA has used Zero Based Budgeting (ZBB) to allocate funding to our various programs based on a review of current program requirements and agency priorities, rather than simply on prior year allocations. The goal of ZBB is to provide sufficient base resources to support program costs for the full year, while at the same time identifying program inefficiencies and improvements so we can redirect funding to our highest priorities.

The FY 2012 President's Budget demonstrates the restraint and the discipline called for in these tough times. For example, DEA's request of $69,489,000 for base adjustments and program increases for our S&E and Construction accounts is offset by $47,057,000 in efficiency, consolidation, and program realignment proposals. While these offsets represent difficult decisions, they are justified and necessary to fund the priorities highlighted in the following discussion. The FY 2012 request also includes a cancellation of $30,000,000 in unobligated prior year balances.

Mexican Cartels and the Southwest Border

Project Deliverance is one of our recent Southwest Border operational successes. This DEA-led operation targeted the transportation infrastructure of Mexican drug trafficking organizations in the United States and culminated on June 9, 2010 with the arrest of 429 individuals in 16 states in a single day. Over the course of 22 months, this operation resulted in a total of 2,266 arrests, including a Consolidated Priority Organization Target (CPOT), and the seizure of $154 million and 74.1 tons of drugs. More than 300 federal, state, local and foreign law enforcement agencies contributed investigative and prosecutorial resources to this operation. Our collaborative efforts inflicted a debilitating blow to the network of shadow facilitators and transportation cells controlled by the major Mexican drug cartels.

Also key to DEA's efforts along the Southwest Border is our close relationship with the Government of Mexico. Under the leadership of President Felipe Calderon, cooperation between the U.S. and Mexico is at an all-time high. In particular, we are grateful for the extradition partnership the U.S has developed with Mexico. Extraditions are an important tool that can be used to ensure criminals are brought to justice in this country. In 2009 and 2010, Mexican authorities extradited 107 and 94 individuals, respectively, to the United States, including several high ranking cartel members. DEA has also worked with the Government of Mexico to restructure the Mexican Sensitive Investigative Unit (SIU) Program. The SIU is composed of individuals from Mexico's Ministry for Public Security and Office of the Attorney General. Every member has been vetted and trained by DEA and assigned to autonomous groups that are tasked with pursuing a specific

Mexican cartel. The Mexican SIU plays an important role in Western Hemisphere drug enforcement efforts and they are working to increase collaboration with counterparts in Colombia through an exchange of SIU personnel.

One of DEA's best known and most significant contributions to Southwest Border enforcement is our El Paso Intelligence Center (EPIC). This all-threats tactical operations and intelligence center currently houses employees from 27 federal, state, local, and foreign agencies, directly supporting the efforts of the Departments of Justice and Homeland Security and the Joint Interagency Task Force-South. EPIC also has information sharing agreements with police agencies in 49 states that give state and local police access to real-time intelligence from 14 databases. As its customer base has grown over the years, EPIC has experienced significant increases in intelligence contributions, database queries, system users, and on-board staffing commitments from partner agencies. Included in the FY 2012 President's Budget is a request for $10,000,000 in no-year construction funding for modular buildings, which will allow increased participation at EPIC by partner agencies and improve the sharing and receipt of information, provide resources for the development of new intelligence initiatives, and enhance the support for and communication with law enforcement agencies on the Southwest Border and worldwide.

To continue targeting the production, distribution, and financial networks of Mexican cartels, we need to keep pace with the new communications technologies used by these organizations. Due to changes in the volume and complexity of today's communications services and technologies, DEA and other law enforcement agencies are sometimes unable to access, intercept, collect and process wire or electronic communications to which we are lawfully authorized. To address these challenges, the Department of Justice is establishing a Domestic Communications Assistance Center (DCAC) to serve as a hub for the management of knowledge and technical expertise regarding lawful electronic surveillance. This center will also facilitate the sharing of solutions and know-how among federal, state, and local law enforcement agencies and improve our relationships with the communications industry. The FY 2012 budget requests $1,519,000 for eight DEA positions to support the Department's efforts to develop these new electronic surveillance capabilities.

Finally, I would be remiss if I did not take this opportunity to thank the Subcommittee for the $33,700,000 in supplemental funding you provided to DEA for Southwest Border enforcement last August. We truly appreciate your support for these very important efforts. This funding is being used for helicopter cameras; Operation All Inclusive and other ongoing enforcement operations; SIUs throughout the Western Hemisphere; license plate readers; communications intercepts; and intelligence programs. The supplemental also funds 50 new positions, including 35 Special Agents. These resources will enable DEA to expand our initiatives related to the Southwest Border, including our strong partnerships with both state and local law enforcement agencies and foreign counterparts in South and Central America. The FY 2012 request includes $32,600,000 in base adjustments required to continue the Southwest Border enforcement efforts that were

originally funded through regular and supplemental appropriations in FY 2009 and FY 2010.

Prescription Drug and Precursor Chemical Diversion

As highlighted in the President's 2010 National Drug Control Strategy, the diversion and abuse of controlled prescription drugs are among the greatest concerns we face today. Over the last several years, national surveys have shown that a significant number of Americans are abusing prescription drugs for nonmedical purposes. According to the 2009 National Survey on Drug Use and Health, seven million people over the age of 12 used prescription medications for non-medical reasons during the past month. The survey also found that 2.6 million people aged 12 or older used psychotherapeutics non-medically for the first time, which equates to approximately 7,000 new prescription drug abusers every day. Furthermore, the Centers for Disease Control's 2009 National Youth Risk Behavior Survey revealed that 1 in 5 high school students say they have taken a prescription drug that was not prescribed for them; including OxyContin, Percocet, Vicodin, Adderall, Ritalin, or Xanax.

To address these troubling statistics, DEA's Diversion Control Program is tasked with preventing, detecting, and investigating the diversion of pharmaceutical controlled substances and listed chemicals from legitimate channels, while simultaneously ensuring an adequate and uninterrupted supply of these substances is available to meet legitimate medical, commercial, and scientific needs. Through its Diversion Control Program, DEA regulates more than 1.3 million registrants, a population that grows at a rate of more than two percent per year.

Last year, DEA launched an innovative campaign to address the increased abuse and theft of controlled prescription drugs. On September 25, 2010, DEA, together with more than 3,000 government, community, public health, and law enforcement partners across the country, hosted a nationwide prescription drug "Take-Back" initiative. This campaign addressed a vital public safety and health issue because medicines that languish in homes are highly susceptible to diversion, misuse, and abuse. More than 4,000 sites in all 50 states were established to collect potentially dangerous expired, unused, or unwanted prescription drugs for destruction; the service was free and anonymous. The results were impressive: the American public turned in over 121 tons of prescription drugs for disposal. I want to thank Congress for their role in recognizing the importance of this effort by passing the Secure and Responsible Drug Disposal Act of 2010. This law will provide Americans with safe, environmentally sound ways to dispose of unused or expired prescription drugs. DEA will be holding its second nationwide prescription drug Take-Back Day on April 30, 2011.

To enhance our diversion control efforts, DEA has expanded the use of Tactical Diversion Squads (TDS) which combine Special Agents, Diversion Investigators, and state and local task force officers to focus on the law enforcement activities of the Diversion Control Program. As of December 31, 2010, DEA had 37 TDS's dispersed among the domestic divisions, with a total of 294 authorized task force officer positions.

We are also increasing our focus on regulatory oversight, including the modification of chemical and regulatory work plans to increase the frequency of scheduled investigations and broaden the pool of registrants that are subject to scheduled regulatory investigations. To continue these efforts in FY 2012, DEA's DCFA request includes 124 positions, including 50 Special Agents and 50 Diversion Investigators, and $30,885,000 to enable DEA to continue fulfilling both the enforcement and regulatory control responsibilities of the Diversion Control Program.

Afghanistan and Narco-terrorism

DEA supports the U.S. policy goals in Afghanistan and helps carry out the U.S. Counternarcotics Strategy through close partnerships with the Departments of State and Defense. DEA's presence in Afghanistan reduces the amount of illicit drugs that are trafficked from the country, and helps develop the capacity of the Afghans to conduct counterdrug operations themselves. DEA is also periodically called upon to support U.S. efforts against insurgents and terrorism, all of which aid in the long-term stabilization of the country and the region.

DEA continues to work bilaterally with our Afghan law enforcement counterparts to identify, investigate, and bring to justice the most significant drug traffickers in Afghanistan and the region. Together, we have increased the size of the Afghan-staffed SIU, Technical Investigative Unit, and National Interdiction Unit. In FY 2010, DEA completed a significant expansion effort in Afghanistan. DEA now has 82 permanent positions assigned to Afghanistan, including 62 agents. Of these 82 positions, 69 positions are funded through transfer funding from the Department of State. DEA's Foreign-Deployed Advisory and Support Teams also deploy to Afghanistan on a temporary basis; the teams consist of 10 positions each and rotate through every 120 days. We are also planning to improve the long term investigative capabilities of these units through coordination with the Afghan Threat Finance Cell and the expansion of a Joint Wire Intercept Program in FY 2011.

Our efforts to target the organizations that are financing terrorism with drug proceeds are paying off. For example, on February 10, 2011, DEA and the Department of the Treasury announced the identification of The Lebanese Canadian Bank (LCB) as a financial institution of primary money laundering concern under Section 311 of the USA PATRIOT Act for the bank's role in facilitating the money laundering activities of an international narcotics trafficking and money laundering network. The announcement also exposed links between the terrorist organization Hezbollah, LCB, and the international narcotics trafficking and money laundering network. Through DEA-led operations, it was discovered that this network moves illegal drugs from South America to Europe and the Middle East via West Africa. It also launders hundreds of millions of dollars monthly through accounts held at LCB, as well as through other money laundering operations involving consumer goods throughout the world, including used car dealerships in the United States.

Only a few days later, on February 14, 2011, federal prosecutors in New York unsealed indictments against seven defendants who were charged with conspiring to provide various forms of support to DEA confidential sources whom they believed to be representatives of the Taliban in Afghanistan. Some of these defendants allegedly agreed to receive, store, and move ton-quantities of Taliban-owned heroin through West Africa, portions of which they understood would then be sent to the United States. Certain defendants also allegedly agreed to sell substantial quantities of cocaine that the Taliban could then sell at a profit in the United States. Additionally, some of the defendants allegedly agreed to sell weapons to the Taliban, including surface-to-air missiles to be used to protect Taliban-owned heroin laboratories against attack by the United States. Five of the defendants were arrested in Monrovia, Liberia on February 10 and 12, 2011, and were transferred by the Government of Liberia to the custody of the United States. The two remaining defendants were arrested in Bucharest, Romania on February 10, 2011, where they remain pending extradition to the United States.

DEA's unique, single mission focus gives us the ability to tie drug trafficking to both criminal activities in the U.S. and to narco-terrorism threats that originate in foreign countries. The challenges are enormous, but as the world's premier drug enforcement organization, we approach them with confidence and with an unwavering commitment to keeping our nation safe from the harmful effects of dangerous drugs. With your support and the backing of the American people I know we cannot fail. Mr. Chairman and Members of the Subcommittee, this concludes my formal remarks. I would be pleased to answer any questions you may have.

Mr. WOLF. Thank you very much.

Before I begin with some of the questions we have, I want to ask you a couple of general ones that were not in the list.

AGENTS KILLED IN THE LINE OF DUTY

How many DEA agents have been killed in the last ten years and can you talk a little bit about where, and the danger that they face?

Ms. LEONHART. Sure. It is not only DEA agents that have been killed in the line of duty, but it is also task force officers. I will start with three agents a year ago last October, three hard-working, very talented agents that died in Afghanistan on our Afghanistan mission.

They were doing the duties. One was assigned to the Kabul country office and two were members of our FAS team who died after executing a search warrant in one of the western provinces in Afghanistan.

Just shortly before that, a year before that, there was an FBI agent who was killed in Pennsylvania while working on a drug organization and serving search warrants.

Prior to that, we had an agent who was attending a conference in New Orleans who was murdered by a crack addict.

We went several years without losing anyone. We lost a pilot in 2005. So over the past ten years, we have lost agents. We have lost fellow federal agents from other agencies; and we have lost task force officers. And I am very concerned about the tempo, the assaults we have seen on not only federal agents, but especially state and local agents, this uptick over the last year after a 40- or 50-year low in deaths to law enforcement.

Mr. WOLF. Okay. Can you submit for the record, get it to the staff maybe within the next two weeks, a report on how many DEA agents and other FBI and others in task forces have been killed, say, since the year 2000? And we can discuss why, but I would like to just submit them for the record too.

[The information follows:]

U.S. Drug Enforcement Administration Wall of Honor, 2000-present

Six DEA special agents, one Diversion Investigator, one Telecommunications Specialist, one Task Force Officer, and one partner agency (FBI) Special Agent have been added to DEA's Wall of Honor since 2000.

Royce D. Tramel

June 5, 1964 to August 28, 2000

On August 28, 2000, Special Agent Royce D. "Doug" Tramel was struck and killed by a vehicle. Special Agent Tramel was 36 years of age at the time of his death.

Special Agent Tramel graduated from Southern Methodist University in Dallas, Texas in May of 1986 with a Bachelors degree in Political Science. In August that year, he began work with the City of Dallas Police Department. Special Agent Tramel received a Masters degree in Public Affairs from the University of Texas at Dallas in May of 1991. He was accepted to the Basic Agent Class 84 in August 1991. Upon graduation he was assigned to the Dallas Field Division.

While working in Dallas, Special Agent Tramel received letters of commendation from DEA Administrator Thomas Constantine for his work on the Mobile Enforcement Team and James Adams, Special Agent in Charge of the FBI's Dallas Office for his efforts on a case indicting 5 drug traffickers from Guadalajara, Mexico.

Special Agent Tramel was an avid hunter and in his spare time enjoyed repairing cars and making home improvements. He was survived by his wife, Cheryl, their children, Wyatt and Whitney, his mother, Rita Tramel, and a sister, Rhonda Welch.

Alice Faye Hall-Walton

July 11, 1968 to March 1, 2001

Drug Enforcement Administration, (DEA) Diversion Investigator, Alice Faye Hall-Walton was killed in an automobile accident on March 1, 2001. She was 32 years of age at the time of her death.

Mrs. Walton began her government service with the DEA as an intern in the Records Management Unit at Headquarters in May of 1990. While at DEA, she received a bachelor of science degree from Alabama A&M University in May of 1991. She remained at Headquarters as a Clerk Typist until October of 1992 when she was assigned to the Honolulu District Office. In May of 1994 she was transferred to the Atlanta Field Division and promoted to Secretary. On March 16, 1997 she was promoted to Diversion Investigator and was assigned to the Dallas Division. She was survived by her husband Ganester, their daughter, Tayler Alexandria, her parents Mr. and Mrs. Leroy Hall and many siblings.

Elton Lee Armstead

August 11, 1957 to March 18, 2003

Telecommunications Specialist, Elton Lee Armstead died in the line of duty on March 18, 2003. His death was a result of injuries suffered from a fall while installing surveillance equipment on a grain silo in support of an ongoing narcotics investigation in Morris, Illinois.

Elton was assigned to the Chicago Field Division and during his 20 years with DEA, excelled in all of the positions he held. In January of 2003, he attained the highest journeyman level in his profession as a Telecommunications Specialist. Elton attended Loop College, Harold Washington College and Prairie State College, all in Illinois. Elton was a former Marine and served from November 1975 until November 1979. During his military service he was awarded a Rifle Marksmanship Medal and the Good Conduct Medal.

Elton will be remembered as a hard-working, dedicated employee, a good friend and a loving husband and father. He was survived by his wife, Marnita, and children, Kevin, Corey and Kellye. He was also survived by his parents, Ed and Doris Armstead and six brothers and sisters.

Special Agent Terry Loftus

September 1, 1959 - May 28, 2004

Drug Enforcement Administration (DEA) Special Agent Terrance P. Loftus was killed on May 28, 2004, when the plane he was piloting crashed shortly after take off from Midway International Airport in Chicago, Illinois. Agent Loftus was providing air support to the Kansas City District Office as part of a Title III Investigation. After transporting drug evidence seized by the Kansas City District Office to the DEA Laboratory in Chicago, Illinois, he was enroute to St. Louis to return the DEA aircraft.

Special Agent Loftus was born in Hasting, Michigan, and graduated from Western Michigan University with a Bachelor of Science Degree. He served in the United States Army from 1981 to 1988. Terry was hired by DEA and assigned to the Washington Division, Baltimore District Office beginning September 10, 1989. While assigned to Baltimore, he served in the active reserve of the Maryland National Guard. He was an experienced pilot with 1,700 hours of flight time. On November 11, 1999, he was assigned to the Office of Aviation Operations in Chicago, Illinois.

Special Agent Loftus was survived by his wife Deborah, and their children, Dornier, Banon, Mallory and Ross, his parents Iris and Patrick Loftus of Hasting, Michigan, his brother Andrew of Annapolis, Maryland and his sister Denise Garn of Jenison, Michigan.

Task Force Officer Jay Balchunas

January 18, 1970 - November 5, 2004

On October 29, 2004, Task Force Officer John "Jay" Balchunas was fatally wounded in Milwaukee, Wisconsin. He died from his injuries on November 5, 2004. Officer Balchunas was conducting surveillance as part of the Department of Justice/FBI Fall Threat Initiative prior to the national elections.

Task Force Officer Balchunas was employed as a Narcotics Bureau Special Agent within the State of Wisconsin, Division of Criminal Investigation (DCI). Prior to joining the State DCI, Task Force Officer Balchunas worked as a Milwaukee Police Officer for seven years and a Marquette University Public Safety Officer before that. Additionally, Task Force Officer Balchunas was a dedicated Volunteer Firefighter with the New Berlin Fire Department, achieving the rank of Lieutenant.

On the evening of October 29th, while walking to his car, Task Force Officer Balchunas was accosted by two assailants. A struggle ensued and one of the assailants shot Officer Balchunas in the abdomen. He underwent several surgeries before succumbing to his injuries on November 5, 2004. Task Force Officer Balchunas was engaged to be married in the fall of 2005 and was survived by his fiancée Luann Vogel, his parents Don and Mary Kay, his brother Dan and his sister Linda.

Special Agent Thomas J. Byrne

January 5, 1968 – August 30, 2008

On August 28, 2008, while attending the Organized Crime Drug Enforcement Task Force Conference in New Orleans, Louisiana, Special Agent Thomas J. Byrne was attacked and severely beaten and mugged while walking to his hotel. After multiple surgeries, he succumbed to his injuries on August 30, 2008.

Special Agent Byrne was born in the Bronx, New York. He graduated from James Madison University in Virginia in 1991 with a Bachelor of Arts Degree in Finance. He joined DEA in 1992 as an Intelligence Specialist assigned to Headquarters in the Financial and Special Intelligence Section. In 1996 he was hired as a DEA Special Agent through the Washington Field Division and upon graduation was assigned to the Miami Field Division. In 2002 he was reassigned to the Nassau Bahamas Country Office where he served for four years. In April 2006, SA Byrne was promoted to Group Supervisor in the Houston Field Division where he served until his death.

Special Agent Byrne was survived by his wife Maureen and four children, Tommy, Joseph, Matthew and Michael. He was also survived by his parents, Retired DEA Special Agent Thomas and Joan Byrne and two sisters, Patricia and Joann. Additionally, he had a large extended family, many of whom also work in law enforcement.

FBI Special Agent Samuel S. Hicks

November 27, 1974 – November 19, 2008

On November 19, 2008, Federal Bureau of Investigation (FBI) Special Agent Samuel S. Hicks was tragically shot and killed during a joint DEA, FBI and Pittsburgh Police Department operation in Pittsburgh, Pennsylvania.

Special Agent Hicks began his law enforcement career with the Ocean City, Maryland Police Department. Prior to joining the FBI in March 2007, Special Agent Hicks served as a police officer with the Baltimore, Maryland Police Department for five years. At the time of his death, Special Agent Hicks was assigned to the Joint Terrorism Task Force in the FBI Pittsburgh Division.

SA Hicks graduated from the University of Pittsburgh at Johnstown in 1999. He was survived by his wife, Brooke, their young son Noah and his parents Charlotte Carrabotta and David Hicks. Special Agent Hicks will be remembered by his friends and loved ones as dedicated to his family and his career in law enforcement.

Special Agent Forrest N. Leamon

November 21, 1971 – October 26, 2009

Drug Enforcement Administration (DEA) Special Agent Forrest N. Leamon was killed on October 26, 2009, when the U.S. military helicopter he was in crashed while returning from a joint counternarcotics mission in Western Afghanistan. Special Agent Leamon was a member of DEA's Foreign-deployed Advisory and Support Team (FAST) Echo, assigned to Afghanistan. He was 37 years old at the time of his death.

Special Agent Leamon grew up in Ukiah, California. He graduated in 1999 from the University of Maryland with a Bachelor's Degree in Computer Studies. Special Agent Leamon served in the United States Navy as a Cryptologic Technician for nine years. He joined DEA in 2002 and was assigned to the Washington Field Division. In 2003 he was transferred to the El Paso Field Division and played a major role in several significant international enforcement operations against Mexico-based drug trafficking organizations. Special Agent Leamon volunteered to serve as a member of DEA's newly-formed FAST Team, serving multiple tours of duty in Afghanistan.

Special Agent Leamon was survived by his wife, Ana Lopez; their unborn son, Luke; his parents, Sue and Richard Leamon; and his sister, Heather.

Special Agent Chad L. Michael

February 22, 1979 – October 26, 2009

Drug Enforcement Administration (DEA) Special Agent Chad L. Michael was killed on October 26, 2009, when the U.S. military helicopter he was in crashed while returning from a joint counternarcotics mission in Western Afghanistan. Special Agent Michael was a member of DEA's Foreign-deployed Advisory and Support Team (FAST) Alpha, assigned to Afghanistan. He was 30 years old at the time of his death.

Special Agent Michael grew up in northeastern Pennsylvania. He graduated in 2001 from St. Leo University in Florida with a Bachelor's Degree in Criminal Justice. Special Agent Michael began his law enforcement career as a patrol officer with the Hillsborough County Sheriff's Office in Tampa, Florida. He joined DEA in 2004 and was assigned to the Miami Field Division, serving for six years in Enforcement Group Six. In September 2009, Special Agent Michael volunteered to serve as a member of DEA's FAST Team.

Special Agent Michael was survived by his fiancé, Paola Berrio; his mother, Debra; his stepfather, Leo Hartz; five brothers, Eric Michael, Russell Hartz, Edward Hartz, Leo Hartz, II, and Justin Hartz; and a sister, Cara Hartz.

Special Agent Michael E. Weston

December 29, 1971 – October 26, 2009

Drug Enforcement Administration (DEA) Special Agent Michael E. Weston was killed on October 26, 2009, when the U.S. military helicopter he was in crashed while returning from a joint counternarcotics mission in Western Afghanistan. Special Agent Weston was assigned to the Kabul Country Office in Kabul, Afghanistan. He was 37 years old at the time of his death.

Special Agent Weston grew up in Pennsylvania and California. He graduated with distinction from Stanford University in 1994 with degrees in Computer Science and Economics. He went on to graduate from the Harvard University School of Law with his Juris Doctorate, cum laude, in 1997.

Special Agent Weston served in the United States Navy and Marine Corps in a variety of capacities, including as a Special Assistant United States Attorney and a Squad Leader. He was stationed at Camp Pendleton and served in deployments to Iraq, Norway, the Panama Canal and various other locations, where he earned numerous awards. Special Agent Weston joined DEA in January 2004 and was assigned to the Washington Field Division, Richmond District Office where he worked until volunteering to join the Kabul Country Office in August 2009.

In addition to his wife, Cynthia Tidler, Special Agent Weston was survived by his mother, Judy Zarit; his father, Steven Weston; and his brother, Thomas.

VIKTOR BOUT

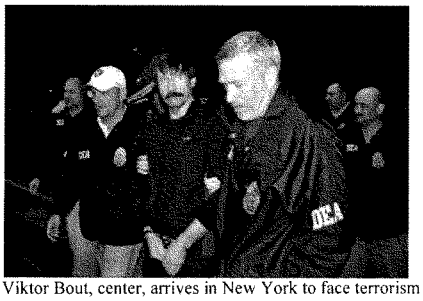
Mr. WOLF. Secondly, I want to thank DEA for the Viktor Bout arrest and apprehension. And I'm going to submit for the record a *Newsweek* story "Getting to Bout."

[The information follows:]

Newsweek

Getting to Bout

by John Barry | November 20, 2010 8:00 AM EST



Viktor Bout, center, arrives in New York to face terrorism charges., Drug Enforcement Administration-AP

When celebrated Russian arms dealer Viktor Bout landed last Tuesday night at Stewart International Airport in upstate New York—before being whisked to Manhattan to appear the next day in front of a district-court judge—it marked the end of a saga known to the Drug Enforcement Administration as Operation Relentless. The man who ran it tells NEWSWEEK the affair began with a challenge from the White House.

After 9/11, law-enforcement agencies had expanded jurisdiction to arrest foreign nationals living outside the U.S. but accused of crimes against Americans. Michael Braun, the DEA's head of operations from 2004 until 2008, had overseen a string of high-profile global arrests, including that of Monzer Al Kassar, a member of the Palestinian Liberation Front and, in his day, the world's second-biggest arms dealer. Braun says that a colleague on the National Security Council, congratulating the DEA team on Kassar's 2007 arrest (he's serving a 30-year sentence), suggested it go after public enemy No. 1: Bout. According to Braun, the NSC official, whom Braun wouldn't name, said, "Every other three-letter agency in town had been tracking him." Could the DEA succeed where they had failed? "We said, 'OK, yeah, let's see what we can do here,'?" says Braun, who now runs a firm supporting State and Pentagon efforts to train law-enforcement personnel worldwide.

Posing as buyers for the Colombian insurgent group FARC, the DEA—which had played the same trick on Kassar—trapped Bout in a March 2008 sting operation in Bangkok; Thai police arrested him at the behest of the U.S., provoking a two-year battle with Russia, which wanted to keep Bout from being extradited to America. But last Monday, the Thais—who received periodic reminders from Washington of their privileged trade status—agreed to let the U.S. have Bout. (He pleaded not guilty, and his next hearing is scheduled for Jan. 10.)

Why were the Russians so anxious to keep Bout out of American hands? Known as "Africa's merchant of death," Bout is thought by U.S. officials to have built an empire worth perhaps $6 billion. According to a U.N. report, he supplied arms to Angola, the Democratic Republic of the Congo, Liberia, Rwanda, Sierra Leone, and Sudan (not to mention Afghanistan). "Bout had the ability to acquire the most sophisticated weapons systems that the former Soviet bloc could offer," Braun says. "He could not have acquired the weapons systems he did without complicity at the highest ranks of the government and military in Russia." Yevgeny Khorishko, a spokesman for the Russian Embassy, says, "Russian officials were never involved in any activities of Mr. Bout, if there were any activities—and there is no proof of that."

November 20, 2010 8:00am

Mr. WOLF. I was in Africa once. We were in the Congo and they said all those planes are Viktor Bout's planes and they are bringing in guns and weapons. And why were the Russians so anxious to keep Bout, known as the "Merchant of Death," out of America.

And so I just want to thank you and thank the DEA people for the outstanding job of staying with it because I think it would have been easy to give up on Bout and also I think in fairness to give credit to the Administration, I think Secretary Clinton and others who stayed with that and did not allow it to drop.

Where is Viktor Bout these days and can you give us the status of his case?

Ms. LEONHART. Sure. I can probably say that——

Mr. WOLF. And tell us just in a couple sentences——

Ms. LEONHART. I can probably say it——

Mr. WOLF [continuing]. Some of the things that he did, so we understand how important this was.

Ms. LEONHART. I can probably say that he is facing trial in New York. We got him extradited from Thailand in November. And he faces charges of attempting to sell weapons and missiles to people who he thought represented the FARC in Colombia and was even offering to give air access to help them to use these weapons to shoot down U.S. and Colombian aircraft.

Mr. WOLF. And was involved in Africa. I mean, many people died in Africa because of his——

Ms. LEONHART. Sure. His history is he armed many conflicts, especially conflicts in Africa. The charges that we were able to take him down on related to his willingness and his conspiracy to fund the FARC.

Mr. WOLF. Well, I want to again thank you because had he not been—and also the Thailand government, too, for cooperating in the way they did. I know it would have been easy to walk away from it. But this Administration stayed with it to their credit and the DEA did. And I think it is very, very important.

When is the trial scheduled?

Ms. LEONHART. I believe October of next year.

MEXICAN CARTELS

Mr. WOLF. Okay. October next year. Well, thank you.

I want to ask about the drug threats from Mexico. I understand the Mexican cartels now control drug distribution in most cities and where they do not control them, they are gaining strength. The struggle against the cartels have gone on for years and the violence seems to be continuing unabated.

Can you give us an update on the status of the joint efforts with the Mexican Government and describe the overarching strategy that DEA is using to disrupt and hopefully dismantle the cartels? And I am very sympathetic to the Mexican Government and to the Mexican people to see what we can do to be helpful. But if you could kind of do that, I would appreciate it.

Ms. LEONHART. Thank you, Chairman, for asking about that. That is our number one priority at DEA.

We have had significant successes in the past several years specifically since the Calderón administration started in December of 2006. We have had an unprecedented partnership with them and

we are helping them on this struggle because it not only affects Mexico, it affects the United States. More than 90 percent of the drugs entering this country come through Mexico, and that is of concern.

And we have seen over the past several years where the seven Mexican cartels, with their domestic affiliates and cells working for them, have taken over drug markets all across the country and not just cocaine, but some heroin markets and methamphetamine. And then there is, of course, the collection of those funds, bulk cash going back down to Mexico, as well as weapons.

So we have a strategy to work with our Mexican counterparts. We have the largest law enforcement presence in Mexico, and we are working around the clock with them to target those most responsible, not only for the cartels, but also most responsible for the violence.

I will say that the successes include the recognition that those cartels we are breaking up. You know, like huge boulders, we are trying to break them into small pebbles, and that really is why you are seeing the violence that you are seeing. They are in disarray. They are acting out like caged animals. They are losing their routes. They are losing their money.

We are seizing cash that they use to continue their operations, and we are having a great effect on attacking not only domestically those organizations that are trafficking all across the country, but tying the information and the intelligence we are getting from our domestic cases, bringing that down to Mexico, sharing it with our Mexican counterparts, and actually being able to act on that information.

So for the kingpins, the highest level traffickers: last year, we arrested three CPOTs (Consolidated Priority Organization Target) with the Mexicans. The Mexicans, this year, acting on our intelligence, have already arrested three CPOTs and have taken off significant high-level leadership of every cartel in Mexico.

Mr. WOLF. Now, were you saying all the cartels in Mexico have some relationship or are active here in the United States?

Ms. LEONHART. Every cartel in Mexico has people, has affiliates, has members working in the United States, yes.

Mr. WOLF. With regard to helping the Mexican Government, would you comment if you were to take Plan Colombia, the concepts behind Plan Colombia, because having seen Colombia where it was, if you recall, they even came into the Supreme Court and killed Supreme Court justices, to where it is to today, they have made tremendous gains, and we could hope for our friends south of the border the same success whereby the people of Mexico could live in peace and freedom similar to what is taking place in Colombia today versus how it was?

Are there models or are you taking all of what was successful in Plan Colombia and applying it with regard to Mexico, of course with cooperation with the Mexican Government?

Ms. LEONHART. We have been working with our partners in Mexico since the Calderón administration came in, to identify for them, especially with DEA's enforcement mission, what worked for us in Colombia, what was successful, and offer those same things to the Mexicans.

We have done the same with bringing a partnership between the Mexicans, the Colombians, and our country. We signed an agreement in 2007 called the Tripartite Agreement where we agreed, our three nations would learn from each other and share with each other.

And many pieces of Plan Colombia, the things that worked, I have been there because we have sponsored now eight tripartite meetings with our three countries. And we have seen the Colombians, with the current president, the former defense minister, Santos, and the Colombian national police, General Naranjo, actually walk through what they did during Plan Colombia, what they did to really turn around the drug trafficking and all the violence in Colombia.

The Mexicans have taken some of that and have put that into practice. So we are constantly learning about things that have worked in Colombia and sharing those with the Mexicans, and have actually learned in Colombia how we stood up sensitive investigative units. We have done the very same thing with the Mexicans in Mexico, and that is why we are having these enforcement successes really over the last couple of years.

Mr. WOLF. Now, how would you compare the seriousness in Mexico today with the seriousness it was in Colombia at its height, Mexico and violence at its height? Is there some hope for the Mexican people so they can see. Can you make a comparison?

Ms. LEONHART. There is great hope for the Mexican people by looking at the Colombia experience. I would like to say that right now, even with all the violence in Mexico, President Calderón has about a 50 percent approval rating. And it is interesting that currently 73 percent of Mexicans think that the government of Mexico should continue directly confronting the drug trafficking organizations and weakening their organized crime.

I have taken people down to Colombia who only know Colombia from the 1990s, and it is such a stark contrast. It is a different place now, and it is our hope and why we have prioritized our relationship and our enforcement operations with Mexico. It's our hope that we will be able to turn and see that after this relentless attack on the cartels, that we will then be able to bring that cartel problem to a regular law enforcement problem that can be dealt with by law enforcement officials and not need the military and not need some of the resources that President Calderón has had to call to attack the problem. So we are very optimistic.

Our friend, the former attorney general, Medina Mora, who we keep in touch with, always used to warn us and used to say it still may get worse before it gets better. And I do not know at what point we say that, you know, it has turned, but I can tell you that those cartels are on the run. Leaders that used to be in charge and be able to corrupt high-level officials and corrupt police forces and corrupt entities to be able to move their drugs are in jail, are dead, or in the United States in jail. The average tenure of a plaza boss in Mexico, which used to be multiple years, is now about six months, and that is because the courageous Mexican Government has taken on those cartels like they have never been taken on before.

Mr. WOLF. In your testimony, you describe Project Deliverance, 429 individuals who were arrested in 16 states in a single day.

Can you describe how these Mexican cartels establish and operate such networks and to what extent are domestic gangs linked to the cartels, just not the cartels who are active, but to what extent is it actually connected?

Ms. LEONHART. Deliverance was an operation that we worked with over 300 state and local police departments and all of our federal partners. It really allowed us to identify the facilitators, the people transporting, the truckers, the people moving money, the people that help those cartels. So it was the first time it did not concentrate on one specific cartel, but the operation targeted across the country those facilitators, those that help the cartel. Part of that operation was looking at what gangs in the United States are also helping. We concentrated a number of our operations down in the El Paso area.

And we saw that, for instance, the Barrio Azteca prison gang operating on both sides of the border helped facilitate in many ways. In some ways, they were low-level drug traffickers themselves, but the cartels paid them in product and paid them to do the dirty business of the cartels to keep people in order, assassinate. So that really helped us see this connection between gangs operating on this side of the border and the other side of the border and their connection and what they do in the business, in the cartel business.

Mr. WOLF. But when we say there is a connection, is there a connection just with gangs along the border? Is it a connection that takes all the way in throughout the United States?

Ms. LEONHART. The best way for me to explain it——

Mr. WOLF. The 50 states, how extensive would the connection be in all 50 states?

Ms. LEONHART. I will tell you that most street gangs make the majority of their money by selling drugs. The drugs that they are selling are controlled and came into this country by the cartels. So there can be loose connections, but the cartels and the domestic cells that work for the cartels are supplying all of those street gangs. It does not matter if you are in Los Angeles, Seattle, Washington, New York, Philadelphia; those cartels are the suppliers for those gangs.

EL PASO INTELLIGENCE CENTER

Mr. WOLF. One of the primary interagency law enforcement assets is the El Paso Intelligence Center. Your fiscal year 2011 request included $42 million for permanent expansion and renovation to the EPIC facility to accommodate increased participation by a number of agencies.

We still have no bill for fiscal year 2011, but your fiscal year 2012 request includes instead $10 million for modular buildings.

How many agencies participate in EPIC and how many intend to increase their EPIC staff levels over the next few years?

Ms. LEONHART. Thank you for that question.

There are almost 30 agencies there.

Mr. WOLF. Can you give us some examples?

Ms. LEONHART. Sure. ATF, FBI, ICE, CBP. We have some state and local organizations like Texas Department of Law Enforce-

ment, DPS. We have people from the Intel Community there. We also have representatives for the first time from Colombia and Mexico working in EPIC.

There are nine agencies that would like to expand their presence at EPIC over the next six months to five years, so we are out of space at EPIC. We see great utility in expanding the operations of EPIC and that is why the request for the $10 million.

Mr. WOLF. Would the $10 million be enough to do what you have to do down there?

Ms. LEONHART. Well, Chairman, these are very, very rough budget times, and we have all been asked to tighten our belts and to see where we can have savings, how we can do things differently.

And the way I can explain this is instead of building an addition on a house to house people, we found other ways. We will bring in semi-permanent trailers. We are looking at going to 24-hour shifts to help with the space so that we can continue to bring those folks in.

So we originally needed $42 million to do a full expansion. But in trying to do our part in helping with the deficit and the budget. The minimum, if we got the $10 million, we could at least expand. We originally were looking for 176 more people. With that $10 million, we will be able to bring in at least 100 more people from these agencies.

Mr. WOLF. And how fast? Pretty fast, the modular trailers?

Ms. LEONHART. Some are actually committed and there now we are sitting on top of each other.

Mr. WOLF. Right.

Ms. LEONHART. But they are committed. We have good commitments. We have a couple of very time-sensitive operations or programs that we have planned that will especially help with our U.S. Mexico border situation, and we did not wait to at least start the planning of that. So the minute we get the money, expansion will start and the people will be coming in.

Mr. WOLF. Okay. Mr. Fattah.

Mr. FATTAH. Thank you very much.

Let me first of all thank you for all of the help of the agency in responding to a lot of the challenges in my home city of Philadelphia.

MEXICAN CARTELS

But I want to start more generally. Can you give us either now or for the record what your agency's view is about the amount of revenue that is being generated by these organizations, for instance in Mexico from illegal drug sales?

Ms. LEONHART. The United Nations does a study and they look at what illicit markets generate the most funding. And I did not bring, I should have brought the figures, but drug trafficking is so high above the next illegal market. We find around the world, if you look at what is happening in Africa for instance, these organizations, especially those that fuel terror, turn to drug trafficking because it is the most lucrative.

The Mexican cartels are acting out because they are losing their routes and they are losing their supply, and that is cutting into their bottom line. They are losing money. So cartels and these

transnational organizations operate; it is all about greed, they operate for money. When you have enforcement operations that attack or interrupt that, then we do significant damage to those cartels.

[The information follows:]

UNODC 2010 ANNUAL REPORT

The UNODC (United Nations Office on Drugs and Crime) 2010 Annul Report and World Drug Report estimate for the global drug market is over $300 B.

AFGHANISTAN

Mr. FATTAH. Are most of the drugs that are coming out of Afghanistan going into Europe?

Ms. LEONHART. That——

Mr. FATTAH. Is that our sense of the trading route? What market is it going to?

Ms. LEONHART. Most of it is going to Europe. A lot is going to Russia. A lot is going to China. A lot is actually staying in the region. Fortunately, and we think that this has to do with our enforcement operations in this country, less than 5 percent of the heroin on the streets of the United States actually comes from Afghanistan.

Mr. FATTAH. Now what could you tell the committee about your work and the agency's work, obviously in cooperation with others, in the efforts in Afghanistan? You have this effort to get farmers to change crops. You have a number of different efforts going on. But what can you tell us generally about the work that is going on there?

Ms. LEONHART. Well I can tell you that our primary mission there is to help the Afghans stand up a narcotics force that will be capable. We call it the DEA of Afghanistan for the future. It is helping them stand up, collect intelligence, perform operations, identify the money flows, identify the biggest and the baddest, those drug kingpins in Afghanistan, and do cases on them. We have brought several drug kingpins to the United States to face trial. We work with the international community that is there within Afghanistan. We work with the military in Afghanistan. What we are most proud of is the three entities in Afghanistan that we stood up. That is the National Interdiction Unit of the Afghan National Police Counternarcotics. We stood them up and think of them like the SWAT team for Afghanistan. Then we stood up a special Sensitive Investigative Unit called the SIU, and more recently stood up a third entity called the TIU, the Technical Investigative Unit. We have a very robust wiretap program that we have set up with the Afghans in Afghanistan, and this is the group that does those wiretaps and has over a hundred translators collect all this intelligence and then we share it with the interagency.

Mr. FATTAH. In terms of your entire budget and your staff, what percentage of your resources or how many dollars are flowing through to this Afghan mission?

Ms. LEONHART. Well in 2012——

Mr. FATTAH. Right.

Ms. LEONHART [continuing]. DEA requested $88.6 million in transfer funding from the Department of State for our ongoing efforts in Afghanistan.

[The information follows:]

S&E IN AFGHANISTAN

In addition, DEA dedicates a little over $19 million of own Salaries & Expenses funding for our operations in Afghanistan. This supports our original 13 positions plus the FAST teams which perform 120 day rotations.

Mr. FATTAH. Now given where the resulting trade is, the EU, Russia, China, do we have buy-in from these other countries who are the recipients of these illegal narcotics from Afghanistan? It would seem to me they have some interest in this matter and I am trying to understand to what degree you have a working relationship, or to what degree they are invested in the United States' effort. I mean, we have our own reasons. We do not want the dollars to flow to potential terrorist entities in Afghanistan so we want to cut off their supply of money. But I am trying to see whether we have any partners in this effort.

Ms. LEONHART. We do. We have a number of partners. We are working with the RCMP of Canada. We are working with the Brits. We are working with the Germans. We are working with the French. More recently we are working very robustly with the Russians, where a lot of these drugs are going. So we have built partnerships there over the years, and we are doing joint enforcement operations, we are sharing intelligence.

[The information follows:]

Summary of Multilateral Assistance in Afghanistan

The European Union countries as part of NATO, UNODC and ISAF have a role in counternarcotics programs throughout Afghanistan. Counternarcotics is, in fact, an ISAF Key Support Task. Under this task, ISAF European Partners must

1. Share Counter Narcotics Information
2. Support Counter Narcotics Information Campaigns
3. Help Train Afghan National Security Forces
4. Provide Enabling/Logistical Support
5. Support Afghan Counter Narcotics Operations

Most European countries to include United Kingdom, France, Germany, Italy, Netherlands and Norway provide Counternarcotics Liaison Officers to work Bi-Lateral Investigations within the Afghanistan Judicial system. ISAF partners commonly provide basic Force Protection when needed for counternarcotics operations in the partners Area of Responsibility. As of March 2011, the ISAF had approximately 132,203 troops with 32 percent of the troops being from coalition nations besides the United States. Listed below by European Partner are some of the mission objectives performed by European countries:

United Kingdom - The British have a significant role in the counternarcotics efforts in Afghanistan. They created the Afghan Special Narcotics Force (ASNF). DEA's FAST teams have participated in numerous lab raids/surge operations with the UK and ASNF. United Kingdom also sponsors mobile detection teams which include drug certified canines that are utilized in airport and highway interdiction operations. They also provide mentors for the Counter Narcotics Police – Afghanistan (CNP-A).

France - The French have contributed funds, totaling about $1M in support of CNP-A programs. This funding was utilized to provide vehicles and protective gear for officers of the CNP-A. The French have also sent trainers from the Police Judiciaire to conduct training for the CNP-A. Forensic chemists have been provided by France to train and staff Forensic laboratories in Kabul.

Germany - Germany has a primary role in the training of the Afghanistan National Police. They participate in the Mentor program at the Afghanistan Ministry of Interior and have also funded the building of the Counter Narcotics Training Unit at the Afghan National Police Academy.

Norway - Norway has provided numerous staff for the Mentor programs at the Afghan Ministry of Interior. Norway has also provided substantial force protection assistance for counternarcotics operations involving DEA FAST team personnel.

Netherlands - The Dutch provided funding to UNODC to build 9 provincial CNPA offices in the high drug trafficking provinces of Balkh, Konduz, Badakshan, Nangahar, Khost, Kandahar, Helmand, Nimroz and Herat.

The State Department and the Department of Justice are in constant negotiation with ISAF partners to increase involvement in counternarcotics operations.

Mr. FATTAH. Are they sharing the resource side of this?

Ms. LEONHART. Yes, they are. One example would be the Afghan Threat Finance Cell. It's a cell; it is a civilian and military operation. DEA was asked to run it, and we have Australians, Canadians, Russians who want into it. We have buy-in from the international community, because this is the entity that is looking at those drug flows and looking at the corruption, and not only drug trafficking, but all crimes. There is interest by the international community and they have come to us to ask to be included in this center. So it is one of our success stories in Afghanistan.

Mr. FATTAH. Okay. We would like to learn more about the arrangements between the partners there. That would be helpful.

CARIBBEAN DRUG TRAFFICKING

But let me get a little closer to home. I know that the chairman talked to you about Mexico. Let me talk to you about some of our friends in the Caribbean. And there has been a concern as to whether some of these law enforcement organizations and governments are starting to be influenced by the large activity of using some of these countries as transshipment points for drugs. What if anything could you tell us about the agency's work in the Caribbean?

Ms. LEONHART. We are putting pressure on the Mexican cartels, and we are working more and more in Central America, in Colombia: for us our southwest border starts in Colombia. That is our concept of the southwest border. As we put more pressure on them, we are very concerned about that shift that we may see back up through the Caribbean, like we saw in the eighties and early nineties. But that being said, we have been able to stand up some units, and we have been able to develop some tremendous partners. I will say our partners from the Dominican Republic, for instance, are very, very concerned about drug loads going into their country from Venezuela. Very concerned about corruption. Very concerned about the money that has been showing up. So collectively we have worked on joint operations with them.

We work very well in the Caribbean, in Jamaica, joint operations and in fact, we just brought out one of their major traffickers here a year ago. So the Caribbean, and they have worked very well together. They are very, very concerned when they see that Mexican traffickers have made their way to South America, have made their way to Europe, have made their way to Africa. They are very concerned about Mexican traffickers also showing up in their countries and starting to have a piece of the drug trafficking there. So we work with them on a daily basis. We have an office in San Juan, Puerto Rico that coordinates our offices within the Caribbean. And there are many success stories——

Mr. FATTAH. Good.

Ms. LEONHART [continuing]. That we have out of there.

MEXICAN DRUG TRAFFICKING

Mr. FATTAH. Now when you get to the States, did you say 90 percent of the drugs were coming via these Mexican cartels?

Ms. LEONHART. Ninety percent of the drugs that end up in the United States——

Mr. FATTAH. Right.

Ms. LEONHART [continuing]. Traffic through Mexico.

Mr. FATTAH. Okay. And then secondly we have this other problem which is the prescription drug issue, right?

Ms. LEONHART. That is correct.

Mr. FATTAH. And a lot of our colleagues are also very concerned about meth and the robust nature of that problem, particularly in rural sections but also in urban areas like Philadelphia. So now we have the, the chairman asked you about street gangs, we have other organized groups moving these drugs. Can you tell us a little bit about who else is in this enterprise?

Ms. LEONHART. Well like I said, the Mexican cartels have taken over the drug market all across the United States, Pennsylvania included. But they get the drugs to these areas. They get the profits from that. Street distribution differs from community to community. What we find in your area is often street gangs or community organizations, organizations that have been operating in your area for quite some time, still have control of distribution on the streets there, but they have cut out all those middle men that we used to have.

Mr. FATTAH. Mm-hmm.

Ms. LEONHART. Like when I was buying drugs as an undercover agent, you would have to go through four or five people until you got to the source. Those have been cut out by the Mexicans. The Mexican traffickers have gone right to your community and are dealing directly with the major distributors in your city. So that has changed drug trafficking all across the country. And the other thing that has changed is, it is not just coke, it is not just meth; it is heroin. It is any drug that a community wants now. These are polydrug organizations that will sell whatever the community, the city, whatever the appetite is for, because it is all about making money.

INTERNET PHARMACIES

Mr. FATTAH. Well I want to thank you for your thirty-year career as a DEA agent. And I will have some more questions, but just as the last one in this round, you also have this new problem which I am not sure is in your lap. But we just had a major exposé on 60 Minutes about drugs via the internet that are less than authentic, but are being sold. Can you comment on that?

Ms. LEONHART. Sure. And it is interesting because some of our best internet cases actually came out of your area. I am thinking about Operation Cyberchase about four years ago, which was an experiment for us on how to go after these internet sites that were selling scheduled drugs. We have had great success. There have been some great laws that have been passed that have helped that, and what we see now is that the internet is being used more for non-controlled substances. I know I have seen a couple of the reports lately that are of concern. I know that our partners at HHS are concerned; CBP at their mail facilities are concerned. It is something that we do not get involved with everyday, but when there are controlled substances involved that is in our bailiwick.

And the internet, there is a great success story to be told here about when we identified the internet as a problem, how a new law

can change the trafficking, and how our strategy had to change. I think they will use that same strategy on the non-controlled substances that are being sold over the internet. The other thing is most of these internet sites are not in the U.S. They are actually foreign internet sites which then make it even harder for us to target. So I think——

Mr. FATTAH. Yes, I want to yield back because I know we have a couple of other members. But I will get another chance. When we do come back I want to talk to you a little bit about juveniles and their involvement. So we will get to that. But thank you, Mr. Chairman.

Ms. LEONHART. Thank you.

Mr. WOLF. Thank you. Mr. Austria.

ARMING AGENTS IN MEXICO

Mr. AUSTRIA. Thank you, Mr. Chairman. Administrator, thank you for being here today and your service to our country. I appreciate it. Let me, I think some of the questions I was going to ask have been hit on. But I want to follow up especially on the Mexican border and what is happening with the cartel, with the gangs there. Like many members of Congress I am very concerned about the safety of our farmers and American citizens who live along that border. And as you describe the amount of activity that is coming across to this country when 90 percent of the drugs come through Mexico, and that there are a large number of people who work with these cartels in the U.S. It concerns me.

And I want to follow up on that a little bit. But also our DEA agents that are working down there, and our ICE agents. And as you know, I think it was February of this year, two ICE special agents were driving in Mexico unarmed in a government vehicle when they were savagely ambushed by Mexican cartel members who fired eighty-three rounds at them. Special Agent Jaime Zapata was murdered and another agent was seriously injured. These agents had no way to defend themselves as they were not permitted to carry weapons. While the Mexican government has issued gun permits to some permanently assigned U.S. agents, those temporarily assigned receive no protection. And in my opinion just because a U.S. agent like the one that was killed are only in Mexico for a short time, maybe six months with detailed work, that does not mean that they are at any less risk sometimes than those that are there permanently.

After the death of this agent, this ICE agent, and I know DEA also works down in that area, and with evidence that American agents have become targets for Mexican cartels, why are we still sending agents across the border into Mexico unarmed?

Ms. LEONHART. Thank you, sir, for the question. I will say that DEA has been in Mexico for over forty years working in various offices, and we have expanded our presence there and are the largest law enforcement presence there. So this is of, you know, absolute great concern. Every day we talk about the safety of our people, and I will speak generally and say that there are protections in place or we would not have our people there. But to go into protections and to go into what we do to keep our people safe will put our people in danger, so I am very cautious about going forward

with that. But I will tell you that it is of concern to me. I have had discussions many, many times with the Attorney General and the Deputy Attorney General and the former Deputy Attorney General. Our agencies from the United States that serve in Mexico we have actually collaborated in safety things that we can do to keep our agents safe.

Mr. AUSTRIA. How many agents do we have assigned in Mexico, DEA agents?

Ms. LEONHART. We do not give the numbers. Again, for safety issues. But I will tell you that it is a very large presence. It is the largest law enforcement presence, and we have offices scattered around Mexico.

Mr. AUSTRIA. Are you able to share with the committee how they are able to defend themselves if they are not able to be armed and——

Ms. LEONHART. What I would offer——

Mr. AUSTRIA. Well you mentioned protections that are in place and, you know, I do not know in this committee setting what you are able to share. But it certainly would put——

Mr. WOLF. If the gentleman would yield just for a second? I think you raise a really legitimate question, and I sense that what maybe we can ask you to do, if you could work out a time to come by to see Mr. Austria——

Ms. LEONHART. I was just going to offer that.

Mr. WOLF [continuing]. And myself, and I will come so we can really get to——

Mr. AUSTRIA. I appreciate that, Mr. Chairman.

Ms. LEONHART. I will do that very quickly.

Mr. WOLF. Sure.

DRONE USAGE

Mr. AUSTRIA. Let me jump to one other area along the Mexican border, the use of drones that are being used now. There was a recent article in the *New York Times* that highlighted the DEA's use of drones to gather intelligence. It helps to locate major traffickers, drug traffickers, and to follow their networks. Are you able to give us, or can you give this committee an overview of the challenges, successes, future opportunities of the DEA's use of drones? And is the DEA using drones domestically? And I think more specifically, are we using them along the Mexican border?

Ms. LEONHART. Well I can tell you that the DEA does not have drones or Predators, so there is no use by DEA. But I can tell you that intel sharing and the collection of information that can be timely shared with our Mexican partners is of utmost priority to us. We have a number of ways, a number of methods to collect information, and we are always looking for new methods. But DEA does not have drones and predators.

PRESCRIPTION DRUG TRAFFICKING

Mr. AUSTRIA. Mr. Chairman, one last just comment, I think, and you are welcome to comment. Mr. Fattah hit on prescription drugs and the problems we are having across this country and with meth labs. And I hear that a lot in my home state of Ohio, that our local law enforcement are just, a large portion of their budget, you know,

from the Sheriff's Department, from the prosecutors, is being used to try to battle these meth labs, to try to battle the prescription drug problem we are having. I know Chairman Rogers has raised that question multiple times with Attorney General Holder. It is a very important issue that we are faced with at the local level and across this country and it seems like it is a growing problem. And I know the DEA did a very good job, I think, in arresting twenty-two people and seizing over $2.5 million in assets during a recent raid in Florida in which you were effective in that area. And I think that is a first good step. But it is also just a drop in the bucket compared to the magnitude of the outbreak of prescription drug abuse and the meth labs that are appearing across this country.

Ms. LEONHART. Thank you, sir, for bringing that up because DEA's main priorities now are Mexico, Afghanistan, and prescription drugs. Unfortunately, this is a problem that is not just in one area; it is across the country. We have pockets. Right now Florida is the hotbed for the pill mills, but I am very concerned for your state and some of the Midwest states because of the impact of what has happened in Florida. We have a strategy, and I have some slides that at some point I hope I am able to walk you through that will talk about what we are doing because of the prescription drug problem.

I am worried because 7 million Americans are abusing prescription drugs, and that means that every day there are 7,000 new users, first time users. The other thing that really worries me for our children is that since 2008, it is more likely that a first time drug user will abuse prescription drugs rather than even marijuana. We have never seen that in our history before. So everything we are charting, everything we are looking at, tells us that prescription drugs are the problem of the future. It is the problem now, and DEA and other agencies are doing what we can to move in that direction and to be able to have an impact on it.

Mr. AUSTRIA. Thank you, Administrator. Thank you, Mr. Chairman.

Mr. WOLF. Thank you. To follow up on what Congressman Austria said, why do we not try to set up something the first week we come back? And we will make sure, we will build it around your schedule. But I think he raised some good questions. And maybe cover both of those issues, but particularly the first issue.

Ms. LEONHART. Okay.

Mr. WOLF. And we will invite all of the members of the committee at that time. Thanks.

Ms. LEONHART. Okay.

Mr. WOLF. Mr. Graves.

Mr. GRAVES. Thank you, Mr. Chairman. Administrator, good morning.

Ms. LEONHART. Good morning.

FY 2012 BUDGET

Mr. GRAVES. I want to thank you for being here this morning. I know that your duties are great and I appreciate you taking the time to answer questions for us. And I know the challenges are mighty out there. And I guess, Mr. Chairman, I am really thankful that, you know, we have an agency who has actually brought in a

request that is less, moving down and understanding the climate we are in. And I want to thank you for that. Because most of the time that we are hearing from agencies that are asking for additional funds, and certainly we all understand that. The missions of all the agencies are big and everybody needs more resources. So I want to thank you for that. And it looks like your request almost got to the 2008 levels, and not far from that. And it is about a 9 percent decrease from 2010. Can you help us understand how you arrived at that and how your agency moved in that direction? Because it is a very positive move, I think, given the climate we are in. And we are grateful for that. And I would like to learn more about that.

Ms. LEONHART. Well I can tell you it is not easy. We just feel a responsibility, however, to do our part. And you know, the Attorney General asked all of the Department of Justice agencies to take a look at our programs, take a look at what our critical needs are, take a look at our mission, and look at anything that is not critical to the mission and see where we can do some belt tightening. I think I have the advantage because I am a DEA agent. I know my agency very well, and I was able to, with my executive staff, take a look and find out what is left. We have had cuts over the years that have really, really hurt, and there is not much fat there. There is no fat there. So this year was extremely hard, because one of the things that we are saying we could do without is a program that is dear to us.

But with the climate, we want to do our part, and in doing that we took critical looks at all of our programs. We identified where we had some overlap or where we could consolidate with another agency, or tweak something, and those were the cuts that we put forward.

Mr. GRAVES. Right. Well I appreciate your willingness——

Mr. FATTAH. If the gentleman would yield? Is this the Mobile Enforcement Team, the program that you cut? Could you just make sure we are clear about what you are saying?

Ms. LEONHART. One of the things we identified was the Mobile Enforcement Team. In doing that, it is really a trade off. The Mobile Enforcement Team, by offering that up, we save our 217 task forces that are working with states and locals all across the country. So we took a look and we said what is core to our mission, and then what is in the next ring? And we came up with this program as one program that we do not like to give it up, but in these very austere times, it is one of the things that will allow us to continue with our core mission. We have lost MET in the past, and we have just strategized about what we will do with our state and local partners to make sure that we are still there to help them.

Mr. GRAVES. Right. Well, thank you. And maybe you can share with the committee at some point some of those decisions you made in detail. Because that helps us to see and offer recommendations to other agencies of areas you can look to or consolidate or be creative with some solutions. And something I am asking all agencies to do is provide us and really go, what you have done is incredible, and maybe go a step or two beyond that. Because we really do not know where it ends. We have got a lot to do fiscally to get the nation back on track. And so if the chairman does not mind I would

like to submit a letter to the committee that just asks the agency to provide us with options that go 25 percent in cuts, and 20 percent as well, as you have already reached almost the 10 percent. To show us how, what impact that would have on your agency and if there are ways you can still focus on core missions that you are focused on. And I know those would be difficult to reach but I think it helps us in making decisions so that you are part of that process that we want you to be a part of. We are not making those decisions for you but we see where we might be able to join you in this partnership during a difficult time.

[The information follows:]

COMMITTEE ON APPROPRIATIONS
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AGRICULTURE, RURAL DEVELOPMENT, FOOD AND DRUG ADMINISTRATION AND RELATED AGENCIES
COMMERCE, JUSTICE, SCIENCE AND RELATED AGENCIES
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March 16, 2011

Drug Enforcement Administration
Administrator Michele Leonhart
U.S. Department of Justice
8701 Morrissette Drive
Springfield, VA 22152

Dear Administrator Leonhart:

I am writing today to request that your agency submit budgets to the Sub-Committee on Commerce, Justice, Science, and Related Agencies within the Committee on Appropriations that represent in detail how your agency would operate with a 25 percent reduction in funds, a 20 percent reduction in funds and a 10 percent reduction in funds.

As you know, as of this writing, we are months away from reaching our debt ceiling of $14.29 trillion. The Congressional Budget Office (CBO) projects that the gross federal debt will increase every year of the 2011-2020 period, reaching $23.1 trillion in 2020 and costing Americans over $1 trillion in interest payments alone by 2020.

According to CBO, at the end of the fiscal year of 2008, the debt held by the public was $5.8 trillion. Since then the public debt has shot to $9 trillion by the end of fiscal year 2010. While the government experienced lower tax revenues due to the economic recession, the response by the Administration and Congress to jolt the economy with higher federal spending coupled with the past imbalance between spending and revenues has led to an unsustainable debt.

Our fiscal situation is unacceptable. The responsibility for our debt is shared jointly by Democrat and Republican Administrations and Congresses of the past and finding solutions must be a bipartisan endeavor. That is why I am writing to you today to ask that your agency work with Republicans to begin reigning in spending and start our nation on a fiscally responsible course.

Thank you in advance for your willingness to work with the Sub-Committee on Commerce, Justice, Science, and Related Agencies on this important issue.

Sincerely,

Tom Graves
Member of Congress

Mr. GRAVES. And so Mr. Chairman I do have that letter and we have one other question, if that is okay? We heard a minute ago about the pill mills and you brought that up and I appreciate you doing that, because we were in a hearing recently where Attorney General Holder was there and Chairmen Rogers and Wolf were questioning what was going on in Broward County, Florida. And I do not know, are you aware of any request by the chairman to look into that issue at all? Because I know that it is a discussion we had in committee.

PRESCRIPTION DRUG DIVERSION

Ms. LEONHART. I do know that right after the Attorney General testified, we have been in discussion to provide a lot of background information so that the Department of Justice can get back to, I believe, Mr. Rogers on questions. But I would like to take the opportunity to tell you that prescription drugs, especially the pill mill situation in Florida, the charts I brought I thought would maybe help you understand that this is a priority for us, and this is a sense of urgency for us. What we have done and the budget we are requesting, especially for the diversion control piece, will have an impact on what is happening in your state.

I worry about Georgia because Ohio and Georgia are the next pill mill states, but I think we can be ahead of that with some of these tweaks and some of these additions to our Diversion Control Program that we are asking for.

Mr. GRAVES. Good. And I think that is something that we are all looking for. And if there was one takeaway for me from that committee meeting it was that the chairman, and I think Chairman Wolf as well, were very engaged in requesting somebody to look into this, and did not seem to be getting a lot of feedback as to whether something was going to happen. And I want to mention to the chairman here that, you know, in the *Atlanta Journal-Constitution* this morning it shows that the DEA reacts very quickly sometimes. In fact, after just two weeks of getting a request from an attorney they have, you know, moved into Georgia and taken over some controlled substance from the State of Georgia. And I am certainly not questioning whether that was right or wrong, but it just shows that they can act quickly when requests are made.

Ms. LEONHART. Thank you.

Mr. WOLF. Thank you, Mr. Graves.

Let me follow up on a couple of those issues. I am going to do a letter and maybe I am going to be the only one that does it, to the new Republican governor of Florida to tell him he ought to get with the program.

At a hearing that we held on OxyContin several years ago Mr. Rogers had people from his district come up, and it was a young man who was not a witness but was behind his dad who was a pastor I believe, and he had been addicted to OxyContin. I can still remember he had an electric blue coat on and he sat to the left, and Mr. Rogers' district has been devastated, and we set up a diversion program and helped and then a couple months later I asked Mr. Rogers how was the boy doing, and he said he had overdosed, he had died, and I saw the figure the other day, the number of people, it is something like 20,000 a year.

So what we are going to do based, and hopefully Mr. Rogers may want to sign it, just ask the governor of Florida to adopt this program, because it is spreading.

Has any action been taken on that specific request? Because we then called down to see did anyone go to Broward County? Was there anything specifically done with regard to that exchange with the Attorney General? And I appreciate Mr. Graves raising it here.

Ms. LEONHART. I can tell you that after the hearing ended, we did get calls from the Attorney Generals office.

Mr. WOLF. Okay, good.

Ms. LEONHART. I think just the week before that we have been down to Florida, we have been working Florida for a year, and the papers do not report it. I felt bad that you, the Committee, did not know all that we have done, but since last February we have sent eleven separate tactical diversion squads from around the country. We have sent them down there and launched them down to Florida, and that is what helped this operation called Pill Nation, which identified that Tri-County area in this pill mills. I think to date we have closed twenty-seven of them.

Mr. WOLF. Well, is it fair to say that if it is not successful there is it coming to Georgia?

Ms. LEONHART. It is already on its way to Georgia, already on its way to Ohio.

Mr. WOLF. Why?

Ms. LEONHART. Because action that we are taking in Florida is moving these owners. We know that many of these clinics are not even owned by doctors.

Mr. WOLF. Who owns them?

Ms. LEONHART. Some are owned by doctors, but of the pain clinics that we are having the biggest problem with are run by people, businessmen, out to make a buck. They saw an opportunity; some have felony arrests. So all that we have been doing over the last year, and then Florida passed a few laws, one being that no longer could these pain clinics advertise or promote the use, sale, or dispensing of a controlled substance.

You have got to go down there and take that paper and look, it is four and five pages of ads for pain clinics.

Mr. WOLF. And what counties for the record can we say so we know? Broward County.

Ms. LEONHART. The primary, Broward, Miami-Dade, and Palm Beach.

Mr. WOLF. And what papers are running the ads?

Ms. LEONHART. When I was down there, and I am familiar with Los Angeles, this reminds me of the marijuana dispensaries, and so it would be the *New Times* in south Florida and *Creative Loafing* and *Tampa Bay Times* in Tampa they run ads.

Mr. WOLF. Well, are the local officials not worked up about it or are the——

Ms. LEONHART. They are very worked up. The law enforcement community on this has come together.

Mr. WOLF. Why do you think the governor has taken the position he has taken then?

Ms. LEONHART. We were very surprised.

Mr. WOLF. But have you spoken to him? Has there been any—because if it is drifting—I mean, frankly this ought to be shut down. I mean it ought to be just—do you believe they are in violation of the law?

Ms. LEONHART. Absolutely.

Mr. WOLF. So the newspapers in Broward County are carrying ads that are basically in violation of the law, what they are advertising. And we went through this here with regard to sexual trafficking.

Ms. LEONHART. Uh-huh.

Mr. WOLF. Major newspapers around the country were carrying ads in the sporting section about sex trafficking centers, legitimate papers. To their credit, to the credit of the *Washington Post*, to the credit of other papers, once brought to their attention they shut it down.

So if you would tell me, if anyone wants to sign, fine, if they do not I will do it by myself, because 20,000—and if they are roaming north they are going to keep coming—I will write every newspaper down there personally and we will release it to the media asking them to stop running the ads.

How many people have died? Was the 20,000 figure a year accurate that I saw in a publication?

Ms. LEONHART. Well, it is probably accurate. I know seven people die a week. No, seven people every day.

Mr. WOLF. From that region?

Ms. LEONHART. In Florida alone.

Mr. WOLF. Seven a day.

Ms. LEONHART. Every day in Florida they are losing seven people a day.

Mr. WOLF. Well, how does a reputable newspaper, and I am sure they are, I mean how do they then carry the ad? Do you think there is a disconnect that they do not understand?

Ms. LEONHART. Let me premise this with, when we start attacking the problem in February of 2010, this was part of the problem.

The State of Florida made some changes to the law, we started taking down these pain clinics, so the situation has changed a bit. I am talking about why it exploded. I will not say that there is any action for you to take on that right now because we believe Operation Pill Nation has completely changed what will happen in Florida. That is why I am worried about Georgia and I am worried about Ohio.

Mr. WOLF. Why Georgia and Ohio and why not Alabama and North Dakota? Why do you mention those two?

Ms. LEONHART. You asked about the new governor in Florida. Florida was on line to have a prescription drug monitoring program. It needed it, we did everything——

Mr. WOLF. Yes, and Bill McCollum supported it.

Ms. LEONHART. We did everything we could to say to State of Florida, this will help. I do not know why he made the decisions he did.

Georgia does not have a prescription drug monitoring program. A number of residents from Georgia closest to Florida would go down there on these trips and get all these pills and bring them back to Georgia and sell them. So there is already a market there,

already an emerging pill market, but also the people that own these clinics have moved up. They have started to do some recruitment of doctors out of Ohio and in Georgia. That is why we are working with you, because we believe that that is where it is headed next.

Mr. WOLF. Would you see the deaths moving too? If you have the seven in Florida would you see the death issue moving to Georgia and Ohio?

Ms. LEONHART. Well, we already saw Georgia, Ohio, Tennessee, Kentucky, West Virginia, the states where there was an explosion of a pill problem. These are people that are going down to Florida. It is like going to Atlantic City for a junket.

Mr. WOLF. Right.

Ms. LEONHART. Instead of gambling you go down there and you get as many pills as possible; come back and you start your own distribution network. So there are established distribution networks now in Georgia and in Ohio, and the rate in those states with prescription drugs and deaths are going up.

On March 3rd my friend, the head of the Georgia Bureau of Investigation, held a summit that we helped them put on, a prescription drug summit in Georgia because he is so concerned about it. Ohio has jumped on it and they want to be ahead of the curve as well. But we are seeing the deaths from prescription drugs are not just in Florida, it is in Georgia, it is in Ohio, it is in California, it is in Houston. The three major hubs for these pill mills have been the tri-county area of South Florida, Broward Miami-Dade and Palm Beach counties, the Houston, Texas area, and Los Angeles, and there is a correlation between the deaths from prescription drugs and the explosion of these pill mills and doctor shopping.

Mr. WOLF. Now the company that manufacturers the pills, what company? I mean there was a successful case in the Western District of Virginia, is it the same company?

Ms. LEONHART. It is a little bit different than the OxyContin problem, and a lot of people think that the drug that is the number one drug out of the pill mills in Florida is OxyContin, and that is not correct.

Mr. WOLF. What is it?

Ms. LEONHART. It is the generic form, it is Oxycodone.

Mr. WOLF. And who makes that?

Ms. LEONHART. A number of companies. Roxicodone is the most popular.

Mr. WOLF. Where are they from?

Ms. LEONHART. And that is manufactured by Xanodyne Pharmaceuticals.

Mr. WOLF. Where are they from?

Ms. LEONHART. I am not sure. Joe, do you know the company? I am not sure where they are located.

Mr. WOLF. And who else? Any other major drug companies?

Ms. LEONHART. Roxy is the main drug.

Mr. WOLF. If you can give us that and I will do a letter to the drug companies telling that, you know, basically I mean they are responsible for killing people and as the CEO goes home at night and looks at his wife or his son or his daughters or his grandkids he has to kind of think about that.

Ms. LEONHART. I am sorry, I found it, I knew we knew. It is Newport, KY and Mount Arlington, NJ.

Mr. WOLF. That is where the company is located?

Ms. LEONHART. Yes. Yes.

Mr. WOLF. Well, I mean, the thought of young people—if you could have seen this fellow, and I know the impact on Mr. Rogers' district has been devastating, and it has on other districts, I mean this is not just—for some reason it was gathered there, but I think where you have had construction jobs and different things it is—and so it is a nationwide problem, unfortunately Mr. Rogers has borne the brunt of it and it was coming there, so what we will do and we will share the—if you want to join the letter with us, what we will do is get a letter off to the governor of Florida and just tell him that we are asking him to take an effort to shut these things down, and then we will also write the newspapers that are involved.

Ms. LEONHART. I am also aware that our drug Czar, Gil Kerlikowske, has written the governor, and I have as well.

Mr. WOLF. Okay, so we will write them, and then if you have any other thoughts maybe we can write the newspapers too. We found the same thing on sex trafficking. Once they found out that they were basically centers for people that were being trafficked they responded quickly, so we will try to do that.

Ms. LEONHART. Okay.

Mr. WOLF. I appreciate Mr. Graves bringing that issue up.

The figure that you have used, seven million we have it here, is it seven million? That figure has been kicking around, are abusing prescription drugs. You said more than the number that were abusing cocaine, heroine, and other hallucinogens. Is that figure an up to date?

Ms. LEONHART. That is a 2009 figure, sir.

Mr. WOLF. And how many people do you think die as a result of this activity of abusing prescription drugs? Because that is one of your major efforts now. How many people have died per year?

Ms. LEONHART. We have looked at that. Some of the reporting is late, so the latest numbers we have are 2007. There was a 298 percent increase in overdose deaths involving opioids, the pain killers, between 1992 and 2007. We have——

Mr. WOLF. What is that in real terms of the number of people that have died?

Ms. LEONHART. In 2007 11,499; however, I can get you some additional reporting that we have seen on drug deaths, and I can tell you that we are concerned because more people are dying from prescription drugs, in some states than from car accidents, and in other states more than people who have died of gunshot wounds.

I would be glad to give you a fact sheet on prescription drug abuse that may be informative.

[The information follows:]

Factsheet on Prescription Drug Abuse

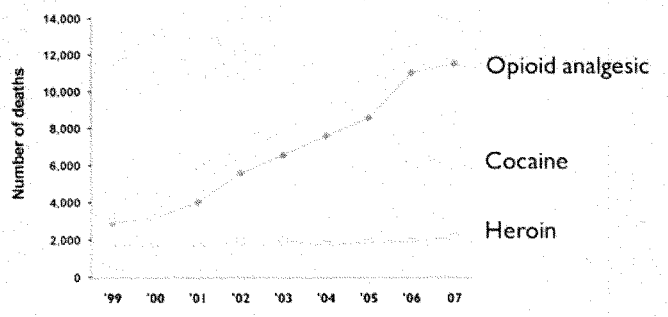
Youth Perception

Various studies indicate that teens, young adults, and at times parents do not understand the dangers associated with prescription drugs. The Partnership For a Drug Free America concluded in their 2008 Partnership Attitude Tracking Study on Teen Drug Abuse that, "4 out of 10 teens (41 percent) agree that prescription drugs are much safer to use than illegal drugs." In their 2009 study they reported that, "1 in 7 teens (15 percent) or 2.4 million teens report having abused a prescription pain reliever in the past year" and "1 in 5 teens (20 percent) or 3.2 million teens report having abused a prescription medication at least once in their lives." In addition, "56 percent of teens report prescription drugs are easier to get than illegal drugs." And "63 percent of teens believe Rx drugs are easy to get from their parent's medicine cabinet, up significantly from 56 percent last year."
(Source: Partnership Availablity Study)

Mortality Rates

According to the Centers for Disease Control, the number of unintentional overdose deaths involving opioid analgesics increased by 296% between 1999 and 2007. There were about 2,900 deaths from opioid drug overdose in the United States in 1999, compared to almost 12,000 in 2007. In 2007, opioids were involved in more overdose deaths than heroin and cocaine combined. In 2007, the number of deaths involving opioid analgesics was 1.93 times the number involving cocaine and 5.38 times the number involving heroin.

Unintentional Drug Overdose Deaths by Major Drug Type
United States, 1999 - 2007



(Source: National Vital Statistics System)

National Survey on Drug Use and Health

The 2009 National Survey on Drug Use and Health (NSDUH) estimates that in 2009 there were 7.0 million (2.8 percent) persons aged 12 or older who used prescription-type psychotherapeutic drugs nonmedically in the past month, which is a 13 percent increase from 2008 (6.2 million or 2.5 percent). According to the NSDUH, "small but statistically significant increases in the percentage of persons using stimulants (from 0.4 percent in 2008 to 0.5 percent in 2009) and sedatives (from 0.09 to 0.15 percent) contributed to this increase. The following table shows the percentage of persons aged 12 or older that abused psychotherapeutic drugs.

Nonmedical Use of Types of Psychotherapeutic Drugs
Percent of Persons Aged 12 or Older Using in the Past Month

Drug Type	2002	2003	2004	2005	2006	2007	2008	2009
Pain Relievers	1.9	2.0	1.8	1.9	2.1	2.1	1.9	2.1
Tranquilizers	0.8	0.8	0.7	0.7	0.7	0.7	0.7	0.8
Stimulants	0.6	0.6	0.5	0.5	0.6	0.4	0.4	0.5
Sedatives	0.2	0.1	0.1	0.1	0.2	0.1	0.1	0.1

(Source: NSDUH)

According to the NSDUH, in 2009, 3.1 million persons aged 12 or older used an illicit drug for the first time within the past 12 months and nearly one third (28.6 percent) initiated with psychotherapeutics. Of this 28.6 percent, 17.1 percent initiated with pain relievers, 8.6 percent initiated with tranquilizers, 2.0 percent initiated with stimulants, and 1.0 percent with sedatives. Between 2008 and 2009, the percentage of past year illicit drug initiates whose first drug was tranquilizers increased from 3.2 to 8.6 percent.

Past Year Initiates for Specific Illicit Drugs
Among Persons Aged 12 or Older in 2009

Drug Type	Thousands
Marijuana	2,361
Pain Relievers	2,179
Tranquilizers	1,226
Ecstasy	1,110
Inhalants	813
Stimulants	702
Cocaine	617
LSD	337
Sedatives	186
Heroin	180
PCP	45

(Source: NSDUH)

Teen Statistics

The following statistics are from the Monitoring the Future Study, which focuses on teen drug abuse.

Non-medical Past Year Use of Prsecirption Drugs by 8th, 10th, and 12th Graders

Category	2004	2005	2006	2007	2008	2009	2010
Amphetamines							
8th Grade	4.9	4.9	4.7	4.2	4.5	4.1	3.9
10th Grade	8.5	7.8	7.9	8	6.4	7.1	7.6
12th Grade	10	8.6	8.1	7.5	6.8	6.6	7.4
OxyContin							
8th Grade	1.7	1.8	2.6	1.8	2.1	2.0	2.1
10th Grade	3.5	3.2	3.8	3.9	3.6	5.1	4.6
12th Grade	5	5.5	4.3	5.2	4.7	4.9	5.1
Ritalin							
8th Grade	2.5	2.4	2.6	2.1	1.6	1.8	1.5
10th Grade	3.4	3.4	3.6	2.8	2.9	3.6	2.7
12th Grade	5.1	4.4	4.4	3.8	3.4	2.1	2.7
Sedatives							
8th Grade	NA	NA	NA	NA	NA	NA	NA
10th Grade	NA	NA	NA	NA	NA	NA	NA
12th Grade	6.5	7.2	6.6	6.2	5.8	5.2	4.8
Tranquilizers							
8th Grade	2.5	2.8	2.6	2.4	2.4	2.6	2.8
10th Grade	5.1	4.8	5.2	5.3	4.6	5.0	5.1
12th Grade	7.3	6.8	6.6	6.2	6.2	6.3	5.6
Vicodin							
8th Grade	2.5	2.6	3	2.7	2.9	2.5	2.7
10th Grade	6.2	5.9	7	7.2	6.7	8.1	7.7
12th Grade	9.3	9.5	9.7	9.6	9.7	9.7	8.0
Narcotics other than Heroin							
8th Grade	NA	NA	NA	NA	NA	NA	NA
10th Grade	NA	NA	NA	NA	NA	NA	NA
12th Grade	9.5	9	9	9.2	9.1	9.2	8.7

(Source: Monitoring the Future)

Emergency Department Visits

The following statistics are from the Drug Abuse Warning Network (DAWN), which records drug and alchohol related emergency demparment visits.

Emergency Department Visits for Non-medical Use of Controlled Substance Presecription Drugs

Category	2004	2005	2006	2007	2008	2009
Benzodiazepines	**143,546**	**189,704**	**195,625**	**218,640**	**271,698**	**312,931**
Alprazolam	46,526	57,419	65,236	80,313	104,762	112,552
Clonazepam	28,178	30,648	33,557	40,920	48,385	57,633
Diazepam	15,619	18,433	19,936	19,674	26,518	25,150
Lorazepam	17,674	23,210	23,720	26,213	36,602	36,582
Stimulants	**9,801**	**10,965**	**13,892**	**18,561**	**18,768**	**21,742**
Amphetamine-dextroamphetamine	2,303	2,669	5,027	6,372	6,500	8,656
Methylphenidate	2,446	2,519	2,192	4,782	3,173	4,953
Narcotic Analgesics	**144,644**	**168,376**	**201,280**	**237,143**	**237,143**	**305,885**
Codeine/combinations	7,171	6,180	6,928	5,648	5,648	8,235
Fentanyl/combinations	9,823	11,211	16,012	15,947	15,947	20,179
Hydrocodone/combinations	39,844	47,192	57,550	65,734	65,734	89,051
Hydromorphone/combinations	3,385	4,714	6,780	9,497	9,497	12,142
Meperidine/combinations	782	383	1,440	997	997	1,435
Methadone	36,806	42,684	45,130	53,950	53,950	63,629
Morphine/combinations	13,966	15,762	20,416	29,591	29,591	28,818
Oxycodone/combinations	41,701	52,943	64,888	76,587	76,587	105,214
Propoxyphene/combinations	6,774	7,648	6,220	7,401	7,401	13,364

(Source: DAWN)

Mr. WOLF. That would be good. Do you think—and I think I should say this in fairness to the governor of Florida, because I do not know him, and I do not think it is fair to be critical of him unless he—do you think he understands the severity of this? Because he is a new governor in fairness and he has not been in there for a long time. Do you think they understand? Have your people—I mean to write a letter but have your people asked to sit down with him to talk? Have your DEA people in the State of Florida gone in to the governor's office?

Ms. LEONHART. I believe our people in DEA have actually talked to some of his staff, but I know that the two letters that the drug czar has written have offered assistance.

[The information follows:]

COPIES OF LETTERS FROM ONDCP TO THE FLORIDA GOVERNOR

[CLERK'S NOTE.—The Department of Justice did not provide a copy of the letter indicated by the witness. The information follows:]

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF NATIONAL DRUG CONTROL POLICY
Washington, D.C. 20503

February 18, 2011

The Honorable Rick Scott
Governor - State of Florida
The Capitol
400 S. Monroe Street
Tallahassee, FL 32399-0001

Dear Governor Scott:

Congratulations on your recent election as Florida's governor. In my role as the Director of National Drug Control Policy, I am seeking to meet with all of the recently elected governors to discuss the Federal government's approach to drug policy and to learn more about substance abuse challenges facing states. I ask that we meet soon to discuss our mutual concern about substance abuse and its consequences.

One of the most urgent issues our Nation faces is the stark growth in prescription drug abuse. According to the Centers for Disease Control and Prevention (CDC), prescription drug abuse in America is now an epidemic, and years of research and data confirm that prescription drug abuse is our Nation's fastest-growing drug problem. The statistics are shocking.

In 17 states, drug induced deaths (driven primarily by prescription drug overdose) are the number one cause of injury death -- more than traffic crashes or gunshot wounds. According to the National Institute on Drug Abuse, 7 of the top 10 drugs abused by high school seniors are now prescription drugs. Further, visits to hospital emergency rooms involving the misuse or abuse of pharmaceutical drugs have doubled over the past five years and for the past several years more people initiate prescription drug abuse than any other category of illicit drugs, including marijuana. Tragically an average of 7 people die every day in Florida due to prescription drug abuse.

I am very interested in meeting with you to discuss this issue and how we can work together to reduce the toll that drug use causes to our fellow citizens. I will be in Tallahassee on March 3rd and am available to meet you at any time that day. Alternatively, I am available to meet with you at the National Governors Association Conference in Washington, DC at the end of February.

Tony Martinez, my Director of Intergovernmental and Public Liaison, would be happy to speak with your staff about a mutually convenient time to meet. Please feel free to have your staff contact him at 202-395-5758. Thank you.

Sincerely,

R. Gil Kerlikowske
Director

Mr. WOLF. But just writing a letter, sometimes you write a letter to the Hill, it is irradiated, it comes in and somebody opens it—what I would recommend is that you call the governor in fairness to him and say we would like to send our people, and I think we owe this to the people of Georgia and all the other States where it is coming to, we would like to send someone down to sit down with you to explain——

Ms. LEONHART. To be fair, it may be that he is just not aware of the entire problem.

Mr. WOLF. Right.

Ms. LEONHART. So what we are attempting to do, and obviously, would have gotten attention after this latest takedown in Pill Nation, we will offer, as we have done to so many other governors around the country, drug summits and some of the things that we are doing. We will make sure we prioritize a meeting with him or his staff to at least let him make a decision. We have been discussing with the Florida Office of Drug Control Policy, which he just disbanded, what seemed to work.

Mr. WOLF. He expanded or disbanded?

Ms. LEONHART. He disbanded the office. That is who we were dealing with.

Mr. WOLF. But I think in fairness you really ought to speak to the governor's office.

Ms. LEONHART. And we will.

Mr. WOLF. Yes, and then if you could let me know what the response is, have you been able to get a meeting, or not. Because it is very easy to be critical and then find out that someone did not even know, and if they had known they would have done something. If you could let us know if you have had a problem getting in to see the governor too so we can have some sense.

Ms. LEONHART. Okay.

[The information follows:]

RESPONSE TO LETTER SENT TO THE FLORIDA GOVERNOR'S OFFICE

DEA contacted the Governor's office after the March 16, 2011, hearing to request a meeting between Administrator Leonhart and Governor Scott, but the meeting was declined, and the state offered instead a Deputy Chief of Staff. Administrator Leonhart sent Governor Scott a letter on March 25, 2011 to request a meeting to discuss ways the DEA can work more closely with the State of Florida to combat prescription drug abuse.

Mr. WOLF. And we will try to do the letter. We will make sure that the committee gets you the letter.

Ms. LEONHART. Thank you.

[The information follows:]

Congress of the United States
House of Representatives
Committee on Appropriations
Washington, DC 20515–6015

March 30, 2011

The Hon. Rick Scott
Governor of Florida
400 Monroe St
Tallahassee, FL 32399-6536

Dear Governor Scott:

We write to share our concern over your recent decision to shut down Florida's prescription drug monitoring program, as previously noted in Chairman Rogers' February 18 letter to you. Additionally, during a recent Commerce-Justice-Science Appropriations Subcommittee hearing, Drug Enforcement Administration (DEA) Administrator Michele Leonhart testified that the abuse of controlled prescription drugs are among the greatest narcotic abuse and trafficking concerns we face today – and Florida is the center of this epidemic.

The Centers for Disease Control and Prevention (CDC) has reported that the number of overdose deaths involving prescription painkillers increased by 296 percent between 1999 and 2007. In fact, drug overdose is the leading cause of unintentional death in the U.S., surpassing motor vehicle and firearms accidents. Seven Floridians die every day from prescription drug abuse.

We have worked closely together for many years to fight the trafficking of prescription drugs from Florida to Kentucky, Virginia and many other states. We have seen firsthand the devastating impact on families of abusers and our communities. The enclosed op-ed by Shawn Seliger, a Florida attorney who lost his step-daughter to drug overdose, details the pain felt by the families of young overdose victims that we have witnessed in our states.

Further, according to the enclosed article from the *Florida Weekly*, "Florida is the unquestioned 'pill mill' capital of the United States." As has been reiterated to you by Chairman Rogers, as well as many members of Congress and governors from around the nation, it is no secret that individuals travel across the country to purchase drugs from Florida pharmacies with notoriously lax standards. The article also reported that, "Dave Aronberg, a former state senator who is now a special prosecutor with the state attorney general's office and charged with tackling the pill mill problem, recently noted that in the first six months of 2010, 41.2 million doses of oxycodone were prescribed in Florida. The total prescribed doses of oxycodone in every other state combined was 4.8 million. **In other words, almost 90 percent of the oxycodone prescribed in the United States is ordered by Florida physicians.**"

As Republican members of the House Appropriations Committee, we understand your interest in protecting individual privacy and reducing spending. Our Fiscal Year (FY) 2011 appropriations legislation, H.R. 1, would cut $100 billion in annualized spending from the president's FY 2011 budget request while reducing burdensome federal interference in state and local governments and the private sector. We nonetheless recognize that shutting down illegal "pill mill" operations and preventing prescription drug abuse and trafficking are inherently governmental functions that merit strong federal, state and local oversight.

We understand that Administrator Leonhart has requested to meet with you regarding the prescription painkiller abuse epidemic in Florida. We respectfully urge you to meet with the administrator as soon as possible to discuss how Florida can support federal efforts to prevent prescription drug abuse. We look forward to your response.

Sincerely,

Hal Rogers
Chairman
House Appropriations Committee

Frank R. Wolf
Chairman
Commerce-Justice-Science Subcommittee
House Appropriations Committee

NAPLES FLORIDA WEEKLY
YOUR NEWS AND ENTERTAINMENT SOURCE

After crying, we opened our eyes

On Oct. 16, 2010, our lives changed forever when my stepdaughter Elise accidentally and tragically died from a multi-drug overdose in Pinellas County, Fla. Prescription medication, street drugs and alcohol were contributing factors in her passing.

Elise was a beautiful and accomplished 21-year-old senior at Eckerd College. She had been on the dean's list and had a wonderful life ahead of her. Each day, I see the effects of our devastating loss: a mother grieving for the daughter she loved so much, and my stepsons missing their loving sister.

The perils of inappropriate prescription drug use affect people in all walks of life, from young people to middle-aged and senior citizens. It does not discriminate against economic class, gender or race, and the results are devastating. Per the Florida Department of Law Enforcement, seven people die each day from prescription drug overdoses in Florida.

While we cannot bring Elise back, my wife and I have made it our mission to reduce the daily number of prescription drug-related deaths from seven to zero.

On March 10, the Florida House Health and Human Services Committee passed a bill to end the Prescription Drug Monitoring

Program authorized by the Florida Legislature in 2009. The full Florida House still needs to approve the committee bill, and the Florida Senate would need to adopt a companion bill. There is much more work to be done.

PDMP funding was to occur through private foundations and grants, not through taxpayer funds. Enough money has been raised to launch and run the PDMP for a year. The PDMP was designed to be a tool for physicians and pharmacies to reduce doctor shopping and fraud, and to limit the flow of Schedule II-IV narcotics. It would allow doctors and pharmacies to check and see if a patient is receiving the same or comparable narcotic prescriptions elsewhere.

The majority of the health and human services committee believes that they need an approach that stops the supply, not monitors the problem. My family and I respectfully disagree. The issue is not the supply of the narcotics coming from the wholesalers, but rather, whether the drugs are being abused by patients and used by other people.

Gov. Rick Scott and others have publicly cited privacy concerns and the premise that it's not the role of government to oversee/regulate narcotic prescriptions. As a life-long conservative Republican, I do not like government intrusion and regulations placed on the lives of American

citizens. However, if government has any role, it must be to provide for the public health and safety of its citizens. It rightfully does so by criminalizing illegal drug use, underage drinking and drunk driving. We need to take a further step in eliminating the poison of prescription drug abuse.

The same privacy concern was initially raised in other states that have a PDMP. However, those states found ways to safeguard patient privacy and comply with HIPAA. If 34 states took the necessary steps to protect patient privacy, then Florida can do it, too.

As the PDMP and pill mill debate heats up, it is important to avoid doctor and pain clinic bashing and to have a fair and balanced approach to the surrounding issues. We must not forget that most doctors and licensed pain management clinics are seeking to look after the health and safety of their patients without overmedicating them. We need to protect individuals with cancer or verifiable back and neck injuries, so they can receive the care and treatment that they need. Law enforcement must continue to pursue the physicians and pain clinics that are giving the medical profession a black eye through excessively dispensing/prescribing narcotics and engaging in illegal operations.

The prescription drug issue is a multifaceted problem that requires multiple solutions. We need to implement the PDMP without using taxpayer funds, strengthen criminal penalties against individuals who illegally dispense and/ or possess these narcotics, and enhance the criminal sanctions against people who crush, inject or inhale these pain pills.

My wife and I are calling on the governor and those opposed to the PDMP to abandon "politics as usual." Pass a law for Elise — and all of the other victims — so we can reduce the daily number of deaths in our state from seven to zero.

– Shawn Seliger, Fort Myers

— Mr. Seliger is an attorney with Bergermann and Seliger Law Firm. A a former assistant state attorney, assistant public defender, high school teacher and drug and alcohol counselor, he serves on the executive board of the Lee Mental Health Center.

NAPLES FLORIDA WEEKLY
YOUR NEWS AND ENTERTAINMENT SOURCE

KIDS & DRUGS

THE WAR RAGES ON, WITH NO CEASEFIRE OR SURRENDER IN SIGHT

BY BILL CORNWELL
bcornwell@floridaweekly.com

"You're doing a story on young people and drugs?" an acquaintance asked. "What can be said that hasn't already been said?"

She had a point. This is a story that has been around forever. Problem is, it seems as if nothing actually gets resolved. The rates of drug usage among teenagers and young adults rise and fall. But they never fall to a level that anyone would find acceptable, and this is certainly true in Southwest Florida.

Drug usage by young people in Charlotte, Collier and Lee counties has remained fairly constant, according to a state survey. Yet, even without huge spikes, the numbers are unsettling. In a survey conducted last year, 41.6 percent of Collier County's high school students said they had used illicit drugs at some point. Nearly 19 percent of Collier's middle school students also admitted to using illicit drugs. In Charlotte County, the numbers were 44.1 percent for high school students and 22.7 for those in middle school. Lee County's figures for illicit drug use were 41.3 percent for those enrolled in high school, and 22.8 percent for middle schoolers.

The substances used and abused by teens and young adults may vary, but the plague of addiction marches on, seemingly unabated.

This year marks the 40th anniversary of when President Richard M. Nixon said we were in crisis and declared his "war on drugs." Four decades and $1 trillion later, we are still in crisis. If Afghanistan represents the longest war in American history, the war on drugs is the conflict that will be with us forever. There will be no ceasefire, no surrender. And meanwhile, the battlefield continues to be littered with ruined lives, shattered families and untimely deaths.

President Obama's drug czar Gil Kerlikowske (a graduate of Fort Myers High School) has said that despite our best efforts, "the concern about drugs and drug problems is, if anything, magnified, intensified." And at no time have we been more concerned with the growing problem of addiction among our young. The array of drugs and intoxicants available to young people today is staggering, and the ease of acquisition is downright terrifying.

According to addiction specialists in Southwest Florida who deal with the young, alcohol remains the substance most commonly sampled and abused. No surprise there. But setting alcohol aside for a moment, you find different locales face different challenges.

In Collier and Lee counties, abuse of prescription drugs, principally high-voltage painkillers (OxyContin — a form of oxycodone — Vicodin and the like), and benzodiazepines (tranquilizers like Xanax) pose a significant and potentially deadly threat to young people. In Charlotte County, marijuana looms as the most stubborn problem.

What the doctor ordered?

The youth of Southwest Florida have been placed in a most dangerous position. Prescription drugs are producing a new generation of addicts, the Cocaine Cowboys of the 1970s and 1980s replaced by unscrupulous men and women in white coats armed with nothing more than a medical degree.

Florida is the unquestioned "pill mill" capital of the United States. Routinely disguised as pain clinics, these mills usually operate on a cashonly basis and accept no insurance. The amount of drugs flowing out of such operations is astonishing.

Consider this: Dave Aronberg, a former state senator who is now a special prosecutor with the state attorney general's office and charged with tackling the pill mill problem, recently noted that in the first six months of 2010, 41.2 million doses of oxycodone were prescribed in Florida. The total prescribed doses of oxycodone in every other state combined was 4.8 million. In other words, almost 90 percent of the oxycodone prescribed in the United States is ordered by Florida physicians.

That pills are a major concern in Collier County and Naples makes sense, since the relative affluence of Naples often affords young people ample funds with which to purchase drugs.

"Kids don't even have to go out to the streets to get drugs," says Anne Frazier, executive director of Drug Free Collier. "OxyContin is available in the schools; it's traded and sold."

Ms. Frazier's assertion is validated by the experience of a Naples man whose 16-year-old daughter struggles with addiction.

"When she was 12 years old, she and four of her friends overdosed on oxycodone at school, at eight in the morning," says the father, who requests anonymity to protect his daughter, who is currently in treatment and also faces charges for petty theft.

"Her addiction has resulted in other problems. She will (steal) things right in front of the security camera," he says. "It's a cry for help, I believe. This takes a toll in many ways. When a kid is in trouble, the family is in trouble."

When he learned of his daughter's addiction, he asked her what percentage of her friends used drugs. "She told me that it was 100 percent," he recalls. "The extent of the pill problem in Naples is unbelievable."

Ms. Frazier says statistics bear out this father's concern about widespread drug and alcohol use among Collier's young people.

According to the 2010 Florida Youth Substance Abuse Survey, nearly 70 percent of Collier's high school students say they have used alcohol or illicit drugs. The survey also shows marijuana use on the rise.

Forty-four percent of Collier high school students say they have used illicit drugs, according to the 2010 abuse survey. Nearly 23 percent of middle school students admitted to similar drug usage. Almost 13 percent of the high school students reported abuse of prescription pain relievers. Amphetamines were used by 4.6 percent of the students.

"It is easier (for a young person) to get an opiate than a beer in Naples," says Rick Furtado, director of community services for Inspirations Naples, a facility that specializes in treating adolescents ages 12-18 with addiction problems.

(The David Lawrence Center in Naples treats both young and adult addiction cases.)

Inspirations opened in Naples because so many young people from Collier were flocking to its flagship facility in Fort Lauderdale.

"The need in Naples for a specialized treatment center for young people was enormous," says Mr. Furtado.

Mr. Furtado, 58, brings a special understanding to his job. He did battle with addiction (principally heroin) as teenager growing up in Massachusetts. He spent two stretches in prison (one for burglarizing pharmacies) before he turned 20. Amazingly, he earned a GED and was then awarded a scholarship to the University of Vermont, where he studied psychology and trained to be a counselor. But his problems with alcohol and drugs continued. At one point, he became so desperate that he voluntarily entered Bridgewater State Hospital, which is Massachusetts' facility for the criminally insane and has been home to the likes of Albert DeSalvo, the "Boston Strangler."

"I needed help, and Bridgewater was the only place that would take me," he says. "Thanks God those days are past, and places like Inspirations exist."

Mr. Furtado, who has been clean and sober for the last 24 years, easily relates to the drug-troubled teenagers who pass through the doors of Inspirations.

"For the most part, these are good kids who could have great futures," he says. "But unless they receive the proper treatment, they're not going to make it."

"A lot of us live in a vacuum," says Ms. Frazier. "Many of the adults just don't know how bad the problem is. But the kids know. They see it every day. They live it."

Feeling the pain

Kevin Lewis, CEO of Southwest Florida Addiction Services in Fort Myers, also detects a growing menace with prescription medications.

"The number one withdrawal in our detox unit is from pain killers," he says.

In years past, most of those in detox at SWFAS were white males between the ages of 45 and 55, and they were withdrawing from alcohol, Mr. Lewis says. "Now, when I walk through detox, most of the people there are withdrawing from pain killers, and they look like my children (who are 27 and 24) or younger."

Mr. Lewis blames this proliferation of pills on a variety of causes, but he says three stand out: our culture, pill mills and the availability of medications within the home.

"Look at all the prescription drug ads on television," he says. "We're selling people a bad bill of goods. We're telling them that anxiety is not a part of human existence. That's wrong. There are some days that anxiety is what gets me out of bed and going."

Amity Chandler, director of Drug- Free Charlotte County, seconds Mr. Lewis' observation.

"In our pop culture you see a tolerance for underage drug use and drinking," she says. "Look at what is shown on MTV and Spice TV. The theme is that using and drinking is cool. This makes it very difficult to convince kids otherwise. They're bombarded with all the wrong messages."

The pill mill problem cannot be overstated, according to Mr. Lewis, and he uses a telling anecdote to illustrate that contention. Not long ago, SWFAS had 30 people on its waiting list for detox, most of them young people hooked on pills. At the same time, there was a raid on an enormous pill mill on the east coast of Florida. Within a day or so, the waiting list for detox at SWFAS jumped from 30 to 70, because local addicts had suddenly been cut off from a major supplier who was serving both coasts.

"The impact (of the pill mills) is stunning," he says. "Florida has become the Wild West of this stuff. I've had pharmacists tell me that a young person will come in with a prescription (from a pill mill) for 180 oxycodone and 120 Xanax. The kid pays in cash and then he's back the next day with another prescription from another source. These kids are getting lethal amounts of prescription drugs on a regular basis."

Many pharmacists have begun limiting their supplies of drugs like oxycodone so they don't have the capacity to fill such large prescriptions. But others are all too happy to satisfy the demand.

"Let's be honest, you've got profiteers in any line of work," says Mr. Lewis.

A large portion of the pills consumed by young people is coming out of home medicine cabinets. A typical scenario, Mr. Lewis says, is this: Dad hurts his back. He receives a prescription for 60 oxycodone pills for pain. Dad takes four or five pills and the pain subsides or he doesn't like the way drug makes him feel. Son or daughter knows the oxycodone is there and begins to pilfer it. Dad, who has forgotten about the pills, doesn't notice they are disappearing.

To counter this pattern, many counties provide programs aimed at helping people dispose of unneeded and outdated prescription drugs. "Operation Medicine Cabinet" was held last month in Lee County, and some 400,000 pills were turned over during a five-day span. A similar event will be held April 30 in Naples at several sites.

Addiction breeds not only desperation but ingenuity as well. Ms. Frazier says the lengths addicts will go to feed their addiction is mind-boggling.

"We have people rooting around in landfills and garbage cans, looking for discarded prescription containers," she says. "If they find one for a drug they like, they have a name and it's not hard to come up with an address. They then target the home for burglary, hoping to find more of the drug."

Not 'just pot'

The perception that marijuana is a benign substance drives Amity Chandler of Drug Free Charlotte County up the wall.

"That is a myth," she says flatly.

The myth largely is a product of the medical marijuana craze in places like California and is further perpetuated by mellow remembrances of aging hippies.

"The marijuana that is out there today is very different from the marijuana that was circulating in the 1960s and 1970s," she says, adding the THC (the primary intoxicant in marijuana) content is much higher than it was years ago, and that means the drug produces a much more pronounced physiological reaction.

According to the 2010 youth abuse survey, about 40 percent of Charlotte County's high school students and nearly 12 percent of its middle school students report marijuana use. Statewide, the figure for high school students is 33.8 percent and 10.5 percent for middle schoolers.

"We're not making the progress we'd like with marijuana," Ms. Chandler says.

It is unclear what is driving this marijuana surge in Charlotte, but ready availability coupled with relatively low prices are presumed to be key factors.

One might think that the heavy marijuana use is linked to a more tolerant attitude toward the substance from baby boomer parents. But Ms. Chandler says statistics do not support that hypothesis.

"We used to think that baby boomers would just look away when it came to marijuana," she says, "but our surveys of students don't bear that out. We found that 75 percent of the students said their parents don't approve of marijuana and strongly discourage any experimentation."

A goal of Drug Free Charlotte County is to change the perceptions of young people toward drug usage. Ms. Chandler says studies have discovered that students think drug use is more widespread than it actually is. This produces a feeling on the part of some students that they must at least experiment with drugs to be accepted by their peers.

"We are trying to get across that most of our students don't use drugs," she says.

Delaying experimentation and use is vital, according to Mark Mishek, president and chief executive of the Minnesota based Hazelden Foundation. Founded in 1949, Hazelden not only operates treatment facilities (it has one in Naples that serves only adults), but it is also one of the leading publishers of books and other materials related to recovery.

"We really don't know what the real effect of drugs and alcohol is on a young person's brain, which is still developing," Mr. Mishek says. "But we do know that young people who start at 13 or 14 or 15 are four times as likely to have problems as adults. You want to tell them to wait until college, please, if they are going to experiment at all."

One major roadblock to addressing the problem of addiction involving young people is the cost of treatment.

Hazelden charges about $26,000 a month for residential treatment of young adults at its other centers around the country, Mr. Mishek says, which is in line with other top-tier facilities. Hazelden invests about 6 percent of its income for "scholarships" and aid to families who cannot afford to pay full freight, he adds.

Insurance for the treatment of substance abuse is filled with "huge holes," he adds. Some plans will cover it, others will not. Those with low incomes and no insurance face daunting challenges and most likely will have to settle on a few days of detox and perhaps a few more days of actual treatment at a facility that receives public funding.

Despite what appears to be a bleak landscape, those who fight the daily battle against addiction refuse to concede defeat.

"I am very optimistic," says Ms. Chandler. "We face a world of obstacles, that's for sure. But despite all of that, most of our kids still make good decisions. We've just got to keep working with those who don't."

2010 Florida Youth Substance Abuse Survey

Percentages of **Lee County** youth who report having used various drugs in their lifetimes.

MIDDLE SCHOOL
Alcohol 37.1
Cigarettes 17.1
Marijuana or Hashish 10.6
Methamphetamine 1.7
Cocaine or Crack 2.9
Prescription Pain Relievers 5.4

HIGH SCHOOL
Alcohol 65.5
Cigarettes 32.8
Marijuana or Hashish 33.4
Methamphetamine 2.9
Cocaine or Crack: 4.6
Prescription Pain Relievers 11.6

Percentages of **Collier County** youth who report having used various drugs in their lifetimes:

MIDDLE SCHOOL:
Alcohol 32.1
Cigarettes 17.3
Marijuana or Hashish 8.3
Methamphetamine 0.4
Cocaine or Crack 0.8
Prescription Pain Relievers 2.3

HIGH SCHOOL
Alcohol 67.4
Cigarettes 36.7
Marijuana or Hashish 33.9
Methamphetamine 1.3
Cocaine or Crack 4.9
Prescription Pain Relievers 8.9

Percentages of **Charlotte County** youth who report having used various drugs in their lifetimes:

MIDDLE SCHOOL
Alcohol 33.8
Cigarettes 19.0
Marijuana or Hashish 11.7
Methamphetamine 0.7
Cocaine or Crack 1.3
Prescription Pain Relievers 5.0

HIGH SCHOOL
Alcohol 61.6
Cigarettes 40.5
Marijuana or Hashish 38.9
Methamphetamine 2.1
Cocaine of Crack Cocaine. 5.9
Prescription Pain Relievers 12.8

Mr. WOLF. Would it be helpful to do a letter to every governor to say that this is—I mean this is not a problem nationwide though is it?

Ms. LEONHART. It is a problem in Los Angeles, Houston, and we see in the future Ohio, Georgia, that area. Most of these places, everyone is aware, and they have had drug summits and drug education.

Mr. WOLF. Has there been a drug summit down in Florida? Why don't you put one on in Fort Lauderdale? Or where is Broward County? Is that Fort Lauderdale?

Ms. LEONHART. Well, that is Miami, Miami-Dade.

Mr. WOLF. Well, why don't you put one on down there?

Ms. LEONHART. I will check, because I think there is a very good chance that we did.

[The information follows:]

DRUG SUMMIT IN FLORIDA

In conjunction with Operation Pill Nation, DEA conducted a training seminar with various Florida state and local law enforcement agencies in February 2010 and with state and federal prosecutors also in February 2010. DEA's Deputy Assistant Administrator for the Office of Diversion Control, Joseph Rannazzisi, participated in a prescription drug forum in Sarasota, Florida, on February 27, 2011, sponsored by Congressman Vern Buchanan.

And one of the things with the National Take-back that we did in September, that was 4,000 locations, 3,000 law enforcement partners, many in Florida—in that we brought together and in one day collected 121 tons of pills, got them out of the medicine cabinet, because we know from kids, teens, that that is the number one place where they get the prescription drugs that they are abusing. That was the best way to educate this entire country about the problem, and I know that they had a very, very robust kind of messaging day and education piece in Florida. I will look and find out exactly in Florida who was a part of that and who participated.

Now we have a great opportunity. April 30th we are going to do the second National Take-back, and this would be a good opportunity. We will make sure that we are working with the Governor's office in Florida and see if we can do something with him for that Take-back.

Mr. WOLF. Now you know, with the take-back—we had thought that every drugstore ought to be the place that you could go, and it did seem that the restrictions were somewhat cumbersome, because there was fairly detailed regulation, and I understand you do not want take-backs at every corner store because you do not know what is going to happen, but if it is a Rexall or Rite-Aid—there were pharmacists in my district who wanted to participate but felt that the situation was too restricted.

So would it not be a good idea to do a take-back day in every certified drugstore in the nation? Because if you are in a rural area and you happen to get your drugs through—like in Leesburg we have a local pharmacy, well-thought of, highly regarded, but they are not a chain, they wanted to participate. So would it not make sense to have that, to try it at least to be less cumbersome that every certified drugstore could be a take-back or at least one in every community?

Ms. LEONHART. Two things on that, sir. There were a lot of drugstores that were a part of the take-back across the country. The cumbersome piece is that the way the CSA is written now, until the law changed, and we are doing the regulations, the only entity that could actually take in these prescription drugs was law enforcement. So the reason it was kind of restricted in certain communities, it was whatever the local police department felt that resource-wise they could do. So to do it in every registered pharmacy we would need a law enforcement department.

Mr. WOLF. Would you really need—I mean couldn't you have a black box, a black metal box that on a continual basis could come in and burn it and they could——

Ms. LEONHART. Not right now. That would be against the CSA; however, the beauty of the law——

Mr. WOLF. Well, against the CSA, but maybe you should change it.

Ms. LEONHART. We did. They passed the—the week after the take-back——

Mr. WOLF. Yes.

Ms. LEONHART [continuing]. Congress passed this Secure Drug Disposal Act and we are writing the regulations right now. We had an open hearing, and we had over 100 people gather to give ideas, and some of those ideas are that a pharmacy, or some people thought, a hospital, some people think police departments. We are working it, and we think by the end of the year, by early next year there will be——

Mr. WOLF. That is a long while.

Ms. LEONHART. Well, it has to be done right, because we are talking about safe disposal, and we will have these take-backs in between.

Mr. WOLF. I have heard stories, and you might want to validate, of high school parties where people are going in and throwing them all in a bowl and young kids are——

Ms. LEONHART. It is called pharming.

Mr. WOLF. Can you tell us about that so we can educate the committee. If that is happening in some locality is it not better to move this thing quickly, better to have it in the local county hospital. Every county almost has a hospital. I am looking at my own congressional district, so you really know it is a reliable, dependable place.

So the faster you do that, because it is better to have it there than in people's medicine cabinets. So the faster you do that and localize it whereby you can memorize it, oh yeah, I know that is still a county hospital I can take these by. Maybe somebody has an accident they are taking a pill, they take care of it, the operation has been successful, they want to get rid of these things, so they know precisely where to go, because maybe their doctor is connected with it.

Can you educate the committee a little bit about what is going on in some of the schools and how this thing works with regard to prescription drugs?

Ms. LEONHART. For at least the last three or four years, every questionnaire, every study, all the research that is done on teens that start abusing prescription drugs, when you ask the question,

where are you getting them from?, has said they are getting them from their family medicine cabinet, a friend's medicine cabinet. They are stealing them when they are babysitting; they are getting it from homes, not the local drug dealer. So——

Mr. WOLF. That is fairly prevalent?

Ms. LEONHART. Very prevalent, and that is the reason for the take-back. When we started looking at that, because we originally thought it was the Internet. It may have been the Internet a few years ago for someone old enough to have a credit card and be able to order on the Internet, but when you look at these questionnaires that are given to young people, you get the sense that they start by stealing out of medicine cabinets, taking grandma's medication. That is why we did the National Take-back, to get those drugs out of the medicine cabinets, 121 tons worth, and what we found, I will give you an example.

I went to one of the take-backs here at one of the local police stations in the district. While I am up there meeting people at the take-back, I am hearing what is going on at Potomac Mills shopping center. I am hearing about a couple people that pull up in a car and have garbage bags and they come and they go, "Will you take these? I know it is a lot, but will you take them?" And our folks said, this is what the take-back is about, and these people have been holding on to these drugs from a couple family members who passed away, and they have always been worried about how to dispose of them so they have just been holding on to them. And we learned that that one day, September 25th, was the best day of education around this country for the prescription drug problem. Everyone showing up not only had a way of disposing of their drugs, but got educated on why it is important to get this out of our medicine cabinets.

We were very happy with Congress. About a week later they passed this bill, and we are working very hard to get the answers to be able to write the regulations. The idea is for every community, every person, every citizen to know 24 hours a day how they can get rid of and safely dispose of their medicine.

Everybody took part in this. We had environmentalists so happy. They participated because they are worried about it in our water streams. So it is that in my 30 years on the job, this one day where I can say something good was done for every citizen of this country, and it was as simple as getting those drugs out of your medicine cabinet.

So we will do it again April 30th, and we have people coming out of the woodwork to do this. And we worked with the International Association of Chiefs of Police. This next one we are working with NOBLE, National Organization of Black Law Enforcement Officers and the National Sheriffs' Association. We have got all of these partners and these community groups that ban together, and they do a take-back, April 30th.

Mr. WOLF. Well, could it not be every day in the sense that if you had it at the county hospital?

Ms. LEONHART. That is the idea of the safe disposal law.

Mr. WOLF. Okay.

Ms. LEONHART. That there will be—it will be in your community, it will be the county—it will be at the hospital.

Mr. WOLF. Okay.

Ms. LEONHART. There have even been people who have suggested the library. Everybody has a library. So there will be a way for disposal to be safe, easy, everybody knows it, 24 hours a day.

Mr. WOLF. Okay. I am going to go to—the last question and you know, you are a career person and I do not think it is fair to put you on the spot, but I do want to just say at our hearing with the Attorney General we discussed the department's plan to zero out the grant program to states and create state prescription drug monitoring programs. This is a part of the budget being cut, correct?

Ms. LEONHART. As I understand it there was nothing in the President's Budget for the Department of Justice's——

Mr. WOLF. That is a yes.

Ms. LEONHART. Yes.

Mr. WOLF. Yes. How many states have such programs, and does the existence of a state monitoring program correlate with reduction in prescription drug abuse?

Ms. LEONHART. I can tell you that we have been raising our voices since they have started.

Mr. WOLF. How many states have programs?

Ms. LEONHART. Thirty-four, with nine starting a program or a program is pending, and the territory of Guam.

Mr. WOLF. Okay. Well, I appreciate that Mr. Graves bringing that issue up, and you know, if that is the number one, I mean, all the attention gets on the drug cartels coming in, but if that is the number one issue we ought to be able to deal with it.

Mr. Fattah.

Mr. FATTAH. Let me start where the chairman left off, and with this monitoring issue, because you have to bifurcate this. We are talking about legal drugs that are prescribed, and in this instance they are being abused, and in these pain clinics operating where the law allows them to somehow sell what would normally be legal prescription drugs in whatever quantity where there is no state regulation. Is that really the issue about why they locate in certain states?

Ms. LEONHART. Well, a couple of things, Mr. Fattah. These are pain clinics. Now remember there are pain clinics that are legitimate pain clinics.

Mr. FATTAH. Okay.

Ms. LEONHART. These are entrepreneurs. These are people who have seen a way to make money. Many are not doctors, and this is not about providing pain relief; this is about making money, so they will open these up somewhere in strip malls. They will open it up, but they will advertise as a pain clinic. Where else would you see people advertising for a doctor on craigslist?

Mr. FATTAH. No, I understand, but I am trying to understand how this correlates with the monitoring issue at the state level. So we were giving grants to states or some states may have been setting up monitoring on their own to monitor the availability of prescription drugs that have not normally been made available, right?

So where states have regulations there are less of these or none of them and where states do not they are more active?

Ms. LEONHART. I would say there is less diversion in states where they do have them, and they also allow the state regulators to take more action against a doctor who would be, you know, writing a number of prescriptions. It allows the doctor who writes the prescription to know if the person they are writing it for has gone to three other doctors and gotten the same prescription.

Mr. FATTAH. So you're not doctor shopping for a prescription, right?

Ms. LEONHART. Yeah, so it helps doctors, and it helps pharmacies.

Mr. FATTAH. So in the Florida instance what you have is a governor who does not want a lot of regulations or promised not to do this and that is why there was this dispute. You say we have thirty-four states that have monitoring, nine more setting them up?

Ms. LEONHART. Yes.

Mr. FATTAH. I am not sure how closely you are involved in the grant program from the Justice Department but was the grant program central in trying to get states to set these monitoring programs up?

Ms. LEONHART. I believe that there are states that have prescription drug monitoring programs that also have serious diversion problems to include pain clinics.

JUVENILES AND DRUG TRAFFICKING

Mr. FATTAH. Let's go back to the issue I wanted to raise beforehand, which is the role of juveniles in the crack and cocaine epidemic. There were a lot of juveniles being utilized, moved from state to state to work in the enterprise, and now we see it with the southwest border. Some juveniles from the United States are being hired by cartels to be engaged particularly in enforcement or killing people and so on and this has been highlighted in the press.

Are you—and if you want to look at this and supply it to the committee that is fine, but I am interested in whether there is more we should do in terms of federal legislation about the movement of juveniles across borders or across states for involvement in drug activity, and whether you have enough enforcement tools now or whether more should be done in that area.

Ms. LEONHART. If we can get back to you, Mr. Fattah. I do know that there are enhanced penalties, and there have been laws passed recently with certain drug trafficking crimes that do increase the penalty for using juveniles, and I believe the last one that was passed—that is why I want to get back to you—covered a number of drugs that were not—trafficking that was not covered previously. Obviously something like that would help, but I believe there have been some laws that have been passed.

[The information follows:]

FEDERAL CRIMINAL LAWS ADDRESSING ENDANGERING CHILDREN

There are a number of Federal criminal laws that specifically address drug defendants who endanger children. These include 21 U.S.C. § 858 (endangering human life while illegally manufacturing a controlled substance); 21 U.S.C. § 860 (distribution or manufacturing in or near schools, playgrounds, youth centers, etc.), 21 U.S.C. § 861(a) (employing or using persons under 18 years of age in drug operations), and 18 U.S.C. § 25 (use of minors in committing crimes of violence). In addition, drug crimes involving children carry enhanced sentences. Under 21 U.S.C.

§ 859, distribution to a person under 21 years of age is subject to twice the maximum sentence. Similarly, 21 U.S.C. § 860(b) doubles the maximum punishment for individuals who employ persons under 18 in drug operations, and § 860a imposes an additional term of imprisonment for individuals who violate 21 U.S.C. § 841(a)(1) by manufacturing or distributing, or possessing with intent to manufacture or distribute, methamphetamine on premises in which an individual under the age of 18 is present or resides. Furthermore, the Victims' Rights and Restitution Act (VRRA), 42 U.S.C. § 10607, and the Crime Victim Rights Act (CVRA), 18 U.S.C. § 3771 prescribe certain rights and services which are available to victims of crimes. Although these statutes do not specifically address children, they would apply to child victims of crimes. Similarly, the Drug Endangered Children Act of 2007 provides funds that can be used for grants related to drug endangered children.

DRUG TRAFFICKING SUBMARINES

Mr. FATTAH. Okay. And one other thing. Now in terms of coordination with other agencies, under our subcommittee we have a number of agencies, some involved in scientific activity and others, but we also have NOAA. And part of the drug trafficking problem that has been in the news of late has been the use of submarines or underwater vehicles. Does the DEA need additional help in trying to think about how to address that issue?

Ms. LEONHART. First of all the semi-submersible subs, and now fully-submersible subs, are a great threat to our nation, not just for drugs, but other things that they could be bringing in. So we took quick action. We actually have seized some in Ecuador—there was quick action on the part of Congress. They passed a law, I think probably a year and a half ago, two years ago, that makes it illegal to manufacture these, and we have had some successful prosecutions already with that. So we have been given the tools to help us with that. I think what we need as a law enforcement community, we have gotten together a couple times to talk about it, is what more can we be doing, and it really is more intel work on who is producing these.

Mr. FATTAH. Well, when you get a chance to talk to the chairman in this other briefing, there may be agencies that are not involved in law enforcement that have expertise that could be helpful in this particular regard, who monitor what is going on in the oceans and have observation and sensors that may not have been used in the past for this purpose, but could conceivably be helpful to you.

FY 2012 BUDGET

Let me go to this issue that was raised by my colleague about you being able to cut the budget. Now the President asked all of the departments to cut $20 billion and there was a round of cuts, and then he came back and he asked for the departments to cut again and there was $119 billion, and now the Congress is coming, and you know, Congress wants more efficiencies in these departments. And my concern is that we do not cut in ways that are irresponsible.

And so let me delve into this particular issue about the mobile enforcement terms, and there may be other cuts that I am not aware of that you have made. But the question here is that as best as my staff has been able to figure out, the estimation is that drug trafficking is about a $400 billion enterprise, and we are applying about $2.5 billion, a rounded number, to attack this problem. I do not know that there is a state, a city, a community, rural, urban,

or suburban, that feels at this moment that the country has a handle on this problem. So while we are interested in efficiencies, I think we are much more interested in our children and our communities being safe.

So I am interested in the cuts to the mobile enforcement teams. And I guess one of the ways I would phrase it is, if you had additional resources, where would you apply them in terms of your core mission, and where else have you cut other than the mobile enforcement teams?

Ms. LEONHART. Thank you, sir. Let me talk about the other areas that we felt we could cut. They are not as big as the meth cut, but we looked at administrative efficiencies. We looked at things that we could do, costs for, mailing and anything that was a continuous cost to us. We looked at how we could consolidate and how we could streamline and cut back, so we offered that.

We looked at our computer refresh, which right now is at every four years we try to refresh our equipment. It is kind of like your car. Okay, tough times, yeah, a car, you are thinking about trading it up for another car. Well maybe an extra year. You hope it doesn't break down. That is our position. We can stretch it out one more year and replace computers. We'll have a five-year cycle.

Reduce our physical footprint, not only DEA but other Justice agencies. We are really looking at where we have offices to find out if there is some way that we could consolidate some of our offices. And we have some very small offices.

Mr. FATTAH. You are operating in some 62 countries?

Ms. LEONHART. We have 82 offices in 62 countries, yes.

Mr. FATTAH. Okay.

Ms. LEONHART. But domestically we have 226 offices. So part of the cut is looking at them and finding out where we have some small two-men posts of duty. Maybe we could save on some rent and some other expenses if we partnered up and moved in with the FBI or moved in with the ATF and in some areas, they will move in with us.

So that is what we are looking at, how to consolidate some of the Department of Justice offices. We are not losing people, but we are shrinking the number of offices that we have.

And then there is task force consolidation. We are doing a review, all of Justice did, of task force operations, to find out if there is a way that we can consolidate——

Mr. FATTAH. Like some of the task forces that you had operating in the city of Philadelphia?

Ms. LEONHART. Philadelphia has a task force.

Mr. FATTAH. Which has been very successful.

Ms. LEONHART. Yes, it has been.

Mr. FATTAH. In part because of the chairman's help we got additional resources there a few years ago. So now we are cutting back. Is that what you are saying?

Ms. LEONHART. We have 217 task forces. We will be looking at all of them. We are not losing the people, and we are not losing the task force component. We might be able to find, and we believe we can find, some of those task forces that maybe are not as effective anymore or have kind of outlived their purpose, and move those resources into existing task forces, programs, or operations.

Mr. FATTAH. Well let me ask you this question. On the meth labs, for instance——

Ms. LEONHART. Mm-hmm.

Mr. FATTAH [continuing]. Part of the problem is the contamination. And in that local enforcement sometimes is not in a position to understand the environmental hazard that is created when someone is operating a meth lab in a particular place, and this is a major problem. I know that prescription drugs is the number one problem. But meth is a major problem in our country.

So I am trying to figure out how these mobile enforcement teams and the cuts there are going to impact our communities.

Ms. LEONHART. Well, like I stated when we talked about cuts, it is just a very austere time. And we felt with our mobile enforcement teams, which we have lost in the past and got back, you know, that is probably the only program we have left that would not be——

Mr. FATTAH. How much was that last year?

Ms. LEONHART. It is about a $39 million program.

Mr. FATTAH. Right. I don't want to belabor the point, because I know the chairman is looming with the time clock. In fact, we don't have one, so it is hard for us to gauge how far we should go with these things.

But just so we are clear, I mean, we are spending $80 plus million in Afghanistan, right? It is not just a matter of austerity. It is a matter of priorities and not your priorities.

But the Congress has to think through where our priorities lie, because if we have drugs coming from Afghanistan that are going to, for instance, Europe, but we have meth labs in Pennsylvania or other problems right here at home and we are cutting back, we have to think through what our priorities are if we are going to cut back, or we have to invest the money we need to cover all of our priorities.

But I am not sure that the notion wasn't that charity should begin in Afghanistan. So I am just trying to figure out where we are and how we go about getting at these issues. Thank you.

Ms. LEONHART. Thank you.

Mr. WOLF. Thank you, Mr. Fattah. And, Mr. Fattah, Mr. Graves made a very good point about the budget issues. And Mr. Fattah makes a very good point. And I am not threading needle. I kind of agree with both of them to a certain extent.

But fundamentally this administration really has to come forward and deal with these entitlement issues, because the money is in the entitlements. And if you continue to cut these things back as he is talking about.

So Speaker Boehner wants the President, and I know you don't talk to the President every day. The President has to engage on this issue of the entitlements. And the Republicans in the House are prepared to engage with him. I think Speaker Boehner has made it very, very clear.

And so as we deal with Medicare and Medicaid and Social Security to reform it in an appropriate way, we take the pressure off, because there are a lot of your programs we really can't cut.

I mean, if you talk to a parent who has a child that has been addicted to drugs, and the pain, and the suffering, and the agony

from the—I mean the flower of the youth just taken away. So I think Mr. Fattah makes a legitimate point.

And now the whole issue on Afghanistan, I don't know what you are going to do. I mean, I oppose what some on your side are trying to do. But I have a resolution, a bill, that we are going to be putting in in a couple of weeks to set up an Afghanistan/Pakistan study group to look to see are we doing the right things in Afghanistan. Is it the right way? I don't necessarily want to get out, but I don't know.

And he raised a legitimate point. Here we are perhaps aiding corruption in Afghanistan. I want the Afghans to have freedom, but yet if we are going to cut back what they are going to do in Philadelphia, or in Boston, or in Los Angeles?

And so the administration has opposed my proposal. We are going to now put it into bill form, which would create an Afghanistan/Pakistan study group. I was the author of the——

Mr. FATTAH. I am for your proposal, Mr. Chairman.

Mr. WOLF. Maybe we can cosponsor together, because I don't know what the answer is. But I think the answer isn't just to drip everything out and give you no resources or to be doing something maybe in Afghanistan where we shouldn't.

And when he asked you the earlier question, I guess the question I wanted to ask is are the Chinese giving you any money? Are the Russians giving you any money? Are our allies or those who are not our allies but who want to participate, are they putting resources in? Is it "big hat, no cattle" that they are all interested and want to participate but have no money? And so are they giving money? So that is for the record. I want to know if they are.

But I think both make a legitimate point. So you have got to deal with the entitlement issue. And then we have to look to see are we doing everything the appropriate way in Afghanistan to be successful. And if it came out that we are funding meritorious programs in Afghanistan but we are taking away from people that live right in the United States, then it is a tough issue.

And I have a couple of meth lab questions. And I want to follow up on that. But did you want to say something?

Mr. FATTAH. Yes, just for one quick second. My whole point is you have one of the most dangerous jobs in the government. And you are going after some very tough people who are making $400 billion. We are giving you a budget of $2.2 billion and say, well, go get the bad guys, right? And then we say, well, we want you to cut here and cut here.

And, you know, I just think that we have to be careful as a Nation not to cut to a point where it is really going to be more costly in the end. And I don't mean just financially. You know, when 34,000 people are losing their lives in Mexico in large measure because of the drug issue there, where we have seven to nine a day in Florida because of prescription drugs, the question of whether we can attack this problem on the cheap is a relevant question.

We are spending $2 billion a week in Afghanistan. If we are going to do that, then we have to be big enough as a country to think about what our other priorities are too. Thank you.

Mr. WOLF. And I agree with Mr. Fattah on that. For instance, a lot of people don't—I mean if you talk to a couple of members

who were really excited about what you had done, by getting Viktor Bout, the number of people whose lives were saved and everything else. And you all stayed with it when others sort of dropped it.

And so I think Mr. Fattah's point is a very appropriate one. And it gets back to we have just got to get the President to join with the leadership here to come together. Some of these programs will actually be increased. I mean I would increase cancer research. A lot of people from my family died of cancer. And I would increase research on autism.

The tax bill, I found out later on, both of us apparently opposed it. They gave a 2 percent payroll deduction on the Social Security tax, which will cost the government $112 billion. Imagine what you could do with $112 billion.

So he makes a good point. So, again, we have got to deal with these entitlements and come together in a bipartisan way quickly, or else we are going to continue to see these problems.

METH LABS

Can you submit for the record the statistics from the number of meth lab cleanups by states over the last three years? And do you know what the number would roughly be?

Ms. LEONHART. Yes. There were over 10,000 meth labs——

Mr. WOLF. Ten thousand.

Ms. LEONHART. Last year, yes. And the number anticipated for 2011 was even more.

[The information follows:]

Clandestine Methamphetamine Lab Clean-ups Administered by DEA by State, FY 2008-2010

State	FY 2008	FY 2009	FY 2010
AK	14	4	10
AL	454	606	665
AR	235	327	400
AZ	29	22	20
CA	13	5	2
CO	66	50	29
CT	-	3	-
DC	-	3	13
DE	-	2	3
FL	190	336	447
GA	168	161	279
HI	1	-	-
IA	61	97	165
ID	18	20	18
IL	255	396	368
IN	680	993	1,213
KS	7	25	95
KY	232	510	854
LA	34	95	174
MA	2	4	-
MD	2	-	2
MI	300	507	668
MN	43	21	20
MO	49	35	72
MS	221	515	773
MT	9	15	11
NC	161	149	170
ND	2	7	2
NE	12	21	20
NH	-	1	2
NJ	1	-	1
NM	64	59	62
NV	16	13	11
NY	12	9	27
OH	184	279	310

OK	96	355	556
OR	36	21	17
PA	17	15	9
SC	105	212	279
SD	5	6	10
TN	682	1,320	1,932
TX	167	183	120
UT	12	8	9
VA	21	19	63
VT	1	-	1
WA	2	1	-
WI	9	8	20
WV	108	122	162
WY	2	4	4
Total	**4,798**	**7,564**	**10,088**

Methamphetamine Labs Total Seizure Incidents[1] by State, FY 2008-2010[2]

State	FY 2008	FY 2009	FY 2010
AK	7	7	7
AL	497	641	670
AR	322	449	490
AZ	9	11	5
CA	349	273	197
CO	50	38	14
FL	142	271	338
GA	80	98	175
IA	200	278	283
ID	13	10	13
IL	272	407	390
IN	843	1,089	936
KS	160	125	144
KY	397	623	961
LA	29	56	114
MA	2	2	-
MD	1	-	2
ME	3	1	3
MI	306	568	700
MN	26	10	12
MO	1,413	1,641	1,922
MS	246	595	821
MT	7	11	12
NC	202	195	215
ND	34	36	14
NE	60	31	21
NH	1	3	6
NJ	4	-	-
NM	61	53	50
NV	12	10	8
NY	14	8	30
OH	136	338	246
OK	107	363	193
OR	20	14	8
PA	20	36	43

SC	48	92	103
SD	4	8	9
TN	496	683	1,077
TX	115	150	126
UT	14	7	3
VA	22	24	82
VT	2	-	3
WA	136	69	46
WI	11	11	21
WV	42	59	45
WY	5	2	4
Total	**6,940**	**9,396**	**10,562**

[1]Total Seizure Incidents include chemical/equipment only, dumpsite, and lab seizure.
[2]This report includes only that information that has been reported to EPIC by contributing agency/ies and may not necessarily reflect total seizures nationwide. Data is reported without corroboration, modification, or editing by EPIC, and, accordingly, EPIC cannot guarantee the timeliness, completeness, or accuracy of the information reported herein. The data and any supporting documentation relied upon by EPIC to prepare this report are the property of the originating agency.

Mr. WOLF. Well then will the states and localities be able to engage such assistance on their own? And what do you expect will happen to these hazardous materials in the absence of funding for the DEA programs for the remainder of the year?

Ms. LEONHART. Well, if I can explain for the committee, the money has always gone to the COPS Program. It has been a grant program.

Mr. WOLF. Does the President's budget for fiscal year 2012 include any funding in the DEA or the COPS accounts for meth lab cleanup?

Ms. LEONHART. No.

Mr. WOLF. No.

Ms. LEONHART. No.

Mr. WOLF. So if that answer is a no, coming back to the question will states and localities, we now know no is no. They would have to be able to engage such assistance on their own.

Ms. LEONHART. A couple of things: the other grants they do receive, some of the Byrne Grants, we understand——

Mr. WOLF. That may very well be in.

Ms. LEONHART. Some of the Byrne Grants actually allow for that. Asset sharing money that we share with state and locals when they work on cases can actually be used for lab cleanup. And what is missed sometimes is that the cases that we are working jointly with them, that we have investigations on, DEA is authorized to clean those up, and we will continue.

Mr. WOLF. I guess the point I am trying to make following up Mr. Fattah, do you expect there will be enough resources to do what has to be done if it is reduced at this level, knowing how the localities are having a very difficult time?

Ms. LEONHART. I am concerned about the resources available to state and locals to be able to respond to the meth issue.

MOBILE ENFORCEMENT TEAMS

Mr. WOLF. As you know, the committee had funds above your request in 2009 and 2010 to expand the mobile enforcement team programs, DEA teams that reside in field divisions that are available for TDY deployments. How many MET teams do you currently have?

Ms. LEONHART. We have currently 16 MET teams.

Mr. WOLF. And your budget proposals, the total elimination of the program; is that correct?

Ms. LEONHART. That's correct, $39 million.

Mr. WOLF. And is that because you were trying to reach a saving and this was the area that you thought that you could save in?

Ms. LEONHART. This was about the only program. We feel strongly that it is worthwhile, but having to do our piece, this is about the only program that we thought was a little bit distant from our core mission, which is disrupting and dismantling the world's largest drug traffickers.

Mr. WOLF. Okay. As I understand it, the rationale for cutting the MET program has been—it is basically an asset to localities. Is there a fundamental difference between the MET teams and Tactical Diversion Squads? And don't both of them target particularly acute localized drug problems and involve the participation of state

and local officers? So why is MET terminated and TDS currently expanding? There seems to be a little bit of an inconsistency there.

Ms. LEONHART. If I can correct you on that.

Mr. WOLF. Sure. You can correct me any time. Go ahead.

Ms. LEONHART. One of the things that the Tactical Diversion Squads, and if you will look at my slides when we are done if we don't get to go through them, one of the things it does, it brings task force officers into the program.

Most of our MET teams do not have state and local task force officers in them. They go to a department, and they assist in whatever that department thinks are the biggest and the baddest in their community, but it is not a program that has task force officers in it.

Mr. WOLF. Well would you acknowledge that this reduction may create some problems?

Ms. LEONHART. I will acknowledge that there will be communities and police departments that we would like to help that we are not going to be able to help.

Mr. WOLF. Okay. The Afghan issue, is DEA there primarily to advise and train the Afghans, or are DEA personnel conducting joint operations?

Ms. LEONHART. It is both. We are there to help stand up the Afghan National Police's Counter Narcotics Police, so that they, at some point, will be fully functional on their own to conduct both their domestic and international drug investigations.

But we are also there because there are major traffickers, high-level traffickers, major drug kingpins, that are a part of the problem for Afghanistan and the surrounding region. The corrupt governments. They are funding and are a part of the insurgency.

So we play this dual role where we are developing counterparts. But we are also saving lives—U.S. military and coalition forces' lives—because as we are developing our informants in the country, we are passing on that information; on a number of occasions we have passed information to Special Forces, and they have been able to get troops out of the way. We have reported on rocket attacks planned on military installations. And with our passing that information, they have been able to prepare for it. Because of our drug enforcement activities in the country, we have been able to provide leads, tips and information to our Ambassadors and even President Karzai himself, which has allowed them to move people out of harm's way. So we are helping our own forces by doing our mission in Afghanistan.

Mr. WOLF. Of your 82 positions in Afghanistan, how many are funded by DEA funds and how many by transfers from State Department?

Ms. LEONHART. The $88.6 million for Afghanistan from the State Dept. supports 69 of the 82 positions.

Mr. WOLF. Tell me from the State Department is how much?

Ms. LEONHART. Well we asked for $88.6 million.

Mr. WOLF. And so if that were not forthcoming, what would that mean?

Ms. LEONHART. Well we are concerned, because it isn't forthcoming. They are now going to give us $38.1 million and an addi-

tional 12.7 million. So we are about $6 million short of what we reduced our request to, $56.8 million.

Mr. WOLF. So will that mean you will have to pull out some?

Ms. LEONHART. Very, very hard questions have to be asked if we do not have that $6 million. And we have 82 people in country, but they can't do operations, then we have to ask, you know, what good is it to have those people in a war zone if they can't conduct their operations.

Mr. WOLF. When do you have to make—what date do you have to foresee making that decision?

Ms. LEONHART. We were just notified by the State Department on Friday, and we have been in discussions every day since. We are going to be discussing with the Department of Justice our plans, because obviously something has to change with us not getting money for what we need.

Mr. WOLF. Is there a drug problem in Pakistan? I don't hear too much about that. How does that compare with regard to the problem in Afghanistan? How does drug money and the drug issue impact them in Pakistan?

Ms. LEONHART. Well I will say that both Afghanistan and Pakistan have a citizen drug problem, a growing citizen drug problem. And they have the problem of drug trafficking and these high-value targets, these kingpins. The ones that we have indicted, have brought to New York, and are prosecuting, what we find is, they jump across the border. They are operating not only in Afghanistan, but they are also in Pakistan.

So what I did a couple of years ago is I set up our eighth foreign region, and I called it the Afghan/Pakistan region, because what we do in Afghanistan affects Pakistan and vice versa.

BOLIVIA

Mr. WOLF. Sounds like my bill, the Afghan Pakistan study group to look at both. Two other questions. In 2008, President Morales of Bolivia ordered the DEA to leave the country. We understand you relocated staff to other Southern Cone countries.

There were concerns at the time that this could be a major setback for counternarcotic efforts in Bolivia and in the region. We understand that the former head of Bolivia's antinarcotics police was recently arrested by the DEA in Panama for drug trafficking and brought to the U.S. for trial. Is that accurate?

Ms. LEONHART. That is accurate.

Mr. WOLF. I bet he was doing——

Ms. LEONHART. I am sorry?

Mr. WOLF. How did he get the job? Did President Morales know he had this problem?

Ms. LEONHART. Let me say what our worries about Bolivia are. The region around it, the countries around it, have been very concerned, because there is an uptick in production and trafficking in Bolivia. You can question why did we really get thrown out of Bolivia.

Mr. WOLF. Yes. Is there not a problem of drug use in Bolivia too?

Ms. LEONHART. There is a growing, already bad, but growing drug problem in Bolivia, a coke problem.

Mr. WOLF. And what does President Morales think of that?

Ms. LEONHART. If you remember, he was a cocalero, so he looks at this through different glasses.

Mr. WOLF. How would you characterize the level of cooperation you get today from the Bolivian government on counter-narcotics?

Ms. LEONHART. We are having to, since we were removed from Bolivia, put our people in surrounding areas, surrounding offices, countries. We have what we call an outside-in strategy. We are having to work our operations from the outside, like this case on General Sanabria that just was taken down.

We have had to develop informants outside of Bolivia. It is difficult, but President Morales has said several times that DEA will never return to Bolivia while he's in office.

Mr. WOLF. What was he doing in Panama when he was arrested?

Ms. LEONHART. This is an undercover operation. He was part of a conspiracy that negotiated to sell our undercovers I think 150 kilos of cocaine.

Mr. WOLF. And what is he charged with?

Ms. LEONHART. He is charged with conspiracy to distribute cocaine.

Mr. WOLF. Now will he have a public defender or will he have to get his own lawyer?

Ms. LEONHART. He has arrived recently in Miami, and I don't know who is representing him.

Mr. WOLF. Could you tell the committee what law firm represents him and the background of the people that represent him? Will it be a public defender or a prominent law firm in Miami or whatever? Who is representing your friend, Viktor?

Ms. LEONHART. One of the reasons for the delay, we thought we were going to trial this summer. It has been delayed until October is because he has fired his attorney.

Mr. WOLF. Who was his attorney?

Ms. LEONHART. I don't know who it was. And I just heard the other day who he has gotten. I will get back to you on that. He has just hired a brand new attorney.

Mr. WOLF. Was it a reputable law firm in the United States?

Ms. LEONHART. I wasn't aware of the person.

Mr. WOLF. Okay.

Ms. LEONHART. Of the name, but I will get you that.

[CLERK'S NOTE.—The Department of Justice did not provide the information regarding legal representation indicated by the witness. The information follows:]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 10-20886-CR-UNGARO

UNITED STATES OF AMERICA

vs

RENE SANABRIA-OROPEZA
Defendant.
_____/

NOTICE OF PERMANENT APPEARANCE

Please take notice that on May 16, 2011 Sabrina Puglisi enters her permanent appearance as counsel on behalf of Rene Sanabria-Oropeza for trial and/or plea and sentencing purposes only. This appearance does not include direct or collateral appeal. The clerk of this court is requested to send copies of all court notices pertaining to this cause to undersigned counsel.

Respectfully submitted,

/s/ Sabrina Puglisi
Sabrina Puglisi
Fla. Bar No. 0178284

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CERTIFICATE OF SERVICE

I hereby certify that on May 16, 2011, undersigned electronically filed the foregoing document with the Clerk of the Court using CM/ECF which will send notification of such filing the United States Attorney's Office, Southern District of Florida.

/s/ Sabrina Puglisi
Sabrina Puglisi, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
_____X

UNITED STATES OF AMERICA,

Plaintiff,

NOTICE OF APPEARANCE

-against-

08-cr-365 (SAS)

VIKTOR BOUT,

Defendant,
_____X

SIRS:

PLEASE TAKE NOTICE, that the Defendant, VIKTOR BOUT, has retained Albert Y. Dayan, Esq. as his Attorney and respectfully requests that a copy of all papers in the above captioned proceeding be served upon the undersigned at the Office and Post Office address stated below.

Dated: Kew Gardens, New York
February 28, 2011

Respectfully submitted,

_____/s/_____
ALBERT Y. DAYAN, ESQ. (AYD-5222)
Attorney for the Defendant
VIKTOR BOUT
80-02 Kew Gardens Rd., Ste. 902
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(718) 268-9400
dayanlaw@aol.com

Mr. WOLF. If you could let us know. Do you think the law firm—do you think it is a public defender, or do you think he is——

Ms. LEONHART. No. I believe——

VIKTOR BOUT

Mr. WOLF. Do you think the law firm knows of all the kids in Africa who have been killed because of Viktor Bout? Do you know if this firm knows of the pain and suffering and the agony he has brought to Sierra Leone, to the Congo, to Liberia?

Ms. LEONHART. I don't know.

Mr. WOLF. If you could do a one page, kind of two page on the pain and suffering that Viktor Bout has brought to the poor people of Africa, I would send the law firm. And then you give me the lawyer. What I will do is I will write him a letter and tell him that his client has been involved in all these activities and the pain, and the suffering, and the agony that he has created.

[The information follows:]

Victor Bout

On November 16, 2010, Viktor Bout was extradited from the Republic of Thailand to the United States pursuant to a request for his extradition related to an indictment returned in the Southern District of New York charging Mr. Bout with four separate offenses: conspiracy to kill U.S. nationals; conspiracy to kill U.S. officers or employees; conspiracy to acquire and use an anti-aircraft missile; and conspiracy to provide material support or resources to a designated foreign terrorist organization. If Mr. Bout is convicted of all four offenses he will face a mandatory minimum sentence of 25 years imprisonment and a maximum sentence of life imprisonment. Because the case involving Mr. Bout is now pending criminal prosecution in U.S. District Court for the Southern District of New York, DEA is legally constrained from commenting further about the case. Any additional inquiries concerning Mr. Bout should be directed to the Office of the U.S. Attorney for the Southern District of New York, the office responsible for prosecuting Mr. Bout's case.

The unsealed indictment includes the following information on Mr. Bout's background:

BOUT, an international weapons trafficker since the1990s, has carried out a massive weapons-trafficking business by assembling a fleet of cargo airplanes capable of transporting weapons and military equipment to various parts of the world, including Africa, South America, and the Middle East. The arms that BOUT has sold or brokered have fueled conflicts and supported regimes in Afghanistan, Angola, the Democratic Republic of the Congo, Liberia, Rwanda, Sierra Leone, and Sudan. CHICHAKLI, an American citizen, has been a close associate of BOUT since at least the mid-1990s, assisting in the operations and financial management of BOUT's network of aircraft companies.

Since at least 2000, BOUT's role in fueling international conflicts with weapons, as well as his close relationship with CHICHAKLI, have been recognized by the international community. Based in part on their close association with former Liberian President CHARLES TAYLOR, both BOUT and CHICHAKLI have been the subject of United Nations Security Council ("UNSC") sanctions restricting their travel and their ability to conduct business around the world.

According to the UNSC Sanctions Committee Concerning Liberia, BOUT "supported former President TAYLOR's regime in [an]effort to destabilize Sierra Leone and gain illicit access to diamonds." The Sanctions Committee also noted that CHICHAKLI, "an employee/associate" of BOUT's, had a "significant role in assisting [BOUT] in setting up and managing a number of his key firms and moving money. " In addition, more than 25 companies affiliated with BOUT and CHICHAKLI have been listed by the Sanctions Committee as subject to similar restrictions concerning their assets and financial transactions. As a result of the UNSC's resolutions and sanctions regime, all United Nations member states have been directed to freeze any funds, financial assets and economic resources owned or controlled by BOUT and CHICHAKLI, and to ensure that such monies are not made available to them, or used for their benefit, within the member states' territories.

In 2004, consistent with the sanctions previously adopted by the UNSC concerning Liberia, the President of the United States issued an executive order prohibiting any transactions or dealings within the United States by individuals affiliated with former President TAYLOR. Accordingly, the U.S. Department of Treasury, pursuant to its authority under the IEEPA, prohibited BOUT from conducting any business in the United States. In 2005, that prohibition was extended to CHICHAKLI. In 2006, similar to the sanctions relating to Liberia, the President of the United States issued an executive order prohibiting any transactions or dealings within the United States by individuals involved in the destabilization of the Democratic Republic of the Congo. The Treasury Department identified BOUT as an individual subject to the Congo prohibitions.

The United Nations and IEEPA sanctions encumbered BOUT's and CHICHAKLI's efforts to conduct business within their existing corporate structures. Accordingly, the defendants took steps to form new companies, and to register these companies in the names of other individuals in order to create the false appearance that they had no affiliation with them.

One such company, Samar Airlines, was created in 2004,right after the majority of United Nations and IEEPA sanctions became effective. BOUT and CHICHAKLI were personally involved in the operational and business affairs and decisions of Samar Airlines, though they held out other individuals as being the officers of the company. In 2007, in violation of the IEEPA sanctions to which they were subject at the time, BOUT and CHICHAKLI, acting through Samar Airlines, contracted to purchase two Boeing aircraft from companies located in the United States.

In connection with the purchase of these aircraft and services relating thereto, BOUT and CHICHAKLI electronically transferred more than $1.7 million through banks in New York and into bank accounts located in the United States. They did so through a number of front companies, whose assets were also owned and controlled by BOUT, in order to evade the UNSC's sanctions regime and the IEEPA prohibitions. Upon the discovery that CHICHAKLI was connected to Samar Airlines, the U.S. Treasury Department blocked the funds that had been transferred into the bank accounts of the U.S. aviation companies....

Mr. WOLF. With that, I have some others we are going to submit for the record. But, Mr. Fattah, do you have any last questions?

CYBERSECURITY

Mr. FATTAH. Let me just ask, because we have asked this I think of all of our other witnesses, about cybersecurity for your agency. Are there issues, challenges, and are there budget requests relative thereto? I heard you say something about not refreshing your computers. I am a little more interested in the security of your computer system.

Ms. LEONHART. Well I will tell you that part of the budget request is $900,000. And that is to stand up, and I believe the FBI or a couple of other agencies may be requesting this as well, this is to help make sure our systems are secure. This is to check not only our automated systems, but this will be a program we can start to even check and see if we are being infiltrated anywhere from informants and employees. So it is $900,000 that would allow us to start a counterintelligence program, looking at our own operations.

Mr. FATTAH. Over the last year have there been attempts to illegally access your system?

Ms. LEONHART. I believe for Justice as a whole that there are always people attempting to get into our systems.

Mr. FATTAH. So other than the generality of that, there have been no persistent or particular attacks on your security system, your computer system——

Ms. LEONHART. I am aware——

Mr. FATTAH [continuing]. That you can talk about?

Ms. LEONHART. I am aware of we have been shut down a few times to protect, because of an intrusion that is always caught. I am not aware of anybody that has actually been able to penetrate us.

Mr. FATTAH. Okay. And so you have this $900,000 request. And just for the record, I know my colleague raised this, there is a story in the *New York Times* today, about drones. They are not operated by the DEA. If they exist, they are operated by the Department of Defense or some other agency.

Ms. LEONHART. We have none.

Mr. FATTAH. Okay. Thank you very much.

Mr. WOLF. I thank you. I think that is all of the questions that we have. There will be a number for the record. And then if we can have the other follow-up information, like the law firms, that information, the prescription drug issues, so we can write the governor.

Ms. LEONHART. Yes, sir.

Mr. WOLF. And then if you could keep us informed after we write the governor whether he will meet with you.

But if you can let us know what takes place with regard to that. And then keep us informed of these other things.

With regard to that, thank you for your testimony. I appreciate the good work your people do. Thanks.

Ms. LEONHART. Thank you for your help.

Department of Justice - FY 2012 Hearing Products

Drug Enforcement Administration QFRs

(DEA - Wolf 1 - SW Border/Mexican Cartel - DEA)

1. **The DEA received supplemental appropriations totaling $54 million in FY09 and FY10 for Southwest Border operations. Your request for FY12 includes $23 million to continue those efforts. What will that money go toward? Are there any activities or staffing levels currently funded that are not continued in your FY12 request?**

ANSWER

The FY 2012 President's Budget includes $8,645,000 in non-personnel funding to annualize the FY 2009/10 supplemental, which provided $20,000,000 for DEA's Sensitive Investigative Unit (SIU) Program in Mexico. The requested FY 2012 funding will support DEA's SIUs in Mexico, including related aviation operations and maintenance. The FY 2012 President's Budget also includes $14,101,000 to annualize the FY 2010/11 supplemental, which provided DEA with $33,671,000 and 50 positions for increased law enforcement activities related to the Southwest Border. Of the FY 2012 request, $10,001,000 will provide full-year payroll costs associated with the 50 new positions, including 35 Special Agents. The remaining $4,100,000 represents non-personnel funding for the annualization of the Speedway Program, the License Plate Reader Project, and Western Hemisphere SIUs.In addition to the initiatives mentioned above, the FY 2010/11 supplemental provided funding for high definition cameras for aircraft and communications intercepts at the El Paso Intelligence Center. The FY 2012 President's Budget does not request the annualization of these two non-personnel items, as they are one-time infrastructure investments. The following table summarizes DEA's FY 2012 request for the annualization of Southwest Border supplemental funding:

FY 2012 Funding Related to the FY 2009/10 and

FY 2010/11 SWB Supplementals

Item

FY 2009/10 Supplemental

(000s)

FY 2012 Request

(000s)

FY 2009/FY 2010 Supplemental

Mexico and Central America SIUs, including air support

$20,000

$8,645

Total FY 2009/10 Supplemental

$20,000

$8,645

Item

FY 2010/11 Supplemental

(000s)

FY 2012 Request

(000s)

FY 2010/FY 2011 Supplemental

Staffing (50 pos: 35 Agents, 8 Intel Analysts, 7 Support)

$10,005

$10,001

Intelligence (Speedway)

$2,000

$2,000

Drug Flow Attack Strategy and Operational Funding

$6,166

$0

License Plate Reader Project

$1,500

$500

Western Hemisphere SIUs

$2,000

$1,600

High Definition Cameras for Aircraft

$7,000

$0

Communications Intercept at EPIC

$5,000

$0

Total FY 2010/11 Supplemental

$33,671

$14,101

Total FY 2009/10 and FY 2010/11 SWB Supplementals

$53,671

$22,746

(DEA - Wolf 2 - SW Border/Mexican Cartel - DEA)

2. **The Supplementals included operational funding and funding for aircraft cameras and communications intercept needs. Are those included in your FY12 request? Will your request for FY12 allow you to continue your current operations tempo for Southwest border activities? Or will it only cover a reduced level of activity? If so, please quantify?**

ANSWER

The FY 2010/11 Supplemental provided DEA with funding to procure aircraft cameras and communications intercept equipment. These were major technology infrastructure investments that have increased DEA's ability to target, disrupt, and dismantle Mexican drug cartels operating along the Southwest Border. Recurring funding for these investments was not included in the FY 2012 President's Budget, as these were one-time expenses and, as such do not require annualization. The initial costs of procuring the equipment are the most significant; the yearly maintenance costs associated with their continued use are not substantial and will be covered by DEA's base resources.

(DEA - Wolf 3 - Prescription Drug Abuse - DEA)

1. **The resources to expand Tactical Diversion Squads will come from fee collections in your Diversion Control Fee Account. Actual fee collections have not always lived up to budget estimates. Please submit the last five years of data on fee collection estimates in the budget compared to actual collections. Are you confident that fee collections will be sufficient to finance program increases of over $30 million such as you have included in your budget?**

ANSWER

Since the last fee rule was put in place in FY 2007, actual collections have ranged between 3.8% below and 5.2% above projections. The costs of DEA's Diversion Control Program are funded through the Diversion Control Fee Account. By law, DEA is required to set fees "at a level that ensures the full costs of operating the various aspects of that program." An update to the fee schedule is currently under review. The current fee structure has been in place since November 2006 and may not provide sufficient fee collections to cover all costs of additional Tactical Diversion Squads requested in FY 2012. DEA has submitted a notification to Congress indicating that it intends to begin implementation of the President's FY 2012 budget proposal to field the additional TDSs in FY 2011.

Estimated and Actual Fee Collections (in $000's)

FY 2006 2

FY 2007 3

FY 2008

FY 2009

FY 2010

Projected 1

$217,933

$226,406

$224,268

$259,450

$240,718

Actual

163,434

219,181

235,904

249,512

245,836

Difference (Actual - Projected)

(54,499)

(7,225)

11,636

(9,938)

5,118

% Difference

-25.0%

-3.2%

5.2%

-3.8%

2.1%

1Projections from same year Congressional President's Budget submissions

2FY 2006 budget submission assumed new fee rule, which did not take effect until Nov 2006 (FY 2007)

3New fee rule implemented in FY 2007

(DEA - Wolf 4 - Prescription Drug Abuse - DEA)

2. **I understand that the current fee structure has been in place since 2006. Does your budget for FY12 assume that there will be an updated fee rule put in place that will result in increased collections in FY12? And if so, is there a risk that you would not be able to afford the increases described in your budget if there is a delay in publishing an updated fee rule?**

ANSWER

The costs of DEA's Diversion Control Program are funded through the Diversion Control Fee Account. By law, DEA is required to set fees "at a level that ensures the full costs of operating the various aspects of that program The current fee structure has been in place since November 2006 and may not provide sufficient fee collections to cover all costs of additional Tactical Diversion Squads requested in FY 2012. DEA has submitted a notification to Congress indicating that it intends to begin implementation of the President's FY 2012 budget proposal to field the additional TDSs in FY 2011.

(DEA - Wolf 5 - Prescription Drug Abuse - DEA)

3. **A few years ago there was an effort to give DEA the statutory authority to review and comment on the labeling, promotion, and risk management plans of new drugs before the FDA approved them. The Administration and the Senate objected to this proposal and it was never fully implemented. What are you currently doing to work cooperatively with FDA regarding the approval of new drugs that may have a high risk of abuse?**

ANSWER

DEA works with the Department of Health and Human Services (HHS) and its component

agencies regarding drugs that pose a high risk of abuse. DEA and HHS work collaboratively to determine how to schedule new controlled substances to protect public health and safety while ensuring an uninterrupted supply to meet legitimate medical and scientific needs. DEA and HHS also continue to monitor and evaluate controlled and non-controlled substances to determine whether drugs should be controlled or whether those that are already controlled should be moved to a different schedule under the Controlled Substances Act. DEA also works collaboratively with HHS in determining legitimate medical and scientific needs when determining what the annual assessment of needs are for a given year. DEA has also been working with HHS, wherever possible, on their implementation of the requirements for Risk Evaluation and Mitigations Strategies (REMS).

(DEA - Wolf 6 - Rescission - JMD Budget)

1. **Your budget proposes a rescission of $30 million from your prior year balances. DEA is the only Justice Department Federal Law Enforcement entity for which such a rescission is proposed. How much do you anticipate having in prior year balances at the end of FY11, and how does this amount compare with previous years?**

ANSWER

Each year, DEA estimates that a certain amount of funding will become available from prior year deobligations. In FY 2010, DEA transferred $56 million in prior year unobligated balances into its no year account using no year funding authority provided in previous appropriations acts. During FY 2011, DEA projects between $60 million and $70 million in direct funding will become available in its no-year Salaries and Expenses Account. DEA will use a portion of these funds to cover the FY 2012 rescission and will allocate the rest through its FY 2011 Zero Based Budgeting (ZBB) process to cover FY 2011 program costs.

(DEA - Wolf 7 - Rescission - JMD Budget)

2. **What is the explanation for the existence of these balances? And absent the rescission proposal would you be planning to obligate that funding during FY12? For what programs or activities?**

ANSWER

Unobligated balances exist for several reasons. If funds are committed for a specific purchase, but a contract or order is not completed before the end of the fiscal year, those funds will become part of the unobligated balances at the end of the year. Also, if funds are obligated for

a contract or project in the prior fiscal year and that contract or project is completed for an amount less than the amount originally obligated, those remaining funds will be added to the unobligated balance. DEA uses no year authority provided in its annual appropriation to transfer prior year unobligated balances to its no-year account. DEA notifies Congress, in accordance with Section 211 of our annual appropriations act, of its intent to use deobligated balances. Per Section 211, deobligations of funds provided in prior fiscal years may only be used if Congress is notified. DEA typically allocates prior year unobligated balances across all programs through its Zero Based Budgeting (ZBB) process.

(DEA - Wolf 8 - Rescission - JMD Budget)

3. **What would be the impact on your FY12 operations of taking such a rescission?**

ANSWER

The $30 million cancellation is approximately half of what DEA historically transfers to its no-year account from prior year unobligated balances. DEA uses its ZBB process to allocate unobligated balances across activity areas. DEA will reduce the level of funding it makes available during the ZBB process to a variety of enforcement, intelligence, and support programs but will prioritize which activities, programs and operations are impacted to minimize or nullify any disruption to high priority initiatives.

(DEA - Wolf 9 - National Drug Intelligence Center (NDIC) - DEA)

1. **During floor consideration of H.R. 1 last month, an amendment was adopted to eliminate all funding for the National Drug Intelligence Center. The President's budget for FY12 likewise cuts the NDIC budget by almost half. From the DEA perspective, what is the value added, if any, by the NDIC? What would be the impact on your operations from significant reductions, or even the elimination of the Center?**

ANSWER

Since 1994, DEA has primarily used NDIC's Document Exploitation and Media (DOMEX), which evaluates large volumes of paper documents and data in support of active investigations. The process of examining seized and subpoenaed hard-copy and digital evidence and extracting critical data to be utilized in ensuing prosecutions is sometimes daunting and can be beyond the capability of even major DEA Divisional Field Offices. If NDIC were eliminated in its entirety, DEA would require an NDIC DOMEX-like capability. While DEA is a customer for approximately 50 percent of NDIC's DOMEX missions, other

federal agencies also utilize NDIC's DOMEX capacity. These customers include the FBI, ATF and ICE.

NDIC also produces reports that are useful to DEA, including the National Drug Threat Assessment and the National Methamphetamine Threat Assessment.

(DEA - Wolf 10 - National Drug Intelligence Center (NDIC) - DEA)

2. **Does the DEA or other Federal entities also produce strategic intelligence products on counterdrug issues?**

ANSWER

DEA produces a wide variety of strategic intelligence products on counterdrug topics. DEA's strategic intelligence products serve to inform law enforcement, the Intelligence Community (IC) and U.S. policy-makers on the latest developments in drug trends and what those developments mean and may portend. DEA shares its strategic intelligence products with U.S. law enforcement, to include federal, state, local and tribal, and with the IC, as well as with foreign counterparts and, depending on the level of sensitivity, with the public. DEA produces its own analyses, but often works with other agencies collaboratively. DEA has produced assessments in conjunction with law enforcement agencies and the IC.

DEA also develops, contributes to, and produces strategic reports under the auspices of the Anti-Drug Intelligence Community Team (ADICT), which was formed in 2005 by DEA and the CIA Crime and Narcotics Center (CNC) as a partnership between the U.S. law enforcement and the IC. ADICT jointly coordinates and produces drug-related intelligence products. Recently, ADICT began a joint U.S.-Mexico assessment on Mexican Drug Trafficking Organizations. ADICT products support policy-makers as well as operational elements.

(DEA - Fattah 1 - Task Force Consolidation - DEA)

1. **The Budget proposes the consolidation of task forces across the Department's law enforcement components, including the elimination or consolidation of 25-31 DEA task forces. Given that the associated savings is only $292,000, what was the impetus for this consolidation?**

ANSWER

The impetus for the elimination or consolidation of 25-31 DEA task forces comes from a DOJ-wide effort to reduce duplication of effort among various existing task forces. By consolidating or eliminating task forces, we will generate savings and improve operational efficiency by reducing the marginal operational and overhead costs associated with operating a task force, such as travel, fuel, office supplies, and investigative equipment.

(DEA - Fattah 2 - Task Force Consolidation - DEA)

1. **What criteria will DEA use to determine which task forces should be consolidated?**

ANSWER

We will review performance statistics over past years along with other factors, such as whether multiple DOJ or other Federal task forces with overlapping missions exist within the same geographical area, to determine where the consolidation or elimination of task forces will have the least impact to our mission and our state and local partners. While DEA needs to consolidate or eliminate certain task forces, we will continue to maintain strong working relationships with the state and local law enforcement agencies that are currently represented on the task forces.

(DEA - Fattah 3 - Task Force Consolidation - DEA)

2. **Are there other savings associated with task force consolidation that are not part of the discretionary budget, such as savings from DEA's Assets Forfeiture Fund resources? If so, what is the total savings associated with DEA's proposed task force consolidation?**

ANSWER

DEA does not anticipate any additional savings over the $292,000 indicated. By consolidating or eliminating task forces, we would find savings and improve operational efficiency by reducing the marginal operational and overhead costs associated with operating a task force, such as travel, fuel, office supplies, and investigative equipment.

AFF's major contribution to DEA's task forces is payments for state and local overtime for task forces that have been formally established as part of the State and Local Task Force Program. DEA may eliminate a significant number of provisional task forces, which do not receive AFF state and local overtime funds. The costs of provisional task forces are funded entirely by DEA field divisions. If DEA consolidates any of the program-funded task forces that provide AFF-funded overtime to state and local task forces, it is very likely that these

task force officers will be reassigned to another task force where they will still receive overtime pay.

(DEA - Fattah 4 - Impact of Task Force/METs Elimination - DEA)

1. **How does DEA expect the elimination of these 25-31 task forces and all of the Mobile Enforcement Teams to impact the number of investigations and prosecutions of criminal activity associated with drug gangs across the country?**

ANSWER

The task force proposal does not eliminate any federal personnel or reduce the number of task force officers (TFO) working with DEA. The savings will be generated entirely through reductions in non-personnel and operational spending. Federal and TFO personnel will be redirected to higher crime areas or higher priority task forces. While DEA needs to consolidate or eliminate certain task forces, DEA will continue to maintain strong working relationships with the state and local law enforcement agencies that are currently represented on the task forces.

Elimination of the MET program will have minimal impact on the number of investigations and prosecutions of criminal activity associated with gangs. DEA will continue to assist communities impacted by gangs through our task forces and through participation on other violent crime task forces led by other DOJ components. For example, DEA and other components also participate in the AG's gang initiative, GangTECC. In FY 2010, GangTECC partnered with DEA's Special Operations Division and is now better positioned to expand coordination efforts, link and deconflict gang cases, and share investigative intelligence. Additionally, DEA will continue to vigorously combat drug trafficking organizations through the enforcement efforts of special agents assigned at existing field offices. DEA will also continue to coordinate its efforts with other federal, state, and local entities outside of formal task force structures.

(DEA - Fattah 5 - Task Force Activity - DEA)

1. **How does DEA work with other DOJ law enforcement components and non-DOJ federal law enforcement to coordinate task force activity and minimize overlap and redundancy?**

ANSWER

Each DOJ component has formed task forces that focus on that component's core mission, and they invite other components and other law enforcement agencies to participate in these task forces, ensuring that all relevant agencies are aware of and are working cooperatively with each other.

Task forces throughout the Department have already taken steps to reduce overlap and improve coordination. For example, all new DOJ task forces that relate to gangs must be approved by the Attorney General's Anti-Gang Coordination Committee (AGCC). The AGCC reviews all new proposed task forces and ensures that their development is coordinated with all federal law enforcement agencies in that locality. In addition, all of these task forces have access to resources that facilitate information sharing and deconfliction such as DEA's Special Operations Division, the El Paso Intelligence Center, and the OCDETF Fusion Center. DEA and other components also participate in the AG's gang initiative, GangTECC.

(DEA - Fattah 6 - Prescription Drug Monitoring Program - DEA)

1. **Most states have now implemented a prescription drug monitoring program. How are those state programs working and how do they help DEA?**

ANSWER

One of the best ways to combat the rising tide of prescription abuse is the implementation and use of Prescription Drug Monitoring Programs (PDMPs). PDMPs help prevent and detect the diversion and abuse of pharmaceutical controlled substances at the retail level where no other automated information collection system exists. This data is used to support DEA's investigative and regulatory efforts.

We are hopeful that the states with PDMPs will be able to operate and maintain their systems and the other states will be able to implement similar systems. As of December 31, 2010, there were 45 states with active PDMP systems, with another five states planning to launch a PDMP in FY 2011. Nearly every state that has decided to implement a Prescription Drug Monitoring Program to date has had an opportunity to apply for grants through the Harold Rogers Prescription Drug Monitoring Program or through the HHS-funded National All Schedules Prescription Electronic Reporting Act program.

(DEA - Fattah 7 - Federal Grant Programs - DEA)

1. **There are two federal grant programs that help states develop prescription drug monitoring programs, one of which is funded through the Department of Justice, the**

Hal Rogers Prescription Drug Monitoring Program. How does that program differ from the NASPER program administered by the Department of Health and Human Services? Is there a need for both programs?

ANSWER

The Harold Rogers Prescription Drug Monitoring Program (HRPDMP) and the NASPER program have similar purposes. HRPDMP is a competitive grant program administered by the Bureau of Justice Assistance (BJA), while NASPER administers a formula grant program under the authority of the Department of Health and Human Services. Both programs have fostered the establishment of state Prescription Drug Monitoring Programs (PDMPs), which now operate or are planned in most states.

Standards for participation in HRPDMP are defined by BJA, which oversees the program. Under the HRPDMP, standards for state PDMPs are based on the state statute that authorizes the program. States that lack authorizing legislation may compete for planning grants. To a large extent, the standards to qualify for NASPER grants are defined in Federal statute. These standards include: minimum Federal requirements for security of PDMP information; uniform electronic data format; availability of information; unsolicited reporting; registration/authentication of users; disclosing information; and interoperability with other states.

While the President's FY 2012 budget does not include funding for HRPDMP, nearly every state that has decided to implement a PDMP to date has had an opportunity to apply for funding under the HRPDMP, *and the program has largely met its goal.* For any states currently without a PDMP, funding for a state PDMP could be obtained from other OJP grant programs, including the Byrne Justice Assistance Grants (JAG) program. Additionally, because PDMPs are vital to combating prescription drug diversion, the FY 2012 budget includes $3 million for a new Prescription Drug Monitoring Pilot and Evaluation Program, which will examine effective implementation of prescription drug monitoring programs by providing funding for implementation pilots in a select number of states and evaluation to help determine the avenues that hold the greatest promise for effectively responding to this public safety-public health threat.

(DEA - Fattah 8 - Prescription Drug Monitoring Program Funds (PDMP) - DEA)

1. **DEA has worked with the states on developing ways to share prescription drug monitoring program (PDMP) data among states to help defeat interstate diversion schemes. What is the status of those efforts, and have federal grant funds been used to help facilitate those efforts?**

ANSWER

The National Association of Boards of Pharmacy is currently working to provide established guidelines for interconnectivity between states that have operational Prescription Drug Monitoring Programs. The Alliance of States with Prescription Monitoring Programs, through its Training and Technical Assistance Center, and the Schneider Institute for Health Policy at Brandeis University have developed a Prescription Monitoring Information Exchange (PMIX) program to enable the interstate exchange of PDMP data. The specific technology used, known informally as the PMIX hub server, significantly reduces the cost and effort that would be required to implement a communications link with every single exchange partner state. The PMIX Hub is now operational, has successfully enabled the exchange of PDMP data between Ohio and Kentucky, and is ready to support data exchanges between states. The Bureau of Justice Assistance (BJA) has provided funds to support the development of the PMIX specifications through the Harold Rogers Prescription Drug Monitoring Program (HRPDMP) Technical Assistance and Training Program. BJA has also prioritized grant awards to states who commit to interstate information sharing via the PMIX specifications. While the President's FY 2012 budget does not include funding for HRPDMP, nearly every state that has decided to implement a PDMP to date has had an opportunity to apply for funding under the HRPDMP, *and the program has largely met its goal.*

The Department of Health and Human Service's National All Schedules Prescription Electronic Reporting Act (NASPER) program also provides federal grant funds in support of PDMP development and enhancement, has been a partner in the creation of PMIX, and requires that existing PDMPs provide interoperability plans with other states.

(DEA - Fattah 9 - Prescription Drug Monitoring Program (PDMP) Funds - JMD Budget)

1. **In the FY 2012 budget, no funding was proposed for the Department of Justice PDMP program, while only $2 million was proposed for NASPER in the HHS budget. Does this mean that the need among states for these programs is less than it was in the past?**

ANSWER

The request acknowledges that PDMPs are vital to combating prescription drug diversion and, as such, the FY 2012 budget for OJP includes $3 million for a new Prescription Drug Monitoring Pilot and Evaluation Program, which will examine effective implementation of prescription drug monitoring programs by providing funding for implementation pilots in a select number of states and evaluation to help determine the avenues that hold the greatest promise for effectively responding to this public safety-public health threat.

(DEA - Fattah 10 - Clan Lab Cleanup Program Funding - JMD Budget)

1. **The Department has not requested any funding for the clan lab cleanup program in FY 2012. If the Subcommittee were to decide to continue the program, would it be more efficient to appropriate funding for the program directly to DEA based on a DEA estimate of the likely demand?**

ANSWER

Because the cleanup activity is a state and local assistance program, it properly belongs in a grant-making agency. DEA's role has simply been to administer the contract that provides funds to state and local authorities that perform the cleanups.

(DEA - Fattah 11 - Clan Lab Cleanup Program Funding - JMD Budget)

2. **What is DEA's estimate of the funding needed for the clan lab program in FY 2012?**

ANSWER

DEA estimates that it would cost at least $22 million to fund state and local clandestine lab cleanup and cleanup training costs for FY 2012. If current trends continue, the costs would be higher.

(DEA - Aderholt 1 - Meth Cleanup Program Funding - DEA)

1. **I know that the funding for the Meth Clean-up Program comes from the DOJ COPS office and that DEA is responsible for the distribution of these funds. However, does the DEA need to take over the funding for this program, given its closer relationship to the state and local agencies daily fighting the scourge of methamphetamines across the country? This funding shortfall is unacceptable and is harming our state and local law enforcement agencies, and it is harming our communities.**

ANSWER

Because the cleanup activity is a state and local assistance program, it properly belongs in a grant-making agency. DEA's role has simply been to administer the contract that performs the cleanups.

(DEA - Aderholt 2 - Funds for Meth Cleanup Program - DEA)

1. **Why has the Department not requested these funds, except for two of the last ten years? Congress has had to step in and fund the programs without the full input of the Administration. The DOJ, specifically through COPS and DEA, must step up and request adequate funds for this vital program. As you know, North Alabama is on the forefront of the meth epidemic. I was told today in a meeting that in the last 2 weeks that there have been 18 sites in just 2 counties that have required clean up.**

ANSWER

Clandestine lab cleanup activity is a state and local assistance program with DEA's role limited to administering the contract that performs the cleanups. Funding has been properly provided though the COPS appropriation. The entire federal government is being asked to make tough decisions on programs that can be consolidated, reduced, or eliminated. The elimination of the funding for the COPS Methamphetamine Enforcement and Cleanup program represents just one of the difficult decisions the Department of Justice had to make in the formulation of the 2012 budget. However, state and local law enforcement agencies are able to use Byrne Justice Assistance Grant (JAG) funding for clandestine lab cleanup.

(DEA - Aderholt 3 - Meth Cleanup Funds)

1. **While we are waiting for the Meth Clean-Up funds to start to flow again, which I understand will take a few months, what else is the DEA doing to help the state and local law enforcement agencies on this issue?**

ANSWER

DEA has a clandestine lab training facility at the DEA Academy in Quantico, Virginia. At this facility, DEA trains federal, state, local, and foreign law enforcement officials on the latest techniques in clandestine laboratory detection, enforcement, and safety. In FY 2010, the Clandestine Laboratory Training Unit conducted training for a total of 1,306 state and local law enforcement officers. Although DEA has had to cut back its training schedule, DEA continues to offer as many state and local clandestine laboratory classes as possible, including:

· On-the-road Clandestine Laboratory Training: The Clandestine Laboratory Unit is conducting certification schools on the road using temporary facilities.

· National Improvised Explosives Forum (NIEF) schools: The DEA Office of Training has also partnered with the FBI to provide Clandestine Laboratory Awareness training throughout

the country in support of the NIEF training school. This school, where the similarities of drug labs to WMD/IED labs are discussed, is provided to Bomb Technicians and other first responders or industry personnel throughout the country.

The states of Alabama, Kentucky, Illinois, Indiana, and Oklahoma already have Container Programs set up that allow state and local law enforcement officers to expedite the removal of seized chemicals from clandestine laboratory sites to temporary secure containers pending removal by a contractor. DEA is willing to provide technical assistance to any other state that wants to implement the Container Program.

Finally, state and local law enforcement agencies are able to use Byrne Justice Assistance Grant (JAG) funding for clandestine lab cleanup.

TUESDAY, MARCH 15, 2011.

U.S. BUREAU OF PRISONS

WITNESS

HARLEY G. LAPPIN, DIRECTOR, U.S. BUREAU OF PRISONS

OPENING REMARKS

Mr. WOLF. Welcome to the hearing. The hearing will begin.

Over the past 25 years, the U.S. prison and jail population has skyrocketed to an all-time high, with 2.3 million people incarcerated. We are the world's incarceration leader, confining 23 percent of the world's prisoners.

Our federal prison population is experiencing incredible growth. The Bureau of Prisons is nearly 40 percent over capacity and its population is expected to grow by an additional 14,000 inmates over the next two years at a cost to taxpayers of $27,000 per inmate per year.

The President's budget requests increases of 10 percent for the prisons and detention accounts just to keep pace. The budget requests $6.8 billion for the Federal Prison System, more than $600 million over the current levels.

I am sympathetic to the challenges the Bureau of Prisons faces as the inmate population continues to grow, because by law they must provide for the custody of all inmates. BOP does not control the number of inmates sentenced to prison and unlike other federal agencies cannot limit assigned workloads and thereby control operating costs.

We must still seek ways to reduce costs and I think the Administration is not doing enough on this to be honest with you, nor did the previous Administration do enough. There is a lot of rhetoric, a lot of talk, a lot of talk about work, a lot of talk about Drug Courts, but nothing really ever changes except the situation gets worse and gets worse and gets worse.

One serious problem influencing our prison population is recidivism. The Bureau of Justice statistics has estimated that two-thirds of all released prisoners will commit new offenses within three years of their release.

I believe that Director Lappin and I likely share the goals of reducing costs of prison populations and crimes. Just a few weeks ago, this subcommittee held a hearing to discuss the growing body of evidence that suggested we can—if we really make an effort—turn around the failure rates associated with our outdated reentry system.

Organizations like the Pew Center on the States and the Council of State Governments are promoting innovative efforts that are being tailored to specific populations and jurisdictions. I hope that

some of these lessons, if not all, will be applied to our Federal Prison System.

In light of this, I am pleased to see the emphasis that the budget request places on reentry programs, specifically residential drug abuse treatment and occupational education. And we have a number of questions to ask with regard to that.

Before your testimony, let me just recognize the ranking member, Mr. Fattah.

Mr. FATTAH. Thank you very much.

I look forward to your testimony. It is true, as the chairman said, that the percentage of prisoners in federal custody—if you go back to 1980, you had about almost 10 percent of what you have now, so it is just growing each and every year.

You do not have anything to do with how many people you have in custody, but it is obviously a very stark reality that among the 210,000 you have significant numbers involved in organized gangs and other levels of activity that lead many to believe that out there, after that average ten-year sentence, that there are going to be further challenges for society even once they are released.

So I look forward to your testimony and I welcome you again to the committee.

Mr. WOLF. Thank you, Mr. Fattah.

Your full statement will appear in the record and you can proceed as you see appropriate.

OPENING STATEMENT

Mr. LAPPIN. Thank you, sir. It certainly is a pleasure to be back. And good morning to you, Chairman Wolf, Ranking Member Fattah, and other Members of the subcommittee.

Let me begin by thanking you for your strong support of the Bureau of Prisons. I appreciate the opportunity to appear before you today to discuss the President's fiscal year 2012 budget request for the Bureau of Prisons.

I assure you we will continue to exercise restraint and good judgment in executing the budget you provide by continuing to contain costs while maintaining a high level of service.

Continuing increases in the inmate population pose substantial ongoing challenges for our agency. A net increase of approximately 5,600 inmates is expected in fiscal year 2012. We believe the inmate population will continue to grow for the foreseeable future and so will the Bureau of Prisons' challenges to provide for safe inmate incarceration and care, and for the safety of Bureau of Prison staff and surrounding communities.

The fiscal year 2012 budget request builds upon the 2011 Continuing Resolution level. For the Bureau of Prisons, this means the starting point for this budget is the fiscal year 2010 enacted level. All adjustments to the base and program change line items are built to bridge from the fiscal year 2010 level to the fiscal year 2012 requirements.

The President's fiscal year 2012 budget request for the Bureau of Prisons is $6.724 billion for the Salaries and Expenses account. This request includes program enhancements to begin the activation processes at three institutions, FCI Berlin, New Hampshire; a secure female facility at FCI Aliceville, Alabama; one acquired fa-

cility USP Thomson, Illinois; also to increase current staffing levels at existing institutions; and to expand residential drug abuse treatment programs and provide occupational education.

It also contains offsets including $41 million for a proposed legislative initiative which, if passed, would allow additional good conduct time credits for inmates.

For the Buildings and Facilities, or B&F account, $99.4 million is requested, and a rescission of $35 million in prior years' new construction balances is proposed.

Our highest priorities continue to be ensuring the safety of federal inmates, staff, and surrounding communities; increasing onboard staffing at Bureau of Prisons' correctional institutions; reducing inmate crowding to help prevent violence by adding additional bed space; maintaining existing institutions in an adequate state of repair; maximizing the use of inmate reentry programs such as education and drug treatment in order to reduce recidivism; and seeking long-term strategies to control population growth.

Crowding is of special concern at higher security institutions. These facilities confine a disproportionate number of inmates who are prone to violence.

The fiscal year 2012 B&F budget request would not provide new beds for the projected future inmate population growth. In order to reduce crowding, one or more of the following must occur: reduce the number of inmates or the length of time inmates spend in prison; expand inmate housing at existing facilities; contract with private prisons for additional bed space for low-security criminal aliens; and acquire and/or construct and staff additional institutions.

The continued professionalism and dedication of our staff has been critical to the Bureau's ability to continue to operate safe and secure facilities. We are managing many more inmates than our prisons were designed to house and also preparing more inmates to transition back into their communities.

Currently, there is a hiring freeze throughout the Department of Justice and all of its components. As of January 29, 2011, the Bureau of Prisons has 36,280 Salaries and Expenses staff on board, which is 90 percent of the fiscal year 2010 authorized level.

The challenges have never been greater. The Bureau is managing severely crowded institutions with more inmates who have histories of serious violence and more inmates who have proven to be confrontational, resistant to authority, and disrespectful of prison rules.

Chairman Wolf, this concludes my formal statement. And, again, I thank you, Mr. Fattah, and the subcommittee for your support of our agency.

As I have indicated in my testimony, the BOP faces many challenges as the inmate population continues to grow. The fiscal year 2012 President's request moves us a step further toward adequate staffing and bed space needed to meet the requirements of the increasing inmate population.

I look forward to working with you, Mr. Chairman, and the Members of the subcommittee. I'd be happy to answer any questions you might have.

[The information follows:]

STATEMENT OF HARLEY G. LAPPIN
DIRECTOR OF THE FEDERAL BUREAU OF PRISONS
BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES

COMMITTEE ON APPROPRIATIONS
SUBCOMMITTEE ON COMMERCE, JUSTICE, SCIENCE AND RELATED AGENCIES

MARCH 15, 2011

Good morning Chairman Wolf, Ranking Member Fattah, and Members of the Subcommittee. I appreciate the opportunity to appear before you today to discuss the President's Fiscal Year 2012 budget request for the Bureau of Prisons (BOP).

Our mission is to protect society by confining offenders in the controlled environments of prisons and community-based facilities that are safe, humane, cost-efficient, and appropriately secure, and to provide work and other self-improvement opportunities to assist offenders in becoming law-abiding citizens.

As the nation's largest corrections system, the BOP is responsible for the incarceration of about 210,000 inmates. Currently, the BOP confines over 171,000 inmates in 116 facilities with a total rated capacity of 126,971. The remainder, more than 18 percent, are managed in contract care consisting primarily of privately operated prisons. In FY 2009, a net growth of 7,091 new inmates was realized and an additional 1,468 inmates were added in FY 2010. An increase of approximately 5,800 inmates per year is currently expected for FY 2011 and FY 2012.

The current Continuing Resolution presents significant challenges for the BOP, as the number of inmates will increase, resulting in additional operational and staffing costs. System-wide, the BOP is operating at 35 percent over its rated capacity. Crowding is of special concern at higher security facilities—with 50 percent overcrowding at high security facilities and 39 percent at medium security facilities. The BOP must manage severe crowding by double and triple bunking inmates. As of January 2011, 94 percent of high security inmates were double bunked and 16 percent of medium security inmates and almost 82 percent of low security inmates were triple bunked, or housed in space not originally designed for inmate housing.

During these challenges, we have exercised restraint and sound judgment in executing the budget you provide. As good stewards of the public's trust, we will continue to contain costs, while maintaining a high level of service. Our hope is that you will continue to support our mission and continue to work with us to provide a safe environment for inmates and staff.

FY 2012 Budget request

The President's FY 2012 Budget Request for the BOP is $6.724 billion for the Salaries and Expenses (S&E) account. For the Buildings and Facilities (B&F) account, $99.4 million is requested, and a rescission of $35 million in prior years' new construction balances is proposed.

The BOP's highest priorities continue to be:

- Ensuring the safety of federal inmates, staff, and surrounding communities;
- Increasing on-board staffing at BOP correctional institutions;
- Reducing inmate crowding to help prevent violence in prisons by adding bedspace;
- Maintaining existing institutions in an adequate state of repair;
- Maximizing the use of inmate reentry programs such as education and drug treatment in order to reduce recidivism; and
- Seeking long-term strategies to control population growth.

This budget builds upon the FY 2011 Continuing Resolution (through March 18, 2011) level. For the BOP, this means the starting point is the FY 2010 enacted level, and all adjustments to base and program change line items are built to bridge from the FY 2010 level to FY 2012 requirements.

S&E Program Increases

For FY 2012, a net increase of $256.0 million in program changes is proposed (again, this is building from the FY 2010 level). The request includes $304.8 million in program enhancements for an institution population adjustment; to increase current staffing levels at existing institutions; to begin the activation process for three institutions -- FCI Berlin, New Hampshire; Secure Female FCI Aliceville, Alabama; and one acquired facility USP Thomson, Illinois; and funding for the expansion of inmate programs for additional occupational, education and residential drug abuse treatment programs. Also included are $48.8 million in offsets: $41 million for a proposed legislative initiative, which, if passed, would allow additional Good Conduct Time credit for inmates; $6.3 million for Administrative Efficiencies; and $1.5 million to Extend Technology Refresh. The inmate population is projected to continue to increase for the foreseeable future. As such, the BOP continues to require increased resources to provide for safe inmate incarceration and care, and the safety of BOP staff and surrounding communities, which is why the requested operating funds are vital.

The Department has developed two legislative proposals that will provide inmates with enhanced incentives for good behavior and participation in programming that is proven to reduce the likelihood of recidivism. The first proposal increases good time credit availability by seven days per year for each year of the sentence imposed. This would result in a reduction, within a year, of approximately 4,000 federal inmates in custody, and such reductions would continue for several subsequent years, resulting in a significant savings of taxpayer dollars. If enacted before FY 2012, this proposal could result in significant cost avoidance, potentially up to $41 million.

This proposal would not only reduce crowding, it would also increase the incentives for inmates to comply with institution rules. Inmates who refuse to comply with institution rules could lose some or all of the available credits, thereby prolonging their time spent in custody.

The second proposal creates a new sentence reduction credit that inmates can earn for successful participation in recidivism-reducing programs, such as Federal Prison Industries, education, and occupational/vocational programming. We are unable to estimate the cost avoidance that this proposal might generate because we cannot estimate the number of inmates that will choose to participate in these programs if provided a sentence reduction credit. We can, however, confidently assume this proposal would reduce, somewhat, the future anticipated growth in the inmate population while encouraging participation in programs proven effective at reducing recidivism, and thereby improve public safety.

The S&E base budget incorporates increases in costs for food, medical, and existing contract beds. As noted in the Government Accountability Office (GAO) report GAO-10-94 released in November 2009, "BOP's costs for key operations to maintain basic services, such as those for inmate medical care and utilities, exceeded the funding levels requested in the President's budget from fiscal years 2004 through 2008, limiting BOP's ability to manage its continually growing inmate population".

The Congress, in FY 2009, directed the GAO to report on BOP's methods for cost estimation, including the pricing of utilities and inmate medical care costs. The report, referenced above, concluded that "BOP's methods for cost estimation largely reflect best practices outlined in GAO's *Cost Estimating and Assessment Guide*." GAO stated that BOP followed a well-defined process for developing mostly comprehensive, well documented, accurate, and credible cost estimates. Further, GAO found that BOP's methods for projecting inmate population changes have been accurate on average, to within one percent of the actual inmate population growth from fiscal year 1999 to August 2009.

B&F Budget Request

For FY 2012, a total of $99.4 million is requested for the B&F Appropriation. The FY 2012 request maintains the B&F programs at prior years' levels and it would not provide new beds for projected future inmate population growth. Additionally, a rescission of $35 million in prior years' New Construction unobligated balances is proposed. The rescission reduces $30 million from the planned "Acquire Existing Institution for Higher Security FCI" project and reduces $5 million from the partially funded "FCI Midwestern/Leavenworth, KS" project.

With the continued and future projected inmate growth and age of existing prisons, B&F funds have been stretched very thin. Approximately one-third of BOP's 116 institutions are 50 years or older. The aging and failing infrastructure at these locations exacerbates our challenges in maintaining our institutions.

The Federal Inmate Population

Continuing increases in the inmate population pose substantial ongoing challenges for our agency. In FY 2009, the inmate population increased by 7,091 net new inmates and an additional 1,468 inmates were added in FY 2010. An increase of approximately 5,800 inmates per year is currently expected for FY 2011 and 2012. We believe the inmate population will continue to grow for the foreseeable future, and so will the BOP's challenges to provide for safe inmate incarceration and care and for the safety of BOP staff and surrounding communities.

The BOP is responsible for the incarceration of about 210,000 inmates. Approximately 82 percent of the inmate population is confined in Bureau-operated institutions, while 18 percent are under contract care, primarily in privately operated prisons. Most of the inmates in BOP facilities (52 percent) are serving sentences for drug trafficking offenses. The remainder of the population includes inmates convicted of weapons offenses (15 percent), immigration law violations (11 percent), violent offenses (7 percent), fraud (5 percent), property crimes (3 percent), sex offenses (5 percent), and other miscellaneous offenses (2 percent). The average sentence length for inmates in BOP custody is 10 years. Approximately 7 percent of inmates in the BOP are women. Approximately 26 percent of the entire prison population is comprised of non-U.S. citizens.

It is particularly challenging to manage the federal prisoner population at higher security levels. The combined inmate population confined in medium and high security facilities represents over 40 percent of the entire inmate population. It is important to note that at the medium security level, about 66 percent of the inmates are drug offenders or weapon offenders, approximately 76 percent have a history of violence, 42 percent have been sanctioned for violating prison rules, and half of the inmates in this population have sentences in excess of 8 years. At the high security level, more than 70 percent of the inmates are drug offenders, weapons offenders, or robbers, another 10 percent have been convicted of murder, aggravated assault, or kidnapping, and half of the inmates in this population have sentences in excess of 12 years.

Moreover, approximately 70 percent of high security inmates have been sanctioned for violating prison rules, and more than 90 percent have a history of violence. One out of every six inmates at high security institutions USP's are gang affiliated. There is a much higher incidence of serious assaults by inmates on staff at medium and high security institutions than at the lower security level facilities. In calendar years 2009 and 2010, an average of 82 percent of serious assaults against staff occurred at medium and high security institutions. In FY 2009, 62 percent of serious assaults occurred at high security facilities and 29 percent occurred at medium security facilities. In 2010, 52 percent of serious assaults occurred at high security facilities and 17 percent occurred at medium security facilities.

Institution Crowding

The BOP confines over 171,000 inmates in Bureau-operated facilities, which have a total rated capacity of about 127,000 beds. Crowding is of special concern at higher security facilities including penitentiaries (operating at 50 percent over capacity) and medium-security institutions

(operating at 39 percent over capacity). These facilities confine a disproportionate number of inmates who are prone to violence. The BOP has managed severe crowding by double bunking inmates throughout the system -- 94 percent of all high-security cells and 100 percent of all medium-security cells are double-bunked. In addition, approximately 16 percent of all medium-security cells are either triple-bunked or the inmates are being housed in space that was not designed for inmate housing.

Crowding also affects inmates' access to important services (such as medical care and food services), an institution's infrastructure (the physical plant and security systems), and inmates' basic necessities (access to toilets, showers, telephones, and recreation equipment). Correctional administrators agree that crowded prisons result in greater tension, frustration, and anger among the inmate population, which leads to conflicts and violence.

In the past, we have been able to take a variety of steps to mitigate some of the effects of crowding in our facilities. For example, we have improved the architectural design of our newer facilities and have taken advantage of improved technologies in security measures such as perimeter security systems, surveillance cameras, and equipment to monitor communications. These technologies support BOP employees' ability to provide inmates the supervision they need in order to maintain security and safety in our institutions. We have also enhanced population management and inmate supervision strategies in areas such as classification and designation, intelligence gathering, gang management, use of preemptive lockdowns, and controlled movement. We have, however, reached a threshold with regard to our efforts, and are facing serious problems with inmate crowding.

In 2005, the BOP performed a rigorous analysis of the effects of crowding and staffing on inmate rates of violence. Data was used from all low-security, medium-security, and high-security BOP facilities for male inmates for the period July 1996 through December 2004. We accounted for a variety of factors known to influence the rate of violence and, in this way, were able to isolate and review the impact that crowding and the inmate-to-staff ratio had on serious assaults. This study found that both the inmate-to-staff ratio and the rate of crowding at an institution (the number of inmates relative to the institution's rated capacity) are important factors that affect the rate of serious inmate assaults.

The analysis revealed that a one percentage point increase in a facility's inmate population over its rated capacity corresponds with an increase in the prison's annual serious assault rate by 4.09 per 5,000 inmates; and an increase of one inmate in an institution's inmate-to-custody-staff ratio increases the prison's annual serious assault rate by approximately 4.5 per 5,000 inmates. The results demonstrate through sound empirical research that there is a direct relationship between resources (bedspace and staffing) and institution safety.

The BOP employs many management interventions in an attempt to prevent and suppress inmate violence. These interventions are resource-intensive and include: paying overtime to increase the number of custody staff available to perform security duties, utilizing staff from program areas (detracting from inmate programs and other vital institution functions), locking down an institution after a serious incident and performing intensive interviews to identify

perpetrators and causal factors, performing comprehensive searches to eliminate weapons and other dangerous contraband, and designating and housing inmates in Special Management Units (SMU). SMU inmates consist of sentenced offenders who participated in or had a leadership role in geographical group/gang-related activity, or those who have a history of disruptive, disciplinary and/or misconduct infractions. The BOP designates inmates to SMUs because greater management of their interaction is necessary to ensure the safety, security, and orderly operation of BOP facilities, and protection of the public. SMU inmates require a more restrictive confinement than general population inmates. The BOP currently has SMU inmates located in five different institutions.

In sum, in order to reduce crowding, one or more of the following must occur: (1) reduce the number of inmates or the length of time inmates spend in prison; (2) expand inmate housing at existing facilities; (3) contract with private prisons for additional bedspace for low-security criminal aliens; and (4) acquire and/or construct and staff additional institutions.

Staffing

The continued professionalism and dedication of our staff has been critical to the Bureau's ability to continue to operate safe and secure facilities, managing many more inmates than our prisons were designed to house, and preparing inmates to transition back into their communities. Currently, there is a hiring freeze throughout the Department of Justice and all of its components. As of January 29, 2011, the BOP has 36,280 S&E staff on-board, which is 90 percent of the FY 2010 authorized level. The challenges have never been greater. The BOP is managing severely overcrowded institutions with more gang-affiliated inmates, who are prone to violence.

Inmate Reentry

Our agency has no control over the number of inmates who come into Federal custody, the length of their sentences, or the skill deficits they bring with them. We do have control, however, over the programs in which inmates can participate while they are incarcerated; and we can thereby affect how inmates leave our custody and return to the community. Almost all Federal inmates will be released back to the community at some point. Each year, over 45,000 Federal inmates return to our communities, a number that will continue to increase as the inmate population grows. Most need job skills, vocational training, education, counseling, and other assistance (such as drug abuse treatment, anger management, and parenting skills) if they are to successfully reenter society.

Federal prisons offer a variety of inmate programs to address reentry needs, including work, education, vocational training, substance abuse treatment, observance of faith and religion, psychological services and counseling, release preparation, and other programs that impart essential life skills. We also provide other structured activities designed to teach inmates productive ways to use their time.

Rigorous research has found that inmates who participate in Federal Prison Industries

(FPI) are 24 percent less likely to recidivate; inmates who participate in vocational or occupational training are 33 percent less likely to recidivate; inmates who participate in education programs are 16 percent less likely to recidivate; and inmates who complete the residential drug abuse treatment program are 16 percent less likely to recidivate and 15 percent less likely to relapse to drug use within 3 years after release.

In 2001, the Washington State Institute for Public Policy evaluated the costs and benefits of a variety of correctional, skills-building programs. The study examined program costs; the benefit of reducing recidivism by lowering costs for arrest, conviction, incarceration, and supervision; and the benefit by avoiding crime victimization.

The study was based on validated evaluations of crime prevention programs, including the BOP's assessment of our industrial work and vocational training programs (the Post Release Employment Project study) and our evaluation of the Residential Drug Abuse Treatment program (the TRIAD study). The "benefit" is the dollar value of criminal justice system and victim costs avoided by reducing recidivism, and the "cost" is the funding required to operate the correctional program. The benefit-to-cost ratio of residential drug abuse treatment is as much as $2.69 for each dollar invested in the program; for adult basic education, the benefit is as much as $5.65; for correctional industries, the benefit is as much as $6.23; and for vocational training, the benefit is as much as $7.13. The study clearly indicates these inmate programs result in significant cost savings through reduced recidivism, and their expansion is important to public safety.

Substance Abuse Treatment

The BOP is mandated by statute (the Violent Crime Control and Law Enforcement Act of 1994) to provide drug abuse treatment to inmates. Our substance abuse strategy includes a required drug education course, non-residential drug abuse treatment, residential drug abuse treatment, and community transition treatment.

Drug abuse education is available in all BOP facilities. Drug abuse education provides inmates with information on the relationship between drugs and crime and the impact of drug use on the individual, his or her family, and the community. Drug abuse education is designed to motivate appropriate offenders to participate in nonresidential or residential drug abuse treatment, as needed.

Non-residential drug abuse treatment is also available in every BOP institution. Specific offenders whom we target for non-residential treatment services include:

- inmates with a relatively minor or low-level substance abuse impairment;
- inmates with a more serious drug use disorder whose sentence does not allow sufficient time to complete the residential drug abuse treatment program;
- inmates with longer sentences who are in need of and are awaiting placement in the residential drug abuse treatment program;

- inmates identified with a drug use history who did not participate in residential drug abuse treatment and are preparing for community transition; and
- inmates who completed the unit-based component of the residential drug abuse treatment program and are required to continue treatment until placement in a residential reentry center, where they will receive transitional drug abuse treatment.

Non-residential drug abuse treatment is based on the cognitive behavioral therapy model and focuses on criminal and drug-using risk factors such as antisocial and pro-criminal attitudes, values, beliefs, and behaviors and then targets replacing them with pro-social alternatives.

Residential drug abuse treatment is available in 61 BOP institutions and one contract facility. The foundation for residential drug abuse treatment is the cognitive behavior therapy treatment model, which targets offenders' major criminal and drug-using risk factors. The program is geared toward reducing anti-social peer associations; promoting positive relationships; increasing self-control, self-management, and problem solving skills; ending drug use; and replacing lying and aggression with pro-social alternatives.

Participants in the residential drug abuse treatment program live together in a unit reserved for drug abuse treatment in order to minimize any negative effects of interaction with the general inmate population. Residential drug abuse treatment is provided toward the end of the sentence in order to maximize its positive impact on soon-to-be-released inmates.

It is important to note that under our statutory mandate, the BOP is required to provide residential drug abuse treatment to all inmates who volunteer and are eligible for the program. In FY 2007 and FY 2008, the BOP did not meet this requirement due to inadequate funding for program expansion; however in FY 2009 and FY 2010, the BOP was able to provide residential drug abuse treatment to 100 percent of the federal inmate population eligible for treatment. Because certain non-violent offenders who successfully complete all components of this recidivism-reducing program are eligible for an incentive of up to one year off their sentence, inmates are strongly motivated to participate. Due to limited capacity, however, inmates receive, on average, only an eight month reduction. The FY 2012 budget request funds an expansion of the drug treatment capacity. An expansion of the drug treatment capacity will allow more inmates to participate in the program and earn an early release, thereby reducing crowding and costs. Specifically, such expansion will allow the BOP to treat all eligible inmates and extend the sentence reductions for those who qualify from the current 8 months average to the full 12 months allowed by statute.

Drug abuse treatment in the BOP includes a community transition treatment component to help ensure a seamless transition from the institution to the community, and inmates are monitored and managed across systems by BOP community corrections staff. As part of the community transition, the BOP provides a treatment summary to the residential reentry center where the inmate will reside, to the community-based treatment provider who will treat the inmate, and to the U.S. Probation Officer before the inmate's arrival at the residential reentry center. Participants in community transition drug abuse treatment typically continue treatment

during their period of supervised release after they leave BOP custody.

Specific Pro-Social Values Programs

Based on the proven success of the residential substance abuse treatment program, we have implemented additional cognitive-behavioral programs to address the needs of other segments of the inmate population (including younger offenders and high-security inmates). These programs focus on inmates' emotional and behavioral responses to difficult situations and emphasize life skills and the development of pro-social values, respect for self and others, responsibility for personal actions, and tolerance. Many of these programs have already been found to significantly reduce inmates' involvement in institution misconduct. The positive relationship between institution conduct and post-release success makes us hopeful about the ability of these programs to reduce recidivism.

Inmate Work Programs

Prison work programs teach inmates occupational skills and instill in offenders sound and lasting work habits and a work ethic. All sentenced inmates in Federal correctional institutions are required to work (with the exception of those who for security, educational, or medical reasons are unable to do so). Most inmates are assigned to an institution job such as food service worker, orderly, painter, warehouse worker, or groundskeeper.

Additionally, approximately 15,500 inmates work in FPI. FPI is one of the BOP's most important correctional programs because it has been proven to substantially reduce recidivism. FPI provides inmates the opportunity to gain marketable work skills and a general work ethic -- both of which can lead to viable, sustained employment upon release. It also keeps inmates productively occupied; inmates who participate in FPI are substantially less likely to engage in misconduct.

At present, FPI reaches only 9 percent of the BOP inmate population; this is a significant decrease from previous years. For example, in 1987 FPI employed 32 percent of the inmate population. This decrease is attributable to various provisions in Department of Defense authorization bills and appropriations bills that have weakened FPI's standing in the Federal procurement process.

FPI is a program, not a business, and is self-sustaining, operating at zero cost to the taxpayer. This requirement, the legislative changes and the present economic situation have combined to place significant pressure on FPI to reduce costs. As you may be aware, within the last two years successively, we made the extremely difficult decision to close or downsize a number of our factories and operations and take several cost containment measures. Had we not taken these actions, our financial situation today would be significantly worse. While all of these efforts are making a positive impact, we are continuing to explore other cost containment measures. Additionally, we are also evaluating whether further factory closures may be necessary to reduce the losses projected in the revised forecast.

In order to increase inmate opportunities to work in FPI, new authorities are essential to expand product and service lines. Absent any expansion of FPI, the BOP will need additional resources to create inmate work and training programs to prepare inmates for a successful reentry into the community.

Education, Vocational Training, and Occupational Training

The BOP offers a variety of programs for inmates to enhance their education and to acquire skills to help them obtain employment after release. Institutions offer literacy classes, English as a Second Language, adult continuing education, parenting classes, recreation activities, wellness education, and library services.

With few exceptions, inmates who do not have a high school diploma or a General Educational Development (GED) certificate must participate in the literacy program for a minimum of 240 hours or until they obtain the GED. The English as a Second Language program enables inmates with limited proficiency in English to improve their English language skills. We also facilitate vocational training and occupationally-oriented higher education programs. Occupational and vocational training programs are based on the needs of the specific institution's inmate population, general labor market conditions, and institution labor force needs. On-the-job training is afforded to inmates through formal apprenticeship programs, institution job assignments, and work in the FPI program. Finally, a number of institutions offer inmates the opportunity to enroll in and pay for more traditional college courses that could lead to a bachelor's degree.

Life Connections

The Life Connections Program is a residential multi-faith-based program that provides the opportunity for inmates to deepen their spiritual life and assist in their ability to successfully reintegrate following release from prison.

Life Connections programs are currently operating at FCI Petersburg, USP Leavenworth, FCI Milan, USP Terre Haute, and the Federal Medical Center Carswell. BOP's Office of Research and Evaluation has completed several preliminary analyses of the program and found a reduction in serious institution misconduct among program participants. The Office of Research will next assess the effect of the program on recidivism once a sufficient number of graduates have been released for at least three years.

Inmates who are not eligible for the residential Life Connections Program may volunteer to participate in a modified version of the program called Threshold. This is a non-residential spiritual/values based program taught by chaplains and volunteers over a six to nine month time period. This program is designed to strengthen inmate community re-entry and reduce recidivism.

The Second Chance Act

The Second Chance Act of 2007 required several changes to BOP policies and practices. The BOP is committed to providing opportunities for offenders to prepare for a successful reentry to the community. We have made significant progress toward meeting the mandates of the Second Chance Act, which is particularly noteworthy given the funding challenges we have faced.

Inmate Skills Development Initiative

The Inmate Skills Development initiative refers to the BOP's targeted efforts to unify our inmate programs and services into a comprehensive reentry strategy. The three principles of the Inmate Skills Development initiative are: (1) inmate participation in programs must be linked to the development of relevant inmate reentry skills; (2) inmates should acquire or improve a skill identified through a comprehensive assessment, rather than simply completing a program; and (3) resources are allocated to target inmates with a high risk for reentry failure.

The initiative includes a comprehensive assessment of inmates' strengths and deficiencies in nine core areas. This critical information is updated throughout each inmate's incarceration and is provided to probation officers as inmates get close to their release from prison so as to assist in the community reentry plan. As part of this initiative, program managers have been collaborating and developing partnerships with a number of governmental and private sector agencies to assist with inmate reentry.

Specific Release Preparation Efforts

In addition to the wide array of inmate programs described above, the BOP provides a Release Preparation Program in which inmates become involved toward the end of their sentence. The program includes classes in resume writing, job seeking, and job retention skills. The program also includes presentations by officials from community-based organizations that help ex-inmates find employment and training opportunities after release from prison.

Release preparation includes a number of inmate transition services provided at our institutions, such as mock job fairs where inmates learn job interview techniques and community recruiters learn of the skills available among inmates. At mock job fairs, qualified inmates are afforded the opportunity to apply for jobs with companies that have job openings. Our facilities also help inmates prepare release portfolios, including a resume, education and training certificates, diplomas, education transcripts, and other significant documents needed for a successful job interview.

The BOP has established employment resource centers at most Federal prisons to assist inmates with creating release folders to use in job searches; soliciting job leads from companies that have participated in mock job fairs; identifying other potential job openings; and identifying points of contact for information on employment references, job training, and educational programs.

We use residential reentry centers (RRCs) -- also known as community corrections centers or halfway houses -- to place inmates in the community prior to their release from custody in order to help them adjust to life in the community and find suitable post-release employment. These centers provide a structured, supervised environment and support in job placement, counseling, and other services. As part of this community-based programming, some inmates are also placed on home detention (statutorily limited to 10 percent of an inmate's sentence): they are at home under strict schedules with telephonic monitoring and electronic monitoring.

Research has shown that inmates who release through community-based programming are less likely to recidivate than those who release directly to the street. RRCs are most effective, in terms of recidivism reduction, for higher-risk inmates, especially those who have demonstrated a willingness to participate in education, vocational training, and treatment programs while they are in our institutions. Consistent with research findings, we continue to move the BOP toward a risk-reduction model in RRC programming, which recognizes that lower-risk inmates may need few RRC services and may, therefore, receive relatively short RRC placements and instead transition more rapidly to home detention; some may be placed directly in home detention with no time in an RRC. In contrast, higher-risk inmates who have shown they are ready to address their crime-producing behaviors may be appropriate for longer RRC stays. These changes will not decrease the number of inmates who will be placed in RRCs. Indeed, we anticipate they will result in greater numbers of placements in community-based programs and a more effective use of our limited RRC resources.

Conclusion

Chairman Wolf, Ranking Member Fattah, and Members of the Subcommittee, I want to thank you for your continued support of our agency and this opportunity to discuss BOP's priorities and challenges. As I have indicated in my testimony, the BOP faces many challenges as the inmate population continues to grow. For the past six years, the BOP has stretched resources, streamlined operations, and constrained costs to operate as efficiently and effectively as possible.

The FY 2012 President's request moves a step further toward adequate staffing and bedspace to meet the requirements of the increasing inmate population. This budget will allow BOP with opportunities to expand inmate programs that have demonstrated a positive impact on reducing recidivism. In addition, we will provide more inmates with the opportunity to avail themselves of beneficial correctional programs by reducing our crowding and adequately staffing our facilities as funding permits.

I look forward to working with you and I am pleased to answer any questions you may have.

Mr. WOLF. Thank you.
Mr. Fattah.
Mr. FATTAH. If the chairman would yield for one second.
Mr. WOLF. Sure.
Mr. FATTAH. I have Secretary Chu, from the Department of Energy, testifying before Energy and Water and I am going to step out for a minute.
Mr. WOLF. Sure.
Mr. FATTAH. And Congressman Schiff is going to take the ranking position.
And I do share all the concerns of the chairman about reduced costs. And 26 percent of the people in your prisons are not even American citizens, so there is a lot for us to deal with.
But, unfortunately, given the situation in Japan, I feel a necessity to go to the Energy and Water Committee.
Mr. WOLF. Sure. No. I understand.
Mr. FATTAH. Thank you. All right.

CLARIFICATION OF OPENING STATEMENT

Mr. WOLF. Thank you, Mr. Fattah.
You said it is a step. Is it a baby step or a giant step? You said in your testimony you are taking a step.
Mr. LAPPIN. It is a small step.
Mr. WOLF. A baby step kind of?
Mr. LAPPIN. It is a step. It is not as big a step as I would like to have. And, again, I think it is all driven by, as you have indicated, the number of inmates that continue to come into the Federal Prison System.
Mr. WOLF. Okay. Well, I could go more, but I think we will from some of the questions.
It seems like we have been here before. Again, this is not directed toward you.
Mr. LAPPIN. I know. I understand.

JUSTICE REINVESTMENT AND PUBLIC SAFETY

Mr. WOLF. You know that. But it just seems that this is the way it has always been.
Most state corrections systems begin their reform process by providing outside experts with corrections data to conduct comprehensive analysis. I believe it is imperative that experts at BOP and outside government fully understand the drivers of population, costs and recidivism so that we can address overcrowding, costs and reduce recidivism and increase public safety.
You said that really in your testimony in some respect, but that is why I requested that you make available the BOP data that will be necessary for a thorough analysis.
Have you read this?
Mr. LAPPIN. I have, sir.
Mr. WOLF. Great. What is your reaction to it?
Mr. LAPPIN. I found it very favorable and——
Mr. WOLF. Okay.
Mr. LAPPIN [continuing]. Would love to work with you and others on a similar initiative.

Mr. WOLF. Okay. What else can the Department do to advance the comprehensive analysis of both its own policies and establish the best practices that will ultimately reduce recidivism and corrections spending?

Basically what I am trying to say is if you have got all the best ideas and you are going to be leaving in four years, I mean, I do not know, you are not going to be here 20 years from now, so——

Mr. LAPPIN. No, sir.

Mr. WOLF. You are a career person, you have a lot of expertise, I have a lot of respect for you, if somebody said, "okay, Lappin, you have got four years to turn this baby around, what are you going to do?"

If you took the very best that was being done by Mitch Daniels in Indiana, by the governor of Texas and what they are supposedly doing, what Pew says, what the Council of State Governments says, what you know in your heart of hearts, what would you do?

Mr. LAPPIN. You know, you are supposed to start these out with an easy question.

Mr. WOLF. But that becomes, fundamentally that is the whole——

Mr. LAPPIN. I wish I had all the answers. And I appreciate your confidence certainly in the Bureau of Prisons and how we have managed in the past. But I think we can learn a lot from this exercise, from this process.

In my opinion, it involves more than just the Department of Justice and the Bureau of Prisons. I look forward to providing you the information you have requested. It is going to be large in volume. It is going to be complicated. But we really welcome the opportunity to work with you on analyzing and assessing that data to look for the direction to go.

I think it involves more than just the Bureau of Prisons and the Department of Justice. As reflected in there, it needs to include representatives from the judicial system and from the legislative branch because it appears to me that they collectively worked together on a number of the initiatives that were of benefit to them and resulted in their success.

It is clear that a lot of the work that they did was in the earlier stages of the criminal justice process with pre-trial detention, diversion, with probation, with a number of other issues.

I think in the federal system, we have to step back and take a look at sentencing. As indicated by Congressman Fattah, 30 years ago, we had 26,000 inmates. Today we have 210,000 inmates. I think there are two common factors there.

One, the passage of the Comprehensive Crime Control Act that resulted in longer sentences for the inmates that were coming to the prison system at the time; and then second was the addition of federal offenses, traditionally state offenses that became federal offenses with the addition of longer sentencing and mandatory minimums. And consequently we saw these two waves of significant increases.

So I think it needs to be a collective effort on the parts of the executive, legislative, and judicial branch. I think we need to reach out to the Sentencing Commission, to the Administrative Office of the United States Courts. We work closely with them as we ana-

lyze this data to look at what vehicles we may be able to pursue to alleviate some of the crowding and some of the ongoing increases of inmates into the federal system.

I could not agree with you more. You have been year after year after year, along with Congressman Mollohan, supportive of "determining, once they are in prison, what should we be doing for them?" Especially for those willing participants who recognize the skills they lack such that we can provide the programs to improve those skills and consequently see fewer of them coming back to prison.

GOOD CONDUCT TIME LEGISLATIVE PROPOSALS

And so I think we need to, for those that end up in prison, we need to continue to emphasize participation in programs. As referenced in my full testimony, there are a couple of pieces of legislation that the Administration has moved forward that you should have, if you do not have them yet, that would encourage more participation in these programs.

And it is leverage that I think would be overwhelmingly supported in moving forward, urging more inmates into programs that we know improve skills—like working in Prison Industries, getting a GED, getting a vocational certificate, getting drug and alcohol treatment, addressing some of their social skills, decisionmaking, anger management that many of them lack—such that when they do leave prison and we can provide a more supportive transition, they are more likely to be successful.

Mr. WOLF. Well, why can't you force that?

Mr. LAPPIN. We——

Mr. WOLF. You know, they are in prison. They have done something. They violated the law. They are not a group of boy scouts. They are in prison. So you are in prison. You are going to work. We are going to get you your GED. We are going to have rehabilitation. We are going to be tough on you.

But the purpose of being tough on inmates is almost the same in some respects, as you are with your children, in order that they will be better persons. So when you get out, you can have a family and live happily ever after.

I mean, when I go to the prisons, no one is working anymore. If someone goes to a federal prison, they ought to be working, period. And I do not mean the laundries. If they do not have their GED, GED class ought to be mandatory, absolutely mandatory.

Why can't we do that? They are in prison. They are in your custody. It is not like you are doing something bad to them. You are actually pulling them along. Most people are redeemable. There are some that are not redeemable. We all know that. We cannot go into this with a kind of pollyannaish view, but there are a number that are redeemable. And so it is sort the initiative, you know. You get them here and you do this. And, finally, these people turn into good citizens. I mean, why can't we force that?

Mr. LAPPIN. First of all, all the inmates do have jobs that are medically able to work. It is complicated——

Mr. WOLF. I walked through one of your prisons a couple of years ago. There were a lot of guys sitting around playing checkers, doing this, doing that. I think they had a little morning kind of drill, but

they were not really learning anything that when they got out, they could say, okay, I am going to go and work for Siemens or I am going to work for X.

Mr. LAPPIN. Again, there's work, education, and vocational training, three separate programs, so let's just focus on work. And it may be——

Mr. WOLF. Now, if we're looking at the optimum, the summum bonum, how many are doing work, rehabilitation, and how many are meeting the capacity to really turn this criminal into a good citizen, who would have an opportunity to make a contribution and live a normal life when they get out? So if they are the three cylinders, are the cylinders going up to 87 percent, 93 percent, 13 percent? Where are they?

Mr. LAPPIN. Based on my experience, about seven out of the ten inmates in our custody are willing to participate in those programs.

Mr. WOLF. But, I mean, how many are not willing? How many are really doing what they could be doing to turn themselves into a decent——

Mr. LAPPIN. I can give you the statistics of how many are participating in programs and how many are working. I would say of the seven out of those ten, the majority of those seven are participating to a great extent in work, education, and vocational training. There are three out of ten who tend to resist.

Could I force them into a classroom, could I make them go in there and sit down in the classroom even though they did not want to be there? We could. It would probably be detrimental to the other participants.

Mr. WOLF. Well, couldn't you say to them, folks, you are not going to participate, but you will spend every single day that you have been sentenced here, and then you who want to participate, we are working on good time——

Mr. LAPPIN. Correct.

Mr. WOLF [continuing]. We are working on this.

Mr. LAPPIN. Correct.

Mr. WOLF. You are going to be able to get, I mean——

Mr. LAPPIN. That is correct. There is little flexibility for us under the current statute.

Mr. WOLF. Well, nobody——

Mr. LAPPIN. They get——

Mr. WOLF. Nobody from the Administration has come up and said to me, Wolf, but we want to—I mean, maybe they have to Mr. Schiff. They have not to me. We want to really deal with this issue, so this is a priority. We are pushing this. We have been by to see Lamar Smith fifteen times. We are talking to you. We are talking to Mr. Conyers. This is our priority. I do not think that is happening, not under this Administration, nor under the previous Administration.

Mr. LAPPIN. I think that is happening under this Administration more so than the prior administrations. I think you have two pieces of legislation that reflect that.

One, to increase the original statute of good time from what they now get, 47 days——

Mr. WOLF. Now, how fast is it moving? Where is it?

Mr. LAPPIN. I think both pieces of legislation have been sent over to The Hill.

Mr. WOLF. But have hearings been held?

Mr. LAPPIN. I do not believe they have, no.

So there are two pieces of legislation. One to increase the amount of good time under the current——

Mr. WOLF. Everything you are testifying on is predicated on the idea that they are going to pass, correct?

Mr. LAPPIN. You are absolutely correct. Right now the budget reflects that it will pass and they have already taken $41 million assuming it does pass. And——

Mr. WOLF. And can you guarantee us that it will pass?

Mr. LAPPIN. I cannot. I cannot without a doubt. Certainly, I am hopeful and I am encouraged by it because the first piece is more of a relief valve. For inmates who are behaving, for inmates who are complying, they get out a little earlier. The second——

Mr. WOLF. Well, it is just a little earlier, too, isn't it? I mean——

Mr. LAPPIN. It adds seven days——

Mr. WOLF. For a year.

Mr. LAPPIN [continuing]. For a year. I mean, is it significant? No.

Mr. WOLF. No.

Mr. LAPPIN. But is it helpful? Yes.

Mr. WOLF. But why if it was——

Mr. LAPPIN. The second piece adds another 60 days on top of that 54 days. To earn that good time, to earn that 60 days, you must be participating in the programs that we recommend you participate in, just as you have indicated or else you do not get that good time.

So when they come into the prison system today, they get assessed, and we identify the skills they lack. There are nine skills we assess. We look at daily living skills, mental health, wellness, interpersonal, academic, cognitive, vocational, career, leisure and character skills.

They do an assessment. We identify those skills that they lack. We then will provide programs at every location that they can participate in to improve those skill sets.

If they participate in those programs successfully, they can earn that 60 days. If they do not, they cannot earn the 60 days.

Mr. WOLF. If the bill passes?

Mr. LAPPIN. If the bill passes, that is correct.

If they earn the good time because they participated——

Mr. WOLF. Has the bill been introduced in the Senate yet?

Mr. LAPPIN. I do not believe so.

If they do earn the 60 days and then misbehave, we can take that good time away.

That's one thing we did not foresee back in the 1980s when we, the Federal Prison System had more flexibility on good time, the granting of good time and the removal of good time. When that was eliminated, a consequence today is that we do not have as much leverage with inmates not only for those who behave, but for those who misbehave, because the only severe type of punishment today in prisons is isolation.

Mr. WOLF. Does this bill take you back to the 1980s?

Mr. LAPPIN. Not quite.

Mr. WOLF. Well, why——

Mr. LAPPIN. It will not drop below two-thirds.

Mr. WOLF. But why wouldn't you want to go back to when you had that flexibility?

Mr. LAPPIN. Obviously given the—is this risky? This is risky for everyone.

Mr. WOLF. Well, what percentage of——

Mr. LAPPIN. And we are trying to take small steps——

Mr. WOLF. What percentage are violent and nonviolent? I mean, the violent guys, it is a different story.

Mr. LAPPIN. It is. And we are probably about six out of ten, 60 percent probably fall into the violent category.

Mr. WOLF. Okay.

Mr. LAPPIN. Yes.

Mr. WOLF. So 40 percent——

Mr. LAPPIN. About 40 percent, my guess is, are not as violent. It depends on how you want to define violence.

Mr. WOLF. And I was going to say——

Mr. LAPPIN. If you define violence as carrying a weapon——

Mr. WOLF. Yeah.

Mr. LAPPIN [continuing]. Then probably more than that. But if you define carrying a weapon without using it in the commission of a crime, probably more 60/40. So, again, on the other hand, we know that these programs that we provide, as we have done the research over the years, have a positive impact even on violent inmates.

So even the violent inmates who participate and improve those skills tend to be far more successful upon release than those that do not. So there is really no differentiation between nonviolent and violent. Certainly there is a perception, a concern of that, but certainly the research we have done on inmates who participate in these programs reflects that it has had a positive impact on both groups of inmates upon release from prison.

Mr. WOLF. So why wouldn't you go back and say we are going to take one prison in the west, one in the east, and we are going to go back and use the 1980s standards and then we are going to take——

Mr. LAPPIN. Those are certainly options that can be considered.

Mr. WOLF. I do not know that your bill is going to pass though. Nobody——

Mr. LAPPIN. I have no idea.

Mr. WOLF. Nobody up here——

Mr. LAPPIN. You are absolutely correct.

Mr. WOLF. Nobody up here is talking to me. Nobody is saying, boy, this is—nobody from the Administration has been by to see me. I am a Republican, so maybe they do not want to deal with me. But nobody has been by to say this is really a priority.

And when the Attorney General testified last week, I did not sense that there was a fervor that he was really committed. We are at a crisis. And if Pew and others can do this, if some of the governors can do it—and you probably have more resources than the average state has. You certainly have better-run prisons than many of the states.

Mr. LAPPIN. Let me tell you, Mr. Chairman, it has taken eight years to convince somebody to go down this route. This Administration has agreed to do this. I think that is significant.

Now, it is early in the process. This is not the first time we have had this debate about the need to step back and reevaluate who is going to prison and for how long. I agree with you. There has been resistance on both sides.

This is the first group that has gotten this far to agree to draft and submit, and maybe it is just getting over here, and maybe it is yet to come, the interaction from them on that issue, but I am encouraged by it. I am not overly optimistic yet because you are right. It has not passed. But certainly for the last 20 years, 25 years, the alternative has only been build, build, build. And I question whether we will ever build our way out of this.

So, I am thankful that they are stepping back, reevaluating as this report urged people to do, maybe not to that degree yet, but I think it is a good first step towards reevaluating how many get incarcerated and for how long.

THE NATIONAL SUMMIT ON JUSTICE REINVESTMENT

Mr. WOLF. Well, why couldn't you take this report and apply it to the Bureau of Prisons?

Mr. LAPPIN. I can. I think we can do that. I do not think it can just be done by the Bureau of Prisons. It is going to take support of——

Mr. WOLF. Why doesn't the Attorney—is there anybody here from the Attorney General's Office?

Mr. LAPPIN. I know the Attorney General has met——

Mr. WOLF. Why doesn't the Attorney General put together a group on a fast march to apply the principles of the Pew and the Council of Governments and try to get this—I mean, this ought to be a bipartisan or kind of a nonpartisan thing.

I consider myself a conservative Republican and tough on crime. You know, my dad was a policeman. So if I can do it, maybe you and Representative Conyers from the other side would do it.

Why couldn't they take this and say, "okay, we are going to replicate, if not across the whole prison system, in a couple prisons to see if this would really work? Is it working? Has Indiana really done as good a job and have some of the states done a pretty good job that you look at those and you yearn to see if you had that same ability and that same"——

Mr. LAPPIN. That is being assessed. I know the Attorney General has met with these folks. But I want to back up here a minute. Again, this is more than a review or reform of prison systems.

Mr. WOLF. Well, get the judges in there too.

Mr. LAPPIN. This has to be a criminal justice initiative.

Mr. WOLF. Well, get the judges in there too.

Mr. LAPPIN. Because once they are sentenced to a period of incarceration, our options are minimal.

Mr. WOLF. But you have an easier time because you have the federal judiciary, and you can call the chief justice and ask him to make this a priority with regard to the judicial system. You have the Justice Department. It is the Attorney General of the United States in addition to the judicial conference, if you will.

And, you know, I think you would call the Supreme Court, the chief justice, and say we would like the priority of the court system to be on a force march to do this by the end of this year. I do not mean by the end of the summer but by the end of this year. So we have that flexibility and this ability to do it.

GOOD CONDUCT TIME LEGISLATIVE PROPOSALS

Now, I am going to go to Mr. Schiff, but let me just ask one or two more questions on the inmates. Currently inmates who participate in Federal Prison Industries, educational programs, and occupation and vocational training cannot earn sentence reduction opportunities in exchange for their successful participation.

Would this legislation change that?

Mr. LAPPIN. I am sorry. What——

Mr. WOLF. Currently inmates participating in Federal Prison Industries, as little as there now currently are——

Mr. LAPPIN. Right.

Mr. WOLF [continuing]. Educational programming and occupational and vocational training cannot earn sentence reduction opportunities in exchange for their successful participation.

You allege that a proposal would change this?

Mr. LAPPIN. Yes.

Mr. WOLF. Has that ever been done before? Was that the way it was in the 1980s?

Mr. LAPPIN. You know, I do not exactly recall how it was framed in the 1980s. But inmates who participate in work-related skills building activities, education, vocational training, other treatment programs would benefit from this good time credit as long as they sincerely participated and completed the programs. They could earn up to the 60 days. So that would change.

There are a couple of groups that it would not affect because they are already getting reductions. So if you are already getting credit for drug treatment, you cannot double dip. So there are a few exceptions, but most of the inmates out there who participate in these programs would earn credit for their participation. And those that did not would not get it. And, again, if you earned it and you misbehaved, you could lose it. And I think that is some of the leverage that——

Mr. WOLF. Give me the optimum of somebody in there for ten years, if they were hitting on every cylinder and went to the Prison Industries and were involved in GED or doing everything that they could be doing, they were an A student, if you will, what would happen to that ten-year sentence?

Mr. LAPPIN. Reduced by 600 days. So they could earn—I do not say they get the entire credit because they have got to participate for a while for——

Mr. WOLF. But the max they would get would be——

Mr. LAPPIN. The max someone could get would be 60 days, an additional 60 days per year. So that is about 600. That is about a couple years.

Mr. WOLF. And how was that number picked? Was that 60 days——

Mr. LAPPIN. This was the first step. No different than the information we are providing you to do the analysis. This is kind of the first step.

Mr. WOLF. So that was just a number? Somebody said let's pick 60? It sounds like it is——

Mr. LAPPIN. Well, no. We looked at what—we are trying to be reasonable.

Mr. WOLF. Any studies done and other——

Mr. LAPPIN. We did not want to raise the ire of the folks that are concerned about letting people out too quickly.

Mr. WOLF. Well, I do not want to do that either and let me just stipulate: I am very tough on crime. And so I am not looking at letting people out there——

Mr. LAPPIN. I know.

Mr. WOLF [continuing]. That are violent. Also, though, I will tell you, and I have talked to prisoners that tell me they believe the prison system is a graduate program to learn how to do crime. We are putting some young people in, particularly on a first offense, that are going into prison and learning about crime. One, they are joining MS-13. They are joining gangs. Some of these prisons, you join a gang or you are in trouble.

And I have been disappointed. I have just got to say it. I was not going to say it. But on this whole prison rape thing, the failure of the Attorney General and the Justice Department to aggressively move on that.

I saw a piece the other day. It is so long. I can submit it in for the record, but—and I want to make sure I am right. I will correct it if I am wrong. It said that the failure to move will result in, the last sentence said, over 200,000 being raped in prison for the failure to aggressively move. If I were the Attorney General, man, I would have moved on it.

So 60——

Mr. LAPPIN. They would serve, at minimum, they have to serve 67 percent of their sentence.

Mr. WOLF. Now, if——

Mr. LAPPIN [continuing]. Under these two proposals, inmates must serve at least 67 percent of their sentence.

[The information follows:]

The New York Review of Books

Prison Rape and the Government

MARCH 24, 2011

David Kaiser and Lovisa Stannow

Sexual Victimization Reported by Adult Correctional Authorities, 2007–2008
by Allen J. Beck and Paul Guerino
Bureau of Justice Statistics, 62 pp., available at bjs.ojp.usdoj.gov

National Standards to Prevent, Detect, and Respond to Prison Rape: Notice of Proposed Rulemaking
by the United States Department of Justice
Federal Register, Vol. 76, No. 23 (February 3, 2011), 56 pp., available at federalregister.gov/a/2011-1905

Initial Regulatory Impact Analysis for Notice of Proposed Rulemaking: Proposed National Standards to Prevent, Detect, and Respond to Prison Rape Under the Prison Rape Elimination Act (PREA)
by the United States Department of Justice
(January 24, 2011), 65 pp., available at ojp.usdoj.gov/programs/pdfs/prea_nprm_iria.pdf

Sexual Victimization in Prisons and Jails Reported by Inmates, 2008–09
by Allen J. Beck, Paige M. Harrison, and others
Bureau of Justice Statistics, 91 pp., available at bjs.ojp.usdoj.gov

Eli Reed/Magnum Photos

Female inmates locked down in the Maricopa County Jail, Phoenix, Arizona, 1998

Back in 1998, Jan Lastocy was serving time for attempted embezzlement in a Michigan prison. Her job was working at a warehouse for a nearby men's prison. She got along well with two of the corrections officers who supervised her, but she thought the third was creepy. "He was always talking about how much power he had," she said, "how he liked being able to write someone a ticket just for looking at him funny." Then, one day, he raped her.

Jan wanted to tell someone, but the warden had made it clear that she would always believe an officer's

word over an inmate's, and didn't like "troublemakers." If Jan had gone to the officers she trusted, they would have had to repeat her story to the same warden. Jan was only a few months away from release to a halfway house. She was desperate to get out of prison, to return to her husband and children. So she kept quiet—and the officer raped her again, and again. There were plenty of secluded places in the huge warehouse, behind piles of crates or in the freezer. Three or four times a week he would assault her, from June all the way through December, and the whole time she was too terrified to report the attacks. Later, she would be tormented by guilt for not speaking out, because the same officer went on to rape other women at the prison. In a poem, Jan wrote:

These are a few of the reasons why prisoners fear reporting rape.
Fear of being written up and possibly losing good time.
Fear of retaliation.
Fear of feeling that no one will believe them.
Fear of feeling that no one really cares.

For all these reasons, a large majority of inmates who have been sexually abused by staff or by other inmates never report it.[1] And corrections officials, with some brave exceptions, have historically taken advantage of this reluctance to downplay or even deny the problem. According to a recent report by the Bureau of Justice Statistics (BJS), a branch of the Department of Justice, there were only 7,444 official allegations of sexual abuse in detention in 2008, and of those, only 931 were substantiated. These are absurdly low figures. But perhaps more shocking is that even when authorities confirmed that corrections staff had sexually abused inmates in their care, only 42 percent of those officers had their cases referred to prosecution; only 23 percent were arrested, and only 3 percent charged, indicted, or convicted. Fifteen percent were actually allowed to keep their jobs.

How many people are really victimized every year? Recent BJS studies using a "snapshot" technique have found that, of those incarcerated on the days the surveys were administered, about 90,000 had been abused in the previous year, but as we have argued previously,[2] those numbers were also misleadingly low. Finally, in January, the Justice Department published its first plausible estimates. In 2008, it now says, more than 216,600 people were sexually abused in prisons and jails and, in the case of at least 17,100 of them, in juvenile detention. Overall, that's almost six hundred people a day—twenty-five an hour.

The department divides sexual abuse in detention into four categories. Most straightforward, and most common, is rape by force or the threat of force. An estimated 69,800 inmates suffered this in 2008.[3] The second category, "nonconsensual sexual acts involving pressure," includes 36,100 inmates coerced by such means as blackmail, offers of protection, and demanded payment of a jailhouse "debt." This is still rape by any reasonable standard.

An estimated 65,700 inmates, including 6,800 juveniles, had sex with staff "willingly." But it is illegal in all fifty states for corrections staff to have any sexual contact with inmates. Since staff can inflict punishments including behavioral reports that may extend the time people serve, solitary confinement, loss of even the most basic privileges such as showering, and (legally or not) violence, it is often impossible for inmates to say no.[4] Finally, the department estimates that there were 45,000 victims of "abusive sexual contacts" in 2008: unwanted touching by another inmate "of the inmate's buttocks, thigh, penis, breasts, or vagina in a sexual way." Overall, most victims were abused not by other inmates but, like Jan, by corrections staff: agents of our government, paid with our taxes, whose job it is to keep inmates safe.

All the numbers we have cited count people who were abused, not instances of abuse. People raped behind bars cannot escape their attackers, though. They must live in constant fear, their trauma renewed every time

they see their assailants. Between half and two thirds of those who claim sexual abuse in adult facilities say it happened more than once; previous BJS studies suggest that victims endure an average of three to five attacks each per year. [5]

We believe that the department's estimate probably remains too low. It is based on extensive surveys conducted by the BJS in which inmates were able to report abuse anonymously. Some inmates probably fabricated such reports, creating "false positives," and some who had been abused probably decided not to report it, creating "false negatives." Since it is impossible to know how many errors of either kind there were, the department chose simply to take the BJS results at face value.

In our opinion, the surveys were effectively designed to discourage false reporting, which would usually be done with the intent of creating trouble for the accused perpetrator or in hopes of being moved to a different facility. The surveys therefore simply didn't take names—of victims or perpetrators. (The surveys' authors also devised a number of ways to check for and discount false claims.) On the other hand, inmates would be likely not to report real abuse from shame, or because it was too painful, or out of fear that those guaranteeing their anonymity could not be trusted—and no survey could be designed to overcome those considerations effectively. Moreover, the department's estimate does not include the many people who are sexually abused in, for example, the Department of Homeland Security's immigration detention facilities, in police lockups, or by their probation and parole officers.

Even the department's estimate is of epidemic numbers, however. It shows that there is a human rights crisis in our own country. The people raped in our prisons are our fellow citizens, family members, and neighbors. And when they're released, as 95 percent of them will be eventually, they bring their trauma home with them, back to our communities.

The notion that rape is inevitable in our prisons is, as the Justice Department says, "not only incorrect but incompatible with American values." After all, the government has extraordinary control over the lives of people whom it locks up and keeps under surveillance every hour of every day. Preventing sexual abuse in detention is primarily a matter of management. The policies needed are, for the most part, straightforward: for example, considering characteristics that make an inmate especially vulnerable when deciding where to house him, such as homosexuality or a history of prior abuse. Well-run prisons have adopted such policies already, and their rates of sexual assault are dramatically lower than the national average. But for too long, too many facilities have failed to take these basic measures.

In 2003, seeking to address this disgraceful situation, both chambers of Congress unanimously passed the Prison Rape Elimination Act (PREA), a law that created a commission to study best practices and come up with national standards for preventing, detecting, and responding to the problem. This commission spent years consulting with corrections officials and other experts. Finally, in June 2009, it delivered its recommendations to Attorney General Eric Holder, who by law then had twelve months to revise them before formally issuing standards that would be nationally binding.

He missed that deadline. The estimate of 216,600 inmates sexually abused in a year comes from a draft of the proposed final standards, which Holder has only now published for public comment—a step that is still far from the last. (The public comment period will run until April 4, 2011. People wishing to comment on the Justice Department's proposals can learn how on our organization's website, www.justdetention.org.) Moreover, the standards that the department has proposed, taken all together, fall far short of the commission's recommendations.

There are some specific points on which the department has gone beyond the standards advocated by the commission. To mention a few examples, while the commission would have required that physical exams

be made available to abused inmates whenever penetration had occurred, the department has expanded this provision, making the exams available whenever they are deemed "evidentiarily or medically appropriate." It has also decided that inmates who have suffered sexual abuse should now be given timely access to legally available "pregnancy-related medical services" and prophylaxis for sexually transmitted infections.

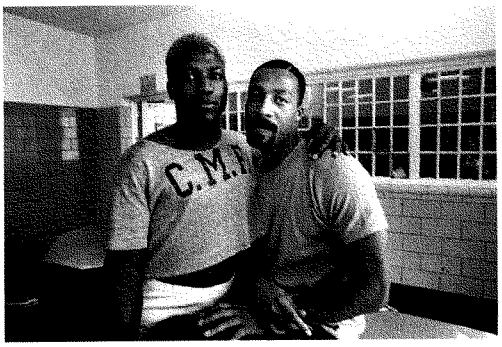
The department also intends to recommend lifting the ban on use of funds available under the Victims of Crime Act for those who have been abused in detention, which will make it much more possible for community rape crisis centers to help inmates. And it has expanded the commission's training requirements, adding, for the first time, that corrections staff must now receive instruction on appropriate professional boundaries and on effective and professional communication with lesbian, gay, bisexual, transgender, and intersex (persons whose biological sex is ambiguous) inmates—obvious enough measures to take, but extremely important ones.

The department has proposed a new standard on housing decisions for transgender and intersex inmates. The vast majority of male-to-female transgender inmates are simply placed in men's facilities. There they are perhaps the most vulnerable of all groups, often raped repeatedly. Now, for the first time, the department is requiring that their housing be considered on an individual basis. This is enormous, indeed life-saving progress. [6]

However, although such points are to be applauded in the attorney general's draft of the standards, it is deeply flawed and should be amended one more time. Again, a few examples of the problems will have to stand in for a much longer list.

To begin with, although the department writes that "protection from sexual abuse should not depend on where an individual is incarcerated: It must be universal," its standards now will not apply to immigration detention facilities—even though the history of the Prison Rape Elimination Act clearly shows that it was intended to cover immigration detention. [7] This is an essential point, because immigration facilities are rife with abuse. [8] The people housed in them, terrified of deportation and often sharing no language with their jailers, tend to be even more reluctant to file reports than most criminal detainees, and so are particularly vulnerable.

Similarly, the department has, against the commission's recommendation, decided that its standards should not apply to probation and parole officers (except those working in community confinement facilities such as halfway houses), even though probation and parole officers sometimes extort sex by taking advantage of their extraordinary ability to send people to prison; even though many inmates wait to tell anyone what they've suffered until release, and then frequently turn to their parole officers, who would therefore benefit greatly from the specialized training about sexual abuse that the standards require for other corrections staff. [9]



Darcy Padilla

Inmates in an isolation unit for HIV-positive convicts at the California Medical Facility in Vacaville, 1990; photograph by Darcy Padilla, winner of the 2010 W. Eugene Smith Award in Humanistic Photography

The Prison Litigation Reform Act of 1996, which was written with the explicit purpose of limiting inmates' access to judicial redress, insists that prisoners must successfully follow the grievance procedures of the facilities where they were abused before seeking help from a judge. Many prison systems have harsh requirements about how quickly after an assault complaints must be filed. Such deadlines often take no account of the likelihood that a victim will still be in shock or in the hospital when that time expires, or of many inmates' very reasonable fear of retaliation if they do file a grievance within their facilities. [10] Recognizing this, the commission tried to ensure that reasonable access to the courts would be restored to victims of prisoner rape. But the Justice Department's draft requires facilities to adopt grievance policies like the one used by the federal Bureau of Prisons—which has even stricter deadlines than those currently used in eighteen states, giving inmates only twenty days to file complaints after an assault, and an additional ninety-day extension only if they are able to document trauma. [11] In many places, therefore, this PREA standard might have the perverse effect of further limiting recourse for people raped in prison.

The department is also weakening one of the commission's recommendations by allowing adult facilities to place victims or those at high risk in segregated, isolated housing for ninety days, even against their will, in order to prevent further assaults. But "solitary confinement" is more commonly used as punishment; it can have devastating psychological effects, especially to people already traumatized. Such segregation has been used with particular frequency against gay inmates in the past, again purportedly for their protection, but often against their will and when no abuse has taken place. Some inmates request segregated housing for their own protection, and they should have that right. No one should be subjected to it involuntarily, however, simply for reporting abuse. The risk of such isolation now contributes to many inmates' reluctance to file grievances. When a victim and his assailant must be separated, it would be more appropriate to isolate the abuser.

The department has essentially eliminated the commission's requirement that inmates be able to report abuse confidentially to people unaffiliated with their facilities. Like the commission, it gives victims access to an advocate during the investigation process; unlike the commission, though, it does not require these advocates to be outsiders, but would allow them to be "qualified" [12] employees of the facility where the abuse took place. Here we suspect that the department may have given in to pressure from corrections officials who fear opening their facilities to outside scrutiny. But if the department is serious about wanting to prevent sexual abuse in detention, it must open prisons to outsiders. It cannot allow them to continue policing themselves.

Much more difficult problems emerge when the Justice Department considers supervision of inmates by officers of the opposite sex. Since this can lead to elevated rates of abuse, the commission recommended standards limiting staff's ability to view inmates of the opposite sex while undressed or to touch them during searches, except in emergencies—recommendations that still came far below international norms. The department has weakened them even further. It bans officers from performing strip searches and visual body-cavity searches on inmates of the opposite sex, except in emergencies, but not from pat-searching them, or viewing them in the shower or on the toilet during cell checks.

The department is worried that a ban on cross-gender pat-searches might mean facilities would have to fire many of their female employees and hire more men, which would be very expensive and perhaps illegal. And it maintains (something we agree with) that it can be beneficial for inmates to have staff of the opposite sex in their facilities. The problem, though, is that a significant majority of staff-on-inmate sexual abuse is cross-gender—women abusing men, as well as men abusing women—and much of it starts during (but then is not limited to) pat-searches.

But it is possible to have both male and female employees available in a facility when nonemergency searches are required so that pat-searches could be conducted by members of the same sex. There are also simple ways to limit the incidental viewing of inmates on the toilet, by, for example, installing small privacy screens, or where that's impractical, allowing inmates to hang a towel from the bars of their cells for a few minutes. In any case, the department should not give higher priority to the employment concerns of corrections staff than to an essential purpose of their jobs, which is ensuring the safety of inmates in their care.

To have any hope of keeping inmates safe, staff must know what is happening to them. The department's standard on supervision, which addresses both staffing levels and video monitoring, is one of its most important. Yet neither the department nor, before it, the commission has defined what would be adequate supervision. (It does not, for example, point out where recording cameras are needed to detect rape in such places as closets or require extra monitoring for inmates with known histories of sexual assaults.) This is a terribly disappointing failure after seven years of work. [13]

Even more troubling is the lack of any mechanism for holding facilities accountable when they do not give inmates the supervision that is needed. All the department proposes is that corrections agencies be responsible for writing annual supervision plans for each of their facilities; they must also devise backup plans in case the first plans cannot be met. But even after deciding for themselves what would be sufficient, agencies face no penalties, either for failing to provide adequate supervision or for failing to implement their backup plans. [14]

None of the department's standards, in fact, will be meaningful unless sufficient mechanisms exist to enforce them. Unfortunately, the department has not yet reached decisions on many important aspects of monitoring compliance—raising the possibility that it might ultimately issue weak auditing standards without even submitting them for public comment first. Indeed, the department has hinted at such a possibility, by proposing that the standards not require true independence from those who judge compliance: that instead, audits could be conducted by "an internal inspector general or ombudsperson who reports directly to the agency head or to the agency's governing board" (emphasis added). Anyone answering directly to the agency, though, could easily be pressured to minimize or ignore certain conditions, or prevented from fully examining conditions should the agency not provide sufficient funding. [15]

As is abundantly clear from the Justice Department's draft, its primary consideration in weakening the standards was expense. The government must fulfill its human rights obligations: this is a constitutional and

moral imperative to which budgetary considerations are secondary, especially when, as the department affirms here, the measures in question will not "have [a significant] effect on the national economy."[16] On the other hand, PREA stipulated that no standards should be issued "that would impose substantial additional costs compared to the costs presently expended by Federal, State, and local prison authorities," and the department was obligated to take that seriously.[17]

Given the scope of the standards, it was not only appropriate but legally mandated that the department conduct a cost-benefit analysis of the standards' projected financial impact, which it has done.[18] It projected costs not only for its own standards but for their "most obvious alternative"—e.g., the commission's recommendations—and found that its proposals would require about $544 million per year in ongoing costs, or, it believes, about a tenth of the commission's. This last assertion is a dubious one, because the cost projections for the commission's recommendations are deeply questionable, but it does at least suggest the extent to which the department has diluted the commission's standards. Having also projected the financial benefits of preventing the various kinds of sexual abuse in detention, the department then determined that its proposed standards would be fiscally justified if they reduced the number of victims by only about 3 percent[19]—something it is so confident they would achieve that the department simply asserts it. On that point, so far as it goes, we more than share the department's confidence.

The assumptions and valuations the department has made in estimating the financial benefits of preventing prisoner rape are extremely conservative.[20] By erring on the side of great caution in its projections of those benefits, and then showing that they would still outweigh costs even if the standards saved only 3 percent of all victims, the department has made it very difficult for anyone to complain about its proposals on the basis of extravagance. But cost-benefit analysis is not meant to be a tool with which bureaucrats and political appointees protect themselves from criticism; it is meant to help them maximize the public good achieved through their regulations. To have used it responsibly for that purpose, though, the department would have had to make some effort to estimate how many inmates would in fact be spared abuse by the standards. Its assertion that the standards could reduce sexual abuse in detention by 3 percent is not good enough. It is clear to anyone who has studied them that they could do that, and much more than that. The question is, how much more?

Since the standards are an effort to codify innovations and best practices of facilities that have already had some success in reducing their rates of sexual abuse, we propose looking more closely at the last BJS study of sexual abuse in adult facilities, Sexual Victimization in Prisons and Jails Reported by Inmates, 2008–09.[21] This study from August 2010 was based on surveys administered at 167 prisons and 286 jails. If we take the average rates of abuse in the best half of those facilities, and then imagine that these rates could become the national averages, that would give us an estimate of possible gains that was both realistic and conservative, based on what has already been accomplished across the country.[22] The top half of all facilities have made their achievements without explicitly stated standards; there is still plenty of room for them to improve, and every reason to expect that they will once the standards are in place, though probably not as dramatically as the bottom half of facilities. In our opinion, if the department issues strong standards, it wouldn't be unrealistic to expect that the national rates of abuse could sink to those of the best quarter or even the best tenth of all facilities.

But even if the standards allowed all facilities to do only as well as half do now, they would be saving not 3 percent of the people sexually abused in detention, but over 53 percent.[23] This means that had the standards been in place in 2008, instead of the 199,500 people who the department says were abused in adult prisons and jails, there would have been about 93,100. More than 100,000 adults (as well as many thousands of children) would have been saved an experience from which few recover emotionally.

If weak standards would be justified by preventing 3 percent of abuse, strong ones would be resoundingly vindicated by what is in fact possible. The department could do much more than it is now proposing while remaining fiscally responsible. Many of its proposals can be improved at minimal cost. Other necessary measures will carry a significant price, but we do not believe they will be nearly as expensive as the department has estimated. Even if they were, however, they would be warranted by the immense good they will do.

The Justice Department still has work to do on the standards, but President Obama should urge it to move more swiftly. In just the time it has taken to read this article, several more people like Jan Lastocy have been raped behind bars, and more than half of them could have been saved if the standards were in place. The department now estimates that it will finish its process by the end of 2011, a year and a half after its statutory deadline passed. But well over 100,000 inmates have already been sexually abused while in the government's care since Holder missed his deadline, and if it takes him until the end of the year to issue standards, there will be nearly 200,000 more.

—*February 23, 2011*

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1. 1
   As the Bureau of Justice Statistics found in a recent study, "between 69% and 82% of inmates who reported sexual abuse in response to the survey stated that they had never reported an incident to correctional managers." ↩

2. 2
   See David Kaiser and Lovisa Stannow, " The Rape of American Prisoners ," *The New York Review* , March 11, 2010; see also David Kaiser and Lovisa Stannow, " The Way to Stop Prison Rape ," *The New York Review* , March 25, 2010. ↩

3. 3
   As a point of comparison, it may be worth noting that the latest National Crime Victimization Survey (NCVS) by the BJS, which excludes "Armed Forces personnel living in military barracks and institutionalized persons, such as correctional facility inmates," estimates that in 2009 there were 125,910 instances of rape and sexual assault in the US. However, several caveats are necessary here: first, that the definitions of these crimes used in this study are not the same as those used in the surveys of prisoner rape; second, that the 2009 number was down significantly from the 2008 NCVS finding of 203,830 rapes and sexual assaults in the free community; third, as the BJS says in the 2009 NCVS, "The measurement of rape and sexual assault represents one of the most serious challenges in the field of victimization research." The 2009 National Crime Victimization Survey is available at bjs.ojp.usdoj.gov/content/pub/pdf/cv09.pdf . ↩

4. 4
   As the Justice Department acknowledges, "the power imbalance in correctional facilities is such that it is impossible to know if an incarcerated person truly 'consented' to sexual activity with staff." ↩

5. 5
   Of juvenile detainees reporting sexual abuse by other inmates, 81 percent said it happened more than once. ↩

6. 6
   According to the National Prison Rape Elimination Commission report, suicide is considered by one third

to one half of rape victims in "non-correctional settings"; 17 to 19 percent attempt it. And as the department says of rape, "Such acts are particularly damaging in the correctional environment, where the power dynamic is heavily skewed against victims and recourse is often limited." ↩

7. 7
Two federal entities charged with implementing parts of PREA, the commission and the BJS, have both recognized immigration as clearly within their mandate; statements in the House Judiciary Committee's report on the bill confirm that it was meant to cover civil as well as criminal detainees; and the late Senator Edward Kennedy, one of PREA's sponsors and its main champion in Congress, publicly expressed his particular gratification that PREA would apply to immigration detention. PREA itself defines "prison" for the purposes of the law as "any confinement facility of a Federal, State, or local government." And as a former adviser to the head of the Department of Homeland Security (DHS) acknowledged, immigration facilities (all of which are run by or contracted from the DHS) need new policies like the standards.

The department's argument for not applying its standards to DHS immigration facilities, we presume, is that PREA didn't stipulate that the standards should apply to DHS facilities. But when PREA was first drafted, in 2002, there was no Department of Homeland Security; the Immigration and Naturalization Service, which did exist then, was a division of the Department of Justice, so the department's standards would have applied to its facilities automatically. While DHS had been established by the time PREA was passed, the scope of its responsibilities for housing immigration detainees was not yet clear. ↩

8. 8
See Human Rights Watch, "Detained and at Risk: Sexual Abuse and Harassment in United States Immigration Detention," August 25, 2010. ↩

9. 9
By 2000, about as many people were being annually sent to prison in the US for parole violations as had been sent to prison for any reason in 1980. (Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness (New Press, 2010), p. 93.) According to the BJS, more than five million people were on probation or parole in 2009. The sorts of parole violations that can get someone sent back to prison include failing to maintain employment, failing a drug test, and missing an appointment with a parole officer—all of which, however, would be typical symptoms of the kind of trauma associated with prior sexual abuse. Thus, unless probation and parole officers can recognize and take into account such trauma, people who have been sexually abused in detention are at heightened risk of being sent back to prison after their release. There, because prior abuse dramatically increases the probability of future abuse, they will very likely face more sexual assaults. ↩

10. 10
About 17 percent of those raped in prison suffer serious additional injuries—knife wounds, broken bones, concussions—and they must often be hospitalized. Sexual abuse of any kind can also cause or exacerbate serious mental and emotional problems: 30 to 40 percent of inmates suffer from such disabilities even prior to any abuse—which, of course, also makes them particularly vulnerable to being abused. And as the department says, "Retaliation for reporting instances of sexual abuse and for cooperating with sexual abuse investigations is a real and serious threat in correctional facilities. Fear of retaliation, such as being subjected to harsh or hostile conditions, being attacked by other inmates, or suffering harassment from staff, prevents many inmates and staff from reporting sexual abuse, which in turn makes it difficult to keep facilities safe and secure." An inmate who has been sexually abused typically feels a sense of panic, extreme isolation, and vulnerability; it is very difficult for such a person to trust any member of the facility's staff when staff have already failed to protect him (or, indeed, when it was staff who abused him). ↩

11. 11
Deadlines are not the only problems inmates face in trying to comply with the grievance procedures of their facilities. Many corrections agencies across the country have taken advantage of the Prison Litigation Reform Act to avoid responsibility for abuses within their walls by creating deliberately confusing or even contradictory grievance requirements. Thus, for example, two recent court cases in Iowa and New York arose after female prisoners followed advice given in agency materials and complained about sexual abuse to officials whom they trusted; but neither the case manager turned to in Iowa nor the inspector general in New York had a role in the official grievance systems of those states, and therefore the courts decided that judicial review was procedurally barred in each case. Such procedural traps and labyrinths are particularly challenging for the country's many illiterate and mentally ill inmates. The department should insist that all grievance procedures be simple, clear, and possible to follow. ↩

12. 12
Beyond failing to recognize the important reasons why this advocate should be an outsider, the department's standard gives no binding criteria by which a staff member would be deemed qualified. Its discussion of what it believes might be required for such qualification suggests that it would accept much more limited training than community rape crisis centers typically demand. Moreover, the department has no requirement that staff members go through any screening in order to become qualified, raising the dangerous possibility that staff perpetrators of sexual abuse might serve as victim advocates. ↩

13. 13
Complicated though this question is, some elements of its solution are clear enough. To mention only a few points, recording cameras should be placed in a facility's known blind spots, including places not designated for inmates but where an abusive staff member could take them, such as closets; similarly, places in a facility where sexual abuse has been known to occur should be monitored, either directly by staff or with cameras; there should be direct "sight and sound supervision" of inmates with a known history of sexual predation when they are in common areas, shared cells, or otherwise interacting with fellow inmates; and the extent to which individual staff members are able to spend time alone with inmates should be minimized. More such suggestions will be forthcoming in the public comment that Just Detention International intends to make in response to the department's draft standards, and will be available on the organization's website. ↩

14. 14
The department writes that auditors would probably not "be able to determine the appropriate staffing level in the limited amount of time available to conduct an audit." Perhaps not, and perhaps asking auditors to create such plans would be too much, but they should certainly be allowed to decide when supervision is inadequate. They must be allowed to reject the plans that agencies have made for their own facilities, and to include failures to provide adequate supervision or to implement backup plans in their public reports. ↩

15. 15
In addition to being truly independent and adequately funded, auditors must have the power to visit every detention facility, unannounced and at any time; to examine and copy documents; to hold private, confidential conversations with all inmates and staff; and to have their findings on noncompliance and recommendations for improvement made publicly available. The standards should require regular document review of the policies and practices of every facility. Ideally, auditors would visit every facility at least every three years. If this isn't possible due to the immense number of corrections facilities nationwide, the standards should require "for cause" audits of facilities where serious problems have been identified, and also the possibility of random audits for all facilities, so that all have proper incentives to comply with the standards, and so that problems can be identified and addressed before becoming serious. The department's

proposals guarantee none of these things. ↩

16. 16
The sentence reads, "The Department does not believe that these national standards will have an effect on the national economy, such as an effect on productivity, economic growth, full employment, creation of productive jobs, or international competitiveness of United States goods and services." ↩

17. 17
However, as the department says, "Congress understood that such standards were likely to require Federal, State, and local agencies (as well as private entities) that operate inmate confinement facilities to incur costs in implementing the standards. Given the statute's aspiration to eliminate prison rape in the United States, Congress expected that some level of compliance costs would be appropriate and necessary." ↩

18. 18
Cost-benefit analysis, as the name suggests, is an effort to quantify both the price and the measurable savings or positive monetized gains associated with a proposed regulation. Ideally it is used to maximize the social good; at a minimum (and perhaps more commonly in practice) it is used to ensure that the achievements of any regulation aren't outweighed by its expense. For a more complete discussion of cost-benefit analysis and its applicability to the department's efforts to prevent sexual abuse in detention, see David Kaiser and Lovisa Stannow, "Prison Rape: Eric Holder's Unfinished Business," NYRblog, August 26, 2010, available at http://www.nybooks.com/blogs/nyrblog/2010/aug/26/prison-rape-holders-unfinished-business/ . See also Institute for Policy Integrity, Letter to Robert Hinchman, dated May 10, 2010, available at http://policyintegrity.or/documents/IPI_PREA_Comments_-_FINAL.pdf , and Institute for Policy Integrity, Memo to DOJ PREA Working Group and Office of Information and Regulatory Affairs dated September 10, 2010, available at policyintegrity.org/documents /PREA_Memorandum_September_2010.pdf . ↩

19. 19
More precisely, the department says that "the proposed standards would have to yield approximately a 2.3–3.5 % reduction from the baseline in the average annual prevalence of prison rape for the ongoing costs and the monetized benefits to break even, without regard to the value of the nonmonetary benefits." For the commission's standards to "break even" with the department's projection of their costs, the department estimates that they would have to reduce sexual abuse in detention by 22 percent. ↩

20. 20
For example, the department has assigned a value to saving an inmate from "nonconsensual sexual acts involving pressure" that is only one fifth the better-established benefit of preventing rape by force, suggesting a similar differential in the "cost" of these crimes. This seems especially low considering that mental trauma and loss of quality of life account for 85 percent of the department's estimate of the "cost" of forcible rape; we believe that the psychological damage inflicted by the two kinds of abuse is similar. The value it assigns to preserving an adult from "abusive sexual contact" is only $375; for a juvenile, it is $500.

More generally, the department has not attempted to quantify all the measurable benefits of preventing sexual abuse in detention. For example, it writes that "sexual assault in prison often leads to long-term trauma, especially if victims are not treated properly in the immediate aftermath of their victimization. When victims return to their communities, this trauma frequently results in an inability to maintain stable employment. The standards will improve the reentry of offenders into society after their incarceration, reducing the likelihood that they will require public assistance (such as welfare, disability benefits, housing vouchers, food stamps) and other forms of governmental support upon their reentry." Although the benefits

mentioned in this passage are difficult ones to measure, they are the sorts of things normally thought susceptible to quantification in cost-benefit analysis.

The department also writes that "implementation of the standards will enhance public safety by reducing the likelihood that inmates released from prison and jail each year will commit crimes (especially violent crimes) after their release.... Reducing recidivism could potentially save society and government tens of millions of dollars per year by avoiding the economic and human costs of crime, the cost of investigating and prosecuting crimes, and the considerable expense of incarceration itself ($22,600 per prisoner per year, or $62 per day, as of 2001)." But it doesn't attempt to include quantification of these benefits in its analysis, either. ↩

21. 21
This study was the primary source from which the department derived its estimate of the number of victims in 2008. It is available at http://bjs.ojp.usdoj.gov/content/pub/pdf/svpjri0809.pdf . ↩

22. 22
Nationally, 4.4 percent of prison inmates are sexually abused every year, as are 3.1 percent of jail inmates. In the better half of all facilities, 2.069 percent of prisoners are abused, and 1.436 percent of jail inmates. ↩

23. 23
To reach this number, we took the rates of abuse from the better-performing 84 prisons in the BJS study and averaged them; we did the same for the better-performing 143 jails. (The figures we reached this way are not weighted averages: we did not try to account for the size of each different facility or the number of inmates who responded to the survey in each.) Then, for both prisons and jails, we divided the rate of abuse for the top half of facilities by the overall rate found by the BJS; we multiplied the numbers this produced by the department's estimate of the numbers of victims in prisons and jails to reach our absolute numbers. We did not attempt to perform the same calculation for juvenile facilities out of concern that the more limited data we have there might not support such an exercise; however, we are confident that strong standards could make an enormous difference in juvenile facilities, just as they would in adult prisons and jails. ↩

INMATE WORK OPPORTUNITIES

Mr. WOLF. And my last question before I go to Mr. Schiff, if everyone said, okay, Mr. Lappin, we are signing up, we are going to be a model, do you now have the work for them? Has the Prison Industries been so decimated?

Today, if everyone says they are lining up in all the federal prisons around the country to participate in Harley Lappin's program, do you have the work for them to do? Decent work where they can learn a skill?

Mr. LAPPIN. Today?

Mr. WOLF. Yes.

Mr. LAPPIN. Not with more inmates housed in prisons than they were built to hold. So that is the complicating factor of work, productive work opportunities. When you have more inmates housed in a prison than it was designed to house—to have to manage, it is complicated. It is—you end up having to make work. You do not want to do that.

So are there meaningful work opportunities today? I do not think they are as meaningful as they should be, in part because there are more inmates housed there than was intended and consequently there are only so many jobs that you can create in a 30-acre site. And so, I mean, it is reality. I mean, those of us running prisons face this every single day when we have more inmates in prisons than they were designed to house. We are in that situation right now.

So can we provide the work? Yes. Is it as meaningful as we would like it to be? I do not think that it is, but that goes back to the basic problem, you know, your concern over these young men and women coming to prison for the first time. Again, I think that is where the justice reinvestment initiative plays an important role. Is that the only option? But that has to be decided before someone is prosecuted, convicted, and sentenced to a period of incarceration.

That is why it has to be a collective involvement of the judicial, legislative, and executive branches to deal with this aspect of who goes to prison and, if so, for how long. And I agree there are probably cases where there may have been alternatives. They currently may not be available in the federal system. Should they be available? In my opinion, they probably should be available. And we have got to work towards that situation.

FEDERAL PRISON INDUSTRIES

Mr. WOLF. Okay. Well, if I could just, Mr. Schiff, just follow-up on that one question. I have a whole series on Prison Industries.

But if Federal Prison Industries entered into partnerships with private businesses, we could bring some manufacturing back. I had a bill in that would allow the prisons, the Federal Prison Industries to work with companies to bring back products that were no longer made in the United States. We called it Operation Condor. Remember the condor bird that was extinct and we brought the bird back? We had different people oppose it.

Would you support that whereby we could aggressively have arrangements with the private sector to make and manufacture products that are no longer made in the United States, so you are not

in competition, and if you do, do you have that capacity now to move ahead based on this legislation that you are sending up?

Mr. LAPPIN. We would have the capacity to do that given how Prison Industries operates with non-appropriated funds. We have the factories. And, yes, I would support any legislative initiative that would allow us to create more productive work opportunities for inmates in prisons as long as it does not negatively impact businesses in our own communities.

Mr. WOLF. How could it have a negative impact if you are making something no longer made in the United States. So if you were making television sets—we had Emerson at one time that was interested in coming into Lorton Reformatory which was a hell hole. People opposed this. I mean, you are not competing with any company that is currently making that product. So the unions would not be hurt. The business would not be hurt. I just do not see how it would have a negative——

Mr. LAPPIN. You and I have had this discussion, and I know how supportive you are.

Mr. WOLF. But nothing ever happens.

Mr. LAPPIN. There is another side to this story that I am sure we will encounter.

Mr. WOLF. What is the other side of the story? What is it?

Mr. LAPPIN. There will be an argument that we are affecting some businesses, some professions in the United States. It has happened in virtually every product area that we have, even as sensitive as we have been to that issue. But we need to explore this. We need to look at legislation that would allow us to do this.

Do I think it can be done? I do. And I think there may have to be an agreement to striking a balance, because this is a societal issue. I mean, if we do not teach these young men and women, and some of them are older men and women, work skills, and I am not talking about getting into a factory and learning how to sew or learning how to do this, I am talking about just like you said, you set your alarm clock, you arrive at work on time. When you are at work, you produce, and you are held accountable for a quality product. When you are at work, you have a relationship with peers, that you make good decisions even when you do not agree such that you can be successful in the workplace. You learn to work under a supervisor. You take direction even if you do not necessarily agree with that supervisor. These are the skills that they learn in those environments.

Mr. WOLF. What was the high number of people working in Federal Prison Industries at its zenith and what is it now?

Mr. LAPPIN. Well, in the recent past, three years ago, we had 23,000 inmates working in the factory every day.

Mr. WOLF. When?

Mr. LAPPIN. Three years ago.

Mr. WOLF. And what is it now?

Mr. LAPPIN. Fifteen thousand.

Mr. WOLF. And what was it, 23,000? What was it at its zenith?

Mr. LAPPIN. I mean, years ago, before we had this huge surge, we had probably 40 percent of the inmates who were in federal prison working in Prison Industries at one time.

Mr. WOLF. And now what——

Mr. LAPPIN. But this is back when we were small.
Mr. WOLF. And now what percentage is working?
Mr. LAPPIN. Nine percent.
Mr. WOLF. Forty to nine. Wow.
Mr. LAPPIN. Yes.
Mr. WOLF. Okay. Mr. Schiff.

INMATE PROGRAMS AND RECIDIVISM

Mr. SCHIFF. Thank you, Mr. Chairman. Thank you, Director, for being here. You have a tough job. I do not envy your responsibilities. And I know that when you get first time offenders, you know, a lot of the damage has been done. You have little role in preventing the first time offenders from getting there and little opportunity to affect them once they leave. But you have an important role in the interim. And I think the chairman is right to focus on recidivism because that is something that you have some power to influence. I mean, obviously when people are released from your facilities what kind of wrap around services they get whenever they are released to wherever they are released will have a big impact, maybe a bigger impact. But I am curious about a couple of things. What is the average period of incarceration in a federal facility?

Mr. LAPPIN. I think we are at about nine years now.
Mr. SCHIFF. Nine years? Wow.
Mr. LAPPIN. Yes.
Mr. SCHIFF. Wow.
Mr. LAPPIN. Yes.
Mr. SCHIFF. In your view, what is the most significant two or three things that you can do while you have someone during those nine years to affect the recidivism rate?

Mr. LAPPIN. You guys are supposed to give me a little easier questions. You cannot do any of this, folks, without safe prisons. If people are unwilling to walk out on that compound on their own every day and participate in the programs that are offered, you have got a problem to begin with. We have had a problem with this in the last three years. One reason why we have been urging people on this Thomson issue, and I will get to that in just a minute, but the first thing any prison system I think will tell you is, you are not going to run programs and provide those opportunities unless inmates are willing to walk out and participate openly. Fortunately, most of our inmates are. There is a small percentage that are unwilling and resist.

Beyond that, you have got to have the programs available, and they have got to be credible, quality programs. You know, it is not just show up and hang out in the classroom.

Mr. SCHIFF. But I guess what I am trying to get at is, if you identify by type, what is the most effective thing you do to attack recidivism? I will give you my gut impression. You can tell me if I am way off. I would put very near the top of the list drug treatment. If you have somebody that goes into custody with an addiction, and that addiction is not treated, and they are released back into the population, we ought to be surprised when they do not recidivate. So I would say one of the most effective things we could do is make sure that anyone who has a drug problem gets drug

treatment. Work skills, you know, might be at the top of the list. But I do not know, I am guessing.

Mr. LAPPIN. I understand now. Beyond a safe environment, beyond a rule oriented environment, because that is the first thing you have got to get people to do. They have got to understand that while you are here you are going to follow the rules. So you have got to have a discipline program and an understanding of that.

Once you get beyond that without a doubt our drug treatment opportunities, the mental health opportunities, have a huge impact. And I think that is reflected in the number of inmates that participate in our intensive residential drug treatment program. And to give you an example, about 40 percent of the inmates in our custody we believe have a drug and/or alcohol addiction. And of those, 92 percent are volunteering for treatment in the drug and alcohol treatment program even though not all of them get any time off their sentence for it. So, of that group that is participating, of the 18,000, about 60 percent actually get some time off their sentence. But 40 percent get no time off their sentence. They are there because they understand they have a problem and over the years they have observed the positive impact this program has had on peers. So I think you have to attract them.

GED and vocational training without a doubt have impact. We do not get as much eagerness in some of those programs. But any of those programs that focus on daily learning, living skills, good decision making, many of which these programs incorporate, are effective. UNICOR, I have described. I mean, it is a bit controversial. But when inmates arrive in UNICOR their expectations are set from the very beginning. One, you are going to show up, you are going to participate, you are going to be a team player. You are going to get along with your peers, and you are going to deal with your supervisor. If they do not do that, they lose that privilege. We have very few inmates who, once they get into UNICOR, lose their jobs. Because they like the environment, they like the fact that they are making a little more money. Consequently, they learn these skills.

Mr. SCHIFF. And does the BOP, I assume you have statistics on what the recidivism rate is for people who were in drug treatment and what the recidivism rate is for people who were not in drug treatment? You know, based on your statistics what are the most effective programs that you have at attacking recidivism?

Mr. LAPPIN. We see about a 16 percent reduction in recidivism for inmates who participate in drug treatment compared to inmates similar to them.

Mr. SCHIFF. Yes.

Mr. LAPPIN. Who do not participate in it.

Mr. SCHIFF. And——

Mr. LAPPIN. We see a 33 percent reduction in inmates who get a vocational skill.

Mr. SCHIFF. I am sorry, 33 percent?

Mr. LAPPIN. 33 percent, compared to inmates who, just like them, who do not get a vocational skill.

Mr. SCHIFF. So the job skills are twice——

Mr. LAPPIN. That is right.

Mr. SCHIFF [continuing]. Twice as effective as even the drug treatment?

Mr. LAPPIN. Sixteen percent for all education in general, and we look at education and vocation, when you combine it, it is about 16 percent. And a 24 percent reduction in people who work in prison industries. So we are seeing a reduction of, beyond our standard recidivism rate of about 24 percent for those inmates who work in prison industries, I think even for as little as six months.

Mr. SCHIFF. Explain if you would, you mentioned vocational ed as being 30 percent and job training as being twenty-something percent. Is that on top of the 30 percent? Or are those a subset of one or the other? How are you dividing between vocational and jobs?

Mr. LAPPIN. And jobs? We see jobs being work related skill enhancement.

Mr. SCHIFF. Yes.

Mr. LAPPIN. We see vocational as being—I am teaching them something that they can leave prison and use to get a job. Now they may learn that in their job as well.

Mr. SCHIFF. Yes.

Mr. LAPPIN. But the vocational education is I am teaching them a skill. I am teaching them to be a plumber——

Mr. SCHIFF. Yes.

Mr. LAPPIN [continuing]. A carpenter, a draftsman, an auto mechanic, whichever it is we provide. Some places we have cosmetology. There is a variety of vocational training. So it is teaching them a skill that can transfer from that experience to a job in the community.

Mr. SCHIFF. And that is even more effective than the actual on the job training that you have?

Mr. LAPPIN. And unfortunately it has probably the least participation. Because what happens is, they do not get paid. Okay? So here they have got a job in prison industries, or they have got a job elsewhere, and they are making money. And they have to leave that job, they become part time workers, to do the vocational training. Now some inmates who are wise, they will get a job in the evening because, as you mentioned, you went into a prison and the inmates were not working. Well there are evening and morning jobs. So some inmates will do both. They will say, "I want this job so I can go to school here." And we certainly work with them on that. On the other hand, we do a lot of half day work, half day school, in part because it helps keep inmates more productive through the course of the day. And so it is a variety of things that work. We work with the inmates to try to address those needs. Believe you me, if they are coming in wanting to do those things, those are the easy ones. You know? Those are the ones that are much simpler because they have a desire.

Mr. SCHIFF. Now is there room, take drug treatment, do you have the capacity to provide drug treatment to every inmate who wants it?

Mr. LAPPIN. We do now. There were two years in the recent past where we did not. And tragically we released 1,500, or 1,600 inmates in each of those years who volunteered, and we did not have enough seats at the table. It was tragic. It is not the case today.

Now we are still not there yet, I will be honest with you. Why do we want another $15 million? Because I want them to get the treatment earlier so they can get more, for those that are eligible, get more time off their sentence so they are out of the prison.

So right now, given the backlog that we have, we are getting everybody treated. But we do not get them treated to take full advantage of the time they can get off their sentence. So they are sitting in prison three, four, five months longer than what they normally should be. We want to get enough drug treatment specialists and programs, and we can do that with this additional money, such that they finish that treatment in advance of them being eligible for what time they can have off their sentence.

Mr. SCHIFF. And do you have the capacity to provide the vocational training to all that want it?

Mr. LAPPIN. Yes, we do.

Mr. SCHIFF. So you have the capacity, although there is a backlog on the drug. You have the capacity and no backlog on the vocational training.

Mr. LAPPIN. There are backlogs on vocational training but I think we have the capacity. I think the one that concerns me the most are productive work opportunities, especially when you have more inmates. When we are at 37 percent over rated capacity, you have got, there is only so much you can squeeze out of one place and only so many jobs. So let me give you an example——

Mr. SCHIFF. Well let me ask you this. This gets to the chairman's question. Within the space that you have, have you maximized the job opportunities? Or because of the resistence and the competition with jobs in the private sector, you still have a lot of opportunity for growth in terms of what you could do in the space you have that is unoccupied?

FEDERAL PRISON INDUSTRIES

Mr. LAPPIN. Yes. We have the space, I think, work wise. It is, on the prison industries it is acquiring the work. You have got to have the work to—I mean, prison industries is a non-appropriated program. It is a company that must make a profit. And so, they are no different than anybody else out there. They have got to be a well run company. But we have got to have the work.

And so, for example, tragically, we have closed nineteen factories in the last two years. So there's nineteen factories right now sitting empty, where if we had the work we would be employing thousands more inmates.

Mr. SCHIFF. Now I remember when this issue came up in Judiciary years ago, and you know, there were those that came in to oppose it because of the competition in the private sector. Can you remind me what the arguments are? Because as the chairman points out there are a lot of products we do not make here anymore. And it is hard for me to see, you know, in the case of a television set, you know, there may be competition I suppose in people that import TVs, distribute TVs, a foreign manufacturer. But now you have a cheaper prison made product. But there has to be a distribution network for those TVs, too, so you would think that the private sector would have a role to play there. So what is the argument that has been used against this?

Mr. LAPPIN. Well there are, let us exclude for a minute the folks that are very extreme and just do not want people working in prison. And let us deal with the folks that are amenable to that but they want to protect certain interests.

Mr. SCHIFF. Well and right now you can imagine how powerful that argument is.

Mr. LAPPIN. Absolutely, yes.

Mr. SCHIFF. Law abiding people trying to find a job, and——

Mr. LAPPIN. Absolutely.

Mr. SCHIFF [continuing]. You know, I was just talking to my, wrote a note for my staff considering that the recidivism rates and the amount we have to pay per year to incarcerate, it would be cheaper to pay ex-cons to stay out of jail. If you gave them a monthly stipend that they could get as long as they stayed out of jail, it would be cheaper than what we do now. Of course, you could never do that. But, but yeah, tell me what——

Mr. LAPPIN. Look, I can give you a couple of examples.

Mr. SCHIFF. Other than the philosophically, yeah.

Mr. LAPPIN. Certainly, we make furniture and it has been a controversial area. There are pieces of furniture that are not made in this country. And we would argue that, well, let us make those pieces that you are buying from another country and we will stop making furniture. Let us focus on those things that we all know are not made in this country. We do not have to make the whole desk. We can make the pedestal. We could make the wheels. Whatever it is. But I think you have to get over this, the philosophical issue of the impact this has on an individual's success upon release versus the fear that somebody is going to produce something. You open this door, and somebody is going to produce something that is going to compete with me and they can do it cheaper. We have to be concerned about that, without a doubt.

On the other hand, it is not easy to run factories in prisons. Even though the labor is less expensive, it is very complicated to account for tools, equipment, material, where things are. So, those added expenses oftentimes result in us finding it difficult to compete with some of those businesses, because of the added burdens of running a factory in a prison given the security nature. So some of that is offset. But I think, you know, the argument continues to be that we are potentially going to take work away from other law abiding citizens' businesses. And we should limit that as much as we can. I think there are ways we could do that if people are reasonable and sit down at the table and look at the options, the advantages, the disadvantages, I think we could get there. I am very confident.

I assure you that the Bureau of Prisons and Federal Prison Industries will be a very flexible and willing participant in that discussion. We really do not care what job we do.

Mr. SCHIFF. Right.

Mr. LAPPIN. You know, that is not important. The issue is, we want the inmates in a factory. We want them coming to work. We want them producing something. I mean, I will be honest with you, some places you know what we do? We sort hangers. You know, we have partnered with a company. These hangers were going to the trash. Now the hangers come to a prison and we sort those hangers, we separate them. It is not complicated. But you know what

it is? It gets them back in that environment. You are coming to work, here is your job for the day. Are they going to be able to transfer that skill into the community? Probably not. But they certainly can transfer the work skills they learn.

GROWING PRISON POPULATION AND RECIDIVISM

Mr. SCHIFF. One last question. You mentioned the increase in the prison population over the last ten or twenty or thirty years. And it being again part of the function of mandatory minimums, and federalizing of otherwise state crimes. How much though has the recidivism rate changed? What was the recidivism rate twenty-five years ago? What is it today?

Mr. LAPPIN. We have seen about a 4 percent reduction. We are at about 40 percent on our last assessment. But you and I have talked a couple of times on the phone about how difficult a discussion this is. Because we have done this global recidivism research that reflected that we have seen a reduction of about, I think it is about 10 percent. It went from 44 percent to 40 percent over a ten year period. But as we discussed, there are so many factors that impact recidivism that are completely outside the control of the people running prisons. You are right. Today, you release an inmate and they are going out into an environment where there are not many jobs available. And they are competing with other very quality people.

Mr. SCHIFF. Recidivism is down 4 percent in the last ten years?

Mr. LAPPIN. We were about 44 percent the last time we did this, which was in the late nineties. Our recidivism rate was about 44 percent. In the aftermath of that we were at 40 percent in the federal system.

Mr. SCHIFF. And what were we twenty-five years ago?

Mr. LAPPIN. I do not know if we even have that research. Yes, my concern, since the last study we have got more crowding, we have got more violent offenders. So I am not sure where we would be today. But my research guy says earlier than that we were in the mid forties. So we were probably at 45 percent, 46 percent, and it came down to about 40 percent. I am not sure where we would be today.

Mr. SCHIFF. Yes, but recidivism has stayed fairly stable for the last two or three decades.

Mr. LAPPIN. Yes.

Mr. SCHIFF. So it is not the situation where we have had a doubling in the recidivism rate?

Mr. LAPPIN. No. No.

Mr. SCHIFF. Okay. Thank you, Mr. Chairman.

FEDERAL PRISON INDUSTRIES

Mr. WOLF. Thank you, Mr. Schiff. I am going to go to Mr. Austria. But you know, I think you are giving up too fast on the prison industry issue. It is really a bogus argument to say it is in competition with U.S. businesses. Since PNTR was given, China has taken 6 million jobs from this country. And to have a man working on hangers is better than nothing but you cannot transfer that out. And we could, I could if I were head of Prison Industries I could find the necessary businesses that were no longer operating in the

United States, and there are so many, that I could have these men and women working. And frankly, you will never deal and you will never solve the recidivism rate and the violence of people coming out. Never, ever, in a Republican administration, in a Democratic administration, until you deal with the issue of work. Biblically, work is dignity. It is dignity. It is a biblical fact of life. A man or a woman without work does not have the dignity. And then you also give them the ability to transfer when they come out, and also to have a little bit of money so when they are in there they are sending it to their wife, to their children. They also have the potential for an element of restitution. There is also putting the money aside so when they get out you are not, and I know a prisoner that got out, you guys let him out, Saturday night, Anacostia, ten o'clock at night, with I forget how much he had in his pocket. And this was about a year and a half ago. Man, no chance. Back to the old neighborhood, back to Barry Farms, it is over. It is, I mean, that guy is coming back. Guaranteed, you put money on it, you would almost win.

So unless you go and deal with that, and so you have got to stand up to the Congress. You have got to stand up to the administration. If there is no work the program will fundamentally fail, and these people are going to come out, and they are going to be violent, and they are going to do very, very bad things. Because you are not even telling the committee how many people go to prison, federal and state and local, and join gangs. How many go in, not part of MS–13, and join gangs? Three a year? Or many, many a year? Is gang——

GANGS IN PRISON

Mr. LAPPIN. Gang participation is up significantly in the Bureau of Prisons.

Mr. WOLF. No, I know, but they have nothing, you know——

Mr. LAPPIN. I am not sure it is because they come to prison and then join a gang. I think many of them are coming from the streets already in the gangs. But Mr. Chairman, you and I agree wholeheartedly on this issue.

Mr. WOLF. But I know you do, and that is why——

Mr. LAPPIN. One hundred percent. So do not let my comments——

FEDERAL PRISON INDUSTRIES

Mr. WOLF. Well I may offer an amendment to this and have this out on the floor. I mean we are not the authorizing committee, we are the Appropriations Committee. And frankly, I have not seen a change as I have watched this thing over the last ten years. The only change that I have seen has been for the worse and not for the better.

Mr. LAPPIN. You and I agree on this. I am just cautioning you that there will be another side to this story from those that do not agree with you and me on the inherent value of work.

Mr. WOLF. But there is not really another side to it, there really is not. Because we are not talking about furniture.

Mr. LAPPIN. You are preaching to the choir.

Mr. WOLF. We are talking about things that are no longer made in the United States. And then you are creating a job for the truck driver who has to drop the equipment off. And if they are using wire you are creating a job for an American company that is manufacturing the wire. If they use a piece of, a lathe or something, you are creating a job for that. So you are actually creating jobs. You are not in competition.

Mr. LAPPIN. I could not agree with you more.

Mr. WOLF. Yes. Mr. Austria.

THE INCREASING INMATE POPULATION

Mr. AUSTRIA. Thank you, Mr. Chairman. And thank you, Director Lappin, for your service, for being here today. I know, I agree with Mr. Schiff that you have a very difficult job. Let me just begin by saying that, you know, I too would like to see some more specifics on how you are going to meet the demands of adequate staffing, bed space, with the increasing inmate population. Especially the demands that are within the budget——

Mr. LAPPIN. Right.

Mr. AUSTRIA [continuing]. The 2012 budget, and I would like to see those specifics as well. One of the areas I know, when I served in the state legislature I chaired the Judiciary Committee. And there was always a debate, an argument, about mandatory sentencing versus discretionary sentencing, especially with violent criminals. And you mentioned that 60 percent of your population is violent criminals, which certainly brings uncertainty I know to the prison system when you may have one judge sentence a sex offender for seven years, another judge sentence another individual who committed the exact same crime for twenty years. But if I heard you correctly the average stay is now nine years, is that correct? Okay. And your population growth has grown from 30,000 some years ago to now 210,000? How many of those inmates are repeat offenders that go back into the system?

Mr. LAPPIN. Well again, our recidivism is about 40 percent, about four out of ten coming back.

Mr. AUSTRIA. Is about forty?

Mr. LAPPIN. I have to give you an idea here recently on another point, the supervised released violators, as kind of an indication. You know how many people are out there under supervised release that are returning to prison?

Mr. AUSTRIA. Right.

Mr. LAPPIN. In 2009, 13 percent of the new admissions were supervised release violators, and in 2010 12.7 percent. So those are folks that are out on supervision and have violated. May not have committed a new crime, but those are the ones returning off of supervised release. But then again, with recidivism of about 40 percent, we are seeing about four out of ten returning to prison probably under a new conviction.

Mr. AUSTRIA. Under a new conviction?

Mr. LAPPIN. Probably. Wouldn't you say, Tom?

BOP STAFF. Yes.

Mr. LAPPIN. Yes.

Mr. AUSTRIA. Okay. And now you have gotten this increase in inmate population. You are trying to deal with this.

Mr. LAPPIN. Yes.

PRIVATELY OPERATED PRISONS

Mr. AUSTRIA. And looking at your testimony, you have 116 facilities that house approximately 171,000 inmates, which the total capacity is 127,000. Eighteen percent are now going to contract care or to privately operated prisons. And I know with many of the states are going through very, very difficult budgets. And you and I just talked a little bit about Ohio, and I know you knew the former director in Ohio. You know, what is your opinion as far as, and let me ask you as far as the cost. You have got 18 percent that are going to privately operated prisons. What is the cost factor of doing that? And what is the, you know, rationale behind many of the states looking at that?

Mr. LAPPIN. We see minimal savings. It is a little different in our system versus the state systems, because we have identified a particular group of inmates who will be in private correctional facilities. So the vast majority of the 27,000 that are in those private contract facilities are non-U.S. citizens. So they are, virtually all of them, are non-U.S. citizens and virtually all of them are going to be deported. So what we buy from them is a little different than what we offer in our own low security institutions. But even with that, even though we are offering more programming opportunities in our own prisons, the costs of incarceration are very close in, per day, per inmate. So we are within a few dollars of each other when you compare the inmates that are currently in the private contract facilities with inmates who are in our low security institutions. So, comparatively speaking we are about the same.

Mr. AUSTRIA. But are you comparing the same prisoners in both facilities here? I mean——

Mr. LAPPIN. Well, we cannot as easily because our facilities have a combination of U.S. citizens and non-U.S. citizens. Okay? So in our institutions——

Mr. AUSTRIA. Sure.

Mr. LAPPIN [continuing]. We do not have institutions that are all non-U.S. citizens. So you are right. It is not an equal comparison. And we offer more and provide more program opportunities at our own institutions than are required in the private contract facilities, so it is not an apples to apples comparison. The cost per day, though, is pretty close to the same.

CONTINUING RESOLUTION PROBLEMS

Mr. AUSTRIA. Let me ask you as far as your operating expenses right now dealing with these CRs, and we have another CR that will expire on Friday. Can you just describe maybe the strain, a gap in funding, you know, that it might be having on the prison system today and how you are dealing with that?

Mr. LAPPIN. We are dealing with that by constraining costs in every area we can. We are not hiring anybody. So we are in a hiring freeze with a few exceptions at some locations where there is significant turnover. We could not function unless we hired people, because in some more urban locations we have higher turnover than in some of the rural locations.

But there is a hiring freeze. We have limited that and we have limited travel. We have tried to manage our costs as closely as we can. We will not get through this fiscal year at the 2010 level. We cannot get through this fiscal year at the 2010 level given the fact we have more inmates, we have more prisons, and we have more staff than we did last year.

Mr. AUSTRIA. What does that do to your future budgets, when you move into 2012 and you move forward?

Mr. LAPPIN. It is a challenge, without a doubt. We have got to plan well. We have got to look at how we can gain efficiencies, which we have done over the years. But as you know, the longer the CR goes on, the harder and harder it is to gain efficiencies. And there is only so far you can go. On medical, what we are trying to do on medical, is just keep it from going up faster than it has. Because it is the most expensive thing we do other than watching inmates. The most expensive thing we provide to inmates other than watching them is medical care. Those expenses continue to go up. Utility expenses continue to go up. So we get a gas bill and an electric bill every month, just like everybody else does. They are getting bigger. And we are trying to absorb that increase. To be honest with you, it has to come out of salaries.

When our operating budget is about 74 percent salary driven, and about 26 percent operations driven, you can only squeeze so much out of the operations side. Food, medical, utilities, those types of things. So we have to offset that increase in cost on the operations side by hiring fewer people. And that is how we have, over the years, whittled down to only filling about 90 percent of our positions. A few years ago we were only filling about 86 percent. We corrected that. We reorganized. We gained efficiencies. We are now hired up to about 90 percent. But the bottom line is most of what we save has to come from salaries given the fact that the majority of our budget is salary driven.

Mr. AUSTRIA. And again that, going back to my original request, is, you know, I too want to see specific plans on how you are going to be able to provide this considering the budgets that you are faced——

Mr. LAPPIN. Right.

THOMSON, IL FACILITY

Mr. AUSTRIA [continuing]. That we are going into a deeper and deeper hole it seems like. But one last question, and I brought this up when the Attorney General was in, about the Thomson facility. And, you know, the request from the U.S. Bureau of Prisons includes funding for 896 positions for activation of the Thomson facility in Illinois. The only problem is that the federal government does not own the facility. And I understand there was funding in the 2011 budget that requests the purchase of the facility, but as you know we are, and we just talked about, we are operating under a CR that it is highly unlikely that there will be, the case for the remainder of the fiscal year 2011. Can you tell this committee why the Thomson facility is needed? And how does the U.S. Bureau of Prisons plan on moving forward with the Thomson facility while operating under a CR? And what additional costs will the taxpayers incur if the purchase of the Thomson facility is delayed?

Mr. LAPPIN. That is a great question. I appreciate you asking that. Before I do, let me go back and tell you one thing we are doing to curb costs. We are not activating two prisons that we own currently. So we have a facility in Mendota, California and a facility in Berlin, New Hampshire that are partially activated. We have hired some people. But we have stopped the activation. So we are going to save millions of dollars by not continuing activation. On the other hand, we cannot add those beds either. So there is a negative consequence. So that is an example of some of the things we are doing.

Thomson, you know, here is the core issue here. I mentioned earlier about seven out of the ten of the inmates tend to cooperate. It is the three out of ten that we are dealing with needing Thomson. It is the three out of ten that do not comply that are, or a portion of that, it is not all of them. That are combative, that are violent even in prison, that carry weapons. And tragically, after eighty years, mostly in the last three years, we have seen this surge in the number of inmates coming into the federal system who are acting in that manner.

So, consequently two years ago, we realized, we saw it evolving in our penitentiaries because we saw more assaultive behavior. We had an increase in the number of assaults on staff and inmates. When inmates got into trouble and staff arrived, there were other inmates coming to the rescue, like they are going to break them out of trouble, you know? So the whole gang mentality. We began about two years ago removing this group of inmates and today we have removed 1,800 inmates from our general population facilities and created Special Management Units, SMU, to house and manage those inmates in more controlled, more restrictive conditions. Not as restrictive as ADX Florence, if you have been to ADX, if you have heard of it, it's much more restrictive. So it is a step between a high security institution and ADX. But the bottom line is they are controlled wherever they move. It is very restrictive. They do not, in the initial phases of this program, they do not rec together, they do not eat together. And they have to show progress in behaving through the other phases to get to the point that they can begin to do those types of activities successfully, and then work their way back out to a general institution.

So we have had to take offline general population bed space. We have taken the entire facility in Lewisburg, Pennsylvania, which was an open general population facility and created a Special Management Unit, and we have taken four small units within other existing facilities to create the 1,800 beds.

We are not there yet, and we are not there yet because whenever I look at the weekly report I continue to see inmates acting out, not as often as they were before, but continuing to act out in that manner. We must have more of this SMU type of bed space. Not only this type of bed space, we need more ADX bed space.

In 1995 we opened ADX Florence, which is our most restrictive, controlled housing in the Bureau of Prisons. There are about 430, 440 cells there. At the time, we had 95,000 inmates, and it served us well for a number of years. Today we have 210,000 inmates, we have got the identification of these difficult inmates, so we need

space for this small group, the difficult group, not a large group, but we need space. Thomson would do that.

I am going to tell you, it is going to happen one way or the other. If we do not get Thomson, we have no choice but to go take another general population facility off line, retrofit it for those SMU types of inmates—although it's expensive—and manage it in that fashion. A consequence of that will be that we are going to displace more inmates than we are going to create space for. So consequently we are going to overcrowd even more. But as I said before, you cannot run safe prisons with inmates like this running amok, they have to be removed and they have to be managed.

We either get Thomson and we fulfill that need, or we take another prison somewhere else, convert it to this operation, and in doing so we solve that problem, but we further exacerbate the crowding problem in our other general population facilities.

It is expensive, folks. Fortunately there are not a lot of them. I think we need about 2,500 beds, maybe 3,000 between SMU, Special Management Units, and ADX Housing, because we have 1,800 of them now. I was just up at Lewisburg a few weeks ago. Granted we have some inmates successfully transitioning through that, but there are 160 inmates sitting up there that cannot get it. They have been there for a year and a half. They are still in phase one or phase two. They need to be going over to the ADX, they need to go through a more structured, more controlled, more difficult environment. This problem exists; we have got to solve it.

Mr. AUSTRIA. And it is a problem and we got to fix it. We have an overcrowding problem.

Let me ask you one last question. I know I said that before, Mr. Chairman, if I can.

Is there any plan in place or are you aware of any plan in place by the Department of Justice to allow Guantanamo Bay detainees to be detained at the Thomson facility?

Mr. LAPPIN. Our plan is to run the entire facility, the entire facility, all 1,600 cells within the Bureau of Prisons.

Right now I have been told the entire facility would be ours. Our activation plan is to open and operate the entire 1,600 cells as Bureau of Prisons beds.

Mr. AUSTRIA. With no plans to have any detainees at Gitmo being housed?

Mr. LAPPIN. Not right now, no. Was there a plan? There certainly was, but that is not the case now. I have been told the entire facility would be a federal prison used for federal inmates and we are planning accordingly. I need every one of those cells.

Mr. AUSTRIA. Thank you, Director, thank you Mr. Chairman.

Mr. WOLF. But you have not told the full story, because the confidence level in the Attorney General and in the Bureau of Prisons and the Administration on this issue is not very high, because they were going to go there. You know, the reality is they were going to go there. You said not right now. Let the record show that when people research this hearing record they will say you felt, your conscience, you are a good man, felt you had to say "not right now." Not right now, but next week.

But the Attorney General of the United States was coming up here and testifying, we were raising the issue of people from Guan-

tanamo Bay who were picked up and had been picked up in an Al Qaeda run training camp in Tora Bora, and you know where they were going to release them? You remember where they were going to release them? They were going to get out of Guantanamo Bay and they were going to live in northern Virginia, and the Justice Department denied, called me up and said, Mr. Wolf, "when the Attorney General comes up please do not raise this question," and my sense was that they meant that we are going to resolve this issue and everything else and all of a sudden on a Friday afternoon I am traveling through my district and I get a call, and a person tipped me off that they are going to release these guys in northern Virginia. They had actually rented an apartment for them.

So here they were they were going to release people picked up in Tora Bora who had gone through an Al Qaeda run training camp, they were going to go to Route 7 in Falls Church near Bailey's Crossroads.

So let the record show he said, "not as of now." There is no confidence in this Administration that you will keep your word. Frankly, I do not believe them. I do not think this Congress is ready. I think you ought to start rehabbing the other places now, because I do not plan on it because I do not trust it. I want to trust everybody, but I have been seeing it. We cannot even get an answer back.

This Justice Department, we saw a report on Freedom of Information Act, some groups, very liberal groups get a response back in one day and two days and three days, I get a response back in five months from Freedom of Information Act and some I do not even get a response back.

Frankly, if we want to save money we can wipe out the congressional relations from this administration at the Justice Department and give you all the money, because they never answer letters.

So they were going to move them to Thomson, and it is integrity, it is trust. It is not only what you say, it is what you do, and what they have done is not trustworthy, it is not honest. And so for me to appropriate Thomson—I believe you. I mean, I think you are a good person, but I do not trust them and I think that, you know, an election will be held in 2012 and all of a sudden they will be booking them out, and they were going to send Khalid Sheikh Mohammed to New York City. They were even looking at Alexandria. Moussaoui was in Alexandria you know for almost what four years? The trial went on—so from an integrity trust form there may be some up here, but I certainly do not have it with regard to this administration on the issue of Guantanamo Bay, and to even think that they would take someone who had served in Guantanamo Bay, and I do not know who had been picked up in training camp in Tora Bora or run by Al Qaeda, but they were going to be released in northern Virginia.

So boy, Thomson, I do not think unless, you know, something happens up here that I do not know about, I think for the next two years I just could not. And if money got put in somewhere I would get down on the floor day in and day out.

I mean, I want to see the Bureau of Prisons do the right thing, but not to bring people from Guantanamo Bay to the United States. Thirty people died in the attack on the Pentagon that were

from my congressional district. The first person killed in Afghanistan was a constituent of mine, a CIA officer, Michael Spann, so.

Mr. LAPPIN. I know this is a really emotional issue for everyone.

Mr. WOLF. Well, it is an emotional issue because——

Mr. LAPPIN. Yes, but as you all know I am not part of that discussion.

Mr. WOLF. Oh, I know you are not part of it, but I think you are an honest man, because you felt you had to say—because of your integrity—"not right now."

Mr. LAPPIN. But I think the reality is it is illegal for them to bring them in. I am not going to get into this discussion.

Mr. WOLF. Well, because the Congress has acted, but Congress can change back and forth and so I do not think the Bureau of Prison ought to get so wrapped up into Thomson, because I think what we ought to get wrapped up in is work, is job rehabilitation, early release, things that really make the Bureau of Prisons a go.

GOOD CONDUCT TIME LEGISLATIVE PROPOSAL

Now I looked and checked last week. Your legislative package is up here, is anyone cosponsoring it? Do you have a cosponsor yet?

Mr. LAPPIN. I am not sure.

Mr. WOLF. Well, can you call us——

Mr. LAPPIN. Yes.

Mr. WOLF [continuing]. When you have a Republican on the Committee on it and a Democrat on the Committee and the same way in the House and the Senate? Just give the committee staff a call and say we just got a person that is behind this and they will put it in, because I think we have got to begin to move this so we can get back to the issue of really dealing with the overcrowding.

ELDERLY OFFENDER PILOT PROGRAM

Now the Second Chance Act authorized a pilot program within BOP to determine the effectiveness of allowing certain elderly nonviolent offenders to serve the remainder of their sentence in home detention. Has this program been implemented, and if so has it been evaluated?

Mr. LAPPIN. It has been implemented.

Mr. WOLF. And how many?

Mr. LAPPIN. The conditions for qualifying were so restrictive believe it or not, out of 210,000 inmates we had 500 apply, 75 inmates qualified, only 75 inmates qualified.

Mr. WOLF. And what has been the result?

Mr. LAPPIN. And 70 have been released of those 75.

Mr. WOLF. And of the 70 that have been released have any returned?

Mr. LAPPIN. Not that I am aware of. Again, personally I think we need to reconsider this, I think there is potential here.

Mr. WOLF. Well, why don't you?

Mr. LAPPIN. I think it is part of the discussion we are having on the whole issue of how we offset the growth.

On the other hand, sir, let me tell you, we are not going to let people go that cannot manage and that is part of the problem.

Mr. WOLF. I know you are not.

Mr. LAPPIN. Some people were not approved because they did not have the wherewithal in the community. They did not have a family that could support their health condition, or they did not have the resources. We are not going to dump that type of person on the community. So it was only those 70 that had the wherewithal to do it.

I think the qualifying criteria needs to be re-evaluated, we are doing some of that now, we will probably make some recommendations once we have further review of that.

Mr. WOLF. And you have the authority to do that on your own?

Mr. LAPPIN. No, I think we would have to have some help. I think it is in the statute what the criteria are, and I think the biggest dilemma is that you had to serve 75 percent of your sentence or 10 years, whichever was less—whichever was greater, I am sorry. You either had to serve a minimum of 10 years or 75 percent of your sentence and be over a certain age.

Mr. WOLF. What is the age?

Mr. LAPPIN. What is that?

Mr. WOLF. What is the age?

Mr. LAPPIN. Sixty-five. There is not a whole lot of people that fall into that category, because a lot of these older folks come into our custody, did not get a long enough sentence or just have not been in custody to meet those criteria.

Mr. WOLF. So are you looking at a legislative change?

Mr. LAPPIN. We are looking at some of those options.

Mr. WOLF. And that will be sent up before the Judiciary Committee?

Mr. LAPPIN. I do not know. We were really focused on the good time first. We wanted to give this a little more time to play out because this has only been in effect for a little less than a year or so.

Mr. WOLF. But you are of the opinion that these people are nonviolent.

Mr. LAPPIN. Yes, they meet all the other criteria. And to be honest with you, sir, they are very expensive people to incarcerate.

Mr. WOLF. Because of their health care and everything else?

Mr. LAPPIN. Correct. And if there are ways to appropriately do it in the community we would be in favor of letting them go a little earlier.

Mr. WOLF. Well, I urge you to tell the Department to send that up as an amendment to the bill that came up that no one has yet introduced.

Mr. LAPPIN. We are working on it.

BOP FURLOUGH PROGRAM

Mr. WOLF. In the Inspector General's audit of the Bureau of Prisons furlough program, one unresolved issue was a need for the BOP to have a more effective means to coordinate with the union on policy changes. According to the audit, BOP's collective bargaining agreement expired nine years ago. Is that true?

Mr. LAPPIN. Well, the agreement expired nine years ago, but there is a clause in that agreement that keeps it in effect until a new agreement is approved and ratified.

So we are still under the old agreement. We still have an agreement.

Mr. WOLF. Okay. Still awaiting implementation there is a policy that would assure the victims of crime are notified when an offender is approved for a medical furlough. This notification has waited seven years for implementation? Must it wait until a new agreement is finalized?

Mr. LAPPIN. Yes, the furlough policy was being renegotiated, it was on the list for seven years, it was finished in October and November, it has now been implemented.

Mr. WOLF. But isn't that a no-brainer? I mean if you are going to release an offender should you not just tell the victim? I mean——

Mr. LAPPIN. There was another program statement that was not recognized in the report on victim witnesses that required that, so victims were still being notified even though the furlough policy was not in place.

So there is another program statement that covered this issue that required staff to notify victims, and victims were being notified.

Mr. WOLF. They were, okay.

Mr. LAPPIN. Yes. Just in all fairness, to get it all on the table, there are times when they are not notified if it is an emergency situation. So, if someone is having a heart attack we do not wait to call the victim, we are heading for the hospital.

And so reality is these really short-term releases, and typically most of those are escorted, so most of them are notified, you know. Especially if they are on a furlough medical trip, so we are going to put the person on furlough and send them down to the hospital. Those are done in advance. So that was continuing to occur even though that program statement had not been negotiated and in place because there was another program statement that required it.

GANGS IN PRISON

Mr. WOLF. Could you tell us about prison gangs? An update on trends and gang growth and discuss what you are doing to disrupt gang recruitment?

Mr. LAPPIN. As I indicated earlier, we are seeing an increase in the number of gang and security threat group members in our prisons. We are probably up, I would say, between 35,000 and 40,000 known participants. So we have seen an increase.

Mr. WOLF. Thirty-five to 40,000 out of a population of?

Mr. LAPPIN. Two hundred and ten thousand. Now those are the ones that we are aware of.

Mr. WOLF. What would that number have been 30 years ago?

Mr. LAPPIN. Thirty years ago, a few hundred. I mean 30 years ago we only had 26,000 inmates. My guess is we had probably an almost smaller percentage. I am not sure exactly. We could go back and probably get that number for you. But certainly it's a growing concern, especially the gangs and security threat groups coming from other countries—non-U.S. citizens. Who have a whole different outlook on what prison life should be—and it has created some problems for us.

[The information follows:]

PERCENT OF BOP INMATE POPULATION IN GANGS 30 YEARS AGO

In 1994 (the earliest date for which data is available), 2,483 inmates or 3 percent of the BOP population was identified as affiliated with a security threat group (identified as part of a disruptive group which includes gangs). In February 2011, there were 15,661 inmates or 6.77 percent affiliated with a security threat group.

Mr. WOLF. Are they merged with the general population?

Mr. LAPPIN. It varies from group to group. Even Hispanic groups who will not associate because one group is from Mexico and other groups are U.S. citizens from the United States. Some of those will not merge, they will not get along, and so it is complicated.

I can tell you right now that many, many of the inmates in the Special Management Units and many of the inmates at Florence are gang members or security threat group members, and one reason why we need to expand that space is because more of these people are coming into our system and are being troublesome.

THOMSON ILLINOIS FACILITY

And so that's one reason why I am disappointed to hear your issue on Thomson. On the other hand, we will have to create this space somewhere. This again would be——

Mr. WOLF. Well, you are not surprised on the Thomson.

Mr. LAPPIN. No, I am not surprised. On the other hand I——

Mr. WOLF. And was Thomson at one time by the administration considered to be a place for Guantanamo Bay detainees?

Mr. LAPPIN. Obviously that is how it was introduced. That has changed, but I will not go back into that. But the bottom line is that we need to find space for these folks that we can use when they act out, when they misbehave, when they are threatening, when they are orchestrating inappropriate behavior in institutions. We need to be able to remove them and handle them accordingly.

Mr. WOLF. Is there a decision being made at the department that you are waiting to see whether the Congress acts on Thomson?

Mr. LAPPIN. I really do not know at this time. I mean, I am waiting to see what the Congress——

Mr. WOLF. I doubt very much that Congress will act.

Mr. LAPPIN. I understand.

Mr. WOLF. So if you have that sort of indication it may be good to just begin to——

Mr. LAPPIN. We will certainly do that, once we are clear that it is not going to happen.

Mr. WOLF. Well, I think you know, I mean my sense is it probably is not.

PRISON RADICALIZATION

On the issue of domestic radicalization. The full extent of the problem of prison radicalization is now known but is a concern as a scholar named James Brandon. Do you know who James Brandon is?

Mr. LAPPIN. No, I do not.

Mr. WOLF. Does anyone in the audience know? He points out that prisons bring together disaffected people who may be receptive to anti-social messages.

A few years ago the Bureau established a counter-terrorism unit that among other activities monitors communications of high-risk inmates.

Can you bring the committee up to date on the continuing operation and results from this unit and from the Bureau's efforts?

Mr. LAPPIN. Yes, I can, and I do not know Mr. Brandon, but I certainly agree that prisons are a place where radicalization can occur at all levels, whether it is for religious or other reasons.

So the potential is always there, and the creation of the counter-terrorism unit was to assist us in precluding that from happening. Not only the counter-terrorism unit, but the operations and the procedures we put in our prisons to one, make our staff aware of those who are potential radicalizers; a classification system to remove those who have a greater risk and house them in more restrictive controlled conditions, which is occurring. But specifically the counter-terrorism unit has been hugely beneficial in helping us monitor the communications of inmates in general, not just those associated with terrorist activities.

So today that group is monitoring in excess of 3,000 inmates, both phones, visits, and mail. A huge cost on translation services. We are spending about $16 million a year just at the counter-terrorism unit on the management of mail, phones, visits, and other coordinated activities with the institutions.

So it is a valuable resource to help us to do a better job of monitoring communication. But day in and day out it is the work of the staff in the prisons who are monitoring the inmates who have tendencies to radicalize other inmates to these types of philosophies, or gang orientation, or acting out in other ways and to put a stop to that. To either discipline them or remove them if necessary to preclude that type of radicalization from occurring. And so it is a daily responsibility throughout every prison that we operate, but certain the counter-terrorism unit has helped us focus on the more risky inmates, those who have greater risk, those who have violated institution rules, those who have broken laws by circumventing these procedures, such that we have far more control than we did a few years ago.

PREVENTING COMMUNICATIONS WITH TERRORISTS

Mr. WOLF. Now can you bring the committee up to date? I vaguely recall there was a communication between prison population with the terrorists in Spain. Can you educate us?

Mr. LAPPIN. Sure. In the aftermath of that, and you and I met and we talked about it quite directly, we soon thereafter, initiated the counter-terrorism unit, which is a piece of that. We also activated two communication management units. And so our classification system breaks down these more risky offenders into the highest risk, and those with the highest risk, most of them are housed at ADX Florence in very controlled structured environments, not much access not only to outside communication, that is—they can communicate externally, but it is only through controlled means. They do not have a lot of access to other inmates.

We created communication management units for inmates who are not as risky as that, and really did not require that level of supervision, that level of control. I took a housing unit within a pris-

on, it is a self-contained unit and those that are in the mid-range, not as risky as the high-risk folks, certainly more risky than the low-risk inmates, are housed there and they can be out of their cells during the day. They can participate in education, vocational, religious programs, but we can control their communications. We schedule when they use the phone, we determine whether or not there will be somebody listening on the phone when they use the phone, we schedule their visits, we monitor their visits, we manage their mail.

So it is controlled, but they are not physically restrained to the degree that they are at ADX, so it is much more conducive to a more normal operation. And so that has allowed us the ability to—and again, these units do not house just terrorists, you have got people in there who are sex offenders who try to reach out to their victims, you have people in there who have threatened judges and congressmen and other government officials. We need to be able to manage—and they do it through the mail or over the phone.

So you have got a combination of people. We have room for about 100 at those two housing units, and I think we are up around 80. We have the other high-risk folks at ADX Florence.

So those are some of the procedures we have put in place to better control communication and manage this difficult group of offenders.

PROPOSED CHEF ACT

Mr. WOLF. Okay. Congresswoman Richardson testified last week, and I said I would ask the question, regarding the testimony of Congresswoman Laura Richardson last Friday. She said she introduced the bill, H.R. 5984, called the CHEF Act. CHEF stands for Cooking Helps Elevate Futures Act. The inspiration for the legislation she said is Chef Jeff Henderson, who developed a passion for cooking while participating in a work program at Terminal Island Federal Prison in L.A. The Bill would establish a pilot program that provides inmates with opportunities to learn certified culinary skills during the normal cafeteria process and would include a study of the program success rate and job placement and recidivism.

The question she wanted us to ask was to what extent are BOP vocational re-entry programs focused on teaching food service skills and how could a program be enhanced by the addition of a certified culinary instruction and training?

Mr. LAPPIN. I think it is a great idea. I will get the exact number. I think we have probably got seven or eight culinary arts vocational training programs, and we have hired instructors. They learn everything from not only how to cook, but how to cost out a meal, how to serve a meal, you know, all the nuts and bolts associated with running a restaurant or working in a restaurant.

[The information follows:]

NUMBER OF BOP CULINARY ARTS VOCATIONAL PROGRAMS

While every BOP institution has a food service operation/cafeteria, almost half of our 116 facilities offer formal culinary arts and/or food service preparation occupational training and/or apprenticeship programs. Programs can range from a 90-hour certificate program in food handling to a two-year degree program designed to prepare students to work as professional chefs. Local resources and proximity to voca-

tional schools or schools of higher education are important factors in determining course offerings.

Congresswoman Laura Richardson's "CHEF Act" or H.R. 5984 would establish a pilot program that provides inmates with an opportunity to learn certified culinary skills during the normal cafeteria process, and would include a study of the program's success rate in job placement and recidivism prevention. A funded program, focused on food service skills and affording inmates an opportunity to receive industry and employer recognized certificates, could greatly enhance or expand the BOP's inmate training and reentry efforts. If combined with a job placement component and supported by research geared to measure employment and recidivism outcomes, the program could also serve to highlight the value and need for correctional education. However, if additional funds were not appropriated to support H.R. 5984, the BOP would not be able to fund the pilot program with existing resources.

So look forward to looking at that legislation. It is news to me, but——

Mr. WOLF. We will give it to you, and then if you could be in touch with her office.

Mr. LAPPIN. We can do that.

Mr. WOLF. Mr. Austria, do you have any questions?

GANG ACTIVITY

Mr. AUSTRIA. Mr. Chairman, I think you have hit on areas that I was going to question as far as gang activity, and also going into the terrorist side, just to put this to rest.

You mentioned that a lot of the gang activity—these are individuals that come in from gangs to the prison system. How much of that is gang related that comes in, and how much in your opinion is being operated or is gang activity in the prisons being operated out of the prisons, and what are you doing to interfere with that and stop that?

Mr. LAPPIN. These questions are supposed to get easier as we go through this, sir. As a fellow Ohioan I thought you may take a little break on it. But any way, I do not know that I have the percentage of inmates coming into the system who are—I think we might be able to determine that, we will check, versus how many get involved in gangs once they arrive. We will see if we can get that information.

[The information follows:]

NUMBER OF OFFENDERS WHO ARE GANG MEMBERS INSIDE THE PRISON VS. OUTSIDE OF PRISON

In February 2011, there were 15,661 inmates in BOP custody (6.77%) affiliated with a security threat group (identified as part of a disruptive group which includes gangs). The BOP does not have statistics on the number of inmates who were gang members prior to their incarceration.

Our numbers are growing. Certainly as I referenced, a concern of ours are the gangs coming, especially out of Mexico, that are being troublesome. Because what we have learned, and we have learned it the hard way, because we were housing people from different states of Mexico in the same prisons, and once we began to develop a relationship with the Mexican Corrections Department we learned the difficulties of trying to house these people together.

So now not only are we looking at where inmates from the United States are from and the concerns associated with where they are from, we are now looking at where citizens from Mexico—what states they are from in Mexico and determining the likelihood

of our ability to house them in the same institution. So it is very complicated.

What we continue to do is one, we try to identify them. The other problem with some of the Hispanic gangs out of Mexico is they do not identify, they are not very well organized. So you may know who the leadership is, you may think you have got 50, but on a day something kicks off you may have 200, because the others are loosely connected, who all at once become associated, once there is a problem in a prison between a Hispanic group and another rival group.

So it is—we have added more intelligence staff not only in our institutions, but we have staff on the National Joint Terrorism Task Force. We have enhanced resources at the National Gang Intelligence Unit in Sacramento which serves the federal system and states to begin identifying and tracking these offenders. A lot of phone monitoring, a lot of mail.

So even though the Counter-Terrorism Unit has this responsibility for about 3,000, in our institutions the wardens and their staff have the authority to put restrictions on inmates' mail and correspondence locally. So if you go to an institution, based on who they have there, the warden has probably imposed other restrictions on inmate's mail and correspondence and visits such that they can manage it locally rather than nationally.

So that is probably occurring in a vast majority of the institutions that house gang members, that they have got another group that they are managing locally with phone communication. So we have the ability to listen in. When they make a phone call, it says right on the phone, this phone call can be monitored. And so there are some inmates where the warden will say, you know what, I want to listen to every one of his phone calls, and he has staff sitting there monitoring phones.

When that person picks up the phone and goes to make a call, a light goes on that tells them this guy is on the phone. They will drop everything else they are doing to listen to that phone call. All of their mail will be monitored.

It is not perfect because they can circumvent some of those procedures, and when we catch them circumventing those procedures that is when we move them to the CMU or the ADX.

Mr. AUSTRIA. Do you monitor visits as well?

Mr. LAPPIN. We can monitor visits. We can when there is a need to do that, and sometimes we will—we do not do it a lot, but we will have non-contact visiting so we can monitor those, so we do a lot of that.

Mr. AUSTRIA. Okay. Thank you, Director, thank you, Mr. Chairman.

Mr. WOLF. Thank you. Mr. Schiff.

Mr. SCHIFF. Thank you, Mr. Chairman.

SUPERVISED RELEASE PROGRAM

Director, the supervised release program, is that run through BOP?

Mr. LAPPIN. It is not, it is run by the United States Probation Service. So once they leave prison that responsibility transitions to the judicial branch with the United States Probation. Now we have

a great relationship with them. In fact, if you do not mind, some of the skills I mentioned in our creation of that we had U.S. probation staff on our committee because they had a lot of insight into, hey, when these guys come out of prisons here is what we see they struggle with. So we have a great relationship with them. We meet with them routinely, and they come into our prisons frequently.

Mr. SCHIFF. The reason I ask is I have been involved in trying to expand the Project Hope effort out of Hawaii, and I was interested to see whether that model could be used by the federal authorities, and I will follow up with the other agency on that.

Mr. LAPPIN. We would be happy to join you when you meet with them and assist any way we can.

SOLITARY CONFINEMENT

Mr. SCHIFF. Thank you. One of my staff brought to my attention a *New Yorker* article about the impact of solitary confinement in terms of the psychological impacts on rehabilitation, and you know, I realize there are cross-cutting interests here, one in having some kind of a method of punishment in the institution in which you cannot deprive someone of liberty because they have already been deprived of that, on the other hand, at least according to this article, there was some kind of demonstrable impacts in terms of recidivism, and I do not know if that is because it is the type of person that gets into trouble in prison, is going to be more likely to recidivate anyway, or whether there is an added impact of the solitary, but can you talk a little about your policy in terms of prolonged solitary?

Mr. LAPPIN. We want to use it as little as we can. That is why sometimes you have to use it more than you would like to create a safer environment for those inmates who are willing to cooperate and live by the rules. So we monitor closely how long people are in special housing, you know, housed alone. And I will be honest with you, if you go to the majority of our special housing units throughout the Bureau of Prisons, they are not housed alone. We do not have the luxury. They are housed with another inmate or two, even though they are in trouble, and without a doubt some of them should be housed alone, we just do not have that luxury.

So the only locations you are going to find somebody totally alone every time you visit is ADX Florence, and that is what it has been reserved for, those inmates who given the nature of their conduct, their behavior, the situation, we have no other choice than to do that, but we do—that does not mean there is no interaction. Our staff routinely visit and they have programming in their cells through closed-circuit television. They do come out of their cells to recreate, so that extreme level of isolation we try to use minimally and only for as long as is necessary, but I am not denying, there are some inmates who end up being in those conditions for five years and beyond.

USP MARION, ILLINOIS

Mr. SCHIFF. Back in my federal prosecutor days, I went out to Marion, Illinois to interview a potential witness, it was not a very successful visit, but is that prison one of the higher level security facilities, and how has that changed since?

Mr. LAPPIN. Marion at one time was our ADX. When we opened ADX Florence in '95 we transitioned that mission from Marion to ADX, so today Marion is a medium security institution, open population.

THOMSON ILLINOIS FACILITY

Mr. SCHIFF. Wow. And tell me a little bit more about the situation in terms of Thomson. You know, I take a different view than the chairman on the overarching issue, which I know you are not here to debate, but I think we need to have some kind of mechanism to detain people that we are going to prosecute in Article III court, and you know, we have a residual problem at Gitmo, but we are going to have a prospective problem with other people who are apprehended in the future who will not be sent to Gitmo and have to be sent somewhere.

So tell me what niche Thomson would fill now and what the capacity is elsewhere in the institution.

Mr. LAPPIN. The niche for Thomson really would be to help us with these disruptive inmates, not to say that if a terrorist, international terrorist convicted in federal court came into our custody he may end up housed at Thomson. Right now what is happening is, like I said, there are 450 beds at ADX Florence. Traditionally those beds were reserved for the most disruptive, the most difficult inmates in the federal prison system. Those that assaulted staff and inmates, those that tried to escape from even our most secure facilities. But over the last few years we have had to use some of those beds for other inmates, such as some of the international terrorists who are not acting that way, but given the conditions of their confinement, because the Attorney General in some cases imposed special administrative measures, we really do not have a choice but to house them at a location of that type.

So there is little contact with other inmates. There are total controls on phone, mail, all those other things. And in our opinion these are the more risky inmates for potentially radicalizing other inmates or other persons.

So without a doubt our ADX bed space is compromised a little bit by the addition of this new function. There is another group, U.S. citizens, who are potential risks in a general population facility because of their skill set. Bomb makers, other folks who are smart enough to take what they can get at a general population institution and use it in a way that would be detrimental to safety and security in an institution like that. So you have got a little subset of those folks out there.

So we are using some of that space for purposes other than what is really intended, and that is why we would look at Thomson, given the design of that facility as being an immediate advantage for us adding that type of specialty space not only for ADX, but for Special Management Unit needs.

So that is why we were attracted to it from the very beginning because of its design, and it is not a general population facility. You could convert some of our general population facilities to an administrative/SMU design. Very difficult in my opinion to convert Thomson to a general population facility given the design of that institution. It was built to be more of a lock down institution. So

it marries up naturally with what the mission would be. And unfortunately ADX Florence is not large enough anymore to accommodate our needs, and we are going to have to find space.

Mr. SCHIFF. And what are the most difficult from a security point of view classifications of it? Can you tell us a little bit about the relative security risks for example of detaining someone who has murdered a prison guard in another facility compared to a Timothy McVeigh compared to a mid-level Gitmo detainee compared to someone apprehended in Europe plotting an attack in Seattle? Which of those pose the greatest problem as a prison authority?

Mr. LAPPIN. It is hard to make such broad generalizations because each of them come to us with unique characteristics and have to be evaluated on a case by case basis.

We have got 259 international terrorists currently in our custody. We have got 35,000 gang related offenders. And then we have got a lot of other little individual groups. And I tell you, and this is just my opinion, the ones that give me most pause are the more serious gang related members, you know, the more traditional gangs. In part because they have, as well as some of the drug cartel leaders we incarcerate given their wherewithal, the financial support that they have. But what concerns me most about the gang folks are that they are established in our communities, and they frequently visit our institutions. They are friends, related people. Those pose huge security concerns.

To be honest with you, we do not get very many visitors for international terrorists, and when we do they are closely monitored.

So those that are just walking in off the street that have ties to people who we know have traditionally been disruptive now, who are acting out now, and they disrupt that way in our prisons, give me pause when we are allowing them, as they have a right to do, to visit prisons, call inmates, they have networks within the community. Without a doubt illegal business could be taking place. I have to say it, but on occasion crime is occurring over the phones, through the mail, through visits. It could be anyone, but I suspect it on a larger scale from these more organized disruptive groups than we see from others.

DRUGS IN PRISONS

Mr. SCHIFF. How much, and I know this is tough to quantify, how much drug availability is there in a federal prison?

Mr. LAPPIN. It's available, and it's unfortunate that it is, but it is available. Let me give you some facts to kind of help put it in perspective. I'll have to get my glasses for this because the print is too small.

Mr. SCHIFF. You know, I just got these. I just turned 50 and I held off until now, but boy did my eyesight go south. The minute I turned 50, two things happened. My eyesight went to Hell, and I kept getting those darned AARP cards in the mail.

Mr. LAPPIN. Right, right.

Mr. SCHIFF. I don't know how much, you know, they spend on those mailings, because they go right into the bin, but——

Mr. LAPPIN. Wait a minute, maybe I can. The drug tests?

We do random tests and we do suspect tests, and my guess is we do in excess of 100,000 tests a year, and our rate of positive results is 0.5 percent.

So, I'm thankful for that. On the other hand, I'm telling you, it is available, and we need to do a better job. Now I'll tell you it's improved in the last ten years because we have limited what mail comes into prisons. No packages, fewer and fewer things that a family can send in. We've eliminated those things. So we've done a lot better job of controlling what comes into prisons. Tragically, with as good of an employee base that I have, very good employees, I've got a small group of employees who break the law and bring in drugs and alcohol and sell it to inmates. I hate to say it, but this is, you get it all when you get me. I mean, you're going to get the good and the bad, and it's unfortunate that it happens, but it does happen.

PRISON RAPE ELIMINATION ACT

Mr. SCHIFF. My last question is on something that the Chairman has raised today, but for many years and that's the prison rape problem. What's necessary to make a major impact on that, and what, what really has to happen?

Mr. LAPPIN. Well, let me begin by saying we want to eliminate all of it. I mean, our goal is zero incidence of this. It's a difficult goal, under any circumstances. I don't want to get into another debate with the Chairman because I know how he feels about this. I feel as though the Attorney General has really done a great job trying to balance this very, very difficult issue. But from the very beginning I told him I thought I believe there are three things, to sum it up really quickly. You need to have a policy, and there are many agencies that don't have a policy on what to do when you become aware of an assault of this type.

You need to make sure that everybody understands that policy. You've got to have training, for your staff, and you've got to have training for the inmates. And you've got to have a vehicle by which inmates can convey to someone who can do something about it when an incident occurs, or they become aware of it, and you've got to have some oversight. You've got to make sure that people are complying with what they said they're going to do in this policy.

That sounds simple? It's more complicated than that because it's, you know, we have a very thorough policy. I'm happy to share with you the policy that we have. Beyond that, it comes down to how well you run your prison, and believe you me, the more inmates we squeeze in there, and the fewer staff you have watching them, it impacts our ability to successfully overcome some of these doings.

Mr. SCHIFF. Is it a common problem that someone gets raped in prison, and they know that if they go to the prison authorities that what they'll get will be worse, if they're considered having ratted out the person that raped them?

Mr. LAPPIN. I'm sure that could be perceived, I hope it doesn't happen. I know that it's an issue that has to be dealt with. But again, I think that training and understanding is key.

Mr. SCHIFF. But I mean for every person that's raped in prison, how many more do you think are raped that will, that are too scared to ever report it?

Mr. LAPPIN. I can't, I don't know, and again, our numbers are, that we've reported in the last year are very small. Do I know that that's all the cases? I don't. My guess is there have been some unreported cases. I don't have an idea, I mean, it's not unlike in the broader community.

Mr. SCHIFF. Thank you, Mr. Chairman.

Mr. WOLF. Thank you, Mr. Schiff, and can you get a copy of that article? Yeah, we'll send you a copy and we'll send you a copy, too.

It's a pretty significant number, and I've had people tell me that they're reluctant. Obviously if you go forward, and the guard and the warden or whoever the supervisor for the shift, you have to basically charge them. There have even been reports, I think when Pat Nolan testified, and I know you know Pat Nolan, and I could have it wrong but I think he was saying that there was one time in a California prison that they were telling a person, "Listen, if you don't cooperate we're going to put you in here, and we almost know what is going to happen." So it is used as an intimidation factor, but then also when it happens, there's a great reluctance in certain cases to go forward, and some of the people who have been raped in prison have ended up with HIV/AIDS.

So I think Mr. Schiff has a, really a good question and we'll supply both of you with an article. What was that magazine?

Mr. SCHIFF. It was the *New York Review of Books.*

Mr. WOLF. The *New York Review of Books* just came out. We'll get a copy to both of you, and so, and it's less in the federal prisons than it is in——

Mr. LAPPIN. But I urge you to look at the research that now has been done by the Department of Justice, probably some of the best and most thorough research that's been ever done.

I don't believe everything I read in the papers, I'll be honest with you. I don't agree with all of these numbers that they're putting out there. Based on what I'm reading on the research that's been done most recently and continues to be done because of this Act, I urge you to take a look at those reports from the Department of Justice on this very issue. Not only are they surveying prisons, they're going in and talking to inmates. So I think you'll have to look at all of that material.

Mr. WOLF. The Department said, by their own Department figures—and most of the figures they have is because the prison rape bill passed—that 216,000 were raped. It wasn't that the Department initiated this because they are wonderful people and wanted to do something to get out ahead. It was because of the bill that Bobby Scott, Senator Kennedy, Senator Sessions and I had.

Mr. LAPPIN. No. That's why I think you've got to go back and look.

Mr. WOLF. Well, that they were sexually assaulted.

Mr. LAPPIN. That doesn't, well, okay, okay.

Mr. WOLF. I withdraw that. But if you're put in prison for robbery, that doesn't mean you all should have to go——

Mr. LAPPIN. I couldn't agree with you more. But I think you normally need to look at what is the clue in that 216,000.

Mr. WOLF. True, and let the record be corrected from that. But sexual assault in prison is not exactly a very positive thing to hap-

pen to someone, and so we can differentiate between the two, and there's some of these prisons, I mean, you know.

Mr. LAPPIN. I'm going to testify in two weeks at the Prison Rape Review Board. I look forward to doing that. I am fortunate that I am testifying on the positive side because we were one of the institutions selected that are doing a really good job. But this is an important issue, and it's not something that we can overlook. On the other hand, I think you need to look at all of the facts.

Mr. WOLF. Right. Let the record show that Mr. Lappin defended the Attorney General earlier in his comments.

Mr. LAPPIN. Several times.

Mr. WOLF. Several times. With vigor and enthusiasm had we been able to we could underline and put it in italics so that it would be clear, and we're going to end on this, but I think it is an important issue because you are a key player. I mean, you're sort of a quarterback for this issue. Congress affirms its duty to protect. We all know that. The much delayed notice of proposed rule making published in the *Federal Register* proposed a new standard, you all know that, in light of the fact that monitoring, monitoring and evaluation will be two keys to the success of the future standards.

The Department is considering three possible approaches for the system of audits. These include audits every three years, random audits, and an auditing system triggered by indications that a facility may be out of compliance. Which of these three approaches to audits do you believe will have the most beneficial affect?

Mr. LAPPIN. Again, it may be, you're talking about a prison rape issue?

Mr. WOLF. Right.

Mr. LAPPIN. It may be a combination of all three, sir. I mean, we audit ourselves every three years without question. But there are times when I, based on what I'm seeing, what indicators show me, I tell somebody, "I want you to go look at this program now." Whether it's been three years or not.

So, I think this is a critically important issue and I know the Attorney General realizes how important this aspect of this requirement is, and we're working together to figure out how best to move forward with that. But I know this is a very important issue, and it is a very important part of the follow-up that needs to be done. I'm not sure exactly where we're going to land, but certainly it may be a combination of all three of those to really provide the adequate oversight.

Mr. WOLF. Would it be good if we had the IG audit this?

Mr. LAPPIN. I don't know.

Mr. WOLF. Somehow though so you're not auditing yourself.

Mr. LAPPIN. Yes, I understand that. You know, right now there are, and I'm not saying that can't be done, but we are audited now by a number of auditing agencies who have contract people who do this. I don't think we should ignore that, that they've done it for a long time. They've done a really good job of it, and whether or not there could be some partnership there as to how to go about doing that and in doing so, maybe at less expense in the long term, because of the travel and other things associated with it.

Mr. WOLF. Sure. Direct staff supervision and video monitoring are two methods of achieving the same goal: reducing the oppor-

tunity for abuse to occur unseen. Is it possible to craft a formula that would set appropriate staffing levels with video monitoring standards for all federal prisons, or to what degree and under what circumstances is flexibility needed?

Mr. LAPPIN. I thought by now you'd be giving me an easier question. I'll be honest with you. I mean, I wish there was a formula, there's not. I'm going to tell you why. It's more so because of the variety of designs that there are in most prison systems.

We operate prisons that are as old as 110 years old and one day old, and any technology is going to be impacted by the design of that prison, as well as staffing. I mean, if you go back to our older institutions you're going to see a much higher staffing level given the design of that prison. I've got to have more people in there to watch the same number of inmates, compared to our more modern designed prisons that we built in a way that, not only can I have fewer people because I can stand in one place and see and hear everything, but when I put a camera or two in there, I can cover a whole lot larger area.

I mean, you can over rely on cameras. You've got to have people looking at these things sometimes. We had this very discussion as we looked at that part of the Prison Rape Elimination Act, the one standard on direct supervision. It's so difficult to do, given the variety of prison designs and the different types of inmates to come up with a formula. I think it's done—now if I look at, do I have certain prisons that should be the same? Absolutely, because I have prisons that were designed exactly the same, housing similar types of inmates, and certainly we can do something like that in a system, a large enough system that has many facilities of the same type and same design, and same type of inmates. But realize, many State systems are really small, and they aren't going to have that type of similarity, and they've acquired prisons I mean, no different than us.

We have prisons that weren't built to be prisons. We have prisons that were military bases. We have prisons that were monasteries, that we have converted to prison use, not conducive, you know, to technology and to staff supervision compared to our new prisons that we built that were designed to be prisons and done so in a more efficient, more effective way.

Mr. WOLF. Okay. The last question on that issue, the published standards diverge in several instances from the Commission's recommendations. One example is in regard to cross-gender strip searches. The Commission proposed strict limits in this area. However, during the initial comment phase, many agencies objected to the limitations on the ground that it would require agencies either to hire significant numbers of additional male staff, or to lay off significant numbers of female staff, due to their overwhelmingly male inmate population and substantial percentage of female staff.

How do you feel about the Commission's recommendations?

Mr. LAPPIN. On strip searches? I think that strip searches should be done only by members of the same sex, unless you're in an emergency situation and you have no choice. That happens very, very seldom.

I feel otherwise on pat searches. The only way we can run safe prisons though is when inmates are uncertain about when, how,

and where they are going to be confronted, either through an electronic device, through a verbal confrontation, or through a physical pat search, and we don't give our staff a whole lot to protect themselves and most prison systems don't. They, most of them, roll in there with a set of keys, a radio with a body alarm, and we give them the skills to verbally and analytically determine when they've got a problem and when they should leave and when they should react. Pat searches are one of the main reasons we can run prisons safely today. I believe they can be done appropriately by members of the opposite sex and should be trained to do so.

But it concerns me greatly when somebody tells me that a staff member is not going to be able to pat search an inmate at the moment they think an inmate needs to be pat searched.

Mr. WOLF. I understand.

Mr. LAPPIN. So, I know this is an issue for some. On the other hand, I'm looking first at safe prisons. I want it done properly. I want it done appropriately, and as I convey to our staff, we have to create uncertainty in prisons. We're more successful when inmates never know. It's kind of the old police philosophy of omnipresence. They just don't know what to expect.

So when they're walking through that unit, they will be uncertain as to whether they're going to get frisked with a hand-held metal detector, walk through a metal detector, be pat searched, wouldn't be strip searched. But if they're going to be strip searched, I want a member of the same sex.

And the better job we can do of that, the better we can run safer prisons. Because inmates, see, most inmates appreciate that, because the better you do that, the more confident they are there's not something in there that's going to hurt them if they're out in the population.

CORRECTIONAL STAFF KILLED IN THE LINE OF DUTY

Mr. WOLF. No, I understand. How many prison guards federal, state and local, have been killed in the last several years? Do you know? A number.

Mr. LAPPIN. We lost one two years ago, unfortunately, and——

Mr. WOLF. Was that the Florida one?

Mr. LAPPIN. No, he was in California. But you've had every year——

Mr. WOLF. Why don't you supply that for the record?

Mr. LAPPIN. Sure. Every year you have states losing—we lost I think, 24 in our history, in the line of duty.

[The information follows:]

NUMBERS OF CORRECTIONAL WORKERS KILLED ON DUTY

During the last 10 years, the BOP lost one Correctional Officer in the line of duty. Jose V. Rivera was killed on June 20, 2008 at USP Atwater, CA.

The BOP does not have statistics on state and local correctional workers killed in the line of duty.

Mr. WOLF. And I'm sure it would be much higher as you're, in the State prisons in the sense of——

Mr. LAPPIN. Could be. There are some extremely well run State prison systems. There really are. Granted, there are some that

aren't as well funded, aren't as well run. But you've got some really good State systems. But it's tragic.

PRISON FARMS

Mr. WOLF. Was the concept that agriculturally, like at Lorton, they——

Mr. LAPPIN. Yes.

Mr. WOLF. Was that a bad idea or a good idea, assuming it, I mean, now——

Mr. LAPPIN. It's not a bad idea. It depends on the population. Although, I'll be honest with you——

Mr. WOLF. I love working in the——

Mr. LAPPIN. You're talking to a former farmer, okay? It's not inexpensive getting on a large scale to do it efficiently.

Mr. WOLF. But you are training somebody. I'm not talking about just——

Mr. LAPPIN. It's work again, and the other thing is, many of our inmates, see, we have no problem finding productive work opportunities for inmates in camps. We are not inclined to take inmates out of secure prisons to work on farms. Some states still do that. It is risky, risky business.

Mr. WOLF. And is that the same way with regard to the road gangs that work on——

Mr. LAPPIN. Yes. Risky business. When you, you know, it's appropriate in our opinion for inmates who are more trustworthy in our minimum security institutions. But the reality is, we have no problem finding ample work for that group, and it's not a very large group. We are resistant to taking people out of prisons who we believe belong behind the fence, risking public safety by putting them out in the community and potentially losing them, or having a conflict that would result in somebody getting hurt.

CLOSING REMARKS

Mr. WOLF. Well, I respect that. You're an expert, and I'm going to end and if Mr. Schiff has any last questions, I will go to him. But one, I want to thank you and your people for your service. I think you do a good job and it's very tough. You live in a tough neighborhood and so I want you to know how I feel about that. Two, I would urge that you really do try to take whatever principles—I want to give again credit to Mr. Mollohan who, with the hearings that he had in the previous Congress, sort of set the stage for this briefing—to see what ideas that they have, and how you can implement them at that level. Third, I hope that you'll push the bill. You ought to get your congressional relations guys to start pushing it because the real danger is that you're going to run out of time and if you don't do it in this year, next year is an election year, and so that ought to be moving fast.

Fourth, on the prison industries, I think you're really going to have to be bold. I think you should take your regulatory authority and stretch it and push it. There have been members on both sides of the aisle who have been problems for you on this whole prison industry issue. But I think it's relatively easy to find products that are no longer made in the U.S., and I think you would be doing

a service to the American taxpayer. You would be reducing the cost.

Mr. LAPPIN. It doesn't cost the taxpayer a penny. We're saving money.

Mr. WOLF. Yeah, you're saving money.

Mr. LAPPIN. If we didn't have those factories running, those 15,000 inmates would be out in the institution being watched by correctional staff and in other programs.

Mr. WOLF. Right. So and secondly, it's good for, to reduce the recidivism rate. Thirdly, it gives them some resources. So I think the more you push on this, at this particular time, because with the economic situation and the lack of funding and everything else, people may be more willing, and then you don't get yourself into the whole issue of early release and everything else. This is a person who is in prison, but they're making a contribution.

So I hope you really move and I don't know what authority we're going to have here to kind of put this in the appropriations process. But we're going to try to push it as far as we possibly can. But we're not the authorizers in this, so I hope you'll talk to them both on the House and the Senate side. With regard to that, Mr. Schiff, do you have any last thing?

Mr. SCHIFF. Well, thank you, Mr. Chairman. I concur with those sentiments and I just want to thank you for this.

Mr. LAPPIN. Thank you both for all of your support.

Mr. WOLF. Okay, thank you very much.

Mr. LAPPIN. Appreciate it.

Commerce, Justice and Science Subcommittee Hearing
Bureau of Prisons Appropriations
Questions for the Record
Rep. Robert Aderholt
March 15, 2011

The Honorable Harley G. Lappin
Director
Bureau of Prisons

1. The Department of Justice released its Notice of Proposed Rulemaking on the Prison Rape Elimination Act (PREA) earlier this year. Knowing that this rule is expected to be finalized in FY 12, what specific steps is BOP taking to prepare for this? Have you built into your budget request adequate funds to implement the new standards? If not, how do you anticipate being prepared to implement PREA?

Answer: The BOP has appointed a National PREA Coordinator to assist with the implementation of the standards. The Department is currently evaluating the public comments submitted with respect to the proposed standards, and they are subject to change before being finalized. Many of the proposed standards are consistent with BOP policies and procedures. Therefore, a separate budget request was not made at this time. However, once standards become finalized, a cost assessment will be conducted, and a budget request will be made if necessary.

2. How will the BOP work with its private contractors facilities to implement the standards of PREA?

Answer: The new PREA standards will be incorporated into the statement of work (SOW) for all new BOP private prison contracts. Existing contracts will have to be modified to incorporate the new SOW. Many of the requirements for the new standards are already in place at the private contract facilities. However, once the standards are finalized, the BOP will modify the contracts which will include a timeframe for the contractor to be in compliance. Contracting staff and oversight staff will ensure the contractor has implemented all requirements within required timeframes.

3. What is the current status of bring the FCI Aliceville, AL women's facility online? How many inmates are expected to be housed there? Is this number above its rated capacity? What is the number of guards that will be employed at the facility? And is this number sufficient? What is the expected economic impact on the area of Aliceville?

Answer: The construction of the Aliceville, AL facility for female inmates will be completed in September 2011. Funding of $22.5 million is requested in the FY 2012 President's Budget Request to begin the activation process of this facility. The activation is a multi-year process,

including many steps from selecting wardens and executive staff, to identifying and ordering equipment, recruiting and training new staff, furnishing and equipping the new facility, and eventually accepting inmates. The facility will have a rated capacity of 1,792 beds, and it is expected to be about 15 percent over rated capacity by FY 2013. Once fully activated, the total number of staff for this facility is estimated at 378, out of which about fifty percent will be correctional officers (guards). The staff of 378 would be sufficient to operate the facility at full capacity of 1,792 beds. The inmate to staff ratio (ISR) would be 4.74 to 1, which is lower than the average BOP ISR rate of 4.84, as of May 2011.

The jobs generated as a result of the opening of Aliceville are expected to have a positive economic impact on the Aliceville area. When fully activated, the ongoing operations and maintenance activities are expected to have an annual budget of about $50 million, most of which will support local jobs and the local economy. In addition, the local multiplier effect associated with these direct expenditures is expected to generate approximately $20 million in local sales each year, indirectly supporting another 180 jobs.

4. In your testimony, you state that the BOP has made "significant progress toward meeting the mandates of the Second Chance Act." Can you be more specific?

Answer: As the GAO audit indicated, the BOP has mechanisms in place addressing 9 of the 12 Second Chance Act requirements. While the requirements are in differing stages of refinement, the BOP has established a federal prisoner reentry strategy which includes: assessment of skill levels; generation of a skill development plan; a process for linking programs based on assessment; a method to determine prioritization of offender needs for high-risk populations; coordination and collaboration strategies with other agencies; collection of information regarding offender family issues; assistance in obtaining identification; establishment of pre-release procedures that address key stated areas; tracking systems and evaluation measures; and transference of information regarding medical and mental health care needs to probation.

In June of last year, revised guidance for Residential Reentry Center (RRC) placements was issued to BOP staff to assist with RRC placement assessment and decision-making. Emphasis is placed on focusing RRC resources on those inmates who are at a higher risk of recidivism and who have established a record of programming during their incarceration, so that RRC placements will be productive and provide services for those with the greatest needs. Thus, an RRC placement provides needed services to help inmates successfully reenter their communities. Additionally, guidance on partnership with the community at the release destination of the inmate is added to the BOP's Life Connection Program's operations memorandum. This partnership is designed to help the inmate with healthy community reintegration upon release. Correspondence with sponsored inmates is strongly encouraged, so they will have a sense of belonging to the community before release.

Mentor Coordinator positions have been allocated at 23 BOP facilities to assist inmates in being matched with community mentors. The Life Connection Program is operational in five BOP institutions, and as of February 2011, has matched 1,738 inmates with community mentors. The

three areas the GAO audit indicated the BOP had mechanisms in progress, but not in place were: a strategy for implementation of the ISDI, which is being addressed through the development of the ISD/Reentry Implementation Plan; modification of policies and procedures related to the transition of inmates to the community, which is a pertinent component identified in the implementation plan; and reporting to Congress on recidivism rates for inmates in reentry programs compared to general population, which will be provided to the Congress in FY 2014.

5. Last year I asked about the BOP limiting time to 6 months the amount of time for individuals to spend at a halfway house, even though the authorization in the Second Chance Act is for 12 months. Can you give me an update on this situation?

Answer: While all inmates are statutorily eligible for up to 12 months of pre-release RRC placement, RRC placement is not appropriate for all inmates. When pre-release RRC placement is appropriate, the length of the RRC placement must be determined on an individualized basis. Research has shown that RRCs are most effective for inmates who pose a relatively higher risk of recidivating, especially those who have demonstrated a willingness to participate in education, vocational training, and treatment programs while they are in our institutions. Consistent with research findings, the BOP continues to move toward a risk-reduction model in RRC programming, which recognizes that inmates who pose a low recidivism risk may need fewer RRC services and may, therefore, receive relatively short RRC placements and transition more rapidly to home detention; some such inmates may also be placed directly in home detention with no time in an RRC. In contrast, higher-risk inmates who have shown they are ready to address their crime-producing behaviors may be appropriate for longer RRC stays. These changes will not decrease the number of inmates who will be placed in RRCs. Indeed, the changes will result in greater numbers of placements in community-based programs and a more effective use of RRC resources.

The BOP seeks to ensure that all inmates who are appropriate for RRC (or home detention) placement have access to community-based programming that meets their transitional programming needs. Our experience has indicated that for most offenders, six months is adequate to achieve release needs. BOP research has found that RRC placement beyond six months is associated with an increased risk for recidivism with some offenders. There has been an increase in the average length of stay at RRCs overall since the implementation of the Second Chance Act, from 113.5 days to 126.3 days at the end of FY 2010. The use of home detention has increased nearly 10 percent during the past year, as 30 percent of eligible inmates (serving the last 10 percent of their term of imprisonment, not to exceed six months) are now on home detention. The use of home detention for inmates, who no longer need the full services of an RRC, or have no need at all for an RRC, increases bed space availability for those in need of RRC services.

Commerce, Justice and Science Subcommittee Hearing
Bureau of Prisons Appropriations
Questions for the Record
Ranking Member Chaka Fattah
March 15, 2011

The Honorable Harley G. Lappin
Director
Bureau of Prisons

1. In July 2010, the Government Accountability Office published the results of a review of BOP's Second Chance Act requirements. GAO recommended that BOP establish a detailed plan for implementing the remaining components of the Inmate Skills Development Initiative and that it develop a comprehensive cost estimate for implementing ISDI. What is the status of BOP's response to those two recommendations?

Answer: An implementation plan has been developed to incorporate GAO's recommendations to describe key tasks for the Inmate Skills Development Initiative implementation, assign responsibility for tasks, and establish timelines for implementation along with comprehensive cost estimates. This plan was transmitted to GAO on April 28, 2011.

2. According to the GAO report, "BOP officials stated that BOP had not fully captured key activities, delineated the program schedule, identified personnel requirements, and estimated costs because key decisions that would impact the project plan and schedule are pending." What key decisions were pending and are they still pending? If those decisions have not yet been made, when are they expected to be made?

Answer: The key decisions are focused in three primary areas: how the data from existing automated systems (i.e., SENTRY, PDS, BEMR, etc.) will be integrated; how programs will be developed to link to the skill deficit areas; and the research scope and methodologies. A number of steps are outlined in the implementation plan transmitted to GAO on April 28, 2011 in order to provide the basis for rendering decisions in these areas.

3. When will BOP be able to fully implement ISDI?

Answer: The ISDI is not a program, but rather a strategy that involves a continuous integration of assessment, program linkage, and partnership. Based on the evaluation of the assessments, program needs and partnerships are continuously redefined. Full implementation of the Inmate Skills Development System (ISDS- the automated tool used to gather the assessment information and track skill development) is dependent upon SENTRY conversion. Currently, 94 percent of the BOP population and all initial commitments are being processed using the ISDS. The full strategy will be implemented as outlined in the implementation plan.

4. According to the GAO report, BOP said it intended to provide a report to Congress by early fiscal year 2011on recidivism rates for inmates in re-entry programs compared to the general population. This is a report mandated by the Second Chance Act. When does BOP you plan to submit that report to Congress?

Answer: The first report will be submitted to Congress in FY 2014. The Act requires us to measure recidivism for inmates who were released in the first fiscal year after enactment of the Act (i.e.,, inmates released in FY 2009). The Act further mandates that BOP use Bureau of Justice Statistics methodology for our research. This methodology requires a three year tracking period after inmates are released from BOP custody in order to accurately gauge recidivism rates. As such, the BOP will receive final follow-up data on inmates released in fiscal years 2009 and 2010 in FY 2013. BOP will then conduct analysis, and prepare the report, which will be ready for submission to Congress in FY 2014. The initial information in the GAO report on the timing of this requirement was an error.

5. What have been the major challenges for BOP in implementing ISDI? Have there been technical challenges with the ISDI system? Has sufficient funding been available to plan for and implement ISDI?

Answer: Implementation of the ISDI involves a cultural shift for BOP in addition to the implementation of new technology and procedures. To accomplish this requires extensive communication and training strategies, as well as procedures to evaluate and monitor the effectiveness and identify further needs to accomplish this shift. There are several challenges with fully implementing the ISDI, such as coordination with external components and agencies due to differing data structures, policies, and priorities, as well as other structural and jurisdictional considerations.

6. What is BOP's current total number of on-board correctional workers, how does this number compare to BOP's on-board staffing level at the end of FY 2010, and what percent of BOP's total authorized positions does this current on-board staffing level represent?

Answer: As of Pay Period 05, ending March 12, 2011, the BOP had 33,920 correctional workers on-board compared to 33,641 correctional workers on-board at the end of FY 2010 (these figures exclude Central Office, Regional Offices, and training staff). This is a net increase of 279 correctional workers. The 33,920 Correctional Workers on-board represents 88.9 percent of the BOP's total correctional worker authorized positions (38,157). Of BOP's 40,279 total authorized positions, 36,044 or about 89.5 percent are filled.

7. When discounting staff positions at newly activating prisons, has the number of authorized correctional worker positions at existing BOP institutions gone down, gone up, or stayed level when compared to FY 2009 and FY 2010? If there have been significant changes, what is the reason for them?

Answer: Excluding authorized correctional worker positions at activations, the total number of authorized correctional worker positions has increased by 146 positions from FY 2009 to FY 2011. The number of authorized correctional workers has increased by 46 between FY 2010 and FY 2011 (the total number of authorized positions was 37,020 in FY 2010 and 37,166 in FY 2011).

8. What is BOP's proposal for net new base correctional worker staffing in FY 2012, and how much progress does BOP expect to have made by the end of that year toward BOP's goal of adding 3,000 new correctional workers to BOP's base.

Answer: Assuming the BOP receives the full FY 2012 President's Budget request for Salaries and Expenses of $6.742 billion, BOP projects 1,140 net new base correctional workers can be brought on board by the end of fiscal year 2012. If achieved during FY 2012, the BOP will have brought on board 2,645 net new base correctional workers since the beginning of FY 2009.

9. No new funding is proposed in the FY12 budget for the construction or acquisition of new prison facilities to help relieve overcrowding, even though BOP has several planned construction projects for which significant funding has not yet been appropriated. In order to maintain BOP's current schedule for constructing and acquiring new prisons, how much additional Buildings and Facilities funding would BOP need to propose in the FY 2013 budget and the FY 2014 budget?

Answer: The BOP has a total of seven partially funded projects that are in need of funding to complete construction. For the FY 2013 budget, a minimum of $1.3 billion would be required to complete construction of 4 medium and high security prisons, which would add approximately 5,600 new beds to capacity. For the FY 2014 budget, a minimum of $1 billion would be required to complete construction of three medium and high security prisons, which would add 3,840 new beds to capacity. Exhibit O, Status of Construction, in the FY 2012 President's Budget Request for Buildings and Facilities gives additional information on these projects.

10. If additional funding for constructing new BOP prisons is not forthcoming in the next few fiscal years, how would that affect the overcrowding rate over the next decade?

Answer: Continuing increases in the inmate population pose substantial ongoing challenges for the BOP, particularly at the medium and high security levels. Crowding rates will worsen by the end of fiscal year 2011, as the inmate population continues to grow and if no new beds come on line as a result of the FY 2011 appropriations process. (Both FCI Berlin and the proposed acquisition/activation of USP Thomson are included in the FY 2011 President's Budget). Only two facilities (USP Yazoo City and FCI Hazelton) for male inmates remain under construction, which will provide about 2,500 beds once completed and activated. The situation may be alleviated by efforts to revise the good conduct time policies and allowing for early release of offenders who complete programs that have been shown to reduce recidivism. (BOP currently projects an increase of approximately 5,800 inmates per year for FY 2011 and FY 2012.) Assuming no new capacity beyond FY 2013, crowding is projected to reach 69% over rated capacity in medium security facilities and 67% over rated capacity in high security facilities by 2020.

11. Currently 94% of high security inmates are double-bunked, and 16% of medium security inmates and 82% of low security inmates are triple bunked or live in common areas that have been converted to housing. At what level of overcrowding will BOP be unable to house additional inmates without new facilities?

Answer: The BOP is in immediate need of additional bed space. It is BOP policy to double bunk 25 percent at high security and 50 percent at medium security. The BOP has also incorporated triple bunking, where possible, to provide bed space for the growing inmate population. The high percentage of inmates in high and medium security facilities that are being double and triple-bunked indicate BOP's need for additional capacity. As of March 24, 2011, crowding is 39 percent above rated capacity in medium security facilities and 50 percent above rated capacity at high security facilities. Additional bed space or action to reduce the prison population would reduce current and projected crowding conditions. Higher security facilities are using disciplinary/ segregation housing and bunking in program areas and open areas to manage the general population. This practice makes it more difficult to secure the institutions in case of emergencies and raises threat levels for staff and inmates, but it does allow BOP to house additional inmates without new facilities.

12. How does the estimated cost of acquiring and renovating the Thomson, Illinois prison facility compare to the cost of constructing a new facility?

Answer: In the FY 2011 President's request, $170 million was included for the acquisition and renovation of the Thomson facility. Based on other ongoing construction projects, the BOP estimates that it would cost between $200 and $300 million to construct an equivalent high security facility in the current market, and it would take approximately three to four years to construct. Depending on the final price of acquiring Thomson, the BOP believes both the cost and time to activate this facility would be significantly less.

13. BOP has awarded contracts for construction of USP-Yazoo City in Mississippi and for FCI-Hazelton in West Virginia. Were these contracts under budget? If so, how much savings was realized, and how does BOP plan to use those savings?

Answer: The design-build contract awards for Yazoo City, Mississippi and Hazelton, West Virginia were awarded in September 2009. Due to the changing economy and resulting lower prices, the design-build costs were lower than previously anticipated and made $105 million available for use towards the Thomson Correctional Center acquisition, another high priority new construction project. On May 4, 2011, the Department of Justice transmitted a congressional notification outlining funding sources to acquire the Thomson Correctional Center as a U.S. Penitentiary for the sole use of the Federal Prison System.

14. What is BOP's current estimate of the backlog of modernization and repair (M&R) projects for BOP facilities, including both major projects and non-major projects that would be funded through the Buildings and Facilities appropriation?

Answer: The BOP has a current backlog of M&R major project priorities totaling 144 projects at an approximate cost of $309 million. This estimate does not include minor projects, Long Range Master Plan improvements, or any major project needs.

15. What is the impact of BOP's growing backlog of modernization and repair projects on the basic operation of BOP facilities and what steps is BOP taking to mitigate this impact?

Answer: Sufficient funding of the M&R program is essential to the safety and security of daily prison operations. Insufficient M&R resources can lead to deteriorated facilities, increased risk of escape, inability to lock down cells, or violence due to inadequate living conditions. In order to operate with limited resources, the BOP now uses an internal prioritization method to identify and fund the most urgent repairs, and therefore is able to address approximately 20 to 30 major system replacement projects a year. In addition, the BOP is able to address some major projects by patching (vs. replacing) aged roofs, repairing out-dated sprinkler systems, repairing overused and outdated HVAC equipment, etc. Because the BOP is committed to maintaining operations and preserving aging prison infrastructure as safely as possible, we continue to address the most critical repairs as funding permits.

16. How does overcrowding impact BOP's ability to provide educational and vocational programming, and which programs have been reduced in scope as a result of overcrowding?

Answer: As of January 2011, 19,160 (94 percent of) high security inmates were double bunked,8,793 (16 percent of) medium security inmates, and almost 36,081 (82 percent of) low security inmates were triple bunked or housed in common areas and activity rooms not originally designed for inmate housing. While the number of beds has been increased to provide a portion of the additional living quarters needed for inmates, the other factors that are essential components to establishing rated capacity (space for programs, services and basic necessities such as education, food service, etc.) have not been adjusted. Crowding inevitably results in waiting lists for educational and vocational training programs. For example, in February 2011, 21,033 inmates were enrolled in a GED program, but another 16,798 were on the waiting list. These programs are linked to reductions in recidivism, but because of the waiting lists the BOP cannot provide these programs to all inmates in a timely manner.

17. What is the status of BOP's efforts to conduct an "uncertainty analysis" on its FY 2012 budget request, and when will the analysis for each of BOP's major budget categories be complete?

Answer: The BOP is developing the capability to forecast future budget requirements using "uncertainty analysis". This will give BOP the opportunity to project a range of potential budget scenarios involving dynamic or "uncertain" cost drivers, such as future increases in medical or utility costs. The BOP has contracted for the statistical expertise to develop the "uncertainty analysis" capability. The contractor has finished testing the new procedures, using prior year expenditures as the test data.

BOP has been identifying the major non-salary Adjustment to Base (ATB) program requirements that need to be included in this analysis and started with the most costly which is Inmate Medical Care. BOP is using a professional consultant via the Office of Research & Evaluation Section. The Medical component of the uncertainty analysis is planned to be complete this summer. Work has just started on the Utility component with historical information on utility costs (by type) for Fiscal Years 2004 thru FY 2010 being provided to the consultant, and completion is expected in early fall. BOP then plans to start on the Inmate Food Cost component. When these are completed, other less costly budget development non-salary ATBs will be evaluated to determine if an uncertainty analysis would be beneficial.

18. For what purpose will the proposed $53 million increase for contract confinement be used?

Answer: The requested $50.947 million increase for contract confinement will be used to cover increasing costs for the following: wage increases for existing contracts; contract price increases for existing contracts; and a pay and benefit adjustment for Contract Confinement Staff. The wage increases are required by the Services Contract Act of 1965, as amended.

19. What type of analysis does BOP use in deciding whether to construct and staff new prisons versus expanding bed space through private contract facilities?

Answer: To meet the demand of a growing inmate population, both the construction of new prisons and expansion of contracts with private prison providers are necessary. For low security male offenders, especially criminal aliens, the BOP has found that contracts with private prison providers are more flexible. Therefore, contracts can be awarded at a more reasonable cost to taxpayers. Currently, the BOP only constructs high and medium security and specialized population (female inmate) facilities. The BOP follows a centralized, long-term capacity planning process, with the aim of ensuring sufficient capacity. BOP has two planning committees that are involved in the decision-making process to identify new facility prison construction projects or expansions through private prison contracts.

Commerce, Justice and Science Subcommittee Hearing

Bureau of Prisons Appropriations

Questions for the Record

Chairman Frank Wolf

March 15, 2011

The Honorable Harley G. Lappin

Director

Bureau of Prisons

Reentry and Recidivism

1. Currently, inmates participating in Federal Prison Industries, educational programming, and occupational and vocational training cannot earn sentence reduction opportunities in exchange for their successful participation. What data or past experience suggests that sentence reduction opportunities of these kinds will be beneficial, both to society in general and to the operation of the federal prison system?

Answer: Sentence reduction opportunities for successful participation in proven programs, such as these, benefit society and prison operations by reducing cost to the taxpayers, reducing recidivism and reducing prisoner misconduct. Research has shown that inmates who work in Federal Prison Industries are 24 percent less likely to recidivate and less likely to engage in misconduct while confined. Educational programs and vocational training (VT) programs are shown to have similar effects (VT participants are 33 percent less likely to recidivate and educational participants 16 percent less likely). Granting sentence reductions for successful participation in such programs allows the BOP to reduce the high cost associated with housing and caring for offenders – more than $28,000 per offender per year. Moreover, the incentives provided by the possibility of early release increase the likelihood that inmates will participate in programs that benefit the community by reducing recidivism and prisoner misconduct while at the same time saving taxpayer dollars.

Overcrowding

2. What are some of the steps BOP is taking to manage the crowding in some of its prisons in order to maximize safety and security?

Answer: The Bureau of Prisons has made a variety of operational enhancements to maximize the ability of staff to effectively manage institutions that exceed their current rated capacity. Specifically, improvements were made in the architectural design of new facilities, and a variety of security technologies (e.g. enhanced video cameras, improved body alarms, more sophisticated perimeter detection systems, etc.) are now available. Both the architectural changes and new technologies have helped staff to monitor and supervise the growing number of inmates. In addition, the BOP has enhanced its population management strategies in a variety of areas, including an improved inmate classification/designation system, more targeted training of staff, intelligence gathering, gang management, controlled movements, preemptive lockdowns, and proactive interventions to prevent violence and other serious misconduct.

Beginning in FY 2008, the BOP began operating Special Management Units (SMUs), targeting inmates who have proven to be violent or confrontational, resistant to authority, and disrespectful to institution rules. Designation to a SMU may be considered when an inmate's behavior poses a threat to the safe and secure operation of BOP facilities.

All of these factors have been helpful; however, BOP's older facilities (about one-third of the BOP's 116 institutions are over 50 years old) are less amenable to some of the technological and architectural improvements (e.g., surveillance cameras) as well as the changes in population management techniques (e.g., "preemptive lockdowns" are not possible in older institutions that have dormitory style housing rather than cells).

Criminal Aliens

3. In 1980, our federal and state prisons housed fewer than 9,000 criminal aliens. By the end of 1999, these same prisons housed over 68,000 criminal aliens. According to GAO, in 2005 criminal aliens accounted for 27 percent of prisoners in Federal Bureau of Prisons facilities. What percentage of the federal prison population this segment comprises today?

Answer: As of March 10, 2011, non-U.S. citizens accounted for 25.5 percent of the total BOP inmate population.

Prison Facilities Maintenance and Repair

4. How much are you requesting for maintenance and repair, and how does that compare to your facilities plan and backlog of major repairs?

Answer: For FY 2012, the President's Budget request is $73.9 million for the Modernization and Repair (M&R) program. At this level of M&R, BOP must prioritize the most critical repairs of BOP's aging facilities' infrastructure, generally focusing on projects addressing emergency, security, or life and safety concerns. A total of 144 major M&R projects have been approved to receive funding as resources become available but are not yet funded. These major projects would cost approximately $309 million. Furthermore, a number of minor unfunded repair and improvement projects (less than $300,000 per project) have been approved but are not funded.

5. Your maintenance and repair budget has fallen shy of recommended industry standards for years. What is the cumulative effect of deferring these projects and what is the relationship to facility safety and security?

Answer: The Federal Facilities Council (FFC) recommends that facilities maintenance programs be funded at a minimum of 2 to 4 percent of facilities' replacement value. Sufficient funding of the M&R program supports the safety and security of daily prison operations. Insufficient M&R resources can lead to deteriorated facilities, increased risk of escape, inability to lock down cells, and violence due to inadequate living conditions.

6. Can you give the Committee an example of a major repair that has been delayed and what BOP is doing while awaiting further funding?

Answer: One example of a major repair project that has been delayed is the Federal Correctional Institution (FCI) Tallahassee, Florida powerhouse project. FCI Tallahassee is a 73 year old facility that is in need of a new powerhouse, and the project was to be completed in three phases. In FY 2005, it cost $16.5 million to build a new powerhouse outside the secure perimeter of the facility. In FY 2006, an additional $4.9 million was spent to purchase and install new equipment, such as boilers, in the new powerhouse. The third and final phase would cost $16.1 million but has so far been delayed. Without the final phase, the BOP cannot completely tie in the new powerhouse to the institution. Therefore, the institution is currently running two powerhouses (existing and new) and is only exercising the new powerhouse equipment at 20 percent of capacity. The final phase is required in order to connect several buildings to the new powerhouse and abandon the existing one inside the secure perimeter.

Given the constrained budget situation, the BOP has tried an alternative way of funding this final phase, namely, through the Energy Savings Performance Contract (ESPC) program. This would allow the completion of the project without upfront funding, since the cost of the project would be paid from realized monthly energy savings. However, the project was not awarded because

cost savings decreased to the point that the project was not viable. One option is to break down the project cost ($16.1 million) into smaller projects and fund them a little at a time. Funding the project in this manner will be more costly and delay further the completion of the work.

Deaths of Corrections Officers

7. How may federal, state and local prison staff have been killed in the course of their employment in the past 3 years?

Answer: During the last 10 years, the BOP lost one Correctional Officer in the line of duty. Jose Rivera was killed on June 20, 2008, at USP Atwater in California. The BOP, fortunately, has not lost any correctional workers since that time.

The BOP does not maintain statistics on state and local correctional workers killed. However, the Correctional Peace Officers (CPO) Foundation lists nine death records, including Officer Rivera, for 2008 and 12 records for 2009, the most recent years available on the website. The CPO is a national, non-profit charitable organization created in 1984. Its primary function is to preserve and support the surviving families of Correctional Officers who lose their lives in pursuit of their chosen profession of protecting the public from those remanded to correctional custody and supervision in the nation's prisons and jails.

WEDNESDAY, MARCH 30, 2011.

OFFICE OF JUSTICE PROGRAMS

WITNESS

LAURIE O. ROBINSON, ASSISTANT ATTORNEY GENERAL

Mr. WOLF. Good morning. The committee will come to order.

We want to welcome Ms. Robinson. We appreciate your being here today to testify regarding the Department of Justice's fiscal year 2012 budget request for the Office of Justice Programs.

As always, I strongly support funding for the Department of Justice programs that assist state and local efforts to fight the scourge of drugs, gangs, and violent crime.

However, it is unlikely that the Congress will be in a position to provide increases to these programs. The fiscal crisis facing the Nation is real and will require a level of austerity that goes beyond the President's budget request.

We will be asking you to help us prioritize funding needs within the Office of Justice Programs as we head into the deliberations on fiscal year 2012.

I'm pleased to see that the budget devotes a portion of its resources to the issue of domestic radicalization. I recently testified before the Committee on Homeland Security regarding the importance of fostering cooperation between law enforcement and peaceful, law-abiding Americans of the Muslim faith.

We need to look no further than a number of individuals who have radicalized in northern Virginia over the last several years for an indication of the extent of this problem and the serious need to address it. So we are pleased that you are willing to move ahead to look at some of that.

We are all concerned about the Administration's decision to divert funding away from some critical proven programs in order to experiment with new programs. For example, the department's abandonment of the Prescription Drug Monitoring Program is a major deficiency in this budget request.

In the opinion of myself and the chairman of the full committee, Mr. Rogers, this cut will be devastating to communities ravaged by prescription drug abuse.

The DEA administrator, before the recess, testified before this committee that prescription drugs have overtaken marijuana as the drug of choice of first-time drug users. Moreover, deaths from prescription drug abuse are on the rise as new distribution networks are emerging particularly in Florida, Georgia, and Ohio.

In addition, this budget significantly reduces funding for the Prison Rape Elimination Act. This as the department has finally put forth regulations with what states and localities soon will be required to comply.

We look forward to asking you questions. Before that, I recognize the gentleman from Pennsylvania, Mr. Fattah, for any comments.

Mr. FATTAH. Let me thank you, Mr. Chairman. And let me thank the witness for appearing. Thank you very much.

Mr. WOLF. Thank you.

Ms. Robinson, your full statement will appear in the record. You can proceed to summarize and go as you see fit.

Ms. ROBINSON. Chairman Wolf and Ranking Member Fattah, I am very pleased to be here to discuss the President's 2012 budget request for the Office of Justice Programs.

And I would like to begin by thanking the subcommittee for its leadership in addressing the public safety concerns of the American people.

And I particularly wanted to thank you, Mr. Chairman, for your leadership in helping the Nation work toward creating a smarter, more effective criminal justice system. I think your work on justice reinvestment, in particular, is to be commended.

I believe we are at a critical moment for public safety in the United States. State, local, and tribal public safety agencies across the country are clearly facing significant budget challenges and I think that threatens their ability to do their jobs.

It seems to me that we have a responsibility at the federal level to see that they have the tools and the knowledge they need to fight crime in the most effective way possible.

OJP's mission is to help reduce crime and improve the administration of justice by promoting innovation, supporting research, and providing strategically targeted assistance.

The President's fiscal year 2012 request reflects three central themes: enhancing partnerships, strengthening evidence-based programs, and ensuring effective stewardship of federal funds.

Our first step is to build on partnerships we have already established with the criminal justice field. The Byrne Memorial Justice Assistance Grants Program, I think, epitomizes the federal-state-local partnership in public safety—I view it as our flagship program.

Since 2009, we have placed a heightened emphasis on supporting evidence-based projects under Byrne JAG. The President's budget request for 2012 includes $519 million for this program, the same amount enacted in 2010, and requested by the President in 2011.

The request also includes $100 million under the Second Chance Act. Inmate reentry is arguably the most significant criminal justice challenge in America today. And I know you are very well aware of this, Mr. Chairman, because of the work you have done in this area.

The Administration views this as a major priority for funding in 2012—to support both adult and juvenile reentry work across the country.

The President's budget also requests a commitment to strengthen our basic knowledge about what works in preventing and controlling crime. I think this is a central federal role in public safety.

The Attorney General last fall appointed an 18-member Science Advisory Board for OJP that is helping to guide our efforts in developing evidence-based policies and programs.

The President's budget request is committed to science by including a three percent set-aside of OJP grant and reimbursement funds for research, statistics, and evaluation purposes.

I have put a strong emphasis on improving our understanding of what works in preventing crime and in using that information to fight crime more effectively.

In line with that, the President's budget request includes a request for an on-line "what works" clearinghouse and a diagnostic center to help jurisdictions develop and then implement evidence-based strategies.

The President's budget request reflects a strong effort to maximize federal resources and be sure we are as effective as possible. This is an area I really care about. In spite of a heightened workload, resulting from grants under the Recovery Act, of which more than 3,300 continue to be administered, salaries and related expenses represent only 7 percent of our total request, and the total request represents a net decrease of some $125 million from the fiscal year 2011 Continuing Resolution level.

Since I returned to OJP in January 2009, I have focused aggressively on ensuring strict accountability of federal funds. So we have established policies, procedures, and internal controls to ensure sound stewardship, strong programmatic and financial management, and effective monitoring and oversight of our grant programs.

I have worked very closely with the Inspector General's Office to strengthen our monitoring and oversight functions. Last year, we closed 151 of the 288 open single and OIG audit reports. This represents a return of $3.3 million to the Federal Government for unallowable or unsupported costs.

In oversight testimony before this subcommittee in February, the acting Inspector General noted the positive steps the Department had taken to improve its grant management practices. She called our efforts to implement the Recovery Act "extraordinary". And it is unusual for the IG to be that praising.

We will continue to work closely with the IG to make sure OJP's grant administration process is fair, transparent, and effective.

In conclusion, Mr. Chairman, with this budget, OJP looks forward to working with you, the subcommittee, and Congress to ensure that funds appropriated to OJP are used wisely and effectively to support states and localities and to promote smart-on-crime approaches.

Thank you so much. And, of course, I am happy to answer your questions.

[The information follows:]

STATEMENT

OF

THE HONORABLE LAURIE ROBINSON
ASSISTANT ATTORNEY GENERAL
OFFICE OF JUSTICE PROGRAMS

BEFORE THE

SUBCOMMITTEE ON COMMERCE, JUSTICE, SCIENCE,
AND RELATED AGENCIES
COMMITTEE ON APPROPRIATIONS
UNITED STATES HOUSE OF REPRESENTATIVES

ON

TUESDAY, MARCH 29, 2011
WASHINGTON, DC

Chairman Wolf, Ranking Member Fattah, and distinguished Members of the Subcommittee, I am pleased to have this opportunity to discuss the President's budget request for the Office of Justice Programs (OJP) for Fiscal Year (FY) 2012.

I wish to begin by thanking the Subcommittee for its leadership in addressing the public safety concerns of the American people. I particularly want to commend you, Mr. Chairman, for your leadership towards helping our nation create a smarter, more effective criminal justice system. Your efforts have helped to bring about a spirit of bipartisanship on many important crime and justice issues on Capitol Hill and in state houses and town halls across the country.

During his campaign for President, Barack Obama said that "protecting citizens is our first and most solemn duty in government." After decades of rising crime, we have entered a period of relative safety, as evidenced by national crime and victimization statistics. The most recent full-year data from the Federal Bureau of Investigation covering 2009 show that violent crime declined for the third year in a row, with an estimated 5.3 percent drop from 2008 figures. Property crime continued to fall as well – for a seventh straight year – with an estimated decrease of 4.6 percent from 2008 to 2009. Preliminary 2010 data indicate a continued decrease in both violent crimes and property crimes nationwide. While we don't know with certainty the reasons for the drop, it is likely a good part of the credit goes to innovations in policing and more focused criminal justice strategies. It is worth noting that our governments – local, state, and federal – have been successful in fulfilling this most solemn of duties.

Unfortunately, as police chiefs and sheriffs across the country will tell you, there is no time to celebrate. The economic crisis that began two-and-a-half years ago continues to take a heavy toll on state and local budgets, and public safety agencies are suffering. Last summer, the city of Oakland, California laid off 80 police officers, representing 10 percent of its force. In January, more than 160 officers in Camden, New Jersey – half of the police department – were forced to turn in their badges. In Cincinnati, Ohio, officers are facing massive lay-offs, demotions, and until recently, the possibility of a merger with the Hamilton County Sheriff's Office. These are just a few of the historically high-crime cities that have seen critical public safety jobs sacrificed to shrinking municipal budgets. These headlines sound an ominous note for public safety in America.

I believe we are at a crossroads. Visionary police leadership and innovative community-based approaches have fueled a remarkable crime decline, but with public safety departments struggling to make payroll – not to mention dealing with a proliferation of responsibilities associated with homeland security and 21st-century crime-fighting – the peace we have secured on our streets is an uneasy one. The challenges faced by criminal and juvenile justice practitioners today remain formidable and demand a robust federal response, yet the fiscal hardships being felt at the state and local levels have also, of course, come to Washington. As the members of this Subcommittee understand, we must ensure that every federal dollar spent is spent wisely.

We have a responsibility to be smart about fighting crime, to provide public safety officials the information they need to make the best decisions about crime-fighting strategies, and to help them leverage resources – federal, state, local, and tribal – to meet the needs that they have identified in their jurisdictions. OJP is uniquely situated to provide this support, and I believe we have an urgent responsibility to do so.

Just as we expect our state and local partners to be smarter in their approaches, so we, too, must be smarter in the way we do business. We must build on partnerships that we have already established with the field to make sure basic criminal and juvenile justice needs are being met. We must seek to expand our base of knowledge about what works in fighting crime and make sure that knowledge gets out to the field in a comprehensible, useable way. And to meet the President's call for discipline in our own ranks, we must continue to ensure that federal funds are used judiciously and are well-accounted for.

The President's budget request for OJP for FY 2012 reflects three thematic priorities commensurate with these charges – enhancing partnerships, strengthening science and evidence-based programming about "what works," and ensuring effective stewardship.

Enhancing Partnerships

Last year before this subcommittee, I discussed the critical importance of partnerships between OJP and state, local, and tribal governments. Given the budget challenges we all are facing, those partnerships are more important today than ever. The Edward Byrne Memorial Justice Assistance Grants (JAG) Program epitomizes the federal-state-local partnership in public safety. Through the years, Byrne JAG funding has supported a wide range of activities designed to reduce and prevent crime, violence, and drug abuse. It has supported both basic criminal justice operations and innovative crime-fighting approaches. Indeed, I view Byrne JAG as OJP's flagship program.

In 2009, we began placing a heightened emphasis on supporting projects under Byrne JAG that demonstrate effectiveness. This evidence-based strategy has yielded results. For example, the Hawaii's Opportunity Probation with Enforcement (HOPE) program, funded as a Byrne JAG subgrant, is a highly promising model in which high risk probationers face immediate, predictable, and proportionate sanctions for probation violations. Research has shown remarkable success rates among participants, including the difficult population of methamphetamine users. One study found that HOPE probationers were 55 percent less likely to be arrested for a new crime, 72 percent less likely to use drugs, and 53 percent less likely to have their probation revoked than other probationers. The program is considered a model of the benefits of applying swift and certain punishment – and is being replicated in other jurisdictions.

President Obama said during his campaign that Byrne JAG is the cornerstone of federal law enforcement assistance. He has been true to his word and to his commitment to our state and local crime-fighters. This year's budget request maintains the level of

Byrne JAG funding enacted in FY 2010 and requested by the President in FY 2011 – $519 million.

Strong intergovernmental and community partnerships are critical if we hope to solve arguably the most significant criminal justice problem in America today, namely, the reintegration of the nation's prisoners and jail inmates. Approximately 730,000 individuals come out of prison every year, along with between 9 and 12 million who cycle in and out of America's jails. Ninety-five percent of all prisoners will eventually be released, and absent careful reentry planning, statistics show that two-thirds will be re-arrested within three years. Prisoner reentry is an urgent challenge that can no longer be ignored.

Fortunately, the issue of reentry has been embraced by both sides of the political aisle. The Second Chance Act, passed by a Democratic Congress and signed into law by then-President George W. Bush, is the embodiment of bipartisanship in the field of crime and justice. And here I want to commend and sincerely thank you, Mr. Chairman, for your leadership and your consistent advocacy, as well as the advocacy of other members of the subcommittee. It is no exaggeration to say that the Second Chance Act has fundamentally reframed our national discussion on this issue. As Attorney General Holder has said, it has moved the concept of reentry "from the margins to the mainstream." This is crucial at a time when prison costs have swamped state budgets and made wholesale incarceration prohibitively expensive.

In Fiscal Year 2010, OJP awarded approximately $100 million to support both adult and juvenile reentry efforts across the country. We now support some 250 reentry projects that link criminal and juvenile justice agencies with community organizations to provide employment assistance, substance abuse treatment, housing, family programming, mentoring, and other services, all designed to help reduce recidivism and strengthen public safety. Funding also supports the National Reentry Resource Center, which provides a one-stop shop for state-of-the art information and assistance, and research investments to study the impact and effectiveness of reentry programs.

Reentry is a major policy issue of concern to OJP, the Department, and the Administration. In January, the Attorney General convened the first meeting of the Interagency Reentry Council, which includes the Secretaries of Education, Health and Human Services, Housing and Urban Development, Agriculture, Interior, Labor, and Veterans Affairs, as well as the Commissioner of the Social Security Administration, the Director of the Office of National Drug Control Policy, the Director of the White House Domestic Policy Council, the Executive Director of the White House Office of Faith-Based and Neighborhood Partnerships, and the Chair of the U.S. Equal Employment Opportunity Commission. I had the opportunity to attend this meeting and sit at the table with seven Cabinet secretaries, all of whom were vocal in their commitment to and engagement on this issue. I also wish to point out that OJP is leading the staff-level effort – which now includes 17 different federal agencies – and is making excellent progress on the Council's key goals.

Enhancing reentry programming will remain a focus of OJP activities. The President's budget proposes $100 million for Second Chance Act programs in FY 2012, maintaining the level of funding enacted in FY 2010 and requested by the President in FY 2011.

Many of the most persistent public safety challenges, such as gang and youth violence, cannot be addressed by law enforcement alone. Rather, they require a comprehensive interagency approach that relies on schools, social service agencies, and community organizations to address both the crime problems and their underlying causes. Research and on-the-ground experience have shown that collaborations between law enforcement and the community, especially approaches that target defined areas, can be very effective in reducing crime and improving relationships between criminal justice officials and the citizens they are sworn to protect.

The Department of Justice is part of a White House-led initiative, coordinated with the Departments of Education and Housing and Urban Development, to support cost-effective, place-based policy solutions to neighborhood revitalization. As a critical part of this initiative, the Byrne Criminal Justice Innovation Program will build on the success of the Weed and Seed strategy, which has been instrumental in encouraging innovative, place-based community responses to crime. The President's budget proposes $30 million for this program.

The President's budget also requests $6 million for the National Forum for Youth Violence Prevention, a collaboration across levels of government and between disciplines. Thus far, six cities – Boston, Chicago, Detroit, Memphis, Salinas, and San Jose – have developed comprehensive plans for preventing youth and gang violence using multidisciplinary partnerships, data-driven strategies, and a balanced approach aimed at reducing violent crime, improving opportunities for youth, and encouraging innovation. Local and federal leaders, as well as law enforcement officials, educators, public health providers, community and faith-based representatives, parents, and young people, from all six sites are working together to implement their strategies and to share information about effective and cost-efficient ways to prevent youth violence. The President's budget would allow OJP to expand the number of sites to 18.

Strengthening partnerships is key to preventing and controlling crime in America's cities, but it is absolutely essential if we are to meet our responsibilities – both legal and moral – to our nation's tribal communities. Crime rates in Indian country far exceed national rates. Native Americans are victimized at two-and-a-half times the national rate, and Native women experience sexual assault at almost three times the rate of other women. Historically, resources for fighting crime on tribal lands have lagged well behind what is called for to address the problem. In recognition of this terrible discrepancy, President Obama last year signed the Tribal Law and Order Act, which provides new tools to fight crime and assist victims and strengthens tribes' authority to prosecute and punish criminals.

Under the Attorney General's guidance and direction, the Department of Justice continues its work to build tribal public safety capacity. A series of regular government-to-government consultation sessions has enabled a steady flow of information and resources between the Department and tribes, and the Consolidated Tribal Assistance Solicitation has made public safety funding from OJP, the Office of Community Oriented Policing Services, and the Office on Violence Against Women easier for tribal officials to access. The President's budget request builds on that progress by proposing a set-aside of seven percent of OJP's discretionary funding for tribal justice assistance programs. These funds would provide almost $114 million for tribal court enhancement, alcohol and substance abuse treatment, and tribal prison construction.

Strengthening Science

In my view, there is no more central federal role in public safety than the development and diffusion of knowledge about what works in preventing and controlling crime. Recognition of this important role has deep roots, going back to President Johnson's Crime Commission, continuing through with the Attorney General's Task Force on Violent Crime under President Reagan, and echoed loudly by the recent report from the National Research Council, *Strengthening the National Institute of Justice*. With our collective resources strained to their limits, relying on evidence gathered through scientifically sound research is an imperative for policymakers and legislators.

We have been working diligently in OJP and throughout the Department of Justice to build our base of knowledge, translate that knowledge into practice, and otherwise promote scientific integrity in the work we do. In November, the Attorney General appointed an 18-member Science Advisory Board to guide the efforts of OJP in developing evidence-based policies and programs. The Board comprises a number of highly respected researchers in criminology, sociology, and statistics and also includes several noted criminal justice leaders. Its goal is to help ensure that our knowledge base is broad and robust and useful to law enforcement officers, prosecutors, corrections officials, and others who work in the justice field. The Board held its inaugural meeting in January.

On top of this important step, OJP has undertaken an agency-wide evidence integration initiative designed to assess the state of our understanding about what works in reducing and preventing crime and determine how to use that information to fight crime more effectively. The goal of this effort is to get this information out to the field in a comprehensible, practical format. We have already begun to explore strategies for packaging and sharing research about gangs and children exposed to violence and have plans to expand our activities into other areas. The President's budget request supports this initiative by proposing $1 million for an online resource center that will provide practitioners and policymakers with a single source of information about what works and what is promising in criminal and juvenile justice. It also proposes $6 million for a State and Local Assistance Help Desk and Diagnostic Center, which will serve as a "one-stop

shop" for jurisdictions that seek assistance in developing and implementing evidence-based strategies.

The President's budget proposal reflects a systemic commitment to science in its inclusion of a three-percent set-aside of all OJP grant and reimbursement funds for research, evaluation, and statistical purposes. The funds available would support research to enhance the value of forensic science, a data experiment to measure the cost and effectiveness of the criminal justice system, an evaluation of diversion strategies, a study of law enforcement line-of-duty vehicular deaths, and several other research and data projects that address Administration and Congressional priorities.

The potential of science to improve our understanding of the causes of crime and how to reduce it is nowhere greater than in its application to children who are exposed to violence. The 2009 *National Survey on Children Exposed to Violence*, administered by the Office of Juvenile Justice and Delinquency Prevention, found that more than 60 percent of children surveyed were exposed to violence, crime, or abuse – either directly or indirectly – during the previous year. More troubling, research has shown that early exposure to violence can lead to a host of later problems, from truancy and academic failure to neurological and developmental difficulties to adult criminality. Fortunately, research also has shown that appropriate interventions can reverse its negative impact.

Last September, the Attorney General launched his signature Defending Childhood initiative. Its goals are to prevent children's exposure to violence as victims

and witnesses, mitigate the negative effects experienced by those who are exposed, and develop knowledge about and increase awareness of the issue. The initiative supports demonstration and seed projects in sites across the country, but its ultimate aim is to improve our understanding of the causes and consequences of exposure to violence. To that end, the President's budget requests funding to support a comprehensive program of research and evaluation that will entail rigorous field experiments and an ongoing data collection effort. A total of $25 million is sought for this initiative under the title, "Children Exposed to Violence."

The President budget also proposes $15 million to support evidence-based community approaches to youth and gang violence. Research shows that approaches to youth crime that rely on managing incidents of serious violence or that include pro-active interventions to prevent retaliation can be remarkably successful. The Community-Based Violence Prevention Initiative will assist state, local, and tribal governments in developing and implementing strategies that have been proven to be effective through research and evaluation.

This evidence-based approach also continues to be the underpinning of the Smart Policing Initiative administered by the Bureau of Justice Assistance. OJP currently funds 16 projects that pair law enforcement agencies with universities to identify crime problems and jointly develop strategies for tackling those problems. For example, the Glendale, Arizona Police Department is partnering with Arizona State University to address crime and disorder issues, focusing on convenience stores identified as crime "hot spots." The President's budget proposes $10 million to continue and expand this initiative.

Improving Stewardship

The President's FY 2012 budget request of $3 billion for OJP represents a net decrease of approximately $300 million from the FY 2011 Continuing Resolution level. Considering the tremendous need for OJP's leadership and resources among its state, local, and tribal partners in the current economic climate, the request reflects an earnest effort to maximize federal resources, achieve efficiencies, and make the difficult decisions necessary to respond to current fiscal realities. I believe it is also worth noting that in spite of a heightened workload resulting from grants awarded under the American Recovery and Reinvestment Act (Recovery Act) -- administration and monitoring of more than 3,300 of which continue to this day -- salaries and related expenses for OJP represent only 7 percent of the total budget request.

While OJP is doing its part to achieve efficiencies and streamline activities, I have put a premium on ensuring strict accountability of federal funds. Since 2000, the Department's Office of Inspector General (OIG) has identified grant management as one of the Department's top ten management challenges. The OIG has stated that, while it is important to efficiently award the billions of dollars in grant funds appropriated by Congress annually, it is equally important to maintain proper oversight over the grantees' use of these funds to ensure accountability and effective use of taxpayer dollars.

Since my return to OJP in January 2009, I have made this issue one of my top three priorities. As a result, OJP has tackled this challenge aggressively, establishing

policies, procedures, and internal controls to ensure sound stewardship, strong programmatic and financial management, and effective monitoring and oversight of OJP's grant programs. This policy and internal control framework positions OJP to carry out statutory mandates and requirements and prevent waste, fraud, and abuse of the billions of taxpayer dollars OJP awards in grants each fiscal year.

Within this framework, OJP conducted on-site programmatic and financial monitoring of grants totaling over $3 billion in FY 2010. In addition, OJP has established common procedures and guidance to improve the quality and completeness of monitoring across OJP, as well as provided effective tools for grants managers, including risk assessments to identify grantees in need of increased technical assistance and oversight.

OJP has developed comprehensive plans for overseeing both its Recovery Act and its non-Recovery Act grants, including a financial monitoring and technical assistance plan and a post-award performance and risk management plan. We have worked closely with the OIG in developing those plans and taken prompt action to address issues raised by that office, including providing for whistleblower training for OJP staff, grant fraud training at OJP-sponsored conferences and meetings, and grantee training on risk-prone activities such as financial management, internal controls, and the reporting of financial and program results.

OJP also has embraced and implemented many of the recommendations from the OIG's 2009 report, *Improving the Grant Management Process*. We have worked closely with grantees and the OIG to address issues identified in grant audits, and we have

streamlined our follow-up audit activities, eliminating existing backlogs and allowing for more timely resolution of outstanding audit recommendations. In FY 2010, OJP closed 151 of the 288 open single and OIG grant audit reports, which represents a return of $3.3 million to the federal government for unallowable or unsupported costs.

In her oversight testimony before this Subcommittee in February, the Acting Inspector General noted the "positive steps" the Department had taken to improve its grant management practices, in particular calling our efforts to implement the Recovery Act "extraordinary," and stating that OJP has improved its monitoring and oversight of grants. We will continue to work closely with the OIG to make sure OJP's grant administration process is fair and transparent and demonstrates effective stewardship of federal funds.

Conclusion

With this budget, Mr. Chairman, the Office of Justice Programs will work with Congress to ensure that funds appropriated to OJP are used effectively and transparently to support our state, local, and tribal partners and to promote smart-on-crime approaches. I look forward to working with you and the Members of the Subcommittee toward these goals.

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Mr. WOLF. Thank you.

JUSTICE REINVESTMENT

We appreciated your participation last year in the January 2010 summit on recidivism reduction. Earlier this year, Pew and the Council of Governments released a final report of the best practices.

Have you had a chance to go through the report?

Ms. ROBINSON. Yes. In fact, I was extremely impressed with the report. I read the entire thing, Mr. Chairman, and I think it provides a wonderful blueprint for states and counties moving forward.

We have been excited to work in concert with the Council of State Governments, Pew, and other technical assistance providers here and with counties and states. And we are now seeing wonderful response back with the work we are doing with the funding from 2010.

Mr. WOLF. Well, what can you do using the Pew recommendations working with state and local governments? What can OJP do?

Ms. ROBINSON. We now have——

Mr. WOLF. What do you plan on doing?

Ms. ROBINSON. We have applications, Mr. Chairman, from 13 states and 23 local communities and we are planning in the next two weeks to go forward with applications.

Mr. WOLF. Are these as a result of the Pew? Can you tell us what states they are?

Ms. ROBINSON. I am not——

Mr. WOLF. For the record or——

Ms. ROBINSON. No, because those decisions have not been made final, so I am not in the position to announce those here. But we would love to have you be part of that announcement if you——

Mr. WOLF. Oh, I do not have to be. I am just curious about which states. Is the State of Virginia a participant or have they approached you at all?

Ms. ROBINSON. I think they are a part of the applications indeed, yes.

Mr. WOLF. A participant in that?

Ms. ROBINSON. Yes. But we are excited about that. I think what is particularly good about the summit report that came out in January is the specificity of the recommendations in there.

For example, the recommendations about supervision of offenders in the community, I thought it was—and I have been in this field for 35 some years—one of the best reports I have seen because of the detail that it goes into about the data-driven approaches and supervision of offenders.

We focus so much attention on offenders when they are in prison, but we have got to connect that back into the supervision in the community. And I thought it was a terrific, detailed report.

Mr. WOLF. How many states are currently implementing these strategies to improve reentry and reduce recidivism?

Ms. ROBINSON. We have 200 active reentry demonstration programs in the community or in states around the country. I will have to get back to you about how many states themselves have those programs.

[The information follows:]

REENTRY AND JUSTICE REINVESTMENT STRATEGIES

Through its Justice Reinvestment Initiative (JRI) and the implementation of seven Second Chance Act programs, BJA is supporting many states and localities in improving reentry and reducing recidivism. Through close coordination with the Pew Center on the States and five technical assistance (TA) providers (the Vera Institute of Justice, the Council of State Governments, the Center for Effective Public Policy, Community Resources for Justice, and the Urban Institute), BJA is currently providing five states (Alabama, Indiana, Louisiana, North Carolina, and Ohio) with support in justice reinvestment analysis and recommendation development. Additionally, BJA has provided three local justidictions (Travis County, TX; Allegheny County, PA; and Alachua County, FL) with initial justice reinvestment planning support. It is worth noting that additional states are utilizing the justice reinvestment model with direct support from Pew Center on the States. It is exciting to see these initiatives taking root in so many jurisdictions around the country, and to have forged to a public-private partnership to support these initiatives.

Looking to the future, BJA has received 30 letters from jurisdictions requesting initial justice reinvestment assistance (12 States and 18 localities) and has received 6 applications (1 State and 5 localities) from jurisdictions requesting technical assistance and "seed" funding to support implementation of justice reinvestment recommendations, BJA is in the process of working with the Pew Center on the States and its TA partners to make recommendations on sites selected to move forward. BJA anticipates making these decisions in June, 2011.

Through Second Chance Act programming, BJA has provided resources to state, local, and tribal governments; and non-profit organizations to provide comprehensive reentry planning and services for reentering offenders. In fiscal year (FY) 2009 and 2010, more than 250 awards were made to or within 47 states and the District of Columbia. Except in the case of mentoring grants, priority was placed on jurisdictions targeting higher risk offenders for services and those that proposed the use of effective correctional practices including both pre- and post-release service provision. In addition to focusing on implementation grants, FY 2011 resources will support National Institute of Justice research and evaluation efforts.

An interactive map at http://www.nationalreentryresourcecenter.org/national-criminal-justice-initiatives-map identifies active reentry grants in each state. Second Chance Act grants, Justice Reinvestment grants, as well as others supported by the Department of Lab or, Education, and Health and Human Services are all available on this map.

But we had over 1,000 applications under the Second Chance Act last year. Tremendous response from around the country.

We had, just at the end of February, a conference in Washington for our reentry grantees from around the country. We had over 800 attendees there working and getting technical assistance on how to work most effectively with returning offenders.

Mr. WOLF. Well, since the report is so new and fresh, although the subcommittee sent a copy to all 50 governors, and I think we have only heard back from one.

Ms. ROBINSON. Really?

Mr. WOLF. Of course, the mail delivery here is always not the best and everything else, but it did not overwhelm me with the response that we have gotten back. And I do not want to miss this——

Ms. ROBINSON. Right.

Mr. WOLF [continuing]. This wave that is coming into sea. So is there a way maybe you could follow-up, get the committee to give you a copy, the subcommittee to give you a copy of the letter that went out to the governors?

Ms. ROBINSON. Yes.

Mr. WOLF. And you could then follow-up with the governors saying that you have been asked to follow-up and if you are willing to be helpful and participating to see how they can move ahead because it has gotten such rave reviews.

But the longer it is out there and people do not begin to move on it, particularly in these economic times, so if you could help us there, maybe look at the letter. We will get you a copy of the letter——

Ms. ROBINSON. Yes.

Mr. WOLF [continuing]. Signed by both of us here. And then you can see if you can follow-up with them.

Ms. ROBINSON. Yes. I think that would be great. And if I can make another suggestion, one of the things that might be good: I think you know that the Attorney General established a Reentry Council with the other cabinet members on the domestic side of the cabinet. We would suggest that each of the governors establish something like that as well.

Mr. WOLF. Well, why don't you get it. We will give you the letter and you can tell us how you think you might move ahead to——

Ms. ROBINSON. Wonderful.

Mr. WOLF [continuing]. Get them.

Ms. ROBINSON. We would be delighted to do that.

PRESCRIPTION DRUG ABUSE

Mr. WOLF. According to your budget priorities, OJP, unlike the Drug Enforcement Administration, does not feel that prescription drug abuse is an urgent national priority in the realm of state and local enforcement.

Is that a fair statement or what is your feelings about that?

Ms. ROBINSON. Mr. Chairman, we do think that prescription drugs abuse is a very serious problem. And I know from the Attorney General's testimony here that there was a lot of discussion about this issue.

With the Byrne JAG——

Mr. WOLF. He did not seem very motivated on it, though. He seemed——

Ms. ROBINSON. I will tell you that Jim Burch who is the acting director of BJA and I are very concerned about this issue.

And we have actually, since 2002 when this program was established, put in a great deal of time and attention to—well, I have not been here that long, but Jim has. And I remember when Mr. Rogers chaired the subcommittee talking with him about this issue in the late 1990s because he was very concerned about it, in Kentucky, about the problem at that time before the program was officially established.

So I have been very well aware of this issue and concern for many years. Through discretionary funding, through Byrne JAG, we will continue to focus on this, to provide training and technical assistance.

Some 47 states have set up PDMPs, the Prescription Drug Monitoring Programs. We will continue to focus on this issue and this problem because it does continue to be of great concern. And I know that.

I know that Florida has applied and received $800,000 under this program in the past. I know this is a great concern in Florida, in Broward County and other parts of Florida. We will not take our eyes off this problem.

Mr. WOLF. Well, we are sending a letter to the governor of Florida today on this issue. I am not so sure Florida has moved nearly as aggressively as you think they have.

In 2009, there were seven million people abusing prescription drugs. And in some states, more people are dying from prescription drug abuse than from car accidents or gunshots. According to the National Institute on Drug Abuse, nearly one in twelve high school seniors reported nonmedical use of codeine and one in twenty reported abusing Oxycodone.

What are the reasons then to eliminate the Prescription Drug Monitoring Program?

Ms. ROBINSON. As I think you said in your opening statement, Mr. Chairman, there are not enough dollars to go around for everything. And these were tough decisions that the Administration was faced with.

And among other things, the Byrne JAG money—which we tried to preserve at the existing levels—is funding that can be used for a variety of purposes. The decision was made in some instances that that funding could be used to cover other purposes. This was one of the programs that the decision was made that it could be covered by Byrne JAG.

Mr. WOLF. The Prescription Drug Monitoring Program supports state electronic databases which collect data on controlled substances that are dispensed.

As of July 2010, this figure seems to differ, 34 states we believe now have monitoring programs, from you.

Ms. ROBINSON. Uh-huh.

Mr. WOLF. Sixteen states including Florida still do not. So what was your basis on the figure that you mentioned with regard——

Ms. ROBINSON. Well, they have received in the past $800,000. It is up to the State then to fully implement that.

Mr. WOLF. And have you been in touch with them based on what——

Ms. ROBINSON. BJA has been in touch, yes.

Mr. WOLF. What have they done with the money?

Ms. ROBINSON. Well, we will have to get back to you on those details. I do not know off the top of my head the specifics on that. But at a certain point, it is up to——

[The information follows:]

Florida's Prescription Drug Monitoring Program

The State of Florida received a fiscal year (FY) 2009 implementation grant and an FY 2010 enhancement grant from the Bureau of Justice Assistance (BJA) in support of the development of its Prescription Drug Monitoring Program (PDMP). Each grant was awarded in the amount of $400,000. The goal of an implementation grant is to establish and build a data collection and analysis system. The purpose of an enhancement grant is to improve the operation and capability of PDMP data collection and analysis systems, as well as to implement interstate data exchanges with other states using the Prescription Monitoring Program Information Exchange (PMIX) specifications. As of April 5, 2011, Florida has drawn down $49,721.04 of their implementation funds and none of their enhancement funds.

To comply with the requirements of its PDMP implementation grant, Florida's Department of Health (DOH) has to date:

- Hired two key staff members, the Program Manager and the Program Operations Administrator, who have engaged BJA's designated Training and Technical Assistance (TTA) provider and made contact with PDMP officials from other states to gather lessons learned and promising practices that were used to inform Florida's PDMP implementation process. These hires were completed in October 2010.
- Released two solicitations to procure a developer for their Prescription Drug Monitoring System (PDMS).
- Branded itself as the Electronic-Florida Online Reporting of Controlled Substances Evaluation (E-FORCSE).
- Launched its official web site in October and developed a marketing plan to increase awareness of the PDMP's utility to prospective users.
- Held rulemaking meetings with stakeholders to discuss the Florida PDMP's proposed rule language and solicit input on the development of indicators of controlled substance abuse.

The State of Florida has not engaged in enhancement grant activities due to delays in accomplishing the required deliverables for their implementation grant. As previously mentioned, the Florida PDMP undertook the required steps to secure a vendor for the development of the PDMS by releasing two competitive requests for proposals (RFP). However, both of these RFPs resulted in bid protests. The second bid protest was recently resolved on March 8, 2011, when the Administrative Court ruled in favor of Florida's DOH. Florida's DOH now has the authority to move forward with awarding the contract and initiating system development and data collection, and BJA expects that the Florida agency will now act quickly to develop and implement the PDMS.

As the grantor agency, BJA has made it clear that our expectation is that the State of Florida will implement the activities described in their grant application and according to the timeline provided, and we will be monitoring this closely. We recognize the

seriousness of the issue of prescription drug abuse, especially in Florida, and we are pushing hard in this matter.

Subsequent to the hearing, the information regarding OJP's state point of contact in this matter was provided directly to Subcommittee staff.

Mr. WOLF. But that is——

Ms. ROBINSON [continuing]. The states to carry forward.

Mr. WOLF [continuing]. That is important because Florida is the leading State for pill mills.

Ms. ROBINSON. Yes.

Mr. WOLF. And it is currently experiencing an average of seven deaths each day.

Ms. ROBINSON. Yes.

Mr. WOLF. So by the end of today, seven more people will die in Florida. If a program like this is eliminated, what is the likelihood that states like Florida will implement a monitoring program or that rural states like Kentucky will be able to maintain the ones that they have?

Ms. ROBINSON. Right. No. I agree with you that this is a serious problem.

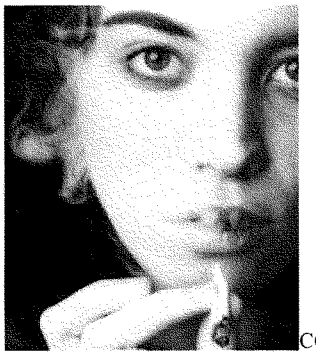
Mr. WOLF. There is an article which we would put in the record at this time from a Florida newspaper.

[The information follows:]

KIDS & DRUGS

THE WAR RAGES ON, WITH NO CEASEFIRE OR SURRENDER IN SIGHT

BY BILL CORNWELL
bcornwell@floridaweekly.com



COURTESY PHOTO **"You're doing a story on young people and drugs?" an acquaintance asked. "What can be said that hasn't already been said?"**

She had a point. This is a story that has been around forever. Problem is, it seems as if nothing actually gets resolved. The rates of drug usage among teenagers and young adults rise and fall. But they never fall to a level that anyone would find acceptable, and this is certainly true in Southwest Florida.

Drug usage by young people in Collier, Charlotte and Lee counties has remained fairly constant, according to a state survey. Yet, even without huge spikes, the numbers are unsettling. In a survey conducted last year, 41.6 percent of Collier County's high school students said they had used illicit drugs at some point. Nearly 19 percent of Collier's middle school students also admitted to using illicit drugs. In Charlotte County, the numbers were 44.1 percent for high school students and 22.7 for those in middle school. Lee County's figures for illicit drug use were 41.3 percent for those enrolled in high school, and 22.8 percent for middle schoolers.

The substances used and abused by teens and young adults may vary, but the plague of addiction marches on, seemingly unabated.

This year marks the 40th anniversary of when President Richard M. Nixon said we were in crisis and declared his "war on drugs." Four decades and $1 trillion later, we are still in crisis. If Afghanistan represents the longest war in American history, the war on drugs is the conflict that will be with us forever. There will be no ceasefire, no surrender. And meanwhile, the battlefield continues to be littered with ruined lives, shattered families and untimely deaths.

President Obama's drug czar Gil Kerlikowske (a graduate of Fort Myers High School) has said that despite our best efforts, "the concern about drugs and drug problems is, if anything, magnified, intensified." And at no time have we been more concerned with the growing problem of addiction among our young. The array of drugs and intoxicants available to young people today is staggering, and the ease of acquisition is downright terrifying.

According to addiction specialists in Southwest Florida who deal with the young, alcohol remains the substance most commonly sampled and abused. No surprise there. But setting alcohol aside for a moment, you find different locales face different challenges.

In Collier and Lee counties, abuse of prescription drugs, principally high-voltage painkillers (OxyContin — a form of oxycodone — Vicodin and the like), and benzodiazepines (tranquilizers like Xanax) pose a significant and potentially deadly threat to young people. In Charlotte County, marijuana looms as the most stubborn problem.

What the doctor ordered?

The youth of Southwest Florida have been placed in a most dangerous position. Prescription drugs are producing a new generation of addicts, the Cocaine Cowboys of the 1970s and 1980s replaced by unscrupulous men and women in white coats armed with nothing more than a medical degree.

Florida is the unquestioned "pill mill" capital of the United States. Routinely disguised as pain clinics, these mills usually operate on a cashonly basis and accept no insurance. The amount of drugs flowing out of such operations is astonishing.

Consider this: Dave Aronberg, a former state senator who is now a special prosecutor with the state attorney general's office and charged with tackling the pill mill problem, recently noted that in the first six months of 2010, 41.2 million doses of oxycodone were prescribed in Florida. The total prescribed doses of oxycodone in every other state combined was 4.8 million. In other words, almost 90 percent of the oxycodone prescribed in the United States is ordered by Florida physicians.

That pills are a major concern in Collier County and Naples makes sense, since the relative affluence of Naples often affords young people ample funds with which to purchase drugs.

"Kids don't even have to go out to the streets to get drugs," says Anne Frazier, executive director of Drug Free Collier. "OxyContin is available in the schools; it's traded and sold."

Ms. Frazier's assertion is validated by the experience of a Naples man whose 16-year-old daughter struggles with addiction.

"When she was 12 years old, she and four of her friends overdosed on oxycodone at school, at eight in the morning," says the father, who requests anonymity to protect his daughter, who is currently in treatment and also faces charges for petty theft.

"Her addiction has resulted in other problems. She will (steal) things right in front of the security camera," he says. "It's a cry for help, I believe. This takes a toll in many ways. When a kid is in trouble, the family is in trouble."

When he learned of his daughter's addiction, he asked her what percentage of her friends used drugs. "She told me that it was 100 percent," he recalls. "The extent of the pill problem in Naples is unbelievable."

Ms. Frazier says statistics bear out this father's concern about widespread drug and alcohol use among Collier's young people.

According to the 2010 Florida Youth Substance Abuse Survey, nearly 70 percent of Collier's high school students say they have used alcohol or illicit drugs. The survey also shows marijuana use on the rise.

Forty-four percent of Collier high school students say they have used illicit drugs, according to the 2010 abuse survey. Nearly 23 percent of middle school students admitted to similar drug usage. Almost 13 percent of the high school students reported abuse of prescription pain relievers. Amphetamines were used by 4.6 percent of the students.

"It is easier (for a young person) to get an opiate than a beer in Naples," says Rick Furtado, director of community services for Inspirations Naples, a facility that specializes in treating adolescents ages 12-18 with addiction problems.

(The David Lawrence Center in Naples treats both young and adult addiction cases.)

Inspirations opened in Naples because so many young people from Collier were flocking to its flagship facility in Fort Lauderdale.

"The need in Naples for a specialized treatment center for young people was enormous," says Mr. Furtado.

Mr. Furtado, 58, brings a special understanding to his job. He did battle with addiction (principally heroin) as teenager growing up in Massachusetts. He spent two stretches in prison (one for burglarizing pharmacies) before he turned 20. Amazingly, he earned a GED and was then awarded a scholarship to the University of Vermont, where he studied psychology and trained to be a counselor. But his problems with alcohol and drugs continued. At one point, he became so desperate that he voluntarily entered Bridgewater State Hospital, which is Massachusetts' facility for the criminally insane and has been home to the likes of Albert DeSalvo, the "Boston Strangler."

"I needed help, and Bridgewater was the only place that would take me," he says. "Thanks God those days are past, and places like Inspirations exist."

Mr. Furtado, who has been clean and sober for the last 24 years, easily relates to the drug-troubled teenagers who pass through the doors of Inspirations.

"For the most part, these are good kids who could have great futures," he says. "But unless they receive the proper treatment, they're not going to make it."

"A lot of us live in a vacuum," says Ms. Frazier. "Many of the adults just don't know how bad the problem is. But the kids know. They see it every day. They live it."

Feeling the pain

Kevin Lewis, CEO of Southwest Florida Addiction Services in Fort Myers, also detects a growing menace with prescription medications.

"The number one withdrawal in our detox unit is from pain killers," he says.

In years past, most of those in detox at SWFAS were white males between the ages of 45 and 55, and they were withdrawing from alcohol, Mr. Lewis says. "Now, when I walk through detox, most of the people there are withdrawing from pain killers, and they look like my children (who are 27 and 24) or younger."

Mr. Lewis blames this proliferation of pills on a variety of causes, but he says three stand out: our culture, pill mills and the availability of medications within the home.

"Look at all the prescription drug ads on television," he says. "We're selling people a bad bill of goods. We're telling them that anxiety is not a part of human existence. That's wrong. There are some days that anxiety is what gets me out of bed and going."

Amity Chandler, director of Drug- Free Charlotte County, seconds Mr. Lewis' observation.

"In our pop culture you see a tolerance for underage drug use and drinking," she says. "Look at what is shown on MTV and Spice TV. The theme is that using and drinking is cool. This makes it very difficult to convince kids otherwise. They're bombarded with all the wrong messages."

The pill mill problem cannot be overstated, according to Mr. Lewis, and he uses a telling anecdote to illustrate that contention. Not long ago, SWFAS had 30 people on its waiting list for detox, most of them young people hooked on pills. At the same time, there was a raid on an enormous pill mill on the east coast of Florida. Within a day or so, the waiting list for detox at SWFAS jumped from 30 to 70, because local addicts had suddenly been cut off from a major supplier who was serving both coasts.

"The impact (of the pill mills) is stunning," he says. "Florida has become the Wild West of this stuff. I've had pharmacists tell me that a young person will come in with a prescription (from a pill mill) for 180 oxycodone and 120 Xanax. The kid pays in cash and then he's back the next day with another prescription from another source. These kids are getting lethal amounts of prescription drugs on a regular basis."

Many pharmacists have begun limiting their supplies of drugs like oxycodone so they don't have the capacity to fill such large prescriptions. But others are all too happy to satisfy the demand.

"Let's be honest, you've got profiteers in any line of work," says Mr. Lewis.

A large portion of the pills consumed by young people is coming out of home medicine cabinets. A typical scenario, Mr. Lewis says, is this: Dad hurts his back. He receives a prescription for 60 oxycodone pills for pain. Dad takes four or five pills and the pain subsides or he doesn't like the way drug makes him feel. Son or daughter knows the oxycodone is there and begins to pilfer it. Dad, who has forgotten about the pills, doesn't notice they are disappearing.

To counter this pattern, many counties provide programs aimed at helping people dispose of unneeded and outdated prescription drugs. "Operation Medicine Cabinet" was held last month in Lee County, and some 400,000 pills were turned over during a five-day span. A similar event will be held April 30 in Naples at several sites.

Addiction breeds not only desperation but ingenuity as well. Ms. Frazier says the lengths addicts will go to feed their addiction is mind-boggling.

"We have people rooting around in landfills and garbage cans, looking for discarded prescription containers," she says. "If they find one for a drug they like, they have a name and it's not hard to come up with an address. They then target the home for burglary, hoping to find more of the drug."

Not 'just pot'

The perception that marijuana is a benign substance drives Amity Chandler of Drug Free Charlotte County up the wall.

"That is a myth," she says flatly.

The myth largely is a product of the medical marijuana craze in places like California and is further perpetuated by mellow remembrances of aging hippies.

"The marijuana that is out there today is very different from the marijuana that was circulating in the 1960s and 1970s," she says, adding the THC (the primary intoxicant in marijuana) content is much higher than it was years ago, and that means the drug produces a much more pronounced physiological reaction.

According to the 2010 youth abuse survey, about 40 percent of Charlotte County's high school students and nearly 12 percent of its middle school students report marijuana use. Statewide, the figure for high school students is 33.8 percent and 10.5 percent for middle schoolers.

"We're not making the progress we'd like with marijuana," Ms. Chandler says.

It is unclear what is driving this marijuana surge in Charlotte, but ready availability coupled with relatively low prices are presumed to be key factors.

One might think that the heavy marijuana use is linked to a more tolerant attitude toward the substance from baby boomer parents. But Ms. Chandler says statistics do not support that hypothesis.

"We used to think that baby boomers would just look away when it came to marijuana," she says, "but our surveys of students don't bear that out. We found that 75 percent of the students said their parents don't approve of marijuana and strongly discourage any experimentation."

A goal of Drug Free Charlotte County is to change the perceptions of young people toward drug usage. Ms. Chandler says studies have discovered that students think drug use is more widespread than it actually is. This produces a feeling on the part of some students that they must at least experiment with drugs to be accepted by their peers.

"We are trying to get across that most of our students don't use drugs," she says.

Delaying experimentation and use is vital, according to Mark Mishek, president and chief executive of the Minnesota based Hazelden Foundation. Founded in 1949, Hazelden not only operates treatment facilities (it has one in Naples that serves only adults), but it is also one of the leading publishers of books and other materials related to recovery.

"We really don't know what the real effect of drugs and alcohol is on a young person's brain, which is still developing," Mr. Mishek says. "But we do know that young people who start at 13 or 14 or 15 are four times as likely to have problems as adults. You want to tell them to wait until college, please, if they are going to experiment at all."

One major roadblock to addressing the problem of addiction involving young people is the cost of treatment.

Hazelden charges about $26,000 a month for residential treatment of young adults at its other centers around the country, Mr. Mishek says, which is in line with other top-tier facilities. Hazelden invests about 6 percent of its income for "scholarships" and aid to families who cannot afford to pay full freight, he adds.

Insurance for the treatment of substance abuse is filled with "huge holes," he adds. Some plans will cover it, others will not. Those with low incomes and no insurance face daunting challenges and most likely will have to settle on a few days of detox and perhaps a few more days of actual treatment at a facility that receives public funding.

Despite what appears to be a bleak landscape, those who fight the daily battle against addiction refuse to concede defeat.

"I am very optimistic," says Ms. Chandler. "We face a world of obstacles, that's for sure. But despite all of that, most of our kids still make good decisions. We've just got to keep working with those who don't."

Mr. WOLF. I would quote it, but the figures may be a little wrong. Ninety percent of the Oxycodone that was prescribed came out of Florida.

Ms. ROBINSON. Yes.

Mr. WOLF. Ten percent came out of the other 49 states.

Ms. ROBINSON. Yes.

Mr. WOLF. And I would like to urge you, if you would—do you have contacts in the State of Florida?

Ms. ROBINSON. Of course, yes.

Mr. WOLF. If you could call them——

Ms. ROBINSON. Yes.

Mr. WOLF [continuing]. See what their plans are. We will share with you.

Ms. ROBINSON. Yes.

Mr. WOLF. Maybe what you can do is get the article, have it sent over. So we can give you, so you can read it before you leave or you can take it with you.

Ms. ROBINSON. Of course. Yes.

Mr. WOLF. And then who is your contact in the State of Florida?

Ms. ROBINSON. We work with a number of the police chiefs down there, with people at the state level.

Mr. WOLF. At the state level, who at the state level?

Ms. ROBINSON. I cannot tell you off the top of my head, but we can certainly follow-up with you. We work with people in the state police. We work with the state Attorney General.

[The information follows:]

FLORIDA'S PRESCRIPTION DRUG MONITORING PROGRAM

Please refer to the previous insert as its response is the same.

Mr. WOLF. Okay. If you would maybe call the head of DEA to get the background.

Ms. ROBINSON. Of course.

Mr. WOLF. Read the article——

Ms. ROBINSON. Yes.

Mr. WOLF [continuing]. That we will give you before you leave.

Ms. ROBINSON. Uh-huh.

Mr. WOLF. And then if you could call the State of Florida and talk to whoever are your contacts and get back to us and let us know——

Ms. ROBINSON. Okay.

Mr. WOLF [continuing]. What because if seven people a day are dying——

Ms. ROBINSON. Of course.

Mr. WOLF [continuing]. The impact on the young people there.

Ms. ROBINSON. Uh-huh.

Mr. WOLF. Mr. Fattah.

MISSING AND EXPLOITED CHILDREN

Mr. FATTAH. Thank you, Mr. Chairman.

Let me start with the missing and exploited children program.

Ms. ROBINSON. Yes.

Mr. FATTAH. Now, we are at $70 million and——

Ms. ROBINSON. Yes.

Mr. FATTAH [continuing]. The proposal is that we go to $60 million. Where would the $10 million be cut from?

Ms. ROBINSON. That funding goes across a number of different programs. It is not simply the National Center on Missing and Exploited Children, but covers a number of things including the ICACS and other programs in this broad area.

Mr. FATTAH. I went out and visited the National Center.

Ms. ROBINSON. Yes, I recall that. Ralph Martin on my staff I know was with you.

Mr. FATTAH. Yes.

Ms. ROBINSON. The National Center is a program that I am very familiar with. I have known Ernie Allen for many years. He is a good friend. I think very highly of it.

This is an area where along with so many other programs across the Department of Justice, across the Administration, and across OJP where there was funding that had to be trimmed because, as the Chairman noted, we are in a tough budget year. So even with programs that are priorities, things had to be shaved off.

Mr. FATTAH. Well, I would hope that as we work to finalize the appropriations for this year——

Ms. ROBINSON. Yes.

Mr. FATTAH [continuing]. That we will work to make sure that this is not one of the areas that is trimmed——

Ms. ROBINSON. Right.

Mr. FATTAH [continuing]. Because I think that missing and exploited children and the—it is not something where we can afford——

Ms. ROBINSON. Right.

PRISONER REENTRY

Mr. FATTAH [continuing]. To make a cut. But let me ask you about this Reentry Council that the Attorney General set up. Now, you have 16 different, 17 different federal agencies——

Ms. ROBINSON. Yes.

Mr. FATTAH [continuing]. Interacting around the question of reentry. Now, we have, based on your testimony, almost 800,000 people being released from prison each year——

Ms. ROBINSON. Yes.

Mr. FATTAH [continuing]. 750,000 or so. How is the Reentry Council's work going to impact making reentry as meaningful as possible for these people returning to various communities? What is the plan of the council in terms of——

Ms. ROBINSON. Yes.

Mr. FATTAH [continuing]. Getting more buy-in from other non-Justice Department agencies?

Ms. ROBINSON. That is a very good question. I have been involved either directly in government or outside of government over three and a half decades and this is one of the most impressive kinds of collaborations across government I have seen over that long career.

On January 5th, Attorney General Eric Holder in his conference room convened seven different cabinet officials around his table and, rather than their sitting there reading talking points, they

were really engaged and very excited about the notion of working on reentry.

So Shaun Donovan from HUD talked about his work in New York City when he headed housing there and how they had worked with Marty Horn who was the head of corrections in New York City, and how they worked to ensure that offenders coming out of jail there actually had a place to live.

And Kathleen Sebelius from HHS talked about the community health centers and how they could really work to ensure that returning offenders had a chance to engage with health services when they were coming out.

And General Shinseki from Veterans Affairs talked about the need to make sure that we knew who the returning offenders are who, in fact, are veterans. He said we are not sure we are connecting with them and have that information.

So we were able to help make connections on that. So it is a problem solving type of situation to connect the dots, to really make those connections.

And beyond that—the cabinet level body—there is the staff level, with 17 agencies regularly meeting, headed by two of my staff members. That is where a lot of the day-to-day work gets done.

Mr. FATTAH. Let me drill down on that for one more layer then. Let's take the issue of veterans.

Ms. ROBINSON. Yes.

Mr. FATTAH. We know that a disproportionate number of these young people end up homeless, end up involved in certain antisocial and illegal activities and end up in our prison system.

Ms. ROBINSON. Yes.

Mr. FATTAH. And we say we do not know. Are we doing something because of the Reentry Council to now know? Are we—

Ms. ROBINSON. Yes.

Mr. FATTAH [continuing]. Creating a data process in which we can extract that information and know how many veterans are incarcerated, how many are being released, and what types of services they may need?

Ms. ROBINSON. Yes. More than that, we are trying to connect them with services that veterans hospitals and other clinics provide, so we are trying to actually connect services. We are trying to lift restrictions. We are trying to make those services available.

Mr. FATTAH. Well, I would be very interested. I had sponsored some report language in the past to try to do a kind of census on veterans——

Ms. ROBINSON. Wonderful.

Mr. FATTAH [continuing]. And this population. So whatever information you could supply that would be of help——

Ms. ROBINSON. Great.

PUBLIC SAFETY OFFICERS BENEFITS

Mr. FATTAH [continuing]. To understanding where you are and what we might do to do even more in that regard. Now, one of the increases in the budget is in the death benefits for law enforcement; is that correct?

Ms. ROBINSON. Yes. The Public Safety Officers Benefits Program.

Mr. FATTAH. Right. And is that because we have had an increased number of fatalities?

Ms. ROBINSON. Yes, yes. Last year alone, we had a 40 percent increase in fatalities, mainly from shootings of law enforcement officers, very sadly. This is really just to keep up with what we have seen.

Mr. FATTAH. Are we satisfied that the level of benefit is sufficient to help the family?

Ms. ROBINSON. Yes. We think that this will calibrate with the need.

HAWAII HOPE

Mr. FATTAH. Okay. All right. And the reentry efforts now, we have funded it at $100 million and that is where the request is now. And some 250 programs have been funded.

You are kind of moving a number of things around here, but the Hawaii program that you identify, the Hawaii Opportunity Probation——

Ms. ROBINSON. Yes.

Mr. FATTAH [continuing]. Enforcement Program, can you tell us a little bit about this? We have a program in Philadelphia called the Youth Violence Prevention Program which is an intensive interaction with youthful offenders——

Ms. ROBINSON. Yes.

Mr. FATTAH [continuing]. Who, based on evidence, there would be a higher probability of them being involved in a very serious crime in the near future. They get a very intensive, focused effort and it has been very successful.

But if you could tell the committee a little bit about the Hawaii program that you have identified, which you say is having remarkable success even with meth users. So tell us a little bit about this.

Ms. ROBINSON. Sure. It is the Hawaii HOPE Program as you mentioned. And it was started by a former U.S. attorney in Hawaii who is now a state court judge, Steven Alm. I knew him back in the 1990s when he was the U.S. attorney there.

And it has some alignment with the Drug Courts, but it is not as treatment intensive. It is a probation program. I always think of the analogy that it keeps the offenders on a short leash. They have to come back and report in very regularly before the judge. And so it is basically using that very regular monitoring before the judge with sanctions if they are not coming back clean.

So it uses regular drug testing and it only sends them to treatment if it is clear that they cannot stay drug free without treatment. So it is a less expensive program than Drug Court.

Judge Alm found that this Hawaii HOPE Program was, with our evaluation through the National Institute of Justice, basically reducing recidivism by 50 percent. So that is a pretty dramatic reduction.

Mr. FATTAH. It is remarkable. The question becomes how we take this here. I assume this means this has something to do with your request for a clearinghouse on what works——

Ms. ROBINSON. Yes.

Mr. FATTAH [continuing]. At least to highlight these types of programs.

Ms. ROBINSON. Correct.

Mr. FATTAH. And let me end my questioning because I am aware of your work and with the University of Pennsylvania and with Jerry Lee——

Ms. ROBINSON. Right.

EVIDENCE-BASED APPROACHES

Mr. FATTAH [continuing]. On this question of evidence-based approaches. Are there things that we now know that could be saving taxpayers money, making communities safer, and helping people turn away from a life of crime that we have not yet taken to scale, that we could find ways to help maybe provide incentives to take them to scale?

That is, are we past the point of finding something over here that works and studying it and that what we need to do is—I think one of the things that the chairman always points to is that the communications to governors and other things, do not seem to get the response that we would hope.

But are there things that we now know work in terms of diverting juveniles from the criminal justice system and some of these other larger issues that have been studied for a very long time?

Ms. ROBINSON. Yes. Your point is very well taken, Mr. Fattah. I firmly believe that we can make government more effective with that kind of smart-on-crime spending.

As you point out, the work that Jerry Lee and others have fostered, that is my reason for proposing this "what works" clearinghouse. We have set out in the budget proposal to highlight for practitioners and policymakers, not in academic journal articles, but in very crisp summaries the things that governors, or mayors or busy practitioners can see, a framework for the things that they can easily adopt at the state and local level. I think that is the way forward in a tight budget environment.

Mr. FATTAH. Thank you, Mr. Chairman.

Mr. WOLF. Mr. Serrano.

STUDY OF HATE CRIMES

Mr. SERRANO. Thank you, Mr. Chairman.

Welcome. Thank you for your service.

For fiscal year 2010, we inserted language in this bill asking for a study of hate crimes against immigrants and Hispanics, in some cases these crimes against Hispanics because some folks—I mean, there is no reason why they should be, but some people perceive them to be undocumented, as some people would say illegal aliens. So how is that going?

When do you think that study will be completed and is there anything you can tell us now about what you are finding?

Ms. ROBINSON. Thank you very much for the question, sir.

The study is underway by our National Institute of Justice. We do not have findings at this point to report to you, but the study will be available by September of 2012 and we look forward to sharing it with you all in the subcommittee.

Mr. SERRANO. And the request came from this committee, but I am sure there has been other discussions of this.

Do you have any information on the reporting of these crimes or crimes that people feel are hate crimes against immigrants?

Ms. ROBINSON. I do not have that information, but we will be happy to do some further inquiry and get back to you.

I know that NIJ is looking at existing information because, when you undertake a study of this kind, you always look at what they call the literature review. So we can certainly get back to you on that.

[The information follows:]

HATE CRIMES AGAINST IMMIGRANTS

The literature in this area is sparse, and more research is needed that takes a serious and rigorous look at hate crimes against immigrants in America.

The Congressionally directed study on hate crimes against immigrants will be completed by September of 2012, and will provide some of the much needed information on this subject. The study's contractor, Abt Associates, is conducting an analysis of existing national data and other data from California, Texas, New Jersey, and Michigan, to determine if there has been an increase in reports of hate crimes against new immigrants, individuals who are perceived to be immigrants, and Hispanic-Americans. Abt Associates will also complete a more in-depth look at the four selected states, including surveys of law enforcement and focus groups.

A preliminary overview of findings regarding trends, as well as details on how participating states were selected, will be available in May 2011.

The National Institute of Justice maintains an active topical webpage on the issue of hate crimes at http://www.nij.gov/topics/crime/hate-crime/welcome.htm, and will continue to update this page as more information becomes available.

Mr. SERRANO. Okay. Well, we would appreciate that because that is an issue of great concern. We have an immigration issue, but a violence related to it that should not be allowed. And we need to know more about it, not to mention the fact, and this is kind of a touchy subject to discuss, but there are people being hurt because they are perceived to be immigrants which was, you know, the concern that——

Ms. ROBINSON. Of course.

Mr. SERRANO [continuing]. The Latino community and many others had with the Arizona law, that it allowed police officers——

Ms. ROBINSON. Uh-huh.

Mr. SERRANO [continuing]. To stop you if they thought you might be here illegally. And so it is a real big problem.

Let me ask you about with regard to the proposed new race to the top.

Ms. ROBINSON. Yes.

JUVENILE JUSTICE

Mr. SERRANO. Funding for juvenile justice. If given full funding in fiscal year 2012, how many states do you envision getting awards? How many states currently get awards under the program?

This initiative is replacing the Juvenile Accountability Incentive Block Grant Program and the Part B Formula grants. Will some states be hurt by reductions in funding if we transfer many of our current state formula initiatives to this race to the top?

You know, Mr. Chairman, I could add to this and say that these grants become even more important now that another source of local funding we used to have is no longer around, but I do not want to get into that discussion at this time out of respect to all

of us. If anybody else knows what I am talking about, we can discuss it later.

Ms. ROBINSON. Mr. Serrano and Mr. Chairman, I want to tell you that we have had a great deal of feedback from the states, from Capitol Hill, and from juvenile justice groups since the release of the President's budget about this juvenile justice proposal.

As you are probably aware, during the development of the President's budget, it is a rather internal process within the executive branch, so you do not have time for a collaboration process, and so in many ways, that consultation process begins after the release of the President's budget.

We have learned a great deal since the release of the President's budget and we have taken that consultation to heart.

So I have been authorized to say at this point, at this time, during this testimony that we have reconsidered the President's budget request as initially proposed and that we are now suggesting and proposing that this program move forward in a different fashion and that 90 percent of the funds be under the existing Formula Program of the original Juvenile Justice and Delinquency Prevention Part B and the Juvenile Accountability Block Grant Program—and so that would be $110 million of it, and that $10 million would be for a demonstration program.

So we would be pulling back from the "Race to the Top" proposal as initially proposed.

Mr. SERRANO. Okay. Well, I thank you for your testimony. I thank you for your answers to these questions.

You know, we are going through a difficult time here. I do not have to tell anyone. And I think we have reached the point where both sides agree there has to be cuts. The question is how to apply those budget cuts.

And while you may not be one of the most famous agencies in the Federal Government, your department is certainly one that has a huge impact on a lot of folks. And I know the chairman understands that because he has spoken in the case of the juvenile justice programs, he has spoken about gangs for many years——

Ms. ROBINSON. Of course.

Mr. SERRANO [continuing]. And other issues. And he knows that issue well. So I wish you well and we will in any way that we can be helpful.

Ms. ROBINSON. Thank you so much.

Mr. SERRANO. Thank you, Mr. Chairman.

Mr. WOLF. Thank you, Mr. Serrano.

PRESCRIPTION DRUG ABUSE

The article we have to give you, I will go back to the issue before we go on, on Oxycodone, it says consider this. This is from War—Kids and Drugs, the war races on with no cease fire or surrender in sight by Bill Cornwell. We will submit it for the record.

Consider this. David Aronberg, a former state senator who is now a special prosecutor with the State Attorney General's Office in charge of tackling the pill mill problem, recently noted in the first six months of 2010, going slow so this can filter in, 41.2 million doses of Oxycodone were prescribed in Florida. The total prescribed doses of Oxycodone in every other state combined was 4.8

million. In other words, almost 90 percent of the Oxycodone prescribed in the United States is ordered by Florida physicians.

So I hope you can—we will give you this—that you can move ahead on this quickly.

And we are releasing a letter today asking the governor of Florida who happens to be a Republican governor, and I guess the letter could be viewed as critical, to kind of deal with this issue. And I hope the Justice Department and you can kind of cooperate.

DEFICIT REDUCTION

On this issue of the deficit, I have just got to. I was not going to say it, but I am going to say it now after looking at this article, too. We have record deficits under this Administration. That is a fact. This month it will be another record.

The comments that I saw the other day, yesterday about Chuck Schumer to sort of put this in a context of playing a political game of crib sheets that had a comment on something is very depressing. It demonstrates that the Democrats, some Democrats in the other body are trying to make political hay out of dealing with this issue.

Thirdly, until we deal with the issue of getting this budget out of the way, coming together on a bipartisan basis which I think can be done——

Ms. ROBINSON. Uh-huh.

Mr. WOLF [continuing]. But also dealing with the whole entitlement issue, of reforming the entitlements, no excuses, let's just come together in a bipartisan way. And I was disappointed that the President and the Administration have failed to step forward and provide the leadership on this issue.

And this article today, when you have the Deficit Reduction Commission signed by Senator Coburn and Senator Durbin, if those two can come together.

Now, Senator Coburn is willing to push this thing and that is what they call the gang of six in the Senate and now Coburn is being attacked by Grover Norquist, but Coburn is pushing back and, yet, where is the President?

Ms. ROBINSON. Uh-huh.

Mr. WOLF. And where is the Administration? They are AWOL. They are silent. So the Senate leadership is silent on continuing to try to come together in a bipartisan way.

Speaker Boehner has laid this thing out. We want to resolve this thing. We do not want to see the government shut down. I think it is fair to say now that Chuck Schumer wants to see the government shut down.

And so if this government shuts down, the blame should be on Chuck Schumer. The fact is if the government shut down, and I am opposed to the government shutting down——

Ms. ROBINSON. Uh-huh.

Mr. WOLF [continuing]. Every person who calls my office, I am going to tell them Chuck Schumer was responsible for the government shutting down. And the failure of the Administration to come together and deal with this entitlement issue in a bipartisan way, the way that Senator Simpson and Erskine Bowles, two people who I think we owe a debt of gratitude to——

Ms. ROBINSON. Uh-huh.

Mr. WOLF [continuing]. So I know you are not—this is not your portfolio——

Ms. ROBINSON. Uh-huh.

Mr. WOLF [continuing]. But I think anyone who has a political appointment when given an opportunity ought to tell the White House the Congress expects, is urging, pleading for the President to come forward to provide the leadership, the same way that Senator Coburn. If Senator Coburn can stand up to Grover Norquist, then the President ought to be willing to participate in this. But to be silent is really not good leadership.

So if the government shuts down, we can blame Senator Schumer. And if these programs are cut, which I do not want to see them cut——

Ms. ROBINSON. Uh-huh.

Mr. WOLF [continuing]. We can blame the Administration for not being willing to come forward to deal with a bipartisan package similar to the Erskine Bowles-Simpson Commission, that we need to get on with this, get on with resolving the continuance so we give some sense of order to government——

Ms. ROBINSON. Uh-huh.

Mr. WOLF [continuing]. As to what we can do and also to come together before the end of this year with a comprehensive, bipartisan, I stress the word bipartisan, and I think the fact that Coburn and Durbin could come together, I think if they can come together, I think the whole Congress ought to be able to come together.

Ms. ROBINSON. Uh-huh.

NICS AND NCHIP

Mr. WOLF. The budget request proposes to support both the NICS Program and the National Stalker and Domestic Violence Reduction Program, which supports state and local domestic violence databases, under the funding for the National Criminal History Improvement Program, but in consolidating these programs, there is a significant net reduction.

The National Stalker and Domestic Violence Reduction Program is targeted for elimination for a savings of $3 million and the NICS is reduced by $8 million, yet a mere $500,000 increase is proposed for the NCHIP.

Will this proposal realistically support all these activities given the net $11 million reduction? So if you are increasing by only $500,000 and you are going to have the other cuts, the $8 million into $3 million, how do you deal with that?

Ms. ROBINSON. I did not know if you were finished.

Mr. WOLF. I am.

Ms. ROBINSON. Okay. These are also, of course, important areas and particularly as we look in the aftermath of the Tucson shootings. We do have a total of $24 million between the two programs that we have requested.

And I would also note, Mr. Chairman, that we have $10 million in carryover under NICS from 2010. Only nine states currently qualify for NICS funding and we were not able, despite out best efforts in outreach to the states, additional states were not able to qualify last year.

We are hoping more will qualify for the solicitation that is currently out on the street right now for 2011, assuming appropriations come through for that. But right now we have a $10 million carryover in the account. So that money is available currently.

Again, budgets have been tight, but we are seeing some good growth in the number of mental health records, for example, that are coming into the NICS system. So we are optimistic about the degree to which states are continuing to build those records in the system.

BJS has done, I think, a good job in the outreach, working with FBI and with ATF and working with states. It is a slow process of getting those records, both domestic violence and the mental health records on line.

A lot of these states started out slowly—I think back to when NCHIP started back in 1994. We actually saw some states out there that were still maintaining their criminal history records on index cards, literally in shoe boxes.

So we have come a long way, but there is a long way admittedly that we have to go. So clearly we could use a lot more money, but it is a tight budget year.

Mr. WOLF. Well, the Administration bragged that their example of working together in a bipartisan way with the Republicans in the House and Senate last year was to pass the tax bill which gave a 2 percent payroll tax into social security which gave Jimmy Buffett and Warren Buffett a big break in their Social Security, which cost $112 billion to the Social Security system, and that was described as great leadership. It is not very tough to give candy away even if you are giving candy to Jimmy Buffett and Warren Buffett, it is the other side of the coin of how do you get control?

PRISON RAPE

Since Congress affirmed its duty to protect inmates from sexual abuse, and I think that—I have been disappointed with the Attorney General on this issue, I thought he would be much more sympathetic particularly since he has served as a judge with Judge Walton, but apparently not.

Since Congress affirmed its duty to protect inmates from sexual abuse by enacting the Prison Rape Elimination Act the national prison Rape Elimination Commission has studied the cause of sexual abuse in confinement, developed national standards for the reduction of such crimes, and set in motion a process for eliminating, once and for all, prison rape.

In a much delayed notice of proposed rule making, the department published its own version of the Commission's national standards for combating sexual abuse in federal, state, and local correctional and detention facilities and it includes comments on many more standards for inclusion in the final rule.

The Prison Rape Elimination Act authorizes grants for staffing, training, and technical assistance to prevent and prosecute prison rape and it makes it clear that the Department of Justice should provide assistance to states—many who resisted this—so that budgetary circumstances do not compromise efforts to protect inmates, yet this budget is reducing funding for the program from $15 million in fiscal year 2010 to $5 million. Can you tell us why?

Ms. ROBINSON. Yes. Mr. Chairman, in the fall of 2010 we provided a $13 million cooperative agreement, a grant, to the National Council on Crime and Delinquency for a resource center on this subject to provide technical assistance and training for implementation of the standards that would be provided to the states and to localities, and that is a three-year grant.

So that, coupled with funding that is in the budget, we thought would be sufficient going forward.

Mr. WOLF. Do you think it really will be to deal with this problem, the budget reduces funding from $15 million to $5 million?

Ms. ROBINSON. That was our best projection.

Mr. WOLF. With a growing problem that it is, and have you read the report of the National Commission?

Ms. ROBINSON. Yes, I have.

Mr. WOLF. They do not seem to think it would be enough.

Ms. ROBINSON. We also will have technical assistance from the National Institute of Corrections, and we can use other technical assistance through BJA. So that was our best projection looking forward.

Mr. WOLF. To what extend will OJP be deploying other resources to get the necessary reforms? What do you plan on actually doing with regard to getting the reforms under way?

Ms. ROBINSON. You mean in terms of PREA?

Mr. WOLF. Yes.

Ms. ROBINSON. Yes, I think that there are other things that we can do. I think through broader technical assistance and training.

Mr. WOLF. What will you do since this is a pretty significant budget cut? What do you plan on doing?

Ms. ROBINSON. We have done a great deal of work over the years in corrections.

Mr. WOLF. But the problem has increased, it has not really decreased, and——

Ms. ROBINSON. I think there is a great deal that we can and will do with regard to training and technical assistance. We can pull together people in a conference and do training that way. We can work with the National Institute of Corrections, which is a highly regarded body. I serve on their advisory board.

Mr. WOLF. Do they support all the recommendations of the commission?

Ms. ROBINSON. I could not speak for the National Institute of Corrections, so I do not know, but they have been very closely involved with it, so I would guess they would be very supportive.

DNA AND FORENSICS

Mr. WOLF. With DNA and forensic analysis programs, the budget request would eliminate the Coverdell Forensic Science Improvement Programs and also reduce funding for the DNA-related and forensic initiatives by $51 million and roughly by one-third.

These programs fund state and local efforts to address the backlog of unanalyzed DNA samples, including activities authorized by the Debbie Smith DNA Backlog Grant Program.

They also support non-DNA forensic science activities and assist law enforcement with solving cold cases in efforts to identify deceased persons.

Will the elimination of these programs affect the achievement of the goals of the President's DNA initiatives, specifically ensuring that forensic DNA analysis reaches its full potential to solve crimes?

Ms. ROBINSON. I am sorry, Mr. Chairman, I could not hear the last—

Mr. WOLF. Will the elimination of these programs affect the achievements or the goals of the President's DNA initiatives, specially ensuring that forensic DNA analysis reaches its full potential to solve crimes?

Ms. ROBINSON. Thank you so much.

Again, we are not happy about the need to cut back on these programs.

The DNA initiative at $161 million was one of the highest—if you are looking across the entire OJP budget it was one of the top three or four highest in dollar amount items in the entire budget. So not surprisingly probably, it was one of those that did get trimmed back.

One of the things that we have seen in the last number of years—between 2005 and 2009—was that state and local DNA labs greatly increased their capacity to process DNA cases, a tremendous increase in their capacity, I think 3.7 fold. At the same time, the field has grown much more sophisticated about the use of DNA. They see so much more potential in DNA.

For example, from NIJ research they know that DNA can now be used in property cases—in burglaries—so there is a lot more DNA business coming in the front door of the labs.

So there are still a lot of backlogs in those labs, but it is much better than it was.

So the answer to your question is that things are better at the state and local level in the forensics and lab area, but the needs still are big. So we are in a better place than we were several years back.

This funding—$110 million—is still a significant amount of money to do a lot in both the DNA and the non-DNA forensic areas. I think we can still make a significant contribution here.

In addition to this, there is a request in the 3 percent research set aside for $10 million for forensic science, so that is an additional piece here that should be recognized as well.

So together, I think, these things can make a very significant contribution to the science both in the DNA and the non-DNA forensic areas.

Mr. WOLF. My last question then I will go to Mr. Fattah, and I appreciate Mr. Bonner, I will be coming back.

To what extent then do you expect the NIJ will be able to maintain the DNA analysis services in the absence of a Coverdell? With the absence of Coverdell what does that mean?

Ms. ROBINSON. I think the Coverdell money is certainly an important one in helping support lab infrastructure, but it is an area where I think we have to, at some point, turn back to the states and say this is something that they, in a tight federal budget year, need to support. I think that if you have one or the other, the federal support on the science side is the more important area to be covering.

Mr. WOLF. Well, the follow up to go one more. With the National Institute of Justice, the National Research Council criticized NIJ's mandated involvement with forensic programs saying that programs like Coverdell "diminish NIJ's stature as a research agency," and divert considerable time away from its core mission.

Was the decision to eliminate this program a response to the report?

Ms. ROBINSON. No, although that is actually a very good question. It was not—though I think that that could be taken in that way—it was not in response to the National Academy of Sciences' report, it was really more around federal versus state functions.

I think that is a separate question that can be addressed, however, the question of who handles that function within OJP—whether that Coverdell program should be transferred, for example, to BJA—would be, I think, the proper question to be asked.

Mr. WOLF. What do you think?

Ms. ROBINSON. I think that is probably a good question, and that perhaps it should be transferred, if it is funded, to BJA.

Mr. WOLF. Mr. Fattah.

Mr. FATTAH. I have had a round so would be glad to yield, if you want, to our colleague.

Mr. WOLF. Okay. I am going to go to Mr.——

Mr. FATTAH. Yeah. And then I will——

Mr. BONNER [presiding]. I have got a few questions, but Chairman Wolf has an appointment. My name is Jo Bonner from Alabama.

Ms. ROBINSON. How are you, sir?

Mr. BONNER. Does my friend from the Bronx have a question?

Mr. FATTAH. I was not yielding to the guy from the Bronx.

Mr. BONNER. Or you were not yielding.

Mr. FATTAH. I was yielding to you.

Mr. BONNER. Okay. Well, I appreciate that.

Mr. FATTAH. Go right ahead.

Mr. BONNER. And I guess the yield to me was with restrictions that I could not yield to my friend from the Bronx.

Let me get a couple questions in——

Ms. ROBINSON. All right.

GRANT PROGRAM FLEXIBILITY

Mr. BONNER [continuing]. And then we will see if Mr. Serrano has some.

Ms. Robinson, I want to follow up and echo the concerns that Chairman Wolf was raising with regard to the DNA backlog issue. I do not know how familiar you are, but I hope after our visit I can encourage you to become more familiar with the Department of Forensic Sciences in my home state of Alabama and the good work that they are doing. It is important work, and they, like many others around the Nation have benefitted from this strong partnership with OJP.

And so my question is really along this line. Short of a miracle occurring, the money issues that we are facing today, the financial crisis that we are facing today we will be facing next year and the year after. We are looking at a deep, deep hole to dig out of, and yet I do not think there is many programs in the Department of

Justice that have a better track record and a more direct relationship to state and local law enforcement than the programs that you are responsible for.

Have you all been able to in anticipating that there is not going to be a lot of new money for these vital programs this year or in the out years, have you been able to spend any time looking at what flexibility you can give to the states and to these others that are seeking these grants, either extending deadlines or other ways to give them more flexibility to participate in the programs and the limited learning that are available?

Ms. ROBINSON. Yes, as a matter of fact we have.

First of all, the Byrne JAG funding, of course, is probably the most flexible funding I have ever been aware of in my many years working either inside or outside government, so with Byrne JAG we give the states maximum flexibility both in categories and in the pretty broad number of years they have to spend that funding. So that would be one thing.

But, secondly, the Administration has just come to us and asked us if we can look at existing guidelines and regulations for grant programs—if there are ways that we can either, through internal regulations and guidelines or through proposed changes that we might suggest to Congress to look at ways to make them more flexible for states and localities, and we just got this assignment recently from the White House. My chief of staff, Thomas Abt, who is here, is heading that for us at the Justice Department. I take that very seriously. Because having been on the outside of government and applying for grants myself, I know it is a tough thing to do and you want to make this very user friendly for people who are applying and who have to grapple with dealing with the government.

Sometimes, Mr. Bonner, I sit in my conference room at the Justice Department and I am dealing with the folks in the agency and I say how many people in this room have written grants, and I and my deputy, Mary Lou Leary, we are sometimes the only people in the room raising our hands. But you know, having that consumer perspective is important to have in the room. We want to make this flexible, we want to make this work for people who are our consumers.

So I hope that is responsive to what you are saying.

Mr. BONNER. It is. And a natural follow up would be, and maybe Tom could give you some idea or you may know, how long do you anticipate taking to look into the scope of this challenge and being able to report back not only to the Administration but perhaps to this committee as well?

Ms. ROBINSON. We are going to turn this around pretty quickly, but I will tell you one thing that would help would be suggestions—suggestions from the field from your constituents as to things that would be helpful to them. So we would love to get some ideas.

Mr. BONNER. Okay. I will make sure you get some with a southern accent.

Ms. ROBINSON. Excellent. Thank you so much.

Mr. BONNER. Mr. Fattah.

Mr. FATTAH. Thank you, Mr. Chairman.

I wanted to ask you one last question and I also want to reference the success over the last two years in the reduction of the crime rate nationwide.

The Attorney General and the department have to be very proud of the achievements in terms of the reduction in the murder rate, which is now over a 7 percent reduction nationwide. In each of the major categories there have been reductions, but in the tribal law enforcement area I think that there are still very significant challenges. I know you mentioned this in your prepared testimony, but if you would take an opportunity to talk about what we are doing to assist in terms of tribal law enforcement.

I know this is a high priority for the Attorney General, for the Administration, and for our committee, so if you could comment on that, that would be helpful.

Ms. ROBINSON. Yes, thank you so much.

Yes, this is indeed a very high priority for the White House, for the Attorney General, and for the Associate Attorney General, who is my immediate boss, Tom Perrelli.

Not just in OJP but the COPS Office and the Office on Violence Against Women—those are two separate entities from OJP—we have tried to collaborate across all three of these offices to coordinate our tribal assistance.

One thing we have heard from the tribal nations is that applying to many separate grant programs is often very difficult for them. So both last year and this year we have issued a joint solicitation called the Coordinated Tribal Assistance Solicitation. Because everything in the government has an acronym, it is called CTAS. So this year the CTAS, the coordinated solicitation is right now on the street and will close the third week in April.

We learned some things from the CTAS last year to make it more streamlined and simpler for them to apply for and have incorporated those kinds of "lessons learned" in this year's CTAS application.

This makes it easier for the tribal nations to apply and it coordinates their ability to have the application come in and meet their specific needs that are respective to their interests.

We are doing the same thing with training and technical assistance. In fact just yesterday the Associate Attorney General told all of us that he is going to be looking at how we can do an even better job of coordinating all of the tribal technical assistance and training across, again, COPS, OJP, and the Office on Violence Against Women.

So we have worked very hard to do this. Because as you point out, Mr. Fattah, the problems of crime, and especially crimes against women, sadly, are very severe in a number of areas in Indian country.

Mr. FATTAH. Thank you very much. Thank you, Mr. Chairman. I have concluded.

Mr. BONNER. Thank you, Mr. Ranking member.

Mr. SERRANO. Mr. Chairman, I only have one more question and I am going submit it to the record.

BYRNE CRIMINAL JUSTICE INNOVATION PROGRAM

Mr. BONNER. Okay. Great. Well, let me get a few more questions in.

Ms. Robinson, you mentioned the Byrne Grant Program and the success that it enjoys, and I think many people around the country would agree with that, so let me focus a little bit more on the Byrne grants.

The budget requests $30 million for a new Byrne criminal justice innovation program.

Ms. ROBINSON. Yes.

Mr. BONNER. This is not an authorized program as I understand it, so the department will not be limited by statute with regard to its scope; is that correct?

Ms. ROBINSON. That is correct. This would be authorized through the appropriation.

Mr. BONNER. This program would be a component of a government-wide neighborhood revitalization initiative to be coordinated with the Department of Housing and Urban Development and other agencies.

Can you tell the committee what its over arching goal is and what is the specific role of the departments of the Justice Department and the necessity of Justice Department funding?

Ms. ROBINSON. Of course, I would be happy to.

It really builds on the success of the Weed and Seed Program that I know has been very active and very successful in Alabama—in Mobile, for example. I have talked many times with Senator Sessions about the Mobile Weed and Seed Program.

It is an evidence-based, place-based program that is a collaboration, in collaboration, and in coordination with efforts at the Departments of Education, HUD, Treasury and HHS.

Again, looking back over the decades of my career, I have seen efforts at coordination with other departments across the executive branch, but this is one of the most successful of those collaborations.

There is a lot of lip service given to coordination, but to see it actually take place in a way that works for localities.

You know, we often expect local jurisdictions, in fact we tell them as a requirement of applying for grants, that they have to have a memoranda of understanding with other entities, you know, the police department has to get the local public health agency and this one and that one all together, but at the Washington level we do not do as good of a job.

In this case the departments have actually worked together on the applications. In most cases the locality will only have to file one application. They will not have to apply separately. They can have one braided and blended application to get funding, and I think that will make it much easier. Again, this is the whole point of being consumer oriented for the localities.

The focus will be on neighborhoods that are in bad shape, and the goal will be to help with things like housing and business development and to get them in better shape. But one of the things

we have stressed is you cannot get businesses in, you cannot get housing to be built, if you do not have safety in the neighborhood.

So Justice has got to be a key component here. This was certainly a lesson with Weed and Seed that we learned early on. So justice has got to be a key component at the table here.

So it is a multi-part, cross-departmental initiative.

Mr. BONNER. So you would file one application and then from that all of the participating agencies would receive their funding.

Ms. ROBINSON. Yes.

Mr. BONNER. Look forward to getting a status record on that. I am sure Senator Sessions would as well.

ADAM WALSH ACT

Let me switch gears to the Adam Walsh Act. The Sex Offender Registration and Notification Act, which is a component of the Adam Walsh Act, establishes a comprehensive set of minimum standards for sex offender registration and notification in the United States.

I understand that the cost of complying with the requirements of this program are a substantial hurdle for the states to overcome. What accounts for the fact that complying with this act is so challenging from the states from your perspective?

Ms. ROBINSON. That is a very, very good question.

When I came to OJP—or I should back up for a minute. I worked on the Obama transition in November of 2008 and as part of that I met with about 90 outside organizations, different interest groups, National Governors' Association, National Conference of State Legislatures, and others. The issue I heard more about than any other was the Adam Walsh Act, which kind of surprised me.

At that time, by the way, I had no intention of going into the government. I had a nice position at the University of Pennsylvania teaching, and I had no intention of going in. Mr. Fattah is smiling because I knew him from up there.

But I heard more about it. I ended up, in fact, going into the Department, and one of the first things I did was to meet with the staff in the SMART office, which is responsible for working on the Adam Walsh implementation. I said to them—and they are a very devoted staff, very passionate about working on this subject—and I said to them, how can we be more flexible in working with the states within the four corners of the statute, and how can we be most flexible in working with them? And they were terrific and they said, let's see how we can do that.

I think one thing by the way, for whatever set of reasons, in the last Administration it took them a while to get the guidelines out. The guidelines took about two years to get out, so that, maybe, was one issue here.

Beyond that, we were able this past year to get out some supplemental guidelines which have been again, within the statute, more flexible and have provided some help.

We have four states, one territory, Guam, and two Indian tribes, that now are in compliance. We have some additional states that are near coming into substantial compliance, and so we have states that are moving toward this, but there are some areas that states are having difficulty with.

One is cost, one is on juvenile registration, one is on the offense versus risk assessment and the tiering, one is on retroactivity. So there are areas on the policy end where there are differences, and I think the budget crisis at the state level is causing consternation or a barrier, I guess I would say, but we are working hard and we are in close collaboration. We have met with John Walsh about it and Ernie Allen at the National Center on Missing and Exploited Children has been very helpful and a very strong supporter.

So we are committed to it, we are passionate about it, and working hard on it, but at some point the states need to make their decisions about it—whether they want to do it or not.

Mr. BONNER. But you mention I think that there were four states and one territory that were in compliance.

Ms. ROBINSON. That is correct.

Mr. BONNER. So there are 248 jurisdictions that are working to implement the requirements, and is Puerto Rico one of—the territory that is compliance or was it Guam?

Ms. ROBINSON. No, it was Guam.

Mr. BONNER. Okay. I know my friend, Mr. Serrano would be interested in making sure that all of the territories are able to fully participate.

Am I correct though that the rest of the jurisdictions face penalties for non-compliance if they do not come into compliance by this July?

Ms. ROBINSON. Yes, that is correct.

Mr. BONNER. And if so, going back to the previous question, what type of flexibility can these jurisdictions, states, and others hope to receive from the Department of Justice? July is just around the corner, you attributed that there were some problems in the previous administration in terms of getting the guidelines out.

Ms. ROBINSON. By statute we have no flexibility; however, the 10 percent that they would lose of their Byrne JAG funding can be given to them to work toward the compliance. So they can use it to work toward that.

Mr. BONNER. And would you be able to keep the committee informed in terms of how you proceed between now and July in terms of others that do come into compliance?

Ms. ROBINSON. Of course.

Mr. BONNER. It just seems to at least this member that there are a lot more that are struggling to get into compliance and those that have already found a way to be there.

Ms. ROBINSON. Of course, we would be happy to do that.

Mr. BONNER. A few more questions until the chairman comes back, and he may have some additional ones and I apologize for shifting gears.

DOMESTIC RADICALIZATION

Mr. BONNER. Domestic radicalization.

Ms. ROBINSON. Yes.

Mr. BONNER. Of the $45 million requested for youth mentoring grants——

Ms. ROBINSON. Yes.

Mr. BONNER [continuing]. $5 million is proposed to be set aside to support domestic radicalization grants. What types of programs could such grants support?

Ms. ROBINSON. Of course. What we are contemplating here would be the kind of thing like an after school program, something that would be perhaps for a basketball program, you know, any kind of athletic program, or maybe some kind of vocational training. It could be any kind of thing.

Mr. BONNER. And has OJP identified any promising evidence-based efforts for preventing domestic radicalization among our youth?

Ms. ROBINSON. This request for 2012 includes $2 million for the National Institute of Justice to do some research in this area because there is not a lot of research that exists that we are aware of, so we are requesting funding to explore that.

Mr. BONNER. And who are some of the likely candidates that would apply for this grant?

Ms. ROBINSON. This is the kind of area that we would do, as we do in many such programs, and that is to look to the state and local level to consult. We would turn to the U.S. Attorneys, who know their districts; we would look to state and local law enforcement; we would look to mayors; and through the normal solicitation process to ask for applications and then go through the peer review process as we do on competitive grants and see what comes back to us.

Mr. BONNER. So the U.S. attorney in Mobile, Kenyen Brown, might suggest a Boys and Girls Club that would be interested in would be a good partner for that, just hypothetically?

Ms. ROBINSON. Right. Yes, exactly.

Mr. BONNER. Okay. The budget also proposes two and a half million dollars for community engagement to address radicalization and a set a side of $2 million for domestic radicalization research through NIJ.

With regard to your proposal for a program of community engagement to address radicalization what can this program do to improve cooperation between communities and law enforcement, and how can it address the potential for radicalization in places where it exists?

Ms. ROBINSON. What we are anticipating or hoping for here, Mr. Chairman, is as I indicated before—and by the way, there would also be in the budget request $2.5 million for the COPS Office for a complementary effort that would draw in their expertise on community policing. This part in OJP, and specifically in BJA, would draw on our expertise in working, for example, in Weed and Seed, the kind of on the ground work that OJP has done over the years in working with communities.

It is the kind of outreach that I think we do quite well, that we do in kind of listening sessions and going into a community and working on the ground as we have done with gang work, outreach involving ministers and parents, and local police chiefs, in going in and doing the kind of outreach—and this is not necessarily targeted to any particular ethnic or religious group per se. We will wait and hear what comes back from the field with particular areas that are identified as problems—but doing that kind of outreach,

and what we hear back with looking at what kind of fairness and procedures can be developed.

AUTOMATED VICTIM IDENTIFICATION AND NOTIFICATION

Mr. BONNER. And let me shift gears one more time if that is okay. I am going to focus our attention on the automated victim identification and notification.

The budget proposes to eliminate statewide automated victim identification and notification program for a savings of $12 million. This program helps protect victims of crime and insures that their legal rights are upheld by providing important information relating to criminal proceedings, including offender release. It increases victim safety while minimizing the cost associated with keeping victims informed.

Is it your expectations that the states, I think all but maybe one or two which are under severe financial pressure as well, that they will be able to sustain these programs on their own, and if so, how many do you think will be able to?

Ms. ROBINSON. This is an example, Mr. Chairman, in a tight budget year where we looked back at funding history and track records. In 2009, we ended the fiscal year with money left on the table. In other words, we did not have enough applications to even spend the money that had been appropriated by Congress.

This past fiscal year, in 2010, we did not have any new applications that came in, only requests for enhancements of existing programs.

So when you have a situation like that you wonder whether when Congress asks you where to cut and you have very tight money, whether it makes sense to request new funding.

Mr. BONNER. And please do not take this as a scolding for finding ways to cut the funding, I just wanted to have a good understanding about the type of participation that the states have had.

Ms. ROBINSON. Sure.

RISS

Mr. BONNER. The last question that I have for the record, and I am sure the members will have additional ones that will be submitted, focuses on the Regional Information Sharing Systems.

Ms. ROBINSON. Yes.

Mr. BONNER. As you know this is a secure environment that allows law enforcement, public safety officers, and private sector partners to share critical information.

Your budget proposes to cut this from $45 million to $17.5 million. What is your justification for such a sizable reduction to this program?

Ms. ROBINSON. I would say first of all that Jim Burch, who is the acting director of BJA, and I are huge fans of RISS.

As you know RISS has been around since 1974. It has been an important part of the law enforcement landscape for a long period of time. This has been a very tough budget year, and I know I have said that any number of times here, as I think all of us have.

This is an area where the Department of Justice has provided over the last decade $335 million to RISS; it is a very substantial

amount of money that we provided. Congress has provided to RISS over the last——

Mr. BONNER. The American people have provided.

Ms. ROBINSON. Yes. Very well stated, Mr. Chairman.

And in a tight budget year this is a scenario where we felt we could provide something, but perhaps not as much as we have in the past. So it is an important initiative to continue to support.

How would we suggest that be supported? Perhaps through a couple of methods. One would be based on it's over 8,000 members. Could there be some kind of user fees charged? That would be one potential suggestion.

Two, would there be some way that the JAG Byrne state agencies could provide some support? So those would be the two suggestions I would offer.

Mr. BONNER. And is OJP planning to work with the RISS centers to implement a user fee type of system?

Ms. ROBINSON. Absolutely. Jim Burch and I have both met with their policy board very recently and said we would collaborate with them in every way we could.

Mr. BONNER. Okay. Then the last comment, not a question, I think you said earlier that you report directly to Tom Perrelli.

TOM PERRELLI

Ms. ROBINSON. Yes.

Mr. BONNER. If you will extend greetings from this member, if not this committee, I have had the pleasure of working with Mr. Perrelli on the frustrations that those of us—I hope the ranking member will forgive me for excelling the virtues of a justice department employee that has really become a hero to South Alabama.

Mr. BONNER. We have been very frustrated that in the creation of the Gulf Coast Claims Facility that the administration pushed hard for and that Mr. Feinberg was named the head of that there are still so many unanswered questions in terms of making sure that the people who were harmed by the worst environmental impact in our Nation's history are struggling just to survive.

Tom Perrelli—and I told this to the attorney general when he appeared before the full committee earlier—is the only person that I can say in Washington that has now been a part of the privilege of putting his name on a ballot who really has stepped forward and has put pressure on Mr. Feinberg to do the right thing, to fulfill the promises that President Obama made and that BP made in the creation of that.

So if you will tell him we continue to say thank you for the work he is doing on behalf of the Administration and on behalf of the American people.

Ms. ROBINSON. I would be delighted to.

Mr. BONNER. Mr. Ranking Member, do you have any other comments?

Mr. FATTAH. Just again let me thank you for your testimony and let me thank the Attorney General and the department for two years of crime going down.

I know we are in a tough budget year, but we cannot eat our own seed corn as the saying goes, so we are going to have to reconcile the President's request with what we think as a subcommittee is

the direction we ought to go in and hopefully we can keep those crime numbers continuing to go in the right direction.

Thank you.

Mr. BONNER. And again I know Chairman Wolf regrets that he had to leave for a few minutes and it was noted from the staff that he would be detained longer, so thank you for your testimony today and for visiting with us and for the good work you are doing at the Office of Justice programs.

Ms. ROBINSON. Thank you so much.

Mr. BONNER. This hearing is concluded.

Commerce, Justice and Science Subcommittee Hearing

Office of Justice Programs Appropriations

Questions for the Record

Chairman Frank Wolf

March 30, 2011

Laurie O. Robinson

Assistant Attorney General

Office of Justice Programs

NICS Improvement Act

1. On March 13th, in a letter to the *Arizona Daily Star*, President Obama stated, "The National Instant Criminal Background Check System is the filter that's supposed to stop the wrong people from getting their hands on a gun. ... It relies on data supplied by states - but that data is often incomplete and inadequate. We must do better."

However, the President's budget request proposes a 40% decrease, for NICS Improvement Act funding. The NICS Improvement Act requires states to make available certain records that would disqualify persons from acquiring a firearm for inclusion National Instant Criminal Background Check System, *including persons adjudicated as mentally defective*. Why is there such a disconnect between the President's rhetoric and the budget request?

Answer: The tragic shootings in Tucson, Arizona and at Virginia Tech serve as stark reminders of the importance of improving criminal history information and other records, especially with regard to background checks for firearm purchases. Such records also play a vital role in supporting criminal investigations; background checks related to licensing, and employment; and the identification of persons subject to protective orders or wanted, arrested, or convicted for stalking and/or domestic violence. The Office of Justice Program's (OJP) NICS Improvement Act grant program and the National Criminal History Improvement Program (NCHIP) help states, territories, and tribes improve the quality, timeliness, and immediate accessibility of criminal history and related records for use by federal, state, tribal, and local law enforcement.

It is important to note that most of the activities supported by the NICS Improvement Act grant program can also be funded under the NCHIP grant program. The Administration's fiscal year (FY) 2012 budget request seeks a total of $24 million for these two grant programs combined and represents a higher request than made in FY 2011, demonstrating the Administration's commitment to this effort. OJP also will seek to utilize $10 million in carryover funds from FY 2010 and any balance from FY 2011 to support these grants programs. All states are currently eligible to receive NCHIP funds, and while OJP anticipates that additional states will be eligible in the future for funds under the NICS Improvement Act

grant program, at present *only nine* states meet the statutory eligibility criteria. OJP will continue to vigorously encourage state participation through outreach and technical assistance efforts.

Probation and Parole

2. The budget request eliminates funding for the Training Program to Assist Probation and Parole Officers. This program provides training and technical assistance to state and local law enforcement to help establish strategies for managing sex offenders under community supervision. Why was this program targeted for elimination?

Answer: Given current budget constraints, the Department has had to make some tradeoffs in order to make priority investments in other initiatives. For example, we decided to prioritize Sex Offender Registration and Notification Act (SORNA) implementation under the Adam Walsh Act, for which we sought a $30 million increase because of the importance of SORNA compliance and information sharing regarding sex offenders.

3. Now, more than ever, we are looking for ways to maximize the public safety impact of limited taxpayer dollars. New justice reinvestment strategies are helping to turn around recidivism rates by addressing the high rate of probation violations, with proven, evidence-based interventions that are certain and swift. Hawaii's Opportunity Probation with Enforcement program, also known as HOPE, is one example. What programs can be used to support smart probation efforts modeled after HOPE?

Answer: The FY 2012 President's Budget would allow OJP to provide direct funding support for replicating the HOPE program through the proposed Smart Probation program, for which $7 million was requested within funds for Second Chance Act programs. Smart Probation will support the development of evidence-based approaches in probation and parole. Other funding sources that may be used by local communities to implement HOPE replications include the Byrne Justice Assistance Grants (JAG) Program and the Byrne Competitive grant program, subject to appropriations.

Juvenile Justice

4. The budget request proposed a new "Race to the Top"-style Juvenile Justice System Incentive Grant Program that would replace and consolidate other juvenile justice programs and goals. The funding requested was $120 million. You've indicated that DOJ has since reconsidered this proposal and will be proposing a reconfigured Juvenile Justice grant plan in its place. What are the details of this modified proposal?

Answer: The Administration is now proposing that the $120 million requested in the President's FY 2012 Budget could be allocated in the following fashion:

$110 million as formula funding;

$80 million under Title II Part B of the Juvenile Justice and Delinquency Prevention Act (JJDPA) – Formula Grants Program;

$30 million under the Juvenile Accountability Incentive Block Grant (JABG) program; and

$10 million in a demonstration program to encourage innovation and juvenile justice system improvements.

This revamped approach would preserve – and add funding to – the important Part B Formula Grants program; continue JABG; and create a new discretionary funding program to encourage innovation and evidence-based reforms in the juvenile justice system, which would showcase approaches that other states may then consider embracing.

5. What determinations impacted your decision to dramatically decrease youth mentoring grants?

Answer: The FY 2012 Youth Mentoring request is equal to the FY 2011 request. The proposed reductions support the President's commitment to cutting the deficit and restoring fiscal sustainability.

Despite this reduced funding level, we continue to support youth mentoring programs and believe that such programs, appropriately designed and implemented, can be highly effective. OJP's Youth Mentoring program will continue to support mentoring for youth at risk of educational failure, dropping out of school, or involvement in delinquent activities, including gangs. OJP will continue to provide funding to support national and community organizations that directly serve youth through mentoring; target specific populations of youth; and/or enhance the capacity of organizations to recruit, train, and supervise mentors.

Victims of Trafficking

6. Human trafficking is one of the fastest-growing crimes in the world and a serious problem right here in the D.C. metro area. The budget proposes to reduce funding for Victims of Trafficking by $2.5 million. The Victims of Trafficking program helps identify, rescue and assist victims in all forms of human trafficking.

The proposed reduction suggests that this is not a high priority for the Department. Yet this program helps support efforts to improve cooperation between State and local governments, the FBI, and our U.S. Attorneys in order to close down the sites where trafficking is taking place and prosecute the offenders.

Currently, I do not think there's nearly enough cooperation, particularly between U.S. attorneys and state and local law enforcement in districts with significant levels of trafficking crimes. This reduction implies that the Department feels differently. Is that the case?

Answer: OJP remains focused on the need for enhanced coordination and collaboration among local, state, and federal government and nongovernmental partners working to end human trafficking in the United States. This includes encouraging coordination specifically between local, state, and federal law enforcement and prosecutorial agencies.

Direct funding is one important means of supporting such coordination; however, identifying and disseminating best practices within the anti-human trafficking field can also be effective. OJP, through its Office for Victims of Crime (OVC) and Bureau of Justice Assistance (BJA), supports expert training and technical assistance to all OJP-funded multidisciplinary anti-human trafficking task forces. There are currently 39 funded human trafficking task forces around the country, each of which has participation from the U.S. Attorney's Office that covers the area in which the task force is located. At the core of these training and technical assistance efforts is conveying the importance of coordination and collaboration. Recently, OVC and BJA expanded the provision of training and technical assistance to non-OJP funded task forces. For example, technical assistance is currently being provided to the Northern Virginia Task Force to enhance their efforts to proactively investigate and prosecute human trafficking cases while supporting services to victims.

OJP's efforts to combat human trafficking are one piece of the Department's larger strategy to eradicate human trafficking in the United States. For example, the Department recently announced a nationwide initiative designed to maximize federal resources through formalized collaboration between the Departments of Justice, Homeland Security and Labor. As part of this initiative, specialized Anti-Trafficking Coordination Teams, known as ACTeams, will convene in pilot areas around the country. The ACTeams, which comprise federal prosecutors and agents from multiple federal enforcement agencies, will implement a strategic action plan to combat identified human trafficking threats. The ACTeams will focus on developing federal criminal human trafficking investigations and prosecutions to vindicate the rights of human trafficking victims, bring traffickers to justice and dismantle human trafficking networks. The ACTeam Initiative will streamline federal criminal investigations and prosecutions of human trafficking offenses.

7. How will a reduction affect these efforts?

Answer: Challenging economic times required the Administration to make difficult choices in determining funding levels for important programs such as this one. We are confident, however, that our FY 2012 efforts will maintain the strong momentum already in place to support law enforcement and victim service providers in their daily efforts to identify, rescue, and assist victims of human trafficking. Existing efforts include:

· Ongoing support for the three multidisciplinary task forces that received awards under the FY 2010 BJA/OVC *Enhanced Collaborative Model to Combat Human Trafficking* solicitation. This program considers the role of the U.S. Attorney's Office in the task force as critical. The program has an expanded approach to combating human trafficking by addressing all forms of this crime – sex and labor, foreign and U.S. citizens, male and female, adults and minors. OJP plans to add more Enhanced task forces in FY 2011.

On January 11, 2011, OVC and BJA released the *Anti-Human Trafficking Task Force Strategy and Operations e-Guide* to support the work of task forces around the country – whether they are newly formed task forces seeking elementary guidance or existing task forces looking to identify new approaches to reinvigorate their efforts. Upon release, the e-Guide received very positive reviews from the anti-trafficking community. The e-Guide will be routinely updated as new information and resources are identified.

· Since January 2011, OVC and BJA have hosted two *Anti-Trafficking Regional Training Forums* to support coordinated regional responses to human trafficking. The forums allow OJP-funded and independently-funded task forces and service providers to receive skills-based instruction, discuss best practices, share case information, and network with other federal, state, and local law enforcement agencies and victim service providers in the region.

· BJA continues to support the development of training curricula to provide criminal justice personnel the tools to effectively address human trafficking. For example, BJA funded a training curriculum entitled *Advanced Investigative Techniques for Human Trafficking Task Forces*, which were pilot tested in 2010. In FY 2011, BJA is supporting similar training curricula for prosecutors and judges.

· OVC continues to explore avenues to leverage federal funding sources to address the needs of human trafficking victims. For example, OVC works closely with the Department of Health and Human Services to coordinate the dissemination of funding to victim service organizations serving human trafficking victims. Additionally, OVC is currently revising its Victims of Crime Act guidelines for the state crime victim assistance formula grant program and is working to incorporate language to allow funds to be used to support legal assistance for trafficking victims.

· OJP, through OVC and BJA, remains part of the larger Federal government effort to support public outreach and awareness activities across the country to highlight the problem of human trafficking and identify assistance resources for victims. Federal agencies such as the Departments of State, Health and Human Services, and Homeland Security have regional, national and international public awareness campaigns on human trafficking. OVC-funded victim service providers and BJA-funded law enforcement agencies routinely conduct training and public awareness activities within their communities with the goals of increasing awareness, identifying potential victims, and informing the public about available resources. These grantees cast a wide net in their efforts to educate the public on the indicators of human trafficking. Targeted audiences include ethnic media outlets (radio, newspaper) in an effort to reach vulnerable populations; local government employees, such as bus drivers and property inspectors; and private sector workers, such as hair dressers and cable/internet installers – all of whom interact with the public on a daily basis and may have access to private homes and businesses where trafficking is occurring.

Commerce, Justice and Science Subcommittee Hearing

Office of Justice Programs Appropriations

Questions for the Record

Ranking Member Chaka Fattah

March 30, 2011

Laurie O. Robinson
Assistant Attorney General
Office of Justice Programs

1. How are OJP and NIJ responding to the recommendations in the July 2010 National Research Council (NRC) review of NIJ's programs and mission?

Answer: The National Research Council/National Academy of Science (NAS) report confirmed that the National Institute of Justice's (NIJ) research, evaluation, and development mission is crucial to advancing the work of preventing and reducing crime and advancing justice in the United States. The report, which was requested and funded by NIJ, identifies ways to strengthen NIJ's processes and makes specific recommendations--including strengthening and clarifying the legal independence and authority of the NIJ Director, strengthening peer review, increasing transparency, and strengthening the overall science mission of the agency.

The Administration has already taken steps that address key findings and recommendations of the report.

· The Administration appointed (and the Senate confirmed) as NIJ Director a leading criminologist, Dr. John Laub, who possesses extremely strong research credentials. Dr. Laub is the 2011 recipient of the Stockholm Criminology Prize, given for excellence in criminology research.

· In its FY 2011 and 2012 budget proposals, the Administration emphasized investing in science that supports the implementation of effective and fair policies and practices regarding criminal justice. One example of this is the three percent set aside requested in FY 2012 for Research, Evaluation, and Statistics, which would provide NIJ (and BJS) with an important source of funding for strong research and development.

· One of the first actions taken by Assistant Attorney General Robinson when she returned to OJP in 2009 was to turn over control of the research peer review process to NIJ. Prior to 2009, NIJ generally had to adhere to OJP peer review policies that did not always reflect the unique nature of peer review for a scientific research agency.

· In November 2010, the Attorney General appointed an 18-member Science Advisory Board to guide the efforts of OJP in developing evidence-based policies and programs. The Board

includes a number of highly respected researchers in criminology, sociology, and statistics and also includes several noted criminal justice leaders. Its goal is to help ensure that our knowledge base is broad, robust, and useful to law enforcement officers, prosecutors, corrections officials, and others who work in the justice field. A subcommittee dedicated to NIJ issues has been formed and discussions are already underway as to how they can contribute to strengthening the science mission of NIJ.

The NAS articulated broad goals for NIJ in terms of building a cumulative body of research knowledge that can inform criminal justice policy and practice. NIJ has undertaken an extensive review and comment process within the agency to obtain feedback on the best course of action. The status of NIJ's review and comment process can be found on NIJ's website at http://www.nij.gov/nij/about/director/strengthening-nij.htm.

2. Will there be a formal plan to implement the recommendations from the NRC review with which OJP and NIJ agree?

Answer: NIJ has undertaken an extensive review and comment process within the agency to respond to each of the recommendations in the NAS report. The NIJ response is very close to completion. When it is released, it will be accompanied by a timeline and plan of action that outline the changes NIJ has already put in place, as well as those that will be implemented over time.

3. Do OJP and NIJ disagree with any of the recommendations in the National Research Council report? And if so, which recommendations appear problematic?

Answer: As reflected in the response above, NIJ is very close to completing its analysis of and response to each of the recommendations. We will share these responses with the Subcommittee once the NIJ response is complete.

4. One of the NRC recommendations is to move DNA and forensics capacity-building programs from NIJ to another grant office, such as BJA. Does OJP agree with this recommendation? If not, what are the arguments against it?

Answer: NIJ is currently reviewing this recommendation. At this time, the Department has not taken a formal position on this matter.

5. Was OJP initially involved in establishing the National Forum on Youth Violence Prevention? And if so, how much funding has OJP invested in this project to-date?

Answer: The Office of Justice Programs (OJP) and the Department have been involved in development of this White House initiative from the beginning. The Departments of Education, Health and Human Services, Housing and Urban Development, and Labor have also participated significantly.

While OJP has been involved in the development of the initiative from the beginning, OJP has expended only a small amount of seed money for training and technical assistance in advance of the current request.

6. How would OJP characterize the success of the Forum so far, and what measures can OJP point to that illustrate success?

Answer: To date, the Forum has been highly successful, especially given the extremely limited amount of federal funds spent. In October 2010, the Forum brought together participating cities (Boston, Chicago, Detroit, Memphis, Salinas and San Jose) and challenged them to develop comprehensive plans within six months to address youth violence in their cities. Each of the cities has delivered robust plans that blend prevention, intervention, enforcement, and reentry into comprehensive approaches to sustainably reduce youth violence. These plans were profiled in a Summit on Preventing Youth Violence in Washington, DC on April 4 th and 5 th , 2011.

Federal agencies, including the Department of Justice, have supported this work by convening experts and stakeholders to share information about "what works" and have provided training and technical assistance on plan development and content.

While it is too soon to expect concrete results from these plans, which have been finalized only recently, the plans reflect the multi-disciplinary partnerships, balanced approaches and data-driven strategies that research tells us are most promising in terms of sustainably reducing youth violence. We are optimistic that, over time, participating cities will be successful in reducing youth violence while increasing opportunities for positive youth development.

7. What will be the process for selecting the 12 new Forum sites that are proposed for FY 2012?

Answer: Participating cities were selected on the basis of need, geographic diversity, and willingness and capacity to engage. New sites will be selected in a competitive process that continues to be based on these criteria.

8. How much of NIJ's budget is focused on research that is primarily targeted to juvenile justice, and how much of the proposed increase for NIJ in FY 2012 would be targeted in this way?

Answer: The Office of Juvenile Justice and Delinquency Prevention (OJJDP) has for years had authority to use up to 10% (or in some cases more) of its program dollars for juvenile justice related research. NIJ does not have a dedicated portion of its budget devoted to juvenile justice related research, but may engage in such research at its programmatic discretion. NIJ collaborates closely with OJJDP and participates in research and evaluation on areas of overlap such as truancy and gangs.

Currently, NIJ has 39 active juvenile justice-related awards. These awards total nearly $20 million, which is 2.7 percent of the total amount of NIJ active grant funds.

9. Has NIJ, or BJS, done work in assessing whether children of incarcerated parents are more likely to commit crimes as juveniles or adults? And if so, what are the findings?

Answer: A recent study entitled, *Effects of parental imprisonment on child antisocial behavior and mental health: a systematic review,* * funded in part by NIJ, sought to systematize findings relating to the impact of parental imprisonment on child delinquency. This analysis found that children with incarcerated parents are twice as likely to exhibit antisocial behavior (outcomes ranging from persistent lying or deceit to criminal conduct), and mental illnesses. This research built on previous work from Murray and Farrington (2005), who found in one study that 71% of boys with incarcerated parents exhibited antisocial behavior by age 18, as opposed to 17% of boys whose parents were never incarcerated. Furthermore, 65% have been convicted between ages 17-25 compared to 22% of boys whose parents were not incarcerated.** Both these differences were statistically significant. Further research is needed to identify the causal impact of parental incarceration on a child's later criminal behavior apart from other risk-factors. While a child's mental illness or other antisocial behavior may not lead to criminal behavior, all three outcomes are concern for criminal justice agencies in an effort to protect our children from harm.

OJP's Bureau of Justice Statistics (BJS) consistently surveys inmates about their parental status. A 2008 BJS special report entitled *Parents in Prison and Their Minor Children* found that almost half of state prison inmates and nearly two-thirds of federal prison inmates reported having at least one child under the age of 18. *Parents in Prison and their Minor Children* also found that more than two-thirds of incarcerated parents in state prisons and 56% of incarcerated parents in federal prison met screening criteria indicating substance abuse and dependency.

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* Murray, Joseph, David P. Farrington, Ivana Sekol, and Rikke F. Olsen. 2009. *Effects of parental imprisonment on child antisocial behavior and mental health: a systematic review.* Campbell Systematic Reviews.

** Murray, Joseph and David P. Farrington. 2005. "Parental imprisonment: effects on boys' antisocial behavior and delinquency through the life-course." *Journal of Child Psychology and Psychiatry* 46 (12): 1269-1278.

10. What OJP programs can be used to help children of incarcerated adults?

Answer: In furtherance of President Obama's policy initiative on Responsible Fatherhood, the Bureau of Justice Assistance (BJA's) 2011 Second Chance Act Family-Based Offender Substance Abuse Treatment Program solicitation invites applications for projects targeting incarcerated parents of minor children who are soon to be released. Subject to further appropriations in FY 2012, BJA anticipates releasing the solicitation again in FY 2012.

BJA has also supported training and technical assistance on the curriculum for Inside Out Dad -- a reentry program by the National Fatherhood Initiative designed to connect inmate fathers to their families and help prepare them for release.

It is likely that OJJDP's mentoring and afterschool programs also reach a number of children of incarcerated parents.

OJP's Center for Faith-Based & Neighborhood Partnerships, part of the White House's Office of Faith-based and Neighborhood Partnerships, is also working with a number of groups on this issue and serves to strengthen families and support at-risk youth.

11. The budget proposes to set aside 2 percent of the Byrne JAG formula grant program to increase the formula allocations of states and communities that submit community-based comprehensive criminal justice plans approved by OJP. What are the current planning requirements for receiving Byrne JAG funding and what additional planning would be required to be eligible for this incentive funding?

Answer: Currently, there are no statutory requirements for states and localities to accomplish strategic planning. However, BJA strongly encourages jurisdictions to use data and research to engage in strategic assessment and planning towards the use of Byrne Justice Assistance Grant (JAG) program development, implementation and evaluation. In the FY 2010 Byrne JAG grant program, language was added that emphasizes that strategic planning is a priority within the Department of Justice.

To further these efforts, BJA has robust training and technical assistance partners that can provide support to state and local communities. For example, state governments can access planning assistance through the National Criminal Justice Association, which provides assistance to the State Administering Agencies by building their capacity to strategically invest their JAG funding.

OJP has also been working with the State Administering Agencies and their research and data analysis partners, the State Analytical Centers, to engage in strategic planning to assess community needs through better use of data and evidence. The project serves to build the capacity of State Administering Agencies to develop priorities and to invest JAG funding in strategies that are research or evidence based and meet identified priority needs.

The two percent set-aside proposed in the FY 2012 Budget will further incentivize community-based, comprehensive criminal justice plans. State level plans should be comprehensive and

involve all segments of the state and local criminal justice systems, such as law enforcement professionals, courts, prosecutors and public defenders, corrections, reentry service providers, and public health and support service partners. The strategic plans at the local level can be developed and supported through existing criminal justice coordinating councils or task forces that address high priority criminal justice issues.

BJA will make an effort to ensure that smaller jurisdictions can leverage strategic planning efforts that may already exist, as opposed to creating entirely new plans. Where possible, strategic planning related to JAG should be integrated into or made supplemental to existing jurisdiction-wide strategic planning efforts. To meet the two percent set aside requirement, BJA will require agencies to submit copies of the plans developed or to submit plans with established linkages to JAG where a new plan is not developed.

12. What assistance is available to State and local governments in developing comprehensive strategic plans?

Answer: OJP provides training and technical assistance to state and local governments to help develop their capacity for meaningful and successful planning.

State governments can access assistance through OJP's collaboration with the National Criminal Justice Association, which provides assistance to the State Administering Agencies by building their capacity to strategically invest their JAG funding. The State Administrative Agencies are charged with managing the majority of federal resources allocated to states through the JAG program which is the primary vehicle for delivering federal criminal justice funding to state and local jurisdictions. OJP has been working with the State Administering Agencies and their research and data analysis partners--the State Analytical Centers--to engage in strategic planning to assess community needs through better use of data and evidence. The project serves to build the capacity of State Administering Agencies to develop priorities and to invest JAG funding in strategies that are research or evidence based and meet identified priority needs. The project offers targeted technical assistance to states seeking to engage in comprehensive community-based planning.

For example, OJP, in partnership with the National Criminal Justice Association, provided technical assistance to the Illinois Criminal Justice Information Authority in the planning of a two-day Statewide Criminal Justice Planning Summit that has contributed to the development of an Illinois Statewide Criminal Justice Strategic Plan. Illinois utilized the technical assistance to plan the Summit that brought together criminal justice practitioners, policy makers, legislators and the community to address important issues. After the event, working groups were formed by interest area: law enforcement, prosecution, courts, probation, corrections, community corrections, victims' services and juvenile justice to develop aspects of a long-term strategic plan for criminal justice policy and programs. The results will guide legislators and policy makers in implementing a coherent criminal justice strategy for future years that is firmly grounded in best practices and will guide the Illinois Criminal Justice Information Authority in its function as a state administering agency in developing long term grant funding priorities.

Through this project, OJP has launched the National Center for Justice Planning (NCJP) website www.ncjp.org with profiles on all State Administering Agencies and their work, up-to-date information on cutting edge national research and evaluations, promising programs and practices in all areas of criminal and juvenile justice, strategic planning information and assistance, and links to all the resources available through BJA and its technical assistance providers.

States and communities can also access assistance by participating in a monthly webinar series on evidence-based programs and practices that offer resources and information on programs that have been found effective through evaluation and can be replicated in other jurisdictions. To date, six webinars have been held. These webinars bring experts in their respective fields to provide resources and ideas for funding programs that meet recognized needs and solve problems at the state and local level.

Another effort focuses on strengthening the ability of local policymakers to improve local level criminal justice planning and policy development to the benefit of all disciplines in the criminal justice system. BJA's Criminal Justice Coordinating Council Project is bringing together 30 criminal justice coordinating councils (CJCCs) from communities around the country that have major roles in shaping decisions regarding criminal justice. OJP will assist these local CJCCs by facilitating learning about promising and evidence-based policy and practices, creating a network of criminal justice coordinating council leaders for on-going peer-to-peer technical assistance, and developing materials that will aid these councils in their policy making and that will assist other jurisdictions in developing effective coordinating councils of their own. This project, begun at the end of FY 2010 with the Justice Management Institute, has to date launched the Criminal Justice Coordinating Council Network and has developed a SharePoint site for the members of the network to share documents, ideas, and questions.

Finally, in June, OJP plans to launch two additional new tools that will support these efforts—

· CrimeSolutions.gov, an online clearinghouse which summarizes current research and evidence-based practices; and

· The State and Local Help Desk or Diagnostic Center, which connects research-based solutions to specific crime issues.

13. OJP is proposing a $145 million increase in the obligation limitation for the Crime Victims Fund in FY 2012, although $135 million of the increase would be dedicated to two new discretionary programs. Were the Crime Victims Fund stakeholders consulted in proposing these new programs? And are they supportive?

Answer: There are needs that are not being met with current funding levels, and an ongoing call from the field for additional services. The proposed increase and allocations were derived during a deliberative process within the Administration, taking into consideration the pressing need for additional resources, balanced by fiscal constraints.

Since the President's FY 2012 Budget was released in February 2011, the Office for Victims of Crime (OVC) has coordinated with a variety of stakeholders, including Victims of Crime Act (VOCA) Administrators, Violence Against Women (VAW) advocacy organizations, and tribal advocates. These groups have not voiced objections to OVC about the new programs.

14. A portion of the CVF funding each year supports FBI victim assistance specialists and Victim Witness Coordinators at U.S. Attorneys offices. Is the funding allocated to these positions expected to increase in FY 2012? If so, will the increase for those positions, combined with the $135 million carve-out for the two new programs, result in a lower total for the Crime Victims compensation and assistance formula grant programs?

Answer: The funding allocated to these positions in FY 2012 is expected to increase by approximately $2.8 million over the FY 2011 enacted level, to accommodate typical inflationary increases and twelve positions for the Executive Office of U.S. Attorneys that will be dedicated to Indian Country. This minor increase, even with the $135 million carve-out for the two new programs, will not impact the Crime Victims compensation and assistance formula grant programs. In fact, with the higher cap, these formula awards will likely receive an increase of nearly $6.8 million.

Justice Reinvestment

Questions: In the FY 2010 CJS bill, we provided $10 million for comprehensive, evidence-based criminal justice reform and recidivism reduction efforts. The inclusion of this funding was informed by a hearing we conducted in 2009 on Justice Reinvestment, an initiative for which OJP had provided support in the past. The subcommittee held another hearing on Justice reinvestment last month.

- How much of the demand for Justice Reinvestment analysis and planning did the $10 million meet, and how much additional demand do you think is still out there?

Answer: The $10 million provided for criminal justice reform and recidivism reduction efforts allowed BJA to significantly expand the Justice Reinvestment Initiative (JRI) by making five grant awards to technical assistance (TA) providers charged with working with state, local, and tribal jurisdictions on a rolling basis to provide immediate support to states, counties, cities, and tribes.

As a result of the FY 2010 appropriation and the grant awards noted above, BJA established the capacity to serve many more states, counties, and tribes through JRI. BJA issued a solicitation to request letters of interest from states, counties, and tribes wishing to participate in JRI. As a result, BJA received 30 letters of interest (12 states and 18 counties or cities) from jurisdictions requesting phase I initial justice reinvestment assistance and 6 applications (1 state and 5 counties or cities) from jurisdictions requesting phase II technical assistance and "seed" funding to support the implementation of justice reinvestment recommendations. BJA is in the process of making decisions on which jurisdictions will be included in JRI and expects to have ample resources to serve all states, counties, and cities that have demonstrated the readiness needed to succeed in JRI. BJA expects to issue a second solicitation for letters of interest later this year, and BJA expects fewer jurisdictions to request phase I assistance, but more jurisdictions to request phase II assistance. Subject to appropriations, BJA will utilize programs such as Byrne Justice Assistance Grants, Byrne Competitive Grants, and other funding opportunities to support the next round of JRI sites.

In addition, through close coordination with the Pew Center on the States and five TA providers (the Vera Institute of Justice, the Council of State Governments, the Center for Effective Public Policy, Community Resources for Justice, and the Urban Institute), BJA is currently providing five states (Alabama, Indiana,

Louisiana, North Carolina, and Ohio) with support in justice reinvestment analysis and recommendation development. BJA has also provided three local jurisdictions (Travis County, Texas; Allegheny County, Pennsylvania; and Alachua County, Florida) with initial justice reinvestment planning support. It is worth noting that additional states are utilizing the justice reinvestment model with direct support from the Pew Center on the States. It is exciting to see these initiatives taking root in so many jurisdictions around the country and to have forged a public-private partnership to support these initiatives.

- The FY 2012 budget request did not propose continuing the $10 million we included for comprehensive reform efforts. If the program were not funded in FY 2012, are there other discretionary resources at OJP that might be used to help State and local governments who are seeking this kind of help?

Answer: In FY 2012, subject to the availability of appropriations, BJA will seek to support Justice Reinvestment Initiative sites through programs such as Byrne JAG, Byrne Competitive and other funding opportunities.

Commerce, Justice and Science Subcommittee Hearing Office of Justice Programs

Appropriations Question for the Record Rep. Tom Graves (GA-9) March 30, 2011

Laurie O. Robinson

Assistant Attorney General Office of

Justice Programs

1. On March 30, 2011, I wrote the attached letter asking you to represent in detail how your agency would operate with a 25 percent reduction in funds, a 20 percent reduction in funds and a 10 percent reduction in funds. Will you provide the Committee with a copy of the reply for the record?

Answer: Please see the attached response that was submitted on behalf of the Department, including OJP. In addition, as discussed with your staff, we would be pleased to work with you to identify impacts of increases and decreases to programs throughout the budget process.

COMMITTEE ON APPROPRIATIONS
SUBCOMMITTEES
AGRICULTURE, RURAL DEVELOPMENT, FOOD AND DRUG ADMINISTRATION AND RELATED AGENCIES
COMMERCE, JUSTICE, SCIENCE AND RELATED AGENCIES
FINANCIAL SERVICES AND GENERAL GOVERNMENT

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http://tomgraves.house.gov

March 30, 2011

Hon. Laurie O. Robinson
Office of Justice Programs
United States Department of Justice
810 7th Street NW
Washington D.C. 20531

Dear Assistant Attorney General Robinson:

I am writing today to request that your agency submit budgets to the Sub-Committee on Commerce, Justice, Science, and Related Agencies within the Committee on Appropriations that represent in detail how your agency would operate with a 25 percent reduction in funds, a 20 percent reduction in funds and a 10 percent reduction in funds.

As you know, as of this writing, we are months away from reaching our debt ceiling of $14.29 trillion. The Congressional Budget Office (CBO) projects that the gross federal debt will increase every year of the 2011-2020 period, reaching $23.1 trillion in 2020 and costing Americans over $1 trillion in interest payments alone by 2020.

According to CBO, at the end of the fiscal year of 2008, the debt held by the public was $5.8 trillion. Since then the public debt has shot to $9 trillion by the end of fiscal year 2010. While the government experienced lower tax revenues due to the economic recession, the response by the Administration and Congress to jolt the economy with higher federal spending coupled with the past imbalance between spending and revenues has led to an unsustainable debt.

Our fiscal situation is unacceptable. The responsibility for our debt is shared jointly by Democrat and Republican Administrations and Congresses of the past and finding solutions must be a bipartisan endeavor. That is why I am writing to you today to ask that your agency work with Republicans to begin reigning in spending and start our nation on a fiscally responsible course.

Thank you in advance for your willingness to work with the Sub-Committee on Commerce, Justice, Science, and Related Agencies on this important issue.

Sincerely,

Tom

Tom Graves
Member of Congress

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

APR 15 2011

The Honorable Tom Graves
Committee on Appropriations
U.S. House of Representatives
Washington, D.C. 20515

Dear Congressman Graves:

This responds to your letters to the Attorney General and to other Department of Justice officials dated March 31, 2011, requesting information regarding the Department's budget. We appreciate your concern for fiscal responsibility.

The Department of Justice carries out critical law enforcement and national security missions. While the Department's budget is categorized as "discretionary" spending, much of the Department's work is not discretionary at all. It is imperative that the Department address terrorist threats and instances of violent crime. In addition, the population of detainees in federal custody is 13 percent higher today than in 2008. In that same time period, over 11,000 inmates have been added to the custody of the Bureau of Prisons.

We would be pleased to work with you and other members of the Committee to identify the impacts of different funding levels on the Department's operations, as we did for the recent 2011 Continuing Resolution scenarios. Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter.

Sincerely,

Ronald Weich
Assistant Attorney General

Commerce, Justice and Science Subcommittee Hearing

Office of Justice Programs Appropriations

Questions for the Record

Rep. Adam B. Schiff (CA-29)

March 30, 2011

Laurie O. Robinson
Assistant Attorney General
Office of Justice Programs

1) OJJDP Administrator Nomination

It has been more than two years since the new Administration came into office, and there is still no nomination for Administrator of OJJDP. This is a vital post responsible for some of the most important prevention programs in the nation and I would hope the position would be filled as soon as possible. Can we expect a nominee for OJJDP Administrator soon?

Answer: Yes, the Department anticipates a nominee will be named by the President in the near future.

2) JJDPA Race to the Top Proposal

I want to express my appreciation for the willingness of OJJDP to respond to concerns of stakeholders over the original proposal to convert the bulk of JJDPA funding to a competitive formula. I support efforts to incentivize innovative practices in the states while avoiding unintended consequences of a wholesale change in the structure of the programming. How can we best mesh the goals of encouraging innovative practices while preserving the historic success of JJDPA formula grants in moving all states towards certain minimum standards for juvenile justice, such as the commitment to house juvenile offenders separately from the general population?

Answer: Since the early 1980s, the Office of Juvenile Justice and Delinquency Prevention (OJJDP) Part B Formula Grants Program has supported significant juvenile justice reforms and helped move many states into compliance with the Juvenile Justice and Delinquency Prevention Act's (JJDPA) four core requirements. It is in the interest of furthering those mandates and stimulating new juvenile justice reforms that we are proposing an enhanced Part B Formula Program, combined with the Juvenile Accountability Block Grants (JABG) funding and a program for demonstration grants. This approach reflects a balance of existing formula and block grant funding with the addition of innovation grants for those states that ***exceed*** the goals and mandates of the JJDPA. Maintaining a relationship with the states and assuring continued compliance is expected through formula and block grant funding. The new innovation grants would provide a means to foster innovations and use of best-practices (e.g., demonstration programs that may showcase approaches other states may consider embracing).

3) State and Local IP Enforcement Grant Program

My district in Southern California is home to many hardworking Americans who are employed by the movie and recording industries, post-production shops, and other IP enterprises, so I have seen first-hand the toll that intellectual property theft takes on the lives of real Americans. I've been a proponent of the program to provide grants to state and local law enforcement to crack down on IP-related crimes, and I applaud OJPs efforts in this area over the last two years in administering the funding. We have seen real results from this program with key actions taken by a number of grant recipients.

The LA City Attorney's Office has used the funds they have received to pursue first-of-their-kind property abatement actions against business and property owners who are participating in and facilitating counterfeiting. In one instance, a gang affiliated business that was involved counterfeit apparel sales, as well as drug sales, was shut down using an abatement action. The property had previously been the site of two murders, but since the order was obtained, there has been no further violence, which bears out the positive impact this approach can have. Last year, the Houston IP Task Force had three significant enforcement actions over a four-month period. In July, seizing nearly a half million dollars worth of counterfeit goods; in September, seizing more than $1 million of pirated DVDs at a local flea market; and, in October, seizing $2.5 million of counterfeit goods at three local businesses.

Given the Administration's strong support for IP enforcement I was dismayed to see that the President's FY12 budget does not include a request that the IP grant program continue. Can you provide some insight into that decision? Or better yet, can it be reconsidered?

I understand the IP grants are capped at $200,000 per award. What is the rationale for the cap? I urge you to consider raising the maximum award so that jurisdictions that have shown particularly high commitment to investigating and prosecuting IP-related crimes can get higher awards. Additionally, I encourage you to maximize the impact of the grant by encouraging information sharing and training for jurisdictions who would like to build IP-enforcement cases but don't have the expertise to do so.

Answer: Although funding constraints did not allow the FY 2012 President's Budget to request dedicated grant funding for intellectual property enforcement programs, the Administration is fully committed to fighting all forms of economic crimes, including intellectual property crimes, and will continue to address this issue through the work of the White House Office of the U.S. Intellectual Property Enforcement Coordinator and the Department's Task Force on Intellectual Property. Jurisdictions seeking federal assistance to support intellectual property crimes enforcement programs may use funding from OJP's Byrne Justice Assistance Grant (JAG) Program or the Byrne Competitive grant program for this purpose, subject to appropriations.

The Intellectual Property (IP) Enforcement Program has provided national support to state, local, and tribal criminal justice systems - including prosecution, prevention, training, and technical

assistance - to improve their intellectual property crime enforcement. In FY 2010, the Bureau of Justice Assistance (BJA) provided funding to 14 of 17 applicants under this program.

The $200,000 award cap has allowed BJA to fund a larger number of task forces and is designed to leverage ongoing task force efforts as opposed to encouraging the creation of new task forces at a time when sustainability is such a challenge. Additionally, in FY 2010, a match requirement was put in place because the funding was informed by the Prioritizing Resources and Organization for Intellectual Property Act of 2008 (PRO IP Act). The match requirement, coupled with feedback from law enforcement around the United States regarding what support was needed, suggested to us that smaller grant awards were optimal. The $200,000 awards can be supplemented up to two additional times, allowing high-performing agencies to receive up to $600,000 over three years for IP enforcement.

BJA is actively providing IP training for jurisdictions across the country and encouraging information sharing among grantees. In FY 2010, BJA partnered with the National White Collar Crime Center, the National Association of Attorneys General, and the National Crime Prevention Council (NCPC) to enhance Training and Technical Assistance (TTA) to state, local, and tribal law enforcement agencies to increase their capacity to respond to IP crime. BJA also engaged in extensive outreach efforts by kicking off its national IP Enforcement Training Initiative in Baltimore, Maryland on September 14, 2010, and is conducting ten additional regional trainings in FY 2011. In addition, BJA held an IP Rights Summit in Pasadena, CA on September 30, 2010, to further raise awareness and provide education about IP enforcement issues primarily to West coast law enforcement agencies. Finally, on March 9, 2011, BJA sponsored a webinar for all IP grantees that offered an overview of the Regional Information Sharing System (RISS), the resources available at the RISS Centers, and how these resources can assist grantees with their IP enforcement activities.

4) HOPE Program

I am pleased that you mentioned the Hawaii HOPE program in your testimony, as you did last year. I know you share my interest in the HOPE program, and I appreciate your support for HOPE and other evidence based approaches to reducing recidivism. Last year I joined with my colleague Ted Poe to introduce legislation to expand the HOPE model to additional pilot sites around the country. The legislation, which I intend to reintroduce soon, would promote and expand the use of the HOPE model pioneered by Judge Stephen Alm in a number of jurisdictions across the country by creating a new dedicated grant program with stringent grantee requirements. We intend to pursue that authorization, but I am also interested in how we can collaboratively identify funding to implement HOPE programs in other interested jurisdictions.

Are there plans to fund HOPE projects in additional jurisdictions using FY11 funds, if they remain available?

The budget requests $7 million for smart probation programs through the Second Chance Act. Will that funding be directed towards HOPE projects? What else might be funded through that proposed set aside?

Answer: Yes, both BJA and the National Institute of Justice (NIJ) have developed funding solicitations in FY 2011 for replicating and evaluating the Hawaii HOPE Program. In FY 2012, innovative and promising programs such as HOPE, variations of that model, and other promising community corrections approaches would be supported, developed, and replicated using Smart Probation funds. NIJ and BJA plan to evaluate HOPE in FY 2011 using NIJ's research funding. The $7 million requested for Smart Probation programs in the FY 2012 Budget could be used to support expansion of the program.

Commerce, Justice and Science Subcommittee Hearing

Office of Justice Programs Appropriations

Questions for the Record

Rep. Michael Honda (CA-15)

March 30, 2011

Laurie O. Robinson
Assistant Attorney General
Office of Justice Programs

Assistant Attorney General Robinson. I want to thank you for your testimony and your work on behalf of our country.

1) Your written testimony on p.5 explains that the Department of Justice intends, with FY 2012 funding under the 7% set-aside to tribal governments, to provide funding for 3 of the 4 program components funded in FY 2010: tribal courts, tribal detention, and the tribal alcohol and substance abuse program. OJP's FY 2012 Congressional Justification also included mention of some of this set-aside funding going to the provision of training and technical assistance and civil and criminal legal assistance as authorized by Title I of the Indian Tribal Justice Technical and Legal Assistance Act (Public Law 106-559). Can you tell us about the overall strategy with this set-aside funding and if it is still the Department's intent to provide funding for the aforementioned programs?

Answer: The goal of the tribal set-aside is to provide a consolidated source of funding to support the Office of Justice Program's (OJP) tribal justice assistance efforts and allow OJP and its grantees greater flexibility in using grant funding. All of the activities of OJP's existing tribal justice assistance programs could be funded under the proposed tribal justice assistance set-aside, including the four critical areas as cited in the question (tribal courts, tribal detention, tribal alcohol and substance abuse, and civil and criminal legal assistance), as well as other areas of need in the tribal justice system. This will allow for critical ongoing support through training, technical assistance and research to ensure that tribal communities have support in building capacity, assessing needs, and building skills and strategies through training about promising practices on a range of issues from substance abuse to courts to corrections. It will also support the integration of new research knowledge and tools for tribal communities.

In FY 2010, the Department launched a new Coordinated Tribal Assistance Solicitation (CTAS) that provided tribes the opportunity to engage in community-wide strategic planning to assess and develop comprehensive plans for their tribal justice needs. Funding allocated under the proposed set-aside would be used to address the full range of needs in the tribal justice system, including law enforcement, courts,

corrections, and crime related to substance abuse. It will allow for more flexibility in funding the priorities of tribal communities, as identified in the planning, while also supporting the demonstration of innovative practices that honor the culture of each tribe. As a core, funding would continue to support strategies related to substance abuse, alcohol and crime; courts and community corrections programming; and the planning, renovation and construction of tribal justice multipurpose centers, alternatives to detention, and detention.

In addition, some funding would also be used to continue to support awards for indigent legal assistance traditionally funded under the Tribal Civil and Criminal Legal Assistance Program. These resources would be coordinated with funding for other Department grant-making agencies through the CTAS structure. Funding would also support critical training and technical assistance to address these needs.

If the set-aside were to be enacted, the Department would set funding priorities based on the projected availability of appropriations and the expressed needs of the tribes.

2) Many localities are facing law enforcement budget cuts right now. As you mentioned, we are at a crossroads in the country where we the responsibilities facing many of our states seem to be ever increasing, but their budgets are ever decreasing. What kind of work is OJP doing, in addition to the Byrne JAG program, to help alleviate this crunch? How can we here in Congress be most helpful?

Answer: As localities continue to grapple with local budget issues that adversely impact law enforcement agencies, OJP provides funding that encourages local law enforcement to implement strategies that are based on sound research and are known to work. One such strategy is the Bureau of Justice Assistance's (BJA) Smart Policing Initiative (SPI), which seeks to build upon concepts of "offender-based" and "place-based" policing. Several longitudinal projects in the United States and the United Kingdom have demonstrated convincingly that a small number of offenders commit a disproportionate amount of crime. It is also well documented that crime reports and calls for service often cluster predominately at specific locations or narrow, easily-defined areas, and that the most convincing research indicates that "place-based" or "hot spot" policing reduces violent crime and neighborhood disorder. The consistent use of preventive and tactical tools that are rooted in a scientific knowledge base of "what works" should be promoted and integrated into daily police work. Inculcating evidence-based policies and procedures in everyday police operations is critically important to an agency's ability to provide quality law enforcement services.

Among many training events and conferences to be held, BJA will be hosting in the Fall of 2011 a national summit on forensic science for law enforcement practitioners – in an effort to assist law enforcement in improving their operations and solving crime cases more efficiently and effectively. The purpose of this summit is to educate

attendees on the basic forensic disciplines, including the latest advances in DNA science; emergent investigative technologies and techniques; and policy trends. The intended result is to improve law enforcement operations, the delivery of justice, and conservation of resources.

BJA provides funding to numerous national partners who then provide no-cost training and technical assistance to state and local law enforcement. Given that local training budgets are often the first to get cut, BJA is able to respond and help meet the training needs of law enforcement.

Congress can be most helpful in this regard by supporting the President's FY2012 request for initiatives that promote evidence-based strategies and provide communities with critical training and assistance from national experts. These initiatives include the Department's Smart Policing Initiative at $10 million, the Smart Probation Initiative at $7 million, the State and Local Assistance Help Desk and Diagnostic Center at $6 million, and the CrimeSolutions.gov resource center at $1 million. These types of initiatives coupled with programs such as the Byrne Justice Assistance Grants (JAG) Program, can help agencies maximize resources to alleviate the impact of decreasing budgets.

3) In your testimony, you mentioned Attorney General Holder's Defending Childhood Initiative. As an educator for 30 years, I am very sensitive to what our children are exposed to. What programs would this initiative be putting into place? Is the Department planning on addressing bullying issues as well?

Answer: The Attorney General's Defending Childhood Initiative is a competitively based grant program that will support communities in developing a comprehensive community-based strategic plan to prevent and reduce the impact of children's exposure to violence in their homes, schools, and communities. Funds provided in FY 2010 supported a one year planning period for eight communities; funds requested in FY 2012 will be used to support four selected planning communities to implement their strategic plans, as well as provide seed money for additional grantees. The program's fundamental objective is to use evidence-based strategies in the development of a comprehensive approach *across the continuum of prevention, intervention, treatment, and response* to address children exposed to violence in the community. The program is intended to address all aspects of children's exposure to violence across home, school, and community; and across the development spectrum of ages 0 through 17.

Because of the comprehensive approach to children's exposure to violence that is required by this project, it is very likely that the strategic plans will address issues of bullying.

TUESDAY, APRIL 5, 2011.

LEGAL SERVICES CORPORATION

WITNESSES

JAMES J. SANDMAN, PRESIDENT

ROBERT J. GREY, JR., MEMBER OF THE BOARD OF DIRECTORS

Mr. WOLF. The hearing will come to order.

I want to welcome both witnesses here today.

James Sandman was appointed president of Legal Services Corporation this past January. Mr. Sandman brings more than three decades of legal experience to the LSC. He had over a 30-year career at Arnold & Porter before becoming general counsel for the District of Columbia Public Schools in 2007.

I think the public is going to miss Michele Rhee, the fact that she left.

Welcome, and congratulations, I think, on your new position.

Mr. SANDMAN. Thank you.

Mr. WOLF. Our other witness, Robert Grey, Jr., was nominated to serve on the board of directors of Legal Services Corporation by President Obama in August of 2009. He has served as president of the American Bar Association. And he is a Virginian having received his undergraduate degree from Virginia Commonwealth University, which we are sorry did not make it to the game last night, but I watched the game the other night and I thought they were going to win up until the last five minutes. He got his law degree from Washington and Lee University.

I appreciate both of you being here to testify regarding the Legal Services Corporation fiscal year 2012 budget request.

Throughout my career, I have been a supporter of Legal Services for Americans who would not otherwise have adequate access to civil legal assistance. In the mid 1990s, I fought to protect the LSC from efforts to eliminate the agency.

As chairman of this subcommittee, I worked closely with LSC leaders in the past to mitigate partisan issues that endanger the corporation. Most recently I opposed an amendment to H.R. 1 that would have completely eliminated funding for LSC basic field grants.

Yet, today the country is facing an extremely challenging budgetary environment. The American people have made clear that they want Congress to rein in federal spending as part of the solution to reducing the unsustainable debt and deficit.

I am keenly aware that the pending budget cuts cannot come at a worse time for those in need of legal assistance. Foreclosure, unemployment, and other recession related cases are more common than ever in the offices of LSC grantees.

Rather than wait out the uncertainties of the budget process, I encouraged the legal community to seize the opportunity to mitigate the effects of potential funding reductions now.

That is why in January I reached out to the American Bar Association requesting that they work closely with LSC to augment the provision of Legal Services during this period of budgetary austerity.

I am grateful for your willingness to engage in a dialogue about how we can best maintain the support for indigent Americans and I am pleased that LSC is planning to establish a pro bono task force.

I am concerned, however, that yet another audit of LSC has uncovered material weaknesses in LSC's governance and internal controls. This comes just one year after LSC testified to its commitment to aggressively implementing GAO's recent recommendations for improving its oversight.

And I was dismayed by a State Legal Aid publication that has come to my attention—a publication that contains needless political representations.

We look forward to asking you some questions about these issues and about your efforts to address unmet needs such as your support for efficient and cost-effective automated legal services.

But before we recognize you, I want to recognize the ranking member, Mr. Fattah.

Mr. FATTAH. Thank you, Mr. Chairman.

And let me thank you again for your holding this hearing and for your long-term support for these and other issues under the jurisdiction of the subcommittee.

Since President Nixon, the country, a host of presidents and Congress has had a commitment to Legal Services and there are some 50 plus million Americans who are eligible for services under the Legal Services Corporation.

And my understanding is that last year, you closed more than a million cases. Three out of four of those seeking services by the Legal Services Corporation are women and you have also done extraordinary work in terms of providing legal services to veterans.

It is impossible to escape the fact that under our system of laws there is no real opportunity for justice absent a lawyer being able to take your case. And so for many, particularly these three out of four who are women who are facing domestic abuse in need of a restraining order or facing foreclosure, you really stand as the last line of defense of our American system of justice in ensuring that there is representation in civil litigation in our country.

So I want to thank you for your service.

And obviously as a person whose both wife and daughter are attorneys, I do not want any debates at home. I do not want any with my chairman, you know, but I am happy to be here.

I did note Mr. Grey, that your team had a great coach with a great name, Shaka Smart. I just thought it was a great name and now I understand he has announced he is going to stay at Virginia Commonwealth versus chasing dollars in some other program somewhere, which I think is an extraordinary commitment.

I would note that he got his start in Pennsylvania and coached there and got his graduate degree at one of our universities, Mr. Chairman, California State University of Pennsylvania.

But this is serious business. And, you know, in our bill, we have close to $70 billion. We spend a lot of money on a lot of different things, on satellites and fish and fish hatcheries, and we have our NASA efforts, but there is nothing more important, there is nothing that even comes close to our constitutional responsibilities of ensuring justice in the work of the Justice Department, the federal courts and prison systems, but most importantly for the huddled masses, the Legal Services Corporation.

So I want to thank you for the work that you are doing on behalf of our Nation and I look forward to the hearing.

Thank you.

Mr. WOLF. Thank you, Mr. Fattah.

Mr. Sandman, you can summarize. Your full statement will appear in the record.

Mr. SANDMAN. Chairman Wolf, Congressman Fattah, thank you for holding this hearing and for inviting us to testify on the fiscal year 2012 budget request of the Legal Services Corporation.

It is my privilege to appear before you for the first time and to be joined by Robert Grey, a long-time champion of pro bono services for low-income Americans.

I joined LSC at the end of January and as you have noted, Mr. Chairman, I spent most of my career in the private sector before entering public service a few years ago.

I look forward in this new position to making the best possible use of my management experience and my time as president of the District of Columbia Bar.

These are hard times for low-income Americans. Requests for legal assistance are increasing and the poverty population is growing. We estimate that more than 63 million Americans are now eligible for legal assistance from LSC programs. Twenty-two million of them are children.

Since 2008, the eligible population has increased by more than 17 percent. The clients at LSC programs are the poorest of the poor. Every day Legal Aid attorneys and pro bono volunteers help families facing foreclosure and individuals who have lost jobs and find themselves sliding into poverty and entangled in serious legal problems.

Last year, LSC programs closed nearly one million cases which affected 2.3 million people. Another five million received legal information and self-help services.

The caseload of LSC programs reflects the impact of the economic downturn. Last year, foreclosure cases increased by 20 percent. Unemployment cases rose by ten and a half percent and domestic violence cases increased by five percent. Programs also closed more cases involving landlord-tenant disputes, bankruptcy and consumer-related matters.

We started an awareness and training program to assist veterans. With the assistance of a technology initiative grant from LSC, a national website, statesidelegal.org, has been created to provide information to veterans about their rights.

LSC programs help communities avert more costly interventions. When a family escapes domestic violence, we save on the cost of medical care for injured victims and the follow-up counseling for affected children. When we resolve landlord-tenant disputes, we keep families together and avoid homelessness and emergency shelter costs. When we create automated standard legal forms, we save time for lawyers and courts.

LSC is the single largest funder of civil legal aid in America. LSC programs receive other funding from non-federal sources, but those sources have been essentially flat or declining in recent years.

Interest on lawyers' trust accounts, or IOLTA, for example, has declined from 13 percent of total funding in 2008 to only seven percent in 2010. State and local grants and United Way contributions have also declined.

For fiscal year 2012, LSC requests an appropriation of $516.5 million. Ninety-four percent of our requested appropriation, $485 million, would go directly to LSC programs as basic field grants to fund legal assistance for low-income Americans.

Our request also includes $6.8 million for technology initiative grants to expand Legal Services in rural areas and develop additional self-help forms for unrepresented litigants.

In addition, we seek funds for our Student Loan Repayment Assistance Program, for grants oversight, and for our Office of Inspector General.

LSC is a steward of public funds and I am committed to running a tight ship. I believe the tone at the top is important and I will work to foster a culture of integrity, accountability, and commitment to high standards of performance and quality.

Mr. Grey will provide you with an update on our work with the GAO. I want you to know that LSC management is committed to implementing the recommendations of the GAO.

Federal funding for civil legal aid is critically important. LSC is at the center of the Nation's access to justice efforts and the progress we have made will be jeopardized if access to justice is denied.

We know that you value equal access to justice regardless of income. We request your support for our budget request.

Thank you for all you have done for our programs.

[The information follows:]

James J. Sandman
President
Legal Services Corporation

Testimony Before the
Subcommittee on Commerce, Justice, Science, and Related Agencies
Committee on Appropriations
U.S. House of Representatives

April 5, 2011

Chairman Wolf, Congressman Fattah and Members of the Subcommittee, thank you for the opportunity to discuss the Fiscal Year 2012 Budget Request of the Legal Services Corporation.

For more than three decades, the Legal Services Corporation (LSC) has touched the lives of millions of low-income Americans, addressing the civil legal needs of the elderly, victims of domestic violence, veterans seeking the benefits to which they are entitled, disabled individuals, tenants facing unlawful evictions, and other poor Americans. Every day at LSC-funded programs, legal aid attorneys and volunteer lawyers help families facing foreclosure and individuals who have lost jobs and find themselves slipping into bankruptcy or entangled in other serious legal problems. Today, LSC is the single largest funder of civil legal services—the most important part of the nation's strained and stressed legal aid network. Requests for assistance are increasing; the poverty population is growing. Funding from non-federal sources is decreasing.

The United States has the greatest legal system in the world, and our country's commitment to the rule of law is second to none. Because of the bipartisan Congressional support for LSC, our nation has created a public-private partnership focused on fulfilling America's pledge of equal justice for all regardless of income. LSC is at the center of the nation's access to justice efforts, and the support of this Subcommittee and this Congress is critically important—particularly now, as a larger number of low-income Americans than ever before qualify for legal services.

It is a great privilege for me to serve as LSC's president and chief executive. I joined the Corporation at the end of January, after having spent most of my career in the private sector, where I had significant management experience. I worked for 30 years at the law firm of Arnold & Porter LLP, including 10 years as Managing Partner. In 2007, I decided to go into public service, and I became General Counsel of the District of Columbia Public Schools shortly after Michelle Rhee became Chancellor. I served as president of the District of Columbia Bar in 2006-2007, and I am now the chair of the D.C. Bar's Pro Bono Committee. I am currently the co-chair of the District of Columbia Circuit Judicial Conference Committee on Pro Bono Legal Services and a member of the Pro Bono Institute's Law Firm Pro Bono Project Advisory Committee. I also have served on the board of the Neighborhood Legal Services Program in the District of Columbia.

Robert J. Grey, Jr., of Richmond, Virginia, a member of the LSC Board of Directors, joins me here today. He is a distinguished lawyer and a past president of the American Bar Association. He chairs the LSC Board's Finance Committee and co-chairs the Board's Special Task Force on Fiscal Oversight. He also has tremendous experience in recruiting lawyers and firms for pro bono activities and will bring the Subcommittee up to date on that aspect of our work.

My goals as President of LSC are to increase resources and funding for civil legal services; to maximize the efficiency, effectiveness, and quality of LSC and the 136 nonprofit legal aid programs that receive LSC grants; to encourage innovation and entrepreneurship within LSC and among the programs that LSC funds; and to further improve collaborations with judges, state Access to Justice Commissions, the organized bar, private attorneys, foundations, law schools, and others involved in serving the needs of low-income Americans.

Equal Access to Justice

In founding LSC, Congress entrusted the Corporation with a dual mission: to provide equal access to justice and to ensure the delivery of high-quality civil legal assistance to those who would be otherwise unable to afford counsel.

Equal access to justice is essential in our democracy, and LSC has become the bedrock on which our national system of access to civil justice now stands. The system is supported today by state and local appropriations, Interest on Lawyers' Trust Accounts (IOLTA) funds, court filing-fee surcharges, foundation support, and private contributions—but those funding sources have been hit hard by the recession. LSC funding has been the most reliable source of legal aid funding in the past few years. All of these resources are augmented by the volunteer hours of pro bono attorneys.

The Conference of Chief Justices, the highest judicial officers in the 50 states and territories, recognized the importance of LSC's role in a February resolution of support. "In recent years," the resolution says, "many states have invested substantially in the core civil legal aid infrastructure funded through the federal Legal Services Corporation, and [a] reduction and/or withdrawal of federal funding would fundamentally undermine the vitality and effectiveness of state-based legal aid delivery systems and adversely affect civil judicial operations."

LSC funding helps "to provide a stable financial base for the [legal services] providers, leverages other resources, enables program planning and avoids budget fluctuations that can disrupt staffing and services," the New Mexico Commission on Access to Justice said this year. "The positive outcomes those legal aid agencies achieve for clients not only help our poverty population, but also impact our communities' abilities to remain strong and vibrant," the Commission said.

The access to justice umbrella brings together the judiciary, bar associations, legal aid providers, law schools, private attorneys, business and civic organizations, and other parties to address the civil legal needs of low-income individuals. Twenty-four states have established Access to Justice Commissions, and many other states have similar entities to achieve access to justice goals. The majority of the Commissions have been created in the last five years.

These access to justice initiatives foster partnerships and collaborations among key segments of the legal profession. In New York, for example, where almost two-thirds of homeowners at foreclosure settlement conferences appear without an attorney, the state's chief judge, Jonathan Lippman, set up a pilot program this year to provide low-income homeowners with legal assistance at the settlement conferences. As a part of the pilot, Legal Services of the Hudson Valley, funded by LSC, will assign attorneys to work at courthouses. The Hudson Valley program also will work with at least two bar associations and private law firms to recruit approximately 50 pro bono attorneys for the project.

We all agree that the rule of law is in jeopardy when the protections of the law are not available to increasingly large numbers of low-income citizens—especially children, the elderly and victims of domestic abuse. Writing in 2009 in *Wyoming Lawyer*, the state bar magazine, about equal access issues, state District Court Judge Scott W. Skavdahl said the best interests of children are often lost in disputes involving unrepresented litigants. "The victims in these cases are wholly innocent and the errors of an uninformed decision can be untreatable and the harm irreparable. . . . Access to justice affects more than just *pro se* litigants. It impacts the quality of a judge's decision, how our legal system is perceived and the lives of people."

Challenges and Accomplishments

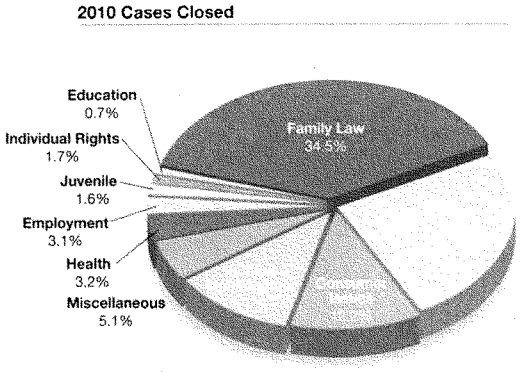
In 2009, nearly 57 million Americans, the largest number since LSC was established, were eligible for civil legal assistance from LSC programs. Almost 20 million of them were children. We estimate that the number qualifying for assistance has now grown to more than 63 million, and that an estimated 22 million of this total are children. Since 2008, the eligible population has increased by more than 17 percent. And these are the poorest of the poor. To qualify for services at LSC-funded programs, a client cannot have more than $27,938 in income for a family of four.

LSC's own data reflect the impact of the economic downturn. LSC-funded programs tell us they are receiving increased requests for legal services in areas related to the economy, such as foreclosure and unemployment.

Last year, LSC-funded programs closed 932,406 cases, up from 920,447 in 2009. In 2010:

- Foreclosure cases were up 20 percent, to 23,984.
- Unemployment cases increased 10.5 percent, to 27,384.
- Landlord-tenant disputes rose by 7.7 percent, to 131,543.
- Bankruptcy, debt relief (39,346) and consumer finance cases (7,011) were up by nearly 5 percent.
- Domestic violence cases increased by 5 percent, to 48,957.

The following chart shows the major categories of the 932,406 cases:



LSC programs are involved in an array of cases, based on priorities set by their local boards of directors. Let me highlight one area—foreclosure—because over the last three years LSC-funded programs have reported significant increases in cases involving foreclosure.

Almost all LSC programs now report handling foreclosure cases, and more than 40 LSC programs have established foreclosure units. LSC programs that are well known for their foreclosure work include Texas RioGrande Legal Aid, Legal Services of Greater Miami, Legal Aid Foundation of Metropolitan Chicago, Indiana Legal Services, Iowa Legal Services, Legal Services NYC and the LSC programs in western and eastern Missouri. Foreclosure work is often complex and labor-intensive.

Atlanta Legal Aid's work has helped protect homeowners from predatory lenders—those who make unsolicited loans with exorbitant interest rates to low-income homeowners who did not understand what they were committing to and have no way of making the payments. Last year, a pro bono attorney for Pine Tree Legal Assistance, the LSC program in Maine, was at the center of a major court ruling. The court determined that the practice of multiple foreclosure filings without sufficient documentation of the title and often with inaccurate affidavits—the so-called "robo-signing" phenomenon—was not acceptable. The decision eventually led banks to suspend foreclosure filings in 23 states.

Several legal aid programs provide housing counseling to homeowners who seek it; others work with housing counselors to advise them when to refer homeowners to lawyers to review their problems. West Tennessee Legal Services, an LSC program, sponsors several counseling projects through NeighborWorks America, the congressionally-chartered nonprofit organization dedicated to improving distressed communities.

LSC programs, such as those in Maine, Nevada and Florida, have participated on state Supreme Court commissions that led to the establishment of mediation programs for foreclosures. Mediation is a particularly helpful tool for the representation of those who started on loan

modification programs, such as the government's Making Home Affordable plan, because mediators often require the full participation of lenders.

Cases involving bankruptcy and consumer matters, such as complaints about fraud and disputes over debt-collection practices, also have increased during the last three years. Legal Services of Alabama, Georgia Legal Services, Maryland Legal Aid Bureau, and Montana Legal Services are among the LSC programs that report handling more consumer and bankruptcy cases. To address consumer issues, Colorado Legal Services created a Consumer Unit in its Denver office. The Legal Aid Foundation of Los Angeles has added a monthly clinic to its regular intake and a hotline to address an overflow of requests for assistance on consumer issues, and partnered with a law school in September 2010 to start a bankruptcy clinic.

LSC encourages legal aid programs to pursue new initiatives that expand access to justice. Last November, Pine Tree Legal Assistance in Maine launched StatesideLegal.org, the first website in the nation to focus exclusively on federal legal rights and resources important to our veterans. LSC also has started an awareness and training campaign to create referrals between legal aid offices and the Department of Veterans Affairs Readjustment Counseling Service offices, known as Vet Centers, across the nation. This initiative is moving in phases, and LSC programs are reaching out to Vet Centers in large states, such as California, Texas, New York and Florida.

Behind these initiatives and the caseload numbers are people in often unique circumstances who never imagined they would need but could not afford the assistance of a lawyer in order to get back on their feet or to start a new life. Here are some case summaries from LSC programs:

- A Texas couple signed loan documents to fix their dilapidated house, but with very little understanding of what they signed. The husband died, and his 58-year-old disabled widow kept up the loan payments until she had a heart attack. Her medical expenses did not leave enough to make her home loan payments. Lone Star Legal Aid negotiated a settlement to prevent foreclosure, allowing this person with a severe heart condition to be cared for in the comfort of her home.

- A disabled veteran was wrongly accused of damaging an apartment. Maryland Legal Aid defended the veteran and discovered other tenants also were victims of fraudulent activities that have led to a state investigation.

- A husband tried to kill his wife and their daughter by setting the house on fire. When his wife ran from him, he found her and smashed her head with a gun, causing serious brain injury. Legal Aid of Western Missouri enrolled her in the state's protection program, and helped her get a divorce and sole custody of her daughter.

- An Alabama woman lived on food stamps and Social Security and fell behind on her mortgage payments when she had to pay a repair bill for a bathtub that fell through the floor. She almost lost her home, but Legal Services Alabama helped her renegotiate a loan modification with the Veterans Affairs Department.

- A 73-year-old Maryland woman was duped by a debt-settlement company into signing a contract with exorbitant administrative fees and authorizing automatic monthly debits from her bank account. The company left some of her debts unpaid, snarling her in litigation. Maryland Legal Aid got the contract canceled and $1,000 in settlement money.

I am trying to meet as many leaders of LSC-funded programs as quickly as I can, as you might expect. My first impression is that these programs are lean, stretched to the limit, and unable to come close to meeting the demands for their services. Recent research by the National Association for Law Placement shows that civil legal aid lawyers are the lowest paid members of the legal profession, earning less than public defenders and other public interest lawyers. First-year staff attorneys in LSC programs earn an average of $43,000 a year and can expect to earn about $59,000 a year after 10-to-14 years of experience. We hear increasing reports of programs that are reducing or eliminating employee benefits.

I have also been reminded that these staff attorneys are engaged in emotionally demanding work. At a briefing at the Maryland Legal Aid Bureau, the intake coordinator told me she now interviews people who never could have imagined the financial circumstances in which they now find themselves and who never thought they would need the help of a legal aid attorney to get back on their feet. The people she interviews are often in tears when explaining what brought them to the doors of the Maryland program.

The Maryland intake coordinator recently saw a couple, in their late 30s, who have two children in elementary school. "Stephen" worked for a supermarket, making between $45,000 and $50,000 a year. His wife, "Marilyn," has her own in-home day care business, earning about $20,000. Their problems began when Stephen was laid off, about the time the couple faced a balloon payment on their mortgage. With Marilyn as the sole breadwinner, they fell behind on their payments, and the bank threatened foreclosure.

Maryland Legal Aid sent the couple to housing counselors for a loan modification, but their finances do not look favorable for that option. Stephen and Marilyn had gotten into a mortgage with payments set to go up every year, without understanding what they were signing and what they were doing. If they go into foreclosure, Maryland Legal Aid will probably represent them in mediation and try to find some options that work for all parties.

Unfortunately, LSC programs are seeing a lot more people like this couple—people who are having trouble finding jobs, spending too much time out of the workforce, and encountering legal problems.

As the Subcommittee knows, large-scale, survey-based studies conducted in 15 states during the last decade have found that only a fraction of the legal problems experienced by low-income people are addressed with the assistance of a private or legal aid lawyer.

Our nation needs federal support to maintain our commitment to equal access to justice. LSC serves as the primary conduit for supporting a national network of civil legal aid providers that help our nation meet its pledge of equal justice for all.

Fiscal Year 2012 Request

For Fiscal Year 2012, the LSC Board of Directors approved a resolution requesting $516,550,000, which includes $484,900,000 for basic field grants (approximately 94 percent of the overall budget request).

The Board's request seeks the same level of funding for FY 2012 as requested in FY 2011. The Board weighed several factors in making the request, including the fiscal pressures facing the nation; the needs of LSC clients who seek legal assistance with foreclosures, unemployment compensation, and a myriad of other matters; and the increase in the population eligible for LSC-funded services.

This may be the point to address an obvious question: in the current fiscal environment, why is LSC asking for more funding than it currently receives? The question we have asked ourselves is, given the growing need in our society, and our statutory charge, how can we not ask for more resources? How can we not ask for funding to ensure that the playing field is even?

The Board, concerned about the increase in the number of people living in poverty and their growing need for civil legal services, decided it would not retreat on funding and, instead, froze the request at the level requested for Fiscal 2011. President Obama made a different decision, but still believed LSC should receive a funding increase.

Funds provided to LSC programs help communities avert more costly interventions. When a family escapes domestic violence, we save on the costs of medical care for injured victims and the follow-up counseling for affected children. When LSC programs resolve landlord-tenant disputes, we keep families together and avoid homelessness and emergency shelter costs. When LSC-funded technology initiatives create automated, standard legal forms, we save time for lawyers and for courts. When we provide legal aid at an early stage, we can avoid litigation and the adverse impact on communities and governments. For individuals, legal aid can be a path to self-sufficiency and stability.

Significant parts of the non-federal funding structure have been essentially flat or declining over the last three years. An important source of non-federal funding for LSC programs, Interest on Lawyers' Trust Accounts (IOLTA), has declined from 12.7 percent of total funding in 2008 to 7.1 percent of total funding in 2010. State and local grants and United Way contributions also have declined. Numerous local legal aid programs are very concerned about their funding from non-LSC sources over the next two years, making federal support increasingly important as more Americans are at risk of being left behind by the slow economic recovery and find themselves confronting serious legal problems.

The following chart shows LSC's current funding, at FY 2010 levels; H.R. 1 funding levels; President Obama's FY 2012 request, and the LSC Board's FY 2012 budget request:

Budget Category	Current Funding (FY 2010)	H.R. 1 (FY 2011)	President's Request (FY 2012)	LSC's Request (FY 2012)
Basic Field Grants	$394,400,000	$324,400,000	$420,150,000	$484,900,000
Technology Initiative Grants	$3,400,000	$3,400,000	$5,000,000	$6,800,000
Loan Repayment Assistance Program	$1,000,000	$1,000,000	$1,000,000	$1,000,000
Management and Grants Oversight	$17,000,000	$17,000,000	$19,500,000	$19,500,000
Office of Inspector General	$4,200,000	$4,200,000	$4,350,000	$4,350,000
Total	**$420,000,000**	**$350,000,000**	**$450,000,000**	**$516,550,000**

In addition to recommending increased funding for basic field grants, LSC also requests:

- $6,800,000 for Technology Initiative Grants (TIG). With this funding, TIG would strengthen and expand the technology infrastructures of legal aid programs, expand wireless broadband access to provide cost-effective legal services in rural areas, and expand assistance for unrepresented litigants through the development of additional automated forms. Increased wireless broadband access would allow legal aid attorneys to hold more clinics in rural areas and provide intake services to low-income citizens. Because many courts have experienced an increase in the self-represented, and because court procedures vary and may be difficult to understand, TIG provides LSC with an ongoing opportunity to work with clients on standard court forms that hold the potential to save time for legal aid attorneys and to increase access for the self-represented. In response to the needs of the self-represented, legal aid programs and libraries are developing partnership strategies and specialized tools to serve library patrons seeking legal help.

- $1,000,000 for the Corporation's Herbert S. Garten Loan Repayment Assistance Program (LRAP). LSC programs have found that helping lawyers reduce their student debt substantially increases the likelihood that they will stay with their programs. It also makes it easier for programs to recruit new attorneys.

- $19,500,000 for Management and Grants Oversight (MGO). The proposed increase would expand LSC's grants oversight operations, including a training program for grantee board members and grantee staff in order to improve local board governance, fiscal oversight and other aspects of grantee operations. The proposed increase also would better enable LSC to further strengthen internal controls for grants administration.

- $4,350,000 for the LSC Office of Inspector General. The OIG request is included in the LSC total, but is made separately by the Inspector General through the LSC Board of Directors.

The proposed MGO training initiative would set aside about $450,000 to create and support a training unit to develop web-based and in-house training for LSC-funded programs. The training would:

- Expand grantee board member training and dissemination of best practices on board governance and oversight in order to support better prepared grantee board members who can conduct more sophisticated oversight of their programs.

- Expand grantee staff and board training on fiscal oversight and management best practices to produce better internal controls and more effective management.

- Expand grantee staff and board training on LSC regulatory compliance requirements.

- Provide assistance on managing pro bono and private attorney involvement, leadership mentoring, technology, and program development.

Improving Management

LSC continues to find ways to conduct its business more efficiently and effectively, and I am committed to further improvements in the operations and the management of the Corporation. In my first weeks as LSC President, I have addressed an all-staff meeting and have met individually or greeted almost all of the LSC employees. I believe the tone at the top is important, and I do my best to foster a culture of integrity, accountability, cost-consciousness, and commitment to high standards of quality. I am acutely aware that we at LSC are stewards of public funds, and I will run a tight ship. I conduct weekly management meetings to hear from office directors. I have an open-door policy for all employees, so that any member of the staff can bring issues to my personal attention; a number of employees have already come to talk to me. I meet regularly with representatives of our employees' union, and am committed to constructive and harmonious labor-management relations. I believe that managing people well is critical to the success of any enterprise.

I hope to bring LSC to a new level of excellence, to reach out and listen to all interested parties, and to continue growing this great public-private partnership that strives to provide access to justice to so many Americans.

Congress has provided us with outside expertise on management issues—the Government Accountability Office (GAO). LSC has found great value in GAO's reviews in recent years, and LSC has accepted all of the recommendations made by GAO. Robert Grey will discuss our progress in this area in his testimony.

I also want the Subcommittee to know that I regard the LSC Inspector General as a colleague with whom I share a common mission—improving efficiency and effectiveness and deterring waste, fraud and abuse. I meet with Inspector General Jeffrey E. Schanz every other week in his office, and I have solicited his advice on systemic changes that he thinks might be appropriate to avoid recurrences of problems LSC has experienced in the past. I am grateful for his help and

his graciousness in welcoming me to LSC. I value our relationship and look forward to working with him for the betterment of LSC.

Going Forward

The Constitution calls for establishing justice as a national purpose in its very first line. Our Pledge of Allegiance proclaims our commitment to "justice for all." "Equal Justice Under Law" is engraved over the entrance to the U.S. Supreme Court building.

With the additional funding provided by the Congress in recent years, LSC-funded programs have been able to help millions of Americans. While we hope that the recession is behind us, unemployment remains high, suggesting that many more low-income Americans will be coming to LSC programs for assistance with legal matters.

But the progress we have made will be threatened if access to justice is limited. The support of Congress is critically important as low-income Americans struggle in this economy. For FY 2012, we urge the Subcommittee to help us close the justice gap by approving the LSC Board's request for $516,550,000. With the Subcommittee's support, we can narrow the justice gap, reaffirm our national commitment to the rule of law, and bring self-sufficiency and stability to individuals and families across our country.

Thank you very much.

Mr. WOLF. Thank you.

Do you have a comment, Mr. Grey?

Mr. GREY. Mr. Chairman, if you do not mind, I would like to share a few thoughts with you.

First of all, thank you again for inviting us.

Congressman Fattah, thank you for your support as well.

I am delighted to be here with Jim Sandman. The Board of Legal Services, as you know, is a bipartisan group. And I have got to tell you when you first start working with each other, you learn a lot about your colleagues.

We have formed a very strong board. We work very well with each other. We listen to each other and we respect each other's views. I am very happy to be a member of the board, very honored to be nominated to be on the Legal Services Corporation Board.

Mr. Chairman, you have been a great supporter of Legal Services. I want to personally thank you for that because I have had a chance to talk to you from time to time about it.

We are here because of your efforts during the 1990s. We appreciate your continued support. And the board is committed to be vigilant about looking after the dollars that we have. As stewards of this budget, we are going to maintain a very careful eye over this.

The chairman, John Levi, and the board through me are expressing to you and the Congress that we are going to be there and we are going to report to you. We are going to be held accountable for what we do.

All 17 of the recommendations from the GAO report of 2007 have been implemented. In addition, 13 recommendations out of the 2010 report regarding grant awards and program effectiveness have been implemented and documentation has been provided to GAO while keeping informed of our full implementation of those recommendations.

As a new board member, we had an important task in front of us and that was identifying the CEO. We cannot be more pleased with Jim Sandman who stepped forward to accept that responsibility. We are very confident in him. And I am sure you will agree with us that we made a good decision.

Now, the chairman before John Levi said, you know, one of the first things we are going to do is we are going to put our arms around the issue of fiscal responsibility and I am going to appoint an oversight committee.

As the new chairman of the finance committee, I am one of the co-chairs with Vic Maddox who is the chair of the audit committee. We have got a fantastic group that we are working with. Three senior executives of Fortune 500 companies, six leaders from national foundations, two experienced accounting executives, two former inspector generals are on this group.

We have had a couple meetings. They had some very detailed questions. I think we have got a good start in helping and providing assistance to our grantees to understand their responsibility in managing with oversight and auditing the money that is given to them.

We expect to have a recommendation this summer, sometime in July. And as soon as that is available, we want you to know about it.

I know you are champions of pro bono, Mr. Chairman, and it is something that is near and dear to my heart. And it is part of something that I have done my entire legal career. And I am vice chair of the pro bono committee as I sit here today.

We have got some challenges, though, but we have also got great opportunities as well. Indeed, 12.5 percent of every LSC grantee budget requires them to go out and to work with the private Bar in establishing pro bono programs. They do that with training and they maintain that relationship that is so important.

As a matter of fact, as we have had these increases in our budget over the last few years, we have also increased the level of pro bono activity that has occurred as well so that leverage has provided us with the opportunity to engage the private Bar and they have gone from 10 to 12 percent of the cases that have been closed by LSC.

The pro bono task force, Mr. Chairman, that you mentioned is going to be chaired by Martha Minow, who you know is the dean from Harvard Law School, and Harry Korell, a member of our board, a private attorney.

And they will be looking at as many ways in which we can engage the private Bar. We do not need to reinvent the wheel. We have done a pretty good job over the years of doing that, but we have got technology and, quite frankly, we have got some challenges.

And one of the challenges is expressed and outlined in the handout that we provided you that illustrates that the concentration of lawyers is generally in metropolitan and urban areas, but the vast majority of those that are in need are outside of those areas.

And so, for example, in Georgia, that concentration of lawyers is in five counties and 69 percent of those lawyers are in those five counties. When you get outside of that, you have got six counties with no lawyers, 29 counties with one to five lawyers, and the vast majority of those people are underserved, even by the private Bar.

So we have got to figure that out. And the task force is looking at more creative and innovative ways to not only use technology but to engage the private Bar to do that.

One of the great things about the private Bar is they can be creative. A couple of examples: Hunton Williams, where I now am employed has three offices, one in Richmond, one in Atlanta, one in Charlottesville, that are storefront shops in low-income communities, and our lawyers populate those storefront operations that we have and invite the community there through the LSC offices so that we can manage their cases. That presence is important and the opportunity to do that is very gratifying not only to our lawyers but to the population that we serve.

Joint relationships between corporations and the clients at the law firms have been a great help. We have got a partnership in northern Virginia with Exxon Mobil that has given us the opportunity to do wills for the elderly and now and representing victims of domestic violence is a part of that partnership.

For the first time, for the last two years, 800 lawyers at Hunton Williams have now contributed 100 percent, each attorney contrib-

uting time to pro bono services. That was a goal that we tried to achieve last year and we got it. And we did it again this year.

That is the kind of effort I think you are looking for for us to encourage and we are looking forward to providing those best practices and enlarging the opportunity for the private Bar to do pro bono work.

Mr. Chairman, thank you very much for allowing me to make these remarks. I stand ready to answer any questions you might have.

[The information follows:]

Robert J. Grey, Jr.
Member of the Board of Directors
Legal Services Corporation

Testimony Before the
Subcommittee on Commerce, Justice, Science, and Related Agencies
Committee on Appropriations
House of Representatives

April 5, 2011

Chairman Wolf, Congressman Fattah, members of the Subcommittee, I am Robert Grey, a member of the Board of Directors of the Legal Services Corporation and Chairman of the Finance Committee of the Board. I was appointed by President Barack Obama to this position in August 2009 and confirmed by the Senate in March 2010. I am a proud son of the Commonwealth of Virginia, a graduate of Washington and Lee School of Law and a partner with Hunton & Williams LLP in Richmond. I was President of the American Bar Association from 2004-2005 and remain very active in the ABA.

I want to begin by thanking you, Mr. Chairman, for holding this important hearing today. The Legal Services Corporation is on the front lines of ensuring equal justice under law in this country and I consider my service to the Corporation and the nation a great honor. I bring you greetings today from Chairman John G. Levi and our entire bipartisan Board. Under the leadership of John Levi and Vice Chair Martha Minow, this Board is working as a team to do the right thing for our nation. We listen to and respect one another's viewpoints about how best to fulfill LSC's mission of providing civil legal assistance to indigent clients.

Let me also thank you, Mr. Chairman, for your long-time support of the mission of the Legal Services Corporation. As a former president of the ABA, an advocate of many years for LSC, and a member of the Bar of the Commonwealth, I have watched you support this Corporation through some very stormy waters of the past. I feel that our ability to have a discussion today about the budget of LSC is in large part a result of your loyalty to the mission of equal justice for all Americans and your support for the survival of this program in the late 1990's. I thank you.

Jim Sandman has stated the case for the need. Let me associate myself with everything he has told you about the increasing importance of federal funding for legal aid. What I would like to speak to is our Board's commitment to be vigilant stewards of the federal appropriations that have been entrusted to us for distribution. I would also like to make an announcement today regarding our commitment to work with the private bar to leverage those federal resources and develop even more resources to assist a growing pool of eligible clients.

Stewardship of the Federal Appropriation

Government Accountability Office Reports

As a testament to this Board's resolve to ensure the efficiency and effectiveness of the governance and management of the Corporation, I am pleased to be able to report today that all 17 of the recommendations of GAO's 2007 reports on governance and management have now been implemented by the Corporation. GAO has certified the implementation and I have attached that certification to this statement. (Attachment 1) In addition, 13 of the 17 recommendations contained in the June 2010 report "Improvements Needed in Controls Over Grant Awards and Grantee Program Effectiveness" have already been implemented and the documentation has been provided to GAO. Of the four recommendations not yet completed, three will be addressed as a part of our new Board's strategic planning process now underway. Our Board will keep the Subcommittee fully and currently informed of progress on the completion of all recommendations.

Special Task Force on Fiscal Oversight

Shortly after the organization of our new Board, two tasks were considered paramount. First, we needed to recruit and hire a new CEO for the corporation, someone with the management background and skills to move LSC forward and ensure an efficient and effective organization. We have accomplished that goal. Second, we needed to determine whether the structure, procedures, and measurements were in place to ensure the best fiscal oversight of our grantees. About a month after the first six Board nominees took office, a high-profile case became public—one that brought into question whether we were doing all that we possibly could as a corporation to ensure fiscal integrity of our grantees.

Board Chairman John Levi, who had already been discussing the idea of a Special Task Force on Fiscal Oversight, moved quickly to create the Task Force to study how fiscal oversight of grantees is currently performed by the Corporation and to report to the Board its findings and recommendations. John also personally recruited and appointed the membership, and asked Victor B. Maddox, the Chairman of our Audit Committee, and me to co-chair the effort.

The Task Force is comprised of the two of us and persons from outside the Corporation and the Board. It includes three senior executives of Fortune 500 corporations, six leaders of national foundations, two experienced accounting executives, and two former inspectors general. Mr. Chairman, it is an impressive group of individuals, and I have included the membership as an attachment to my testimony. (Attachment 2)

We have begun our work and are in the process of engaging a consultant to assist in the organization of our task and the writing of our final report to the Board. We are hoping to have a draft report and recommendations completed by July.

Partnership with the Bar – Pro Bono as a Vital Resource

Mr. Chairman, I know that the use of pro bono resources to supplement the resources of civil legal aid is something you are very interested in and have championed on this subcommittee. The Board and management of the Corporation thank you for your interest and advocacy for this vital resource for the provision of access to the courts in the United States. Your outreach to LSC and to the American Bar Association early in this budget year was very valuable and a clear indication of your support for our mission.

I am fortunate to be a partner at Hunton & Williams, which has long supported pro bono and opened neighborhood offices in Richmond's Church Hill, in Charlottesville and in Atlanta. I've learned that pro bono can be a very effective tool to help ensure access to justice.

LSC shares your interest in and commitment to the effective, strategic, and creative engagement of private pro bono attorneys and attorneys providing legal services to eligible clients at reduced fees in the delivery system of the Legal Services Corporation. That engagement has been an important part of our delivery system for many years. We are fully committed to encouraging and supporting private attorney involvement with LSC-funded programs to expand the availability of civil legal assistance to eligible clients. LSC programs are currently using a variety of private attorney delivery models and cooperative relationships with the organized bar to serve clients. Private attorneys are working with programs in urban and rural communities to provide legal assistance to individual clients and to offer community legal education to groups of low-income individuals. They are conducting intake interviews and staffing telephone hotlines and clinics. They are training program attorneys in specialty areas of the law, performing legal research, and assisting in the drafting and revising of manuals and other publications. In some instances, they are co-counseling with program attorneys.

As you know, Mr. Chairman, the Legal Services Corporation requires that 12.5 percent of each grant be devoted to support of private attorney involvement within our local programs. This funding goes to recruitment of private attorneys, training, research, technical assistance, and other "back office" support to ensure that their volunteer participation is practical, efficient and effective. The availability of substantive training and support from our local programs is a key factor in obtaining and retaining volunteers and in generating high-quality pro bono work. Corporate attorneys, government attorneys, real estate practitioners, and others may wish to help, but without an intake, screening, training, research, and deployment infrastructure to support them, they are unlikely to step forward.

When resources are available, the screening of cases is an important function to ensure the best outcomes in pro bono representations. LSC-funded programs often develop the facts of each referral so as to allow participating volunteer and Judicare attorneys to quickly assess the legal issues presented. This may entail collecting necessary documentation and compiling the administrative record.

LSC has placed a great deal of emphasis on private attorney involvement in recent years and this is an area where the efforts have clearly paid off. In each of the last three years, this Subcommittee increased the funding of the LSC grants program. Over those last three years, the number of cases closed by pro bono counsel increased by 14,000 and went from 10 percent of all cases closed to the current level of 12 percent. Increases in funding enable our local programs to provide the support necessary to ensure strong volunteer participation.

As Esther Lardent, President and CEO of the Pro Bono Institute, and one of the key leaders in this field, recently wrote, "The reality is that effective pro bono service by attorneys in private practice is possible only if these attorneys can rely upon the expertise and consistent community presence of LSC programs. Without a strong core of full-time advocates, pro bono simply does not work."

She went on to add, "Without that critical infrastructure that LSC provides — to screen and place matters, train and mentor volunteer attorneys taking on matters outside their areas of expertise, and identify emerging legal problems and solutions — pro bono, despite the willingness of volunteer attorneys, will inevitably decline."

The legal delivery system in the United States has evolved over the last 25 years. Changes in client demographics and needs, technology, and available resources necessitate that we revisit and revaluate the ways in which private attorneys are currently integrated into LSC's legal services delivery structure. We need to reassess whether there are more effective and strategic methods of involving private, corporate and government attorneys that will result in increased availability of legal services to eligible clients. While service area needs and resources vary, we all would benefit from assessing how those resources that do exist can be used effectively.

We must ask ourselves:

- Are we using large law firms, corporate, and government attorneys (who in many settings can do pro bono work) to their full advantage?

- Have we gotten the most out of attorney and paralegal rotation programs that place firm or corporate personnel in legal services programs for a defined period of time?

- Have we used technology to its full advantage to mitigate traditional geographic barriers to pro bono resources?

- Have we done enough to encourage the states' highest courts and bar associations to promote pro bono by implementing rules changes to facilitate pro bono services?

- Are we making the best use of retired attorneys, whose experience may be of assistance?

- Is there more that we can do to involve law schools and law students in the delivery of civil legal assistance?

- Have we taken full advantage of the recently formed Access to Justice entities in our states?

To answer these and other questions, and in furtherance of your call, Mr. Chairman, to expand pro bono legal services for low-income Americans, we are today announcing the formation of the Legal Services Corporation Pro Bono Task Force. John Levi has been authorized by the Board to form the Task Force and has named Board members Martha Minow and Harry J.F. Korrell III as the co-chairs. John is in the process of recruiting a blue-ribbon group, and will announce members at the Board's April meeting.

The Task Force will have a membership that can provide guidance on pro bono in urban and rural communities, can help us better understand what steps to recommend to LSC-funded programs, can identify the most effective delivery models, can help us improve our outreach to the organized bar, the business community, national and state bar associations and others, and can position the Corporation to more consistently foster recognition of the importance of pro bono.

We hope that the task force can address two particular challenges that we all face in our pro bono plans. First of all, I know that the Chairman is aware of the limits of pro bono in states just like ours. As you can see from this active attorney address distribution provided by the Virginia State Bar, the vast majority of attorneys in the Commonwealth live in the cities and metropolitan areas of Richmond, Norfolk, and Northern Virginia. (Attachment 3) The poverty population, however, is widespread and encompasses many of Virginia's rural areas, such as the counties in the southwest region. It is very difficult to serve the poverty population through pro bono service in areas where there are few lawyers.

Not just in our home state, but in broad sections of this country, there are just not enough attorneys to do this work pro bono. In the state of Georgia, 69 percent of the state's lawyers are in the five-county Atlanta Metro area, which has only 28 percent of the state's poverty population.(Attachment 4) The remaining 154 counties have 31 percent of the lawyers and 72 percent of the poverty population. Six counties in the state have no lawyers, and 29 counties have from 1 to 5 lawyers. Forty percent of the counties have 10 or fewer active lawyers (and this count includes judges, prosecutors, public defenders, and others not generally available for civil legal work).

Secondly, the most robust pro bono programs, and the ones that get the most publicity, are those of the nation's large law firms. The lawyers in those firms are the ones with the encouragement, opportunity, and income to do pro bono. But only 15 percent of the lawyers in the United States work in the 250 largest firms (those with more than 174 lawyers). Many solo practitioners and small firm attorneys in smaller cities and rural areas do not have the time, the financial resources, the practice expertise, or the necessary

support to do pro bono work. And the smaller the community, the more likely it is that conflicts of interest prevent attorneys from being able to assist pro bono clients. As Esther Lardent points out, "Conflicts of interest have severely limited volunteer service in foreclosure matters and are often endemic in smaller cities and rural areas." When a local firm represents the bank or does the title work in a small town, they are not going to be able to help a low-income homeowner avoid an unnecessary foreclosure.

Mr. Chairman, in light of these challenges, John Levi has told me that he does not want a task force that plows old ground. We want to encourage new thinking and to develop innovative practices. Our job is to find ways to train private lawyers for legal aid work, to equip them with the right information, and to encourage them to experience life as a volunteer attorney. We all believe they will find it immensely rewarding. I believe we can do more for pro bono, and that is our goal.

Thank you, Mr. Chairman, I'd be happy to answer any questions.

GAO
U.S. Government Accountability Office

Legal Services Corporation: Governance and Accountability Practices Need to Be Modernized and Strengthened

GAO-07-993 August 15, 2007

Highlights Page (PDF) Full Report (PDF, 81 pages) Accessible Text
Recommendations (HTML)

Summary

The Legal Services Corporation (LSC) was federally created as a private nonprofit corporation to support legal assistance for low-income people to resolve their civil matters and relies heavily on federal appropriations. Due to its unique status, its governance and accountability requirements differ from those of federal entities and nonprofits. This report responds to a congressional request that GAO review LSC board oversight of LSC's operations and whether LSC has sufficient governance and accountability. GAO's report objectives are to (1) compare LSC's framework for corporate governance and accountability to others', (2) evaluate LSC's governance practices, and (3) evaluate LSC's internal control and financial reporting practices. We reviewed the LSC Act, legislative history, relevant standards and requirements, and LSC documentation and accountability requirements and interviewed board and staff.

Although LSC has stronger federal accountability requirements than many nonprofit corporations, it is subject to governance and accountability requirements that are weaker than those of independent federal agencies and U.S. government corporations. Congress issued LSC's federal charter over 30 years ago. Established with governance and accountability requirements as they existed at the time, LSC has not kept up with evolving reforms aimed at strengthening internal control over an organization's financial reporting process and systems. Rigorous controls are important for the heavily federally funded LSC. During fiscal year 2007, LSC is responsible for the safeguarding and stewardship of $348.6 million of taxpayer dollars. Although no single set of practices exists for both private and public entities, current accepted practices of federal agencies, government corporations, and nonprofit corporations offer models for strengthening LSC's governance and accountability, including effective board oversight of management; its performance; and its use of federal funds and resources. The board members demonstrated active involvement in LSC through their regular board meeting attendance and participation in LSC oversight. Although LSC's Board of Directors was established with provisions in law that may have supported effective operation over 30 years ago, its practices fall short of modern board practices. The LSC board generally provides each new member an informal orientation to LSC and the board, but it does not have consistent, formal orientation and ongoing training with updates on new developments in governance and accountability standards and practice. The current board has four committees, but none are specifically targeted at providing critical audit, ethics, or compensation functions, which are important governance mechanisms commonly used in corporate governance structures. Because it has not taken advantage of opportunities to incorporate such practices, LSC's Board of Directors is at risk of not being able to fulfill its role of effective governance and oversight. A properly implemented governance and accountability structure may have prevented recent incidents of compensation rates in excess of statutory caps, questionable expenditures, and potential conflicts of interest. LSC also has not kept up with current management practices. Of particular importance are key processes in risk assessment, internal control, and financial reporting. Management has not formally assessed the risks to the safeguarding of its assets and maintaining the effectiveness and efficiency of its operation, nor has it implemented internal controls or other risk mitigation policies. LSC is also at increased risk that conflicts of interest will occur and not be identified because senior management has not established comprehensive policies or procedures regarding ethical issues that are aimed at identifying potential conflicts and taking appropriate actions to prevent them. Finally, management has not performed its own assessment or analysis of accounting standards to determine the most appropriate standards for LSC to follow.

Recommendations

Our recommendations from this work are listed below with a Contact for more information. Status will change from "In process" to "Open," "Closed - implemented," or "Closed - not implemented" based on our follow up work.

Director: Susan Ragland
Team: Government Accountability Office: Financial Management and Assurance
Phone: (202) 512-9471

Matters for Congressional Consideration

Recommendation: Since the LSC Act was enacted in 1974 and last comprehensively amended and reauthorized in 1977, new laws governing federal agencies, U.S. government corporations, and public companies have been enacted to strengthen governance and accountability requirements. Therefore, Congress may wish to consider whether LSC could benefit from additional legislatively mandated governance and accountability requirements, such as financial reporting and internal control requirements, modeled after what has worked successfully at federal agencies or U.S. government corporations. There are different options available to Congress for such a mandate. Congress may wish to maintain LSC's current organizational structure as a federally chartered and federally funded, private, nonmembership, and tax-exempt D.C. nonprofit corporation and enact permanent legislation to require LSC to implement additional governance and accountability requirements.

Status: Open

Comments: In recent years, we have had conversations with congressional staff regarding the need for Congressional action on this matter. However, as of December 2010, while still considering action in this area, no specific action has been taken as yet.

Recommendation: Since the LSC Act was enacted in 1974 and last comprehensively amended and reauthorized in 1977, new laws governing federal agencies, U.S. government corporations, and public companies have been enacted to strengthen governance and accountability requirements. Therefore, Congress may wish to consider whether LSC could benefit from additional legislatively mandated governance and accountability requirements, such as financial reporting and internal control requirements, modeled after what has worked successfully at federal agencies or U.S. government corporations. There are different options available to Congress for such a mandate. Congress may wish to enact legislation to convert LSC to a federal entity (such as a U.S. government corporation subject to the Government Corporation Control Act) or an independent federal agency that is required to follow the same laws and regulations as executive branch agencies. In the statute establishing LSC as a federal entity, Congress could specifically exempt LSC from certain requirements that would otherwise apply to that type of federal entity in order to further special policy considerations particular to LSC.

Status: Open

Comments: In recent years we have had conversation with Congressional staff regarding this matter. However, as of December 2010, while action is under consideration, no specific action has been taken as yet.

Recommendations for Executive Action

Recommendation: In order to improve and modernize the governance processes and structure of LSC, the LSC Board of Directors should establish and implement a comprehensive orientation program for new board members to include key topics such as fiduciary duties, Internal Revenue Service requirements, and interpretation of the financial statements.

Agency Affected: Legal Services Corporation

Status: Closed - implemented

Comments: In a 2007 review of Legal Services Corporation (LSC) governance and accountability, GAO found that new LSC board member orientation did not include key information on oversight and fiduciary responsibilities, including Washington, D.C. law governing nonprofits; the Internal Revenue Service (IRS) regulatory requirements for nonprofit organizations; interpreting LSC's financial statements; managing sensitive documents; FOIA requirements; or travel expenditure limitations. New board member training is a basic tool used by well-functioning boards. Further, without comprehensive orientation, LSC board members may not be adequately prepared to effectively fulfill their oversight and governance responsibilities. GAO recommended that the Board establish and implement a comprehensive orientation program for new board members to include key topics such as fiduciary duties, IRS requirements, and interpretation of the financial statements. Over the course of 2008 and 2009, LSC's Governance and Performance Review Committee developed a comprehensive curriculum for new member orientation. The orientation topics address the following: History of LSC; LSC Structure and Staff; Board Roles and Responsibilities; Board Meetings; Budgets; Regulatory Process; Oversight; Government Accountability

Office Reports; Litigation Report; Job Descriptions; Recent Activities of LSC, and other topics, such as LSC IRS 990 Form. Orientation materials included the IRS Form 990 Return of Organization Exempt from Income Tax; a Budget and Administration presentation by the Chief Administration Officer, which included an overview of the LSC Strategic Plan; and an overview of the Congressional Appropriations Process, LSC Budget Cycle, and LSC financial information, such as income and expenditures. Other orientation materials included the Guidelines for Adoption, Review and Modification of the Consolidated Operating Budget of the Legal Services Corporation, Management's Recommendations for LSC's FY 2011 Budget Request, and an in-depth outline for orientation of Board Nominees on Administrative Operations. New board member orientation sessions in December 2009 and January and November 2010, provided members an in-person orientation session by the President of LSC, the Corporate Secretary, the Director of Government Relations and Public Affairs, the Chief Administrative Officer, the Comptroller/Treasurer, the Vice President for Programs and Compliance, and the Office of Inspector General. Based on the establishment and implementation of a comprehensive Board orientation, LSC's governance structure should be enhanced through increased board knowledge of current, relevant governance and accountability practices. As a result, the Board will be better able to address issues as they arise and more effectively govern LSC.

Recommendation: In order to improve and modernize the governance processes and structure of LSC, the LSC Board of Directors should develop a plan for providing a regular training program for board members that includes providing updates or changes in LSC's operating environment and relevant governance and accountability practices.

Agency Affected: Legal Services Corporation

Status: Closed - implemented

Comments: In a 2007 review of Legal Services Corporation (LSC) governance and accountability, GAO found that LSC's board did not have an ongoing (e.g., annual) training program for its board members. In general, it is a good management practice for such governing boards to stay current with changes in governance practices, its regulatory environment, and key management practices and requirements in such areas as risk assessment and mitigation, internal controls, and financial reporting. One way to achieve this objective is through requiring board members to receive annual training on current best practices in these areas. GAO recommended that LSC develop a plan for providing periodic training to board members that included providing updates or changes in LSC's operating environment and relevant governance and accountability practices. In March 2010, LSC issued an LSC Board of Directors Training Program document. As a result, if the board training is implemented as planned in the Board of Directors Training Program, LSC's governance structure will be enhanced through increased board knowledge of current, relevant governance and accountability practices.

Recommendation: In order to improve and modernize the governance processes and structure of LSC, the LSC Board of Directors should establish an audit committee function to provide oversight to LSC's financial reporting and audit processes either through creating a separate audit committee or by rewriting the charter of its finance committee.

Agency Affected: Legal Services Corporation

Status: Closed - implemented

Comments: As part of its 2007 review of the Legal Services Corporation (LSC), GAO recommended that the LSC establish an audit committee function to provide oversight to LSC's financial reporting and audit processes either through creating a separate audit committee or by rewriting the charter of its finance committee. On March 24, 2008, the LSC Board of Directors established an audit committee and adopted an audit committee charter. Under this charter, the audit committee is charged with assisting the Board in fulfilling its responsibility to ensure that the Corporation's assets are properly safeguarded; to oversee the quality and integrity of the Corporation's accounting, auditing, and reporting practices. LSC's actions to establish an audit committee, if fully and effectively implemented, should enable LSC to more effectively oversee its financial reporting and audit processes.

Recommendation: In order to improve and modernize the governance processes and structure of LSC, the LSC Board of Directors should establish a compensation committee function to oversee compensation matters involving LSC officers and overall compensation structure either through creating a separate compensation committee or by rewriting the charter of its annual performance review committee.

Agency Affected: Legal Services Corporation

Status: Closed - implemented

Comments: In our 2007 review of Legal Services Corporation (LSC) governance and accountability, GAO found that LSC's board does not have a compensation committee to oversee LSC's overall compensation structure, including the compensation provided to LSC's officers. Such a compensation committee is an accepted practice for nonprofit corporations and required for public companies listed on the New York Stock Exchange. GAO recommended that the LSC establish a function to oversee its overall compensation structure, including compensation matters involving LSC officers, either through creating a separate compensation committee or by rewriting the charter of its performance review committee to include such responsibilities. On October 31, 2009, the Governance Performance Review Committee passed a resolution augmenting its charter to provide for annually reviewing LSC's compensation plan and LSC officers compensation. If these augmented committee responsibilities are fully and effectively implemented, LSC's governance structure will be enhanced through increased oversight of compensation across LSC.

Recommendation: In order to improve and modernize the governance processes and structure of LSC, the LSC Board of Directors should establish charters for the Board of Directors and all existing and any newly developed committees to clearly establish committees' purposes, duties, and responsibilities.

Agency Affected: Legal Services Corporation

Status: Closed - implemented

Comments: In 2007, GAO reported the Legal Services Corporation (LSC) board and its committees did not have charters that established their purpose and responsibilities. A charter defines committee membership, and members' oversight duties and responsibilities. GAO found that this condition resulted from the LSC not keeping up with current practices for non profit corporations. LSC issued a board resolution in 1995 that provided descriptions of the committees, but the resolution does not contain the elements of a charter and the resolution has not been updated since it was issued in 1995 for three of the four committees. The fourth committee was established in 2003. GAO recommended that the LSC establish charters for its newly developed committees to clearly establish their purposes, duties and responsibilities. In 2008, the LSC Board established charters for its Audit, Finance, Operations and Regulations, Provision for the Delivery of Legal Services, and Governance and Performance Review Committees. With the establishment of these charters describing committee duties and responsibilities, LSC has a foundation for establishing effective accountability and has reduced the risk that LSC committees and their members are performing duties beyond the scope of their respective charters.

Recommendation: In order to improve and modernize the governance processes and structure of LSC, the LSC Board of Directors should implement a periodic self-assessment of the board's, the committees', and each individual member's performance for purposes of evaluating whether improvements can be made to the board's structure and processes.

Agency Affected: Legal Services Corporation

Status: Closed - implemented

Comments: In a 2007 review of Legal Services Corporation (LSC) governance and accountability, GAO found that the LSC board did not assess the performance of the overall board, its committees, or the individual board members. Such periodic assessments assist the board in determining whether it is meeting its intended goals and fulfilling its duties, and enables the board to identify areas for improvement in the board's operating procedures, its committee structure, and its governance practices. Board assessments are a common practice for nonprofit corporation boards and a NYSE listing requirement for audit committees of public companies. An assessment can include (1) an overall self-assessment of the entire board, (2) an assessment of the separate board committees, (3) individual board member assessments, or (4) all three. GAO recommended that LSC's Board of Directors implement periodic self-assessments of the board's, the committee's, and individual member's performance for purposes of evaluating whether improvements can be made to the board's structure and processes. In response to our recommendation, LSC implemented processes for Board, committee, and individual board member assessments. LSC's Board approved the process on April 7, 2010. According to LSC documentation, the Board Self-Evaluation is designed to give the Board an opportunity to assess its group performance in meeting annual goals and to set new goals for the upcoming program year and to serve as the basis for a planning discussion at the annual meeting of the Board. The committee self-evaluation is designed to give each committee's members an

annual opportunity to provide feedback to committee chairs and for all committee members to assess the performance of the committee against a common set of protocols. According to LSC management, the first committee self-evaluation was conducted in 2010 and provided feedback on areas of strengths, areas needing improvement, and committee goals for the year for each committee to use during a January discussion. Board members' individual self evaluations were implemented in 2009. By implementing such comprehensive board assessments, committee assessments and individual board member assessments, LSC has enhanced its governance structure. Specifically, by providing regular, ongoing feedback and awareness of areas needing improvement, the Board will be better able to address issues as they arise and, thus, more effectively govern LSC.

Recommendation: In order to improve and modernize the governance processes and structure of LSC, the LSC Board of Directors should develop and implement procedures to periodically evaluate key management processes, including at a minimum, processes for risk assessment and mitigation, internal control, and financial reporting.

Agency Affected: Legal Services Corporation

Status: Closed - implemented

Comments: In a 2007 review of Legal Services Corporation (LSC) governance and accountability, GAO reported that LSC management relies on a cycle memorandum prepared by LSC's external auditor as management's assessment of internal controls. The cycle memorandum contained process descriptions but did not identify internal controls, their objectives, or management's assertions (completeness, rights and obligations, valuation, existence, and presentation and disclosure) that the controls are intended to address. Instead, LSC's management conducted ongoing, informal assessments of selected financial processes on an ad hoc basis. However, these management assessments were not utilized as part of a comprehensive internal control evaluation. Without comprehensive internal control assessment and monitoring, LSC is at risk that it will not prevent or promptly detect any internal control failures, including unauthorized or improper use of federal funds or violations of laws or regulations in its operations. GAO recommended that the Board develop and implement procedures to periodically evaluate key management processes, including at a minimum, processes for risk assessment and mitigation, internal control, and financial reporting. In 2010, LSC developed and implemented new procedures by first identifying its six major management processes and priorities for evaluation of the major processes. Specifically, LSC in 2010 evaluated (1) grant awards and (2) internal financial controls and plans to evaluated in 2011, accuracy of grantee data. For example, LSC's Office of Information Management developed a checklist for Office of Program Performance to verify the accuracy of information included in grant award letters. In July 2010, LSC management evaluated the grant award process and briefed the LSC Audit Committee on September 9, 2010 on the results of the identification of several key internal controls in the grant awards process. For example, LSC documented internal controls related to grantee payments. In addition, in September 2010, LSC also hired an independent risk assessment consultant to perform an assessment of LSC's internal controls within the grant-making process. LSC's actions demonstrate that the Board has developed and implemented procedures to periodically evaluate key management processes. These new procedures help strengthen LSC's internal control environment and reduces the risk that internal control failures, including unauthorized or improper use of federal funds or violations of laws or regulations, will occur and not be detected.

Recommendation: In order to improve and modernize the governance processes and structure of LSC, the LSC Board of Directors should establish a shorter time frame (e.g., 60 days) for issuing LSC's audited financial statements.

Agency Affected: Legal Services Corporation

Status: Closed - implemented

Comments: In its 2007 review of Legal Services Corporation (LSC) governance and accountability, GAO found that for the previous 5 years, LSC issued its audited financial statements in March or later, which is 6 months or more after its year-end of September 30th. GAO recommended that LSC establish a shorter time frame (e.g., 60 days) for issuing its audited financial statements. LSC's Board of Directors instructed LSC's Office of Inspector General (OIG) to deliver audited financial statements for the year ending September 30, 2007 earlier than the financial statements had been in previous years. Subsequently, the audited financial statements for the year ending September 30, 2007 were issued on January 7, 2008 and the September 30, 2008 audited financial statements were issued on January 28, 2009. Further, to ensure the timeliness on the issuance of the financial statements for the year ending September 30, 2009, LSC established a completion date of December 15, 2009 for LSC's auditor. In addition, both the OIG and LSC's Office of Financial & Administrative Services (OFAS) have committed to monitoring the progress of the financial statements and ensuring that the process is completed on time. As a result of LSC's guidance requiring accelerated completion dates and oversight, LSC reduced the time

frame for issuing its annual audited financial statements and thereby helped to increase the relevancy of the financial information.

Recommendation: In order to improve and modernize key management processes at LSC, the president and executive committee should conduct and document a risk assessment and implement a corresponding risk management program as part of a comprehensive evaluation of internal control.

Agency Affected: Legal Services Corporation

Status: Closed - implemented

Comments: In its 2007 review of the Legal Services Corporation (LSC), GAO found that Management had not established risk mitigation policies. According to the Standards for Internal Control in the Federal Government, internal control should provide for an assessment of the risks the agency faces from both external and internal sources. GAO recommended that LSC develop and implement a risk management program as part of a comprehensive evaluation of internal control. Subsequently, on January 31, 2009, LSC implemented a risk assessment and risk management plan in a document entitled "LSC Risk Management Program". Our review of LSC's Risk Management Plan showed it included appropriate risk management roles and responsibilities for both the LSC audit committee and LSC executives. Further, LSC held an internal control risk assessment session with its board on December 11, 2008. With LSC's actions to establish a comprehensive internal control risk assessment program, LSC should have greater assurance that it has appropriate, risk-based internal controls in place when its internal control reviews are implemented.

Recommendation: In order to improve and modernize key management processes at LSC, the president and executive committee should, with the board's oversight, evaluate and document relevant requirements of the Sarbanes-Oxley Act of 2002 and practices of the New York Stock Exchange and the American Bar Association that are used to establish a comprehensive code of conduct, including ethics and conflict-of-interest policies and procedures for employees and officers of the corporation.

Agency Affected: Legal Services Corporation

Status: Closed - implemented

Comments: In an August 2007 review of Legal Services Corporation (LSC) governance and accountability, GAO found that LSC did not have policies and procedures establishing a code of conduct for its employees concerning conflict-of-interest or ethics issues. Lacking such policies and procedures, the LSC Office of the Inspector General (OIG) found several instances of non-ethical conduct including using LSC funds to pay for non-LSC related travel expenses for its President. The LSC OIG also reported that LSC had hired special councils responsible for providing management with advice on policy who were also employees of organizations that receive LSC grant money, causing potential conflicts of interest. GAO recommended that LSC, with the oversight of LSC's board, evaluate ethics and conflict-of-interest requirements of the Sarbanes-Oxley Act of 2002 and related policies and procedures of the New York Stock Exchange (NYSE) and American Bar Association (ABA) to establish a comprehensive code of conduct for LSC employees, including policies and procedures for LSC's corporate officers. In response, LSC formed a task force to study corporate compliance programs that considered Sarbanes-Oxley requirements as well as the practices of NYSE and the ABA in the formation of a proposed code of conduct policy and procedures for the agency and presented a proposal to LSC's Operations and Regulations Committee. After further consideration and refinements by LSC's Operations and Regulations Committee in October 2007 and January 2008, the LSC board adopted a code of conduct for LSC at its March 2008 Board Meeting. LSC's final policies and procedures, the Code of Ethics and Conduct, includes a conflict-of-interest policy and applies to all LSC Directors, officers and employees. Based on the actions taken to date by LSC, the agency now has greater assurance that its personnel will be aware of their responsibilities in the area of ethics and conflicts of interest and that policies and procedures are in place to identify and avoid future ethics violations and conflicts of interest.

Recommendation: In order to improve and modernize key management processes at LSC, the president and executive committee should establish a comprehensive and effective comprehensive continuity of operations program, including conducting a simulation to test the established program.

Agency Affected: Legal Services Corporation

Status: Closed - implemented

Comments: In a fiscal year 2007 review of the Legal Services Corporation (LSC), GAO found that although LSC does have a Comprehensive Continuity Of Operations Plan (COOP), the plan was not complete or comprehensive. For example, LSC's COOP did not provide information on essential functions for each office. In addition, GAO found that LSC had not conducted a comprehensive assessment to identify risks or identify acceptable levels of risk associated with LSC's current COOP. GAO recommended that LSC develop a comprehensive COOP and risk assessment and management program. Subsequently, in March 2008, LSC issued a two volume Continuity of Operations Plan. LSC's COOP consists of the Emergency Response Plan and the Continuity of Operations Plan. Also, in January of 2009, LSC established a Risk Management Program which considered the risk posed by threats to continuity of operations. The LSC COOP primarily relies on LSC personnel relocating from their headquarters offices to their residences to continue operations through telework. Such action is identified as a desired practice in GAO's CONTINUITY OF OPERATIONS: Selected Agencies Could Improve Planning for Use of Alternate Facilities and Telework during Disruptions (GAO 06-713). Further LSC's COOP substantially complies with the ten requirements for effective federal COOP's as defined by the Federal Emergency Management Agency's FPC 65. In addition, during September 2008, LSC successfully tested the telephone trees identified in LSC's COOP. As a result of LSC's actions to implement a comprehensive COOP and associated risk management program, it is now better able to ensure its ability to continue operations in the event of a catastrophic event.

Recommendation: In order to improve and modernize key management processes at LSC, the president and executive committee should conduct an evaluation to determine whether the Government Accounting Standards Board should be adopted as a financial reporting standard for LSC's annual financial statements.

Agency Affected: Legal Services Corporation

Status: Closed - implemented

Comments: In a 2007 review of Legal Services Corporation (LSC) governance and accountability (GAO-07-993), GAO found that LSC's management had not conducted an assessment of accounting standards--those promulgated by the Financial Accounting Standards Board (FASB), Government Accounting Standards Board (GASB), or Federal Accounting Standards Advisory Board--most applicable to LSC operations. GAO recommended that LSC conduct an evaluation to determine which set of standards should be adopted for preparing LSC's annual financial statements. Subsequently, in October of 2007, an LSC management assessment concluded LSC should use GASB as the financial reporting standard for LSC's financial statements. An LSC IG review of LSC's management's assessment concluded it provided a full and complete analysis to determine which accounting standards should be used by LSC. Also, in October 2007, LSC Management presented the results of their evaluation to the LSC Board of Director's Finance Committee. The Finance Committee agreed with Management's recommendation and presented their recommendation in an open session of the Board of Directors. LSC's Board of Directors agreed with the assessments of both LSC management and the finance committee to use GASB as the financial reporting standard for LSC's annual financial statements. As a result of LSC's assessments, LSC now has a more informed basis for the financial reporting standards it will use to prepare its annual financial statements.

GAO
U.S. Government Accountability Office

Legal Services Corporation: Improved Internal Controls Needed in Grants Management and Oversight

GAO-08-37 December 28, 2007

Highlights Page (PDF) Full Report (PDF, 41 pages) Accessible Text
Recommendations (HTML)

Summary

The Legal Services Corporation (LSC) was created as a private nonprofit to support legal assistance for low-income people to resolve their civil legal matters and relies heavily on federal appropriations. In 2006, LSC distributed most of its $327 million in grants to support such assistance. Effective internal controls over grants and oversight of grantees are critical to LSC's mission. GAO was asked to determine whether LSC's internal controls over grants management and oversight processes provide reasonable assurance that grant funds are used for their intended purposes. GAO analyzed key records and interviewed agency officials to obtain an understanding of LSC's internal control framework, including the monitoring and oversight of grantees, and performed limited reviews of internal controls and compliance at 14 grantees.

GAO found weaknesses in LSC's internal controls over grants management and oversight of grantees that negatively affect LSC's ability to provide assurance that grant funds are being used for their intended purposes in compliance with applicable laws and regulations. Effective internal controls over grants and grantee oversight are critical to LSC as its very mission and operations rely extensively on grantees to provide legal services to people who otherwise could not afford to pay for adequate legal counsel. GAO also found poor fiscal practices and improper and potentially improper expenditures at grantees it visited. Weaknesses in LSC's control environment include the lack of clear definition in the responsibilities of two of the three organizational units that oversee the work of grantees. GAO also found that communication between oversight units and coordination of grantee site visits is not sufficient to prevent gaps or duplication of effort, or both. The timing and scope of site visits is not based on a systematic analysis of the risk of noncompliance or financial control weakness across LSC's 138 grantees, so LSC cannot determine whether its resources are being used effectively and efficiently to mitigate risk among its grantees. LSC control activities performed in the monitoring of grantee internal control were not sufficient in scope to achieve effective oversight, and GAO noted implementation weaknesses. For example, in the site visits GAO observed, staff did not follow up on questionable transactions and relied heavily on information obtained through interviews. Feedback to grantees was often delayed, preventing grantees from correcting deficiencies in a timely manner. As of September 2007, LSC had not yet issued reports to grantee management for about 19 percent (10 out of 53) of the 2006 site visits. LSC grantee reviews missed potential control deficiencies at grantees that could have been detected with more effective oversight as evidenced by weaknesses GAO found at 9 of the 14 grantee sites it visited. While control deficiencies at the grantees were the immediate cause of the problems GAO found, weaknesses in LSC's controls over its oversight of grantees did not assure effective monitoring of grantee controls and compliance. Among the questionable expenditures GAO found were grantee use of funds for expenditures with insufficient supporting documentation, unusual contractor arrangements, alcohol purchases, employee interest-free loans, lobbying fees, late fees, and earnest money.

Recommendations

Our recommendations from this work are listed below with a Contact for more information. Status will change from "In process" to "Open," "Closed - implemented," or "Closed - not implemented" based on our follow up work.

Director: Susan Ragland
Team: Government Accountability Office: Financial Management and Assurance
Phone: (202) 512-9471

Recommendations for Executive Action

Recommendation: To help Legal Services Corporation improve its internal control and oversight of grantees, LSC management should develop and implement policies and procedures for information sharing among the Office of

the Inspector General (OIG), Office of Compliance and Enforcement (OCE), and Office of Program Performance (OPP), and coordination of OCE and OPP site visits.

Agency Affected: Legal Services Corporation

Status: Closed - implemented

Comments: GAO will follow up on LSC actions in this area as part of an engagement planned to begin in November 2009. Subsequently, LSC issued an OCE procedures manual that addresses the coordination of information with other offices, including visit coordination between OCE and OPP. Additionally, the OCE procedures established a protocol for OCE and the OIG to exchange information. OPP also issued a procedures manual that describes information sharing, specifying when OCE is to provide notice to OPP or to consult with OPP in such matters as --Providing prior approvals to recipients for major expenditures; -- Reviewing and responding to grantees' requests for waivers related to Private Attorney Involvement (PAI) requirements, fund balances and fund deficits; -- Investigating complaints referred by Members of Congress to LSC management pertaining to LSC grantees; -- Reviewing, assessing and responding to public complaints; -- Providing follow up to the referrals of findings by the OIG through the A-50 referral process; and -- Investigating grantees' compliance with the regulations recipients agreed to abide by when accepting Federal funding. In addition, the OPP Procedures Manual includes a protocol for exchanging information with the OIG. As a result of LSC's guidance on information sharing and communication among OPP, OCE and the OIG can enable them to be more effective and should improve LSC's ability to monitor and oversee grants.

Recommendation: To help LSC improve its internal control and oversight of grantees, LSC management should develop and implement an approach for selecting grantees for internal control and compliance reviews that is founded on risk-based criteria, uses information and results from oversight and audit activities, and is consistently applied.

Agency Affected: Legal Services Corporation

Status: Closed - implemented

Comments: In our 2007 report on the Legal Services Corporation (LSC), we found that LSC did not use a structured or systematic approach for assessing risk associated with its 138 grantees as a basis for determining the timing and scope of its grantee oversight visits. In determining which grantees to visit, both the Office of Program Performance (OPP) and the Office of Compliance and Enforcement (OCE) use an approach based primarily on time between site visits and the respective office director's judgments. The director of OCE also said OCE attempts to visit every grantee on a 5 and a half year cycle. However, this time-based cycle is not consistently followed. For example, the second largest grant recipient, receiving over $13 million in 2006, has not been visited by OCE since at least 1996. In addition, we noted there was a 7-year lapse between OCE visits to a grantee in Las Vegas, Nevada, for which OCE, recently opened an investigation after discovering several significant compliance-related findings. Without a more structured process for selecting grantees to review, LSC does not have an analytical basis to know whether it is has the proper level of staff resources assigned to the grantee review function or whether it is gaining an adequate level of assurance for the number of staff assigned to grantee review activities. Also, when a significant time period exists between OCE visits the risk increases that non-compliance issues may not be detected and remediated in a timely manner. GAO recommended that LSC management develop and implement an approach for selecting grantees for internal control and compliance reviews that is founded on risk-based criteria, uses information and results from oversight and audit activities, and is consistently applied. During 2010, LSC developed two documents: (1) OPP Steps for Program Selection and (2) OCE Steps for Compliance Visit Selection to complement its OPP and OCE Procedures Manuals. The OCE guidance refers to the risk factors listed in the OCE Procedures Manual in the "Criteria to Select Programs for Visits". Both the OPP and OCE guidance documents for program visit selection provide a risk-based, concise description of the process to select programs for reviews. Further, in 2010, LSC revised OCE Office Procedures Manual to emphasize the top risk criteria for selecting grantees for visits, and in 2011, documented program quality and compliance examination visit selection based on a review of risk factors to include both primary and secondary risk factors. Primary risk factors included date of last site visit, and significant programmatic issues identified by LSC or other reliable source. Secondary risk factors included significant complaints filed or pending against a program, transition in program leadership, results of financial statement reviews and others. LSC's actions demonstrate that LSC has developed and implemented risk-based steps for program visit selection and, therefore, has increased the effectiveness and efficiency of its program oversight.

Recommendation: To help LSC improve its internal control and oversight of grantees, LSC management should develop and implement procedures to improve the effectiveness of the current LSC fiscal compliance reviews by

revising LSC's current guidelines to provide a direct link to the results of OPP reviews and OIG and Independent Public Accountant audit findings, guidance for performing follow-up on responses from grantee interviews, and examples of fiscal and internal control review procedures that may be appropriate based on individual risk factors and circumstances at grantees.

Agency Affected: Legal Services Corporation

Status: Closed - implemented

Comments: In our December 2007 report on Legal Services Corporation (LSC) we found that the roles and division of responsibilities between the Office of Inspector General (OIG) and Office of Compliance and Enforcement (OCE) for oversight of grantee financial controls and compliance were not clearly defined. With compliance oversight and monitoring responsibilities divided between OCE and OIG and program oversight activities being performed by Office of Program Performance (OPP), strong coordination and communication among the three offices and a clear understanding of their roles and responsibilities is critical for achieving effective grantee and program oversight. OCE staff expressed confusion about their own roles and responsibility for the more limited fiscal compliance reviews they perform, and there was contention between OCE and OIG over unclear areas of responsibility that dates back to 1995. To help LSC improve its internal control and oversight of grantees, we recommended that LSC develop and implement policies that clearly delineate organizational roles and responsibilities for grantee oversight and monitoring, including grantee internal controls and compliance. During 2010, LSC developed and issued an April 2, 2010 memorandum which defined the responsibilities of the OIG and OCE for grantee oversight and monitoring, including grantee internal controls and compliance. The memo provided that the LSC Board of Directors adopted the "Roles and Responsibilities of LSC Offices Responsible for Grantee Oversight", to include the responsibilities of OPP, OCE and OIG. LSC resolution no. 2008-008 also specified the respective responsibilities for OPP and OCE in the oversight of internal financial controls at grantees. As a result of LSC's actions, LSC increased clarity over roles and responsibilities for grantee oversight, thus providing greater assurance that staff are not duplicating efforts and conducting more effective grantee and program oversight.

Recommendation: LSC management should perform follow-ups on each of the improper or potentially improper uses of grant funds that we identified in this report.

Agency Affected: Legal Services Corporation

Status: Closed - implemented

Comments: Both management and the board are preparing status updates that they plan on delivering on September 1, 2009. GAO will follow up on LSC actions in this area as part of an engagement planned to begin in November 2009. Subsequently, in November 2007, the LSC President referred eight of the nine programs to the LSC Office of Inspector General (OIG) for follow-up. The ninth program, Nevada Legal Services (NLS), was followed up with by the Office of Program Performance and the Office of Compliance and Enforcement (OCE). In a summary report, the LSC OIG concluded that the issues specifically identified by GAO had been sufficiently corrected at each of the eight grantees visited. In addition, the OIG issued eight individual reports demonstrating that follow-up occurred with the eight grantees contributing to the resolution of the recommendation. During 2008, LSC took oversight actions over NLS. In June 2008, as a result of an OCE investigation, NLS was placed on month to month funding along with monthly reporting requirements. In September 2009, a joint OPP and OCE review of NLS was completed which reviewed progress against specific grant conditions. As a result of LSC's and OIG's follow-up efforts on the nine LSC grantees, LSC has a more informed basis for its grant management actions.

Recommendation: To help LSC improve its internal control and oversight of grantees, the LSC Board of Directors should develop and implement policies that clearly delineate organizational roles and responsibilities for grantee oversight and monitoring, including grantee internal controls and compliance.

Agency Affected: Legal Services Corporation

Status: Closed - implemented

Comments: In our December 2007 report of the Legal Services Corporation (LSC), we found that LSC's fiscal reviews did not contain sufficient scope of work to adequately assess grantee internal control or fiscal compliance for purposes of achieving effective oversight. LSC fiscal reviews are intended to determine whether LSC grant recipients demonstrate effective discharge of their stewardship responsibilities. Specifically, fiscal reviews are to examine accountability of LSC funds, and on a limited basis, the effectiveness of the recipient's internal controls. LSC's Office of Program Performance (OPP) performs program site visits to evaluate and develop programs, gather

information, and develop new strategies for expanding access and enhancing quality. However, the LSC reviews we observed left out important follow-up to issues that surfaced during LSC's interviews with grantee personnel and did not address outstanding auditor findings. As a result, GAO found that an OCE analyst did not question grantee officials about a $30,000 payment to a subgrantee that lacked supporting documentation. In addition, our review of documentation that LSC officials had also reviewed found that LSC staff did not always follow up on apparent improper transactions, such an improper transaction involving a grantee's sale of a building. To help LSC improve its internal control and oversight of grantees, we recommended that LSC management develop and implement procedures to improve the effectiveness of the current LSC fiscal compliance reviews by revising LSC's current guidelines to provide a direct link to the results of site visit reviews audit findings and responses from grantee interviews, and also provide examples of appropriate fiscal and internal control review procedures. During 2009, LSC revised its On-site Fiscal Review Policies and Procedures to provide comprehensive and the on-site fiscal review policies and procedures, including numerous examples of the types of appropriate procedures to perform and whom to interview. During 2010, LSC updated its manuals to include revised guidance for performing interviews including follow-up on responses from grantee interviews. In addition, procedures were updated in 2010 to provide that on-site reviews are to be conducted in accordance with the approved work plan, and each work plan should identify, in the "Basis for Review" section, the specific risk factors that led to the program being selected for review. For example, the results of financial statement reviews and compliance or other reviews are to be considered as risk factors and incorporated in the approved work plan. With these actions, LSC has developed and implemented procedures to strengthen the effectiveness of its grantee fiscal compliance reviews.

LSC

Legal Services Corporation
America's Partner For Equal Justice

LSC Special Task Force on Fiscal Oversight

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Project Management Consultant
Annapolis, MD

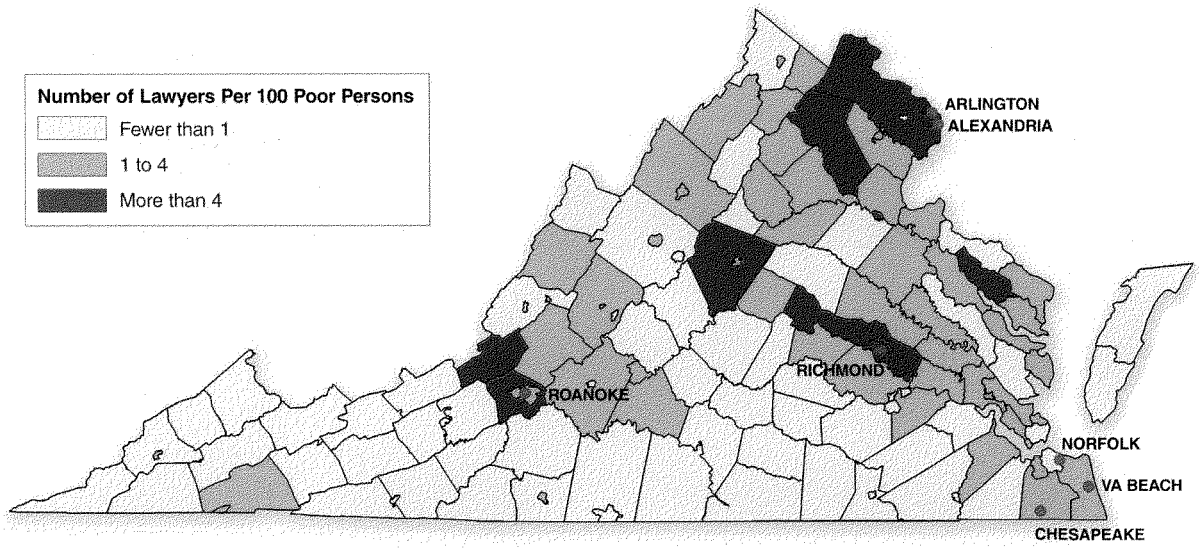
Douglas Varley
Caplin & Drysdale
Washington, DC

Michele S. Warman
General Counsel & Secretary
The Andrew W. Mellon Foundation
New York, NY

Alan Jenkins
Executive Director
The Opportunity Agenda
New York, NY

David Hoffman
former Inspector General for the City of Chicago
Chicago, IL

Attachment 3:
Number of Lawyers Per 100 Poor Persons in Virginia's Counties

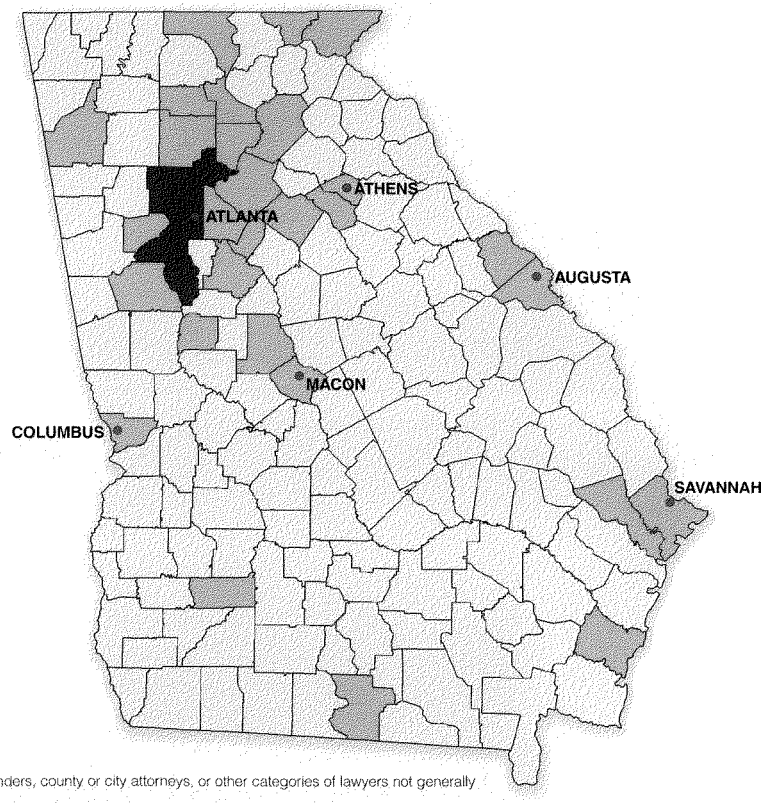


Note: This number may include prosecutors, public defenders, county or city attorneys, or other categories of lawyers not generally available to provide civil legal services.

Source: Calculated from data provided by the State Bar of Virginia and U.S. Census Bureau, 2005-2009 American Community Survey, "Table B17001 Poverty Status in the Past 12 Months by Sex by Age." The State Bar data were by zip code. These were converted to counties with "Zip Codes by County Lookup" on MelissaData.com. http://www.melissadata.com/lookups/countyzip.asp

Attachment 4:

Number of Lawyers Per 100 Poor Persons in Georgia's Counties



Number of Lawyers Per 100 Poor Persons

- Fewer than 1
- 1 to 4
- More than 4

Note: This number may include judges, prosecutors, public defenders, county or city attorneys, or other categories of lawyers not generally available to provide civil legal services.

Source: Calculated from data from the State Bar of Georgia Membership Department and U.S. Census Bureau, 2005-2009 American Community Survey, "Table B17001 Poverty Status in the Past 12 Months by Sex by Age."

POLITICAL ACTIVISM

Mr. WOLF. Thank you both.

Temporary agriculture workers, H–2A, are one of the only categories of non-citizens that LSC grantees are permitted to represent. A "know your rights" booklet published by Legal Aid of North Carolina featured on its web page contains an unflattering caricature of President Bush in a cartoon in which he is depicted as burying, or lowering, the wages of H–2A guest workers into a grave.

The booklet goes on to declare that President Bush and North Carolina farmers want to lower wages for H–2A workers, while the Obama administration and the North Carolina Legal Aid supports federal efforts to increase wages.

Is this an appropriate use of federal funds and why should Congress be asked to pay for this grantee's political activism?

It is currently on their website now and if you look at it, just for people who do not have it in front of them, it lists their telephone number as 1–800–777–5869. I was almost going to call them up during the hearing and ask them about it.

One page says, if you look at it, in Spanish, we had to translate it, "If you have been coming to the United States under H–2A contract for many years, you know that in the past few years, the pay has not been as high as before. Why has the pay changed?"

"Four groups have had an effect on the pay, those who want lower wages, the Bush administration, ranchers, and associations such as the North Carolina Growers Associations, and those who want higher wages, the Obama administration and farm workers and friends such as Legal Aid."

Your comments.

Mr. SANDMAN. Mr. Chairman, I was not aware of this. I will look into it and would like to supplement the record with a response when I have an opportunity if I could.

Mr. WOLF. Well, this "know your rights" H–2A booklet goes on to create discord between willing, legal guest workers and their employers by depicting H–2A workers passed out from exhaustion, living in squalor, being poisoned by pesticides and suffering numerous other injustices at the hands of their employers.

In contrast, none of the information for non-H–2A farm workers depicts such uncharacteristic suffering at the hands of an employer.

Do you agree that such representations are defamatory in nature and border on political activism? And Bush is no longer the President. This is dated 2010. This is part of the problem.

There was a tape years ago that was circulated where Legal Services got together and were talking about what Member of the Congress they were going to defeat. The Member of Congress that I worked for when I was a staff person was Congressman Pete Biester who worked very hard in helping to establish the Legal Services.

But what is your reaction about this?

Mr. SANDMAN. I think I share your reaction, Mr. Chairman. I do not think it would be appropriate for an LSC-funded program to be using LSC funds to engage in political statements on their website.

Mr. WOLF. Mr. Grey, do you have any thoughts?

Mr. GREY. Mr. Chairman, you know, this is something that as a new board, we are committed to looking at and engaging grantees in the work of LSC.

Things outside of that parameter of trying to evoke other kinds of responses from the community are not in our wheelhouse. I think what we want to try to do is get people focused on what they do best and that is representing the poor.

Mr. WOLF. I understand that. Years ago, we worked with Mr. John Erlenborn, he has since passed away, who was a Member of the House, who really brought sort of an element of sanity back into this issue, took it out of the political process, and then everyone felt very, very comfortable.

And when I became the chairman of this committee before, back in the year 2000, we literally removed the political controversies that surrounded the Legal Services. There are some Members, you know, who are never going to be happy with Legal Services. I mean, I understand that. There will always be an element when an amendment comes on the floor.

But things like this just set it back. It is dated 2010 and it is inflammatory. I guess the other question I would ask with regard to this is, is there anything else like this that we should know about that we do not know?

Is there anything else out there like this that you could tell us before we find out about it.

Mr. SANDMAN. Mr. Chairman, I am not aware of anything else like this.

Mr. WOLF. Mr. Grey.

Mr. GREY. I am not either.

Mr. WOLF. Okay. Well, you know, these things always eventually come to light. Sometimes they come early. I would say that if you do find there is anything like this going on, I would ask you respectfully to come and tell both Mr. Fattah and myself before it comes out and hits the media because I guarantee you there is somebody somewhere that will tell someone here and it will be on the floor of the House in a raging debate.

PRO BONO LEGAL SERVICES

And what can you tell us about the American Bar Association's effort to help respond to the increasing need for pro bono legal services since January when I reached out to them and encouraged them to get more involved in this cause than they already have?

And I would insert in the record at this point the letter that we sent to the American Bar Association.

[The information follows:]

FRANK R. WOLF
10TH DISTRICT, VIRGINIA

COMMITTEE ON APPROPRIATIONS

SUBCOMMITTEES:

RANKING MEMBER—COMMERCE-JUSTICE-SCIENCE

TRANSPORTATION-HUD

CO-CHAIR—TOM LANTOS
HUMAN RIGHTS COMMISSION

241 CANNON HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-4610
(202) 225-5136

13873 PARK CENTER ROAD
SUITE 130
HERNDON, VA 20171
(703) 709-5800
(800) 945-9653 (IN STATE)

110 NORTH CAMERON STREET
WINCHESTER, VA 22601
(540) 667-0990
(800) 850-3463 (IN STATE)

wolf.house.gov

Congress of the United States
House of Representatives

January 24, 2011

Mr. Stephen N. Zack
President
American Bar Association
321 N Clark St
Chicago IL 60654

Dear Mr. Zack:

As the 112th Congress gets under way, the country is facing an extremely challenging budgetary environment. Our nation is running trillion dollar annual deficits and has accumulated more than $14 trillion in debt. Credit rating agencies have indicated that they may downgrade America's coveted AAA bond rating within the next two years. The American people have made clear that they want the Congress to rein in federal spending as part of the solution to reducing the unsustainable debt and deficit. The choices ahead will not be easy, but it is imperative that we begin to act now to secure the fiscal future of our country.

Currently, funding for fiscal year 2011 programs is being held to fiscal year 2010 levels, and the House leadership has indicated that a likely approach for getting the budget back on track involves bringing non-security spending to the fiscal year 2008 levels. Despite the necessity of these actions, these reductions will be felt by all recipients of federal funds, including the Legal Services Corporation (LSC).

Throughout my career, I have been an ardent supporter of legal services for Americans who would not otherwise have adequate access to civil legal assistance. In the mid-1990s, I fought to protect LSC from efforts to eliminate the agency. As chairman of the Commerce-Justice-Science Appropriations Subcommittee, I have worked closely with LSC leaders to mitigate partisan issues that endangered the corporation. Because of my longstanding support for LSC, I felt it important to contact you now to discuss how the Congress and the ABA can work to continue civil legal assistance during this challenging time.

The ABA's efforts to promote pro bono legal service as an element of attorneys' professional responsibility have always been both commendable and vital. In light of this, it is my hope that the ABA can reach out to its member attorneys and state bars or bar associations and encourage even greater aspirations for pro bono legal services—especially from our nation's large law firms—during this difficult time. By reemphasizing the opportunities for private attorney involvement with LSC-funded programs, I am certain you can help increase the number of such partnerships.

LSC programs are currently using a variety of private attorney delivery models and cooperative relationships with the organized bar to serve clients. Through LSC, private attorneys are working with programs in urban and rural communities to provide legal assistance to individual clients and community legal education to groups of low-income individuals. Therefore, as LSC continues to undertake strategic efforts to leverage private attorney involvement, I am hopeful that the ABA and state bars will rise to today's challenge and work closely with LSC to address unmet needs.

I am keenly aware that the pending budget cuts cannot come at a worse time for those desperate for civil legal assistance. Foreclosure, unemployment and other recession-related cases are overwhelming LSC grantees. It may be weeks or months before a final FY 2011 appropriation is enacted; however, the opportunity to mitigate the effects of potential funding reductions exists now. Since the ABA has always been a strong advocate for LSC and its state subsidiaries, I strongly encourage you to work closely with LSC to augment the provision of legal services during this period of budget austerity.

I understand that LSC is planning to establish a Pro Bono Task Force in the near future and am encouraged by the leadership of the corporation's new board under its Chairman, John Levi. I have asked Mr. Levi and LSC to cooperate with the ABA and local bar associations in directing new volunteer attorneys to their local LSC-funded programs. Please feel free to contact Tom Culligan on my staff at 202-225-5136, if you have any thoughts or questions.

Best wishes.

Sincerely,

Frank R. Wolf
Member of Congress

cc: John G. Levi
Legal Services Corporation

Mr. WOLF. We also wrote every State Bar Association. We did not hear from many of them. I think we heard from four, but we can submit them for the record. But there are a number that we did not.

[The information follows:]

DCBAR

DISTRICT OF COLUMBIA BAR

February 16, 2011

The Honorable Frank R. Wolf
Congress of the United States
241 Cannon House Office Building
Washington, DC 20515-4610

Dear Congressman Wolf:

I am writing in response to your letter dated February 7, 2011, requesting the D.C. Bar to work with the American Bar Association (ABA) to support the Legal Services Corporation (LSC). On behalf of the D.C. Bar, I commend you for your long-standing leadership and support for legal services to serve those most in need, and thank you for reaching out to the D.C. Bar at this time.

As you may know, the D.C. Bar is the second largest unified bar in the country, and more than half of our 94,000 members live and work in the D.C. metropolitan area. As your letter to the ABA recognizes, volunteer lawyers play a very important role in helping to meet the growing legal needs of the low-income population of our country. Likewise, our Bar recognizes its obligation to strive to ensure that everyone has meaningful access to justice. One of the hallmarks of the D.C. Bar is our strong *pro bono* culture, and the District's law firms and lawyers have sustained their *pro bono* commitments during these difficult economic times. For example, District of Columbia lawyers and law firms continue to contribute over a million hours of *pro bono* legal services and millions of dollars to legal services annually. *Pro bono* lawyers are an integral component of the delivery of civil legal services in the District.

As your letter also recognizes, *pro bono* attorneys often work in partnership with legal services attorneys. Our experience in the District of Columbia confirms this point. To be fully effective in their delivery of *pro bono* legal services, *pro bono* lawyers need training and mentoring as well as a way to evaluate potential cases and be directed to the most pressing legal needs in the community. Full-time paid legal services lawyers are the ones who can make that happen.

Our experience in the District is that the private bar cannot do it alone. It can only provide effective assistance if there is a strong core of civil legal services providers who can identify our neighbors who need *pro bono* assistance, make the links between the clients and *pro bono* lawyers, and provide training and mentoring to volunteers. This partnership is critical. We in the private bar stand ready to do our part, but without civil legal services providers to organize, support, and deploy volunteers, our efforts are not a substitute for full-time paid civil legal services lawyers.

We hope that the outcome of your efforts is favorable and sincerely appreciate all of the support you have given to the delivery of legal services to the poor in our community.

Sincerely,

Ronald S. Flagg

Ronald S. Flagg

cc: Darrell G. Mottley, Esq.
Katherine A. Mazzaferri, Esq.

MAR 11 2011

INDIANA STATE BAR ASSOCIATION

Serving the legal profession and the public

Jeffry A. Lind
President

March 4, 2011

Honorable Frank R. Wolf
House of Representatives
241 Cannon House Office Building
Washington, D.C. 20515-4610

Dear Representative Wolf:

This responds to your letter to our former state bar president, Mr. Roderick Morgan. He forwarded your letter to me as our current association president.

The Indiana State Bar Association has long supported both the Legal Services Corporation and pro bono work by our members. In fact, just last month I wrote a letter to each member of Indiana's U.S. House of Representatives delegation urging them to oppose any proposed reduction in LSC funding this year. Our Association's House of Delegates was instrumental in having our Supreme Court issue an aspirational goal of 50 hours of pro bono service for each lawyer in Indiana. These steps are examples of our state's dedication to the concept of providing legal services to the poor.

We appreciate your concern about this issue. I can assure you that Indiana lawyers are constantly working to eliminate any barriers to access to our courts. Thank you for your encouragement. We will continue to ask our members to do their part.

Sincerely,

Jeffry A. Lind

JL:bw

201 Ohio Street, Terre Haute, IN 47807; (812) 232-2000, Fax: (812) 235-6013, jeff@fleschnerlaw.com

MAR 16 2011

NEW YORK STATE BAR ASSOCIATION
NYSBA One Elk Street, Albany, New York 12207 • 518.463.3200 • www.nysba.org

STEPHEN P. YOUNGER
President, New York State Bar Association

Stephen P. Younger, Esq.
Patterson Belknap Webb & Tyler LLP
1133 Avenue of the Americas
New York, NY 10036
212/336-2685
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spyounger@pbwt.com

March 10, 2011

Honorable Frank R. Wolf
Congress of the United States
Tenth District, Virginia
241 Cannon House Office Building
Washington, DC 20515-4610

Dear Congressman Wolf:

Thank you for your letter dated February 7, 2011 wherein you ask the New York State Bar Association (NYSBA) to work with the American Bar Association (ABA) to take a proactive role in helping to offset budget cuts to the Legal Services Corporation (LSC) with increased pro bono work from private law firms.

The Association historically has promoted pro bono through a variety of volunteer attorney recognition programs, such as the Empire State Counsel® Program, the President's Pro Bono Services Awards, the Denison Ray Awards, and the Awards for Excellence in Mandated Legal Representation. Similarly, in order to encourage more attorneys to accept pro bono cases, the Association routinely partners with legal services programs, local bar associations and law firms to provide free continuing legal education training opportunities to lawyers who agree to represent a low-income individual in bankruptcy, unemployment insurance, family law, consumer credit, land-lord tenant and foreclosure cases. Scores of attorneys have been trained through these partnerships in core substantive poverty law issues.

In 2009 approximately 1500 *Association members* collectively donated more than a ¼ million pro bono hours through the Empire State Counsel® Program. In 2010, 1475 NYSBA members contributed almost 300,000 hours of free legal services. The Task Force to Expand Access to Civil Legal Services in New York found that annually the *private bar* contributes more than 2 million hours of pro bono throughout the state. *See,* Report to the Chief Judge of the State of New York, at p. 35 (November 2010).

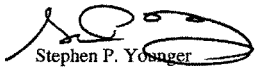
Yet, despite New York lawyers' extraordinary pro bono contributions, in 2009 one out of every two eligible clients were turned away by a legal services provider on account of insufficient resources. Since January 2010 providers have reported that the turn-away rate has increased substantially. The Task Force Report concluded that, "Private lawyers cannot fill the gap in services as the sheer numbers of needy and unrepresented litigants overwhelm the capacity of volunteer lawyers." *Id.*

While we wholeheartedly support efforts to increase pro bono by individual attorneys and law firms, it is not a substitute for stable and adequate funding. Therefore we continue to urge federal and state policymakers to appropriate funds to address the unmet need for civil legal services.

Enclosed is a copy of the Task Force's Report to the Chief Judge which sets forth a detailed and critical analysis of the state of the civil legal services delivery system in New York.

Thank you for sharing your concerns about the impact the loss of LSC funding will have on our Nation's neediest citizens.

Sincerely,



Stephen P. Younger

Enc.
Cc: John G. Levi, Legal Services Corporation
Stephen N. Zack, President, ABA

Mr. WOLF. What have you heard from them?

Mr. GREY. Mr. Chairman, I can tell you that I think you are absolutely on the right track and that we will follow-up with the ABA. We are going through our regional meetings. The board meetings are actually in the regions that we serve. And when we do that, Chairman Levi has been very particular about making sure that we reach out to the private Bar each time we go out.

I can tell you they are coming to Richmond this month. And we have a group of law firms called Firms in Service that is putting on a presentation in terms of what they are doing to support pro bono activities. So it is now a critical part of what we do.

But specifically I happen to know the president of the American Bar Association and when I leave here today, he is going to get a call from me about the letter that you sent. I will tell you what he says.

Mr. WOLF. Okay. What percentage of your funding comes from non-federal sources?

Mr. SANDMAN. Fifty-seven percent of our programs' funding in 2010 came from non-LSC sources.

Mr. WOLF. Okay. And could you tell us, for instance, the top three or four or five categories?

Mr. SANDMAN. The top categories would be state and local appropriations, IOLTA funds, interest on lawyers' trust accounts, although that is——

Mr. WOLF. Which is down?

Mr. SANDMAN. Down considerably over the last few years with the decline in interest rates. Private and foundation support. Those are the principal categories.

Mr. WOLF. Okay. How many of the law firms or how many of the lawyers in the country, and I know everyone does not practice law in the traditional sense, but of those who are practicing, how many participate with Legal Services or in pro bono work? Do you have any sense? Have there been any studies by anyone?

Mr. SANDMAN. The American Bar Association has attempted to estimate that, but there are many different kinds of pro bono work, everything from working with our grantee programs to people representing Boys and Girls Clubs and doing unpaid legal work for their local churches.

It is difficult for any one organization to capture all the different kinds of pro bono work that different lawyers do, but I do recall an American Bar Association survey that said that 70 percent of American lawyers were doing pro bono work.

Mr. WOLF. Okay. Is that a pretty tight definition or do you think it is a pretty liberal definition? Because there are some people that really do not have the time to do it and they are not going to do it. And you understand because you may be a sole practitioner some place. But has there been any thought of some sort of assessment?

You know I am a member of the D.C. Bar and I pay my Bar dues. I am a member of the Virginia Bar and I pay my Bar dues.

Is there any assessment that any of the Bar associations add on to that? You may very well be an attorney, with only two or three people in your firm and no time to donate. Some people give in dif-

ferent ways. They give with their time and others will give with their resources.

Is there a mechanism whereby the Bar associations have looked at some sort of assessment like the combined federal campaign? Does Legal Services compete or participate in the Combined Federal Campaign?

Mr. SANDMAN. Our individual programs and their local jurisdictions are often members of United Way and I believe the Combined Federal Campaign. There are things that Bar associations do. Some of them allocate a portion of their mandatory dues.

Mr. WOLF. How many do that? Do you know?

Mr. SANDMAN. I do not know off the top of my head, Mr. Chairman. I also know that here in the District of Columbia, the courts, both the federal court and the local courts, have recommended to lawyers that if for any reason they are not able to engage in pro bono work that they make an annual contribution of at least $750 to a local Legal Aid organization. One of the——

Mr. WOLF. Is that mandatory or is that——

Mr. SANDMAN. It is recommended, but it is not mandatory. The State of Maryland I know requires that lawyers report annually as a part of their registration how much pro bono work they have done in the prior year, so that gives the Bar authorities a way to assess who is doing how much pro bono work.

Mr. WOLF. Do many other Bars do that, Bar associations?

Mr. SANDMAN. Some do. I do not think it is widespread, Mr. Chairman.

Mr. WOLF. Would it be a good idea to have some sort of cooperative arrangement whereby it is an either/or? You may want to spend your time and someone else may be in a situation where they cannot for whatever reason, but they would make a contribution.

Mr. SANDMAN. That is the theory of what the courts in D.C. have recommended, but not required.

Mr. WOLF. How widespread is that? Nationwide?

Mr. SANDMAN. I think what has been done here is uncommon. I have been involved in the committees that have recommended to the courts that they adopt that recommendation and I have not seen a lot of comparable initiatives in other jurisdictions.

But there are a lot of lawyers who do find it difficult to do pro bono work. Only 15 percent of American lawyers work in big law firms. The vast majority of them are solo practitioners or in small law firms. And sometimes their financial circumstances, the demands on their time are such that it is difficult for them to take on a pro bono case.

Mr. WOLF. Oh, I understand that. That is why I am not being critical of that. But if they had an option of either/or, could not the Bar Association put that in as a requirement.

Mr. SANDMAN. Uh-huh.

Mr. WOLF. If every lawyer nationwide gave a very small amount, I mean, if D.C. Bar wants to add on to my—I have not practiced for years, but if they want to add on, it would be fine to add on. They could add on a couple dollars. And I think if you did that, that would make a big difference. Lawyers could give it to either

the National Legal Services Corporation and you could disburse it or give it to the states.

Is that one of the things you are looking at in this pro bono group?

Mr. GREY. As the president said, that actually happens. And, Mr. Chairman, you ought to know that each one of your suggestions is a suggestion that in some form or fashion is incorporated in every Bar Association around the country.

It is not a centralized approach because each State Supreme Court is responsible for the rules of practice in those states. And each Bar Association may or may not be the governing body reporting to the Supreme Court.

And so the mechanism for getting that done is not the same in each State, just as the IOLTA funds are mandatory in some states going to Legal Services and other states, it is not.

Mr. WOLF. So did I write to the wrong group? Should I have also written to every Supreme Court justice, State Supreme Court justice?

Mr. GREY. Yeah. I think that in terms of understanding the landscape that the chief justices of the State Supreme Courts have the ultimate responsibility over the practice of law in those states. And it is not the American Bar Association that determines how you practice. They provide what are commonly called the model code——

Mr. WOLF. Right.

Mr. GREY [continuing]. For how you do it. But it has to be implemented at the state level.

Mr. WOLF. So it is the State Supreme Court? Well, if you can give me a list or we can find it through our own mechanism.

Mr. GREY. We have got that.

Mr. WOLF. I will write each chief justice and ask if they would they consider implementing something whereby every member of the Bar Association or however—you can help me word it because you would know better than I would.

Mr. GREY. They have got a conference. There is a conference of chief justices. And I think that would be, Jim, I think that is probably the best place to get access to all of them in a way that would be effective. But we would be happy to work with you on that.

Mr. WOLF. Who is the head of that now? Who is the chairman of it?

Mr. GREY. I do not know.

Mr. SANDMAN. I know that later this year, the chief judge of the D.C. Court of Appeals is going to become the head of that conference. It is the Conference of Chief Justices. It is the most efficient way to reach them all at once.

Mr. WOLF. If you can give us that, we will do a letter.

Mr. SANDMAN. Be happy to.

Mr. WOLF. I will do a letter to all of them and ask them.

Bill Mims was my administrative assistant for a number of years and I will contact Bill and ask him that Virginia lead the way.

Mr. GREY. We could do that.

IOLTA FUNDING

Mr. WOLF. Virginia has led the way in so many other ways. This is my last question and then I will go to Mr. Fattah. The IOLTA funding has been in a steep decline since 2008 when it was nearly $284 million.

How much were IOLTA revenues in 2010 and do you have a reliable projection for what they will be in 2011?

Mr. SANDMAN. I do not know the absolute number in 2010 off the top of my head, Mr. Chairman. I can get that for you. I do know that IOLTA funds as a percentage of total funding for LSC programs has declined from about 12 percent a few years ago to seven percent last year. And I also know that the projection for this year is that the funds will be no better than they were last year.

Mr. WOLF. Solely because of interest rates? Is that the main——

Mr. SANDMAN. Solely because of interest rates. Also, some of the IOLTA programs had set aside reserves anticipating that interest rates might fall at some point. But their reserves are depleted now and their ability to tap them, which has seen them through the last few years, is now much more limited than it was.

Mr. WOLF. Okay. Mr. Fattah.

LSC IN THE CONTEXT OF THE OVERALL FEDERAL BUDGET

Mr. FATTAH. Thank you, Mr. Chairman.

I will share this with your staff, but I want to provide it for the record. This is a statement from the group that is going to receive your letter, the Conference of Chief Justices. And it just is in support of Legal Services, but I think it lays the foundation for the fact that they like to try to find ways to support this very worthy activity.

[The information follows:]

CONFERENCE OF CHIEF JUSTICES

Resolution

In Support of the Federal Legal Services Corporation

WHEREAS, equal justice and the fair administration of justice are cornerstones of our democracy and core functions of our national and state governments and the Preamble to our national Constitution declares it to be an express purpose of the federal government "to establish justice;" and we as a nation daily pledge ourselves to a nation dedicated to "liberty *and justice* for all"; and

WHEREAS, as a nation grounded in the democratic rule of law, equal justice and the fair administration of justice are functions that have long transcended partisan difference with all Americans standing together in common commitment to these ideals; and

WHEREAS, the promise of equal justice and our commitment to the democratic rule of law are so fundamental to our way of life, that it has long been the policy of the United States of America to promote these ideals beyond our national borders and to help fund effective judicial systems that include meaningful legal aid systems in new and emerging democracies throughout the world; and

WHEREAS, for more than four decades a succession of United States Congresses and Presidents has looked to the federal Legal Services Corporation (LSC) as the vehicle through which the federal interest in civil equal justice is realized; and

WHEREAS, bipartisan congressional action in the late 1990s formed the foundation of an enduring national consensus regarding the focus and value of the work underwritten by the federal Legal Services Corporation and ensured that the work of federally funded legal aid providers is focused on the individual needs of low income people facing the most significant civil legal problems that affect basic human needs such as family preservation, safety and economic security; protection of housing and other essential property rights; and ensuring governmental accountability in disputes involving essential benefits and services to which low income people have a legal claim of entitlement; and

WHEREAS, ensuring equal justice is a joint federal and state responsibility, and that in recent years many states have invested substantially in the core civil legal aid infrastructure funded through the federal Legal Services Corporation, and that reduction and/or withdrawal of federal funding would fundamentally undermine the vitality and effectiveness of state-based legal aid delivery systems and adversely affect civil judicial operations; and

WHEREAS, there are now more than 44 million Americans living at or near the poverty level and the legal problems faced by low income and vulnerable people have skyrocketed during this period of economic crisis. Study after study has objectively documented that between 50% and 75% of low income households experience one or more civil legal problems that affect basic human needs each and every year, and according to the same studies, less than 50% of such households are able to secure the legal assistance that they need; and

WHEREAS, when entire populations are denied effective access to the justice system and are unable to assert and to defend effectively important civil legal rights and prerogatives, public trust and confidence in the justice system itself is placed in jeopardy and those denied access lose the incentive to voluntarily adhere to legal norms and expectations; and

WHEREAS, the civil legal aid system in every state is a model public-private partnership and that investments in programs funded through the federal Legal Services Corporation effectively leverage millions of dollars of complimentary legal assistance through the efforts of volunteer attorneys; and

WHEREAS, at times of fiscal crisis, it is necessary that government focus on core functions. The establishment and administration of justice are core functions of the federal government and ensuring the availability of civil legal aid for those unable to otherwise meaningfully assert and defend important rights within the justice system furthers these ends; and

WHEREAS, the Conference of Chief Justices consists of the chief justices of the 50 states, the District of Columbia and the commonwealths and territories that make up the United States; and

WHEREAS, the Conference has repeatedly affirmed the importance of the federal Legal Services Corporation, most recently declaring "continued operation of the Legal Services Corporation [as] essential to the guarantee of equal justice and to the efficient operation of the courts" (Res. No. 9; Jan. 24, 2002) and calling for "increased federal funding on a continuing basis for LSC to better meet the demand for legal services and to ensure access to justice for all" (Res. No. 11, August 2009);

NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices reaffirms the importance of the federal Legal Services Corporation and calls upon all members of Congress to live up to our nation's promise of "Equal Justice Under Law," to oppose any proposal to cut funding for the federal Legal Services Corporation, and to support increased funding of the Corporation to the level necessary to provide critically needed services to low-income Americans.

Adopted by the Conference of Chief Justices Board of Directors on February 28, 2011.

Mr. FATTAH. Let me start in a couple different places all at once. I am a politician. We can embellish as we go.

So, you know, we have in our subcommittee a lot of critical agencies. I mentioned this in my opening statement, NASA handles our activities in space. And I am very committed to their work and so are the chairman and others.

But they had a satellite they were launching a couple of weeks ago. It is called Glory. And it just did not work out. It did not make orbit. That is a $500 million deal. It did not work out.

We are going to send more satellites and, you know, we are never going to be in a situation where success is guaranteed. But we spent $500 million on that effort, right? And we are going to spend a billion dollars on marine life and the NOAA agency.

I just put this in perspective because of the million plus cases that you settle, and what this means. I read about some of these cases.

I read about a woman who was badly assaulted by her husband, and had to come to Legal Services to get a restraining order. And she did not live in Pennsylvania. I mean, this was not a constituent of mine. I just read it.

But I think that it is so very important that we understand what is at stake here. And the Congress, rightfully as stewards of taxpayers' money, has to ask important questions.

I was one of the cosponsors of the bill that created the IG's operations and GAO has to do audits and so on.

But it is amazing to me because I was down in the Capitol Visitor Center earlier this morning for a meeting. This is a building that we were going to put up for $260 million. It came in at $621 million. The cost overruns were enormous, right? This is an activity of the United States Congress.

So I just think that we need to put these things in perspective as we go forward here because we are talking about the life chances of tens of millions of Americans who are in the balance, their access to a fair hearing in court.

And I say this as a father of three daughters. When you have three out of four of the clients of Legal Services being women who are already—I mean, they are in poverty, that is why they are eligible for services, so they are already in the shadows of our society. They are in a desperate situation. They need access to redress in the courts, which is ensured under our Constitution.

And the way that, since Nixon, we have done this is through the work of the Legal Services Corporation. So, when I look at your request—and I know that we talk about this being a tight budget year, you may not have noticed this, but we spent a little bit of money in Libya over the last ten days, and nobody has a calculator out. Nobody is saying, well, you know, Tomahawk cruise missile, $1.1 million every time we send one off, you know.

And we are spending $2 billion a week in Afghanistan. We have spent more than your budget in Iraq just in trying to create a legal system so that Iraqi citizens could have a court system they could have access to. Now, this is on the generosity of American taxpayers.

And this pro bono work is critically important and I want to work with you to encourage it. I know people who provide pro bono work.

Ken Frazier is a neighbor of mine. He has moved up in the world. He is the CEO of Merck. But in his spare time every summer, he takes a case and usually in the deep south handling, you know, some of the ugliest cases in the world, a criminal case, and he does his pro bono work when he is not running one of the world's largest pharmaceutical companies.

A lot of attorneys provide pro bono work and they do it on the criminal side. The difference with Legal Services is that your work is on the civil side. And I would say that we have seen lawyers who are volunteering to represent and they should, you know, people in Guantanamo and on and on and on.

But when a woman is being abused by her husband, almost beaten to death and needs a restraining order and needs a lawyer to help get one, we just need to make sure that the door of Legal Services is open.

And I do not think you can get any auditor to do an audit in which they do not find something. That is what they get paid to do. They come back and they have got some recommendation—and we have been through this. I have been in this committee for years and there is always something.

But I know that we see this in these other agencies. The FBI has spent tens of millions of dollars on an IT system that just has not worked out very well. And $150 million or so later, it is like, well, okay, we are going to try something different.

And when we come to poor people, I think that we need to be balanced in our approach on these issues because we cannot give people justice on the cheap. We can encourage pro bono work, but we should not have this woman's opportunity to get a restraining order contingent on the generosity of some lawyer who is trying to figure out how to pay their—you know, my daughter who is trying to figure out how to pay her bills from law school, right?

You have got to be careful that we keep the courthouse door open. And that is what this all about. This is what the chairman, —and he has been true to the support of this agency from my first days on this committee, and there have been some tough political times. But the politics, we need to push it aside because there is no—as best as I can tell in these million clients, nobody is trying to figure out whether they are Ds or they are Rs or independents.

They are in the main, women with, in many instances, this particular case, with children who need to be protected. And the only way that they can find that protection is through the work that you are doing.

LSC STRUCTURE

So I want to get to my question. My question is not in the North Carolina instance. I was trying to look at this Web site. I have not found this document yet. But the way Legal Services works is this is not a top-down operation. These are local decisions made by local communities and local boards.

So in Philadelphia, decisions are made about what is an important priority, what cases are going to be handled, and so forth and

so on so that the first thing is that—and I think that, in a bipartisan way, we think decisions are better made at a local level.

So I want you just to talk for a minute about the structure of how the board is working on the dissemination of these grants and how decisions are made about which agencies are going to have a veterans' outreach effort and which are going to get technology grants and how this is working from the top down.

Mr. SANDMAN. Congressman Fattah, our 136 programs, the 136 programs that LSC funds, each is a separate 501(c)(3), an independent corporation. We are a grant maker, but we do not control them. We do have restrictions associated with the money that we grant and we monitor our grantees' compliance with the restrictions that Congress has mandated go along with LSC funds.

Each of the programs does have a local focus. They are required each year to do a local needs assessment and do priority setting based on what the needs of the population they serve are. And those needs vary. The needs in rural areas are different from those in urban areas. The mix of cases can vary from one grantee to another.

And we do not attempt to mandate from a national level exactly what the mix of cases for any individual grantee should be. We do think that is a decision that is best made at the local level by people who know their local communities.

LEGAL SERVICES FOR VETERANS

Mr. FATTAH. Now, this veterans work that is being done, this is an important issue. More than a million of our young men are rotated through battlefields in Iraq and Afghanistan and they come home and they have a lot of challenges.

So can you talk a little bit about what is being done particularly in terms of veterans by Legal Services.

Mr. SANDMAN. Our veterans' initiative has two components. We have a web site, statesidelegal.org, which was the creation of Pine Tree Legal Services in Maine in cooperation with Arkansas, the Arkansas Legal Services Partnership.

And that is a web site that contains information of interest to veterans and military families. It also has information about state and local issues of interest to them.

The second component is outreach to what are called readjustment counseling centers that the VA runs, facilities. There are about 300 of them around the country where veterans can go for assistance.

And we have done outreach to them so that they are familiar with the availability of legal services by the area Legal Services providers, the LSC grantees, so that they can make referrals and connections and so that we can go to where the clients are and get connected to the veterans who are likely to need the services of our local Legal Services programs.

Mr. FATTAH. Now, are many of these services related to foreclosures and other kinds of challenges that these veterans are facing?

Mr. SANDMAN. Yes. We have seen situations where returning veterans are facing financial difficulties. They have been out of the civilian workforce for some time. They are coming back into an envi-

ronment where the economy is depressed and where jobs are hard to find. And they are facing issues like foreclosures or evictions if they are in rental housing, real subsistence issues.

Mr. FATTAH. I met with a group that is providing some effort to work with veterans in the Philadelphia area. What was amazing to me is that, Mr. Chairman, the number of suicides has risen almost to the level that we have lost young people on the battlefield itself.

So the numbers are like parallel now. And it is because, in large measure, they face an extraordinary set of dynamics in the war, but some of them are losing their homes while they are away. And they are getting notifications and so on from loved ones about it. So they have a lot of challenges.

So I think this work is vitally important. I want to know whether you—you said you are working with these 300 local readjustment counseling centers. Are there other efforts of coordinating between the VA and Legal Services to make sure that whatever can be done is being done?

Mr. SANDMAN. We are working on that. We have started with the 300 centers, but we have made contacts at high levels in the Veterans Administration to be sure that we are doing all that we can to make veterans aware of the availability of Legal Services and our programs and to figure out how we can better serve their legal needs.

LEGAL AID CLINICS

Mr. FATTAH. Now, along the line of this pro bono side, a number of law schools have set up clinics, Legal Aid clinics. I know at Temple Law School, they are now trying to create one focused on healthcare law because a lot of people are running into challenges in that respect.

But does Legal Services work in conjunction with law schools in the establishment or staffing or utilizing the resources of law students who may be able to help people with some what we would consider more mundane matters?

Sometimes when you are in a difficult circumstance, what may seem simple to one person is a very complex matter to someone else.

Mr. SANDMAN. Yes. Our programs do reach out to the law schools and their communities to try to connect to the clinics that they are operating and to use the law students as a source of pro bono legal assistance.

I know, for example, that our program in southern Arizona has an active outreach program to the law schools and actively involves law students in their work.

IMPACT OF BUDGET CUTS

Mr. FATTAH. Now let's talk about the budget numbers themselves, the appropriations request. So your request in fiscal year 2012 is the same as it was in fiscal year 2011.

The cuts that have been suggested by the Congress, can you tell us how the board, Mr. Grey, or the Administration would handle it if you had to deal with these cuts, how you would proceed in making what would be unpleasant—what would be the results of the cuts as outlined around this $70 million number?

Mr. SANDMAN. Well, if we were to look at the impact of the $70 million cut provided in H.R. 1 for the current fiscal year, that would come entirely out of what we call our field grants to the programs, the 136 programs around the country that serve poor people.

Our best estimate is that that would require the layoff of 370 full-time Legal Aid lawyers, that it would reduce the number of cases we could handle by 60,500, and the number of people who would not get legal services would be about double that, about 121,000.

I think it would have a devastating effect on service. The particular consequences would depend on each individual program and to what extent it gets its funding from LSC.

On average, our grantees get 43 percent of their funding from LSC, but that varies. Our program in Alabama gets 86 percent of its funding from us. So obviously the impact there would be much greater than in the average program.

JUSTICE GAP

Mr. FATTAH. Let me just conclude with this question. It is about what we call the justice gap, and that is that notwithstanding your best efforts, there are people who are not getting help, right?

So part of the impetus was trying to create more pro bono opportunities. It is not to fill budget cuts, but it is to reach out to people who are not yet being able to be helped with the limited amount of dollars that you have.

So can you talk a little bit about what the gap is, how it literally plays itself out in communities throughout the country.

Mr. SANDMAN. There have been different studies trying to measure the gap. I think the most conservative was one that was done a few years ago by LSC itself and it estimated that the justice gap is at 50 percent, that we are meeting only 50 percent of the legal needs of poor people. And that is a generous estimate of how well we are doing. Studies at the state level have set the figure much lower than that in different areas of the country.

But the matters that we handle for the clients that we see and those that we would like to be able to serve but cannot are often matters of safety and subsistence. They have to do with the availability of housing, avoiding eviction or foreclosure, being out on the street and being in a homeless shelter. They have to do with the safety of abused women.

I was up in Pennsylvania the week before last in one of our programs out in western Pennsylvania, the Laurel Program. And a six county area handles virtually all of the civil protection orders sought by poor women in the area. Almost none of them were served by the private Bar. These are the matters that we handle.

Unemployment compensation, these are matters that are often life or death matters to our clients and that if we can have an appropriate legal intervention and get people the help they are entitled to, we can save society other costs.

Mr. FATTAH. All right. Thank you very much.

POLITICAL ACTIVISM

Mr. WOLF. Thank you.

I am going to go to Mr. Austria. But before I do, I want to make a couple comments.

We will give you a copy of the whole article, the whole publication, and I want you to get a copy too. And, you know, I mean, it just goes after Bush. It is a replay of what has gone on before.

I happen to have been here for 30 years. I am not going to take a back seat to anybody here in this place, no one, zero, Democratic side or the Republican side on this issue. I am not going to do it.

But this becomes the issue that people go at. 171 people voted to eliminate funding for LSC. I thought we helped protect Legal Services very much in this. There were times we told the staff protect this, and let's try to take it from other areas.

Secondly, the political activity hurts. I mean, if I am the only one who agrees, fine. If you all do not agree with it, fine. I agree with it. I know it is the way it is because I have watched it over the years. We have taken it out of the political process and people want to put it back in. It hurts. And if nobody believes it hurts, then they can keep doing it and keep violating the law, but it hurts.

And, again, there were 171 Members that voted to eliminate funding. I have already had letters criticizing me for voting for not zeroing out Legal Services from people that I know and like. They are saying, Wolf, you missed an opportunity. You should have been for that. And I did not do it.

Third, regarding all this talk about the poor, in my neighborhood, 70th and M, we did not have a lawyer. I did not know a lawyer growing up. I did not know anyone who was. I do not think there was a law firm in my neighborhood. So I understand that. And I think for the cases that you are supposed to work on, there is a compelling need.

KHALID SHEIKH MOHAMMAD

In contrast, some big law firms—silk stocking firms—made a big deal that they represented Khalid Sheikh Mohammad at Guantanamo Bay. Khalid Sheikh Mohammad beheaded Daniel Pearl. That is their pro bono work? Their pro bono work should be to help the poor here in the United States with so many unmet needs. Instead, they were tripping over themselves to represent Khalid Sheikh Mohammad, a man who brought about the death of 30 people from my congressional district, who brought about pain and suffering in this country in 2001, on September 11.

And just look at some of the big law firms. They brag that this was their pro bono work. But they do not go down into the ghetto and help and they do not come to southwest Philadelphia and help and they do not come out into the Winchester area and help. It was like of the liberal left kind of felt good by saying that it represented Khalid Sheikh Mohammad.

I mean, I did not watch it, but there is a video of a terrorist literally beheading Daniel Pearl. That is pro bono work? Everyone in this country deserves the right to representation.

But if you have got an opportunity to assist the poor in an inner city or in a rural area versus Khalid Sheikh Mohammad, I think you should choose to assist the poor. To choose Khalid Sheikh Mohammad, Dietrich Bonhoeffer calls that cheap grace. That is cheap grace. If that makes you feel good and you are with a big law firm

and you can go to your cocktail parties and tell them that you are representing people who devastated this country and brought around pain and suffering and agony at the World Trade Center and at the Pentagon and in Pennsylvania, then so be it. That is every right under this.

But what we want to do is make sure there is not this political process, which I have to assume both of you do, because you said you do. There was not a raging debate on the floor on this issue because we funded LSC at the number it ought to be rather than coming in low knowing that there would be efforts to increase it. But you have got to get rid of this political stuff that goes on. It has gone on over a long period of time.

INCREASING PRO BONO SERVICES

And, lastly, I think most lawyers are good people. I will stipulate they are. They would want to help if given an opportunity. And I know there are going to be some cuts. I know it. Do I like it? No. But I know there are going to be some.

So how can we help Legal Services to meet the needs, to meet the poor, and, yet, see if we can bring in some of the law firms?

There is a policy here that if you invite the preacher to give the opening prayer, they will take you into the speaker's office and you get a picture taken. I had not invited this gentleman in, but the former congressman whom I replaced had invited him in. And I remember Tip O'Neill had a group of us in the ceremonial office. Of course, I had just arrived here. I did not really know the speaker.

And two things stick out in my mind. One is I was standing on the edge of the picture and he pulled me in the middle. He said never stand on the edge because they can crop you out.

And he was talking about the story of when he ran for office. He did not get the vote of the lady across the street. And he said something to the effect of "Ms. McGillicuddy, why didn't you vote for me" and she said, "Tip, he asked me for the vote."

And sometimes you have to ask. And I think what I want you to do is to ask the law firms who are made up of good people if they can help supplement.

And so that is why I wrote all the Bar associations. That is why I wrote the ABA. There is going to be an effort. Let's see if we can maintain it. Let's see if we can bring in the pro bono and, lastly, not give the opportunity for people to throw rocks at it by having things where we do caricatures of President Bush and get into the political process that used to bring controversy here. That is not going to be good for the poor.

And the programs you have all mentioned ought to be helped and people that are in those circumstances, they ought to be helped. But some of those guys who took the time to represent Khalid Sheikh Mohammad ought to consider going into the inner city and helping some of the people that need the help in the inner city or the rural areas.

Mr. Austria.

LSC SPENDING

Mr. AUSTRIA. Thank you, Mr. Chairman.

Mr. Sandman, Mr. Grey, thank you for being here.

Mr. Chairman, I think you are hitting right on the line of questioning that I had. And I know Mr. Fattah started to go down the budget route. And I wanted to talk a little bit more about that because there has been debate and there is going to continue to be debate.

When you look at the budgets that have been rolled out with this Congress with H.R. 1 and the reductions that were in H.R. 1, the $350 million, I believe it was, an amendment on the floor to pretty much eliminate, my understanding was, to zero out the program.

Certainly there is a perception here versus the President's budget request at $450 million in fiscal year 2012 for LSC which is, my understanding, 7.1 percent above 2010 enacted level and 28.6 percent above 2008 enacted level.

And I just want to say during these difficult budget times that, you know, expansion of any program by 28 percent for a fiscal year, it does not matter how large or small, in my opinion is not sustainable even in good times, but especially when we are borrowing 42 cents on every dollar in the Federal Government and we are trying to get our spending under control here in Washington.

And you have talked about some of the justifications, some of the needs that you have out there, but help me better understand how you expect to continue to grow at what I am considering unsustainable rates while we are asking other agencies and more importantly the American people to tighten their belts and tighten their budgets and reduce their budgets at this time?

Mr. SANDMAN. I appreciate the question, Congressman Austria, and it is something that our board wrestled with in terms of what the right amount to put in our budget request for the fiscal year 2012 was.

The board was focused on the two purposes that the Legal Services Corporation Act established for the corporation. One is to provide access to justice and the other is to provide high-quality legal services to low-income Americans.

The request is driven by the need and also I think by the special place that access to justice has in the pantheon of American values. Hard times test values. And this is a test of what the country places a priority on.

The very first line of the Constitution says that establishing justice is a purpose of the Federal Government. The framers mentioned establishing justice even before they mentioned providing for the common defense or ensuring domestic tranquility.

The last three lines of our Pledge of Allegiance, justice for all, that was our focus, that compared to other matters, the types of things that Congressman Fattah mentioned, it is a matter of setting priorities. And we believe that access to justice needs to be a paramount national priority.

Mr. AUSTRIA. Well, help me understand then what efficiencies and what accountability measures are Legal Services Corporation putting into place to save taxpayer dollars. And how is Legal Services Corporation working with other states and local governments, as you described, to reduce the overall cost of civil legal services? And we have talked a little bit about the pro bono side of things, but if you could.

Mr. SANDMAN. We do work hard to coordinate with all of the players in the Legal Services delivery system, the state and local appropriators, the state IOLTA programs, the judiciary. It is a cooperative effort to try to identify what the needs are and to be sure that they are met as efficiently as possible.

We do leverage our federal money very successfully. On average, as I mentioned, the funding for the programs that we made grants to, only 43 percent of that comes from LSC. The rest is coming from other sources which I think is a sign of the effectiveness of the federal dollar as an investment with the programs that we fund.

Our programs make good use of technology to try to reach poor people in rural areas, to make forms easier to understand, forms available to people, to provide on-line resources for those who might not be able to make it into a Legal Aid office.

We do have rigorous oversight of our grantees. We visited 72 of our 136 programs last year, more than half, to monitor their performance and to oversee their compliance with our regulations and with the requirements of federal law.

So we are very focused on getting bang for the buck and getting the best value that we can out of the money that the Congress invests in our programs.

Mr. AUSTRIA. All right. Well, let me just say, you know, as we go through these difficult times, I mean, cuts are inevitable. We are looking at each program, the efficiencies, what plans are in place as far as operating within sustainable budgets over the long term.

And I certainly want to continue to work with you and keep an open line of communication on what plans you have as far as in the future as far as trying to reduce these costs in addition to the services that you are providing.

So with that, Mr. Chairman, I will yield back. And thank you.

Mr. WOLF. Thank you, Mr. Austria.

RESTRICTIONS ON COLLECTION OF ATTORNEYS' FEES

In fiscal year 2010, Congress removed the restrictions on LSC grantees related to the collection of attorney fees.

Can you give an estimate of approximately how much in attorneys' fees have been recovered by LSC grantees in the period since?

Mr. SANDMAN. Yes, Mr. Chairman. 2010 was the first full year in which we could see the impact of the lifting of that restriction and we saw an increase in 2010 of $540,000 in attorneys' fees recovered by our programs. Averaged across our 136 programs, that was about $4,000 a program. I think it is still too early to tell what the long-term impact of the lifting of that restriction might be, but that was the figure last year.

TECHNOLOGY INITIATIVE GRANTS

Mr. WOLF. Okay. We have one more question we will ask on that. But the technology initiative grants, the budget requests $6.8 million for technology initiative grants for fiscal year 2012, a figure that is twice the current level.

While the program has been credited with increasing access to legal representation, in December, LSC's Office of Inspector Gen-

eral released an audit of the program and they found appropriate internal controls over the grant funds to be lacking.

I think you briefly mentioned that in your opening statement. As a result, the IG recommended that LSC suspend its awarding of these grants until an adequate internal control system could be designed and implemented. What is the current status?

Mr. SANDMAN. The suspension has been lifted and we have begun the process for——

Mr. WOLF. How long was the suspension in effect?

Mr. SANDMAN. It started before I became president, sir. I am not sure exactly when it became—in December, I believe.

Mr. WOLF. And have you met all the concerns of the IG and is your IG convinced that that has been resolved?

Mr. SANDMAN. The IG made 36 recommendations in December. We have closed 12 of those. We are working closely with our inspector general to address the others. I think we are making good progress.

Mr. WOLF. If you could keep us informed then.

In 2010, LSC awarded 42 TIG grants including grants for the development of mobile phone applications. As your budget justification notes, Montana Legal Services is developing a mobile website platform to provide information by phones and hand-held computers. The platform you hope will be replicated in 27 other states.

Does that mean these applications are being developed for people with BlackBerries and iPads or what does that mean?

Mr. SANDMAN. For some of the clients that we are trying to reach, their telephone is the most effective way of reaching them. It is part of our effort to get to where clients are as best we can.

Mr. WOLF. So it is more for telephones and not for——

Mr. SANDMAN. It is for whatever application will reach them most effectively, Mr. Chairman.

Mr. WOLF. But they are designed to serve the indigent who need the help?

Mr. SANDMAN. Absolutely, yes.

Mr. WOLF. In light of LSC's efforts to adopt and implement GAO's recent recommendations, did the results of the IG's audit come as a surprise?

Mr. SANDMAN. The TIG audit?

Mr. WOLF. Right.

Mr. SANDMAN. That was before I started, Mr. Chairman. I am not able to answer the question.

Mr. WOLF. Okay. One of the major concerns of the IG was that LSC did not properly apply its sub-grant rules when grantees paid TIG funds to third parties. Sub-grants must be submitted to LSC for approval and must contain certain terms specified by regulation including a term to ensure compliance with LSC restrictions such as prohibition against lobbying.

This deficiency is certainly a concern as Congress takes the LSC restrictions seriously. Did the IG find that any LSC funds were used by sub-grantees engaged in activities prohibited by the LSC restrictions?

Mr. SANDMAN. I am not aware of any finding to that effect, Mr. Chairman.

Mr. WOLF. Is the IG here now?

Mr. SANDMAN. Yes, he is.

Mr. WOLF. Did they find any?

Mr. SCHANZ. No, sir. We did not drill down quite that far. We were taking it more from the internal control point of view to make sure that controls were in place to ensure the stewardship of the funds that were being applied to the technology grants.

Mr. WOLF. Okay. Since you are here, if you would just identify yourself for the record.

Mr. SCHANZ. I am Jeff Schanz, the inspector general for the Legal Services Corporation.

Mr. WOLF. And also, if you would take a look at this North Carolina——

Mr. SCHANZ. I would be happy to. When I first saw that, that we do risk assessments to leverage our resources and that, of course, is right on top of the list.

Mr. WOLF. Yeah. We have some questions about that. If you would look at it and get back to us and see if there is any other activity like that.

How long have you been the IG?

Mr. SCHANZ. I have just passed my third year.

Mr. WOLF. Okay. Are the relationships better than it was with the previous IG? I know they were rocky.

Mr. SCHANZ. Mr. Chairman, I think significantly so. I came to this job after 34 years with the Department of Justice, the last 30 years of those with Glenn Fine, the IG of the Department of Justice. So I came to this job trying to make a difference. And we are making a difference.

Mr. WOLF. Okay. We will get you a copy of the booklet——

Mr. SCHANZ. Okay. That will be very helpful. Thank you.

FISCAL OVERSIGHT

Mr. WOLF [continuing]. Before you leave. I am going to just ask a couple more and then go to Mr. Fattah.

In 2010, the LSC Board established a special task force on fiscal oversight to review its oversight responsibilities.

Who makes up this task force?

Mr. GREY. Mr. Chairman, I am co-chair of that with Vic Maddox. Included in my materials submitted are the members of that task force. In the testimony I provided, I talked about the work that they do in the private sector. It is I think by all accounts a pretty impressive group.

We have got senior executives of Fortune 500s, six with foundations, two with accounting experience, and we have two former inspector generals on this committee. So from the standpoint of expertise, I think we are well suited to undertake the responsibilities of looking at the oversight responsibility of LSC with its grantees.

Mr. WOLF. And when will there be a report released?

Mr. GREY. I am looking to July as the opportunity to provide a draft.

Mr. WOLF. Is it your intention that the task force will cease to operate when the review is concluded or when the report is issued?

Mr. GREY. We would cease to conclude once it has performed its responsibility, but we expect that there will be ongoing activities in

terms of training and monitoring of the recommendations that are provided.

Mr. WOLF. Okay. Last question and then we will go to Mr. Fattah.

The budget requests an additional $2.5 million over the current level for grants management and oversight. That is an increase of 15 percent.

How would that additional funding be used?

Mr. SANDMAN. A good portion of it, Mr. Chairman, would be used for training activities for our programs to help them do a good job of fiscal oversight and compliance with federal requirements.

Mr. WOLF. Okay. Mr. Fattah.

Mr. FATTAH. I will have some questions I can submit for the record, Mr. Chairman.

Thank you.

PUBLIC LIBRARIES

Mr. WOLF. I just have a few more and then we will just conclude. We will have some others for the record too.

But in response to the surge of pro se litigants, Legal Aid programs and libraries are working in partnership to help library patrons obtain legal services.

To what extent can libraries help to alleviate the workload of Legal Aid offices?

Mr. SANDMAN. They can do a good job in conjunction with the Legal Aid offices. People often go to libraries looking for information when they do not know about the availability of a Legal Services office down the street. The librarian is often the general information source for people.

So we worked to reach out to librarians through our programs to make sure that they are aware of what online resources are available that people can access right there in the library and what is available down the street at a Legal Aid office.

Mr. WOLF. So do all your Legal Aid people go to libraries and tell them that here we are, we are here, and is that a formal program or is it just that if somebody takes the initiative and does it, fine, but——

Mr. SANDMAN. I think it is going to vary from program to program depending on what their local circumstances are. As I mentioned, each program is independent and different from one another, but it is an emphasis that we are trying to——

PERFORMANCE STANDARDS

Mr. WOLF. Are there standards, though, that every program should meet to be certified though? I mean, I know they are different, but is there——

Mr. SANDMAN. We do have performance standards that we use in evaluating our programs and that are the guide that our teams use when they go out to visit programs and assess them.

Mr. WOLF. Have any ever been dropped?

Mr. SANDMAN. Yes.

Mr. WOLF. Can you tell us for the record who?

Mr. SANDMAN. I cannot name names of particular programs off the top of my head, Mr. Chairman.

Mr. WOLF. Can you just supply it for the record?

Mr. SANDMAN. Yes.

Mr. WOLF. Can you give an estimate of the percentage of grantee clients who are aided by self-help resources such as forms or advice regarding the availability of internet-based information?

Mr. SANDMAN. I am not able to give a number, but it is a very significant percentage of the clients that we serve.

Mr. WOLF. Okay. You know, the others we will just kind of submit for the record.

[The information follows:]

1. Can you give an estimate of the percentage of clients who are aided by self-help resources such as forms or advice regarding the availability of internet-based information?

Answer: Last year, LSC grantees closed nearly 1 million cases, involving households of approximately 2.3 million people. In addition, another 4 million people received pro se assistance from a variety of sources that included court kiosks, self-help materials posted on websites, and distributed at workshops and clinics in 2010.

Mr. Fattah, do you have any last questions before we leave?

Mr. FATTAH. No.

I thank you for your testimony.

Mr. FATTAH. It was a western Missouri case related to a husband who tried to kill his wife and their daughter by setting the house on fire. And when his wife ran from him, he found her and smashed her head in with a gun causing serious brain injury. Legal Aid of western Missouri enrolled her in the State Protection Program and helped her get a divorce and sole custody of her daughter. And there are an ample number of other cases.

But, again, I want to thank you for the work you are doing. I know that the chairman and the committee will work hard to do the best we can with your appropriations request. Thank you.

Mr. WOLF. Mr. Grey, you wanted to——

Mr. GREY. Mr. Chairman, just one thing to add. Having been the president of the ABA at one point in my life, I think it is important just to observe that the association takes pro bono work very seriously. It has a standing committee on Legal Aid and indigent defendants and also works to establish a summit on an annual basis. And it is my understanding that the chairman also plans to have the ABA representative on this task force.

So what we understand to be the way you have championed this is similar to our approach to this is that we want to have the players involved with us as we make this happen. But I would like to do a little bit more research and work to assist you in reaching out because I think your outreach is important as well.

PRO BONO REQUIREMENTS IN LAW SCHOOLS

Mr. WOLF. Well, we will share. If you can assist us, because you understand better than I do. We will share with you the letters, and we will share with you the responses that we get.

The other thing is in law school, they had some pro bono program, but it was really not serious. It was——

Mr. GREY. It has changed.

Mr. WOLF. And it has changed a lot.

Mr. GREY. Oh, yeah.

Mr. WOLF. So like——

Mr. GREY. It has changed a lot.

Mr. WOLF. Would a whole course involve, for example, being with a Legal Services provider in south Philadelphia?

Are there any that are so intense that way?

Mr. SANDMAN. Oh, yes. There are a number of law schools that have mandatory pro bono hours as a requirement for graduation. Also some of the law schools are very generous in providing loan repayment assistance to graduates who go into Legal Services. They will forgive portions of their law school debt depending on the——

Mr. WOLF. How do they do that?

A young woman who worked for me for a number of years just graduated from a good law school. And she is going with a big firm here in town. And she says that because of the cost of tuition, she really does not have any other choice.

Mr. SANDMAN. The loan repayment assistance programs have been very important in allowing law students who might not otherwise be able to afford to to go into——

Mr. WOLF. How many have that? How many law schools have that?

Mr. SANDMAN. I do not know how many of the law schools have it. I know that the bigger, wealthier law schools have very generous programs. Part of our funding request also is——

Mr. FATTAH. If the gentleman would yield. I know, for instance, the great law school in Philadelphia, the University of Pennsylvania Law School, that my wife graduated from, it does have a mandatory, Mr. Chairman, requirement for credit, where the third-year student must do this pro bono work as part of their activities.

Mr. WOLF. Well, that is good.

Mr. SANDMAN. That is my law school too.

Mr. WOLF. The closest I got to Penn is a weekend—they let me play in the sandlot football team on their practice field down by the Schuylkill River if you recall.

Well, that is good. I think the more you are reaching out to the major law schools with regard to the payment of tuition the better.

Very seldom do you go with a big law firm in New York City or Washington or Philadelphia and then leave to go out and practice either in a district attorney's office or practice in a Legal Services program. It is usually you do that for a couple years and then you go the other way.

So it would be interesting to see for the record how many law schools actually give help with regard to the repayment of loans.

What is the traditional time that people stay with Legal Services?

[The information follows:]

2. How many law schools help with the repayment of loans?

Answer: According to Equal Justice Works, a non-profit organization dedicated to promoting public interest careers for law students, there are 101 law schools that offer loan repayment assistance programs. The list of law schools is below:

- Albany Law School of Union University
- American University, Washington College of Law
- Arizona State University, Sandra Day O'Connor College of Law*
- Benjamin N. Cardozo School of Law, Yeshiva University
- Boston College Law School
- Boston University School of Law
- Brooklyn Law School
- California Western School of Law
- Capital University Law School
- Case Western Reserve University School of Law
- Catholic University of America, Columbus School of Law
- Chicago-Kent College of Law, Illinois Institute of Technology*
- City University of New York School of Law at Queens College
- Columbia University School of Law
- Cornell Law School
- Creighton University School of Law
- DePaul University College of Law
- Duke University School of Law
- Duquesne University School of Law
- Emory University School of Law
- Fordham University School of Law
- George Washington University Law School
- Georgetown University Law Center
- Golden Gate University School of Law
- Gonzaga University School of Law
- Hamline University School of Law*
- Harvard Law School
- Hofstra University School of Law*
- Indiana University School of Law - Bloomington
- Lewis and Clark Law School
- Loyola Law School Loyola Marymount University (Los Angeles)
- Loyola University Chicago School of Law
- Loyola University New Orleans School of Law
- Marquette University School of Law
- New York Law School
- New York University School of Law
- North Carolina Central University School of Law*
- Northeastern University School of Law
- Northwestern University School of Law
- Notre Dame

- The Ohio State University, Michael E. Moritz College of Law
- Pace University School of Law
- Pacific McGeorge School of Law
- Pennsylvania State University, The Dickinson School of Law
- Pepperdine University School of Law
- Quinnipiac University School of Law
- Regent University School of Law
- Roger Williams University School of Law
- Rutgers School of Law - Camden
- Rutgers University School of Law - Newark
- Santa Clara University School of Law
- Seattle University School of Law
- Seton Hall University School of Law
- South Texas College of Law
- Southwestern Law School
- St. Thomas University School of Law
- Stanford University School of Law
- Suffolk University Law School
- Temple University, James E. Beasley School of Law
- Touro College - Jacob D. Fuchsberg Law Center
- Tulane University School of Law
- University of Arizona, James E. Rogers College of Law*
- University of California Berkeley School of Law
- University of California Davis School of Law
- University of California Hastings School of Law
- University of Chicago Law School
- University of Colorado Law School
- University of Denver College of Law
- University of Georgia
- University of Illinois
- University of Iowa
- University of Maine School of Law
- University of Maryland School of Law*
- University of Michigan Law School
- University of Minnesota Law School*
- University of New Hampshire School of Law
- University of New Mexico School of Law*
- University of North Carolina School of Law*
- University of Oregon School of Law
- University of Pennsylvania Law School
- University of San Diego School of Law
- University of San Francisco Law School
- University of South Carolina School of Law
- University of Southern California Gould School of Law
- University of St. Thomas School of Law (Minnesota)
- University of Utah, S.J. Quinney College of Law
- University of Virginia School of Law
- University of Washington School of Law

- University of Wisconsin Law School
- Valparaiso University School of Law
- Vanderbilt University Law School
- Vermont Law School
- Villanova University School of Law
- Wake Forest School of Law*
- Washington and Lee University School of Law
- Washington University School of Law
- West Virginia University College of Law
- Whittier Law School
- Widener University School of Law
- William & Mary School of Law
- William Mitchell College of Law*
- Yale Law School

* School reports participating in state LRAP

Mr. SANDMAN. The average tenure, I am not certain of. It is difficult, though, because the starting salary at the programs we fund averages $43,000 a year and after 10 to 14 years, the lawyer might be averaging $59,000 a year.

So we do see significant turnover at the bottom. We also, though, have many long-serving people who stick it out for decades. But there is significant attrition after those first three or four years because of the financial burden that people bear when they decide to go into Legal Services.

Mr. WOLF. So when they go into Legal Services, do they sign a contract for a specified period of time and then they continue or is it just you just join and maybe stay six months, maybe stay six years?

Mr. SANDMAN. They typically would not have a fixed commitment except that if they are getting loan repayment assistance——

Mr. WOLF. Right.

Mr. SANDMAN [continuing]. Either from a law school or from us. Part of our funding request is for loan repayment assistance so that our grantees can attract people who otherwise——

Mr. WOLF. How much is in your budget request for loan repayment?

Mr. SANDMAN. A million dollars is our request.

Mr. WOLF. So if you could give us for the record what the normal course of time of the average attorney spends with Legal Services.

Mr. SANDMAN. Yes.

[The information follows:]

3. What is the traditional (or average) amount of time that lawyers stay with Legal Services offices?

Answer: Based on data collected from LSC grantees for 2010, on average, staff attorneys stay in their positions at LSC-funded program from six to seven years.

Mr. WOLF. Okay. With that, we thank you for your testimony.

Mr. SANDMAN. Thank you.

Mr. WOLF. The hearing is adjourned. Thanks.

The Honorable Frank Wolf
House Appropriations Subcommittee on
Commerce, Justice, Science and Related Agencies

Hearing on the FY 2012 Budget Request for
the Legal Services Corporation

Questions for the Record

April 5, 2011

Political Activism

1. According to your budget request, in 2010, your Office of Compliance and Enforcement and your Office of Program Performance conducted performance and oversight visits in North Carolina. Is it correct to say that the "Your Rights as an H-2A Worker" booklet, although posted on the Internet and presumably circulated for outreach purposes, apparently did not come to their attention?

   Answer: According to the Executive Director of the North Carolina program, the pamphlet in question was produced in print edition in May or June 2009 in an effort to clarify the confusion among H-2A workers about a 20 percent cut to wage rates. It was not included on the program's website until late 2010. In response to my inquiry about the matter following the hearing, the executive director agreed that the cartoon depiction was inappropriate and immediately removed the publication from the website. The program has also added an additional level of review for future publications to prevent similar mistakes in the future. Furthermore, the Executive Director performed an investigation to make certain that no LSC funds were used for the publication.

   In February 2009, our Office of Program Performance (OPP) conducted a program quality visit of the Farmworker Unit at the Legal Aid of North Carolina (LANC), prior to the publication of the pamphlet in question. The visit that was conducted in 2010 was a "program engagement visit," which is a brief visit, typically 2-3 days, conducted by OPP liaison to become more informed about the program's services. Often a program engagement visit includes follow-up on a program quality visit or a focus on a particular issue or concern. The 2010 program engagement visit to LANC focused on the effect of funding decreases and the merger of a small program into the Winston-Salem office of LANC. A review of the program Farmworkers Unit was not performed at that time.

Attorneys' Fees

2. If there is no underlying agreement to *charge* a client for legal services, on what basis can a legal services attorney file for attorneys' fees on behalf of its client? Have grantees run into any problems in this regard?

   Answer: Attorneys' fees awards are usually the result of either a contract between the parties to a lawsuit or a statute providing that the party prevailing in a lawsuit may recover attorneys' fees from the losing party in the lawsuit. In a 1984 case, the U.S. Supreme Court determined that "reasonable

fees" can be calculated according to the prevailing market rates in the relevant community, not according to the actual cost of providing legal services, regardless of whether the prevailing party is represented by private attorneys or nonprofit legal aid organizations. *Blum v. Stenson*, 465 U.S. 886 (1984). Attorneys' fees awarded to legal aid programs that do not charge their clients, therefore, should be calculated at rates comparable to those charged by private attorneys in the community with comparable experience. The Court rejected the argument that fees should be limited to the internal costs of the relatively low salaries paid by legal aid programs. The fee applicant has the burden of proving relevant market rates through evidence "in addition to the attorney's own affidavits." This evidence often includes:

- declarations from attorneys in a range of private law firms in the relevant community reporting hourly rates charged by those firms for attorneys with the same law school graduation date as the fee applicant,
- excerpts from hourly rate surveys,
- fee award orders specifying past hourly rates awarded for the work of attorneys in the case, and
- other fee award orders in the jurisdiction stating hourly rates for attorneys of comparable experience.

Fees are generally awarded based on the number of hours worked multiplied by the prevailing hourly rate for that type of case. This approach is generally used regardless of whether the client is actually charged a fee, and regardless of whether or not the client paid a higher fee than the court awards. Courts will not award excessive fees or high fees, even if the lawyer in fact charged the client high or excessive fees. Private attorneys taking *pro bono* cases and legal aid attorneys providing free legal services can seek fee awards using the same standard as attorneys who charge their clients.

LSC has not heard of any major problems with grantees obtaining attorneys' fees. The awarding of fees to *pro bono* attorneys and legal aid attorneys is a well established practice in the courts.

Management and Oversight of Grants

3. How do the I.G.'s recent criticisms compare to GAO's past assessments of the governance and accountability weaknesses in the LSC grant processes?

Answer: The LSC Office of Inspector General (OIG) issued an audit report of LSC's Technology Initiative Grant (TIG) Program in December 2010. The report included 36 recommendations to strengthen internal controls over TIG program operations in the areas of legal interpretation, grant awards and administration, and regulatory compliance issues. The GAO issued a report in June 2010 on LSC's Grant Awards and Grantee Program Effectiveness. The GAO recommended improvements in internal controls over LSC's grant awards distributed to 136 grantees for the provision of civil legal services. This is separate and apart from LSC's TIG program, which was not audited by the GAO.

4. How did LSC respond to these criticisms? Were any of the recommended reforms already underway as a result of lessons LSC learned from recent GAO audits?

Answer: LSC Management agreed to accept most of the recommendations in the TIG audit and to further review the remaining recommendations. Since issuing its report on December 8, 2010, the OIG has determined that LSC Management has fully implemented 12 of the 36 recommendations and those recommendations have been closed by the OIG. Three additional recommendations have been submitted to the OIG for close-out but remain open subject to the submission of additional information and/or demonstration of additional progress. LSC is continuing to work with the OIG on the remaining recommendations to ensure that all matters are addressed and completed in a timely manner.

The IG recognizes in his report that "the TIG program has been successful in using scarce resources to assist millions of people who would otherwise not receive help."

Overlap in Legal Services Funding

5. To what extent might there be overlap between the services that LSC is seeking to provide, and services that the federal government is already funding through other means. Last year, LSC-funded programs launched a website known as *statesidelegal.org* to help veterans and military families who need legal assistance. Don't services such as Armed Forces Legal Assistance already provide such assistance to members of the military and their dependants?

Answer: The Armed Forces Legal Assistance program is primarily limited to assisting military families living on or near large military installations. Most Reserve and National Guard personnel, and their families, have little access to legal assistance because they live in areas not near large military bases. Military assistance attorneys typically provide only limited help, primarily focusing on preparation of wills, powers of attorney and advanced medical directives. Military assistance attorneys rarely represent a military client in court, because most military attorneys are not licensed to practice law in the state where they are assigned, most are assigned to legal assistance for only six months to a year, and most legal assistance offices do not authorize their attorneys to represent soldiers or family members in court.

There is little overlap between LSC-funded programs and Armed Forces Legal Assistance. LSC-funded programs are located at more than 900 sites across the nation, in urban and rural settings, and provide full representation in court for qualifying clients in child support, landlord-tenant, consumer and other civil legal matters. All legal aid attorneys are licensed to practice law in the state where they work, and most LSC-funded programs have a close working relationship with the local bar to provide pro bono assistance to clients. The role of LSC-funded programs is particularly important for soldiers who face legal issues that involve more than one jurisdiction—as is often the case. StatesideLegal.org enhances the LSC network by allowing soldiers to seek help across jurisdictions. Since there is no one-stop location for veterans to get all types of information relevant to their needs, this project fills a void rather than creates an overlap. For example, an eligible service member in Maine seeking help for a custody hearing in Colorado has a good chance of finding the help needed through a referral from the LSC Maine program to the Colorado program or by contacting the Colorado program directly.

6. With regard to LSC services related to unemployment compensation and veterans or food stamp benefits, the federal government and state and local governments have numerous websites and offices devoted to the provision of these services. When LSC says that it bases its budget request on the need for it to assist clients with such matters, it suggests that either LSC should direct its clients to offices designed to help people access these benefits, or that such matters are not being handled properly by the agencies the government has funded and tasked with doing so. What is your assessment of the need for LSC to assist in these or similar matters?

Answer: LSC-funded programs deliver civil legal assistance to eligible clients (for example, for a family of four, no more than $27,983 in income). LSC programs tell us that they are receiving increased requests for legal services in areas related to the economy. In 2010, cases increased in such areas as foreclosure, unemployment compensation, bankruptcy, debt relief, consumer issues and domestic violence.

Many people come to LSC program offices for assistance after being rejected for services or benefits by agencies, have received a notice of denial of benefits, have become enmeshed in an administrative law matter and feel they are not being treated fairly, or find themselves unable to understand website instructions or navigate the process prescribed by an agency. In some cases, the agency is in error or is not responding in a timely manner to citizens because the agency is overwhelmed with requests for services or benefits. In these situations, LSC programs represent the client by seeking to resolve the matter either through advice, negotiation or through administrative agency action or litigation.

While the IRS, the SEC and similar government agencies have self-help programs, in many cases legal representation and assistance is required to receive the full benefits to which a person is entitled. Our clients need such assistance to receive their full rights. LSC programs provide legal assistance to people who are eligible for services and who fall within the priorities set by local boards of directors. For many of these clients, the advice and counsel of a legal aid lawyer is essential to safety and security.

Many LSC programs sponsor or participate in community legal education forums, which provide overviews of rights and benefits and inform the audience of where to go at the local, state and federal levels to seek detailed information or apply for benefits. Often representatives of social service agencies or other service providers, such as domestic violence shelters or homeless shelters, participate at these events, which serve as a clearinghouse for social and legal services.

LSC Responses Submitted to CJS Subcommittee
May 9, 2011

The Honorable Chaka Fattah
House Appropriations Subcommittee on
Commerce, Justice, Science and Related Agencies

Hearing on the FY 2012 Budget Request for
the Legal Services Corporation

Questions for the Record

April 5, 2011

1. What types of cases have shown the highest rate of growth since 2008?

   Answer: Since 2008, LSC-funded programs have seen the highest growth in cases that involve matters related to the economic downturn. These include:

   - 142 percent increase in mortgage foreclosure cases.
   - 80 percent increase in unemployment compensation cases.
   - 37 percent increase in food stamp assistance.
   - 24 percent increase in bankruptcy and debt relief cases.
   - 9.5 increase in domestic violence cases.

2. Have studies been conducted on whether legal aid services help reduce other government costs or help contribute to economic growth? If so, what do those studies conclude about the return on our investment in Legal Services?

   Answer: Studies have been conducted, and they show that spending on civil legal assistance opens doors for low-income Americans, providing them with access to justice, including protection from violence and to benefits to which they are entitled.

   In November 2010, a New York State task force report *(The Task Force to Expand Access to Civil Legal Services in New York: Report to the Chief Judge of the State of New York)* estimated that New York taxpayers saved approximately $355 million in emergency shelter costs because of avoided or delayed evictions during the 2005-2009 period. The task force also estimated approximately $37 million in savings in costs related to legal assistance on behalf of domestic violence victims during the same period.

   New York business leaders told the task force that the provision of civil legal aid at an early stage "would in many instances avert the need to commence litigation in the first place. Indeed, the lack of civil legal aid is having an adverse impact on the bottom line for represented parties and governmental parties as well as on judicial resources."

   A study in Pennsylvania released in February 2009 found civil legal assistance resulted in $8 million in savings in emergency shelter costs and $23 million in savings through the protection of victims of domestic violence during the 2004-2008 period. The report cited

savings in medical care for injured victims, in counseling for affected children, and in police resources. *(Results of the Pennsylvania Access to Justice Act: A Report on the Filing-Fee Surcharge Law, FY 2004-2008, the Pennsylvania IOLTA Board, Harrisburg, Pa.)* A report issued by the Missouri Legal Aid Network in 2009 also found similar cost savings.

An analysis in Texas concluded that "the typical contribution to economic well-being per dollar of legal aid spending is approximately $2.65 per dollar expended." *(The Impact of Legal Aid Services on Economic Activity in Texas: An Analysis of Current Efforts and Expansion Potential," The Perryman Group, February 2009.)*

In general, these studies on the benefits of legal aid look at how many federal dollars are brought into states that would have been otherwise lost to local economies, and how the federal funds are spent on food, rent and other necessities for families. They do not quantify savings from law enforcement, keeping children in school, or efficiencies in courts made possible by legal assistance to clients.

A key concept assumed in the state studies is that when families are more stable, they are likely to be more self-sustaining, able to participate in society's economic opportunities, and able to contribute to their communities.

3. The attorney's fee restriction on LSC grantees was removed beginning in fiscal year 2010. How much revenue has been generated by attorneys' fees since then?

   Answer: As a result of the change in the law, LSC programs received a total of $738,767 in attorneys' fees revenue in 2010, a $540,000 increase over 2009. With 136 grantees, this is an increase of $4,000 per program.

4. Does LSC expect attorneys' fee revenue to increase in future years, or is the FY 2010 level a good indication of future year fee revenue?

   Answer: We expect that the true impact of removing this restriction will be evident in the next few years. We will keep the subcommittee informed as we move forward.

5. Does LSC believe attorneys' fee revenue will be able to help offset any cuts to the LSC appropriation?

   Answer: LSC does not believe that attorneys' fees will be able to offset any cuts to LSC's appropriations for a number of reasons. First, the amount generated by the collection of attorneys' fees is significantly smaller than the total appropriations of grants to LSC grantees. In 2010, Congress appropriated $394.4 million for grants for basic field grants, while total revenues generated from attorneys' fees nationwide were less than $750,000 for the same year. Second, the collection of attorneys' fees is not predictable, depends on the nature and outcome of cases handled, and therefore is not uniform across the 136 LSC grantees. Some programs will receive no attorneys' fees in a given year.

6. Other than being a source of additional revenue, have there been other benefits to LSC from the lifting of the attorneys' fee restriction?

   Answer: In addition to being a source of additional revenue, attorneys' fee awards act as a deterrent to discourage people from violating laws that are designed to protect the public and provide an incentive to a party likely to lose a case to agree to a settlement and to avoid the time and expense of a trial.

   Attorneys' fee awards play a critical role in consumer protection and mortgage fraud cases. In all but five states, consumer protection statutes that prohibit deceptive practices permit prevailing plaintiffs to recover attorneys' fees from defendants who have been found to have violated the law. In predatory lending cases, where the underlying loan to the homeowner may be a product of deceptive or overreaching strategies on the part of the lender, the unfairness inherent in the original loan agreement may be compounded if the lender has no incentive to conduct the litigation responsibly. The possibility of having to pay attorneys' fees provides critical leverage to ensure that a better funded legal adversary does not drag out proceedings in an attempt to exhaust the poor client's resources and those of the legal aid lawyer.

   The award of attorneys' fees also serves a deterrent purpose. For example, it ensures that wrongdoers suffer additional financial penalty for violating a consumer protection or civil rights statute. Due to the increased number of foreclosures across the country, there has been a rise in "foreclosure consultant" scams, in which unscrupulous consultants make money by falsely promising to help distressed homeowners refinance or otherwise reduce their mortgage debt. LSC-funded Legal Aid Foundation of Los Angeles estimates that as many as 30 to 40 percent of homeowners contacting its office last year for foreclosure-related assistance had either already paid a foreclosure consultant or had been contacted by one. To protect homeowners and ensure that they are informed of their rights, California law regulates the practices of these foreclosure consultants and permits the recovery of attorneys' fees against predatory consultants. The ability of legal services attorneys to collect these fees threatens to raise the consultants' cost of continuing illegal practices and serves as a deterrent.

   Attorneys' fees also deter wrongful conduct by individuals who flout court orders. In LSC-funded Legal Aid of West Virginia's practice, staff attorneys and volunteer private attorneys represent victims of domestic violence who seek protective orders. When an abuser repeatedly flouts court orders, the victim can seek attorneys' fees to deter such flagrant and dangerous violation of the law.

7. In what ways do federally-supported legal services providers facilitate and leverage pro bono services by private attorneys?

   Answer: LSC is committed to encouraging and supporting private attorney involvement with LSC-funded programs to expand the availability of civil legal assistance to eligible clients. The engagement of private pro bono attorneys and attorneys providing legal

services to eligible clients at reduced fees has been an important part of LSC's delivery system for many years. LSC programs are currently using a variety of private attorney delivery models and cooperate with the organized bar to serve clients. Private attorneys are working with programs in urban and rural communities to provide legal assistance to individual clients and to offer community legal education to groups of low-income individuals. They are conducting intake interviews and staffing telephone hotlines and clinics. They are training legal services attorneys in specialty areas of the law, performing legal research, and assisting in the drafting and revising of manuals and other publications. In some instances, they are co-counseling with program attorneys.

LSC leverages pro bono work by requiring all its grantees to spend 12.5 percent of their grant funding on efforts to involve private attorneys in service to their clients. This funding goes to recruiting, training, and providing technical assistance to private attorneys, and to providing other "back office" support to ensure that volunteer participation is efficient and effective. The availability of training and support from our local programs is a key factor in obtaining and retaining volunteers and in generating high-quality pro bono work. Corporate attorneys, government attorneys, real estate practitioners, and others may wish to help, but without an intake, screening, training, research, and deployment infrastructure to support them, they are unlikely to step forward.

LSC has placed a great deal of emphasis on private attorney involvement in recent years, and its efforts have clearly paid off. In each of the last three years, increases in LSC's funding have been accompanied by increases in pro bono work with our grantees. Over those last three years, the number of cases closed by pro bono counsel increased by 14,000 and went from 10 percent of all cases closed to 12 percent. Increases in funding enable our local programs to provide the support necessary to ensure increased volunteer participation.

LSC's Board of Directors has taken a leadership role on this issue and uses its national voice to encourage grantees to increase their pro bono efforts, promote best practices and draw attention to LSC programs within the larger legal community. Last month, the Board launched a Pro Bono Task Force to develop additional resources to help low-income American's facing foreclosure, domestic violence and other serious civil legal problems. The Task Force will explore how LSC-funded programs can better recruit, coordinate, and deploy pro bono attorneys.

An effective pro bono system requires a full-time corps of advocates to provide the infrastructure necessary to support pro bono attorneys providing services to low-income Americans.

LSC Responses Submitted to CJS Subcommittee
May 9, 2011

The Honorable Michael Honda
House Appropriations Subcommittee on
Commerce, Justice, Science and Related Agencies

Hearing on the FY 2012 Budget Request for
the Legal Services Corporation

Questions for the Record

April 5, 2011

1. If the cuts to LSC that were in H.R.1 became law, what would the impact be on the state of California?

Answer: H.R. 1 included a $70 million, or 18 percent, cut to LSC's FY 2011 funding from FY 2010. For the state of California, this would have meant a reduction of $9.2 million and would translate to 10,000 fewer cases closed and 21,000 fewer people served. The impact on programs in California would be greater than on programs in other states because LSC grantees in California receive an average of 50 percent of their funding from LSC, whereas the national average for LSC-funded programs is 43 percent.

Ultimately, cuts to LSC's funding hurts those Americans who cannot afford to pay for a lawyer—including women and their children seeking safety from domestic violence, veterans returning to civilian life, and elderly victims from foreclosure.

2. As you know one of the suggestions made to the Legal Services Corporation for dealing with possible budget cuts is to get more volunteer attorneys to take the place of paid staff. Can you please give us an idea of what kind of barriers there are to this and what concerns could arise?

Answer: LSC recognizes that pro bono is part of the solution to America's access to justice crisis, but it can never be a substitute for a vibrant legal services program and cannot offset reductions in legal services funding. Effective pro bono requires an infrastructure of full-time legal services lawyers who recruit volunteers, screen cases, and provide training and support.

LSC leverages pro bono work by requiring all its grantees to spend 12.5 percent of their grant funding on efforts to involve private attorneys in service to their clients. This funding goes to recruiting, training, and providing technical assistance to private attorneys, and to providing other "back office" support to ensure that volunteer participation is efficient and effective. The availability of training and support from our local programs is a key factor in obtaining and retaining volunteers and in generating high-quality pro bono work. Corporate attorneys, government attorneys, real estate practitioners, and others may wish to help, but without an intake,

screening, training, research, and deployment infrastructure to support them, they are unlikely to step forward.

There are a number of barriers that limits the expansion of pro bono services to low-income Americans. In broad sections of this country, there are just not enough attorneys to do pro bono work. The location of the poverty population is often not where the private attorneys are. In the state of Georgia, for example, 69 percent of the state's lawyers are in the five-county Atlanta Metro area, which has only 28 percent of the state's poverty population. The remaining 154 counties have 31 percent of the lawyers and 72 percent of the poverty population. Six counties in the state have no lawyers, and 29 counties have from 1 to 5 lawyers. Forty percent of the counties in Georgia have 10 or fewer active lawyers (and this count includes judges, prosecutors, public defenders, and others not generally available for civil legal work).

Similarly, in Virginia, the vast majority of attorneys live in the metropolitan areas of Richmond, Norfolk, and Northern Virginia. The poverty population, however, is widespread and encompasses many of Virginia's rural areas, such as the counties in the southwest region. It is very difficult to serve the poverty population through pro bono service in areas where there are few lawyers.

Furthermore, the most robust pro bono programs, and the ones that get the most publicity, are those of the nation's large law firms. The lawyers in those firms are the ones with the resources, opportunity, and income to do pro bono. But only 15 percent of the lawyers in the United States work in the 250 largest firms (those with more than 174 lawyers), and they are concentrated in the big cities. Many solo practitioners and small firm attorneys in smaller cities and rural areas do not have the time, the financial resources, the practice expertise, or the necessary support to do pro bono work. And the smaller the community, the more likely it is that conflicts of interest will prevent attorneys from being able to assist pro bono clients. When a local lawyer represents the bank or does the title work in a small town, he or she is not going to be able to help a low-income homeowner avoid an unnecessary foreclosure.

3. On a similar note, I read in the written testimony that Virginia has the same problem as Georgia in the location of lawyers and the location of the poor seeking services. I know this is the case in California, and I assume that it is a national problem. What would be the impact of cuts to LSC's budget on small legal aid offices in rural communities and how could this be exacerbated by moving more towards volunteer attorneys?

Answer: The final FY 2011 funding bill includes a $15.8 million or 4 percent cut to LSC's funding. Our programs have told us that their first move when facing these kinds of cut-backs will be to eliminate rural offices where they employ only one or two attorneys. Those offices have been critical to serving low-income Americans in rural areas.

4. What are the highest growth areas in types of cases that your programs are receiving in this economy?

Answer: Data collected from cases closed in 2010 reflect the impact of the economic downturn. LSC-funded programs are receiving increased requests for legal assistance in areas related to the economy, such as foreclosures and unemployment. The highest growth areas in 2010 included:

- 20 percent increase in foreclosures.
- 10.5 percent increase in unemployment.
- 7.7 percent increase in landlord-tenant disputes.
- 5 percent increase in bankruptcy, debt relief and consumer finance cases.
- 5 percent increase in domestic violence cases.

LSC Responses Submitted to CSJ Subcommittee
May 9, 2011

The Honorable Tom Graves
House Appropriations Subcommittee on
Commerce, Justice, Science and Related Agencies
Hearing on the FY 2012 Budget Request for
the Legal Services Corporation
Questions for the Record
April 5, 2011

1. On April 5, 2011, I wrote the attached letter asking you to represent in detail how your agency would operate with a 25 percent reduction in funds, a 20 percent reduction in funds and a 10 percent reduction in funds. Will you provide the Committee with a copy of the reply for the record?

Answer: When we consider reductions in federal funding for legal assistance, we look at: (1) the non-federal funding environment, (2) what steps have already been taken to streamline operations and increase efficiency, (3) the cost of the management and oversight of the program, (4) the demand for increases in services, and (5) how many fewer Americans would be assisted at each proposed funding level.

The non-federal funding environment

Significant parts of the non-federal funding structure for legal services have been declining over the last three years. An important source of non-federal funding for LSC programs, Interest on Lawyers' Trust Accounts (IOLTA), has declined from 12.7 percent of total funding in 2008 to 7.1 percent of total funding in 2010. State and local grants and United Way contributions also have declined. Numerous local legal aid programs are very concerned about their funding from non-LSC sources over the next two years, making federal support increasingly important as more Americans are at risk of being left behind by the slow economic recovery and find themselves confronting serious legal problems.

Steps already taken to streamline and increase efficiency

This non-federal funding environment has already had an impact on programs nationwide, and programs have been forced to make hard decisions. Services programs like legal aid have only three large categories of cost to reduce in times of scarce revenue: payroll, benefits, and occupancy costs. Programs across the country have already conducted layoffs, largely because of declines in non-federal dollars. For example, South Jersey Legal Services began 2011 with 68 staff members, including 36 attorneys, down from 120 employees, including 60 attorneys, prior to 2008, and has closed one office. Blue Ridge Legal Services in Virginia eliminated three attorney positions this year because of funding declines; the program may cut additional positions or close an office and abandon a number of rural counties.

Our Wisconsin grantee is currently facing a potential $3 million reduction in funding. The state legislature has proposed to zero out $1.3 million in funding to the grantee, effective June 30. In

addition to losing nearly $200,000 in its FY 2011 LSC funding, the grantee is losing several other large grants, which will end July 31. Should these funding cuts take place, the grantee will be forced to lay off 46 people—or 42 percent of the staff. The first round of layoffs would take effect June 30, and the second round on Dec. 31. If the plan is carried out, the grantee estimates it would close 4,400 fewer cases in 2012.

Pro bono assistance from the private bar has always been an important supplement to paid, professional legal aid programs, and our programs have promoted increases in pro bono assistance in recent years. In fact, in the last three years, pro bono attorneys have closed more and more cases for our programs, going from 10 percent of all cases nationwide in 2008 to 12 percent of all cases in 2010.

However, there are two constraints on using pro bono resources to compensate for reductions in federal funding. First, the use of pro bono attorneys depends heavily on strong legal aid programs to recruit, train, place and support private attorneys in appropriate cases. Second, there is often a disconnect between where attorneys live and where they are needed to provide pro bono services, particularly in states with large rural and remote areas.

In recent years, technology has been heavily used to increase the efficiency and effectiveness of our programs. Through LSC's Technology Initiative Grants (TIG), our programs have strengthened and expanded their technology infrastructures, expanded wireless broadband access for attorneys so they may provide cost-effective legal services in rural areas, and expanded assistance for unrepresented litigants through the development of automated forms. Our 2012 funding request is designed to increase wireless broadband access and allow legal aid attorneys to hold even more clinics in rural areas and provide intake services to low-income citizens. Because many courts have experienced an increase in the self-represented, and because court procedures vary and may be difficult to understand, TIG provides LSC with an opportunity to work with clients on standard court forms that hold the potential to save time for legal aid attorneys and to increase access to justice for the self-represented. In response to the needs of the self-represented, legal aid programs and libraries are developing partnership strategies to serve library patrons seeking legal help.

What is the level of Washington office overhead in managing this program?

LSC's Washington operation is funded through the Management and Grants Oversight (MGO) portion of our budget, which represents only 5 percent of the total budget. The majority of this funding goes to staff the compliance and program oversight functions of the Corporation. Last year, LSC staff visited 72 of our local programs for quality evaluations or compliance assessment—over 50 percent of all programs in one year. In addition, LSC staff in Washington issue performance criteria, disseminates information on best practices, and provide training to programs to ensure uniform, high-quality representation of clients and proper governance by the 136 independent boards of directors that administer the programs.

We believe that $140,000 per local LSC-funded program for oversight, training, quality enhancement, and support is a modest amount to ask for this important work.

What is the demand for services?

In 2009, nearly 57 million Americans, the largest number since LSC was established, were eligible for civil legal assistance from LSC programs. Almost 20 million of them were children. We estimate that the number qualifying for assistance has now grown to more than 63 million, and that an estimated 22 million of this total are children. Since 2008, the eligible population has increased by an estimated 17 percent. LSC-funded programs tell us they are receiving increased requests for legal services in areas related to the economy, such as foreclosure and unemployment.

Last year, LSC-funded programs closed 932,406 cases, up from 920,447 in 2009. In 2010:

- Foreclosure cases were up 20 percent, to 23,984.
- Unemployment cases increased 10.5 percent, to 27,384.
- Landlord-tenant disputes rose by 7.7 percent, to 131,543.
- Bankruptcy, debt relief (39,346) and consumer finance cases (7,011) were up by nearly 5 percent.
- Domestic violence cases increased by 5 percent, to 48,957.

How many fewer Americans would be assisted at each proposed funding level?

Since the economic downturn has forced legal aid in America to rely increasingly on the federal dollar, since programs have worked hard to streamline and use every available means in recent years to increase their efficiency, since LSC's Washington overhead is not the core issue, and since more and more constituents are in need of legal services every year, the ultimate question is how many fewer low-income Americans are we willing to serve.

H.R. 1 would have cut legal aid grant funding by 18 percent, which would have taken us back to FY 2008 levels. Based on an analysis of those levels, LSC has determined that a cut of that magnitude would force LSC-funded programs to layoff at least 370 staff attorneys and close many rural offices. Nationwide, 161,000 fewer Americans would receive critical legal services. If these cuts had to be absorbed in one year, there would be widespread retrenchment—laying off staff, closing down offices, and reducing employee benefits.

However, this is not about attorneys losing their jobs. The ultimate impact is reduced services to clients, such as mothers trying to escape an abusive relationship and keep their children safe, veterans seeking to appeal benefit denials, and elderly victims of equity-stripping mortgage schemes.

Based on LSC's analysis, the impact of reductions at the 10, 20, and 25 percent levels would be as follows:

- At 10 percent fewer dollars: 89,400 eligible Americans would go unserved.

- At 20 percent fewer dollars: 179,000 eligible Americans would go unserved.

- At 25 percent fewer dollars: 223,600 eligible Americans would go unserved.

Finally, we have to remember that reductions in funding for legal aid implicate a core American value—access to justice—recognized in the first line of our Constitution and in the closing words of our Pledge of Allegiance. Limiting access to justice undermines the stability of our society and increases other costs. Funds provided to LSC programs help communities avert more costly interventions. When a family escapes domestic violence, we save on the costs of medical care for injured victims and the follow-up counseling for affected children. When LSC programs resolve landlord-tenant disputes, we keep families together and avoid homelessness and emergency shelter costs. When LSC-funded technology initiatives create automated, standard legal forms, we save time for lawyers and for courts. When we provide legal aid at an early stage, we can avoid litigation and adverse impacts on communities and governments. For individuals, legal aid can be a path to self-sufficiency and stability.

FRIDAY, FEBRUARY 11, 2011.

ASSESSMENT OF REENTRY INITIATIVES, RECIDIVISM AND CORRECTIONS SPENDING

WITNESSES

ADAM GELB, DIRECTOR, PUBLIC SAFETY PERFORMANCE PROJECT, PEW CENTER ON THE STATES

THE HON. MARK L. EARLEY, MEMBER OF THE BOARD, PRISON FELLOWSHIP INTERNATIONAL, AND IMMEDIATE PAST PRESIDENT, PRISON FELLOWSHIP USA

MICHAEL THOMPSON, DIRECTOR, JUSTICE CENTER, COUNCIL OF STATE GOVERNMENTS

R. SETH WILLIAMS, DISTRICT ATTORNEY, CITY OF PHILADELPHIA

Mr. WOLF. Good morning. The hearing will come to order.

Over the past 25 years, the U.S. prison and jail population has skyrocketed to an all-time high with 2.3 million people incarcerated. We are the world's incarceration leader confining 23 percent of the world's prisoners. Therefore, it has become imperative that the U.S. modernizes expensive, unsuccessful, and unsustainable corrections policies.

The Nation spent $68.7 billion on corrections in 2006, a $660,000 increase from 1982. In fiscal year 2010, we spent $100 million on reentry programs at Justice and today, the Justice Department oversees the Second Chance Act grants, and numerous other federal agencies oversee others. And we are really not sure what the response has been.

Despite the dramatic increase in corrections spending over the past two decades, re-incarceration rates for people released from prison are largely unchanged. And as the report points out, by some measures, they have worsened. National data show that about 40 percent of released individuals are re-incarcerated within three years.

As the acting inspector general of the Justice Department reported recently, because of certain design flaws, it is difficult to determine the effect that some of our programs have had on reducing recidivism.

As this report states, "if a program does not reduce recidivism, agencies are wasting their investments." Clearly what we need are strategically designed programs based on demonstrated evidence with vigorous evaluation components to alert us to what is and is not working.

The report released early this week is a culmination of nearly two years of collaboration between the Congress and these private foundations to identify the best practices in recidivism reduction and reentry programs.

Two years ago, in this subcommittee, Alan Mollohan, Chairman Mollohan, held some of the best hearings that I have been involved

in, and I know Mark and others were here during that time, on correction reform.

The witnesses demonstrated that a number of state and local governments have taken the lead in correction reform. There are innovative policies that have dramatically reduced recidivism and reduced spending on corrections.

The testimony confirmed to me that it is time to stop studying this issue and instead start widely implementing the best practices from these successful reforms.

At the end of this hearing, I challenged the hearing witnesses to host a national summit to bring together the best minds from state and local governments to identify the best practices for reform. The national summit was held in the Capitol one year later on January 27, 2010, with more than 300 experts and policymakers from the state and federal governments.

The excellent information that was presented at the summit has now been distilled into the report that is being released this morning. This report has been written to serve as a best practices manual for policymakers and correction practitioners. It is a practical resource that will serve as a handbook for reform.

The report is a rich summary of the growing body of evidence that suggests that we can turn around the failure rates associated with outdated reentry efforts. It describes promising innovative efforts that are being tailored to specific populations and jurisdictions. And I hope the lessons can be applied to our federal prison system.

I am encouraged by this pursuit of real solutions that I believe can achieve the critical objectives of reducing costs, prison population, and crime because things need to change. We need to actually make a difference.

With that, I am pleased to welcome our four witnesses here today. Mr. Adam Gelb is the director of the Public Safety Performance Project at the Pew Center on the States which helps states advance fiscally sound, data-driven sentencing and correction policies that protect public safety, hold offenders accountable, and control correction costs. He was recently executive director of the Georgia Sentencing Commission and vice president of the Georgia Council on Substance Abuse.

The Honorable Mark Earley, a former state senator and Attorney General of Virginia, and somebody who really made a great contribution to the State, is the immediate past president of the Prison Fellowship USA, having served for more than eight years as president of the Nationwide Ministry founded by Charles Colson. He is currently a member of the board of directors of Prison Fellowship International which is now active in over 110 countries.

Mr. Michael Thompson, director of the Justice Center at the Council of State Governments, Mr. Thompson has worked on criminal justice policy issues with the Council of State Governments since 1997 where he has launched and overseen various initiatives to improve outcomes for people with mental illness in the criminal justice system, enhance the ability of people released from prisons and jails to succeed in the community, and increase public safety while reducing the spending for corrections.

The last witness, who I will defer to Mr. Fattah to introduce, will be Seth Williams of the City of Philadelphia. And with that, I will just defer to Mr. Fattah.

Mr. FATTAH. Thank you, Mr. Chairman, and thank you for convening this important hearing today. It is a very important subject in our criminal justice system.

And to contribute, I have invited and you have agreed to hear testimony from the district attorney of the City of Philadelphia, Seth Williams, who I have known since the mid 1980s. He went to Penn State. He was the head of the student government there. And you have some affinity for this school, and I served on the board of trustees.

Mr. WOLF. Have the colors on today, blue and white.

Mr. FATTAH. I did not matriculate there, but I did get a chance to serve at some later point on the board of trustees. It is a great university.

But Seth is a product of the Philadelphia public schools. He runs a 600-employee shop of the district attorney's office responsible on the front line of protecting one and a half million citizens from crime and prosecuting wrongdoers.

But he has taken an unusual interest in this issue of reentry because we have literally hundreds of people released from prison back to Philadelphia every week and they are trying to figure out how not to have them victimize others and return to prison. We have a 70 percent recidivism rate in the Philadelphia area.

So Seth is a major in the JAG Unit for the Army Reserve, and I will stop there because I could go on forever. He is an extraordinary young man who is making a real impact in Philadelphia. I am glad he is here and I want to welcome him.

Mr. WOLF. Well, thank you.

And I want to welcome you, too, and I looked at, as we mentioned earlier, your bio. I went to John Barshom High School which is pretty close to where you live and went to Penn State and also went to Georgetown Law School.

Mr. WILLIAMS. You made a good choice.

Mr. WOLF. Yes. I admit to the Georgetown law thing, you know. And at one time, I actually considered returning when I graduated from law school, returning to Philadelphia to run actually for district attorney. It had been a dream that I had. My dad had been a Philadelphia policeman.

No, I am not going to go back. I fell in love with Virginia. But, you know, really got interested in this issue and I am glad you are here.

Mr. Fattah, I was a probation officer, parole officer for the county courts of Philadelphia and, you know, and maybe we can help work with Philadelphia to make this a model to see, but I think in the recidivism rate and to do what we can. So I am glad somebody with your practical experience is here, and I appreciate Mr. Fattah, you know, in inviting you.

With regard to that, we will just sort of open up and maybe go in order. And then, you know, we will have a lot of questions. Maybe just go down.

Mr. GELB. Great. Thank you.

Good morning, Mr. Chairman. Thank you and Ranking Member Fattah and other Members of the subcommittee for the opportunity to testify this morning. I am Adam Gelb with the Pew Center on the States and run the Public Safety Performance Project as you described.

All of us at Pew applaud you for your leadership in drawing attention to promising strategies for reducing crime and victimization in America. States increasingly are moving toward the adoption of cost-effective solutions to pressing corrections issues and the Federal Government has played and has an incredible opportunity to continue to play an important role in that.

Mr. Chairman, you cited some of the statistics here. Over the past three decades, the United States has built a prison system that is the largest and most expensive on the planet. There is no question that violence and career criminals need to be locked up and for a long time.

But as we reported in 2008, with those 2.3 million prisoners and jail inmates we now have one in a hundred adults in this country behind bars. That is the equivalent of locking up every single person in Virginia Beach, Louisville, Kentucky, Pittsburgh, Seattle, and Cincinnati, every single person in those states and those cities.

The cost of this has been consuming state budgets. State prisons now cost over $50 billion a year. It has been the second-fastest category of state spending, trailing only Medicaid, and it now accounts for one in every fourteen state general fund dollars, twice the share it did about 20 years ago.

And even though two-thirds of the offender population is in the community, about 90 percent of the corrections spending is on prisons. And at this point, about one in eight state government employees works for Department of Corrections.

What have we gotten for all this spending? No question crime rates have fallen since the mid 1990s, and research shows that increased incarceration can claim a modest part of the credit. The crime rate is still too high, particularly in certain areas, and recidivism rates, as you said, do not appear to have come down.

The average inmate released today spends a good bit longer behind bars, but is not necessarily any less likely to come back than he would have been 25 years ago.

The good news, though, is that we now have solutions, new strategies revealed by research that can both cut crime and lower costs for taxpayers. More than a dozen states have now engaged in a comprehensive data analysis and planning process that we call justice reinvestment.

With this assistance from Pew, other funders, and certainly the Bureau of Justice Assistance at the Justice Department and the Congress, states are making significant shifts in policy, making better decisions about who goes to prison, how long they stay, and how they can do a better job reducing the recidivism rate.

Now, there is a presumption, I think out there, that states are sort of being forced to do these kind of things because of the budget situation. They are sort of holding their nose and saying we have got to find budget savings and sort of make some bad policy decisions. And we are out there on the ground working with them and

can just say unequivocally that is not the case. There is much more to the story.

There is no question that the fiscal pressure is partly responsible for the interest in these approaches, but states, particularly tough on crime states like Texas and South Carolina, would not be engaged in justice reinvestment just to save money. They are simply not folks who are going to try to balance their budgets on the back of public safety. And, in fact, a number of states including Texas started down this road well before the recession started in 2007.

What instead is going on is that states are realizing that they can deliver taxpayers a better public safety return on their corrections dollars and they can do it because we do so much more today than we did 30 years ago when we started down the prison building path when prisons became our weapon of choice in the war on crime. We know so much better about how to stop the cycle of recidivism. I am just going to list a few things.

We have much more accurate risk assessments than we did. Volumes of data have been analyzed and we are much better able these days to distinguish between high and medium and low-risk offenders, who needs to go to prison and at what levels to supervise people.

Second, there have been tremendous advances in supervision technology. The short time you were in the system as a parole officer, there was no such thing, you could not have dreamed of a GPS tracking system, rapid result drug tests that turn around those results instantly. And those things just did not even exist. We have them now, ignition interlocks for drunk drivers, et cetera, ATM-like kiosks for low-risk offenders, all kinds of things that did not exist before.

Third, we have improved our knowledge about how to change behavior. The treatment programs today are not the kind of treatment programs that were around, the effective ones anyway. They use cognitive behavioral therapy. They use motivational interviewing and swift and certain sanctions. They are much more effective.

One example of a program that sort of brings these pieces together that collectively are known as evidence-based practices is the HOPE Program in Hawaii which I think, Mr. Chairman, you are familiar with. It is showing dramatic results with large numbers of offenders including those who have problems with meth.

HOPE was started by Judge Steven Alm, the former U.S. attorney who was really frustrated with the revolving door. He said, let's stop, let's do things differently. We are going to test drug offenders twice per week and if they are dirty, they are going to go to jail immediately for two days, no ifs, ands, or buts. We are not going to wait for them to test positive 15 or 20 times and then at some arbitrary point sort of throw down the hammer and end up in prison for two years for a costly prison term. But each and every time, it is swift and certain. And if offenders do not stop and cannot stop on that testing and sanctions regime with swift and certain jail terms, then at that point, they are referred for treatment.

The results have been powerful. There was a randomized controlled trial, sort of the gold standard research evaluation, and HOPE probationers were 55 percent less likely than the control

group to be arrested for a new crime, 72 percent less likely to test positive for drugs, and they used about 50 percent fewer prison and jail bed days.

So with these kind of results, states and localities across the country are beginning to adopt and experiment with the HOPE model. Pilots are up and running in Alaska and Arizona and under consideration in Virginia, in Fairfax County, in Kentucky, Arkansas, California, and Alabama.

But in order to realize the fiscal benefits which are estimated at between four and eight thousand dollars per probationer, states need the technical assistance and start-up funds that are currently in short supply. So if we had even a modest investment in the HOPE model with those kind of results, we could make a profound impact on crime and drug abuse and on overall correctional costs.

There is still one more reason why states are pursuing alternate strategies and that is public support. Last year, we worked with Public Opinion Strategies and the Benson Strategy Group to conduct comprehensive research on public attitudes towards crime and punishment. The survey found that without question, voters want a strong public safety system that holds criminals accountable and metes out consequences for illegal activities.

At the same time, voters believe that such a system is possible while reducing the size and the cost of the prison system. And I will just give you one question from the poll. We asked whether voters agreed or how much they agreed with the following statement: "It does not matter whether a nonviolent offender is in prison for 21, 24, or 27 months, what really matters is that the system does a better job of making sure that when an offender does get out, he is less likely to commit another crime." Ninety-one percent of the respondents agreed with that and 75 percent strongly agreed with that statement.

So with that kind of support, it is clear to us the American public is ready for a shift from simply building more and more prisons to smarter strategies that actually make them safer.

So in sum, the economic crisis is bringing states to the table, but it is not the meal. The demand we are seeing for justice reinvestment and better recidivism reduction strategies is happening because policymakers from both sides of the aisle increasingly know that there are research-based strategies for nonviolent offenders that produce less crime at less cost than prison.

Thank you.

TESTIMONY
Adam Gelb – Director, Public Safety Performance Project
The Pew Center on the States
Committee on Appropriations, Subcommittee on Commerce, Justice, Science and Related Agencies
February 11, 2011

Chairman Wolf, Ranking Member Fattah and members of the subcommittee:

Thank you for the opportunity to testify today.

My name is Adam Gelb, and I am director of the Public Safety Performance Project of the Pew Center on the States, a division of the Pew Charitable Trusts that helps states advance fiscally sound, data-driven policies and practices in sentencing and corrections that protect public safety, hold offenders accountable and control corrections costs.

All of us at Pew applaud you for your leadership in drawing attention to promising strategies for reducing crime and victimization in America. States are increasingly moving toward the adoption of cost-effective solutions to pressing corrections issues, and the federal government has an incredible opportunity to support and bolster these efforts.

Data-driven decision-making and programming can provide better returns on what has become a massive investment in public safety. As policymakers charged with allocating federal resources, you have the unique opportunity to encourage and promote the adoption of smart approaches proven to control corrections expenses and keep communities safe.

One in 100 Behind Bars
Over the past three decades, the United States has built a prison system larger and more expensive than any other on the planet. Violent and career criminals need to be locked up, and for a long time. But, as the Pew Center on the States reported in 2008, we now have 1 in 100 adults in America behind bars. That's the equivalent of locking up every single person in: Virginia Beach, Virginia; Louisville, Kentucky; Pittsburgh, Pennsylvania; Seattle, Washington and Cincinnati, Ohio combined.

High Costs
The cost of this incarceration has been consuming state budgets. At more than $50 billion per year, corrections has been the second fastest growing budget category, behind only Medicaid, and now accounts for one in every 14 general fund dollars, twice its share in the mid-1980s. Nearly 90 percent of the spending goes to prisons, even though two-thirds of the offender population is on probation or parole in the community. Five states now spend more on corrections than higher education. When you add in the federal and local incarceration costs, the tab surpasses $70 billion.

Low Public Safety Return
What have we gotten for our money? Crime rates have fallen since the mid-1990s, and research shows that increased incarceration can claim a modest part of the credit. But crime still is well

above the levels we had through the late 1960s, and violent crime, especially in our most disadvantaged communities, remains intolerably high.

On top of that, recidivism rates do not appear to have come down. The average inmate released today has spent several months longer behind bars than he would have 25 years ago, but he may be just as likely to return to crime. And over the past 10 years, seven states have reduced both their crime rates and incarceration rates, firmly debunking the notion that if imprisonment goes down, crime will go up.

Changing Directions

The good news is that we now have solutions—new strategies revealed by research that both cut crime and lower costs for taxpayers. More than a dozen states have now engaged in the comprehensive data analysis and planning process we call "Justice Reinvestment." With this assistance, states are making significant shifts in policy – who goes to prison, how long they stay, and how they can do a better job cutting the recidivism rate.

The Public Safety Performance Project at Pew and our partners at the Council of State Governments' Justice Center and the Vera Institute of Justice have played a part in this change of direction, as has Bureau of Justice Assistance at the Department of Justice, thanks to the work that this Committee has done in supporting Justice Reinvestment. We are providing technical assistance to states which are taking a bipartisan, inter-branch and data-driven approach to their criminal justice system. We work with them to analyze the key drivers of their prison population and costs and identify policies to control corrections spending, hold offenders accountable, and reinvest savings in strategies that can decrease crime and reduce recidivism. The appropriations for the Justice Reinvestment Initiative at BJA support these same efforts, and we collaborate very closely. Michael Thompson will describe some of the successful efforts that have been undertaken.

There is a presumption that states are pursuing changes in their sentencing and corrections policies because their budgets are forcing their hands. There's no question that fiscal pressure is partly responsible for the interest. But there's much more to the story. States, particularly tough-on-crime states like Texas and South Carolina, would not be engaged in Justice Reinvestment just to save money. They simply won't balance their budgets on the back of public safety. And we started down this road with a number of states in 2007, well before the recession of 2008-2009.

Instead, states have realized that they can deliver taxpayers a better public safety return on their corrections dollars. And they can do it because we know so much more today than we did 30 years ago, when prisons became our weapon of choice in the fight against crime, about how to stop the cycle of recidivism.

Development of more accurate risk assessments. Analyses of huge volumes of data have helped isolate the specific factors that predict criminal behavior, such as antisocial values and thinking patterns. While no risk assessment tools are foolproof, today's "third generation" tools do a good job of distinguishing high-, medium- and low-risk offenders and of pointing the way toward case management plans that will cut the chances of re-offense.

Advances in supervision technology. Global positioning system (GPS) monitors, rapid-result drug tests and ATM-like reporting kiosks offer authorities new technologies to monitor the whereabouts and activities of offenders in the community. These capabilities are giving lawmakers, judges and prosecutors greater confidence that they can protect public safety and hold offenders accountable with sanctions other than prison.

Advances in the science of behavior change. Research has identified several strategies that can make significant dents in recidivism rates, including cognitive-behavioral therapy, motivational interviewing and the use of swift and certain but proportional sanctions for violations of the rules of probation and parole.

HOPE

An example of a program that brings together many of these advances is found in Hawaii, where the Honest Opportunity Probation with Enforcement (HOPE) program is showing dramatic results with large numbers of offenders, including users of methamphetamine.

The brainchild of Judge Steven Alm, a former United States Attorney, HOPE deters drug use and crime through the credible threat of swift, certain and short jail stays. At the start of the program, probationers get a warning: they'll be tested for drug use twice each week and if they test positive, they'll go to jail immediately but only for a couple of days. No if's, and's or but's. Probation officers are trained to use motivational interviewing skills, and offenders who don't or can't stop using drugs without professional treatment services are referred for treatment.

The results have been powerful. In a gold-standard, randomized controlled evaluation, HOPE probationers were 55 percent less likely than the control group to be arrested for a new crime; 72 percent less likely to use drugs; and they use 48 percent fewer jail and prison beds. Just imagine the impact, or even half the impact—on crime, on drug abuse, and on the cost of incarceration—if HOPE Probation was brought to scale across the country.

The good news is that states across the country are beginning to adopt and experiment with the HOPE model. Pilots are up-and-running in Alaska and Arizona, and under consideration in Virginia, Kentucky, Arkansas, California and Alabama. But in order to realize the fiscal benefits from HOPE—tentatively estimated at $4,000 to $8,000 per probationer—states need the technical assistance and start-up funds that are currently in short supply.

More than 5 million people are on probation or parole in the United States, twice the number behind bars. They consume as much as half of the nation's cocaine, heroin and methamphetamine, and when they fail drug tests or break other rules of community supervision, they eventually land in prison. In fact, probation and parole violators are a leading driver of prison growth, reaching nearly two-thirds of prison admissions in some states. So if we have even a modest success with them, we could make a profound impact on crime and drug abuse, and on correctional costs.

There are a couple more important reasons why states are eager to pursue alternate strategies.

Increasing focus on cost-benefit analysis. Across all areas of government, policy makers are demanding to know what results programs are producing, not just what funding levels are or how many people are being served. The economic downturn certainly has accelerated this trend.

Polls show support for prison alternatives. Finally, the public is supportive of using community corrections rather than prison for nonviolent offenders. Last year, we worked with Public Opinion Strategies and the Benenson Strategy Group to conduct comprehensive research on public attitudes toward crime and punishment. The survey found that without question voters want a strong public safety system that holds criminals accountable and metes out consequences for illegal activities. At the same time, voters believe a strong public safety system is possible while reducing the size and cost of the prison system.

One of the poll questions was particularly revealing. It asked voters whether they agreed with the following statement: "It does not matter whether a nonviolent offender is in prison for 21 or 24 or 27 months. What really matters is the system does a better job of making sure that when an offender does get out, he is less likely to commit another crime." Ninety-one percent of the respondents agreed, and 75 percent agreed strongly. With that kind of support, it is clear to us that the American public is ready for a shift from simply building more and more prisons to smarter strategies that actually make them safer.

In sum, the economic crisis is helping bring states to the table, but it's not the meal. The demand we're seeing for justice reinvestment and better recidivism reduction is happening because policy makers from both sides of the aisle increasingly are aware of research-based strategies for nonviolent offenders that produce less crime at less cost than prison.

Federal Role

Successful strategies such as HOPE Probation and Justice Reinvestment create savings for states and localities, so no doubt you're wondering, "What role can Congress play?"

Pew's work and funding of these proven, innovative approaches spans four years, and we along with other private funders have been carrying much of the load. The demand for these approaches has now outstripped supply. Governors, state legislators, judges, corrections executives—entire states are requesting assistance and struggling to maintain services in the face of dire budget cuts. They know that if they continue with business as usual, there will be more crime, more victims, more arrests, more prosecutions and still more incarceration.

Congress has long supported state and local crime control initiatives, and has a unique role in promoting the replication of innovative policies and programs. You can help reduce recidivism rates and promote successful offender re-entry by using data to inform your policy decisions, and investing increasingly scarce public resources in proven public safety strategies. Most states simply don't have the research capacity to crunch the numbers, or the limited funds it takes to start up alternative programs so that offenders can be adequately supervised in the short run, until the reduction in prison population translates into actual savings that can be reinvested into those programs. The federal government needs to prime the pump. But then it should be able to step away.

Less Crime, Lower Cost
Nearly 40 years ago, prisons became America's weapon of choice in the fight against crime. There is no question that more prisons have helped cut crime, but that's no longer the question at hand. The right question, the one that more and more states are asking, is "What policies and programs would do a better job cutting crime and do it at a lower cost?"

Programs and strategies supported by rigorous research offer potent answers. Congress should use this pivotal moment in our nation's history to invest in what actually works.

Thank you again for the opportunity to speak with the subcommittee today.

The Pew Charitable Trusts
The Pew Charitable Trusts was founded 61 years ago by the sons and daughters of Joseph N. Pew., the founder of Sun Oil Company. Pew has three primary areas of interest: improving public policy, informing the public and stimulating civic life. Pew partners with a diverse range of donors, public and private organizations.

The Pew Center on the States (PCS), a division of The Pew Charitable Trusts, identifies and advances effective policy approaches to critical issues facing states. It researches emerging topics, develops 50-state comparisons, and highlights innovative approaches among states to complex problems. When the facts are clear, PCS advocates for nonpartisan, pragmatic solutions.

With a staff that includes researchers, policy analysts, journalists, campaign strategists and issue experts, PCS works across a range of topics to ensure states have what they need to make smart, data-driven investments and adopt fiscally sound policies. PCS focuses principally on three areas of interest: (1) investing in human capital, with campaigns addressing early education, children's dental health and home visiting; (2) maximizing government performance, with an elections project, a sentencing and corrections initiative, and work on government management; and (3) ensuring states' fiscal health. To learn more about the Pew Center on the States, please visit www.pewcenteronthestates.org.

Mr. WOLF. Thank you.

Mr. Earley.

Mr. EARLEY. Congressman Wolf and Ranking Member Fattah, thank you for having us this morning. And along with my colleagues, I thank you for keeping the attention on what I think is probably one of the most significant pressing domestic issues in the country.

I would like to begin just by sharing a little bit of my own personal story. I have had a bit of an evolution on thinking about the whole criminal justice system. I can do this fairly quickly.

When I was first elected to office in 1987 as a state senator in Virginia, crime was a wedge issue in politics at almost every level in the United States, mayor, state legislature, governor, attorney general, Congress, even President. And so it was a hot topic and basically everyone pretty much tried to out-toughen everybody else.

And there were some reasons people were responding to that. There was a pretty significant breakdown of the family going on. The high drug use was beginning to happen. And so there were a lot of things, percolating around the 1970s and 1980s.

When I was elected, I was sort of right in the middle of that. And during my ten years in the Senate in Virginia, we did what everybody else in the Nation did, we got touch on crime. And it happened in Congress too. And, quite frankly, it was a pretty bipartisan effort across the board.

And as a result of that, when you step back and look now back 25 years later, we went in America from having less than 500,000 people incarcerated in total to today having over two million.

And as Adam shared, one out of one hundred adults in the United States are incarcerated. We incarcerate at a greater rate than any other nation and we have more people behind bars than any other nation, which is ironic based on how we perceive ourselves as a Nation and what we hold as some of our fundamental values.

I was and am a social conservative if you had to describe me, I suppose. And so the things that were important to me were things like liberty and freedom, obviously wise stewardship of taxpayer dollars, and also limited government.

And when I look back now, I see that the policies that we used, which was primarily viewing prison as probably the most effective tool in doing something about crime, going down that road led to a tremendous national loss of personal liberty and freedom. It led to one of the biggest growths in any government program we have seen in the last 50 years, which is corrections. And it is really spending an incredible amount of money and getting no better results. You know, we still have the same recidivism rates today that we had 25, 30, 40 years ago. They have not moved. Half of everybody who gets out of prison comes back within three years.

So this is really something that needs a lot of attention. And the really tragic thing is when you look beneath these numbers of one out of every one hundred being locked up and then a more devastating number, I think, one out of every thirty-one adults are either locked up or under the direct or indirect supervision of a Department of Corrections, probation or parole.

It is having a devastating effect disproportionately on certain communities in America. In the African American community, this is having a generational impact that is unraveling the community I think for generations to come unless we do something different.

Women are the fastest growing sub-population in prisons in America. The Hispanic population is significantly over-represented even when you take away immigration related issues. In California, 65 percent of the people locked up today are Hispanic.

So that is the problem we are all trying to address and I think this committee is aware of it. I think the public is aware of it more today. I certainly see that. There has been a huge ground shift in public perception, and I think the main reason is once you put over two million people behind bars, everybody knows somebody who is locked up. And that was not true 25 or 30 years ago.

You know, when I grew up, I did not know anybody who went to jail, but now I have had family members who have been to jail, good friends, colleagues, and I think that is true for everybody in this room.

So it has touched the Nation in a very personal way, and I think everybody realizes that not everybody in prison is beyond redemption, beyond hope, and beyond the chance of a better life.

So in response to the summit that you convened last year, we have got a great report that is in front of you. I agree with everything that is in that report, so I will not sort of go back over that.

I do want to add some things that I think are not in the report that I think are as critical as what is in the report. And it is three things that I think are well within the reach of this Congress to do.

The first is there is a really important piece of the puzzle in my experience both in getting tough on crime and now in the last nine years at Prison Fellowship going into prison and try to help people who are in prison get ready to come out. There is a very important piece missing in a lot of discussion and it is this.

You cannot hire enough people at the state level or federal level to help inmates get ready to come home. Government at the federal and state and local level has to leverage the volunteers in the community, nonprofits, be they faith based or secular, but community people to get involved in the lives of these inmates.

Over the last nine years, I have probably been in over 200 prisons in the United States and around the world. Most of the successful stories that I have seen of people whose lives have changed have been through human interaction. That human interaction may have come through a program, but it has been through human interaction and it is often expressed like this by an inmate.

When these people started coming into prison, I wondered what they wanted and then I realized they love me. And there was something about being affirmed, being loved, being invested in which many of these men and women have not had before, that was the pivotal life-changing moment. It may have helped them to go on and believe they could get their degree. It may have helped them believe they could truly break an addictive habit of drugs or alcohol. But it was human interaction.

We cannot hire people to do that and we should not try, but there are an army of volunteers around the Nation who are willing

to do that and it is growing because everyone has been touched by this issue. So it becomes very important for states and the federal prison system to be volunteer friendly to let people in.

The big emphasis in prisons in the 1980s and 1990s was on security. If the emphasis shifts toward success in reducing recidivism as well as security, then every level of correctional operation in the U.S. has to get better at welcoming volunteers and partnering with volunteers. It is absolutely key and it does not cost money at the end of the day. It does take some time and it takes a different approach within the prison, but it is not a big ticket item. So that is the first thing I would ask everybody to keep in mind.

Secondly, one of the things that the justice reinvestment report points out that I think is very important is that we do not have enough research going on with programs that we fund. There are a lot of pilot programs that go on at the state level and the federal level and many of them are good.

The problem is most of them when they are set up and funded, they are not funded with the idea of being really research evaluated at the end. So even if they are evaluated, it is usually not research. And if they try to be evaluated, they have not been set up in such a way to be a good experiment.

So one of my suggestions is that both in the Second Chance Act and in the Justice Reinvestment Act, the Congress consider changing the language or doing what it needs to do so that every grant that is given, whether it is given to a state or whether it is given to a 501(c)(3) community-based program, built into that grant is a research requirement that is also funded within the grant, that part of applying for the grant is you have to apply for your program and you design the program to be studied. That is part of the deal. And when you get funded, you are funded not only to do the program but the research is funded as well.

So then everything that Congress funds, it can really look back on in one or two or three or four or five years and see if this worked. And if it did, we are going to have a growing number of programs that prove themselves beyond the mere legend but prove themselves based on the data. So I think that would be a really good way to bring accountability into what are two really good acts and that is the Second Chance Act and the Justice Reinvestment Act.

The third thing I would suggest is that though I think it is important for the Congress to continue to fund programs at the state level, provide the technical assistance like is going on through the Second Chance Act and the Justice Reinvestment Act, do not neglect the Federal Bureau of Prisons. There are 2.3 million people in prison in the Nation. I looked this morning. The Federal Bureau of Prisons every Thursday at twelve noon lists the current count. As of yesterday at twelve, there were 209,159 people in the federal system, a little less then ten percent. So Congress itself actually has an incubator.

The Bureau of Prisons could be made to do a lot of the things we have talked about that the states need to do and become a model. When that happens, I promise you the states will copy it. Every state loves to find a program that is working and copy it. Every state correctional department has a very high view of the

Bureau of Prisons. And so I think it is really an opportunity for the Bureau of Prisons to be the leader.

When I shared last year at the Justice Reinvestment Summit, I mentioned five things I thought the Bureau of Prisons could do pretty much fairly quickly that would help them to be a model. I think they all sort of still stand as needed. I will run through them real quickly.

First, to establish a probation and parole system that punishes violators immediately like Project HOPE which you just heard Adam talk about.

Secondly, to actually comply with I think an existing regulation to expand the beds in halfway houses to allow a 12-month stay rather than a six-month stay and to give reentry participants first priority.

Third, and this is a really important one, put inmates as close to their families as possible rather than as far away. The research has been clear for three decades that the greater separation there is between families when people are in prison, the higher the recidivism rates. It does not necessarily mean we have to build new prisons.

For example, in D.C., we have several thousand people returning to D.C. from prison every year. They could be staged back at the facility here in D.C. rather than brought back cold. But get them closer to their families.

Finally, I talked about the mentoring aspect and then the last thing open the doors. In my experience in the last nine years, and this is limited experience so I would not die on this, but at Prison Fellowship, we have found it much easier to work with prisons in the states than we did the Federal Bureau of Prisons in terms of getting volunteers in, getting programming time. The Federal Bureau of Prisons just seem to be much more rigid and very, very security conscious that they had a difficult time creating opportunities for programs and interaction that could really change inmates' lives.

So with that, I thank you and appreciate you all's continued attention to this subject.

Written Statement of
The Honorable Mark L. Earley
Former Attorney General of the Commonwealth of Virginia
Immediate Past President of Prison Fellowship

Before the
House Appropriations Committee
Subcommittee on Commerce, Justice, Science and Related Agencies
Hearing on an Assessment of Reentry Initiatives, Recidivism and Corrections Spending

February 11, 2011

THE NEW FRONTIER OF PUBLIC SAFETY

INTRODUCTION

In the 1980s and 1990s as a Virginia State Senator and Attorney General, I believed in law and order. I still do. What I did not realize at the time is that there are two equally important aspects to public safety. First, is getting the right people off the streets and behind bars. Second, is providing opportunities for personal transformation to those behind bars so that when they return home they will not still pose a threat to public safety.

My approach at the time was biased to the front end of the problem. I initiated or supported any bill that put more people behind bars and kept them there longer. I seldom voted against any crime bill. I was not alone. Legislators of all stripes at the state and federal level were getting tough on crime. As a result, America now incarcerates more people than any other nation in the world and at a higher per capita rate than any other nation in the world.[1] For a person who believes that less is more when it comes to government, I helped turn the correctional system into one of the biggest government programs in the world. According to a research report published in 2008 by the Pew Center on the States, one out of every thirty-one adults in the United States is locked up or on probation or parole.[2] Not only have we supersized government, we have fueled a system that does not work. Thousands of inmates are released every year in America and national studies show that more than half end up behind bars within three years.[3] Correctional systems are failing to "correct" the behavior of inmates. For the most part, they are simply warehousing them. After sweeping the streets clean of "criminals," they are now coming home in record numbers—but the public is not safe. Released inmates are reoffending at a rate of 50%[4] and creating more victims, eating up more taxpayer dollars, and adding fuel to bigger government.

The good news is that we can reduce the mass incarceration trend, advance public safety, shrink government, and save taxpayers dollars if we will begin to focus on providing meaningful opportunities for personal transformation to those behind bars who want to change their lives. This article suggests that the key is not more money pumped into corrections for a few pilot programs (most of which are never

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1. PEW CHARITABLE TRUSTS, ONE IN 100: BEHIND BARS IN AMERICA 2008, at 5 (2008), *available at* http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing_and_corrections/one_in_100.pdf.

2. PEW CHARITABLE TRUSTS, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 5 (2009), *available at* http://www.pewcenteronthestates.org/uploadedFiles/PSPP_1in31_report_FINAL_WEB_3-26-09.pdf.

3. Michael Lollar *Recidivism Rate Worse Than Statistics Indicate, Memphis-area Study Finds*, MEMPHIS COMMERCIAL APPEAL, March 10, 2010, *available at* http://www.commercialappeal.com/news/2010/mar/07/recidivism-rate-worse-study-finds/.

4. *Id.*

brought to scale because of cost), but to unleash the power of partnerships between community-based organizations, volunteers, and departments of corrections. By allowing volunteers with community-based non-profits unprecedented access to inmates to provide life changing relationships, recidivism could be significantly reduced and public safety increased. It requires strong executive leadership in government and partnership with community-based nonprofits and volunteers who utilize evidence-based best practices for cognitive and life transformation and are held accountable for achieving the goal of lower recidivism.

I. THE PRICE OF A BIG GOVERNMENT APPROACH TO PUBLIC SAFETY

A. Loss of Human Capital and Freedom

Prior to 1972, the prison population tended to grow at a steady rate that closely tracked growth rates in the general population. Beginning in 1973, the number of incarcerated Americans began to rise precipitously, due to legislation that stiffened sentencing and release laws and decisions by courts and parole boards that sent more offenders to prison and kept them there longer.[5] Also, fueling the fire were the breakdown of family structure, particularly the growing absence of fathers, the proliferation of drugs, and the de-institutalization of the mentally disabled. Incarcerated drug offenders soared 1,200% and the rate of mentally ill people in prisons rather than in mental health hospitals has quadrupled.[6]

Today more than 2.3 million individuals are behind bars. With 5% of the world's population, the U.S. now houses 25% of the world's reported prisoners.[7] Today, a staggering 1 out of every 100 adults in our nation is behind bars.[8] And, even more sobering, 1 out of every 31 adults is either behind bars or on probation or parole.[9]

The demographic picture becomes more miserable: For the African American community, the growth in incarceration has been nothing short of catastrophic. Black adults are four times as likely as whites and nearly 2.5 times as likely as Hispanics to be under correctional control. One in eleven black adults—9.2%—is either behind bars or on probation or parole.[10]

B. Wasteful Stewardship of Taxpayers' Money

The increase in incarceration and stubborn recidivism rates result in a huge cost to the taxpayers: over $68 billion will be spent on corrections in 2010.[11] Second only to Medicaid, spending on corrections has become the fastest growing general fund expenditure in the nation.[12] State spending on corrections has

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5. PEW CHARITABLE TRUSTS, PRISON COUNT 2010: STATE POPULATION DECLINES FOR THE FIRST TIME IN 38 YEARS 1 (2010), *available at http://www.pewcenteronthestates.org/uploadedFiles/Prison_Count_2010.pdf?n=880* (citing Alfred Blumstein & Allen J. Beck, *Reentry as a Transient State Between Liberty and Recommitment, in* PRISON REENTRY AND CRIME IN AMERICA 50-79 (Jeremy Travis & Christy Visher eds., 2005)).

6. Alfred Blumstein and Allen J. Beck, *Reentry as a Transient State Between Liberty and Recommitment, in* PRISONER REENTRY AND CRIME IN AMERICA 50, 62 (Jeremy Travis & Christy Visher eds., 2005]).

7. PEW CHARITABLE TRUSTS, *supra* note 2, at 5.

8. *Id.* at 3.

9. PEW CHARITABLE TRUSTS, *supra* note 3, at 3.

10. PEW CHARITABLE TRUSTS, *supra* note 3, at 5.

11. *Id.* at 11.

12. PEW CHARITABLE TRUSTS, *supra* note 3, at 1.

increased over $40 billion in the last 20 years, up over 30% in the past 10 years alone.[13] The current approach to incarceration is breaking the bank. If for no other reason, the stress on state budgets—in no small part due to burgeoning correctional system budgets—has finally captured the attention of policymakers and focused their efforts on the poor return they are getting for their dollars.

C. Compromising Public Safety

Indeed, if the billions spent nationwide ensured that prisoners would return to our neighborhoods in greater numbers as peaceful, productive, and law-abiding citizens, we might argue that it was money well spent. But according to the Bureau of Justice Statistics, of the hundreds of thousands of inmates that leave prisons and return home, two-thirds will be rearrested and almost one-half re-incarcerated within three years.[14] Is it too much to suggest that prisons resemble graduate schools of crime more than places of correction and rehabilitation? With a 50% recidivism rate after three years, public safety is corroded on the back end of the criminal justice system.

"What happens inside jails and prisons does not stay inside jails and prisons. It comes home with prisoners after they are released. . . ."[15] Indeed, all too often inmates return home more criminally savvy and prepared to fail at real life then before they went in. No other enterprise could remain in business with such a dismal performance and return on investment. Yet, prisons seem to expand by failing.

To ensure public safety, save taxpayers dollars, and reverse the trend toward mass incarceration, we must start by seeking the transformation of individuals in prison to get them ready to come home. Departments of Corrections and Rehabilitation should be living up to their names.

II. REDUCING RECIDIVISM THROUGH PERSONAL TRANSFORMATION OF PRISONERS

As Doris Layton MacKenzie described in *What Works in Correction*—a review of the literature on effective strategies for the incarcerated—attitudes and philosophies on "what works" to change lives behind bars has shifted drastically during the past thirty or forty years.[16] MacKenzie's examination of studies that researched how changes in thinking can affect attitude and behavior (cognitive-behavior) in offenders has cast a new light on how we look at corrections. As a result, some experts and policymakers have begun to move away from an emphasis on a crime control model, which fostered slogans such as the "war on drugs" and "truth in sentencing," and toward more evidence-based strategies in which individual-level changes occur in prisoners that then allow them to go on to make better life choices. MacKenzie also notes that criminals "think differently than noncriminals either because they have dysfunctional information processing and coping skills or a lower level of moral development."[17]

One of MacKenzie's theories is that "one mechanism by which education will affect recidivism is through improvement of inmate cognitive skills. The way individuals think influences whether they violate the law. . . . Other research demonstrates a connection between executive cognitive functioning

13. PEW CHARITABLE TRUSTS, *supra* note 2, at 11 (citing PEW CHARITABLE TRUSTS, PUBLIC SAFETY, PUBLIC SPENDING: FORECASTING AMERICA'S PRISON POPULATION 2007-2011 II (2007)). Source includes page number as ii instead of 2.

14. Langan, Dr. Patrick A., and Dr. David J. Levin, "Recidivism of Prisoners Released in 1994," U.S. Department of Justice Bureau of Justice Statistics (2002), http://bjs.ojp.usdoj.gov/content/pub/pdf/rpr94.pdf, *supra* note 6, at 1.

15. THE COMMISSION ON SAFETY AND ABUSE IN AMERICA'S PRISONS, CONFRONTING CONFINEMENT 11 (2006).

16. DORIS LAYTON MACKENZIE, WHAT WORKS IN CORRECTIONS: REDUCING THE CRIMINAL ACTIVITIES OF OFFENDERS AND DELINQUENTS 337 (2006).

17. *Id.* at 113.

(ECF) and antisocial behavior. ECF is defined as the cognitive functioning required in planning, initiation and regulation of goal-directed behavior."[18] MacKenzie concludes that "individual-level change must precede changes in ties or bonds to social institutions. . . . To get along with family, keep a job, support children, or form strong, positive ties with other institutions, the person must change in cognitive reasoning, attitude toward drug use, anti-social attitudes, reading level and vocation skills. A focus on individual change is critical to our understanding of what works in corrections."[19]

These studies show that when inmates complete cognitive-behavior programs, they have a much better chance to develop and to follow an internal moral compass.

The public is more than ready for an approach to corrections that does not merely warehouse but seeks opportunities for inmates to change their behavior. A 2006 Zogby International public opinion poll commissioned by the National Council of Crime and Delinquency found that a striking majority of American voters support pre- and post-release rehabilitative programming.[20] Of those polled, "79 percent are concerned or fearful about the annual release of 700,000 prisoners," and "by almost an 8 to 1 margin (87%to 11%), the US voting public is in favor of rehabilitative services for prisoners as opposed to a punishment-only system." Additionally, "[b]y strong majorities, U.S. voters feel that a lack of life skills, the experience of being in prison, and obstacles to reentry are major factors in the rearrest of prisoners after release." Furthermore, "[b]y huge margins, those polled felt that job training, drug treatment, mental health services, family support, mentoring and housing were all very important services that should be offered to prisoners." Perhaps one of the most astounding findings was that "44%felt that planning for reentry should begin at sentencing."[21]

The results of these polls are helpful for policymakers when trying to understand public perception. With 2.3 million people behind bars there is no one who does not know someone in prison. And they know many of them are not lost causes.

III. The Need for Partnerships Between Corrections and Community-Based Nonprofits

It is my thesis, that when it comes to rehabilitation of prisoners, the state, by its very nature, will not and cannot do the job. Having served in the Virginia senate for ten years and as Virginia's attorney general for four, I know only too well that in times of fiscal stress, correctional budgets are the first to be cut. Within those budgets, rehabilitation and educational programs are the first and proportionally the deepest cuts that tend to be made. That is not likely to change in the real-world competition for dollars. Even when state treasuries are bulging, these efforts historically receive relatively low priority because of demand in other "high profile" areas such as education and transportation. But even if these realities changed overnight and prisoner rehabilitation and reentry became the number one priority of state governments, government agencies are by nature woefully incapable of rehabilitation that transforms.

State employees cannot primarily deliver prisoner rehabilitation and reentry efforts. For starters, it is anything but a nine to five job. Instead, such efforts must be delivered through properly trained volunteers

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18. *Id.* at 113.

19. *Id.* at 337.

20. Barry Krisberg & Susan Marchionna, *Attitudes of US Voters Toward Prisoner Rehabilitation and Reentry Policies*, Nat'l Council on Crime & Delinq. Focus, April 2006, *available at* http://www.policyarchive.org/handle/10207/bitstreams/5943.pdf

21. *Id.* at 1

in the community through loving relationships that are patient, nurturing, sacrificial, holistic, tough, and able to sustain a genuine long-term commitment to the welfare of prisoners and ex-prisoners. These efforts must be administered by those who believe that darkness can be overcome by light, evil by good, fear by faith, despair by hope, and addiction by freedom. They must be delivered by men and women who believe that transformed prisoners and ex-prisoners, in spite of and precisely because of their past, are uniquely situated to contribute to society because they have experienced brokenness, forgiveness, and restoration.

Rehabilitation must be rooted in transformation of the heart, dispositions, and character. It must equip prisoners with the knowledge and skills for productive work. It must be characterized not by a systems approach, but by a relational (mentoring) approach. It must begin in prison and continue for up to two years after release from prison—a critical transitional stage. And since it will not and cannot be provided primarily by the state, it must be provided by community-based nonprofits and volunteers.

To focus on the importance of rehabilitation is not "soft on crime," nor does it compromise public safety. Indeed, the State has a duty to protect the public, restore the victim, guard the treasury, and ensure the safety of inmates in prison. A commitment to rehabilitation is consistent with each of these goals. Correspondingly, failing to provide rehabilitation compromises each one of them. For without rehabilitative efforts that transform, inmates are more of a threat upon release than when they were sentenced, more victims are created, more taxpayer money is spent for the same thing over and over again, and inmates are at a greater risk of violence and criminal corruption in prison. Such an understanding is leading to public support of bold new initiatives in rehabilitation and a willingness to become personally involved in this community-based partnership with the state.

"The partnership between governments and nonprofits for purposes of rehabilitation and reentry is not new. What is new is the large-scale interest developing among nonprofits and faith-based nonprofits coupled with a willingness to spend their own money as opposed to government grants. Indeed, the renaissance in rehabilitation spearheaded by nonprofits need not be fueled by government funds. Some limited application of grants may be helpful in developing prototypes, but in the long run the prison population is too large and the needs in rehabilitation too intensely relational to be realistically supported by the government. This can and should be a movement overwhelmingly sustained by volunteerism and philanthropy, and the correctional system must welcome and adapt to the partnership."[22]

IV. Examples of Working Partnerships that Reduce Recidivism

A. Boston Reentry Initiative (BRI)

BRI is an initiative to help transition violent young adult offenders released back to their neighborhoods through mentoring, social service assistance, and vocational development provided by both government and community-based nonprofits. Faced with a growing crime rate, city and state officials called on four community-based nonprofits—Nation of Islam, Ella J. Baker House, Bruce Wall Ministries, and Boston Ten Point Coalition—to help develop solutions. They worked with young men eighteen to thirty years of age who were considered at-risk of resuming a criminal life upon release. Focusing on mentoring, education, vocational training, and treatment for substance abuse and mental

22. Mark L. Earley, *The Role of Nonprofits in the Rehabilitation of Prisoners*, Crim. Just. *Ethics*, Winter-Spring 2005, at 2, 58.

health issues, a customized transition plan was developed for each offender. The mentors were volunteers from a nonprofit partner located in the offender's neighborhood.

Evaluations of a non-randomized study conducted by a team of Harvard and Perdue criminal justice experts found that the BRI was strikingly successful in reducing recidivism in one of the toughest age groups.[23] The study found that after one year post-release, 36.1% of BRI participants had been arrested for a new crime while 51.1% of control group subjects had been arrested for a new crime. Harvard's Anthony Braga concluded that, "not only is it possible to provide services to this tough-to-reach population, it is possible to do so effectively."[24]

B. Prison Fellowship

In 1997, Prison Fellowship developed and staffed a program called the InnerChange Freedom Initiative (IFI) in Texas. It is a pre-release program that inmates can volunteer for eighteen to twenty-four months prior to their release. It is a holistic approach to individual transformation and readiness for release focusing on the intellectual, spiritual, emotional, and physical. The spiritual component of the program is based on the life and teachings of Jesus. The in-prison portion addresses academics, life-skills training, spiritual development, and job preparation. It is followed by several months of post-prison support to ensure that released prisoners have the best opportunity to successfully reintegrate into society. For each program, hundreds of volunteers from the community are trained to work with and mentor the inmates.

IFI was designed to incorporate mentoring as an essential part of the program and the goal is for each prisoner to be assigned a mentor both in prison and upon release. The importance of a caring and accountable relationship during incarceration and after release is crucial for the inmate's successful return home. Nowhere is that seen more clearly than in the University of Pennsylvania study released in 2003. Most significantly. The study found that IFI graduates were significantly less likely to be rearrested within two years of release than those inmates who had started, but not completed, the program (17.3% versus 35%) and less likely to be reincarcerated (8% versus 36.3%).[25]

C. La Bodega de la Familia

One partnership showing great promise, not only in intervention, but also having application for the successful reentry of inmates, is La Bodega de la Familia. In 1996, Family Justice, a New York City-based nonprofit, launched a family support initiative in a small New York City storefront that had seen a number of drug deals and murders on its sidewalk. The idea was to introduce new methods to engage families struggling with addiction and mental illness in order to help them keep their loved ones out of prison or jail. Emphasizing prevention as well as intervention, the nonprofit partnered with a wide range of strategic partners, including government agencies (such as the U.S. Department of Housing and Urban Development) and often community-based organizations (such as the Langeloth Foundation and the Minuchin Family Center) to create a new paradigm. They focused on the strengths, rather than the deficits, of poor families to end multi-generational patterns of substance abuse and violence. According to

23. Anthony Braga et al., *Controlling Violent Offenders Released to the Community: An Evaluation of the Boston Reentry Initiative*, 46 J. OF RES. CRIME & DELINQ., 411, (2009), *available at* http://jrc.sagepub.com/content/46/4/411.full.pdf+html.

24. *Id.* at 427.

25. Byron R. Johnson, *The InnerChange Freedom Initiative: A Preliminary Evaluation of a Faith-Based Prison Program*, 2003 CENTER FOR RES. ON RELIGION AND URB. CIV. SOC. REP. 19, *available at* http://www.manhattan-institute.org/pdf/crrucs_innerchange.pdf.

La Bodega's founding director Carol Shapiro, "We saw that outcomes improve when law-enforcement officers and community-service providers build on the strengths of people's social networks. Research shows that our approach keeps people out of prison, reduces drug use, and improves the overall well-being of families living in poverty."[26] A 2002 research study by the Vera Institute of Justice found that substance use (illegal drugs, methadone, alcohol to intoxication, abuse of amphetamines, sedatives or barbiturates) among participants in La Bodega de la Familia declined by 80% to 42% over six months, compared with only a 7% decline among comparison group members over the same time period. Illegal drug use (heroin, cocaine, crack, marijuana and hallucinogens) declined by 47.5% over six months, compared with a 21% decline among comparison group members over the same time period. Those participating in La Bodega de la Familia program were also "less likely to be arrested and convicted of a new offense" based on data collected from comparison groups.[27]

D. Educational Partnerships

Another collaborative effort arose not long ago when North Carolina's Department of Corrections formed a partnership with the state's Community College System to provide postsecondary correctional education to 78 prisons in North Carolina, reaching one-third of the state's inmates.[28] The educational and vocational resources are tailored for each prison. Many inmates take classes, either full time or part time. The real value of inmate education, however, is lower recidivism rates.

Boston University and the faith-based nonprofit organization, Partakers, based in Massachusetts is another public-private partnership example. The Boston University Prison Education Program enables prisoners to earn a bachelor of liberal studies in interdisciplinary studies. Partakers enlists local religious organizations to support individual prisoners who hope to qualify for the Boston University Prison Education Program and its volunteers provide support through visits and encouraging letters. Boston University funds the program, donating the cost of faculty, books and materials. Through their collaboration, these organizations are able to provide prisoners with support, practical resources and technical education.

Another example of a public-private collaboration reducing recidivism comes from Sing Sing, the infamous maximum security prison in Ossining, New York. The New York Theological Seminary (NYTS) began offering degree programs at Sing Sing in the early 1980s and in 1997 the Center for Social Research found that "only 9 percent of graduates of the New York Theological Seminary masters program were re-arrested within 28 months, compared to 37 percent of people who did not go through the program.[29]" In 1994, in an effort to get-tough-on-crime, the U.S. Congress abolished Pell grants for prisoners, effectively ending chances for inmates to get a college education while behind bars. Struggling prisons such as Sing Sing reached out to the nonprofit community to fill the void, and in 2000 the non-profit Hudson Link began offering higher education opportunities at the prison through private funding. Today Hudson Link partners with Mercy College, Vassar College and Nyack College to provide

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26. Letter from Carol Shapiro, President, Fam. Just. available at http://www.usmayors.org/76thannualmeeting/documents/fj-identity.pdf

27. Eileen Sullivan et al., *Family as a Resource in Recovery from Drug Abuse*, 2002 VERA INST. OF JUST. 56, *available at* http://www.vera.org/download?file=115/Families%2Bas%2Ba%2Bresource.pdf.

28. Jeanne Contardo & Michelle Tolbert, *Prison Postsecondary Education: Bridging Learning from Incarceration to the Community*, 2008 PRISONER REENTRY INST. 7, *available at* http://www.jjay.cuny.edu/ContardoTolbert_Paper.pdf.

29. Mary Beth Pfeiffer, *Inmate College Programs Now Rare*, POUGHKEEPSIE J., Nov. 17, 2000, http://www.poughkeepsiejournal.com/projects/prison/po111700s1.shtml.

education to the inmates. A total of 197 students have graduated to date[30] and most enjoy healthy social and family lives, low rates of recidivism, and gainful employment.

E. Ready4Work

Ready4Work is a pilot program launched in 2003 to address the employment needs of ex-prisoners through faith-based and community-based organizations.[31] Funded by U.S. Departments of Labor and Justice and the Annie E. Casey and Ford foundations, this national demonstration project was implemented in seventeen sites. The programs were developed to help local community- and faith-based organizations support the reentry and reintegration of ex-prisoners. Results after three years were promising: 4,482 former prisoners had been enrolled, with 86% receiving employment services and 63% receiving mentoring services.[32] Public/Private Ventures, an action-based research, public policy, and program development organization, that oversaw the Readey4Work project, reported that only 2.5% of Ready4Work participants were reincarcerated within six months and that only 6.9% had been reincarcerated at the one-year mark. [33]One recent evaluation of the program stated that "Ready4Work gives us an important preliminary snapshot of what is possible when an intermediary brings together public and private entities to address prisoner reentry in a comprehensive and coordinated strategy. These results . . . support the notion that a comprehensive prisoner reentry plan is possible and that is can be accomplished without a massive expansion of the existing criminal justice system."[34] Lessons learned from Ready4Work's employment and life coaching (mentoring) components were published in manuals and distributed to cities, city task forces, and selected organizations to provide technical assistance to organizations such as Maryland Opportunity Public Safety Compact, the Newark Reentry Initiative, and the Community Reentry Initiative for Baltimore Empowerment Zone Residents.

F. Second Chance Act

One sign that congressional policymakers have recognized the benefits of partnering with nonprofits and community-based agencies is the passage of the Second Chance Act, which passed with overwhelming bipartisan support and was signed into law by President George W. Bush in 2008. The Act opened the door to government grants intended to foster a partnership between corrections and community-based organizations. Second Chance Act funding to date includes billions of dollars made available through the federal government to state and local governments, law enforcement, and non-profit agencies.[36] The legislation establishes several grant competitions for state and local governments to improve their planning process for inmates about to be released. One important feature of these grants is the opportunity for states to include in their plans community organizations that provide housing, job training, health and drug treatment and mentoring.

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30. What's New, HUDSON LINK FOR HIGHER EDUCATION IN PRISON, http://www.hudsonlink.org/joomla/index.php?option=com_content&view=article&id=51&Itemid=65 (last visited October 28, 2010).

31. Byron K. Johnson, *The Faith Factor and Prison Reenty*, INTERDISC. J. RES. ON RELIGION, no. 4, 2008 at 10. I

32. Id.

33. Id. at 11.

34. Id. at 12.

35. Council of State Governments, Second Chance Act, REENTRY POL'Y COUNCIL, http://reentrypolicy.org/government_affairs/second_chance_act (last visited October 28, 2010).

G. Common Ground for Progress

Whatever one's political ideology, each of us should lament the loss of liberty and freedom that has resulted from one out of thirty-one adults being under direct or indirect government correctional supervision. History teaches us that public safety can not only be used to advance a truly healthy public square, but is often the ruse to successfully deprive a society of its natural right to liberty and freedom.

Whether liberal or conservative, each of us believes in the capacity of humans to undergo redemptive change and personal transformation. This is the common ground upon which we all can stand. I have no romantic view of prisoners and no naïve view of human transformation. As a criminal defense attorney and as Attorney General of Virginia, I saw too much. There are many in prisons that need to be there for their entire life and some who even need to be segregated from fellow prisoners. But I also have been in too many prisons to ignore the profound and lasting transformations I have seen, nor can I ignore the many prisoners who desire to change, but cannot do so on their own.

By cooperating with nonprofit groups and the faith community, prisons can exponentially multiply their own efforts to change prisoners' lives. Such non-governmental groups have a great advantage: They connect the inmates with caring and well trained people from the community. These mentors provide inmates with good role models and healthy relationships that will help them make the difficult transition from prison to freedom.

This is our common ground. This is our chance to advance public safety, reduce recidivism, steward tax dollars wisely, and reverse America's misguided romance with mass incarceration.

Mr. WOLF. Mr. Thompson.

Mr. THOMPSON. Chairman Wolf, Ranking Member Fattah, members of the subcommittee, thank you very much for the invitation to testify today about issues concerning corrections and public safety.

This committee's constant focus on unacceptably high recidivism rates in this country has begun to yield significant and exciting dividends. I am pleased today to provide you an update about what is happening across the country.

In 2009, this committee convened a series of hearings on reentry and recidivism. As you mentioned, Mr. Chairman, it was an unprecedented examination by Congress on challenges confronting government officials and community-based organizations across the country trying to reduce the Nation's high rates in recidivism. The hearing also spotlighted innovative, promising reentry programs underway across the country.

Congressman Wolf at the time challenged the Council of State Governments and the Pew Center on the States to convene a summit of the Nation's leading corrections and criminal justice experts as well as researchers and practitioners.

The instructions that we received were not simply to catalogue programs but zero in on the strategies relevant to all jurisdictions, boil down the research and experience of places and the experiences of places across the country, and report on the key elements to reduce recidivism.

We convened the summit with the support of BJA, a division of the Office of Justice Programs in the Department of Justice and the Pew Center on the States and the Public Welfare Foundation. As you mentioned, it happened about a year ago, pulled together, including Mr. Earley and others, 300 people across the country, State Supreme Court chief justices, state corrections directors, jail administrators, police chiefs, victim advocates, a real who's who of criminal justice from across the country.

We released the report earlier this week. We thank you very much for helping to speak at that event. And I want to focus on the four strategies that the summit report highlights.

The first is to focus on individuals most likely to re-offend. We need to stop making gut decisions about who represents a risk to public safety and, as Mr. Gelb mentioned, use the science-based tools that now exist to really distinguish about who is high risk of re-offending, medium, and low risk of re-offending.

Texas does this. Every parole decision now that is made is informed by and driven by a risk assessment instrument that helps predict what the likelihood is of re-offense. Recidivism rates of parolees in Texas have never been lower.

Second, we need to base programs on science and ensure quality. Like never before, we know now about the services and reentry programs that have an evidence base to them. We need to make sure that that is what we are funding.

Three, we need to make sure that we are implementing effective community supervision policies and practices. Both witnesses so far have talked about the importance of swift and certain responses. For too long, when a probationer or a parolee does not comply with conditions of release, we wait for weeks before taking any action.

We now know and the evidence shows that we need an immediate response. Georgia does this with its probation and it has seen extremely significant reductions in revocations as a result.

Fourth, we need to apply place-based strategies. As Mr. Earley mentioned, we are talking oftentimes about people not from and evenly distributed across the state. They are returning to very specific neighborhoods in the state. We know, for example, in Arizona, a neighborhood that is one percent of the state's population, yet seven percent of the state's prison population. We need to focus on those particular places and make sure that people are safely and successfully reintegrated there.

The bipartisan Second Chance Act and the funding that was made available through it enables states and county governments and community and faith-based organizations to incubate the kinds of programs that the strategies talked about in the summit. It helps them translate them into actual practice.

The Second Chance Act grant programs have been extremely popular among state and local governments and community and faith-based organizations.

In the first year since the act's authorization, nearly a thousand sites applied for Second Chance funding. Of those nearly thousand applications, 67 grants were actually approved, spanning 31 states. The level of demand for the Second Chance Act Grant Program makes it about the most competitive program the Department of Justice manages with just a seven percent approval rate.

In fiscal year 2010, nearly 1,200 applications were received under the Second Chance Act. This time, thanks to increased funding made available through this committee, 200 awards were made to grantees in 45 states. Even with the increase in funding from 2009 to 2010, less than 16 percent of the applicants actually received support.

One grantee that I would want to spotlight for just a second is the Oklahoma Department of Corrections. It actually took some of the strategies that the summit report that you commissioned from us, Mr. Chairman, actually takes those and operationalizes them. It focuses, for example, on medium to high-risk offenders.

And what it does is it recognizes, as was said earlier, that the people coming out of the prisons, and this group in particular comes out to no supervision whatsoever, is in one remote part of the state, returning to Oklahoma City. With the Second Chance Act grant funds, it actually creates a transitional reentry program in downtown Oklahoma City. We are very optimistic and confident it is going to show dramatic impact on recidivism. And we are looking forward to reporting on that soon.

Unfortunately, pilot programs and an improved knowledge base are not enough to help states navigate the dilemmas they face as they are trying to figure out how to cut tens of millions or hundreds of millions of dollars in spending while still trying to increase public safety.

In 2009, you heard testimony from a legislative leader in Texas, a corrections secretary in Kansas, and they talked about how their states were facing significant growth in their prison population and they were receiving instructions to somehow cut correction spend-

ing and increase public safety. It is against this backdrop that they employed a justice reinvestment approach.

By justice reinvestment approach, what they did is they took a real data driven detailed look at what was driving their prison populations, worked across party lines with all the people on the front lines of the criminal justice system with help from BJA and the Pew Center on the States and really determined what would actually make the biggest impact on public safety.

What we found after the results of those policy changes was that Texas and Kansas actually avoided building several new prisons that were initially projected, actually saw declines in recidivism and saw a decline in crime rates. That was a success story that resonated with policymakers across the country. We saw governors and legislatures quickly scrambling trying to see how they could replicate the successes of those two places. The demand, however, for support quickly exceeded whatever kind of capacity was available.

This committee, Mr. Chairman, you recognize the immediacy of the challenges that state and local leaders were facing, made available $10 million in 2010 for state and local governments that wanted to pursue justice reinvestment.

BJA has since moved exceptionally quickly since receiving that funding. They already identified five states where the governor and the legislative leaders and the chief justices stepped up and said they wanted to employ a justice reinvestment approach. Alabama, Indiana, Louisiana, North Carolina, and Ohio are the states where the Department of Justice is already actively helping them and providing intensive support.

I want to spotlight real quickly Indiana and the work that they are doing. Between 2000 and 2009, Indiana's prison population grew by over 40 percent, a rate that was three times faster than other states in the region. Now, if the existing policies in Indiana remain unchanged, Indiana's prison population is going to continue to grow. It is going to grow by about 21 percent over the next six years. They are going to need to spend $1.2 billion to build more prisons and operate those prisons on top of what they are already spending over the six years to accommodate that growth in the prison population.

And Governor Daniels and others have said that they wanted to take this justice reinvestment approach. They examined what was driving the prison population, found that a high rate of probation revocations was in part contributing to that, looked at the different counties and found that one county had an 11 percent failure rate for probationers. Another county had triple the failure rate.

How can you have such a wide disparity in failure rates from one county to the next? Governor Daniels said this needed to be a priority for the State of Indiana and in the State of the State, he made it one of his top three legislative priorities for this session. We are looking forward to continuing to work with him.

Fourteen states in addition to those that I have mentioned have written to the Department of Justice, governors who have just been in office for a couple of weeks, saying this needs to be one of their priorities. Department of Justice is now in the process of reviewing those applications.

In sum, what we have before us is an historic moment. High recidivism rates that once seemed an unfortunate but inescapable reality, now, thanks to the work that you have done and, Mr. Chairman, as you said, it looks like we are turning a corner, there are concrete examples that have actually demonstrated significant reductions in recidivism.

We also have the summit report that distills those experiences and tells us what the core strategies are. And states and counties can replicate those now across the country.

And the constant relentless bipartisan focus of this committee has changed the mind set about reentry across the country. Fifteen years ago when you asked corrections directors about reentry, few were talking about it. Now today every corrections agency has a point person assigned specifically on the issue of reentry. Mayors, sheriffs, governors have all a point person in their administration to focus on the topic of reentry.

Now what we need to do is harness the momentum that exists, capitalize on the tools that have been assembled because we have created an extraordinary window of opportunity to make our communities safer. It is because of this committee's work and we are looking forward, Mr. Chairman and Ranking Member, to continuing to work with you.

Thank you very much.

JUSTICE CENTER
THE COUNCIL OF STATE GOVERNMENTS
Collaborative Approaches to Public Safety

Statement by

Michael Thompson

Director

Council of State Governments Justice Center

"An Assessment of Reentry Initiatives, Recidivism and Corrections Spending"

February 11, 2011

Commerce, Justice, Science, and Related Agencies

Appropriations Subcommittee

U.S. House of Representatives

Chairman Wolf, Ranking Member Fattah, and Members of the subcommittee, thank you for the invitation to testify about issues concerning corrections and public safety. This committee's relentless and bipartisan focus on unacceptably high recidivism rates in this country has begun to yield significant, exciting dividends. I am pleased to appear before you again and provide an update on state and local efforts to address prison reentry, reduce recidivism, and design comprehensive policy frameworks that reduce corrections spending and increase public safety.

Problem

State and local governments are facing historic fiscal challenges. Only by slashing billions in spending will they be able to balance their budgets. An obvious target for such budget cutting is spending on corrections. One of the fastest growing areas of state spending is the prison budget - second only to the growth in spending on health care.[1] In Michigan, one out of every three state employees works for the Department of Corrections.[2] In Ohio, one out of every four state workers is an employee of the state's corrections department.[3] And, in Vermont, spending on corrections has increased from 4 percent of state general funds to 12 percent of state general funds over the last 20 years.[4]

Haphazard cuts to corrections budgets can have serious public safety implications. Americans have made it clear they want a correctional system that keeps communities safe and holds people who commit crimes accountable for their behavior. But they also want and deserve a system that makes the most of their tax dollars—especially in perilous economic times, when public funds are scarce and there are compelling, competing needs such as education and health care that must be addressed. In working round the clock to balance their budgets, governors and legislative leaders are sizing up their options regarding prison spending.

The first option is to do nothing at all, which in and of itself has serious consequences: in many states, it means crowding in prisons will intensify, creating dangerous conditions inside the walls, prompting potential involvement by the federal courts, and handing off a more acute problem to the next legislature and governor.

The second option is to make crude cuts. Although this approach may provide instant fiscal relief, it creates public safety problems: people are pushed indiscriminately out of prison and into communities where there are little or no services to facilitate their reentry and inadequate community supervision to monitor them closely.

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[1] National Association of State Budget Officers, *Fiscal Year 1988 State Expenditure Report,* p. 71 (Washington, DC: National Association of State Budget
Officers, 1989),
http://www.nasbo.org/Publications/StateExpenditureReport/StateExpenditureReportArchives/tabid/107/Default.aspx. National
Association of State Budget Officers, *Fiscal Year 2008 State Expenditure Report,* p. 54 (Washington, DC:

[2] State of Michigan Civil Service Commission, "Annual Workforce Report: First Quarter, Fiscal Year 2007-08." (Lansing, MI: Michigan Civil Service Commission, 2007).

[3] Council of State Governments Justice Center, "Justice Reinvestment in Ohio: Reducing Spending on Corrections and Reinvesting in Strategies to Increase Public Safety." (New York, NY: Council of State Governments Justice Center, 2009).

[4] Council of State Governments Justice Center. *Justice Reinvestment State Brief: Vermont.* (New York, NY:
Council of State Governments Justice Center, 2008).

There is another option, which a growing number of states are pursuing. It involves conducting an exhaustive analysis of their system, involving all decisions makers and key stakeholders, and working across party lines. An approach based on data-analysis and common sense policy and practice changes to reduce recidivism and costs – often referred to as Justice Reinvestment – aids state and corrections officials determining what policies and programs will have the biggest impact on crime and reduction in recidivism.

Justice Reinvestment Summit

In 2009, the Commerce, Justice, Science Subcommittee convened a series of hearings on reentry and recidivism. It was an unprecedented examination by Congress of the challenges confronting government officials and community-based organizations trying to improve success rates of people released from prison and jail. The hearing also spotlighted innovative, promising reentry programs underway across the country.

During those hearings, Congressmen Mollohan and Wolf anticipated the dilemma confronting states and counties today: finding a way to incubate and sustain effective reentry programs in the face of intensifying budget problems. They challenged the Council of State Governments and the Pew Center on the States to convene a summit of the nation's leading corrections and criminal justice experts, researchers, and practitioners to identify what works in reducing recidivism and to summarize the latest research and promising programs and policies. Their instructions were not just to catalog programs, but to zero in on the strategies relevant to all jurisdictions, boiling down the research and the experiences of places across the country to report those key elements of recidivism reduction.

With support from the Bureau of Justice Assistance, (a division of the Office of Justice Programs in the U.S. Department of Justice), the Pew Center on the States Public Safety Performance Project, the Public Welfare Foundation, and the Open Society Foundations, the Council of State Governments Justice Center convened the National Summit on Justice Reinvestment and Public Safety on January 27, 2010 in Washington, D.C. The goal of this meeting was to highlight data-driven, fiscally responsible policies and practices that increase public safety and reduce recidivism and spending on corrections.

Supported by members of Congress on both sides of the aisle, and bringing together the nation's leaders in reducing recidivism, the summit was the first event of its kind on Capitol Hill. More than 300 people – including state supreme court chief justices, state corrections commissioners, jail administrators, police chiefs, victim advocates, and state legislative leaders – participated. Congressman Frank Wolf (R-VA), Congressman Alan B. Mollohan (D-WV), Congressman Adam Schiff (D-CA) and

Senator Sheldon Whitehouse (D-RI) addressed the attendees. Over the course of the day, criminal justice experts and researchers presented data in a manner that stimulated provocative questions and thoughtful discussions.

The National Justice Reinvestment Summit Report

The Justice Reinvestment Summit Report summarizes the rich information presented during the conference—highlighting the promising practices, the latest thinking on criminal justice policy, published research, and the experiences of states, counties, and communities in reducing recidivism, increasing public safety, and cutting corrections spending. The report distills the data and experiences of jurisdictions into four fundamental strategies for developing cost-effective corrections policies that can reduce recidivism. It also features states that have designed policy changes frameworks to address recidivism and reduce corrections spending.

The four key strategies summarized in the report are:

1. Focus on Individuals Most Likely to Reoffend
2. Base Programs on Science and Ensure Quality
3. Implement Effective Community Supervision Policies and Practices
4. Apply Place-Based Strategies

Focus on Individuals Most Likely to Reoffend

It might seem like an obvious and straightforward principle to identify and focus community supervision and treatment resources on those at the highest risk for reoffending, but criminal justice policies, programs, and current practices in many states do not concentrate on the offenders most likely to commit more crime, or are not using validated assessment tools to identify that high-risk group accurately. Available research confirms that programs are most successful when they employ validated risk assessment instruments to sort and tailor supervision levels and intervention programs to an individual's needs.[5]

The Justice Reinvestment Summit Report highlights several practical examples of the application of this strategy:

[5] Report of The National Summit on Justice Reinvestment and Public Safety: Addressing Recidivism, Crime, and Corrections Spending. New York: Council of State Governments Justice Center, January 2011.

- In Texas, the parole board uses risk assessment tools and data to inform release decisions. The guidelines provide that individuals incarcerated in state prisons who committed a low-severity crime and are classified as low probability for reoffending be approved for release between 76 and 100 percent of the time, whereas high-risk/high-severity offenders be paroled just 6-15 percent of the time. Each year, the parole board issues a report showing how the actual parole approval rates for the previous year compare to these guidelines.
- In Hennepin County, MN, the drug court focuses programming on high-risk individuals, as identified by a risk assessment tool. The court uses specialized case management, which includes early and long-term treatment intervention; frequent and random drug testing; judicial supervision; intensive probation supervision; and assistance with employment, school, and education. Program outcomes support the notion that drug courts work effectively for individuals at high risk for recidivating. In two years of operation, 61 defendants have graduated from the year-long Hennepin County program and, after 15 months, 89 percent of drug court program participants had stayed crime free.[6]
- In Arizona, the governor signed legislation in 2008 authorizing courts to use risk assessments to triage their caseloads. Shortening the length of a low-risk offender's probation by up to 20 days a month for every month served without a violation of the conditions of supervision enables officers to focus more of their time on high-risk cases. By reducing the amount of time probation officers supervise people who are successful on probation, officers concentrate their resources on individuals who are most likely to reoffend and may pose the greatest threat to public safety.
- The New York City Department of Probation implemented and tested an automated reporting system using kiosks in the mid-1990s for a limited group of low-risk probationers. Adopting kiosks allowed NYC Probation to assign large numbers of probationers considered to be low risk for reoffending to a system of supervision that required substantially fewer probation officers. This freed up resources to provide more intensive supervision to high-risk probationers, which revealed that they were not complying with conditions of release. The percentage of high-risk probationers who missed at least one in-person appointment increased from 40 percent in 2000 to 63 percent in 2004. This behavior would not have been uncovered had they not reallocated

[6] Report of The National Summit on Justice Reinvestment and Public Safety: Addressing Recidivism, Crime, and Corrections Spending. New York: Council of State Governments Justice Center, January 2011.

officers' caseloads to spend more time with high-risk probationers and used the probation kiosks for people categorized as low risk.[7]

Base Programs on Science and Ensure Quality

Thousands of programs designed to reduce reoffending have been established by well-meaning administrators over the years. Legislatures seeking to cut crime rates have made considerable investments in a wide variety of these initiatives, which have performed with varying levels of success. Some of these initiatives have even had the unintended consequence of making clients more likely to reoffend.

Resources must be invested in program models that studies demonstrate can reduce recidivism. Steps must then be taken to monitor the quality and performance of those models and to hold administrators accountable. Policymakers must ensure that taxpayer dollars are invested only in those strategies that research has shown are promising approaches or that have demonstrated success in making communities safer and healthier.

The good news is that studies show that implementing evidence-based programs and practices in areas like substance abuse treatment and job training in the community while offenders are under supervision can reduce reoffense rates by 10 to 20 percent.[8]

The Justice Reinvestment Summit Report illustrates how two states are working two ensure funding is focused on programs that have research demonstrating their efficacy.

- In response to a request from Washington state lawmakers seeking information on what programs to fund (and not to fund), the Washington State Institute of Public Policy (WSIPP) conducted a meta analysis, examining 500 research articles on correctional programming. Researchers found that intensive supervision with treatment is effective at reducing recidivism, while intensive supervision without treatment is not. Treatment-oriented supervision programs yielded a 17.9-percent reduction in recidivism.
- Oregon's Senate Bill 267 (Sections 3–9 of Oregon Laws, 2003) requires the Oregon Department of Corrections, the Youth Commission, and the Criminal to ensure effectiveness. For the biennium beginning in 2005, 25 percent of programs and interventions were expected to meet

[7] Report of The National Summit on Justice Reinvestment and Public Safety: Addressing Recidivism, Crime, and Corrections Spending. New York: Council of State Governments Justice Center, January 2011.
[8] Ibid, Council of State Governments Justice Center, January 2011.

these criteria. For the 2007 biennium, this expectation increased to 50 percent, and in 2009 and future biennium, this increased to 75 percent. The agencies affected by this legislation must audit and report on their program spending.[9]

A comprehensive database of evidence-based programs will soon be available to the field and Congress. The National Reentry Resource Center is working with the Urban Institute and the John Jay College of Criminal Justice to develop a "what works" library, which provides a user-friendly, one-stop shop for practitioners who want to know what the research says about the design and implementation of evidence-based reentry practices, programs, and policies. By offering an organized, searchable, and routinely updated, compilation of the most recent peer-reviewed studies, this library will also assist the growing community of scholars who are developing a reentry research agenda. The Urban Institute and John Jay College developed classification criteria and categories of evidential strength, incorporating findings from the systematic review of "what works" literature. They also identified more than 500 evaluations of reentry interventions and developed procedures for rating and classifying the evaluations. An electronic prototype for the "what works" library will be developed, and focus groups will test its utility and user friendliness. The online library will be launched by the fall 2011, and fully populated with research by the fall of 2012..

Implement Effective Community Supervision Policies and Practices.

More than five million people—one in 45 adults—are on probation or parole in the United States. This is more than two times the population of prisons and jails in this country. Over the last 25 years, the rate of growth of community supervision populations has exceeded even the growth of prison and jail populations, with far smaller budget increases.[10] In spite of increasing strains on probation and parole agencies, administrators have a better sense today than ever before of what makes community supervision effective at reducing recidivism: Policies must help parole and probation departments make the optimal use of their resources, and these supervision agencies must adopt best practices as identified by researchers and practitioners.

It is critical that supervision and services for people involved in the criminal justice system

[9] Report of The National Summit on Justice Reinvestment and Public Safety: Addressing Recidivism, Crime, and Corrections Spending. New York: Council of State Governments Justice Center, January 2011.
[10] Pew Center on the States Public Safety Performance Project, *One in 31: The Long Reach of American Corrections* (Washington, DC: The Pew Charitable Trusts, March 2009).

address the following: 1) target high and medium-risk individuals; 2) concentrate on the timeframes when people are most likely to recidivate; and 3) provide a broad range of options for swift and certain sanctions that are proportionate to the violation and appropriate to the individual.[11]

The Justice Reinvestment Summit Report highlights several examples of places where these elements of effective community supervision have been implemented:

- The Georgia Department of Corrections (GDC) has established the Probation Options Management (POM) program. Through this program, the judge retains authority in all cases, and is still the only person who can revoke a probationer to prison, but GDC can modify the probationer's current supervision as long as the sanctions imposed are equal to or less restrictive than the maximum non-prison sanction set by the sentencing judge. Where this program was implemented, participants spent considerably less time in jail than non-POM probationers (a three- to five-fold decrease in jail time). Probation officers spent considerably less time in court, saving time and money. The implementation also shortened the interval between violation and sanction, resulting in an increase of the "swiftness" of sanction imposition, thereby likely reinforcing the behavioral link between the violation and its attendant sanction.
- The Travis County Probation Department created a centralized assessment process, ensuring that all probationers were subjected to risk/needs assessment, using the latest science-based tools. They redesigned supervision and sanctioning strategies to better match these assessments, and introduced a system of progressive sanctions to respond more consistently respond to violations. Since implementing these and other changes, the number of felony probation revocations (for technical violations or new criminal activity) in Travis County declined by 20 percent from FY 2005 to 2008. This is steepest decline in revocations of the five most populous counties in TX and significantly better than the statewide average decline of 1 percent.

Apply Place-Based Strategies

People released from prison and jail return to a handful of communities in each state where crime is concentrated and high rates of joblessness, inadequate housing, acute health issues, and lack of resources further exacerbate communities' capacity to receive people who have complex needs and challenges.[12] For example, in Wichita, Kansas, where probation and parole revocations account for more

[11] Ibid, Council of State Governments Justice Center, January 2011.
[12] Ibid, Council of State Governments Justice Center, January 2011.

than two-thirds of the city's admissions to prison each year, one quarter of all people on probation or parole live in communities that are home to only 8 percent of the city's adult population. Ensuring that resources available to supervision agencies are concentrated on specific places is critical to reducing recidivism. The Summit Report illustrates how place-based strategies are applied in policing, probation and parole supervision, treatment and services, family supports, and other forms of community engagement. Two such examples come from Arizona and Maryland.

- A single neighborhood in Phoenix (Maricopa County) is home to 1 percent of the state's total population, but 6.5 percent of the state's prison population. The Maricopa County Adult Probation Department assigns officers in one Phoenix neighborhood to a probation office located in the community. The program resulted in two significant forms of increased compliance, when compared with a control group of probationers who reported to a central office outside the neighborhood.
- The Maryland Division of Probation and Parole encourages its officers to supervise individuals in the community. Under the Proactive Community Supervision (PCS) model, officers are encouraged to meet low risk supervisees at the offices of local community or faith based organizations. A 2006 study by researchers from Virginia Commonwealth University and the University of Maryland showed that 32.1 percent of the PCS participants were rearrested compared with 40.9 percent of a matched group receiving traditional supervision.[13]

Second Chance Act: Incubating Programs that Reduce Recidivism

Congress has recognized that reversing stubbornly high (and in some cases climbing) recidivism rates must be a national public safety priority. It has provided resources, technical assistance, and other support that can be applied across the country. In passing and funding the Second Chance Act, Congress has enabled state and local governments and community-based organizations to design, test, evaluate, and promote innovative programs that increase the likelihood that individuals' leaving prison or jail will become law-abiding, contributing members of communities and families.

[13] Faye S. Taxman, "The Role of Community Supervision in Addressing Reentry from Jails." Paper prepared for the Urban Institute, John Jay College, and Montgomery County, Maryland, Department of corrections and Rehabilitation Reentry Roundtable on Reentry from Jails, June 2006.

The Second Chance Act was a monumental first step in addressing recidivism rates nationwide. It is also the foundation to build on as criminal justice agencies and communities struggle to find more effective strategies to keep neighborhoods safe, promote public safety, and reduce victimization all while using resources more efficiently.

The Second Chance Act grant programs have been incredibly popular among state and local governments and community and faith-based organizations eager to implement or expand their reentry programs. In FY 2009, Congress appropriated $25 million for programs authorized under the Second Chance Act. In this first year since the act's authorization, 955 applicants applied for SCA funding. Of the 955 applications, 67 grantees were funded in 2009, spanning 31 states. This level of demand established the Second Chance Act as one of the most competitive justice programs, with only a seven (7%) percent funding rate in the first year.

In FY 2010, Congress appropriated $100 million for programs authorized under the Second Chance Act. That year, 1189 applications were received for Second Chance Act grant programs, and 187 awards were made to grantees in 45 states. Even with the increase in funding from fiscal year 2009 to 2010, less than 16% of applicants in 2010 received awards.

Two sites, each of which received one-year demonstration grants of approximately $700,000 through the Second Chance Act, illustrate the application of the latest in evidence, research and practice to address recidivism and reentry.

In San Mateo, California, the County Manager's office has designed a reentry program to reduce recidivism among county jail inmates. To date, the program has assessed 285 inmates for eligibility and enrolled 123 of them. The program only accepts individuals who present a high risk for recidivism, based on a risk assessment instrument that has been "validated"—that is, checked for its ability to accurately predict risk. This assessment also identifies an individual's treatment and service needs, and uses these findings to develop individualized case plans. Funded by its SCA grant, a Reentry Coordinator and case managers oversee these case plans. The program links clients to residential and/or outpatient substance abuse treatment, employment training, life skills workshops, peer mentoring, and assistance in finding housing. The services, funded through the SCA grant, are available pre- and post-release. 73 of the 123 enrollees—59 percent—have been released from jail and connected to services in the community. Of that cohort, only 6.85 percent have returned to jail—giving the program a 93 percent success rate.

The Oklahoma Department of Corrections has used a SCA grant to establish a reentry facility for individuals who present medium or high risk of reoffending and have complex needs (such as addiction disorders, mental illnesses, low levels of education, or inadequate housing). All soon-to-be released from state prison, these individuals will have completed their sentences at the time of release and therefore will not be under community supervision. Recognizing the threat to public safety that this presents, the Department of Corrections opened the reentry transition facility to allow officials to work with an unsupervised population in need of structure and support. Located in downtown Oklahoma City (rather than in the state's more rural areas, where its prisons are located), the facility provides a direct bridge between prison and home. So far, the program has served 58 individuals. 24 of them have received or are receiving intensive mental health services; 18 are enrolled in an education or vocational program; and 53 are enrolled in a program designed to get them to change their criminal behavior.

Justice Reinvestment: Helping States and Counties Design a Policy Framework that Reduces Recidivism

The Justice Reinvestment Initiative builds and expands on recent developments in addressing prisoner reentry and recidivism rates through the Second Chance Act. While the prisoner reentry programs under Second Chance Act fund important transitional services to help reduce recidivism and improve post-release success, the Justice Reinvestment Initiative provides the resources needed to provide the analysis and policy options for system-wide changes that can reduce recidivism, crime, and corrections spending. The Justice Reinvestment Initiative touches the many important points along the criminal justice system continuum, such as corrections, parole, probation, law enforcement, courts, community corrections and research capacity.

The genesis for the Justice Reinvestment project was a call from state governments – CSG members. Increasingly reluctant to finance the construction of another prison, but wary of the ramifications of doing nothing, our members (who are both the conservative Republicans and liberal Democrats from all three branches of state governments across the country) delivered these instructions to us: help us cut spending on corrections, reduce failure rates of people released from prison, and increase public safety in the neighborhoods where people released from prison return.

In response, we developed a data-driven strategy called Justice Reinvestment, a bipartisan, data-driven approach for policymakers seeking to determine how best to reduce corrections spending and

reinvest in strategies that are most likely to reduce recidivism and increase public safety. The Justice Reinvestment approach has three phases: 1) analyze data and develop policy options; 2) adopt new policies and put reinvestment strategies into place; and 3) measure performance.

Justice Reinvestment has a proven track record. This appropriations subcommittee heard testimony in 2009 from a key Republican lawmaker in Texas and the then-Secretary of Corrections in Kansas, who detailed the Justice Reinvestment work and accomplishment in their states.

In 2007, the prison population in Texas was projected to grow by more than 14,000 people over a five-year period at a cost to taxpayers of an additional $523 million for the construction and operation of new facilities in the 2008 and 2009 fiscal biennium.[14]Analysis conducted by CSG Justice Center experts found that probation revocations, reduced funding for residential treatment programs for people on probation and parole, and reduced parole usage led to the buildup of the prison population. During the 2007 legislative session, state lawmakers enacted a package of criminal justice policies to avert the growth in the prison population and save $443 million. To improve success rates of people under supervision, the legislature reinvested $241 million to expand the capacity of treatment and diversion programs, and enhance the use of parole for low-risk offenders. Since the enactment of the policies, the prison population did not grow as originally projected and recidivism and crime rates appear to have fallen.

In 2007, the Kansas prison population was projected to increase 22 percent by 2016 at a cost of approximately $500 million in additional construction and operating costs over a ten year period.[15] Justice Reinvestment analysis found that parole and probation revocations accounted for 65 percent of prison admissions, consuming 27 percent of prison capacity at a cost to taxpayers of $53 million annually. Ninety percent of revocations were for violations of conditions of release, with alcohol or drug use accounting for 32 percent of parole revocations. During the 2007 legislative session, state policymakers approved a package of recidivism reduction policies and appropriated $7.9 million to expand reentry programs and strengthen community supervision through the adoption of evidence-based strategies.[16] The legislation included: creation of a performance-based grant program for community supervision (probation) programs to design local strategies to reduce revocations by 20 percent; establishment of a 60-day program credit to create an incentive for people who successfully complete

[14] Council of State Governments Justice Center, "Justice Reinvestment State Brief: Texas," 2007.
[15] Council of State Governments Justice Center, "Justice Reinvestment State Brief: Kansas," 2007.
[16] Ibid, Justice Center.

educational, vocational, and treatment programs prior to release; and, restoration of earned time credits for good behavior for nonviolent offenders.

The work in these states was made possible through funding support provided by the Pew Center on the States and the Bureau of Justice Assistance in the Office of Justice Programs at the US Department of Justice. As more states learned about the experiences of Kansas and Texas, governors and legislative leaders, and court officials sought technical assistance and other forms of support needed to employ a reinvestment approach in their jurisdictions.

Demand from these state leaders, however, overwhelmed the limited resources available to them. Recognizing the immediacy of the challenges confronting state and local leaders, this Subcommittee made available $10 million in FY 2010 for state and local governments requesting federal support for their justice reinvestment initiatives.

With this funding, the Bureau of Justice Assistance has moved exceptionally quickly. BJA engaged the Council of State Governments Justice Center, the Vera Institute of Justice, the Center for Effective Public Policy, and the Crime and Justice Institute to respond to state and local governments that wanted to pursue a justice reinvestment approach in their jurisdictions. In addition, BJA designated the Urban Institute to coordinate and evaluate these efforts and serve as a one-stop resource for people seeking information about justice reinvestment.

Governors, legislative leaders, and court officials in five states immediately approached BJA, demonstrating convincingly that they had already taken extraordinary steps to work across party lines and launch a justice reinvestment approach. They urgently needed assistance from the federal government. BJA subsequently instructed CSG and Vera to provide intensive technical assistance to these states: Alabama, Indiana, Louisiana, North Carolina, and Ohio.

Of course, each of these states is unique; comprehensive analyses conducted in each state are yielding distinct sets of findings. These are examples of the findings in three states.

Ohio

Prison crowding is a significant problem in Ohio: 13,000 more inmates are being held behind bars in this state than the system was designed to hold. The state's prison population projections indicate that the the system will experience a net growth of 4,000 more people within the next four years, pushing crowding to 140 percent of capacity. Building additional prison beds and staffing them to house these inmates would cost the state nearly half a billion dollars. As it is, the state spends $1.1

billion annually on corrections. And, this year alone, policymakers are working to fill an $8 billion budget deficit.

One driver of growth in the prison population are low-level nonviolent property and drug offenders, 10,000 of whom are admitted to Ohio prisons annually. They serve an average of 9 months in prison, during which time few receive treatment for their addictions or services to assist with behavior change. After prison, three-quarters of them are released to the community completely unsupervised. Ohio policymakers agree that this costly "revolving door," while contributing to sizeable increases in prison crowding and costs, is doing little to impact public safety.

State leaders are reviewing policy options, including imposing mandatory community supervision and drug treatment for low level offenders who have substance abuse problems. Such an approach would translate to lengthier supervision than the prison terms to which these offenders are currently subjected and ensure they get the treatment they need.

Indiana

Between 2000 and 2009, Indiana's prison population grew by over 40 percent, a rate of increase three times faster than what other states in the region experienced. If existing policies remain unchanged, Indiana's prison population will continue to grow. Current projections show the prison population increasing by nearly 21 percent over the next 6 years.

One factor fueling Indiana's prison growth that policymakers are examining is the wide variation from county to county in the number of people who have their probation revoked and are sentenced to prison. In St. Joseph County, 11 percent of terminations from probation involved people whose probation was revoked and who were incarcerated in prison. In Marion County, by contrast, 33 percent of probationers—triple St. Joseph County's rate—had their probation revoked because of violations of their conditions of supervision.

Within nearly every county in Indiana, there are multiple supervision agencies with overlapping authority. In Lake County, for example, there are 14 probation departments. Policies and practices vary widely from one probation department to the next (and often within the same probation department). Agencies do not coordinate operations, they have overlapping authority, and they do not share information about individuals under supervision. This makes adoption of countywide policies

impossible and prevents supervision resources within each county from being distributed where they could impact public safety the greatest.

Governor Mitch Daniels announced in his state of the state address that addressing this finding, and others that the analyses yielded, would be one of his top three legislative priorities. Among the policy options now under consideration is the creation of a probation improvement fund that provides counties with economic incentives to reduce probation revocations and coordinate with other supervision agencies, and support the adoption of best practices that can help cut crime. Strengthening probation will help increase public safety and lower crime.

North Carolina

North Carolina, where policymakers are working to address a $3.7 billion deficit this year, is facing pressures on its state prison system similar to those described for Ohio and Indiana. In North Carolina, even though the crime rate has declined and arrests have remained stable since 2000, the prison population has followed the opposite trend, increasing by almost a third since 2000. Spending on corrections has increased by more than two-thirds over the same time period.

High numbers of people released from prison re-offend, either committing a new crime or violating conditions of community supervision, and are returned to prison within three years. Analyses conducted for the state through its justice reinvestment initiative found that 85 percent of people in North Carolina who complete a prison sentence return to the community completely unsupervised. That means no community supervision officers are watching these individuals upon returning to the community, ensuring they comply with their conditions, fulfill their reporting requirements, and complete programming and treatment as needed.

Research demonstrates that if people released from prison are going to reoffend, it is most going to happen relatively early: within the first three years after release from prison, two-thirds of inmate recidivism occurs within the first year.[17] North Carolina policymakers are therefore exploring policies that would ensure everyone completing a prison term first undergoes a period of community supervision. This approach helps achieve the goals of managing growth in spending while at the same time increasing public safety.

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[17] [1] Patrick A. Langan and David J. Levin, *Recidivism of Prisoners Released in 1994,* NCJ 193427 (Washington, DC: U.S. Department of Justice, Bureau of Justice Statistics, 2002).

In addition to efforts in these states, the Bureau of Justice Assistance invited state and county leaders to submit letters expressing interest in using the justice reinvestment approach and to request this very intensive form of research and technical assistance from these national experts. . Response, from states in particular, has been impressive. Fourteen additional states and 23 localities have applied for assistance under the justice reinvestment program. Selection of new justice reinvestment sites will be made this spring, according to BJA. Jurisdictions have applied for either assistance with analysis and policy development, referenced as Phase 1, or implementation of policy options and expansion of efforts, referenced as Phase 2.

The demand and enthusiasm for federal resources and advanced expertise in this area is high. Governors in office for less than a month submitted lengthy letters explaining the dire circumstances in their states and the need for assistance. Republican and Democrat legislative leaders, court officials, and executives have collaborated to express their desire to take a smarter, data-driven approach to corrections and recidivism challenges facing their systems.

Justice Reinvestment has proven that just a small infusion of funds from federal government can enable huge advances within the states, particularly those don't have the capability to do it themselves as a result of the current economy. The initiative allows us to take everything that has been learned over the past few decades on criminal justice, corrections and supervision policy, and recidivism reduction to devise data-driven approaches tailored to each state's unique criminal justice and corrections systems to manage the costs of a corrections and better protect public safety.

Recommendations

For years, high recidivism rates in this country seemed an unfortunate, but inescapable, reality. Now, as Chairman Wolf recently said, we are starting to turn a corner. To maintain this course it is important to ensure that recent advances in research and practice take root and policies are changed to help reduce recidivism and protect public safety. Here are three recommendations to help further these goals:

1. *Continue funding for programs authorized under the Second Chance Act.* The Second Chance Act has made available funding for state and local governments and community-based organizations seeking to implement and expand innovative programs to reduce recidivism. The intensely competitive process that these funds prompted, coupled with technical assistance

provided to grantees, have yielded exciting reentry initiatives across the country. Lessons learned from these experiences have positioned experts to explain, as highlighted in the Summit Report, what are the keys to reducing recidivism. It is essential that Congress continue its funding of programs authorized under the Second Chance Act because it drives reentry programs toward the strategies that are most likely to have an impact.

2. *Convene state and local leaders to ensure translation of strategies highlighted in Summit Report into policy and practice.* This committee's bipartisan and relentless focus on recidivism, as reflected in part through the investments made in the Second Chance Act, has helped change the mindset of state and local leaders across the country. Whereas "reentry" was rarely mentioned even among corrections administrators just 15 years ago, today, every state corrections administrator and many mayors, sheriffs, and county executives, have designated a high level person whose exclusive responsibility to oversee that jurisdiction's work in reentry. Governors and legislators have established high level, interagency, bipartisan reentry commissions focused on lowering recidivism. To harness and make the most of this momentum, the federal government should convene state and local government leaders across the country and challenge them to embrace, and fully operationalize, what we now know are essential elements of reducing recidivism.

3. *Maintain funding for Justice Reinvestment initiatives.* Unfortunately, pilot programs and an improved knowledge base are not enough to help states navigate the dilemmas they face as they attempt to cut corrections spending while increasing public safety. This is where the justice reinvestment approach is indispensable. The resources made available through this initiative, which help states and local jurisdictions bring in objective, outside experts to help them analyze their corrections system, develop smart and cost effective solutions, and ensure public safety, are in high demand.

Conclusion

In sum, thanks in large part to the work of this committee, key resources -- the knowledge, the practical tools, and the concrete examples – are available to state and local governments determined to reduce recidivism. And, the combination of declining revenues and soaring corrections expenditures have created an imperative, unlike anything in recent memory, to cut spending on prisons and jails and

reinvest in the strategies that will have the greatest impact on public safety. Now, more than ever, is when states and counties need the right guidance and support from the federal government -- not only to help them avoid decisions that could inadvertently compromise public safety, but to ensure they capitalize fully on the information currently at their disposal.

Thank you again for getting us to this historic moment; we look forward to working with you to continuing to make our communities safer.

Mr. WOLF. Mr. Williams.

Mr. WILLIAMS. Good morning, Chairman Wolf and my good friend, Ranking Member Congressman Fattah.

And first, Mr. Chairman, I am glad and proud to see another Philadelphia boy that went to Penn State and Georgetown doing pretty well for himself.

And, again, my name is Seth Williams and I am the district attorney of the City of Philadelphia. I am indeed grateful for this opportunity, one just to be here and to share whatever ideas I can share with you, but equally important for me just to hear from other distinguished people, always the great ideas about what we can do to improve the criminal justice system, what we can do to improve public safety for all Americans.

I am very thankful because I really believe that the ideas and the goals of reentry and reinvestment are bipartisan. And I have come to learn that the hard way. And I think as you heard from other people here, my own evolution to this point was when I was an assistant district attorney for ten and a half years.

And it was my job every day to get all of my cases ready and to try all ready cases. And it was referred, and I mean not to be vulgar, but that we had a verdict orgasm, that all of our energies were focused on getting to the verdict, but very little of our energies were really in line with trying to prevent crime or trying to reduce recidivism.

As you may know, my predecessor was known as the tough cookie. And for generations of prosecutors, that was the goal. No matter what the question was, the response was to just be tough, no matter if it was from kids writing graffiti on walls to homicide. And my predecessor took great pride in being known as America's deadliest DA for having more people on death row. But Philadelphia still led the Nation in the rate of homicides caused by handguns.

So there was no cause and effect between the one stance and on the other hand reducing homicide. So I ran for district attorney originally in 2005 and what was on my tee shirts was that we had to be smart on crime, not just tough. I wish I had copyrighted that because the current attorney general for the State of California wrote a book, Smart on Crime, and I do not receive any of those royalties, Mr. Chairman. I could pay for my kids to go to school if I had.

But really that I think is what my philosophy is now as the district attorney of Philadelphia. Now, we have to be smart on crime, that my goal as the district attorney is public safety and public safety is about preventing crime.

Great members of Congressman Fattah's family would prefer that he was not shot, not that he was shot, and the district attorney's office handled the case very well. So we have to do all we can to prevent crime and to reduce recidivism.

In Pennsylvania, we have seven times the number of people today incarcerated than we did 30 years ago, but we are not seven times safer. When I came to this, as I said, I was an assistant district attorney for ten and a half years. In 2000, I was asked to create a unit called the Repeat Offenders Unit to deal with the phenomena that in Philadelphia, five percent of the defendants were committing 60 percent of the crimes.

And so I was not a trained criminologist. You know, I did very poorly in math and Algebra II when I was in high school, but I had to try to come up with ways to try to figure out, well, what can we do, what should we do. And what I learned along the way is that we have to do all that we can to reduce recidivism.

Defendants that made it into my unit were people who had been arrested 25 times or more or had three or more prior felony convictions or a total of seven convictions including misdemeanors and felonies.

What I really began to realize was that we did not do enough the first time these people were arrested. We did not do enough for them while they were on probation or parole or while they were incarcerated to ensure that they did not get arrested over and over and over again.

So that was what I meant when I ran, that I wanted to be smart on crime. And being smart on crime does not mean being soft on criminals. And, again, it is not the severity of punishment that changes behavior. It is the certainty of punishment. It is not the severity of punishment that changes behavior. It is the certainty. So I tell people this everywhere I go.

The honest truth is, I know I was not sworn in today, but I hardly ever wear my seat belt. And it is rare that when I am driving, I have police officers that drive me now, but it is rare when I drive that I drive the speed limit. But I always drive the speed limit and I always wear my seat belt when I am on a military installation. You heard I am a major in the United States Army. I always wear my seat belt. I always go the speed limit.

Why? Because if I do not, if I go one mile per hour over the speed limit, I get pulled over on a military installation. And it is not going to be a big fine, but I am going to be yelled at. I am going to be made, you know, a laughing stock by my peers. So it is not the severity of punishment. It is the certainty of punishment that changes behavior. And that is true if you are raising children, if you are trying to house break a dog, or if you are trying to change criminal behavior.

So this morning, I want to discuss how we can look to reduce corrections spending by reducing recidivism. And that way is through justice reinvestment. With our limited budgets and struggling economy, it remains a challenge to find the necessary capital to invest in programs that will improve public safety.

As district attorney of Philadelphia, I want to invest in good programs that will reduce recidivism and reduce the size of our prison population, but the money just is not there.

Justice reinvestment affords prosecutors like me, as well as other public officials, the opportunity to have a real impact in making our communities safer and saving precious taxpayers' dollars.

To that end, I have three primary points this morning. First, I want to talk about justice reinvestment generally from the perspective of a big city prosecutor. Second, I want to provide examples of the kind of public safety investments we are trying to implement in Philadelphia and how justice reinvestment would help us in that mission. And, finally, I want to address the practical importance of obtaining and using good data.

Justice reinvestment, there are three elements of justice reinvestment: one, improving public safety; two, reducing correction costs; and three, utilizing good and reliable data to inform our decisions.

Justice reinvestment teaches us that we cannot reduce correction costs merely for the sake of trying to save a few dollars. Such misguided policy will lead to more crime and increase costs. Instead we know we can reduce correction costs by reducing recidivism. And by reducing recidivism, we make our streets and neighborhoods safer.

And when we decide what programs we are going to invest in to reduce recidivism, we must always look to accurate data and research, as you heard earlier, not merely anecdote, legend, or gut feeling about things. This approach is more than a theoretical aspiration.

In these difficult economic times when our states and municipalities are struggling for dollars, it is the most responsible and economically sound approach we can undertake. Investing in the right programs and reinvesting those savings simultaneously make our communities safer and saves precious taxpayer dollars. And that is what I call being smart on crime.

As we talk about justice reinvestment and as we continue to show that this is the most effective way of saving money and making our cities and towns safer, I believe there will be more innovations, efficiencies, and data-driven approaches to public safety.

But here is the challenge. In many cases, programs that will lower recidivism rates require us to spend some money well before we can realize the greater savings. For those of us on the municipal level, it remains a challenge to receive the up-front capital to invest in the first place.

More than 90 percent of my office's budget is for salary. Therefore, I have little discretionary funds that I can merely set aside for new programs or things that I think are great. I have made the argument of our mayor, Michael Nutter, that such investments will yield Philadelphia both greater financial savings as well as safer streets and neighborhoods. Mayor Nutter and his staff understand this argument and we continue to work together to fund improvement investments.

The tough economy and the absence of Recovery Act dollars should incentivize all of us to find the necessary funding to implement public safety programs that will save taxpayer dollars.

Let's use my office as a brief case study. I have undertaken a number of initiatives, some with other public entities that have saved Philadelphia millions of dollars, made our criminal justice system far more efficient and victim friendly, and, most importantly, improved public safety.

Specifically I have revamped our charging unit. The charging unit is with the district attorney's office and I have the full discretion to determine who gets arrested and who does not get arrested and what they are charged with.

My predecessor used the charging unit as a place to punish people. If you dance too close with the boss' wife at the Christmas party, then you were sent to the charging unit where you spent maybe a year or two, 12 hour shifts in a room that had no sunlight,

and you reviewed documents that the police sent. Well, I have changed that.

And I travel. And we talk about the best practices. I went and I met with Bonnie Dumanis. I flew to San Diego. She is the district attorney for San Diego. And she takes great pride, she says, in being America's only openly gay Republican Jewish district attorney. She has a very small caucus.

And I learned a lot from her when I visited her. And she only puts the most qualified and competent prosecutors who have demonstrated great judgment in the charging unit to determine who should be charged, what they should be charged with.

And so I took a unit that had five people and I have expanded it to 15. And we are holding the police to task to ensure that we have all the proper evidence at the front end and that just makes sense. And we are seeing that now in the quality of cases that we are putting into our system. We are not just abdicating my responsibility to the judges and let the judges figure it out. We are doing that in our charging unit.

Diverting low risk and nonviolent drug offenders. In order to move thousands of nonviolent cases out of our main court system, we now process cases involving small amounts of marijuana as summary cases rather than misdemeanor trials. By this method, there are no appointment of counsel costs, no police, no necessity for witnesses. We just save a lot of money. We do not incur the lab costs.

My predecessor, one of her parting shots when I tried this, she said, oh, the Mexican drug cartels will be jumping for joy. Well, the truth of the matter is in Philadelphia, about 75,000 people get arrested every year. About ten percent of them, the most serious charge was that they possessed marijuana. And of that 7,500, more than half possessed what our General Assembly says is a de minimums amount. It is less than 30 grams. We were spending thousands of dollars, appointing attorney, passing discovery, having police wait in the courthouse, doing analysis on the drugs for thousands of dollars for what is about a $10.00 weed case.

So what we are doing now is we have more certain punishment, not severe, but more certain that the defendants are paying a $300 fine very quickly. It just makes sense. And we are reinvesting that in the criminal justice system of Philadelphia.

Our accelerated misdemeanor program. I have implemented a program that accelerates appropriate misdemeanor cases for diversion into community service with no misdemeanor trial. The city saves counsel costs and reduced police overtime costs. There were 464 such cases in the first six months of this program.

Smart rooms, I also learned this from the DA in San Diego. There about 75 percent of all their cases result in negotiated guilty pleas before the preliminary hearing, before the trial. We might not even have had seven of those cases in Philadelphia last year. We are trying to ensure that we charge the right people, that we get discovery to the defense counsel as soon as possible so they can evaluate that and review it with their client, and we give a very reasonable offer as the first offer that everyone in the system knows is the best offer anyone will get.

Zone courts. I have initiated a program in Philadelphia known as Community-Based Prosecution. Crimes occurs geographically. I am now assigning my district attorneys geographically. Police are assigned geographically. Probation officers for the most part are assigned geographically.

There are patterns of crime based on geography, time, temperature, and season. So my DAs are assigned geographically and only work in specific neighborhoods to get to understand the good, the bad, and the ugly in those neighborhoods and see the patterns of crime, know who the good people are, the clergy, the business leaders. It is making them more accountable, but it is also improving the efficiencies.

As you heard earlier, all these accomplishments are because of several reasons. One, the economy. I mean, every one in the criminal justice system has fewer dollars, so people are now willing to sit together and say what can we do to solve our problems.

Secondly, the *Philadelphia Inquirer*, the newspaper of record in our city, did a long and exhaustive study about the criminal justice system and how broken it was in Philadelphia, how Philadelphia had the lowest conviction rate of the 40 largest urban areas in America despite having had this tough cookie.

So trying to come up with ways to be smart on crime made sense economically and it makes sense in trying to reduce recidivism and assign the DAs geographically where they work with the police. All the courthouse now is assigned geographically and we are improving the efficiencies in our courthouse. And we are going to hopefully reinvest that again into preventing crime.

Prison legislation. In 2008, my office working along with Governor Rendell, Adam Gelb of Pew, and Michael Thompson and Dr. Fibello of the Council of State Governments obtained four legislative enactments designed to improve many aspects of sentencing, parole, and state and county prison practices. These legislative enactments have dramatically reduced our county prison population by more than 1,000 individuals.

Preliminary hearing changes. Working collaboratively with the Pennsylvania Supreme Court, we have issued rule changes that will no longer require the presence of civilian witnesses at preliminary hearings in certain nonviolent crimes. People who are there just to give ownership and non-permission testimony will no longer have to come. And this will help save significantly and reduce the number of preliminary hearings and police court overtime.

All told, we estimate the total cost savings of these improvements to be around $15 million just this year alone. To be sure, we could not have made these changes without the cooperation of the other agencies in Philadelphia including the courts and police. But the principles of justice reinvestment will permit me to receive a portion of that money back to use for programs that would reduce recidivism which in turn we could save even more money.

The next question is what kind of program will we invest in with such savings. And you learned when you were at Penn State and at Georgetown that generally plagiarism is bad. I believe as a district attorney plagiarism is a good thing. I try to take the best ideas from Joe Hynes in Brooklyn to Kamala Harris in San Francisco or Bonnie Dumanis in San Diego and places all in between.

And one of those is a program that the now attorney general of California created when she was a district attorney of San Francisco called Back on Track to deal with the phenomena again that many young men made a terrible decision to be drug dealers for whatever their reason. And I do not care what their reason is, it is wrong, of course.

But what we have seen in Pennsylvania is that we are filling our state prison with people that are often first-time nonviolent offenders who have sold or possessed drugs with the intent to deliver a mandatory amount. So in Pennsylvania, if you have two sugar packets worth of crack and you are found to be in possession with that with the intent to deliver or you do, in fact, sell it, you go to jail for a minimum of one year.

So we are sending people to jail for one to two years who had no prior record. When they come home, it is like an economic death sentence because they are a convicted felon. By the act of the General Assembly in Pennsylvania, you cannot get a job cleaning toilets in a nursing home if you have a felony conviction. And they were nonviolent when they went to state prison. Often now when they come home, they are violent people. And we are spending $40,000 a year.

So I say it does not matter what your partisan position is. What we are doing now just does not make sense. If you are a right-wing fiscal conservative or a person that is a bleeding heart liberal for these people who have been to prison, the fact is we are spending $40,000 a year to send these folks to state prison and there is a 73 percent recidivism rate. So it is just not making any sense.

The Back on Track Program, which I am going to change the name in Philadelphia and call it the Choice is Yours, takes these first-time nonviolent offenders and instead of spending $40,000 a year, we will spend about $5,000 a year trying to address the criminogenic needs, helping them address their drug and alcohol addiction, are literacy skills.

I learned as the chief of the Repeat Offenders Unit in Philadelphia that the number one thing people have in common that get arrested in Philadelphia is they did not finish high school. So we have addressed their literacy needs, peer relationships. And the more of those criminogenic needs we can address, we will reduce recidivism and it costs about $5,000 a year versus $40,000 and the recidivism rate is about five percent.

So many of you have talked about reentry. This is what I call pre-entry. So if they successfully complete the program, there will be a community service program component to this, if they successfully complete the program, not only do they have no conviction, they have no record. And I think this will give them the second chance that they need to move forward.

Historically the federal justice system grants, JAG, have provided much needed funding for important and innovative programs like our drug and mental health courts, technology improvements and the establishment of our local Criminal Justice Advisory Board. I know the Department of Justice already has a solicitation pending for Justice Reinvestment programs and I hope that JAG funding going forward will allow law enforcement officials to imple-

ment innovative programs that will promote public safety and reduce correction costs.

And there has been discussion earlier about the Bureau of Justice Assistance and a lot of the great work that they do in allowing local governments to serve as incubators and to gather the data that can then be replicated in other places across the country which leads me to the importance of reliable data.

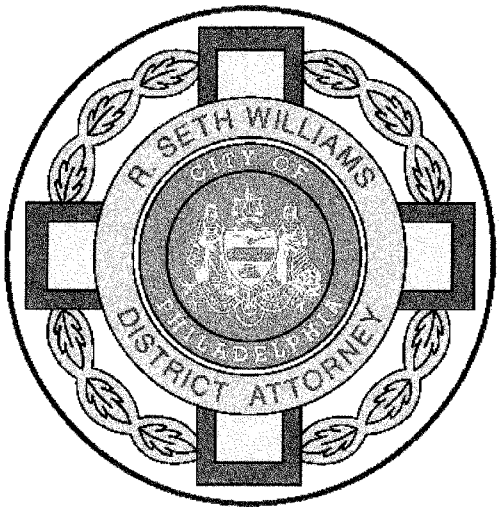
Another critical aspect of justice reinvestment, as has been mentioned earlier, is the importance it places on basing decisions on data, good data. It is fitting that I am sitting with Mr. Thompson and Mr. Gelb because both individuals worked with members of my staff and officials in the Commonwealth to develop legislation that I have spoken about earlier enacted in 2008 to among other things reduce recidivism by providing earned time credits for those offenders who complete programs likely to reduce the likelihood of re-victimization. Their work was invaluable.

There are a number of possible explanations for why this has happened, but among them is poor data. To be sure, without this legislation, the size of Pennsylvania's prison population would be higher than it is now and it can be said that at a minimum, the legislation slowed the rate of prison population growth.

All this is a long way of saying that data matters and that we have to be smart on crime and work to find not just how we can be tough or make good sound bites but to really reduce recidivism.

So, Mr. Chairman, thank you for this opportunity. There are many programs and changes that we can make to reduce recidivism, to improve the safety in our neighborhoods, and reduce corrections. I hope to work with many of you in the future to achieve these goals. And, again, I am available to any of the questions you may have.

AN ASSESSMENT OF REENTRY INITIATIVES, RECIDIVISM AND CORRECTIONS SPENDING



Testimony of R. Seth Williams
District Attorney of Philadelphia
February 11, 2011
U.S. House Appropriations Subcommittee on Commerce, Justice, Science and Related Agencies
Washington, D.C.

Good morning Chairman Wolf, Representative Fattah and other members of this subcommittee. My name is R. Seth Williams, and I am District Attorney of Philadelphia. I am indeed grateful for this opportunity, as well as to appear with the distinguished group of individuals sitting with me. I was sworn into office about 13 months ago; my predecessor had served for almost two decades. In little more than one year, we have implemented a number of critical changes and made a series of investments that will make our city safer, improve community relations, and save precious taxpayer dollars. I have often referred to many of these changes as investments in our office and our city.

This morning, I want to discuss how we can look to reduce corrections spending by reducing recidivism. And that way is through justice reinvestment. With our limited budgets and struggling economy, it remains a challenge to find the necessary capital to invest in programs that will improve public safety. As District Attorney of Philadelphia, I want to invest in good programs that will reduce recidivism and reduce the size of our prison population. But, the money just is not there. Justice reinvestment affords prosecutors like me, as well as other public officials, to have a real impact at making our communities safer and saving precious taxpayer dollars.

To that end, I have three primary points this morning. First, I want to talk about justice reinvestment generally from the perspective of a big-city district attorney. Second, I want to provide examples of the kind of public safety investments we are trying to implement in Philadelphia, and how justice reinvestment would help us in that mission. And finally, I want to address the practical importance of obtaining and using good data.

1. Justice Reinvestment

There are three concomitant elements to justice reinvestment: 1) improving public safety; 2) reducing corrections costs; and 3) utilizing good and reliable data to inform our decisions. Justice reinvestment teaches us that we cannot reduce corrections costs merely for the sake of trying to save a few dollars. Such misguided policy will lead to more crime and increased costs. Instead, we know we can reduce corrections costs by reducing recidivism—and by reducing recidivism we make our streets and neighborhoods safer. And when we decide what programs we are going to invest in to reduce recidivism, we must always look to accurate data and research, not merely anecdote or gut feelings about things.

This approach is more than a theoretical aspiration. In these difficult economic times, when our states and municipalities are struggling for dollars, it is the most responsible and economically sound approach we can undertake. Investing in the right programs and reinvesting those savings simultaneously makes our communities safer and saves precious taxpayer dollars—and that is what I call being smart on crime. As we talk about justice reinvestment and as we continue to show that this is the most effective way of saving money and making our cities and towns safer, I believe there will be more innovations, efficiencies, and data-driven approaches to public safety.

But here is the challenge. In many cases, programs that will lower the recidivism rates require us to spend some money well before we can realize greater savings. For those of us on the municipal level, it remains a challenge to receive the upfront capital to invest in the first place. More than 90% of my office's budget goes to salaries. Therefore, I have little discretionary funds that I can merely set aside. I have made the argument to my mayor, Michael Nutter, that such investments will yield Philadelphia both greater financial savings as well as safer streets and neighborhoods. Mayor Nutter and his staff understand this argument, and we continue to work together to fund important investments. The tough economy and looming absence of Recovery Act dollars should incentivize all of us to find the necessary funding to implement public safety programs that will save taxpayer dollars.

2. *Public Safety Investments in Philadelphia: Improvements Made, Money Saved, Public Safety Improving*

Let's use my office as a brief case study. I have undertaken a number of initiatives—some with other public entities—that have saved Philadelphia millions of dollars, made our criminal justice system far more efficient and victim friendly, and, most importantly, improved public safety. Specifically:

Revamping Our Charging Unit. On my first day in office, I revamped our Charging Unit, the Unit that takes the details from police arrest sheets and writes them up as criminal charges. The Charging Unit used to be seen as a place you were sent to if you did something wrong, and it was staffed with individuals who had very little criminal justice experience. This is a critical improvement because misjudgments in the decision to charge have had very real consequences, including clogging the courts and hampering the ability to get convictions. Now, the charging unit charges only what we can prove—not more and not less—and we will get it right from the start—not ask our judges to simply sort things out later.

Diverting Low Risk, Non-Violent Drug Offenders. In order to move thousands of non-violent cases out of our main court system, we now process cases involving small amounts of marijuana as summary cases rather than misdemeanor trials. By this method, there are no appointment of counsel costs, no police witnesses necessary, and no need to incur lab analysis costs. In the first six months of this program, we processed 2,318 cases as summaries rather than misdemeanors, and the penalties the offenders receive are typically the same as what they received before we implemented this program.

Accelerated Misdemeanor Program. I have also implemented a program that accelerates appropriate misdemeanor cases for diversion into community service. With no misdemeanor trial, the City saves appointed counsel costs and reduces police court overtime. There were 464 such cases in the first 6 months of this program.

SMART Rooms. This SMART program [which stands for Strategic Management ARC (Advance Review and Consolidation), Readiness and Trial] has dramatically changed the way that pleas are negotiated in cases. Pleas are offered as soon as possible in the criminal process, and they emphasize sentencing alternatives that do not involve county prison time (such as diversion, probation, alternatives to incarceration for less serious offenders and state sentences for serious offenders). This program combined with other changes in plea offers reduces police court overtime, appointed counsel fees, and pretrial detention time.

Zone Courts. This program has centralized all criminal proceedings in the Criminal Justice Center, with prosecutions assigned by geographic zones. This approach is designed to improve the quality of justice in the City, but also has the added benefit of reducing court continuances and, in turn, reducing police court overtime.

Prison Legislation. In 2008, my office, working together with Governor Rendell, Adam Gelb at PEW and both Michael Thompson and Dr. Tony Fabelo of the Council of State Governments obtained 4 legislative enactments designed to improve many aspects of sentencing, parole, and state and county prison practices. These legislative enactments have dramatically reduced our county prison population by more than 1,000 individuals.

Preliminary Hearing Changes. Working collaboratively with my staff and me, the Pennsylvania Supreme Court has issued rule changes that will no longer require the presence of civilian witnesses at preliminary hearings in certain non-violent crimes (such as burglary and car theft). We believe that these changes will significantly reduce the number of preliminary hearing listings and police court overtime.

All told, we estimate the total cost savings of these improvements to be around $15 million. To be sure, we could not have made these changes without the cooperation with other agencies in Philadelphia, including the courts and the police. But the principles of justice reinvestment would permit me to receive a portion of that money back and use it for programs that would reduce recidivism, which in turn would save even more money.

But these changes were more than just a money saver: statistics have shown that judges are dismissing fewer cases and more cases are being held for trial. In other words, more offenders are being held accountable for their crimes.

The next question is what kind of program would we invest in with such savings. Let me discuss one example.

I am working on implementing a program called The Choice Is Yours (TCY). This program, loosely based on a successful program begun by California Attorney General Kamala Harris when she was district attorney of San Francisco, recognizes that non-violent drug offenders too often cycle in and out of jail. It is a comprehensive employment and education pre-entry program that provides job training, education, access to faith based organizations, and other

important life skills as an alternative to incarceration. Those first-time non-violent offenders who have committed the crime of possession with intent to deliver narcotics—usually crack—and are subject to a state mandatory minimum sentence of at least one year will be eligible for the program. If they fail the program, they will go to the state prison; but if they succeed, their records will be expunged and they will most likely able to be productive members of our society.

We are working closely with Public/Private Ventures to implement this program, and will be receiving funding from the Lenfest Foundation. We were obligated to seek foundation money because there simply was no money available in the state budget, even though this program will save Pennsylvania substantial amounts of money. We estimate that we will target in the first year about 150 non-violent drug offenders. We are fortunate to have the support of the Lenfest Foundation, but we know that if this program is to be successful—and I believe it will be—a dedicated funding source is needed. An investment of a portion of the money we have saved the city of Philadelphia with the initiatives that I discussed earlier could serve as this dedicated funding source, and other counties could adopt the program as well.

Historically, the federal Justice Assistance Grants (JAG) have provided much needed funding for important and innovative programs, like our drug and mental health courts, technology improvements, and establishment of our local Criminal Justice Advisory Board (CJAB). I know that the Department of Justice already has a solicitation pending for justice reinvestment programs, and I hope that JAG funding going forward will allow law enforcement officials to implement innovative programs that will promote public safety and reduce corrections costs.

3. Importance of Reliable Data

Another critical aspect of justice reinvestment is the import it places on basing decisions on data—good data. It is fitting that I am sitting with Mr. Thompson and Mr. Gelb, because both individuals worked with members of my staff and officials in the Commonwealth to develop legislation enacted in 2008 to, among other things, reduce recidivism by providing earned time credits for those offenders who complete programs likely to reduce the likelihood of re-victimization. Their work was invaluable.

But something interesting and unexpected has happened since this legislation was enacted into law—the state prison population has increased from over 49,000 in December, 2008 to over 51,000 in December, 2010.

There are a number of possible explanations for why this has happened, but among them is poor data. To be sure, without this legislation, the size of Pennsylvania's prison population would be

higher than it is now, and it can be said that, at a minimum, the legislation slowed the rate of prison population growth.

With that all said, it appears that the prison population projections that were generated to accompany this legislation were too optimistic, and the projections by the Pennsylvania Department of Corrections about how many offenders could complete programming in order to receive earned time credits were too high. And unfortunately, the problem of bad data continues. Some of the current proposals that have subsequently been introduced to reduce the size of the prison population are based on incorrect numbers that miscalculate how many offenders district attorneys throughout Pennsylvania are recommending be diverted to diversionary programs.

All of this is a long way of saying that data matters.

Mr. Chairman, thank you for this opportunity. There are so many programs and changes we can make to reduce recidivism, improve the safety in our neighborhoods, and reduce corrections costs, and I hope to work with many of you in the future to achieve these goals. I would be happy to answer any questions you and the other members of this subcommittee may have.

Mr. WOLF. Well, thank you very much, all of you, for your testimony.

And before we have questions, too, I want to again thank Adam and Mike or the Pew people and the Council of State Governments for sort of pulling this together and using your own funding to do this and not really relying on the Federal Government.

EFFECTUATING REFORMS AT THE STATE LEVEL

Secondly, I appreciate all your testimony. You know, I am a conservative Republican. There is no doubt about that. And my first job out of college was given to me by Frank Rizzo. And my father was a policeman in the City of Philadelphia and the neighborhood that I come from is not a pretty—it is a—so I am not naive about this, and have been into a lot of prisons.

But I am committed to doing with and working with Mr. Fattah to see if we can honestly do something during this two years that really makes a difference. And we can maybe make Philadelphia one of the targets that we use because there has been a lot of talk about it and nothing really seems to make that much of a difference.

Parenthetically, I should not say this, but I will say this, I think one of the big decisions that Governor Rendell made and former mayor was bringing gambling to the City of Philadelphia. I think it will be a very bad, bad thing. Destination gambling is one thing, but convenience gambling where it is just right there, and I remember doing a press conference at Independence Hall criticizing Rendell when he was trying to do this, I remember, but bring gambling to the City of Philadelphia, I was the author of the National Commission on Gambling, it will be a bad, bad thing.

But that is not the subject of this hearing, but I just felt I had to get that out there. But let's see what we can honestly do working together and maybe Philadelphia can be one of the places.

One of the things I would like to do is we are going to do a letter to all the governors and maybe what we should do in the letter is put all four of your names and also telephone numbers and addresses whereby they can come to a place, one from a practical, one from an intellectual sort of place.

Secondly, I want to ask you before we have a lot of other questions, how should we do this so it is just not another hearing, another thing and it moves on? Should there be a team developed whereby you all can get the Texas people, the Kansas people, the whoever so that there is someone able to go out to a governor and really practically do something rather than just say here is the printed report?

But should there be an offer that we will put somebody together, that every governor ought to have a reentry program and recidivism person like you were talking about, and that will have an availability? Would that make sense before you think to actually have a group of people rather than saying, you know, give a speech, this is a great idea, this is important, somebody will do a magazine article on it and then it will just kind of move on?

Should there be a team put together that actually is available to go out to any governor or any district attorney, any board to sort of sit down with them? What do you all think about it?

On every question, all of you should comment. So what do you think that we should do so that we really do something rather than just talk about it?

Mr. GELB. Right. So I think you are selling yourself a little bit short here. You are doing this already right now by funding that you have provided, the Justice Department has been providing for the last couple of years and that it is formalized in the justice reinvestment initiative that you have funded.

There are a number of things going on. Mike made reference a few minutes ago to the applications that have just come in from 14, 15 states that have said we want this type of assistance. I think there are probably about another 10 or 12 that maybe did not file, did not make this deadline but that are interested and that the various among us are in contact.

We are doing presentations at the National Governors Association, at the National Conference of State Legislators, at ALEC, American Legislative Exchange Council meetings, and also the National Center for State Courts.

So I think what has been happening over the past couple of years through federal funding, through funding from Pew and other private funders is I think a pretty significant level of awareness out there that there are resources available. I will not say that this is enough. We always want to try to hit all 50 states.

But also I would say quite honestly there are a dozen or so states, maybe 15, that are not ready to do this kind of work. And I do not think you want to see the federal money and we at Pew certainly do not want to see our time and energy and resources going into states that just simply do not have the political will, do not have the data systems at this point and are not ready to engage in this process.

But between us, we are doing a pretty darn good job of covering the landscape at this point.

Mr. FATTAH. You know, Adam, I think what the chairman is saying is in addition to the $10 million and the initial work here, what more we could be doing in this area, so——

Mr. GELB. Well, let me say something quickly and then turn it to Mike and that is that the money is important. There is no question about it. It takes a lot of time and a lot of energy and a lot of people to do the justice reinvestment process at a state level. I will not go into the gory details of that, but it is a long intensive process that takes between 12 and 18 months and lots of folks involved at lots of different levels, at political levels as well as very technical data levels.

But also at this point, I think what you have heard in the testimony that the problems we are seeing in the system and getting these reforms at this point are at least, and see the results that you want to see, are at least as much problems of management as they are of policy.

I think what you have heard is that we pretty much know now what needs to be done and the tough work is about sort of how to actually get it done.

And so do not also sort of understate the importance of the leadership that you are showing by having this hearing and this continued focus on these issues because the agencies that are responsible

for actually putting these policies and evidence-based practices into place have been, in my view, long been sort of the stepchild of the criminal justice system, parole and probation agencies.

They do not get very much attention. They certainly do not get a lot of resources. And the extent to which you continue to provide focus and funding to improve those agencies is absolutely critical.

Mr. WOLF. Mark, do you have any?

Mr. EARLEY. I would agree with Adam. I think probably, too, the governors are obviously really key at the state level in this as are the attorney generals and I would not underestimate——

Mr. WOLF. Should we write every attorney general also?

Mr. EARLEY. I would. And they have a growing interest in this. I spoke at the NAAG meeting just a couple of months ago on this issue and there was a lot of interest. It is the second time I have been asked to do it in the last few years.

Mr. WOLF. We will do that. We will send the same letter maybe. If you all can sort of agree, we will wait. We were going to try to get something out today, but I think if the four of you can sort of talk and we can have something by Tuesday, but that we will do.

And maybe since both of you are in that area, you can rework it a little bit for an attorney general or a DA. The language at the outset may be a little bit different than the governor. So we will do that. We will send a copy to all of them.

Mr. EARLEY. The governors are clearly important for obvious reasons not the least of which what Adam just mentioned is that in many instances, there is some political will to do this, but it is a management issue in corrections and in government execution itself. And the governors are absolutely key to that because their agency heads will pretty much do what they give them orders to do.

The reason the AGs are so important is because when they become convinced this is a public safety issue, that is very important leadership then at the state level for people in the House and the Senate to see that this is not something that somehow we are going in and saving money at the expense of public safety because we are in a crisis. So I think it is very important that this be framed as a public safety issue.

And the one concern I have, and I was invited to speak at Stanford Law School at their Criminal Justice Center about this earlier this week, the one concern I have is I think a lot of times when the tough work has been done like over the last couple of years and putting together something like these concepts on justice reinvestment, we need to think a little more about branding it in such a way that it can translate easily into the political arena.

Justice reinvestment in my opinion is a very boring way to talk about what we are talking about. I think it really needs to be framed in public safety. It is not that I disagree with the notion. It is just at the end of the day, if I walk into an AG's office or a state senator's office or a congressman's office to talk about this, if I talk about justice reinvestment, I mean, they do not know what that means. I have to explain it. If I talk about making neighborhoods safer and saving money by doing it, that makes a lot of sense and that is how they are going to have to talk to their constituents about it.

So somewhere along the line, some thought needs to be given to how we sort of brand this larger concept. I think justice reinvestment is fine for us in this room, but as it translates out, I think it is a weak brand.

Mr. WOLF. Well, maybe when you do the letter, you could do that. I want to make sure that people know that we are not talking about opening up the prison doors and allowing dangerous people to get out on the street.

Mr. EARLEY. You would be amazed how often that is the hurdle. When I testify before state legislators, that is the hurdle I find I am having to get over in the first ten minutes because that is oftentimes the thing they have sort of pigeonholed us in as I walk in, so——

Mr. WOLF. I do not want to do that. And I do not want to be there. I just do not want to do that.

Mr. EARLEY. Right.

Mr. WOLF. So maybe as you are drafting, and we did not hear from the other two, but you can sort of put language in that makes that clear, particularly I think both to the governors and to the attorneys general.

I mean, what do we do?

Mr. THOMPSON. First of all, I think your point is dead on that we have so much of the data we need now. Now is the time of action and we need to be able to take action.

And the important point is, Mr. Earley's point, is that the focus here that we are talking about is using this research and the data to increase public safety and these strategies actually cost less than the strategies that we are employing. And so absolutely increasing public safety and less spending are messages that resonate with everything.

I like the idea very much of letters right now to the governors, to the attorneys general. I just spoke to Attorney General DeWine in Ohio, for example, about this and it was great talking to him. I also think, in effect, your counterparts in the states, the legislators who are chairing these appropriations committees and the judiciary committees, for example, or public safety committees, we can definitely make that happen. And I think that is a great idea.

Mr. WOLF. Well, if you could get us the list.

Mr. THOMPSON. We can easily generate that and we would be happy to help.

I think the second point is, and I mentioned I think earlier or at some point, I actually went down to the national convening of all the state corrections directors and corrections leadership just to sort of give them an advanced peek at the summit report. And they are just thrilled that there is this kind of interest and focus coming from this level of government on this.

And I think, convening them with the leadership in their states to actually walk through the strategies themselves and make sure they are applied, I think that is a second thing that makes a lot of sense.

To your point about making sure that there is a team of people that can respond to these requests, as Adam said thanks to what you all have made possible, that that team exists now, it is in place.

One example of something that has already happened is you had this Speaker of the House in Oklahoma, the corrections director, the chairman of the Finance Committee all going to Austin, Texas to try to learn what exactly had been done in Texas and how they can replicate that in the state.

So now you have all of these applications coming in from states which BJA is working incredibly quickly to process. But at the end of the day, there is just going to be more demand than there is supply.

And so to your point, Ranking Member, I think that we are going to need to understand that there is going to be more states and counties that need assistance that will not be able to get it this go around.

The other fact of the matter is is you have in a number of states governors that, are still just getting settled, term limits where you have just cleaned out legislatures in a lot of places, and they are just not ready to seize the moment right this minute. I think they will be better positioned next year through the convenings and the letters.

So I think that three-tiered approach of essentially writing to everybody now, a national convening, and then being immediately responsive to places that are ready and then recognizing there is going to be a new round of places that are ready next year, I think that is the combination of strategies.

Mr. WILLIAMS. Mr. Chairman, I think it would be helpful just from a practical standpoint, from a prosecutor's standpoint, each state has a District Attorneys Association and there is also nationally the National District Attorneys Association, so I can speak on behalf of the Pennsylvania District Attorneys Association.

I serve as the chairman of our Legislative Committee. And what is interesting is that there are 67 district attorneys across the state, the Commonwealth of Pennsylvania, and there is only about five that are elected that are Democrats. But really there is no blue way or red way of trying to promote public safety until one of those decides to run for governor and then things kind of change.

But when we are sitting at our table for just the district attorneys, there is almost unanimous agreement on reinvestment and what we need to do and to work together and to work collaboratively.

So with me today is Mr. Greg Roe who is the chief of my Legislation and Policy Unit. He does all the work really in lobbying, I have an assistant chief of that unit as well, doing all the lobbying on behalf of the Pennsylvania District Attorneys Association in our State Capitol in Harrisburg.

So I am sure that we would be willing to work. And as an example, we worked with our new governor, Tom Corbett, in making his application grant for the Reinvestment Grant last month and we helped him with that.

So I am sure that you could get our assistance and maybe from the National District Attorneys Association as well because as the role of the prosecutor has evolved in America—it used to be in England, they had private prosecution. You really had to use your own attorney. But here we have the public prosecution and the DA has almost unlimited authority to decide who gets prosecuted.

And we are at the fulcrum of the criminal justice system, but everybody is coming at us to help reduce prison costs and the changed policies that in many ways could put these elected people on the hot seat——

Mr. WOLF. Yeah.

Mr. WILLIAMS [continuing]. But no one wants to say, you know what, you helped us. Like in Philadelphia, we reduced the costs so far by $15 million, but no one is saying, well, some of that money needs to go back to further reducing recidivism or any of these great ideas.

So you know what? We will use that for whatever might help somebody else get reelected or that will help the potholes or something else. But it makes sense if, of some set number, some part of that money could go back into public safety. And so you will have our support.

Mr. WOLF. Okay.

Mr. WILLIAMS. I will put Greg to do whatever you need him to do for you.

Mr. WOLF. Okay. I remember in high school, they said there were 67 counties in Pennsylvania. Philadelphia was one of the counties. You thought of it as a city, but a county. Why don't we do that?

And I see Mr. Yoder came in and I think he has one of the best governors in the country, Sam Brownback. And you mentioned Kansas. Maybe we could also get two Republican governors and two Democratic governors to also do.

And maybe Mr. Fattah will sign a letter with me here so we can send it out. And then if we can get two Republicans, maybe Mitch Daniels and Sam Brownback, with two Democratic governors because I think there will be a comfort level if they are going to hear from a couple congressmen. Okay.

But if a governor contacts a governor and then maybe we can even take this and you all could help us, we could get two attorney generals to follow up two Republican and two attorney generals who are Democrats so that then you are sort of getting Republican and Democratic congressmen from here, Republican and Democratic governor, Republican and Democratic attorney general, and then you sort of take this thing out of the political.

So we will do, Mr. Fattah and I will do the letter, the one that you kind of get us to go out with, and then we will sort of work on that second level and if you can kind of help us on that, and then we will do the same thing with regard to the attorneys general.

Mr. Fattah.

Mr. FATTAH. Let me thank all of you for your testimony.

And I want to thank the chairman again for convening this hearing. But throughout a number of hearings, a number of these issues have been raised.

I will be happy to sign on to the letter. I also would like, at least for purposes of my few minutes here today, to broaden this issue because I think that the district attorney from Philadelphia talked about pre-entry. The chairman in an earlier hearing this week talked about making the incarceration itself a useful part of stopping recidivism through Prison Industries and other activities.

I think we have got to look at the broader picture here. And one of the things that we know about this whole area is that the younger a person is who becomes connected to the criminal justice system, the longer they stay in it, the more severe the crimes, and the longer the sentence. I mean, it is kind of like an education, a higher education system except in the wrong direction. So diverting people from the system earlier is critically important.

One of the things that the Federal Government is supporting, and we have a Philadelphian very involved through our former mayor, Wilson Goode, is a nationwide effort to deal with the children of people who are incarcerated. There is an almost 90 percent correlation between a parent being in jail and eventually the child becoming incarcerated at some later stage in their life.

And so intervening on behalf of these children and making sure that they get the kind of assistance that they need is important. And, Senator, you spoke about how the arrest of a parent has a disastrous effect on the family, and now we have so many women who are increasingly being incarcerated. The lack of stability in these homes creates much more challenging circumstances, so this is an area that is kind of very pre-entry, you know.

But we talk about evidence-based work in this area. This is clearly an area where a great deal of effort can be rewarded because this is a stream of eventual tenants in the incarceration system that can be diverted. And then there are other diversion efforts. It was Governor Thornburgh or Shapp who closed Camp Hill and took youthful offenders out.

My parents created a reentry group home for boys and Ronald Reagan in 1981 saluted my parents for the work that they were doing in Philadelphia helping youthful offenders not get rearrested. I know we are celebrating a big event, Reagan's 100th birthday. So it reminded me of that. But I think that it is important to note that there is work that is being done.

And we used to have things we called earmarks and one of the things that I earmarked on this committee with the chairman's help was the Youth Violence Reduction Program, which in Philadelphia meant an intensive probation effort focusing on young people who, by the empirical evidence, were either going to be the victim of a homicide or were going to kill someone based on empirical data. And this program, which required these young people to check in daily, to be seen once a week by a combination of both the probation units and other people, really had reduced recidivism, I think, in the 1,700 young people who were focused on. I think less than nine of them ended up being re-incarcerated over that two-year period.

So there are efforts. Now, this was a costly effort. There was some cost associated with it, but obviously not to the degree of what it would be if they committed a crime or ended up being incarcerated.

So there are things that we can do and I would be glad to sign on to the letter.

I want to thank all of you for the work that you are doing. This is not one of those sexy issues, but it is something that the chair-

man—and one of the proudest things I did was as one of the original co-sponsors of the Second Chance Act and pushing to have this subcommittee increase its support for that, but we are in for some tough times. There are going to be savings that have to be found in the full committee.

One of the things I was thinking about, Mr. Chairman, is maybe what we end up with is something like the Debt Commission but focused on this question of looking at and trying to get the country around a set of policies that could deal with pre-entry, could deal with what is happening.

If we know that people are incarcerated and some part of the problem is that they cannot read, then maybe one of the ways that they can earn good time or even be considered for taking advantage of some type of reentry is to learn how to read while they are in prison. We need to look at some of the facts and apply them to the problem in ways that might make some sense going forward.

Mr. WOLF. Mr. Yoder.

JUSTICE REINVESTMENT

Mr. YODER. Thank you, Mr. Chairman.

I appreciate just the opportunity to be here today. You know, Kansas has made this a priority and I notice that several of the speakers noted that fact that several years ago, when I was in the Kansas legislature in 2007, several representatives including one from a city very close to mine, took this up as a personal project. And I think we have made some progress.

Our numbers are going back up again now and that may be the result of the economy and strain that is being placed on families. And we are back in a position now where we do have a prison capacity problem. But we were able to curb the projections in prison population by focusing on lower recidivism rates. And so I think this is an area in which taxpayers get the biggest bang for their buck in terms of the future expenses.

And we focus a lot and we are going to focus on this subcommittee and we focus in legislative bodies and congressional bodies across the country about cost. And I noted that there was a note here that that is one of the main drivers of these types of policies. But certainly there is, I guess, a warmth and an understanding that we might help people not return to prison. I do not think anybody enjoys the idea of individuals in our community having to spend their life in prison. That is a very depressing, sad story.

So if we can find something that actually saves us money and puts us in a position where we can turn people back into the society as productive citizens, I would feel like that is a win-win for everyone. And I am glad to see that this subcommittee is focusing on that.

You know, as we are under the constraints at state levels and at the federal level with spending, for anyone on the panel, and this may have already been covered, but how do we, if we are not going to increase public safety spending and take it from another area, and we know that money comes directly from taxpayers, and if we are either going to go back and get more money from taxpayers to produce these reentry programs or they are going to come from other programs within government, and none of us have the

interest in raising taxes at this moment, we are trying to find ways to produce better results with less money, how do we balance these things and particularly in light of many of our beliefs and the public belief that we do need a punishment portion of the system and that if you commit a crime, you are incarcerated, you are punished, which is solely separate from rehab?

Do we reduce some of the punishment expenses or do we reduce in another area? Can we fit more people into a smaller space and reduce overhead? How do we balance the competing financial interests so that we can find the resources to invest in the types of programs that might save us money in the long run without having to go back to taxpayers and say we need more money for this or having to take it from other areas such as education or, you know, social services? So I do not know who might answer that.

Mr. WILLIAMS. I think it is important that we make a crime pyramid. So what you see as the lead story on TV every night, like the top like five percent is violent crimes. The super majority of things that we deal with are nonviolent crimes and things that we can address by changing some of our policies. We can address and reduce recidivism for them.

So you ask, you know, what is the shifting of the use of the money. Well, just some of the policies themselves on who we are going to send to prison and is our goal going to be to reducing recidivism and we have all this data that shows that we can reduce recidivism if we address this, this, and that.

And I think again and in speaking to the chairman earlier is that it is really about understanding the difference between—we have to be smart on crime, but people that are violent, that are shooting people and, you know, raping people, that is something a little bit different than the super majority of crimes are people—you know, my wife loves the movie Ocean's Eleven with, you know, Brad Pitt and George Clooney, right? So these guys spend months preparing to rob the Bellagio.

Most crimes are crimes of opportunity. Just a knucklehead sees you left your garage door open and takes your lawn mower and then goes and sells it, crimes that for the most part we can prevent and that these are people who commit the most crimes over and over. The highest rate of recidivism are people that commit low-level property crimes.

And those are the types of people that if we address their criminogenic needs, what is it about this person, where did society fail that person, what can we do to teach this person to be a barber or a cobbler or auto mechanic or some real job in the economy, that we will not see them again. So a lot of it comes with the fact that we do not need to send so many people that are nonviolent through mandatory sentences for nonviolent things to prison.

Mr. THOMPSON. Congressman, I appreciate your question on this and I did enjoy working with you when you were in Topeka in the legislature, you and Senator Rattle and a number of others in the legislature. It really was a trend setting moment when the legislature came together.

Then Senator Brownback called. His directive was I want to see recidivism cut by 50 percent in this country and I want to start in Kansas. And really coming out of that—at that point in 2007, as

you know, the legislature was looking at a growth in the prison population that was going to cost about $500 million to build and operate new prisons and the State was looking at the driver of that. And part of it, in fact, was that two out of every three people coming to prison was someone who had violated the conditions of their release and the question was, how do we actually reduce that rate of admissions.

And as you know, one of the things that you did was you set up that County Grant Program which really sort of forced counties to sort of deliver on a reduced revocation rate. And it did do that and crime dropped at the same time.

Now, what has happened in the past year or so is that funding for some of those initiatives has been cut and recidivism has gone back up among that subgroup. And so you have put your finger on it. You know, how do you in effect maintain funding for those things because it is going to cost the State more. You cannot cram any more people in. If you do, you end up with such a crowded system. Sooner or later, the federal courts become involved and then you have got a California situation on your hands. So that is not an option.

The states are running these systems as leanly as they possibly can. I mean, they get the meals down to a one day meal, the $1.99 to $1.98. There are no more savings to be had there. The only places that they can cut are in these programs that actually have some impact on recidivism.

And, again, if they are cut, then you see the prison population go up and the State is going to have to build more which will cost even more. So how do you get out of this sort of vicious circle without a net increase in spending, you know, your question, and it is one that so many states are dealing with.

This is where they need to go back, look at the data, and it is sort of our hypothesis that there are ways in which they can make further reductions in recidivism which would further slow the growth coming in.

And to your point earlier, are there a group of people for whom length of stay could be shortened in a particular case. I mean, the point was made repeatedly by this panel. What we know is not always the severity of the punishment. It is the certainty of it and knowing that it is happening. Some people we want to lock up and put away for as long as we possibly can. But there is going to be a cohort of folks that if they complete certain programs while they are incarcerated, then you can actually, if you are a nonviolent offender, go from 85 percent of your sentence to about 75 percent. That saves tens of millions of dollars.

And so I think the State needs to sort of get that data in front of them. If they do not, if they just simply take a blunt instrument and make some of the cuts, then they are going to be back in that same sort of problem that they found themselves in 2007.

Mr. EARLEY. I am really glad you asked that question, Congressman, because I think this goes back to my point a little earlier. I think that some of the way this is branded when you talk about reinvestment, people automatically thing it means an increased expenditure of money.

The great thing about almost the vast majority of the proposals in the justice reinvestment report and the things we have talked about here earlier today is that they do not require additional money. They require a re-prioritization of how current money is being spent and they beg for a willingness on the Departments of Corrections around the country to partner more fully with community-based organizations, nonprofits, be they faith based or secular, to allow them greater access to prisoners to provide the kind of programming that would cost the State literally millions upon millions of dollars to provide.

You have a great example in Kansas. Prison Fellowship has been there for almost ten years. I think it is at the Lansing unit. It was at Ellsworth. In fact, Governor Brownback has spent the night there not as an inmate, he would want you to know, but he spent the night with the inmates.

But that program has probably had close to a thousand people go through it, if not more, over the last eight years and, for the last five years, all of it has been provided free. What we needed from Kansas—I was the president of Prison Fellowship at that time—was simply the green light to be able to do the program.

Now, there are a lot of groups, small, big, medium, who are willing to do things like that, but oftentimes because of the management philosophy of the Department of Corrections, well, we cannot make that much space for programming, we cannot give the inmates that much time, we do not want the inmates to be able to spend more time with their families.

In other words, it is a way of looking at how you do corrections that has such an intense focus on security and warehousing that it cuts off opportunities for the kinds of things that really can bring about change, increased educational opportunities.

I mean, the data is there that if an inmate is willing to get more education in prison, his chances of recidivism drop drastically. If an inmate has more contact with his family in prison, the chances of recidivism drop drastically.

So much of this is not about paying for something new. It is about re-spending the money we have and, quite frankly, it will leave you with money left over because it usually is not going to cost as much as what it is costing to house those inmates. So it is not a question of more money. It is a question of a different way to approach the time that an inmate stays in the system.

Mr. GELB. Let me put some numbers on that really quickly. It costs about $79 a day to house someone in prison. That is the national average, $79 a day. We are spending an average of about $3.42 a day on probation. So it costs 23 times as much to have somebody behind the walls as it does in the community.

And I think that disparity is what is becoming compelling here in providing the sort of win-win. Often when you say stuff like this, we are going to do justice reinvestment, I think we feel a little bit like it is snake oil, like how is this possible, we are going to have this win-win, we are going to improve public safety and we are going to save money, is that too good to be true.

But when you see that kind of disparity between the numbers, it does not take too long to realize we can substantially improve the level of supervision that we are providing. We could substan-

tially improve the quality of services that are provided. You could double, triple, quadruple that $3.42 a day and really have a strong system in place that is much more likely to reduce recidivism and do it at a fraction of the cost of that prison cell.

So the math works out easy. I think we have discussed it is a lot of hard work to get there and to build the political will to make those decisions. But in Kansas and elsewhere, they have been made and I think that is why we are seeing this level of activity around the country.

Mr. FATTAH. Mr. Chairman, I think part of the problem, and my colleague is back, so I am only going to speak for a few seconds here, is that we have this myth operating, which the public somehow believes, that we lock someone up and they are going away and they are never coming back. And the truth is the exact opposite. Almost every single one of them is going to come back.

My question is, are they coming back in a circumstance in which they are going to victimize someone else and go back to prison or are they coming back in a way in which they are going to live a life that would not require them to be incarcerated again and would not have them victimize anyone else?

And that is really the only issue. And we have somehow convinced people that, well, if they do not get an education while they are in prison, if they do not have Prison Industries, if we are tough on them, then somehow they are never coming back. We have to have people understand that almost every single person, 90 plus percent, are coming right back to the neighborhoods and the communities that they left from.

And now under our present system, they are coming back more violent, more disconnected, and a large percent of them are going to be re-incarcerated, but only after victimizing someone else before they are re-incarcerated.

Mr. WOLF. Let me just say, I am going to comment on that and then go to Mr. Schiff, Mr. Fattah is right. And I hope you will tell Sam Brownback that, and we do miss him, he was a voice in this town for human rights, religious freedom that frankly we have lost. And maybe you can help fill that role because really Sam made a tremendous effort.

Sam and I were the first two persons in Congress to go to Darfur to see firsthand the genocide and he was the leading advocate in the Senate on that issue. So maybe the two republican governors can be Daniels who has done a great job and Sam Brownback and then you can find us or you can find us two democratic governors to do that.

Mr. GELB. Lots of choices.

Mr. WOLF. I have been in a lot of prisons and a lot of people you send there come out hardened, hardened criminals. It is almost like a graduate school for crime.

Also, you are finding a tremendous problem, we are not going to get into it here, a radicalization. I mean, the Saudis have been funding radical textbooks of Wahhabism going into prisons to radicalize people. And so they come out of prison.

So what Mr. Fattah said is exactly right. It is not being soft. It is being smart because if you send somebody away for ten years, give him or her no work—and this Congress unfortunately has re-

duced the prison work, the Prison Industries is literally dying on the vine—they come back to the neighborhood and then they commit a crime that is actually worse. So I think that is exactly right.

Mr. Schiff.

Mr. SCHIFF. Mr. Chairman, I could not agree more. And I think actually some of the most powerful testimony on that subject was someone who I have a long history with who was a political opponent of mine back when I ran for the state legislature. He was an incumbent assembly member, Pat Nolan, who later went to prison.

And he testified that when he got out of prison, and he was the guy who was the majority leader on the State Assembly, very smart, served a relatively short sentence compared to many others, I think it was probably around two years or less, and when he got out, he was invited to have lunch with some of his colleagues in Sacramento. They went out to a delicatessen for lunch. And he opened up the menu and there were so many choices, he was rattled. He did not know how to cope with it and he got up and left.

Now, here is someone who you would expect has every advantage in terms of being able to re-assimilate and found it difficult even to know how to operate in a restaurant. You can imagine people sent away for a long time who have no job skills, who have a substance abuse problem. The only time we should be surprised is when they do not recidivate under those circumstances.

I want to thank you for your leadership and our former colleague, Alan Mollohan, who have really always been tremendous supporters of being smart as well as being tough on crime. And I want to thank the panelists today.

During the last session, Dan Lungren and I introduced legislation on justice reinvestment. Ted Poe and I introduced legislation on Project HOPE both to try to expand those promising programs.

And, Michael and Adam, I want to thank you for all your efforts in assisting me and my staff and helping to draft that legislation.

Mark, I think you are absolutely right. Justice reinvestment is a terrible term. And, I mean, the whole concept is hard to explain. And every time I try to explain it, I struggle with it. It just sounds so wonkish and wonkish is hard to sell in the area of public safety.

But we have 170,000 people in custody in California. It is ten percent of our budget. It is bankrupting our State. It is not doing much for our federal budget either. And we have to find strategies of reducing those costs and the terrible waste of human capital.

I would like to ask you. I had an interesting meeting with our sheriff, Lee Baca, recently and we were talking about some of the changes in California and among them the possibility of the local government taking over some of the parole responsibilities.

One of the things he emphasizes, he has really begun an aggressive program of education in the jail system, people who are in the jails for a year or less, but then they often go to prison from the jail once the trial proceedings are done, et cetera. A lot of work that he has done in terms of rehabilitation or education may or may not be carried on once they leave jail.

And I would be interested to know, Seth, from your experience and your colleagues on the panel how much of a focus we should put on the jail as opposed to the prison. Is that an important period as well? Is there any coordination between jail and prison because

they are run by different agencies or is there like a big falling off of the cliff?

DRUG TREATMENT

And then the final question I have is, I think it is just insane for us not to make drug treatment available on demand for anybody in custody. To release somebody back into the population with a substance abuse problem that has been unaddressed is just crazy and cost inefficient. So I would be interested to know your sense of where are we with that. Have we conquered that problem or are there still lots of people who are on waiting lists to get into a substance abuse program in an incarcerated setting?

Mr. WILLIAMS. I will tackle it first a little bit. One, I think there is almost virtually no communication between our county prison facility and the state. And also the county facility, which you term as the jail, really serves two purposes, one for people that have county sentences, people who have less than a state sentence.

Often in Pennsylvania or in Philadelphia, the judges give people a county sentence when really the sentencing guidelines require a state sentence, but they think they are helping the defendant or something. It just adds more cost to the municipal government. But also we have people that are there that are awaiting trial, as you said.

So part of what we are trying to do to reduce our costs locally is just changing our philosophy on who needs to be incarcerated pretrial. The goal should be to ensure that they appear. And so we can use more day treatment centers. You heard about $3.00 a day for probation. Well, the day treatment centers are almost the same. But they go. They might report. They can get treatment while they are there, but you do not have the expense of the housing and all the overtime for those employees. So that is a major goal.

But really there has to be more of a focus on addressing the criminogenic needs of those that are incarcerated, as Congressman Fattah said, so that when they come out, because 90 percent of them or more are going to be coming home, to ensure that they can be better citizens. They are not going to be altar boys or anything, I am sure, for the most part, but they can be better citizens that get employed and try not to re-victimize. And that is really the challenge.

Mr. THOMPSON. I am glad, Congressman, that you mentioned the issue of the jails. You know, we talk so often about approximately 700,000 people being released from state prison each year. Eleven million releases are conducted by U.S. jails. I mean, the volume of people churning through the jail system is just extraordinary as are the challenges. The dislocation that somebody can have even in a short stay can be just as life altering as a lengthy prison sentence in some cases.

Mr. SCHIFF. You know, and I would just add to that, those that are serving the jail sentences not awaiting trial but, as you point out, that have a sentence of a year or less, they will often become part of the prison population when they recidivate. So to whatever degree we can improve the jail rehabilitation efforts, it could pay big dividends.

MENTAL HEALTH AND THE INCARCERATED

Mr. THOMPSON. And the population that I know this committee is focused on that has been particularly difficult, we talked about the Los Angeles County jails and the Nation's largest mental health hospital, and we talk about jobs now where about one in every five people in the prisons and jails have a serious mental health issue. With women, it is close to one in three having a serious mental illness.

And the lengths of stay, for example, are sort of stunning because I know I was just meeting with New York City officials, the average length of stay pretrial is about 30 days. If it is someone with mental illness, it is about 100 days, because once they get there, they act out, they have issues, and then, of course, if they are lucky we give them a supply of medications for ten days and hope that things will work out. So that absolutely needs to be a priority.

And we talk about the justice reinvestment approach, and I am thrilled that the legislation includes a focus on counties, and, in fact, a number of counties have applied because the big challenge there is they do not have the kind of data that the states have. You ask them who is coming into your facilities, how long are they staying, who is recidivating, not only can they not tell you, they do not have the information systems oftentimes to help generate that. So it is critically important.

DRUG TREATMENT

And to your point of drug treatment: obviously we have a huge demand for drug treatment for people who are coming in contact with the criminal justice system. We are not coming anywhere close to meeting that demand.

And I think what we are most concerned about is with the very few treatment slots that are available behind the walls, are they being prioritized as they most effectively can. And sometimes they are and that is through the great work of the kinds of Second Chance Act and the Justice Reinvestment Project, but what we need to do is make sure that we are putting those medium to high-risk people in those drug treatment programs and that we make sure that it is immediately before their release and then there is immediate continuity of care.

If we do not do those things, then we do not have the kind of return on the investment. And so our big focus right now is just with the limited treatment slots available, getting the absolute most out of them and that is something that this committee is helping us do.

OVERCROWDING

Mr. EARLEY. I think, Congressman, on the jail and prison connection I cannot really add anything. It has been covered pretty completely. Only to say that there is also a third category and that is people that are sentenced to the state system but end up spending maybe one or two years in the local jail basically awaiting transfer because of prison overcrowding situations.

So there does obviously need to be more connectivity because for many of them, it is all incarceration. And the earlier you start, the better chance you have got of getting a good result.

DRUG TREATMENT

On the drugs, two things. I think a couple of states are really good about requiring drug treatment for prisoners. They do good assessment up front about who should have it and they require them to get it before they can be released. So if you have not had your drug counseling, you are not going to get released. So I think that is important.

Second, what we found in our work over the last ten years or so is that even if people get it, which they should, that is not the end of the story because people who have a substance abuse problem, even who have been through the treatment in prison, are still very high-risk recidivators when they come out simply because it is easier to deal with drugs in prison when it is a very structured, secure environment and they are not as available. When you get out, within the first 30 to 60 days, it is tough.

So it is one of the reasons why we found the mentoring is so important. A guy on the street 30 to 90 days after he is released who is getting ready to go off the edge with drugs is not going to call his probation officer. He may call a friend, someone he trusts. And so we think it is really important for those coming out of prison—particularly drug offenders—to have mentors.

And, again, this is something the community can provide. They can be volunteers who are well trained. It is not something that has to be paid for by the state, but the state has to allow an interaction between these mentors and these inmates before they come out so the mentor can be there to meet them at the gate and know who they are and begin walking with them.

Mr. SCHIFF. Thank you, Mr. Chairman.

Mr. WOLF. Thank you, Mr. Schiff.

PRISON INDUSTRIES

I just have two other questions and then I will go back to Mr. Fattah or the other Members.

The Congress pretty much abolished the Prison Industries and we are going to try to do something here. I do not know what we are going to be able to do, but. I have a bill that would allow the BoP to work on products that are no longer made in the United States.

Oversimplification, but to give you an example, we no longer make televisions in the United States and, yet, I would venture to guess everyone here has a television set and some of you may have two or three or four or five. And a while back, in Lorton Reformatory, which I was involved in a program years ago at Lorton, we had had a company we thought, Emerson, that was willing to coming in. They were the last television manufacturer in the country and I think they were willing to come in. For different reasons, everyone opposed it, bad idea, competing with, the unions will not like it, et cetera, and so it never took place. In Lorton, there was basically no work.

Have any of you ever been at Lorton? It was amazing.

And the men would tell you they, I mean, they had a little license plate operation, but they just had no work. And so what we wanted to do was to bring in Emerson or a company that would make television sets that would be for sale in the United States and around the world, but they would not be competing with any American manufacturer.

And so what we are trying to do is get some language in this bill that would allow them to work on products that are no longer made in the United States—which unfortunately, if you go to Walmart, it is almost everything it seems lately. Unfortunately, our manufacturing base is eroding.

And so if you could just give us some comments about what you think about the importance of giving men and women in prison dignity with regard to work.

The second question, and maybe as you answer, you can answer the other one, too, are all of these ideas applicable to the Bureau of Prisons?

And, Mark, you were saying you were a little concerned that there was not quite the openness there. This Congress is sort of the board of directors for the Bureau of Prisons.

Mr. EARLEY. I mentioned it.

Mr. WOLF. And so what do you think or what are your recommendations with regard to the Bureau of Prisons who will be up here in a week or two or three with regard to some of the recommendations that you have? So, one, the importance of work in prisons and, two, how this would relate what you have done here with regard to the Bureau of Prisons.

Mr. EARLEY. I think with the Bureau of Prisons, I would think about it as the 51st state or the 51st system in the country and make it the model. It is a small enough population that all of the things, take the best of what is maybe out there at the state level, the best of some of the ideas that have not yet been implemented, and gradually phase them into the Bureau of Prisons so it becomes what everybody else looks to in the states as the model.

In the long run, it will save money. It is much cheaper for you to do something in one place and the states will copy it on their own as in many cases, it is not necessarily a question of more money, but doing things differently. So a lot of the stuff we have just talked about here today could just start picking and say is this true at our home place, the Bureau of Prisons. And if it is not prioritize and start phasing it in.

On work, I think, you know, the suggestion about having products made in prison that are not made in the U.S. is obviously a good suggestion insofar as it settles the objections that come from private industry. And it does give the inmates the dignity of work which everyone needs, I believe, and the values that come along with it.

The only drawback is if they are making something that is not made here in the United States. We know that one of the biggest needs of inmates when they get out is a job. It has not necessarily made them more job ready in a particular vocation. It has clearly made them more job ready in terms of the value of work and going to work. So I think it is good.

Mr. WOLF. We do deal with that. The exact product may not be made in the United States, but the technology and skill could be transfered to the manufacturing of another product.

Mr. EARLEY. Well, then I think it is a home run if you get that.

FEDERAL PRISON SYSTEM

Mr. WOLF. Anybody else? How do you think the Bureau of Prisons are doing? I mean, you may not want to be critical of your prisons and I understand that.

Mr. EARLEY. I am the one that brought it up. I do not think they are doing bad. I just think——

Mr. EARLEY [continuing]. That could be the model.

Mr. WOLF. I think we should write Mr. Fattah and I should write the Bureau of Prisons to say that what was in this report that you are not doing, you ought to be doing. That way, I do not want to get you two involved in the Bureau of Prisons. And, you know, I think they work hard. But maybe we should ask them to replicate or take whatever you have. And I think Mr. Lappin would be open to do that.

Mr. GELB. I guess I would just say quickly that I think you are absolutely right in terms of the role and the leadership position that the BoP has and the level of respect that it has in the field and that if it does something, others will definitely take note.

But in this case, it really has been the states that have been the innovators here in terms of what is happening behind the walls and in terms of the whole justice reinvestment approach and that there are a number of things from the states that could be learned at the federal level with the population of, 209,000.

And one of them that we have not really talked about today, but I would want to just throw out quickly, is the use of incentives. And there is a lot of talk about running government more like a business not only from the limited government perspective but the efficiencies and this is about results and what comes out, not just what goes in.

And I am sorry that Congressman Yoder left, but Kansas really helped pioneer this approach in saying that there is going to be a return to the parole and probation agencies if they increase their success rate and stop sending so many failures back to the system. And that model was sort of refined in Arizona the next year.

And believe it or not, California which is, I guess I have to say, a basket case in this arena and is facing federal court intervention, despite all the paralysis in California on this, they were able to pass legislation, Senate Bill 678, a couple of years ago which says exactly this, from the state to the counties, we are going to count the number of violators and revocations you had from last year and each year going forward, if you send fewer, we will tally up the savings that the state accrues by not having to lock up those failed cases and we will give you half of it back.

The Department of Finance, a totally independent agency in California, has calculated what happened just in the first year of that program, reduced prison admissions by 4,000, 4,000 fewer people coming into California Department of Corrections at an actual savings of $118 million and recommending that half of that go back

to the counties to put into substance abuse treatment and other recidivism reduction programs.

And there has been some discussion at the federal level of this type of model and similar——

Mr. WOLF. How would you apply that? What would you say to the bureau? What would the committee say to the Bureau of Prisons? How would you structure that?

Mr. GELB. So a lot of thinking would have to go into this. But one of the reasons why it may be applicable at the federal level is that you have a disconnect between the fiscal responsibility and authority here, which is that the executive branch runs the BoP and the judicial branch runs probation. And so the same dynamic exists at the counties between the states and local government, right?

If you are local government, you are paying for probation and you are having problems with somebody, why not just violate them and dump them into the state system? And they are off your caseload, they are out of your hair, and they are on somebody else's dime.

And so you have a little bit of that same dynamic here where it is one branch of government and one budget that is totally separated from the other. There is no incentive necessarily to work with those people and not send them back to prison because if they do, they are off your caseload and on to somebody else's budget.

Mr. WOLF. Well, if you have an idea, let us know, a way that would be directly incentivized.

Years ago, I once offered an amendment in the Appropriations Committee and it was overwhelmingly opposed that an agency could save money and most of the money would come back to the Federal Government, but a small percentage would stay with the agency for them to do with what they wanted to and another portion of it would be used for bonuses. And it just did not go. The appropriators said that it would be taking away the authority of the committee, et cetera.

So if you have a way of doing that in the Federal Government, we would like to hear it.

Mr. EARLEY. I think in addition to the financial incentives, just to talk about that one particular idea, a part of it has to do, too, with how people are evaluated who do certain jobs. In other words, is probation and parole evaluated based on how quickly they revoke someone or are they evaluated on, you know, declined recidivism. Same thing with those who run the institutions. Are they evaluated not just on how secure their institutions are, but on what the recidivism rate looks like of those coming out.

So once people realize that they are responsible for delivering something other than just what they are focused on today, they begin to change and exciting things begin to happen at the grass roots level which sometimes is even better than what we can think of here.

Mr. WOLF. That is a good point.

Mr. Fattah, do you have any questions?

PRE-ENTRY

Mr. FATTAH. Well, let me just conclude with the point I was trying to make earlier, and I will try to make it even more so now,

which is I think that the work that is being done is very good, but it is overwhelmed by the problem. That is to say that there is a lot more that needs to be done. And it is at pre-entry, it is at education.

This vast increase in young women going to prison is in large measure because of some of the mandatory sentencing requirements. And a lot of times, the real culprit, takes a plea, negotiates a deal, and, the young lady who was an innocent, essentially almost an innocent player in some of these drug transactions, ends up doing the mandatory sentence.

We have lots of problems here and a lot of our young people have no idea about the difference between joy riding and grand theft auto, and nobody spends the time trying to explain it to them either.

And we have a case in Pennsylvania right now with a number of judges who are on trial today for essentially taking kickbacks, $2 million in kickbacks for sending young people away to a prison that was a for-profit operation.

But the point here is the chairman is right that it is not just what we do on reentry. It is what we do while they are incarcerated. I mean, there is no reason why we should be spending $79.00 a day and have someone come in who cannot read and for them to leave not being able to read. I mean, It makes no sense and there are ways for us to figure out how to do this.

So I think that the federal system is a place where we can have an impact. Obviously we can have an impact at the states. I do think we need to get the judges in the deal because judges need to know a little bit more about the reality.

And Seth was, I think, being kind when he says that in some cases, they sentence people to the city prison versus the state prison. They are trying to help the inmate. And it is true because they know that if they send them away to state prison, you know—I mean, part of the reason why we have a million people and members of gangs in this country is a lot of recruitment takes place in prison. We are creating a set of dynamics here that just spirals out of control.

And, the idea that we should be taking someone who is shoplifting and put them in a prison with someone who is a violent repeat offender and think something good is going to come of this, it just does not make a lot of sense.

So there is a lot of work to be done, and I thank the chairman for having the hearing. I thank you for your testimony.

GANGS

Mr. WOLF. Sure. Well, I have one last question. Mr. Fattah is right. You send somebody to some of these prisons, they are going to join one of four or five gangs. They just literally join.

Mr. FATTAH. They do it for self-protection.

Mr. WOLF. They do it for self-protection.

ACCESS TO FEDERAL RECIDIVISM DATA

The last question we had had in this was, does BoP generally provide outside groups like Pew, Council of State Governments, the

Prison Fellowship with the same access to its recidivism data as state corrections systems do? Do they supply you with that?

Mr. GELB. Sir, we have not asked for it. We are a state project and we work with states, so we have not.

Mr. WOLF. Okay.

Mr. GELB. It goes with BoP on that.

Mr. THOMPSON. And, again, I was with Director Lappin just a week ago and he actually, he right after the meeting put me in touch with this research team instead.

Mr. WOLF. Okay.

Mr. THOMPSON. But they seem incredibly cooperative.

Mr. WOLF. Okay. Good.

Mr. EARLEY. Yeah. I think on that kind of stuff, they are very transparent.

Mr. WOLF. Okay. Good.

Well, I want to thank the four of you. We appreciate it very, very much.

And with that, the hearing will adjourn. Thanks.

APPENDIX I

U.S. Commission on Civil Rights, *The U.S. Department of Justice and the New Black Panther Party Litigation: An Interim Report*

U.S. Commission on Civil Rights

The U.S. Commission on Civil Rights is an independent, bipartisan agency established by Congress in 1957. It is directed to:

- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, disability, or national origin, or by reason of fraudulent practices.
- Study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.
- Appraise federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.
- Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin.
- Submit reports, findings, and recommendations to the President and Congress.
- Issue public service announcements to discourage discrimination or denial of equal protection of the laws.

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This report is available on disk in ASCII Text and Microsoft Word 2003 for persons with visual impairments. Please call (202) 376-8110.

Letter of Transmittal
The President
The President of the Senate
The Speaker of the House

Sirs:

The United States Commission on Civil Rights transmits this report, *Race Neutral Enforcement of the Law? DOJ and the New Black Panther Party Litigation: An Interim Report*, pursuant to Public Law 103-419. The purpose of the report is to examine the U.S. Department of Justice's ("DOJ" or "the Department") legal and policy rationales for dismissing a civil voter intimidation lawsuit against three of four defendants and reducing the relief requested against the fourth, despite the case being in default. Based upon the incomplete, incorrect and changing explanations offered by the Department for its actions, the Commission decided to examine whether the U.S. Department of Justice enforced voting rights in a race-neutral manner when it reversed course in the New Black Panther Party case.

The case stemmed from an incident that occurred in Philadelphia during the 2008 presidential election in which two New Black Panther Party members stood in the entrance to a polling place in full paramilitary garb and shouted racial slurs. One of the two brandished a nightstick. In December 2008, a civil case for alleged Voting Rights Act violations for intimidating or attempting to intimidate voters, poll workers and observers was initiated against the NBPP, its chairman, and the two men at the polling place. Despite the entry of a default in DOJ's favor against each of the defendants, in May 2009 the Department abruptly reversed course and dismissed charges against all but one of the defendants and reduced the original sanctions it requested against the remaining defendant, who was only enjoined from carrying a weapon at a polling place in Philadelphia until 2012.

Pursuant to its investigation, the Commission has held four public hearings, taken several depositions and attempted several others. It has attempted to work cooperatively with DOJ, but has been met with substantial resistance and only contrived cooperation for public affairs purposes. For example, though DOJ has provided thousands of documents unrelated to its decision to drastically reduce the nature and scope of the relief it sought in the NBPP case, it has repeatedly rebuffed Commission requests for key documents. While it provided witness testimony from a high-level official not at the Department during the relevant time period in question, it has directed those of its employees under subpoena with relevant, direct knowledge not to provide testimony to the Commission. It has also attempted to impose unreasonable conditions on the Commission before it will allow the deposition testimony of other Department employees and has raised questionable and sweeping privilege claims.

Two senior career attorneys who worked on the NBPP case defied DOJ's directive not to comply with the Commission's subpoenas at great personal risk to themselves. One testified after resigning his position at DOJ. The other, the former head of the Voting Section who was transferred to South Carolina, is still currently employed with DOJ. Both accused the Department of failing to enforce the voting rights laws in a race-neutral manner, an allegation denied by the current head of the Civil Rights Division who testified, but who was not at DOJ during the critical period in question.

Because the Department withheld relevant documents and relevant officials' and supervisors' witness testimony, the Commission was limited in its ability to complete a final report. As a result, the Commission issues this interim report, which was approved on November 19, 2010. Part A of the report, consisting of Chapters 1 through 5 and the appendix, was approved by a vote of 5-2. Chairman Reynolds and Commissioners Gaziano, Heriot, Kirsanow and Taylor voted in the majority. Commissioners Yaki and Melendez voted against the report. Vice Chair Thernstrom was absent and declined an opportunity to cast her vote for the body of the report and findings and recommendation at a subsequent meeting.

The Commission, by a separate 5-2 vote breaking down along the same lines, found that although its statute authorizes the Commission to subpoena witnesses and written material and requires federal agencies to cooperate fully with its investigations, its authority to seek legal recourse when the Attorney General refuses to enforce Commission subpoenas, as has occurred repeatedly during this investigation, is unclear. By a vote of 5-1-1, the Commission further found that the Department has an inherent conflict of interest when it would prefer not to cooperate fully with the Commission's investigations of DOJ's actions. In the New Black Panther Party investigation that is the subject of this report, the Department refused to comply with certain Commission requests for information concerning DOJ's enforcement actions, and it instructed its employees not to comply with the Commission's subpoenas for testimony. (Commissioner Yaki voted against; Commissioner Melendez abstained; Vice Chair Thernstrom was absent for the vote; the remaining Commissioners approved the finding).

The Commission recommended, therefore, that Congress consider amendments to the Commission's statute to address investigations in which the Attorney General and/or the Department have a conflict of interest in complying fully with the Commission's requests for information. Options might include the enactment of a statutory procedure to require the Attorney General to respond in writing to a Commission request for the appointment of a special counsel to represent it in court; a statutory provision clarifying that the Commission may hire its own counsel and proceed independently in federal court; or a conscious decision by Congress not to alter the current authority that allows the Attorney General and the Department of Justice to act against the Commission's interest without explanation (5-2; Commissioners Yaki and Melendez voted against; Vice Chair Thernstrom was absent for the vote; the remaining Commissioners approved the recommendation).

The report includes separate concurring statements submitted by Commissioners Gaziano, Heriot and Kirsanow. Commissioners Gaziano and Kirsanow joined each other's statements and Commissioner Heriot's statement. Commissioners Melendez and Yaki filed a joint dissenting statement. Vice Chair Thernstrom also submitted a dissenting statement. Finally, the report includes a joint-rebuttal statement submitted by Commissioners Kirsanow, Heriot and Gaziano.

For the Commissioners,

Gerald A. Reynolds
Chairman

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Chronology of Significant Events in United States of America v.New Black Panther Party for Self Defense et al.

- November 4, 2008

  Two members of the New Black Panther Party for Self Defense (NBPP), Jerry Jackson and Minister King Samir Shabazz, appear in front of a polling station in Philadelphia, Pennsylvania, sporting paramilitary-style gear. Mr. Shabazz carries a night stick and stands with Jackson close to the polling place entrance doors. Witnesses report that Mr. Shabazz shouts racial epithets and threatening statements.

- January 7, 2009

  The U.S. Department of Justice (DOJ) files a lawsuit for voter intimidation under § 11(b) of the Voting Rights Act against: (1) Minister King Samir Shabazz; (2) Jerry Jackson; (3) NBPP President Malik Zulu Shabazz; and (4) the New Black Panther Party for Self Defense.

- April 17, 2009

  A default is entered. DOJ is given until May 1, 2009 to file a motion for default judgment.

- April 28, 2009

  DOJ provides the NBPP defendants notice of its intent to file for default judgment.

- April 29, 2009

  Acting Deputy Assistant Attorney General Steve Rosenbaum tells trial team for the first time of his doubts about the case.

- April 30, 2009

  Rosenbaum exchanges eight e-mails with Deputy Associate Attorney General Sam Hirsch about the case. Hirsch communicates with Associate Attorney General Thomas Perrelli.

- May 1, 2009

  DOJ files a motion to extend the filing deadline for a default judgment until May 15, 2009.

- May 6, 2009

  The trial team, made up of DOJ career attorneys Christopher Coates (the Chief of the Voting Section), Robert Popper (the Deputy Chief), and trial attorneys J. Christian Adams and Spencer Fisher, submits a Remedial Memorandum to Acting Assistant Attorney General Loretta King detailing legal arguments in support of the lawsuit.

- May 7, 2009

  Rosenbaum forwards background material to Appellate Section for review of merits of the lawsuit.

- May 13, 2009

  Appellate Section Chief Diana Flynn sends her comments, along with those of fellow Appellate Section attorney Marie McElderry, to Steven Rosenbaum, copying Coates. Flynn recommends proceeding to judgment against all four defendants.

- May 15, 2009

  DOJ voluntarily dismisses three of the original four defendants. The injunctive relief against the remaining defendant is substantially reduced.

- November 18, 2009

  The U.S. Commission on Civil Rights issues subpoenas to members of the trial team, Christopher Coates and J. Christian Adams, to testify. The Department instructs Coates and Adams not to comply with the subpoena.

- May 13, 2010

  Assistant Attorney General for Civil Rights Thomas Perez has meeting with trial team members Christopher Coates, Robert Popper, and J. Christian Adams. Perez is told that the trial team believes the lawsuit was justified as to all defendants. Coates tells Perez of hostility within the Civil Rights Section to race-neutral enforcement of voting laws.

- May 14, 2010

  Thomas Perez testifies before the Commission.

- May 14, 2010

  J. Christian Adams submits resignation to the Department following Perez's testimony.

- July 6, 2010

  J. Christian Adams testifies before the Commission, claiming that Thomas Perez testified inaccurately.

- September 24, 2010

  Coates testifies before the Commission, claiming that he believes Perez's statements to the Commission do not "accurately reflect what occurred in the Panther case and do not reflect the hostile atmosphere that has existed within the Division [Civil Rights Division] for a long time against race-neutral enforcement of the Voting Rights Act."[1]

[1] Sept. 24, 2010 Hearing Before the U.S. Comm'n on Civil Rights, at 9 (Testimony of Christopher Coates), *available at* http://www.usccr.gov/NBPH/09-24-2010_NBPPhearing.pdf [hereinafter "Coates Testimony"].

INTRODUCTION

For over a year, the U.S. Commission on Civil Rights (the Commission) has been trying to determine why the U.S. Justice Department took the unusual action of dismissing voter intimidation claims against defendants who did not contest their own liability, as well as significantly scaling back the injunctive relief sought against the remaining defendant. Almost from the beginning of its inquiry, the Commission has been interested in determining what could explain this abrupt change in the trajectory of the lawsuit and what the implications might be for other law enforcement actions. The troubling testimony of misconduct provided by Justice Department whistleblowers thus far deserves careful attention; it may even explain why the Department refuses to provide information that would allow the Commission to complete its inquiry.

The facts relating to the original lawsuit, including evidence partially captured on video, have now become familiar. On Election Day 2008, two members of the New Black Panther Party for Self Defense (NBPP or the Party) appeared at a polling site in Philadelphia wearing paramilitary garb. One of the Party members carried a nightstick and witnesses reported that racially offensive and threatening statements were made to poll watchers and poll workers. These actions resulted in the U.S. Department of Justice (DOJ or the Department) filing a lawsuit against these individuals, as well as the NBPP and its leader, who was alleged to have encouraged and endorsed the intimidating conduct. Although the suit was uncontested, and a default was entered, the Department unilaterally dismissed the claims against three of the defendants and reduced the injunctive relief sought against the fourth.

The Department has argued that the change was based on a review of the totality of the circumstances and was simply a matter of career people disagreeing with other career people about the adequacy of the evidence under the pertinent law. Evidence obtained by the Commission, however, has called this version of events into serious doubt. First, two members of the NBPP trial team, Christopher Coates and J. Christian Adams, have testified before the Commission that the lawsuit was strong and that there was no legally sound reason to reverse course. Second, internal Department documents obtained by the Commission show that an independent review of the facts and legal arguments undertaken by career attorneys in the Appellate Section resulted in a recommendation that the case proceed without change. Third, evidence obtained pursuant to a Freedom of Information Act lawsuit by a third party indicates that this matter was not simply a difference of opinion between career attorneys. Instead, the record of communications within the Department appears to indicate that senior political appointees played a significant role in the decision making surrounding the lawsuit. The involvement of senior DOJ officials by itself would not be unusual, but the Department's repeated attempts to obscure the nature of their involvement and other refusals to cooperate raise questions about what the Department is trying to hide.

In their appearances before the Commission, which the Department attempted to prevent, trial team members Coates and Adams presented testimony that both raises concerns about the current enforcement policies of the Department and provides a possible explanation for

the reversal in the course of the NBPP litigation. In sum, they indicated that there is currently a conscious policy within the Department that voting rights laws should not be enforced in a race-neutral fashion. In their testimony, they gave numerous specific examples of open hostility and opposition to pursuing cases in which whites were the perceived victims and minorities the alleged wrongdoers. This testimony includes allegations that some career attorneys refuse to work on such cases; that those who have worked on such cases have been harassed and ostracized; and that some employees, including supervisory attorneys and political appointees, openly oppose race-neutral enforcement of voting rights laws.

Mr. Coates and Mr. Adams testified that this hostility to race-neutral enforcement influenced the decisionmaking process in the NBPP case. The disposition of the Panther case, Mr. Coates testified, was the result of anger on the part of acting political appointees and other attorneys arising from a "deep-seated opposition to the equal enforcement of the Voting Rights Act against racial minorities and for the protection of white voters who had been discriminated against."[2]

These serious accusations deserve to either be proven or exposed as false. While the Department has issued general statements that it enforces the laws without regard to race, these assurances do not confirm, deny, or explain the specific allegations of misconduct raised by Mr. Coates and Mr. Adams.[3] Unfortunately, the Department has thus far refused to address many of these specific claims or to provide the type of information that would allow the Commission to properly review the decision making relating to the NBPP lawsuit.

The Commission's interest arose from the notoriety of the incident and the unusual dismissal of uncontested claims. This led the Commission to issue letters to the Department dated June 16 and June 22, 2009, requesting that the Department explain the basis for its actions. This initial correspondence to the Department merely requested an explanation. It was anticipated that the Department would either explain its decision to dismiss most of the charges, or that the inquiry might spur reconsideration of the Department's actions. The Commission's longer-term investigation, begun in September 2009, resulted from the Department's initial, conclusory response that was largely unresponsive to the Commission's specific requests for information.

What was not anticipated was the extent of the Department's lack of cooperation. At various times the Department alleged it would provide no information because the matter was being reviewed by its Office of Professional Responsibility. At other times, the Department raised a wide variety of legal privileges, many of which seemed to have no relevance to the current investigation. Although the Department eventually began to provide some information, including 4,000 pages of documents, much of the information provided either did not relate

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[2] Coates Testimony, *supra* note 1, at 23.

[3] Attorney General Holder has stated, "The notion that we are enforcing any civil rights laws – voting or others – on the basis of race, ethnicity or gender is simply false." Mike Levine, *Holder Vows Equal Enforcement, Calls Allegations to Contrary "Simply False,"* FOX NEWS.COM, Oct. 4, 2010, http://politics.blogs.foxnews.com/2010/10/04/holder-vows-equal-enforcement-calls-allegations-contrary-simply-false (last visited Oct. 19, 2010). *See also* Letter from Thomas E. Perez, Asst. Atty. Gen., U.S. Dep't of Justice, to Gerald A. Reynolds, Chairman, U.S. Comm'n on Civil Rights (Aug. 11, 2010), *available at* http://www.usccr.gov/NBPH/AR-M620U_20100811_173009.pdf.

to the New Black Panther Party litigation, involved matters that were already public, or involved prior voter intimidation lawsuits. While useful, this information did not address the core of the Commission's inquiry as to why the NBPP lawsuit had been challenged internally.

The lack of cooperation by both the Department, as well as the members of the New Black Panther Party, leaves this investigation with many questions. Nonetheless, the existing evidence is useful in shedding light on many of these questions. The purpose of this report is to summarize the information collected by the Commission as of this date.

The report is in six parts. Part I examines what is known about what occurred on Election Day 2008. Part II examines the course of the lawsuit, the explanations provided by the Justice Department regarding the same, and describes the extent to which political appointees acknowledge that they played a part in the decision making. This section also examines allegations that the NAACP Legal Defense and Education Fund played a part in the decision to dismiss the lawsuit.

Part III of the report examines the accusations of Mr. Coates and Mr. Adams relating to the Department's Civil Rights Division as a whole, as well as prior claims and allegations of politicization within the Voting Rights Section. Part IV then summarizes ongoing discovery disputes between the Commission and the Department as to the proper scope of this investigation, while Part V reviews the prior enforcement of Section 11(b) cases. Lastly, Part VI presents the Commission's Interim Findings and Recommendations. A separate Appendix provides background information about the New Black Panther Party.

PART I: Factual Background

A. Election Day 2008

On November 4, 2008, two members of the New Black Panther Party for Self Defense ("the NBPP" or "the Party") positioned themselves outside the entrance to the Fairmount Street polling site located in Philadelphia, Pennsylvania. Their names are Minister King Samir Shabazz, the commander of the Philadelphia Chapter of the NBPP, and his chief of staff, Jerry Jackson.

The men were dressed in paramilitary uniforms consisting of black pants, black shirts, and black jackets, as well as combat boots and berets. Their clothing bore a NBPP insignia, as well as symbols of rank within the New Black Panther Party. The higher-ranking party member, King Samir Shabazz, carried a nightstick secured by a lanyard wrapped around his hand.[4] Mr. Shabazz was observed occasionally slapping the nightstick in his free hand in a menacing manner and pointing the weapon at people located at the polling site.[5] According to witness testimony, Jackson and Shabazz stood shoulder to shoulder in front of the entrance to the polling place and were positioned in such a way that voters had to pass within arm's length of them to gain access.[6] Shabazz and Jackson were observed to be moving in concert and at one point closed ranks to attempt to block a poll watcher from gaining access to the polling entrance.[7] Their presence was caught on video.[8]

During their time at the polling site, a series of racial epithets were directed at those at the polling location. This included statements calling poll watchers "white devils"[9] and "white supremacists and crackers" and general statements such as "fuck you cracker" "how you [sic] white mother [expletive] gonna like being ruled by a black man?;" and "now you will see what it means to be ruled by the black man, cracker."[10]

Video evidence and witness statements indicate that King Samir Shabazz was the only Party member identified as carrying a weapon, i.e., the nightstick. Yet, witnesses indicated that at no point did Jackson attempt to disassociate himself from Mr. Shabazz. Instead, Jackson and Shabazz were observed acting in concert. No witness heard Mr. Jackson request that Mr.

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[4] *See* Apr. 23, 2010 Hearing Before the U.S. Comm'n on Civil Rights, at 47 (testimony of Chris Hill), *available at* http://www.usccr.gov/NBPH/04-23-2010_NBPPhearing.pdf [hereinafter "Hill Testimony"].

[5] *See id.* at 47; Apr. 23, 2010 Hearing Before the U.S. Comm'n on Civil Rights, at 57 (testimony of Bartle Bull), *available at* http://www.usccr.gov/NBPH/04-23-2010_NBPPhearing.pdf [hereinafter "Bull Testimony"].

[6] *See* Apr. 23, 2010 Hearing Before the U.S. Comm'n on Civil Rights, at 36 (Testimony of Mike Mauro), *available at* http://www.usccr.gov/NBPH/04-23-2010_NBPPhearing.pdf [hereinafter "Mauro Testimony"]; Hill Testimony, *supra* note 4, at 50.

[7] *See* Mauro Testimony, *supra* note 6, at 36; Hill Testimony, *supra* note 4, at 47.

[8] *See* Video: YouTube.com, "Security" Patrols Stationed at Polling Places in Philly (2008), http://www.youtube.com/watch?v=neGbKHyGuHU (last visited Oct. 19, 2010); Video: YouTube.com, Fox News- Black Panthers Guarding Polling Site (2008), http://www.youtube.com/watch?v=JwNDMdrqKcc (last visited Oct. 19, 2010).

[9] *See* Mauro Testimony, *supra* note 6, at 38; Hill Testimony, *supra* note 4, at 49.

[10] *See* Memorandum from Christopher Coates et al. to Grace Chung Becker, at 6 (Dec. 22, 2008), *available at* http://www.usccr.gov/NBPH/DOJmemo_12-22-08_rerecommendedlawsuitagainstNBPP.pdf [hereinafter "J. Memo"]; *see also* Mauro Testimony, *supra* note 6, at 39; Hill Testimony, *supra* note 4, at 58.

Shabazz either put away the nightstick or cease making inflammatory and racially abusive comments.[11] The latter information is important inasmuch as Mr. Jackson was a certified poll watcher serving on behalf of the Democratic Party and presumably had training as to what constitutes improper behavior at a polling site.

The fact that Jackson and Shabazz acted in concert is consistent with other evidence relating to their relationship. As is more fully discussed in the Appendix, Jackson is the chief of staff to King Samir Shabazz. In a documentary produced by National Geographic,[12] they are often observed working together, posing with weapons, and standing within feet of each other as Shabazz makes threats of violence.

Witnesses testified before the Commission that they observed voters turned away from the polling place due to the presence of the NBPP members.[13] For example, Christopher Hill, a Republican poll watcher, testified before the Commission to the following:

> People were put off when – there were a couple of people that walked up, couple of people that drove up, and they would come to a screeching halt because it's not something you expect to see in front of a polling place. As I was standing on the corner, I had two older ladies and an older gentleman stop right next to me, ask what was going on. I said, "Truthfully, we don't really know. All we know is there's two Black Panthers here." And the lady said, "Well, we'll just come back." And so, they just walked away. I didn't see anybody other than them leave but I did see those three leave.[14]

Similar testimony was provided by Bartle Bull, who was serving on that date as part of a roving legal team on behalf of Senator John McCain's presidential campaign. Mr. Bull has extensive experience in political campaigns and a record of supporting the voting rights of minorities. Among his past activities, Mr. Bull indicated that he had served on the Lawyers' Committee for Civil Rights Under Law in Mississippi in the 1960s; was the publisher of the Village Voice; was the New York campaign manager for Senator Robert Kennedy's presidential campaign in 1968; was a campaign worker on behalf of Charles Evers' campaign for Governor of Mississippi; was the 1976 New York State campaign manager for Jimmy Carter's presidential campaign; was the 1980 chairman for the New York Democrats for Edward Kennedy; was the chairman of New York Democrats for both Mario Cuomo and

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[11] *See* Mauro Testimony, *supra* note 6, at 37; Hill Testimony, *supra* note 4, at 50.

[12] *Inside the New Black Panthers* (National Geographic television broadcast 2009).

[13] While factually relevant, proof of whether voters, or those aiding voters, were actually intimidated is legally unnecessary for purposes of establishing liability under § 11(b) of the Voting Rights Act. As noted by one legal authority who formerly served in the Civil Rights Division:

> Congress's explanations of the purposes behind Section 11(b) support the view that neither proof of *intent* to intimidate nor proof of any actual *effect* of voter intimidation must be shown to establish a violation of Section 11(b).

J. Gerald Hebert, Rattling the Vote Cage – Part 1, The Campaign Legal Center Blog, http://www.clcblog.org/blog_item-245.html (Aug. 8, 2008) (emphasis in original) (last visited Oct. 21, 2010).

[14] Hill Testimony, *supra* note 4, at 50-51.

Hugh Carey; and that he worked for Ramsey Clark's Senate campaign. As to the 2008 election, Mr. Bull indicated that he was chairman of New York Democrats for John McCain.

Mr. Bull was interviewed by Department of Justice personnel on Election Day, as well as in preparation for the lawsuit eventually filed by the Department. In a declaration prepared for use in the lawsuit he stated, in part:

> I watched the two uniformed men confront voters, and attempt to intimidate voters. They were positioned in a location that forced every voter to pass in close proximity to them. The weapon [a nightstick] was openly displayed and brandished in sight of voters.
>
> I watched the two uniformed men attempt to intimidate, and interfere with the work of other poll observers whom the uniformed men apparently believed did not share their preferences politically.
>
> In my opinion, the men created an intimidating presence at the entrance to a poll. In all of my experience in politics, in civil rights litigation, and in my efforts in the 1960's to secure the right to vote in Mississippi through participation with civil rights leaders and the Lawyers Committee for Civil Rights Under Law, I have never encountered or heard of another instance in the United States where armed and uniformed men blocked the entrance to a polling location. Their clear purpose and intent was to intimidate voters with whom they did not agree. Their views were, in part, made apparent by the uniform of the organization the two men wore and the racially charged statements they made. For example, I have heard the shorter man make a statement directed toward white poll observers that "you are about to be ruled by the black man, cracker." To me, the presence and behavior of the two uniformed men was an outrageous affront to American democracy and the rights of voters to participate in an election without fear. It would qualify as the most blatant form of voter intimidation I have encountered in my life in political campaigns in many states, even going back to the work I did in Mississippi in the 1960's. I considered their presence to be a racially motivated effort to intimidate both poll watchers aiding voters, as well as voters with whom the men did not agree.[15]

The Department trial team prepared a memorandum dated December 22, 2008 to justify the filing of a possible civil lawsuit. These memoranda are typically called "J Memos" within the Department. The J Memo summarized Department interviews of various witnesses at the polling place. Although the Department has refused to turn over to the Commission the

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[15] Declaration of Bartle Bull at 2-3, United States v. New Black Panther Party for Self-Defense et al., No. 09-0065 SD (E.D. Pa., executed Apr. 7, 2009) (not filed), *available at* http://michellemalkin.cachefly.net/michellemalkin.com/wp/wp-content/uploads/2009/05/bull-declaration_04-07-20092.pdf (last visited Oct. 21, 2010).

actual witness statements without any plausible justification,[16] the summary provided in the J Memo presumably reflects the contents of witness statements taken by the trial team[17]:

> [Republican poll watcher Mike] Mauro told us that he watched voters arrive at the polling location and exhibit manifest surprise and apprehension at the presence of the Black Panthers. Mauro also stated that he saw black voters congregate away from the entrance to the polling location and speak about the presence of the Black Panthers. He recalls them saying words to the effect of "what is going on there?" Mauro also witnessed an elderly black woman approaching the polls and exhibiting apprehension as she approached the scene. Attorney poll watcher Harry Lewis told us he saw voters appear apprehensive about approaching the polling location entrance behind the Black Panthers. We received similar information from [Republican poll watcher Joe] Fischetti. Officer Alexander said that he received a call from dispatch about reports of "voter intimidation" at the polling place. He said he saw individuals gathered within sight of the polling entrance, but they did not attempt to enter. Officer Alexander did not interview any voters while he was at the polling location.[18]

In addition to the threats and actions directed toward Republican poll watchers outside the building, the New Black Panther Party members also made threats to those serving as Republican poll watchers inside the polling site.[19] Although registered as Democrats,[20] Larry and Angela Counts, husband and wife, served as paid Republican poll watchers at the Fairmount Street location. They had performed similar services in prior elections.[21] Statements made by Republican poll workers and Department of Justice records both reflect that the Counts indicated that the NBPP members had called them "race traitors" and threatened that "if [they] stepped outside of the building, there would be hell to pay."[22] The Republican Party representatives also indicated that the Counts had told them that they took these threats seriously, and that they would not leave the building until the NBPP members had left.[23]

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[16] Witness statements are not likely to contain legal analysis or deliberations that would justify the assertion of a legal privilege precluding disclosure. Moreover, to the extent such analysis or deliberations exist, they could be redacted so as to allow the release of the witnesses' factual observations.

[17] Due to the Department's failure to provide the underlying supporting documentation, the Commission has been unable to independently verify whether the representations as to the content of witness statements contained in the J Memo are accurate.

[18] J. Memo, *supra* note 10, at 6.

[19] Under § 11(b) of the Voting Rights Act, it is illegal to threaten poll watchers. *See* 42 U.S.C. § 1973i(b).

[20] *See* Deposition of Larry Counts at 5, U.S. Comm'n on Civil Rights, Phila., Pa., Jan. 12, 2010, *available at* http://www.usccr.gov/NBPH/LarryCountsDepositionTranscript.pdf [hereinafter "L. Counts Deposition"]; Deposition of Angela Counts at 4, U.S. Comm'n on Civil Rights, Phila., Pa., Jan. 12, 2010, *available at* http://www.usccr.gov/NBPH/AngelaCountsDepositionTranscript.pdf [hereinafter A. Counts Deposition].

[21] *See* L. Counts Deposition, *supra* note 20, at 5; A. Counts Deposition, *supra* note 20, at 4.

[22] *See* Hill Testimony, *supra* note 4, at 47-48; *see also* J. Memo, *supra* note 10, at 5-6.

[23] *See* Hill Testimony, *supra* note 4, at 48.

The Department trial team summarized the evidence relating to the threats made against Mr. and Mrs. Counts in the previously-referenced J Memo. It provided:

> The events which precipitated reports about the Black Panthers' presence were statements made by [King] Samir Shabazz or [Jerry] Jackson, or both, to poll watchers for the Republican Party, and a complaint by an unspecified voter about the presence of the Black Panthers. [Republican poll worker Wayne] Byman was at 1221 Fairmount Street for a short time and saw the Black Panthers. He characterized their presence as "menacing and intimidating." Byman told us they "were the type you don't confront unless you are ready for a confrontation." He reported their presence to Joe Fischetti, an attorney poll watcher for the Republican Party. Fischetti then arrived at 1221 Fairmount Street and encountered the Black Panthers and two African-American poll watchers for the Republican Party, Larry Counts and his wife Angela Counts, who were assigned there. The Counts' had credentials entitling them to enter and remain in the polling place. Fischetti described Larry Counts as scared and worried about his safety at the polling place. Counts, according to Fischetti, huddled away from the Panthers' presence and kept looking over his shoulder as he spoke to Fischetti. Counts described to Fischetti his concern about leaving the polling place at the end of the day given the presence of the Panthers. Fischetti also described the Black Panthers' presence as alarming and said members of the local community present at the time also seemed alarmed and annoyed by the Panthers. Fischetti made a call concerning the situation to the Philadelphia Republican Party headquarters that resulted in an incident report. [Republican videographer Steve] Morse, back at headquarters, also separately received a telephone complaint from a voter concerning a man with a "billy club" at 1221 Fairmount Street.
>
> Larry and Angela Counts, the husband and wife poll workers, confirmed that they were afraid to leave the polling place until the Black Panthers had departed. This is consistent with the behavior of Counts as described to us by Fischetti. Angela Counts said she kept looking out the window at the Black Panthers with concern. She said she wondered what might occur next and if someone might "bomb the place." Lunch was brought to them, instead of them leaving to get it themselves. Larry and Angela Counts told us that when they finally departed the polling place, they first checked to see if the Black Panthers were still deployed outside. They told us that they left only because the Black Panthers had departed.[24]

The Commission took the depositions of Larry and Angela Counts on January 12, 2010, long after the claim against three NBPP defendants had been dismissed and the scope of the

[24] J. Memo, *supra* note 10, at 5-6.

injunction sought against the fourth had been reduced. Their testimony to the Commission varied greatly from what was represented in the J Memo, as well as from the statements made by other Republican poll watchers. In their sworn depositions, Mr. and Mrs. Counts stated that they had not seen members of the New Black Panther Party at the polling site.[25] In addition, both denied speaking with anyone from the Republican Party about the Panthers.[26] Further, Mr. Counts even contended that he had never been interviewed by the Justice Department.[27] His testimony on this latter point was contradicted by his wife, however, who indicated that they each had been interviewed by a team from the Federal Bureau of Investigation (FBI) and the Department of Justice several months after the election.[28]

Other than the simple passage of time, the only known change in circumstance that might have affected the testimony of Mr. and Mrs. Counts was the dismissal of the suit as to three of the defendants. The Counts live less than four miles from the Fairmont Street polling location and would likely be aware of the New Black Panther Party members' activities in Philadelphia in recent years. If the J Memo and statements by Republican poll watchers are to be believed, the Counts were threatened by, and afraid of, the New Black Panther Party members. If the Counts' subsequent testimony before the Commission is to be believed, they never saw the Black Panther Party members (who were just outside the entrance of the building), never spoke to any Republican Party representatives (who made contemporaneous reports of such conversations) and, if Mr. Counts is to be believed, never even spoke to anyone from the Department of Justice (although both the J Memo and his wife indicate that such an interview occurred).[29] These claims of ignorance contrast with the documented statements the Counts appear to have given to the Department. The extent of the newly claimed ignorance is captured in the following colloquy with Mr. Counts during his deposition:

> QUESTION: When did you become aware that [the Party] members had arrived?
>
> COUNTS: I wasn't aware. All I know when I was inside, all I saw was the news people outside, and I didn't see anybody. I didn't see anybody outside. Nobody said nothing to me about anything. I didn't go outside. All I just saw the news people outside. I don't know whether they were just there for the election, talking to the election people outside, or whatever. But as far as telling me, I didn't see nobody come inside or outside.[30]

The discrepancy between these versions of events can likely be resolved by the Department releasing the witness statements obtained from Mr. and Mrs. Counts as part of the

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[25] *See* L. Counts Deposition, *supra* note 20, at 11-12, 15; A. Counts Deposition, *supra* note 20, at 18, 25-26.
[26] *See* L. Counts Deposition, *supra* note 20, at 14, 17-18; A. Counts Deposition, *supra* note 20, at 11, 19.
[27] *See* L. Counts Deposition, *supra* note 20, at 19.
[28] *See* A. Counts Deposition, *supra* note 20, at 23-24.
[29] *See* J. Memo, *supra* note 10, at 5-6; A. Counts Deposition, *supra* note 20, at 23-24.
[30] L. Counts Deposition, *supra* note 20, at 8-9.

Department's investigation. Such records should help address whether Mr. and Mrs. Counts were intimidated or targeted by the NBPP members.

The Commission attempted to interview and take the deposition of as many people as it could locate who were identified as having been at the polling site.[31] Among them was Ronald Vann, who had served as a Democratic poll watcher with Jerry Jackson during prior elections.[32] Mr. Vann indicated that Election Day 2008 was the first time that he had noticed Jerry Jackson wearing his Panther uniform.[33] When questioned as to whether, as a certified poll watcher, he had requested that Jackson ask King Samir Shabazz to put away the nightstick or cease making inflammatory statements, he responded as follows:

> QUESTION: If you were flabbergasted – I want to make sure, and I know you kind of hinted before, if you were flabbergasted, why didn't you go up to Jerry and say, "Why don't you ask your friend to leave?"
>
> VANN: Mr. Black[wood], some things unsaid. If I said something to Jerry, it would be an argument, so I don't even want to go there. My thing is keep my mouth shut, stay out of it, and that's the best method.[34]

This statement was consistent with Mr. Vann's expressed intention that he was not going to interfere with Mr. Jackson's activities.

> QUESTION: Did anybody express concern to you about Jerry and his friend?
>
> VANN: Well, you know, I mean people was talking about all the publicity going on about the police and the news media and stuff like that and the guy with the stick.
>
> But, you know, my thing is I just listen, keep my mouth shut. This way can nobody come back and say, "Mr. Vann said this," or "Mr. Vann said that." Sometimes it's just best to keep your mouth shut.
>
> QUESTION: Did you even talk to Jerry until the ward leader got there?
>
> VANN: Kept my mouth shut.

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[31] One witness of strong interest is an unidentified white woman who is shown on video at the polling site, directly behind Mr. Jackson and Mr. Shabazz. Throughout her time on camera, she is shown speaking on a cell phone. Unfortunately, none of the witnesses interviewed by Commission staff could identify this woman.

[32] *See* Deposition of Ronald Vann at 4-5, U.S. Comm'n on Civil Rights, Phila., Pa., Jan. 11, 2010, *available at* http://www.usccr.gov/NBPH/RonaldVannDepositionTranscript.pdf [hereinafter "Vann Deposition"].

[33] *See id.* at 6.

[34] *Id.* at 19.

> QUESTION: I'm just asking. You didn't talk to Jerry at all and you didn't call the ward leader or anybody else at the Democratic Party to say, "We have a problem here"?
>
> VANN: No.[35]

Mr. Vann may have been somewhat intimidated himself.

Mr. Vann did confirm, however, that King Samir Shabazz was armed with a nightstick, and that he was observed smacking the stick in his hand.[36] While he indicated that, in his opinion, King Samir Shabazz should not have been present,[37] he also stated that he did not report him to the police.[38] Mr. Vann also indicated that the voting judge at the site did not take any steps to address the situation.[39] Finally, Mr. Vann confirmed that Mr. Jackson remains an election poll watcher for the Democratic Party to this day.[40]

Eventually the police arrived at the polling site. Their arrival and confrontation with Mr. Shabazz and Mr. Jackson were caught by a Fox News team that had arrived.[41] Mr. Shabazz was ordered to leave the site. It is unclear, however, whether he surrendered his nightstick or kept the weapon in his possession.[42] Mr. Jackson was allowed to remain on the scene. According to the J Memo of December 2008, the police believed that Mr. Jackson had a right to remain at the property due to his status as a poll watcher.[43]

The actions of the New Black Panther Party members quickly achieved notoriety due to the fact that their presence was filmed by a videographer hired by the Republican Party,[44] as well as by a Fox News team that arrived on the scene.[45] These broadcasts became widely available through television rebroadcasts and YouTube video clips on the Internet. At least in part because of this notoriety, a Department of Justice roving legal team met with several of the witnesses who observed the events of Election Day.[46] Despite a subpoena issued by the Commission, the statements taken on that date have not been provided to the Commission by the Department.

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[35] *Id.* at 21-22.
[36] *See id.* at 12, 16, 22.
[37] *See id.* at 17.
[38] *See id.* at 18.
[39] *See id.* at 24-25.
[40] *See id.* at 10. *See also* Watcher's Certificate of Jerry Jackson, Commonwealth of Pa., County of Phila., *available at* http://www.usccr.gov/NBPH/CongressionalCorrespondencereNBPP.pdf (scroll to p. 29)
[41] *See* Vann Deposition, *supra* note 32, at 23.
[42] *See* Mauro Testimony, *supra* note 6, at 41; Bull Testimony, *supra* note 5, at 58.
[43] *See* J. Memo, *supra* note 10, at 4.
[44] *See id.* at 3-4.
[45] *See* Video: YouTube.com, "Security" Patrols Stationed at Polling Places in Philly (2008), http://www.youtube.com/watch?v=neGbKHyGuHU (last visited Oct. 19, 2010); Video: YouTube.com, Fox News, Black Panthers Guarding Polling Site (2008), http://www.youtube.com/watch?v=JwNDMdrqKcc (last visited Oct. 19, 2010).
[46] *See* Mauro Testimony, *supra* note 6, at 42-43.

In addition to the Election Day interviews, trial team members J. Christian Adams and Spencer Fisher interviewed many of the witnesses who had been at the polling site. Some of these interviews were later summarized in Declarations by such witnesses as Bartle Bull, Chris Hill, Wayne Byman and Mike Mauro.[47] Regrettably, the Department has declined to provide the statements taken by the trial team to the Commission.

[47] *See* Declaration of Bartle Bull, United States v. New Black Panther Party for Self-Defense et al., No. 09-0065 (E.D. Pa., executed Mar. 31, 2009) (not filed), *available at* http://www.usccr.gov/NBPH/DeclarationofBartleBull(3-31-09).pdf; Declaration of Christopher Hill, United States v. New Black Panther Party for Self-Defense et al., No 09-0065 (E.D. Pa., executed Apr. 1, 2009) (not filed), *available at* http://www.usccr.gov/NBPH/DeclarationofChristopherHill(4-1-09).pdf; Declaration of Wayne Bynam [sic], United States v. New Black Panther Party for Self-Defense et al., No. 09-0065 SD (E.D. Pa., executed Apr. 1, 2009) (not filed), *available at* http://www.usccr.gov/NBPH/DeclarationofWayneByman(4-1-09).pdf; Declaration of Michael Mauro, United States v. New Black Panther Party for Self-Defense et al., No. 09-0065 SD (E.D. Pa., executed Mar. 31, 2009) (not filed), *available at* http://www.usccr.gov/NBPH/DeclarationofMichaelMauro(3-31-09).pdf.

PART II: The New Black Panther Party Litigation

A. History of The Lawsuit

Following its investigation of the facts and circumstances surrounding the Election Day incident, the Department of Justice trial team prepared a Justification Memorandum ("J Memo") dated December 22, 2008.[48] The memorandum was directed to the then-Acting Assistant Attorney General, Grace Chung Becker. The memorandum was signed by Christopher Coates, the Chief of the Voting Section,[49] Robert Popper, the Deputy Chief, and attorneys J. Christian Adams and Spencer R. Fisher.[50]

The memorandum summarized the evidence collected by the trial team and discussed theories of liability. It recommended a civil lawsuit pursuant to Section 11(b) of the Voting Rights Act[51] and requested authorization to file a complaint against the New Black Panther Party for Self Defense, its Chairman, Malik Zulu Shabazz, and the two NBPP members present at the Fairmount Street polling site on Election Day, King Samir Shabazz and Jerry Jackson.[52] These recommendations were approved.[53]

The lawsuit itself was filed in the U.S. District Court for the Eastern District of Pennsylvania on January 7, 2009.[54] The Complaint charged each of the four defendants with (i) intimidation of voters (Count I); (ii) attempted intimidation of voters (Count II); (iii) intimidation of individuals aiding voters (Count III); and (iv) attempted intimidation of individuals aiding voters (Count IV).

Each of the defendants was served with the Complaint, but none of the defendants filed an answer. The allegations were uncontested. The failure to file a response is particularly curious given that the Chairman of the NBPP, Malik Zulu Shabazz, is an attorney, and the

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[48] J. Memo, *supra* note 10.

[49] The legal expertise and professionalism of Mr. Coates has been recognized. He has received the Attorney General's Special Achievement and Meritorious Performance Award, the Civil Rights Division's Walter Barnett Memorial Award for Excellence in Advocacy, the Environmental Justice Award from the Georgia Environmental Organization, and the Thurgood Marshall Decade Award from the Georgia NAACP.

[50] In his testimony before the Commission, J. Christian Adams stated that "[i]t's customary practice in the Department that you do not attach your name to a document that you disagree with." July 6, 2010 Hearing Before the U.S. Comm'n on Civil Rights, at 17 (Testimony of J. Christian Adams), *available at* http://www.usccr.gov/NBPH/07-06-2010_NBPPhearing.pdf [hereinafter "Adams Testimony"],

[51] 42 U.S.C. § 1973i(b).

[52] *See* J. Memo, *supra* note 10, at 12-13.

[53] According to Assistant Attorney General Thomas Perez, the Department had considered criminal charges, but decided that a civil suit was the appropriate course. *See* May 14, 2010 Hearing Before the U.S. Comm'n on Civil Rights, at 18 (Testimony of Thomas E. Perez), *available at* http://www.usccr.gov/NBPH/05-14-2010_NBPPhearing.pdf [hereinafter "Perez Testimony"]; Statement of Thomas E. Perez, Asst. Atty. Gen., Civil Rights Div., U.S. Dep't of Justice, at 5, Before the U.S. Comm'n on Civil Rights, May 24, 2010, *available at* http://www.usccr.gov/NBPH/Perez_05-14-2010.pdf [hereinafter "Perez Statement"].

[54] Complaint, United States v. New Black Panther Party for Self-Defense et al., No. 2:09-CV-065-SD (E.D. Pa. Jan. 8, 2009), *available at* http://www.usccr.gov/NBPH/COMPLAINT-USAvNBPP.pdf.

fact that Jerry Jackson apparently had consulted with Philadelphia attorney Michael Coard.[55] Subsequent papers filed in the case reflect that Mr. Coard was copied on pleadings,[56] but he never formally entered an appearance and he did not file an answer on behalf of either Jerry Jackson or King Samir Shabazz.

Under the terms of the Federal Rules of Civil Procedure, the failure to contest allegations contained in a civil complaint has important legal ramifications. Specifically, Federal Rule of Civil Procedure 8(b)(6) provides, in part, that an "allegation – other than one relating to the amount of damages – is admitted if a responsive pleading is required and the allegation is not denied." Accordingly, the failure of the defendants to contest allegations contained in the complaint served to establish liability as to each.[57]

On April 17, 2009, the Court entered an order of default and gave the Justice Department until May 1, 2009 to file a motion for default judgment.[58] The motion for default judgment was necessary for the Department to specify the ultimate remedy it was seeking as to each of the defendants. In the Complaint, the Department indicated that it was seeking a permanent injunction that would prohibit voter intimidation at *any* polling site. As set forth in the Complaint:

> [T]he Plaintiff, United States of America, prays for an order that:
>
> * * *
>
> Permanently enjoins Defendants, their agents and successors in office, and all persons acting in concert with them, from deploying athwart the entrance to polling locations either with weapons or in the uniform of the Defendant New Black Panther Party, or both, and from

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[55] *See* Adams Testimony, *supra* note 50, at 109; *see also* Supplemental Interrogatory Responses of the Dep't of Justice at 6-7, Apr. 16, 2010 (Supplemental Response to Interrogatory No. 17), *available at* http://www.usccr.gov/NBPH/LetterfromHunttoUSCCRprovidingsupplementalresponses_04-16-10.pdf [hereinafter "Supp. Interrog. Responses"].

[56] *See* Motion for Extension of Time to Comply with This Court's Order of April 20, 2010, United States v. New Black Panther Party for Self-Defense, No. 2:09-cv-065-SD (E.D. Pa. May 1, 2009), *available at* http://www.usccr.gov/NBPH/MotionforExtensionofTimetoComplywithCourtsOrderofApril20,2009.pdf; Motion for Default Judgment, United States v. New Black Panther Party for Self-Defense, No. 2:09-cv-065-SD (E.D. Pa. May 15, 2009), *available at* http://www.usccr.gov/NBPH/MotionforDefaultJudgmentreKingSamirShabazz.pdf.

[57] *See* Greyhound Exhibitgroup, Inc. v. E.L.U.L. Realty Corp., 973 F.2d 155, 158 (2d Cir. 1992) ("... a party's default is deemed to constitute a concession of all well-pleaded allegations of liability . . ."); Steinberg v. Int'l Criminal Police Org., 672 F.2d 927, 933, n.2 (D.C. Cir. 1981) (Wright, J., concurring) ("[O]n default for failure to answer or otherwise defend, well-pleaded factual allegations of the pleading that relate to liability . . . will be taken as true."); GMA Accessories, Inc. v. BOP, LLC, 2009 WL 2634771, at *1 n.1 (S.D.N.Y. 2009) ("[B]ecause [defendant] did not respond to the Complaint, they are deemed to have admitted the factual allegations concerning liability contained therein.").

[58] Order, United States v. New Black Panther Party for Self-Defense et al., No. 2:09-CV-065-SD (E.D. Pa. Apr. 17, 2009), *available at* http://www.usccr.gov/NBPH/OrderforGovernmenttofileMotionforDefaultJudgment.pdf.

> otherwise engaging in coercing, threatening, or intimidating, behavior at polling locations during elections.[59]

On April 28, 2009, the Department provided notice to the defendants of the Department's intent to file for default judgment.[60] It was at this point, after liability had been conceded, and only days before the motion for default judgment was due, that objections to the lawsuit were raised internally within the Justice Department. Specifically, it is alleged that the Acting Assistant Attorney General for Civil Rights, Loretta King, and the Acting Deputy Assistant Attorney General for Civil Rights, Steven Rosenbaum, raised objections and began the process by which three of the defendants were to be dismissed and the remedy sought against the fourth defendant was to be substantially reduced. What follows is an examination of the process whereby the direction of the lawsuit was reversed.

Because the Department has refused to provide information relating to the internal deliberations and decisionmaking process regarding the NBPP lawsuit, the following discussion is based on a combination of the limited information obtained independently by the Commission, testimony by a former Department official regarding how these types of decisions are made, press reports, and the testimony of trial team members Christopher Coates and J. Christian Adams.

In addition to the above, this discussion also includes references to information obtained by a third party, Judicial Watch, pursuant to a lawsuit it filed against the Department pursuant to the Freedom of Information Act (FOIA).[61] As of September 20, 2010, Judicial Watch received an index from the Department that describes the number and variety of internal contacts between the trial team, the Civil Rights Division, the office of the Associate Attorney General, and others with regard to the NBPP litigation.[62]

To the extent possible, the source of each item of information is identified. While it has not been possible for the Commission to verify all of the information that will be described

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[59] Complaint at 8, United States v. New Black Panther Party for Self-Defense et al., No. 2:09-CV-065-SD (E.D. Pa. Jan. 8, 2009), *available at* http://www.usccr.gov/NBPH/COMPLAINT-USAvNBPP.pdf.

[60] *See* Letter from Spencer R. Fisher, Trial Atty., Voting Section, Civil Rights Div., U.S. Dep't of Justice, to Malik Zulu Shabazz, Chairman, New Black Panther Party for Self-Defense (Apr. 28, 2009), *available at* http://www.usccr.gov/NBPH/LettersfromSFisher2DefendantsreEntryofDefault.pdf; Letter from Spencer R. Fisher, Trial Atty., Voting Section, Civil Rights Div., U.S. Dep't of Justice, to Jerry Jackson (Apr. 28, 2009), *available at* http://www.usccr.gov/NBPH/LettersfromSFisher2DefendantsreEntryofDefault.pdf; Letter from Spencer R. Fisher, Trial Atty., Voting Section, Civil Rights Div., U.S. Dep't of Justice, to Malik Zulu Shabazz, (Apr. 28, 2009), *available at* http://www.usccr.gov/NBPH/LettersfromSFisher2DefendantsreEntryofDefault.pdf; Letter from Spencer R. Fisher, Trial Atty., Voting Section, Civil Rights Div., U.S. Dep't of Justice, to Minister King Samir Shabazz a/k/a Maurice Heath (Apr. 28, 2009), *available at* http://www.usccr.gov/NBPH/LettersfromSFisher2DefendantsreEntryofDefault.pdf.

[61] *See* Judicial Watch, Inc. v. U.S. Dep't of Justice, No. 10-CV-851-RBW (D.D.C.).

[62] As is discussed *infra* in Part IV, from the time of its initial discovery requests to the Department, the Commission has sought a similar log with regard to those documents that the Department has refused to provide based on a claim of privilege or other objection. Although Judicial Watch obtained such information pursuant to its FOIA litigation, the Department has refused to provide similar information to the Commission.

below, the allegations presented are of such seriousness that they need to be addressed and presented to the public.

According to *The Weekly Standard*, the trial team first learned of concerns by higher Department officials on April 29 when Acting Deputy Assistant Attorney General for Civil Rights, Steven Rosenbaum, informed the trial team: "I have serious doubts about the merits of the motion for entry of a default judgment and the request for injunctive relief."[63] The article indicated that Mr. Rosenbaum stated: "Most significantly, this case raises serious First Amendment issues, but the papers make no mention of the First Amendment."[64] The article further indicated that the nature of the questions raised by Mr. Rosenbaum seemed to reflect that he was "not familiar with the case and had not read the detailed memorandum accompanying the draft order."[65]

The Weekly Standard article further indicated that the trial team responded the same day with an e-mail addressing each of Mr. Rosenbaum's concerns. The article states:

> The trial team was surprised by the email and answered Rosenbaum point by point in a response sent that same evening. They corrected his misstatements and explained in answer to his First Amendment concerns, "We are not seeking to enjoin the making of those (or any) statements. We plan to introduce them as evidence to show that what happened in Philadelphia on Election Day was planned and announced in advance by the central authority of the NBPP, and was a NBPP initiative." They pointed out that dressing in military garb did not raise First Amendment concerns when "used with the brandishing of a weapon to intimidate people going to the polling station." They concluded: "We strongly believe that this is one of the clearest violations of Section 11(b) [of the Voting Rights Act] the Department has come across. There is never a good reason to bring a billy club to a polling station. If the conduct of these men, which was video recorded and broadcast nationally, does not violate Section 11(b), the statute will have little meaning going forward."[66]

In his testimony before the Commission, Mr. Adams confirmed that such an e-mail was sent,[67] but refused to confirm its contents due to alleged privileges previously raised by the

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[63] Jennifer Rubin, *Friends in High Places*, WEEKLY STANDARD, June 12, 2010, *available at* https://www.weeklystandard.com/articles/friends-high-places (last visited Oct. 21, 2010). The index produced in the *Judicial Watch* litigation reflects a series of e-mails between Mr. Rosenbaum and Mr. Coates between April 28 and April 30, 2009.

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *See* Adams Testimony, *supra* note 50, at 26. In his testimony before the Commission, Mr. Coates noted that such memo was written, but also refused to testify as to its substance. *See* Coates Testimony, *supra* note 1, at 59-62.

Department.[68] At the same time, the index provided in the *Judicial Watch* litigation shows that e-mails on these subjects were sent in the time frame described in the above article.[69]

The Weekly Standard article alleged that Mr. Coates and Mr. Popper subsequently met with Mr. Rosenbaum and Loretta King, the Acting Assistant Attorney General for Civil Rights. The article describes these meetings as "two days of shouting."[70]

In their appearance before the Commission, Mr. Coates and Mr. Adams were careful to explain that they would not go into the substance of any deliberations because of the Department's assertions of privilege.[71] Yet both witnesses did provide some corroboration for *The Weekly Standard*'s account of events:

> QUESTION: The press reports, that same article that I referenced before from *The Weekly Standard*, also indicated that, right after Mr. Rosenbaum made his objections, after a response was prepared by the trial team, there was 'two days of yelling.' Can you confirm that?
>
> ADAMS: Yelling was part of it. There were other things, profanity, tossing of papers at each other, all-nighters.
>
> QUESTION: All-nighters by the trial team?
>
> ADAMS: Correct.
>
> QUESTION: Defending their position?
>
> ADAMS: Correct.[72]

While the substance remains undisclosed, the result of these discussions is clear. The trial team was ordered to seek a continuance from the court requesting that the Department be given until May 15, 2009 for the filing of the motion for default.[73]

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[68] Both Mr. Coates and Mr. Adams testified that they were limiting their testimony due to the Department's assertion of a deliberative process privilege as to the NBPP litigation. *See* Coates Testimony, *supra* note 1, at 11; Adams Testimony, *supra* note 50, at 10-11.

[69] Civil Rights Division (CRT) Index of Withheld Documents at 2, 6-7, Judicial Watch v. Dep't of Justice, No. 10-851 (D.D.C.), Sept. 15, 2010, *available at* http://www.judicialwatch.org/files/documents/2010/jw-v-doj-vaughn-09152010.pdf (last visited Oct. 20, 2010) [hereinafter "Judicial Watch *Vaughn* Index"].

[70] *See* Rubin, *supra* note 63. The index produced in the *Judicial Watch* litigation reflects the following summary of a May 4, 2009 e-mail from Coates to King and Rosenbaum: "Section Chief [Coates] and Deputy Section Chief [Popper] [email] to their AAG [King] and DAAG [Rosenbaum] supervisors with candid statements about an earlier meeting discussing specific factual matters and clarification of issues in a draft memorandum of law for the NBPP litigation." Judicial Watch *Vaughn* Index, *supra* note 69, at 9 (Doc. No. 20(a)) (emphasis added).

[71] *See* Adams Testimony, *supra* note 50, at 10-11.

[72] *Id.* at 26-27.

[73] *See* Motion for Extension of Time to Comply with This Court's Order of April 20, 2010, United States v. New Black Panther Party for Self-Defense, No. 2:09-cv-065-SD (E.D. Pa. May 1, 2009), *available at* http://www.usccr.gov/NBPH/MotionforExtensionofTimetoComplywithCourtsOrderofApril20,2009.pdf.

On May 6, 2009, after the continuance was granted, the trial team submitted a Remedial Memorandum to Loretta King which addressed questions that had been raised regarding the basis for liability and the remedies being sought.[74] These issues had not been raised by the defendants, who had not contested the lawsuit. Instead, each of the objections had been raised by Department officials after a default had been entered.

According to *The Weekly Standard* article, disputes with the trial team continued after the May 6 Remedial Memorandum was submitted.[75] In his testimony before the Commission, Mr. Coates described the situation as follows:

> QUESTION: In a magazine article about the *New Black Panther* case, it was alleged that there were two days of yelling as arising out of the time that the case got continued. Can you tell us anything about that?
>
> COATES: Well, in terms of the – I won't tell you what the discussions were. I will tell you that I became so frustrated with the process that I did use profanity. It wasn't the first time that I've ever used profanity, but it was not my customary way of speaking to my supervisors at the Division level. And I used the "bs" word that Mr. Adams identified in his testimony. And so, to that extent, that yelling went on.
>
> QUESTION: Aside from use of profanity or not, did that arise out of the fact that it appeared that Mr. Rosenbaum had not been reading the background materials supplied by the trial team for his review?
>
> COATES: No. It arose because the accusation had been – was made against me and Mr. Popper that wasn't true.
>
> QUESTION: Can you tell us what that accusation was?
>
> COATES: No, I can't.[76]

At this stage of the debate, the four members of the career trial team, Mr. Coates, Mr. Popper, Mr. Adams and Mr. Fisher, remained unanimous in their recommendation that the case should proceed against all four defendants. Faced by this opposition, Ms. King and Mr. Rosenbaum took the extraordinary step of requesting a review by the Appellate Section of a matter that was in default.[77] In their testimony before the Commission, both Mr. Coates and

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[74] *See* Memorandum from Christopher Coates et al. to Loretta King (May 6, 2009), *available at* http://www.usccr.gov/NBPH/DOJremedialmemo_05-06-09_reproposedinjunction.pdf [hereinafter "Remedial Memo"].

[75] *See* Rubin, *supra* note 63.

[76] Coates Testimony, *supra* note 1, at 55-56. Mr. Coates testified that he would not discuss certain topics, stating: "I will not answer questions which will require me to disclose communications in the Panther case that are protected by the deliberative process privilege." *Id.* at 11.

[77] According to the index in the *Judicial Watch* litigation, Mr. Rosenbaum requested a review by the appellate section on May 7, 2009. A series of e-mails in the index indicates that Mr. Rosenbaum forwarded to Diana Flynn a copy of the draft remedial memorandum, his own analysis and opinion of the development of different

Mr. Adams indicated that they were unaware of any similar review in their tenure at the Department.[78] Other former Department officials have also indicated that they had never heard of an Appellate Section review being conducted in a case in which the defendants had conceded liability.[79]

The requested review was undertaken by career Appellate Section attorney Marie McElderry and Appellate Section chief Diana Flynn, also a career official.[80] While the Appellate Section analysis examined the strengths and weaknesses of the lawsuit, and indicated that the trial court might require proceedings in addition to the filing of a motion for a default judgment, the analysis concluded as follows:

> We can make a reasonable argument in favor of default relief against all defendants and probably should, given the unusual procedural situation. The argument may well not succeed at the default stage, and we should expect the district court to schedule further proceedings. But it would be curious not to pray for the relief on default that we would seek following trial. Thus we generally concur in Voting's recommendation to go forward, with some suggested modifications in our argument, as set out below.[81]

Despite the Appellate Section's recommendation, and the fact that six career attorneys were now on record that the case should proceed, the trial team was instructed that the lawsuit should be dismissed as to defendants Jerry Jackson, the New Black Panther Party, and its Chairman, Malik Zulu Shabazz.[82] As to the relief sought against the remaining defendant, King Samir Shabazz, the Department substantially limited the injunctive relief sought. Whereas the complaint had sought a permanent injunction with a potentially national scope, the final request sought only an injunction through November 15, 2012 precluding King Samir Shabazz from displaying a weapon within 100 feet of any polling location in Philadelphia.[83]

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approaches under consideration, the trial team's analysis and detailed responses to questions on the merits, as well as draft pleadings, witness statements, and legal research.

[78] *See* Coates Testimony, *supra* note 1, at 52; Adams Testimony, *supra* note 50, at 34.

[79] *See* Statement of Gregory G. Katsas at 10, Apr. 23, 2010, *available at* http://www.usccr.gov/NBPH/Katsas_04-23-2010.pdf [hereinafter "Katsas Statement"]; Affidavit of Hans A. von Spakovsky at 2, July 15, 2010, *available at* http://www.usccr.gov/NBPH/vonSpakovskyAffidavit_07-15-10.pdf [hereinafter "von Spakovsky Affidavit"].

[80] E-mail from Diana K. Flynn to Steven Rosenbaum (May 13, 2009), *available at* http://www.usccr.gov/NBPH/DOJcomments_05-13-09_reproposeddefaultjudgment.pdf.

[81] *Id.*

[82] *Cf.* Jerry Markon & Krissah Thompson, *Dispute Over New Black Panthers Case Causes Deep Divisions*, WASH. POST, Oct. 22, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/10/22/AR2010102203982.html (last visited Nov. 9, 2010) ("Legal experts have called the reversal exceedingly rare, especially because the defendants had not contested the charges.").

[83] *See* Order, United States v. New Black Panther Party for Self-Defense et al., No. 2:09-cv-065-SD (E.D. Pa. May 18, 2009), *available at* http://www.usccr.gov/NBPH/OrdergrantingMotionforDefaultJudgmentandenjoinderreKingSamirShabazz.pdf (granting motion for default judgment and injunction).

Original Relief Sought	**Relief Ultimately Obtained**
An order that: "Permanently enjoins Defendants, their agents and successors in office, and all persons acting in concert with them, from deploying athwart the entrance to polling locations either with weapons or in the uniform of the Defendant New Black Panther Party, or both, and from otherwise engaging in coercing, threatening, or intimidating, behavior at polling locations during elections." (Complaint, United States v. New Black Panther Party for Self-Defense et al., entered Jan. 8, 2009)	An order providing that: "Defendant Minister King Samir Shabazz is enjoined from displaying a weapon within 100 feet of any open polling location on any election day in Philadelphia, Pennsylvania, or from otherwise engaging in coercing, threatening, or intimidating behavior in violation of Section 11(b) of the Voting Rights Act." And that the Court only "maintain jurisdiction over this matter until November 15, 2012." (Proposed Default Judgment Order, United States v. Minister King Shamir Shabazz, entered May 15, 2009)

B. The Department's Explanations

In his testimony before the Commission, Assistant Attorney General for Civil Rights Thomas Perez acknowledged that no new facts had come to light between the time the case had been filed and the time it was dismissed.[84] That is to say, the six career line attorneys, and those who overruled them, were looking at the same set of facts.

In explaining the Department's reversal, Mr. Perez testified that the decision to overrule the position of the six line attorneys was "based on a review of the totality of the circumstances,"[85] and simply represented the "kind of robust interaction [that] is part of the daily fabric of the Department of Justice."[86] He stated: "[R]easonable people can look at the same set of facts and reach different conclusions. Career people can disagree with career people. And that's precisely what happened in this case."[87]

In his testimony before the Commission, Christopher Coates disagreed:

> . . . I have always been flabbergasted that anyone would make such a claim regarding the *New Black Panther* case. People can have

[84] *See* Perez Testimony, *supra* note 53, at 21-22, 27, 53; *see also* Adams Testimony, *supra* note 50, at 106-07.
[85] Perez Testimony, *supra* note 53, at 23.
[86] *Id.* at 25.
[87] *Id.* at 27.

> differences about a number of things, but we had eyewitness testimony.
>
> We had videotape that there were two people standing in uniform in front of a polling place in violation of the distance required by Pennsylvania law, as I recall, for people to be away from the polling place. One of them had a weapon.
>
> They were hurling racial slurs, including to white voters, "How do you think you're going to feel with a black man ruling over you?" at the voters. They were standing in close proximity to each other to block the ingress into the polling place.
>
> The 11(b) of the Voting Rights Act prohibits attempts to intimidate or coerce or threaten. It doesn't even require that the actual intimidation or coercion or threat occurred. It requires that no number of people be intimidated but just that there was an attempt in intimidation.
>
> And I've never been able to understand how anyone could accuse us of not having a basis in law and fact for bringing a straightforward 11(b) claim in circumstances where the evidence was so compelling.[88]

This disagreement as to the merits of the lawsuit requires an examination of the reasons the Department has given as to why on the course of the litigation was reversed. The Department was not required to explain to the court why it decided to dismiss its claims against Defendants Jerry Jackson, the New Black Panther Party, and its Chairman, Malik Zulu Shabazz. Nonetheless, internal Department memoranda and the testimony of Assistant Attorney General Thomas Perez provide an indication of the Department's concerns and reasoning. These are examined in turn.

i. First Amendment Concerns

The existing record reflects that Mr. Rosenbaum originally raised First Amendment concerns with the trial team after a default had been entered.[89] These concerns were responded to, at length, in both the Remedial Memo and in the Appellate Section review.[90] In both instances, the career attorneys argued that any First Amendment concerns could be successfully addressed and would not preclude a default judgment.

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[88] Coates Testimony, *supra* note 1, at 57-58.

[89] *See* Rubin, *supra* note 63; Adams Testimony, *supra* note 50, at 24-25.

[90] This issue may also have been addressed in an e-mail by the trial team prepared in response to the doubts originally expressed by Mr. Rosenbaum on April 29, 2009. The Vaughn index shows a series of e-mails on those dates between Mr. Rosenbaum and Mr. Coates and this was the subject of testimony by Mr. Adams and Mr. Coates that trial team members worked all night to prepare a response. *See* Adams Testimony, *supra* note 50, at 26-27; Coates Testimony, *supra* note 1, at 60.

As to the scope of the initial injunction sought by the Department, the potential relief sought in the Complaint focused on conduct not protected by the First Amendment. The proposed restrictions were directed at the behavior of the NBPP members, with no direct prohibition on speech. Even if the scope of the injunction was a matter of legitimate debate, however, such concerns would not have justified the dismissal of all claims against three of the defendants. Instead, the same limited restrictions approved by the Department as to King Samir Shabazz could have been applied to the other defendants.

Gregory Katsas, former Acting Associate Attorney General who once supervised the Civil Rights Division, explained in his prepared testimony submitted to the Commission why he believes there were no serious First Amendment concerns:

> The alleged conduct of Minister Shabazz and Mr. Jackson was not constitutionally protected. To begin with, the First Amendment does not protect intimidation in any context, even if carried out through speech or expressive conduct. See *Virginia* v. *Black*, 538 U.S. 343, 360 (2003). Moreover, to prevent against voter intimidation, states may prohibit even pure political speech around entrances to polling places. See *Burson v. Freeman*, 504 U.S. 191, 196-210 (1992) (plurality opinion) (upholding ban on such speech within 100 feet of entrance); *id* at 213 (Scalia, J., concurring in the judgment) ("restrictions on speech around polling places on Election Day are as venerable a part of the American tradition as the secret ballot").
>
> The alleged conduct of Malik Shabazz and the New Black Panther Party, in directing and ratifying the conduct of Minister Shabazz and Mr. Jackson, also was unprotected. Even in cases involving some activity protected by the First Amendment, a supervisor "may be held liable for unlawful conduct that he himself authorized or incited." *NAACP* v. *Claiburne Hardware Co.*, 458 U.S. 886, 920 n.56 (1982). And a political party or advocacy group, "like any other organization—of course may be held responsible for the acts of its agents throughout the country that are undertaken within the scope of their actual or apparent authority." *Id.* at 930.[91]
>
> Finally, the relief requested would have raised no significant First Amendment problems. In its original complaint, DOJ asked the court for an order that "[p]ermanently enjoins Defendants, their agents and successors in office, and all persons acting in concert with them, from deploying athwart the entrance to polling locations either with weapons or in the uniform of the Defendant New Black Panther Party, or both, and from otherwise engaging in coercing, threatening, or intimidating, behavior at polling locations during elections."[92] The first clause describes the specific unlawful conduct committed or authorized by the defendants, and the second clause describes

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[91] See *infra* Part II(B)(iii) for a discussion of the NBPP's joint liability for the actions of King Samir Shabazz and Jerry Jackson.

[92] Complaint at 8, United States v. New Black Panther Party for Self-Defense et al., No. 2:09-CV-065-SD (E.D. Pa. Jan. 8, 2009), *available at* http://www.usccr.gov/NBPH/COMPLAINT-USAvNBPP.pdf.

> more generally the conduct of intimidating voters "at polling locations during elections." Neither clause plausibly encompasses constitutionally protected conduct.[93]

During his live testimony before the Commission, Mr. Katsas defended and elaborated on these views.[94]

The Department's concern about the First Amendment rights of § 11(b) defendants also appears to be somewhat inconsistent. On the current record, it was Mr. Rosenbaum who raised purported concerns about the First Amendment rights of the New Black Panther defendants. Yet, several years earlier, Mr. Rosenbaum was part of the trial team that filed an 11(b) suit in the case *United States of America v. North Carolina Republican Party, et al.*, 91-161 CIO-5-F (E.D.N.C.). In that suit, the Department sought to preclude both the North Carolina Republican Party and the Helms for Senate Committee from mailing misleading postcards, a type of conduct more closely aligned with the First Amendment than wielding a nightstick at a polling site.

ii. Jerry Jackson

The information collected by the trial team evidenced a long-established relationship between King Samir Shabazz and Mr. Jackson. Their depiction as commander and subordinate, as captured in a National Geographic documentary (discussed more fully in the Appendix), is a matter of public record. The two are shown acting in tandem, in uniform, posing with firearms and issuing threats of violence. The actions and relationship of the pair in the documentary are analogous to what occurred at the polling place on Fairmount Street. In both instances, Mr. Jackson and King Samir Shabazz move in concert, as part of a team.

The nature of their joint liability is reflected in the fact that at no point in the internal memoranda of the Department was a distinction drawn between the potential liability of King Samir Shabazz and that of Mr. Jackson. The J Memo and the Remedial Memo prepared by the trial team, as well as the review prepared by the Appellate Section, did not even raise, let alone address, the issue. For these career attorneys, Jackson and Shabazz apparently were never regarded as anything but equally liable. Indeed, on the existing record, neither Mr. Rosenbaum nor Ms. King appears to have sought any legal analysis on the issue prior to the decision to dismiss the claims against Mr. Jackson.

In his written statement submitted as part of his testimony before the Commission, Assistant Attorney General Thomas Perez indicated that the basis of dismissing the claim against Mr. Jackson was as follows:

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[93] Katsas Statement, *supra* note 79, at 11-12.

[94] *See* Apr. 23, 2010 Hearing Before the U.S. Comm'n on Civil Rights, at 174-176 (Testimony of Gregory Katsas), *available at* http://www.usccr.gov/NBPH/04-23-2010_NBPPhearing.pdf [hereinafter "Katsas Testimony"].

> The Department concluded that the allegations in the complaint against Jerry Jackson, the other defendant present at the Philadelphia polling place, did not have sufficient evidentiary support. The Department's determination was based on the totality of the evidence. In reaching this conclusion, the Department placed significant weight on the response of the law enforcement first responders to the Philadelphia polling place on Election Day. A report of the local police officer who responded to the scene, which is included in the Department's production to the Commission, indicates that the officer interviewed Mr. Jackson, confirmed that he in fact was a certified poll watcher, and concluded that his actions did not warrant his removal from the premises.[95]

The Department's decision to place "substantial weight" on the judgment of the local police officer is curious. First, if the police officer's actions were determinative, the case against King Samir Shabazz should have been dismissed as well. The police officer did not arrest Mr. Shabazz. Instead, Mr. Shabazz was simply directed to leave the premises. Under the rationale relied upon by Mr. Perez, the failure of the police to take formal action against Mr. Shabazz should have resulted in the dismissal of the claims against him, as was done with Mr. Jackson.

Second, local police officers are not charged with enforcement of the federal Voting Rights Act. The distinction between local law enforcement and the Department's enforcement of federal laws was captured in the testimony of trial team members Christopher Coates and J. Christian Adams before the Commission.

Mr. Coates testified as follows:

> The primary reason cited by the Division for not obtaining injunctive relief against Black Panther Jerry Jackson, who stood at the Philadelphia polling place in uniform with fellow Panther King Samir Shabazz but without a weapon, was that a Philadelphia police officer came to the polling place, made the determination that King Samir Shabazz had to leave the polling place, but that Black Panther Jackson could stay because he was a certified Democratic poll watcher.
>
> During my 13 and a half years in the Voting Section, I cannot remember another situation where a decision not to file a Voting Rights Act case, much less to dismiss pending claims and parties, as happened in the *New Black Panther Party* case, was made, in whole or in part, on a determination of a local police officer.
>
> In my experience, officials in the Voting Section and the Civil Rights Division always reserved for themselves, and correctly so, the determination as to what behavior constitutes a violation of federal law

[95] Perez Statement, *supra* note 53, at 8; *see also* Perez Testimony, *supra* note 53, at 69-71.

> and what does not. One of the reasons for this federal preemption of the determination of what constitutes a Voting Rights Act violation is that local police officers are normally not trained in what constitutes a Voting Rights Act violation.[96]

Mr. Adams added the following:

> QUESTION: Okay. Okay. The police, I believe, when they came and told the – Mr. Shabazz, the one with the billy club, that he had to vacate the premises, they let Mr. Jackson stay. Does the fact that Mr. Jackson was a poll-watcher have any bearing on his liability?
>
> ADAMS: No. Thank heavens, no. I mean, otherwise, you would appoint as poll-watchers the biggest and baddest thugs you have and give them credentials to roam about the community, nor does the fact that the police let him stay have anything to do with it.
>
> The federal government has never taken the position, and hopefully never will, that local law enforcement officials can opine on matters of federal law. We have entirely different laws that we enforce.
>
> QUESTION: Okay.
>
> ADAMS: And the Philadelphia police don't enforce federal voting rights statutes.
>
> QUESTION: So you don't have to defer to the Philadelphia police.
>
> ADAMS: Of course not.[97]

In sum, it is difficult to see why a police officer's decision about potential criminal activity would determine liability in a civil suit. It should again be noted that the dismissal occurred despite the fact that Mr. Jackson, who was represented by counsel, did not contest the lawsuit. Whatever the opinion of the local police as to possible criminal culpability under local laws, even Mr. Jackson did not question his civil liability under federal § 11(b).

iii. Post-Election Response Of The New Black Panther Party

One of the subjects of this investigation is the degree of responsibility of the New Black Panther Party for Self Defense, and its Chairman, Malik Zulu Shabazz, for the events that occurred on Fairmount Street on Election Day 2008. In the lawsuit, it is alleged that the Party and Malik Zulu Shabazz:

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[96] Coates Testimony, *supra* note 1, at 26-27.
[97] Adams Testimony, *supra* note 50, at 89-90.

> managed, directed, and endorsed the behavior, actions and statements of Defendants Samir Shabazz and Jackson at 1221 Fairmount Street on November 4, 2008... Prior to the election, Defendant New Black Panther Party for Self-Defense made statements and posted notice that over 300 members of the New Black Panther Party for Self-Defense would be deployed at polling locations during voting on November 4, 2008 throughout the United States. After the election, Defendant Malik Zulu Shabazz made statements adopting and endorsing the deployment, behavior, and statements of Defendants Samir Shabazz and Jackson at 1221 Fairmount Street in Philadelphia, Pennsylvania.[98]

In his testimony before the Commission, Assistant Attorney General for Civil Rights Thomas Perez stated that these claims "did not have sufficient evidentiary support."[99] He further indicated that the Department had taken into consideration that the Party had specifically disavowed the actions at the polling site in the Department's decision to dismiss claims against both the Party and Malik Zulu Shabazz.[100]

> As it relates to the national party... there is no vicarious liability so that – and the post-election statements from the national party that they didn't condone the activities: Statements of that nature were very relevant in the determination that we could not sustain the evidentiary burden against the national party.[101]

According to Mr. Perez, it was based on this reasoning that, despite the fact that neither the NBPP nor Malik Zulu Shabazz, who is an attorney, contested the allegations in the Complaint, the Department proceeded to dismiss the claims against both the Party and Mr. Shabazz.

The position of Mr. Perez is contrary to those with the most direct knowledge about the case. All four career attorneys of the trial team indicated that there was sufficient evidence to proceed to judgment against both the Party and Malik Zulu Shabazz. This position was also supported by the two career attorneys from the Appellate Section who reviewed the claim. In addition, the Commission heard the testimony of Gregory Katsas, who previously held a series of high-level positions in the Department, including that of Acting Associate Attorney General, which supervises the Civil Rights Division. Both in his written statement[102] and in his oral testimony before the Commission,[103] Mr. Katsas said that a judgment could have been obtained against both the Party and its Chairman under general principles of agency law.[104]

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[98] Complaint at 3, United States v. New Black Panther Party for Self-Defense et al., No. 2:09-CV-065-SD (E.D. Pa. Jan. 8, 2009), *available at* http://www.usccr.gov/NBPH/COMPLAINT-USAvNBPP.pdf.
[99] Perez Testimony, *supra* note 53, at 20.
[100] *See id.* at 23-24, 96.
[101] *Id.* at 103; *see also* Perez Statement, *supra* note 53, at 6.
[102] *See* Katsas Statement, *supra* note 79, at 7.
[103] *See* Katsas Testimony, *supra* note 94, at 159.
[104] *See* Katsas Statement, *supra* note 79, at 7.

In an attempt to establish the extent of the Party's involvement on Election Day 2008, the Commission subpoenaed King Samir Shabazz, Jerry Jackson, and Malik Zulu Shabazz. The first two individuals, who had been present at the polling site in Philadelphia, asserted their rights against self-incrimination under the Fifth Amendment of the U.S. Constitution and refused to testify.[105] As of the date of this report, Malik Zulu Shabazz remains under subpoena, but refuses to testify, contesting the subpoena in the U.S. District Court for the District of Columbia.[106]

Faced with this lack of cooperation, the Commission reviewed publicly available sources to attempt to determine the extent of the Party's programs and activities on Election Day 2008. This included attempting to determine: Did the Party organize a poll security program? If so, what steps were taken to organize or train Party members? What was the degree of control of the Party over its members relating to such activities? And what activities were sanctioned by the Party and what activities were prohibited?

The publicly available information provided few clear answers to these questions. Instead, the Commission was presented with a series of confusing and contradictory statements by the Party and its Chairman, Malik Zulu Shabazz. An examination of these statements is nonetheless useful, as they raise serious questions as to the sincerity of the Party's expressions of regret and whether the Department reasonably relied on such statements to justify the dismissal of the suit as to the Party and its Chairman.

In a statement posted on the New Black Panther Party website, dated November 4, 2008 but possibly posted after that date, the Party indicated that "[it] does not now nor ever has, engaged in any form of voter intimidation."[107] The notice goes on to state that the Party had "over 350 of its members on the ground in 15 cities in order to ensure that people of color particularly our women, youth and elders, are ensured their right to vote and in order to provide security protecting our people in the face of real and confirmed Neo-Nazi, Skinhead, KKK, Aryan Nation and other White Supremacist threats."[108] The statement then directly addresses the incident in Philadelphia:

> Specifically, in the case of Philadelphia, the New Black Panther Party wishes to express that the actions of people purported to be members do not represent the official views of the New Black Panther Party and are not connected nor in keeping with our official position as a party.

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[105] *See* Deposition of King Samir Shabazz at 4-6, U.S. Comm'n on Civil Rights, Phila., Pa., Jan. 11, 2010, *available at* http://www.usccr.gov/NBPH/KingSamirShabazzDepositionTranscript_01-11-10.pdf; Deposition of Jerry Jackson at 6-8, U.S. Comm'n on Civil Rights, Phila., Pa., Jan. 11, 2010, *available at* http://www.usccr.gov/NBPH/JerryJacksonDepositionTranscript_01-11-10.pdf.

[106] *See* U.S. Comm'n on Civil Rights v. Shabazz, No. 1:10-mc-00232 (D.D.C.).

[107] New Black Panther Party, The NBPP Issues Official Statement re: Election 2008 and Voter Intimidation 11/4/08, http://www.newblackpanther.com/statement-voterintimidation_phillychapter.html (last visited Mar. 30, 2010). This statement is no longer publicly available on the New Black Panther Party's website. A copy of the statement is on file with the U.S. Commission on Civil Rights.

[108] *Id.*

> The publicly expressed sentiments and actions of purported members do not speak for either the party's leadership or its membership.[109]

The statement then notes that, "The New Black Panther Party does not issue threats of violence to those who we may not agree with."[110]

Only three days after the election, Malik Zulu Shabazz appeared on the Fox News program, "The Strategy Room."[111] In that interview, Mr. Shabazz made statements that contradicted the representations contained in the Party's statement on its website.

First, Mr. Shabazz alleged that white supremacists created the incident on Fairmount Street:

> RICK LEVENTHAL: ...All right. So, first and foremost, because probably most of the people watching have seen some portion of it [videos of King Samir Shabazz and Jerry Jackson on Election Day], what was your reaction to that?
>
> SHABAZZ: After my investigation into that case, I have found that those members were responding to members of the Aryan Nation and the Nazi Party who were voting Republican and who were at those polling stations really intimidating black voters.
>
> RICK LEVENTHAL: Whoa, whoa, whoa. You're saying that there were white members of, there were Aryans living in that district who went to vote in that polling place?

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[109] *Id.*

[110] *Id.* The above statement raises several questions:

- The statement is dated November 4, 2008, Election Day, but it is unclear if the statement was actually posted on that date. Neither the efforts of the Department, nor of the Commission, were able to establish the actual date of posting.[110]
- The notice makes reference to the actions in Philadelphia being attributed to "purported members." Even as of Election Day, a national broadcast had shown the video images of King Samir Shabazz and Jerry Jackson. These members were well known to Party members and Malik Zulu Shabazz. Was this an attempt at deniability?
- The statement that, "The New Black Panther Party does not issue threats of violence to those we may not agree with," is demonstrably false. King Samir Shabazz has issued blunt threats of violence of which Malik Zulu Shabazz was surely aware. Yet no suspension resulted from these earlier incidents.

While the statement indicates that the party had some form of voter plan in place (the reference to 350 members being on the ground in 15 cities), and makes reference to the party's "official position," there has been no explanation of what exactly the party had planned for Election Day and in what way King Samir Shabazz and/or Jerry Jackson violated the Party's "official position." If the "official position" would have exonerated the Party, why wasn't it made public and provided to the Department?

[111] *The Strategy Room* (Fox News Internet broadcast Nov. 7, 2009), *available at* http://video.foxnews.com/v/3917372/dr-malik-shabazz (last visited Oct. 21, 2010).

> SHABAZZ: I don't know if they were voting, but they were there. They were in the parking lot, they had Nazi insignia on their arms, and...
>
> RICK LEVENTHAL: This is absolutely the first I've heard of this.
>
> SHABAZZ: That is the absolute truth. And those men were not wrong, that they were there...
>
> RICK LEVENTHAL: Dr. Shabazz, why wouldn't anyone there tell me that? What they told me was that that gentleman in the Black Panther uniform was a poll watcher who was just there to greet voters. There was never any mention from any one of the people who I spoke with that day at that location who said anything about anyone from an Aryan Nation or any white supremacist being there.
>
> SHABAZZ: I can only tell you what my investigation has uncovered. Yes, one of the members of the Party, he lived there, he was a poll watcher, and there are other elders and grandmothers that we have interviewed that have told of the intimidation that was taking place that day. And so those men were there to try to stop something, not start something.[112]

When he was asked whether he had any evidence of the existence of white supremacists, the following exchange took place:

> RICK LEVENTHAL: Dr. Shabazz, do you have any film or pictures of the presence of these Nazis at the Philadelphia polling place? Any evidence whatsoever?
>
> SHABAZZ: You check our website soon, coming out.
>
> RICK LEVENTHAL: Oh, soon. You're gonna have pictures of them?
>
> SHABAZZ: Well, we're gonna have interviews with the elders. You know, the elderly who were at that polling site were really thanking the New Black Panther Party for being there because they were the only security they had on that day.[113]

Mr. Shabazz also stated, "I can tell you at that polling site that there were neo-Nazis at the polling site, as God is my witness."[114]

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[112] *Id.*
[113] *Id.*
[114] *Id.*

The testimony developed by the Commission indicates that the allegations claiming the presence of white supremacists at the polling site are false. Commission witnesses Chris Hill, Mike Mauro, Bartle Bull and Ronald Vann all testified that there was no evidence of white supremacists at the polling site.[115] In addition, despite Mr. Shabazz's representations, no evidence substantiating the presence of white supremacists has ever been posted on the Panthers' website or otherwise made publicly available.

Finally, Mr. Shabazz seemed to agree with the statement on the Party's website that: (i) the Panthers were organized and appeared at numerous polling sites; (ii) the only problem had been at the Fairmount Street polling place; and (iii) the problem at Fairmount Street was the cause of white supremacists.

> RICK LEVENTHAL: Did you know that there were Black Panthers in Philadelphia, because when we called your office that day we were told that you had Black Panthers at other polling locations around the country but no one in Philadelphia.
>
> SHABAZZ: Well, once we did our research we figured out that there were members of the Party not only in Pennsylvania but many areas. I mean, obviously we don't condone bringing billy clubs to polling sites. But when we found out that this was an emergency response to some other skinhead and white supremacist activity at that polling site, then there was some explanation for that.[116]

In the J Memo of December 22, 2008, the trial team indicates that Malik Zulu Shabazz was interviewed by the Department about the incident. However, the references in the J Memo do not provide much detail about the interview. The document simply notes that Shabazz stated that "[t]here were members of the party in many areas [on Election Day]" and that he "specifically endorsed the use and display of the weapon at 1221 Fairmount Street by Samir Shabazz . . . ."[117] In his testimony before the Commission, trial team member J. Christian Adams indicated that Malik Zulu Shabazz had "said the weapon was necessary."[118]

Although in the previously-cited Fox News "Strategy Room" interview Malik Zulu Shabazz acknowledges that the actions of King Samir Shabazz at the polling place were improper, there is no evidence that the Party imposed any sanction or discipline at that time. Instead, it appears that the alleged imposition of discipline was delayed until January 7, 2009, over two

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[115] *See* Mauro Testimony, *supra* note 6, at 39; Hill Testimony, *supra* note 4, at 51; Bull Testimony, *supra* note 5, at 59; Vann Deposition, *supra* note 32, at 21; *see also* L. Counts Deposition, *supra* note 20, at 19; Adams Testimony, *supra* note 50, at 21.

[116] *The Strategy Room* (Fox News Internet broadcast Nov. 7, 2009), *available at* http://video.foxnews.com/v/3917372/dr-malik-shabazz (last visited Oct. 21, 2010).

[117] J. Memo, *supra* note 10, at 7.

[118] Adams Testimony, *supra* note 50, at 21-22.

months after Election Day, the same date the Justice Department filed its lawsuit against King Samir Shabazz, Jerry Jackson, the Party, and Malik Zulu Shabazz.[119]

On that date, a new notice was evidently posted on the Party's website. The statement, in whole, reads as follows:

> **Public Notice Regarding Philadelphia Chapter Suspension 1/7/09**
> **NBPP Official Statement**
>
> Philadelphia Chapter of the New Black Panther Party is suspended from operations and is not recognized by the New Black Panther Party until further notice.
>
> The New Black Panther Party has never, and never will, condone or promote the carrying of nightsticks or any kind of weapon at any polling place. Such actions that were taken were purely the individual actions of Samir Shabazz and not in any way representative or connected to the New Black Panther Party. On that day November 4th, Samir Shabazz acted purely on his own will and in complete contradiction to the code and conduct of a member of our organization. We don't believe in what he did and did not tell him to do what he did, he moved on his own instructions.
>
> It is true that volunteers in the New Black Panther Party successfully served as poll watchers all over the country and helped get the Black vote out. We were incident free. We are intelligent enough to understand that a polling place is a sensitive site and all actions must be carried out in a civilized and lawful manner.
>
> Certainly no advice from the leadership of the New Black Panther Party was given to Samir Shabazz to do what he did, he acted on his own. This will be the New Black Panther Party's Only Statement on the matter.[120]

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[119] Press Release, U.S. Dep't of Justice, Justice Department Seeks Injunction Against New Black Panther Party (Jan. 7, 2009), *available at* http://www.justice.gov/opa/pr/2009/January/09-crt-014.html (last visited Oct. 21, 2010).

[120] New Black Panther Party, Public Notice Regarding Philadelphia Chapter Suspension 1/7/09 NBPP Official Statement, http://www.newblackpanther.com/statement-voterintimidation_phillychapter.html (last visited Mar. 30, 2010). This statement is no longer publicly available on the New Black Panther Party's website. A copy of the statement is on file with the U.S. Commission on Civil Rights. As with the Party's other statements, questions arise out of the notice dated January 7, 2009.

- On its face, it appears that the suspension of the Philadelphia Chapter only occurred after the Department's lawsuit was filed. Yet, the actions of King Samir Shabazz and Jerry Jackson were known to the Party and Malik Zulu Shabazz no later than November 7, 2008, the date of the Fox News "Strategy Room" interview. Why was the suspension not imposed earlier?

The sincerity of the alleged repudiation and suspension was called into question by a subsequent speech given by Malik Zulu Shabazz in November 2009, at a party conference in Dallas.[121] The Party Chairman appears in his uniform, with four stars on his lapel, and surrounded by Party members in paramilitary garb. During that speech, less than a year after the alleged suspension of King Samir Shabazz and the Philadelphia Chapter, Malik Zulu Shabazz stated:

> And, for the record, for the record, for inside the Party, King Samir is welcome back in the New Black Panther Party. King Samir is welcome. [applause] . . . And so he served a little suspension, but that suspension is up. I still charge it to his head and not our heart. He's still our brother. We're not gonna throw our brother away for no damn devils. [applause] No, but we also had to move in a way that gets this beast off our back and to get everything dropped.[122]

Elsewhere in his speech, Malik Zulu Shabazz seems to indicate that the Party's post-election statements and actions were taken to avoid liability. He stated:

> They only had video evidence on Samir. They didn't have no evidence that I directed the operation. They had no evidence -- they say brother Jerry didn't have a baton and he was a poll watcher. The New Black Panther Party moved in a way where they couldn't say that the Party

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- There is no reference to the presence of white supremacists justifying the use of a nightstick. Should this have not raised questions in the Department as to whether the Party's alleged repudiation was credible? Did no one at the Department question the Party's changing positions?
- The notice contends that, "The New Black Panther Party has never, and never will, condone or promote the carrying of nightsticks or any kind of weapon at any polling place."[120] Yet the Party's own website and publications, as well as the media interviews with King Samir Shabazz and Malik Zulu Shabazz, all reflect that Party members have arms training, and often appear with weapons. Given the general encouragement of armed status, what specific instructions, if any, were given with regard to Election Day activities?
- The statement contends that King Samir Shabazz acted in "contradiction to the code and conduct of a member of our organization." Yet the rules and principles of the Party posted on its website in no way address electoral matters or polling activities. What code is the statement referring to? Given the past record of King Samir Shabazz making threats of violence (*See* Appendix), what steps were taken to prevent their reoccurrence?
- The statement notes that, "volunteers in the New Black Panther Party successfully served as poll watchers all over the country and helped get the Black vote out."[120] If this statement is true, and the Party planned and organized Election Day activities, the instructions, training, and orders given to the Party members should be readily available and logically would have been produced to the Department as part of an argument for dismissal of the lawsuit. No such evidence has been forthcoming and the Party did not challenge the allegations in the suit. Why not?

[121] *See* Video: YouTube.com, New Black Panther Party 20 Year Reunion: Dr. Malik's Keynote Part #10 (2010), http://www.youtube.com/user/NewBlackPantherTV#p/u/16/1Oo65qHi4nQ (last visited Dec. 28, 2010) [hereinafter "Shabazz Speech Part 10"]; Video: YouTube.com, New Black Panther Party 20 Year Reunion: Dr. Malik's Keynote Part #11 (2010), http://www.youtube.com/user/NewBlackPantherTV#p/u/15/BEBpERVmU94 (last visited Dec. 28, 2010[hereinafter "Shabazz Speech Part 11"].

[122] Shabazz Speech Part 11, *supra* note 122 (emphasis added).

> had condoned doing that. And so the Justice Department changed hands into the Obama administration and the Justice Department leadership changed into the hands of a black man by the name of Eric Holder, and they took a look at it and they threw most of everything out.[123]

In the same speech, Malik Zulu Shabazz made light of the fact that King Samir Shabazz had a weapon at the polling site.

> And I've always been of the belief that Bush had vowed that before he left office he would try to trap us or something. And as strong as we were, we were still too wise to run in his traps, or into his traps. So on the last days of his administration, on the last day, November 4, 2008, he gets what he wants, some little weak charge on the New Black Panther Party of voter intimidation, sayin' that we were in front of a polling place with a baton. Now, what would we look like in front of a polling place with a baton? You know we don't carry batons. Psyche. I'm just playin'. [laughter][124]

Lastly, in the same speech, Malik Zulu Shabazz gave the fullest explanation, to date, of what the Panthers were allegedly attempting to do on Election Day:

> We went out there to help the elders. We went out there to pass out flyers, and went out there to pass out some information to our brothers and sisters. That was our orders. And we went out, and for the most part we did that well. It's just that the New Black Panther Party sometimes, whatever we do, we just tend to do it kind of strong, you know what I mean? [laughter] Sometimes, whatever we do, sometimes we just do it just real strong, and sometimes it can even be too black and too strong. And so what happened was, one of our men, one of our brothers, who's my little brother and I love, King Samir Shabazz, just was a little bit too strong and he was caught out there at the polling place with a nightstick, at the polling place, and the John McCain campaign rode up on him with some cameras and some poll watchers and jumped all over the issue and all over the brother.[125]

The contradictory and seemingly tactical nature of the statements made by Malik Zulu Shabazz raise serious questions that call for additional investigation. On the one hand, he clearly acknowledges that the Party planned Election Day activities at polling sites and that there was some form of instruction or orders relating to conduct. At the same time, serious questions exist as to whether his alleged condemnations and suspension of King Samir Shabazz, made only after the lawsuit was filed, were genuine. By his own words, the alleged

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[123] *Id.* (emphasis added).
[124] Shabazz Speech Part 10, *supra* note 122.
[125] Shabazz Speech Part 11, *supra* note 122.

acts of discipline appear to have been taken strictly "in a way that gets this beast off our back and to get everything dropped."

The following questions need to be addressed. What was the Party's program for Election Day? What training was given? What rules or code of conduct were established? What activities were to occur? Why didn't the Party suspend King Samir Shabazz immediately? What was the basis for the claims relating to the alleged presence of white supremacists? Was this merely a tactic, or was there any substance to the claim? And, finally, if the Party and Malik Zulu Shabazz did not believe they had any liability, why did they not defend the lawsuit brought by the Department?

Even if these questions cannot be answered, a fuller explanation should be provided by the Department as to why the opinions of the trial team and the Appellate Section were disregarded. Regardless of the NBPP's post-election comments, the Party's control and discipline over its members, would seem to present a strong case that general principles of agency would bind the Party for the acts of Jerry Jackson and King Samir Shabazz.[126]

The Department has indicated that the decision to dismiss the claim against the Party and its Chairman was made in part because of "post-election statements from the national party that they didn't condone the activity." As presented in this report, substantial doubt exists as to whether the Party's condemnation of King Samir Shabazz was anything but a subterfuge. It strains credulity to believe that the Department decided to dismiss the claims against the Party and its Chairman based on statements that, at a minimum, were contradictory, self-serving and, with regard to the white supremacist allegations, demonstrably false.

C. The Response of Christopher Coates

As reflected above, in his testimony before the Commission, Christopher Coates challenged many of the specific explanations provided by the Department to justify its reversal of the NBPP litigation. In addressing the Department's overall position, he posed the following hypothetical:

> To understand the rationale of these articulated reasons for gutting this case, the *Panther* case, one only has to state the facts in the racial reverse. Assume that two members of the Ku Klux Klan, one of which lived in an apartment building that was being used as a polling place, showed up at the entrance in KKK regalia and that one of the Klansmen was carrying a billy stick. Further assume that the two Klansmen were yelling racial slurs at black voters, who were a minority of the people registered to vote at that particular polling place and that the Klansman was blocking ingress to the polling place. Assume further that a local policeman came on the scene and determined that the Klan with the billy

[126] The Appendix to this report details Mr. Jackson's and Mr. Shabazz's compliance with, and conformance to, NBPP policies generally.

> club must leave but that the other Klansman could stay because he was a certified poll watcher for a local political party.
>
> In those circumstances, ladies and gentlemen, does anyone seriously believe that the Assistant Attorney General for Civil Rights would contend that, on the basis of the facts and the law, the Civil Rights Division did not have a case under the Voting Rights Act against the hypothetical Klansman that I described because he resided in the apartment building where the polling place was located or because he was allowed to stay at the polling place by a local police officer because he was a poll watcher?[127]

As is described more fully in Part III of this report, Mr. Coates believes the change in direction of the NBPP litigation was not based on the specifics of the case, but instead was the product of ongoing hostility to the race-neutral enforcement of voting rights laws in the Civil Rights Division.

D. Decision Making By Political Appointees

The Commission does not question the responsibility of political appointees to review, and in many instances, to overrule the decisions of career lawyers in the Department. But it is the Commission's responsibility in a case like this to investigate, evaluate, and report on whether the Commission believes the ultimate decision was based on impermissible factors. If no plausible explanation is offered for overruling numerous career lawyers, it raises questions as to whether the purported explanation is accurate and/or legitimate.

In the present case, the Department has taken the position that the decisions regarding the ultimate fate of the NBPP litigation were made by career attorneys Loretta King and Steven Rosenbaum.[128] Ms. King and Mr. Rosenbaum are indeed career attorneys at the Department. At the time the decisions were made with regard to the litigation, however, both Ms. King and Mr. Rosenbaum were temporarily serving in political positions. Specifically, Ms. King was serving as the Acting Assistant Attorney General for Civil Rights, and Mr. Rosenbaum was serving as the Acting Deputy Assistant Attorney General for Civil Rights. It has been argued that, under the Vacancies Reform Act,[129] Ms. King and Mr. Rosenbaum were, in fact, political appointees.[130]

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[127] Coates Testimony, *supra* note 1, at 29-30.

[128] In his testimony before the Commission, Assistant Attorney General Thomas Perez stated, "The judgment in this case to proceed in the way that was chosen was made by Steve Rosenbaum and ultimately by Loretta King based on a review of the totality of the circumstances." Perez Testimony, *supra* note 53, at 23.

[129] 5 U.S.C. § 3345 et seq.

[130] Under the Vacancies Reform Act, when there is a vacancy in a position that requires Senate approval, such as Assistant Attorney General for Civil Rights, the "President (and only the President) may direct an officer or employee of such Executive agency to perform the functions and duties of the vacant office temporarily in an acting capacity." Rubin, *supra* note 63.

The Department does not share this interpretation.[131] In responses to discovery requests to the Commission, the Department contends:

> Career supervising attorneys [Loretta King and Steven Rosenbaum] who have over 60 years of experience at the Department between them decided not to seek relief against three other defendants after a thorough review of the facts and applicable legal precedent. The Department implemented that decision. Political considerations had no role in that decision and reports that political appointees interfered with the advice of career attorneys are false.[132]

At the same time, the Department has acknowledged that high-ranking political appointees at the Department were at least aware of the decision of Ms. King and Mr. Rosenbaum and did not object to the dismissal of the three defendants or the reduction of the relief sought against the fourth defendant.

> Consistent with the Department's practice, the attorney serving as Acting Assistant Attorney General for Civil Rights [Loretta King] informed Department supervisors of the Division's decisions related to the case. The Department supervisors [in the office of Associate Attorney General Thomas Perrelli] did not overrule that attorney.[133]

As a result of the FOIA lawsuit brought by Judicial Watch, additional information has been uncovered regarding contacts between the Civil Rights Division and the Office of the Associate Attorney General and others. The index of withheld documents provided by the Department strongly suggests that, contrary to the above assertion, senior political appointees outside the Civil Rights Division actively participated in the decision making regarding the litigation.

As discussed previously, there were two main decision points with regard to the fate of the litigation. The first was just before May 1, 2009, the original date that a motion for default judgment was required to be filed by the Department. The second was just before May 15, 2009, the ultimate date when the motion for default judgment was due, following the granting of a continuance. The index provided in the *Judicial Watch* litigation reflects a substantial increase in the involvement of political appointees in the decisionmaking process on or about both dates.

With regard to the original May 1 deadline, the index reflects that the Acting Deputy Assistant Attorney General for Civil Rights, Steve Rosenbaum, exchanged eight e-mails on

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[131] *See* Letter from Joseph H. Hunt, Dir., Fed. Programs Branch, Civil Div., U.S. Dep't of Justice, to David P. Blackwood, Gen. Counsel, U.S. Comm'n on Civil Rights (Sept. 24, 2010), *available at* http://www.usccr.gov/NBPH/09-24-10_Blackwood.pdf.

[132] Discovery Response of the U.S. Dep't of Justice at 4, Jan. 11, 2010 (Response to Interrogatory No. 4), *available at* http://www.usccr.gov/correspd/1-12-10_DOJResponse2Subpoena.pdf [hereinafter "Discovery Responses"].

[133] *Id.* at 5 (Response to Interrogatory No. 4); *see also* Jerry Seper, *Justice Appointee OK'd Panther Reversal*, WASH. TIMES, July 30, 2009, at A01.

April 30, 2009 with Sam Hirsch, a political appointee who was serving as a Deputy Associate Attorney General.[134] Mr. Hirsch reports directly to Thomas Perrelli, the Associate Attorney General, and third-highest official within the Department. These communications included Mr. Rosenbaum's "detailed response and analysis of the proposed draft filings"[135] as well as discussions regarding said drafts "and legal strategy and merits of NBPP litigation."[136]

The index also reflects that, on the same date, Mr. Hirsch reported developments in the NBPP case directly to Mr. Perrelli. These communications are described in the index as: "Emails forwarding and discussing draft filings for the pending NBPP litigation. Emails start with a discussion of proposed filings, and of the merits and legal arguments underlying them."[137] In addition, it is reported that Mr. Hirsch provided a "briefing on the current status of litigation and provid[ed] his opinion on the development of different approaches under consideration."[138] The description then indicates that, as to the latter communication: "Email is then forwarded within OASG [the Office of the Associate Attorney General] with comment and noting need to discuss."[139]

As the May 15 deadline approached, the index reflects that Mr. Rosenbaum and Mr. Hirsch were again in contact. Between May 8 and May 14, 2009, there were 10 e-mails between them.[140] These messages seem to indicate that Mr. Hirsch actively sought information and provided direction to Mr. Rosenbaum. The index summarizes a series of e-mails between the parties dated May 12, 2009 as follows: "DAAG [Rosenbaum] provides OASG in charge of CRT [Hirsch] with requested follow-up information and confirmation that additional actions would be conducted by Criminal Section Chief per his request."[141] Thereafter, on the day before the filing deadline, the index reflects that Mr. Rosenbaum provided Mr. Hirsch with "revised proposed draft documents for review and analysis."

These communications continued up to the last minute. As late as May 15, 2009, the day the motion for default judgment was due, the record reflects that Mr. Hirsch was overseeing edits to the pleadings to be filed with the court.[142]

The index also reflects that Mr. Perrelli was kept informed of the change in course in the litigation. On May 14, 2009, Mr. Perrelli and Mr. Hirsch shared updates on the status of the case. In one of these e-mails, it is suggested that Mr. Perrelli's office had been consulting with the Office of the Deputy Attorney General (ODAG), the second-highest office in the

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[134] *See* Judicial Watch *Vaughn* Index, *supra* note 69, at 5-8 (Doc. Nos. 13(a), 14(a), 17(a)-(f)).
[135] *Id.* at 6 (Doc. No. 14(a)).
[136] *Id.* at 7 (Doc. No. 17(a)).
[137] *Id.* at 53 (Doc. No. 100(a)).
[138] *Id.* (Doc. No. 101(a)).
[139] *Id.*
[140] *See id.* at 21, 25-27, 29-30 (Doc. Nos. 36(a), 44(a), 49(a), 50(a)-(d), 55(b), 55(d) & 57(a)).
[141] *Id.* at 27 (Doc. Nos. 50(a)-(d)). In his testimony before the Commission, Mr. Coates, the Chief of the Voting Section, indicated that he had no knowledge of any participation by the Criminal Section in the decision making process. *See* Coates Testimony, *supra* note 1, at 54.
[142] DOJ Motion for Summary Judgment in Judicial Watch litigation, Document 11-3, p. 55 (Docs. No. 67 and 68).

Department, then headed by David Ogden. The index provides the following summary: "Email asking for update on the NBPP litigation between officials in OASG [Office of the Associate Attorney General], and noting ODAG's [Ogden's] current thoughts on the case."[143]

The communications between Mr. Hirsch and Mr. Perrelli continued up through the court deadline of May 15, 2009. On e-mails of that date, Mr. Hirsch provided Mr. Perrelli with "the status of deliberations,"[144] updates "regarding edits to court papers,"[145] as well as "Emails forwarding and presenting legal analysis from CRT Appellate Section attorneys on questions presented from the CRT Front Office..."[146]

While the Department has refused to reveal the content of the various emails between the Civil Rights Division and Mr. Hirsch, and between Mr. Hirsch and Mr. Perrelli, the number, timing, and subject matter of such communications appear to reflect a level of participation by senior political appointees that is at odds with representations by the Department that senior career attorneys made the ultimate decision to override the opinions of the trial team and appellate section attorneys who supported seeking a default judgment as to all four NBPP defendants.

The Department has also acknowledged that the Attorney General was made aware of the decision making with regard to the NBPP litigation. The Department represented the following:

> The Attorney General was made generally aware by the then-Acting Assistant Attorney General for Civil Rights [Loretta King] and the Associate's staff that the Civil Rights Division was considering the appropriate actions to take in the *New Black Panther Party* litigation. The Associate Attorney General [Thomas Perrelli] likely provided a brief update to the Attorney General on the timetable for the Civil Rights Division's decision. The Attorney General did not make the decisions regarding any aspect of the *New Black Panther Party* litigation, including which claims to pursue or the scope of relief to seek.[147]

Finally, the Commission requested information as to communications by or between the Department and the Executive Office of the President regarding the NBPP litigation. The Department responded as follows:

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[143] Judicial Watch *Vaught Index*, *supra* note 69, at 53 (Doc. No. 102). It is unclear from this passage whether the use of the word "current" is meant to indicate that Mr. Ogden may have made prior comments on the case. The index reflects no other references to communications with ODAG.

[144] *Id.* at 54 (Doc. No. 104(a)).

[145] *Id.* at 55 (Doc. No. 106(c)).

[146] *Id.* at 30 (Doc. Nos. 57(a) and 103(a)).

[147] Supp. Interrog. Responses, *supra* note 55, at 5 (Apr. 16, 2010) (Supplemental Response to Interrogatory No. 6).

> On January 7, 2009, the day that the Civil Rights Division filed its complaint against the four defendants, the Department's press office notified the Executive Office of the President about a press release it issued on the filing of the case ... The Department has identified no other communication relating to this litigation with the Executive Office of the President prior to the May 18, 2009 court judgment enjoining Minister King Samir Shabazz and dismissing the three other defendants. The Department is aware of no information that might suggest that the Executive Office of the President had a role in any litigation decision in this case.[148]

At present, despite the subpoena issued to the Department, DOJ has not turned over the direct evidence regarding its management-level communications and decision making about the NBPP litigation other than (i) the above statements submitted by the Department, and (ii) the information provided to Judicial Watch in response to its FOIA lawsuit. Accordingly, it is not currently possible to verify the accuracy of the Department's version of such communications, although the timing, frequency, and captions of such communications cast considerable doubt on several of the Department's claims.

In an effort to understand the normal decisionmaking process in DOJ, the Commission received testimony from the former Acting Associate Attorney General Gregory Katsas. Mr. Katsas described the normal decisionmaking process within the Department in cases like the NBPP litigation. He testified that he "would expect that OASG [the Office of Associate Attorney General, then held by Thomas Perrelli] was kept routinely apprised of significant developments in the [NBPP] litigation" and, moreover, that he "would expect that OASG played a far more active role in these decisions [to dismiss] than it likely played in its initial decision to file the case."[149] He explained:

> The initial decision – to file a straightforward and seemingly strong voter intimidation lawsuit – would not likely have raised concerns with OASG. In contrast, the decisions at the end of the case would have been anything but straightforward. They amounted to nothing less than a decision by DOJ,

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[148] *Id.* at 5-6 (Supplemental Response to Interrogatory No. 15). *See also* Letter from Ronald Weich, Asst. Atty. Gen., Office of Legislative Affairs, U.S. Dep't of Justice, to Congressman Lamar Smith (Feb. 25, 2010), *available at* http://www.usccr.gov/correspd/LetterfromWeich2Smithredecision-makingNBPP_02-25-10.pdf. While there has been some speculation of additional contacts with the White House, these allegations remain unsubstantiated. *See* Editorial, *Panther Politics: White House Interference Derails Justice?*, WASH. TIMES, Jan. 19, 2010, at B01, *available* at http://www.washingtontimes.com/news/2010/jan/19/panther-politics/ (last visited Oct. 20, 2010).

For reports on meetings between Thomas Perrelli and Cassandra Butts, see Editorial, *Annotated Panther Timeline*; WASH. TIMES, Jan. 19, 2010, at B01, *available at* http://www.washingtontimes.com/news/2010/jan/19/annotated-timeline/ (last visited Oct. 20, 2010). For an additional timeline, including Thomas Perrelli meetings in White House, see Hans A. von Spakovsky, *The New Black Panthers and the White House*, NATIONAL REVIEW ONLINE, Jan. 19, 2010, http://article.nationalreview.com/421518/the-new-black-panthers-and-the-white-house/hans-a-von-spakovsky (last visited Oct. 20, 2010).

[149] Katsas Statement, *supra* note 79, at 8-9.

> following a change in presidential administrations, to reverse legal positions asserted in a pending case. Such reversals are extremely rare – and for good reason: they inevitably undermine DOJ's credibility with the courts, and they inevitably raise suspicion that DOJ's litigating positions may be influenced by political considerations. Accordingly, while a new Administration obviously has wide discretion to change its enforcement priorities and even its litigating positions in new cases, it is extremely rare for DOJ to shift course so dramatically in the course of a pending case.
>
> Several considerations specific to the *New Black Panther Party* case would have exacerbated these general concerns. For one thing, DOJ did not merely abandon some of its claims in the course of ongoing and contested litigation; instead, it abandoned most of its claims after a default by all of the defendants, and an entry of that default pursuant to Federal Rule of Civil Procedure 55(a). I cannot think of any other instance when that has occurred. Moreover, the New Black Panther Party had endorsed President Obama in the 2008 election, and Mr. Jackson, during the events at issue, apparently was a registered poll watcher for the Democratic Party. Those facts inevitably would raise suspicion that the highly unusual decision to abandon a defaulted case was politically motivated, and that suspicion, in turn, would have heightened the sensitivity of deliberations within DOJ.
>
> For these reasons, I believe that OASG would have been actively involved in deliberations about whether to reverse positions in the *New Black Panther Party* litigation.[150]

As of the date of this report, Judicial Watch has announced that it has filed another Freedom of Information Act lawsuit against the Department of Justice to obtain records relating to any meetings between Associate Attorney General Thomas Perrelli and White House officials regarding the NBPP lawsuit.[151]

E. Possible Involvement By The NAACP Legal Defense and Educational Fund

During the course of this investigation, allegations appeared that the NAACP Legal Defense and Educational Fund ("NAACP Legal Defense Fund") had communicated with the Department regarding the course of the NBPP litigation. Such allegations raise concerns,

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[150] *Id.* at 9-10.

[151] *See* Press Release, Judicial Watch, Judicial Watch Sues DOJ for Documents Detailing White House Involvement in Black Panther Case Dismissal (Sept. 22, 2010), *available at* http://www.judicialwatch.org/news/2010/sep/judicial-watch-sues-doj-documents-detailing-white-house-involvement-black-panther-case (last visited Oct. 20, 2010); Judicial Watch, Inc. v. U.S. Dep't of Justice, No. 1:10-cv-1606 (D.D.C.).

inasmuch as outside influence might, at least in part, explain the abrupt reversal in policy relating to the litigation.[152]

As part of its discovery requests, the Commission sought information with regard to any contacts by the Department with outside third-parties including, specifically, Kristen Clarke of the NAACP Legal Defense Fund.[153] Although the Department has consistently raised assertions of privilege relating to internal decision making, no such privilege exists with regard to third-party contacts. In response to the Commission's interrogatory request, the Department indicated that it had "identified no communication, oral or otherwise, with Kristen Clarke of the NAACP Legal Defense Fund relating to this litigation prior to the May 18, 2009 court judgment enjoining Minister King Samir Shabazz and dismissing the three other defendants."[154]

The basis of the request was a media report that Department officials and the NAACP Legal Defense Fund had communicated about the fate of the lawsuit. In a July 2009 article in *The Washington Times*, it was reported:

> Kristen Clarke, Director of Political Participation at the NAACP Legal Defense Fund in Washington ... confirmed to The Times that she talked about the case with lawyers at the Justice Department and shared copies of the complaint with several persons. She said, however, her organization was "not involved in the decision to dismiss the civil complaint."[155]

The Commission deposed Ms. Clarke. In her testimony, she acknowledged only limited, non-substantive contacts with the Department with regard to the New Black Panther Party litigation. The following colloquy took place:

> CLARKE: I learned about the fact that the filing, the fact that this case was filed, from a Justice Department attorney.
>
> QUESTION: And who was that?
>
> CLARKE: Yvette Rivera.
>
> QUESTION: And who is she?

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[152] According to an article in the *Washington Post*, Assistant Attorney General Thomas Perez confirmed that restoring relations between the Civil Rights Division and certain civil rights groups is a priority for the administration. John Payton, president of the NAACP Legal Defense Fund, "said the relationship is much improved. 'When we call them, they listen, he said.'" Jerry Markon, *Justice Dept. Steps Up Civil Rights Enforcement*, WASH. POST, June 4, 2010.

[153] *See* U.S. Comm'n on Civil Rights Discovery Requests to U.S. Dep't of Justice at 10, Dec. 8, 2009 (Interrogatory No. 12), *available at* http://www.usccr.gov/correspd/DISCOVERYREQUESTStoJosephHuntreNBPP.pdf [hereinafter "U.S.C.C.R. Discovery Requests"].

[154] Supp. Interrog. Responses, *supra* note 55, at 5 (Supplemental Response to Interrogatory No. 12).

[155] Seper, *supra* note 133.

CLARKE: She is an attorney in the Civil Rights Division of the Department in the Voting Section. . . .

QUESTION: . . . Well, tell me when you learned about it approximately.

CLARKE: I believe it was on January 8th of 2009.

QUESTION: And how did you learn that?

CLARKE: Through a phone call.

QUESTION: Who called who?

CLARKE: She called me.

* * *

QUESTION: And what did she say to you and what did you say to her?

CLARKE: This case had been filed. That was the extent of the phone call.

QUESTION: Okay. Did you subsequently have any other contacts with anybody at the Justice Department with regard to the litigation?

CLARKE: No.

* * *

QUESTION: Can you tell me what Exhibit A is?

CLARKE: Exhibit A is an email that was sent to me on January 13th.

QUESTION: 2009, correct?

CLARKE: 2009. That's correct.

QUESTION: And then the email appears to be from Judith Reed. Who is she?

CLARKE: Judith Reed is an attorney in the Civil Rights Division of the Justice Department.

> QUESTION: And is it typical for Ms. Reed to send you just news clips of this kind?
>
> CLARKE: No.
>
> QUESTION: Did you talk to Ms. Reed about the content of this email?
>
> CLARKE: No, I did not.[156]
>
> * * *
>
> QUESTION: [B]etween the time of the first email on Exhibit A, January 13, 2009 and then July 31, 2009 [the day after *The Washington Times* article], do you recall having any conversations or any communications of any kind with anybody at DOJ about the New Black Panther litigation?
>
> CLARKE: Now again as I indicated earlier, I learned about the fact of the filing from a Justice Department attorney. I received the email that we just referenced that also make mention of the fact of filing. Beyond that, there were no additional contacts about the litigation itself.[157]

While Ms. Clarke confirmed that she did talk to a reporter for *The Washington Times*,[158] she denied that the reporting set forth in the article was accurate, and claimed that she had written to *The Washington Times* requesting a correction.[159] When asked what she had said to the reporter, however, Ms. Clarke refused to say.[160]

Despite Ms. Clarke's denial, subsequent reporting in *The Weekly Standard* alleged that such contacts had indeed occurred.

> She [Kristen Clarke] spoke to a voting section attorney Laura Coates (no relation to Chris Coates) about the case at a Justice Department function. Clarke asked Coates, who she assumed was sympathetic, when the Panther case was going to be dismissed. The comment suggested that the NAACP had been pushing for such an outcome, and Coates reported the conversation to her superiors.[161]

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[156] The Department has never disclosed the contacts by Ms. Clarke with either Ms. Rivera or Ms. Reed, calling into question the sufficiency of its discovery responses to the Commission.
[157] *See* Deposition of Kristen Clarke at 15-18, U.S. Comm'n on Civil Rights, Wash., D.C., Jan. 8, 2010, *available at* http://www.usccr.gov/NBPH/KristenClarkeDepositionTranscript.pdf [hereinafter "Clarke Deposition"].
[158] *See id.* at 46.
[159] *See id.* at 13-14.
[160] *See id.* at 10-13.
[161] Rubin, *supra* note 63.

In response to this report, on June 15, 2010 the Commission requested that the Department determine "whether Laura Coates had a conversation with Ms. Clarke, the date thereof, the content of the conversation, and whether, as represented in the... article, the conversation was reported to Ms. Coates' superiors."[162] In a letter dated June 30, 2010, it was represented that "the Department of Justice has re-examined the accuracy of the Supplemental Response to Interrogatory No. 12" but "determined that the prior response remains accurate and therefore requires no amendment."[163]

During her deposition, Ms. Clarke was specifically asked if she recalled any conversation with Laura Coates:

> QUESTION: Okay. I want to make sure or follow up on one of the names I mentioned before. To be clear, did you – are you sure that you did not have a conversation with Laura Coats [sic] of the Justice Department with regard to the litigation?
>
> CLARKE: As I indicated earlier, no. I recall no such conversation with her.[164]

In his testimony before the Commission, Christopher Coates indicated that the contact between Ms. Clarke and Laura Coates had been reported to him:

> [I]t was reported to me that Ms. Clarke approached an African-American attorney who had been working in the Voting Section for only a short period of time in the Winter of 2009, before the dismissals in the *Panther* case and asked that attorney when the *New Black Panther Party* case was going to be dismissed. The Voting Section attorney to whom I refer was not even involved in the *Panther* case.
>
> This reported incident led me to believe in 2009 that the Legal Defense Fund Political Participation Director, Ms. Clarke, was lobbying for the dismissal of the *New Black Panther Party* case before it was dismissed.[165]

In his testimony, Mr. Coates also indicated a possible motive for Ms. Clarke's interest in having the NBPP litigation dismissed. Discussing the *Ike Brown* case, he testified:

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[162] Letter from David P. Blackwood, Gen. Counsel, U.S. Comm'n on Civil Rights, to Joseph H. Hunt, Dir., Fed. Programs Branch, Civil Div., U.S. Dep't of Justice (June 15, 2010), *available at* http://www.usccr.gov/NBPH/StatEnforce_06-15-10.pdf.

[163] Letter from Joseph H. Hunt, Dir., Fed. Programs Branch, Civil Div., U.S. Dep't of Justice to David P. Blackwood, Gen. Counsel, U.S. Comm'n on Civil Rights (June 30, 2010), *available at* http://www.usccr.gov/correspd/6-30-10_Hunt2Blackwood.pdf.

[164] Clarke Deposition, *supra* note 157, at 33; *see also id.* at 19.

[165] Coates Testimony, *supra* note 1, at 22-23.

> [O]ne of the groups that had opposed the Civil Rights Division's prosecution of the *Ike Brown* case the most adamantly was the NAACP Legal Defense Fund, through its Director of Political Participation, Kristen Clarke. Ms. Clarke has spent a considerable amount of time attacking the Division's decision to file and prosecute the *Ike Brown* case.[166]

Subsequent to Mr. Coates' testimony, the NAACP Legal Defense Fund submitted a letter to the Commission denying that it had either "encouraged or lobbied the Department of Justice. . . to drop or take some other action with respect to DOJ's New Black Panther Party litigation."[167] The letter further provided:

> Neither LDF nor any of its staff ever urged DOJ to take any action with respect to the New Black Panther Party litigation. LDF played no role in, and conducted no advocacy around, DOJ's New Black Panther Party litigation. Statements that LDF, or any of its staff, sought to influence the manner or to limit the scope of the litigation in any respect are false.[168]

As of this date, it is not possible to reconcile the competing versions of such contacts, due to the fact that the Department has precluded its employees from testifying before the Commission (and refused to provide all relevant emails and documents), and Ms. Clarke has refused to testify regarding certain relevant questions. At a minimum, it would be highly relevant if Laura Coates and others could testify as to whether the NAACP Legal Defense Fund was seeking to have the suit dismissed or raised other concerns about the litigation. It should also be determined if any such concerns were conveyed to Loretta King, Steven Rosenbaum, Sam Hirsch or others, and whether those concerns played a part in their decision making. Because such communications are not privileged, there is no reason that these witnesses should not be allowed to testify before the Commission on this limited topic. The matter deserves to be proven or disproven, and Department personnel should be allowed to testify before the Commission on this topic.

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[166] *Id.* at 21.

[167] Letter from Jeffrey D. Robinson, Assoc. Dir.-Counsel, Programs & Admin., NAACP Legal Defense & Educ. Fund, to Gerald A. Reynolds, Chairman, U.S Comm'n on Civil Rights (October 11, 2010), *available at* http://www.usccr.gov/NBPH/NAACPLDF_10-11-10.pdf.

[168] *Id.*

PART III: The Civil Rights Division and Race-Neutral Enforcement

A. The Testimony Of Christopher Coates and J. Christian Adams

Much of the direct evidence in this Section has been provided by former Chief of the Voting Section, Christopher Coates. His testimony includes allegations that political appointees in the Civil Rights Division have adopted policies that oppose the race-neutral enforcement of this nation's voting rights laws. His testimony also includes specific allegations that career attorneys have refused to work on cases in which the victims are white and the wrongdoers are black; that attorneys who support race-neutral policies have been harassed and ostracized; and that current supervisory attorneys and political appointees have openly opposed such race-neutral policies.

The troubling nature of these allegations of misconduct in the Division might explain why some anonymous sources within the Department have attempted to paint Coates as a disgruntled right-wing ideologue.[169] A review of his career, however, speaks for itself and paints a picture at odds with his detractors' characterization.

Before beginning his work at the Department, Mr. Coates served with the Voting Rights Project of the American Civil Liberties Union in Atlanta, Georgia. During his time there, he litigated cases on behalf of African-American clients, particularly those challenging at-large election procedures. In 1993 he argued a case before the United States Supreme Court on behalf of six African-American citizens in the local NAACP chapter in Bleckley County, Georgia.[170] For his service with the ACLU he was awarded the Thurgood Marshall Decade Award by the Georgia Conference of the NAACP, as well as an award from the Georgia Environmental Association for his representation of African-American clients opposing the installation of landfill in their neighborhood.

Mr. Coates began his career at the Department of Justice in 1996 during the Clinton administration. During that administration, he was promoted to Special Litigation Counsel and served in that position until 2005. He was later appointed Principal Deputy Chief of the Voting Section and became Chief of the Voting Section in May 2008. In 2007 he received the Hubble Award, the second-highest award given by the Civil Rights Division. In his 13 and a half years in the Voting Section, Mr. Coates indicated that there were only two cases in which he was involved that concerned white victims. It is the opposition to these two cases which forms much of this portion of the report.

i. The Decision to Testify

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[169] *See* Ryan J. Reilly, *Ex-Voting Section Chief Defends Black Panther Case at Goodbye Lunch*, MAIN JUSTICE, Jan. 8, 2010, http://www.mainjustice.com/2010/01/08/ex-voting-section-chief-defends-black-panther-case-at-goodbye-lunch/ (last visited Oct. 20, 2010); Adam Serwer, *The Battle for Voting Rights*, AM. PROSPECT, Jan. 8, 2010, http://www.prospect.org/cs/articles?article=the_battle_for_voting_rights (last visited Oct. 20, 2010).

[170] *See* Holder v. Hall, 512 U.S. 874 (1994).

In November 2009, the Commission issued subpoenas to two members of the trial team, Christopher Coates, the Chief of the Voting Section, and J. Christian Adams. Despite the statutory mandate requiring federal agencies to cooperate with the Commission,[171] the Department directed Mr. Coates and Mr. Adams not to appear before the Commission. Mr. Adams indicated that the Department told him that there was no need to comply with the Commission's subpoena because the Department had no intention of enforcing it.[172]

Despite numerous demands that the Department allow Mr. Coates and Mr. Adams to testify, the Department refused to change its position.[173] In the meantime, in January 2010, Mr. Coates was transferred to the U.S. Attorney's Office for South Carolina.

This impasse changed following the testimony of Assistant Attorney General Thomas Perez before the Commission. Although Mr. Perez had not been at DOJ during the NBPP litigation, he was selected by the Department as its representative to testify on the issue. As part of his preparation, a meeting was held the day before between Mr. Perez and several members of the trial team. Participating in the meeting were Mr. Perez, Mr. Coates (by telephone), Mr. Adams, and Robert Popper. Other Department staff were also present. Both Mr. Coates and Mr. Adams have testified that, during this meeting, they discussed the merits of the NBPP litigation.[174]

This meeting had consequences. Both Mr. Coates and Mr. Adams have testified that, despite their providing the Assistant Attorney General with detailed information about the NBPP litigation, Mr. Perez's testimony before the Commission was inaccurate.[175] As a result of the nature of Mr. Perez's testimony, Mr. Adams submitted his resignation to the Department later the same day.[176] After formally leaving the Department, Mr. Adams then complied with the pending subpoena and testified before the Commission on July 6, 2010.[177]

A similar process occurred with regard to Mr. Coates. Although he is still currently employed by the Department, he testified that he was troubled by the inaccuracies of Mr. Perez's testimony before the Commission. He did not take immediate action, however, because he

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[171] *See* 42 U.S.C. § 1975b(4)(e): "All Federal agencies shall cooperate fully with the Commission to the end that it may effectively carry out its functions and duties."

[172] *See* Adams Testimony, *supra* note 50, at 9, 83; *see also* 42 U.S.C. § 1975a(e)(2). Adams also rebutted allegations that he was a disgruntled employee, testifying that he had received a promotion two weeks before he resigned. *See* Adams Testimony, *supra* note 50, at 70.

[173] *See* Letter from Ronald Weich, Asst. Atty. Gen., Office of Legislative Affairs, U.S. Dep't of Justice, to Congressman Frank Wolf (Oct. 15, 2010), *available at* http://www.usccr.gov/NBPH/LetterWeich2WolfreCoatestestimony_10-15-10.pdf. In a letter to Congressman Frank Wolf, the Department argued that "The disclosure of internal recommendations and deliberations would have a chilling effect on the open exchange of ideas, advice and analyses that is essential to our decisionmaking process. Based on this policy, the Department declined to authorize Mr. Coates to testify before the Commission in connection with the Commission's review of the Department's actions in *United States v. New Black Panther Party for Self Defense*, Civil Action No. 2:09-cv-0065."

[174] *See* Adams Testimony, *supra* note 50, at 68-69; Coates Testimony, *supra* note 1, at 103.

[175] *See* Coates Testimony, *supra* note 1, at 8-10; Adams Testimony, *supra* note 50, at 68-69.

[176] *See* Adams Testimony, *supra* note 50, at 69-70.

[177] He explained to the Commission he would not testify about "genuine deliberative process" for which the Department had asserted a privilege. *See id.* at 10-11.

was hopeful that revisions would be made.[178] When this did not occur, he decided that he should appear before the Commission to correct the record. He did so on September 24, 2010. Explaining his reasons for appearing before the Commission, he testified:

> I do not lightly decide to comply with your subpoena in contradiction to the DOJ's directives to me not to testify. I had hoped that this controversy would not come to this point. However, I have determined that I will not fail to respond to your subpoena and thereby fail to give this Commission accurate information pertinent to your investigation.
>
> Quite simply, if incorrect representations are going to successfully thwart inquiry into the systemic problems regarding race-neutral enforcement of the Voting Rights Act by the Civil Rights Division, problems that were manifested in the DOJ's disposition of the *New Black Panther Party* case, that end is not going to be furthered or accomplished by my sitting idly or silently by at the direction of my supervisors while incorrect information is provided.
>
> I do not believe that I am professionally, ethically, legally, much less morally bound to allow such a result to occur. In addition, in giving this testimony, I am claiming the protections of all applicable federal whistleblower statutes.[179]

ii. Hostility to Race-Neutral Enforcement

Both Mr. Coates and Mr. Adams testified that the decisions in the NBPP case should not be viewed in isolation; that it needed to be viewed in the context of overall hostility by many in the Civil Rights Division to race-neutral enforcement of the Voting Rights Act.[180] This portion of the report relates to their testimony on this topic.

Mr. Coates and Mr. Adams testified that the overwhelming number of cases on which they worked while at the Department involved the protection of minority rights. On two occasions, however, they worked on cases in which the victims were white and the defendants were black.[181] These two cases were the Ike Brown case and the New Black Panther Party litigation.[182] In the Ike Brown case, the Department filed a civil suit against Mr. Brown for violation of the Voting Rights Act. It was alleged that Mr. Brown, who is

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[178] Coates Testimony at 2, U.S. Comm'n on Civil Rights, Sept. 24, 2010, *available at* http://www.usccr.gov/NBPH/TestimonyChristopherCoates_09-24-10.pdf.
[179] Coates Testimony, *supra* note 1, at 10-11.
[180] *See* J. Christian Adams, *PJM Exclusive: Unequal Law Enforcement Reigns at Obama's DOJ*, PAJAMAS MEDIA, June 28, 2010, http://pajamasmedia.com/blog/j-christian-adams-you-deserve-to-know-%E2%80%94-unequal-law-enforcement-reigns-at-obamas-doj-pjm-exclusive/ (last visited Oct. 20, 2010); [Coates Testimony *supra* note 2, at 11-12, 23-24.
[181] *See* Adams Testimony, *supra* note 50, at 44, 49.
[182] *Id.* at 49.

black, systematically violated the rights of whites and blacks in Noxubee County, Mississippi. The matter was tried, won, and successfully defended on appeal.[183]

Mr. Coates testified that the two cases were related in that they were both opposed by many within the Department:

> To understand what occurred in the *NBPP* case, those action [sic] must be placed in the context of *United States v. Ike Brown et al.* Prior to the filing of the *Brown* case in 2005, the CRD [Civil Rights Division] had *never* filed a single case under the VRA [Voting Rights Act] in which it claimed that white voters had been subjected to racial discrimination by defendants who were African American or members of other minority groups... I am very familiar with the reaction of many employees, both line and management attorneys and support staff in both the CRD and the Voting Section, to the *Ike Brown* investigation and case because I was the attorney who initiated and led the investigation in that matter and was the lead trial attorney throughout the case in the trial court.[184]

Although the *Ike Brown* suit was successful, Mr. Coates and Mr. Adams indicated that there was a great deal of hostility within the Department to the filing and pursuit of the case. They testified to the following incidents:

- Attorneys refused to work on the Ike Brown case. At least one attorney stated, "I'm not going to work on the case because I didn't join the voting section to sue black people."[185]

- Mark Kappelhoff, the chief of the Criminal Section, at a meeting of the chiefs of the Civil Rights Division, allegedly stated about the Ike Brown case, "That's the case that has gotten us into many problems with civil rights groups."[186]

- Robert Kengle, deputy in the Voting Section, allegedly stated to Mr. Coates during a trip to investigate the Ike Brown case, "Can you believe we are being sent down to Mississippi to help a bunch of white people?"[187]

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[183] *See* United States v. Brown, 494 F. Supp.2d 440 (S.D. Miss. 2007), *aff'd*, 561 F.3d 420 (5th Cir. 2009).

[184] Statement of Christopher Coates at 3, U.S. Comm'n on Civil Rights, Sept. 24, 2010, *available at* http://www.usccr.gov/NBPH/TestimonyChristopherCoates_09-24-10.pdf (emphasis in original) [hereinafter "Coates Statement"].

[185] *See* Adams Testimony, *supra* note 50, at 49. Coates Statement, *supra* note 184, at 5; *see also* von Spakovsky Affidavit, *supra* note 79, at 2-3 (stating that Coates told von Spakovsky that lawyers refused to work on the Ike Brown case).

[186] Adams Testimony, *supra* note 50, at 54; *see also* Coates Statement, *supra* note 184, at 6.

[187] Adams Testimony, *supra* note 50, at 55; *see also* Coates Testimony, *supra* note 1, at 4, 103; von Spakovsky Affidavit, *supra* note 79, at 3. In a declaration submitted to the Commission in response to Mr. Coates' testimony, Mr. Kengle stated, in part:

> I do not recall making the statement to Mr. Coates "Can you believe that we are going to Mississippi to protect white voters". I certainly did express my

- Attorneys in the civil rights division allegedly told Adams that "until blacks and whites achieved economic parity in Mississippi, we had no business bringing this case." A similar comment was made by a career attorney to Mr. Coates.[188]

- A non-lawyer minority employee at the Department was "relentlessly harassed by Voting Section staff for his willingness as a minority to work on the case of *United States v. Ike Brown*."[189]

- "Others assigned to the case were harassed in other ways, such as being badgered and baited about their evangelical religious views or their political beliefs. In these instances, the victimized employee was openly assumed to espouse various political positions hostile to civil rights, simply because he worked on this case."[190]

- Adams testified: "There was outrage that was pervasive that the laws would be used against the original beneficiaries of the civil rights laws. Some people said 'we don't have the resources to do this. We should be spending our money elsewhere.' And that was how they would cloak some of these arguments."[191]

> dissatisfaction to Mr. Coates on several occasions during the trip and it is possible that during the multi-day coverage I said something to him along the lines of "Can you believe we're doing this?" However, I did not complain to Mr. Coates in sum or substance about "protect[ing] white voters" because I did not consider that to be the problem.

He further stated:

> I believed that a double standard was being applied under which complaints by minority voters were subjected to excessive and unprecedentedly demanding standards, then dismissed as not being credible, while on the other hand the Voting Section was being ordered to pursue the Noxubee complaint at face value – in a dispute over party loyalty – as a top priority. I confided my view of this double-standard to Mr. Coates and to other management-level career staff. If I made the remark to Mr. Coates "Can you believe we're doing this?" it was within this context.

Declaration of Robert A. Kengle at 1-2, Oct. 18, 2010, *available at* http://www.usccr.gov/NBPH/RAKDEC_10-18-10.pdf

Shortly after Mr. Kengle submitted his declaration, Mr. von Spakovsky submitted a response challenging many of Mr. Kengle's representations. *See* Letter from Hans A. von Spakovsky to Gerald A. Reynolds, Chairman, U.S. Comm'n on Civil Rights (Oct. 28, 2010) *available at* http://www.usccr.gov/NBPH/vonSpakovskyLetter_10-28-10.pdf.

[188] Adams Testimony, *supra* note 50, at 54; *see also* Coates Testimony, *supra* note 1, at 16.

[189] Adams Testimony, *supra* note 50, at 56-57, 93; *see also* Coates Testimony, *supra* note 1, at 6, 17. Mr. Coates also indicated that this treatment extended to the harassed employee's mother. *See id.*

[190] Adams Testimony, *supra* note 50, at 57; *see also* von Spakovsky Affidavit, *supra* note 79, at 3-4 (discussing harassment of employees).

[191] Adams Testimony, *supra* note 50, at 58.

- In another instance, "[a]nother deputy in the section said in the presence of Mr. Coates, 'I know that Ike Brown is crooked and everybody knows that, but the resources of the division should not be used in this way.'"[192]

As part of his testimony, Mr. Adams indicated that he had heard a report that Joe Rich, who was then Chief of the Voting Section, had allegedly altered a memorandum prepared by Mr. Coates that urged the filing of a suit against Ike Brown. Mr. Adams testified that he had heard Mr. Rich "omitted all of the discussion that Mr. Coates made about why a civil lawsuit was the best course of action" and made it appear that Mr. Coates only supported monitoring the situation.[193] Following this testimony, Mr. Rich submitted a declaration to the Commission in which he countered many of Mr. Adams' general allegations and specifically denied any alleged revisions to Mr. Coates' memorandum recommending that a civil suit be filed against Ike Brown.[194] Mr. Rich stated: "No recommendation made by Mr. Coates was removed or deleted from this memo."[195]

At the time Mr. Coates testified before the Commission, the allegations of Mr. Adams, and the rebuttal of Mr. Rich, were in the public record. On this topic, Mr. Coates testified as follows:

> Some time [sic], as best I recall, in the Winter of 2003 or 2004 . . . I wrote a preliminary memorandum summarizing the evidence that we had to that point and made a recommendation as to what action to take in Noxubee County. In that memorandum, I recommended that the Voting Section go forward with an investigation under the Voting Rights Act and argued that a civil injunction against Ike Brown and the local Democratic Committee was the most effective way of stopping the pattern of voting discrimination that I had observed.
>
> I forwarded this memorandum to Joe Rich, who was Chief of the Voting Section at that time. I later found out that Mr. Rich had forwarded the memorandum to the Division front office, but he had omitted the portion of the memorandum in which I discussed why it was best to seek a civil injunction in the *Brown* case. Because I am aware that Mr. Rich and Mr. Hans von Spakovsky have filed conflicting affidavits on this point with this Commission, I believe that I am at liberty to address this issue without violating DOJ privileges.
>
> I want to underscore that my memorandum in which Mr. Rich omitted portions was not the subsequent justification memorandum that sought

[192] Coates Testimony, *supra* note 1, at 102 (statement by David Blackwood).
[193] *See* Adams Testimony, *supra* note 50, at 56.
[194] *See* Declaration of Joseph D. Rich, Aug. 23, 2010, *available at* http://www.usccr.gov/NBPH/RichDeclaration_08-23-10.pdf.
[195] *Id.* Mr. Adams' version of events was corroborated by Hans von Spakovsky, former counsel to the Assistant Attorney General for Civil Rights, in his affidavit submitted to the Commission. *See* von Spakovsky Affidavit *supra* note 79, at 3.

> approval to file the case in Noxubee County, but was a preliminary memorandum that sought permission to go forward with the investigation.
>
> Nevertheless, it is my clear recollection that Mr. Rich omitted a portion of my memorandum, a highly unusual act, and that I was later informed by the Division front office that Mr. Rich had stated that the omission was because he did not agree with my recommendation that the investigation needed to go forward or that a civil injunction should be sought. Nevertheless, approval to go forward with the investigation was obtained from the Bush administration Civil Rights Division front office in 2004.[196]

In response to the testimony of Mr. Coates, Mr. Rich submitted a second declaration in which he contends that Mr. Coates' version of events is also in error.[197]

Without examining the Department's internal records, it is not possible to resolve the dispute regarding Mr. Rich definitively. Nonetheless, the nature of the above allegations reflects the contentious atmosphere within the Civil Rights Division regarding the *Ike Brown* case.

That opposition to the *Ike Brown* case existed within the Civil Rights Division is further bolstered by an article that appeared in *The Washington Post* subsequent to Mr. Coates and Mr. Adams testifying before the Commission. In this article, attorneys within the Civil Rights Division confirmed that "the decision to bring the Brown case caused bitter divisions in the voting section and opposition from civil rights groups:"[198]

> Three Justice Department lawyers, speaking on the condition of anonymity because they feared retaliation from their supervisors, described the same tensions, among career lawyers as well as political appointees. Employees who worked on the Brown case were harassed by colleagues, they said, and some department lawyers anonymously went on legal blogs "absolutely tearing apart anybody who was involved in that case," said one lawyer.
>
> "There are career people who feel strongly that it is not the voting section's job to protect white voters," the lawyer said. "The environment is that you better toe the line of traditional civil rights ideas or you better keep quiet about it, because you will not advance, you will not receive awards and you will be ostracized."[199]

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[196] Coates Testimony, *supra* note 1, at 14-15; *see also* von Spakovsky Affidavit, *supra note* 79; Hans von Spakovsky, *Enough Is Enough, Joe Rich: An Uncivil Man from the Civil Rights Division*, PAJAMAS MEDIA, Sept. 20, 2010, http://pajamasmedia.com/blog/enough-is-enough-joe-rich-an-uncivil-man-from-the-civil-rights-division/ (last visited Nov. 9, 2010).

[197] *See* Declaration of Joseph D. Rich, Oct. 20, 2010, *available at* http://www.usccr.gov/NBPH/RichDeclaration_10-20-10.pdf.

[198] Markon & Thompson, *supra* note 82.

[199] *Id.*

In each instance, the above allegations relate to comments made, or actions taken, during the Bush administration. Mr. Coates and Mr. Adams testified that similar opinions were more recently expressed by high-level attorneys (political appointees and management) during the Obama administration.

Mr. Coates described the following:

> When I was Chief of the Voting Section in 2008, and because I had experienced, as I have described, employees in the Voting Section refusing to work on the *Ike Brown* case, I began to ask applicants for trial attorney positions in their job interviews whether they would be willing to work on cases that involved claims of racial discrimination against white voters as well as cases that involved claims of racial discrimination against minority voters. For obvious reasons, I did not want to hire people who were politically or ideologically opposed to the equal enforcement of the voting statutes the Voting Section is charged with enforcing.
>
> The asking of this question in job interviews did not ever to my knowledge cause any problems with applicants to whom I asked that question and, in fact, every applicant to whom I asked the question responded that he or she would have no problem working on a case involving white victims, such as the Ike Brown case.
>
> However, word that I was asking applicants that question got back to Loretta King. In the spring of 2009, Ms. King, who had by then been appointed the Acting Assistant Attorney General for Civil Rights by the Obama administration, called me to her office and specifically instructed me that I was not to ask any other applicants whether they would be willing to, in effect, race-neutrally enforce the Voting Rights Act.
>
> Ms. King took offense that I was asking such a question of job applicants and directed me not to ask it because I do not believe she supports equal enforcement of the provisions of the Voting Rights Act and she has been highly critical of the filing and the civil prosecution of the *Ike Brown* case.[200]

In addition to the actions of Loretta King, both Mr. Coates and Mr. Adams described a series of statements by Julie Fernandes, a Deputy Assistant Attorney General for Civil Rights. Mr. Coates testified to the following:

> In September 2009, Ms. Fernandes held a meeting to discuss enforcement of the anti-discrimination provisions of Section 2 of the Voting Rights Act. At this meeting, one of the Voting Section trial

[200] Coates Testimony, *supra* note 1, at 19-20.

> attorneys asked Ms. Fernandes what criteria would be used to determine what type of Section 2 cases the Division front office would be interested in pursuing.
>
> Ms. Fernandes responded by telling the gathering there that the Obama administration was only interested in bringing traditional types of Section 2 cases that would provide equality for racial and language minority voters. And then she went on to say that this is what we are all about or words to that effect.
>
> When Ms. Fernandes made that statement, everyone in the room, talking about the conference room on the seventh floor, where the Voting Section is located, understood exactly what she meant: no more cases like *Ike Brown* and no more cases like the *New Black Panther Party* case.
>
> Ms. Fernandes reiterated that directive in another meeting held in December 2009 on the subject of federal observer election coverage, in which she stated to the entire group in attendance that the Voting Section's goal was to ensure equal access for voters of color or language minority.[201]

The Department has never denied that Ms. Fernandes made the above representations, and Ms. Fernandes has refused to respond to media inquiries about the alleged statement. Following a *Washington Post* article that ran on October 23, 2010, on the *NBPP* dispute, the *Post* reporters engaged in an online question-and-answer session. The following exchange took place:

> QUESTION: The Justice Department has never denied that Jule [sic] Fernandes said the things that multiple witnesses have alleged about not enforcing civil rights laws equally. Did you ask the DOJ if she said it or not, and what do you think of their response?
>
> REPORTER: Hi, thanks for the chat. Yes I asked the Justice Department several times if she said it. Their response was to say that their policy is to enforce the laws equally, without regard to race. I can't really "assess" their response, because that gets into personal opinion, and I don't do that. I will say that they never directly answered the question. It is something that Mr. Coates had alleged, and as we wrote, Ms. Fernandez declined to comment.[202]

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[201] *Id.* at 32-33.

[202] Live Q&A: New Black Panther Case: Voter Intimidation at Philadelphia Voting Location in 2008, Oct. 22, 2010, http://live.washingtonpost.com/black-panther-party-10-22-10.html (last visited Nov. 9, 2010) (discussion with Jerry Markon and Krissa Thompson).

Mr. Coates and Mr. Adams also testified that Ms. Fernandes supported selective enforcement of provisions of the National Voter Registration Act. Specifically, Mr. Adams testified that, during a meeting on November 30, 2009,

> Deputy Assistant Attorney General Julie Fernandes, when asked about Section 8 [of the National Voter Registration Act],[203] said, 'We have no interest in enforcing this provision of the law. It has nothing to do with increasing turnout, and we are just not going to do it.' Everybody in the Voting Section heard her say it.[204]

On this topic, Mr. Coates testified that Ms. Fernandes' statement regarding non-enforcement of the list maintenance requirement appeared to have been adopted as Department policy. He testified:

> In June 2009, the Election Assistance Commission issued a biannual report concerning what states appeared not to be in compliance with Section 8's list maintenance requirements.
>
> The report identified eight states that appeared to be the worst in terms of their noncompliance with the list maintenance requirement of Section 8.
>
> These were states that reported that no voters have been removed from any of their voters' lists in the last two years. Obviously this is a good indication that something is not right with the list maintenance practices in a state.
>
> As Chief of the Voting Section, I assigned attorneys to work on this matter. And in September 2009, I forwarded a memo to the Division front office asking for approval to go forward with the Section 8 list maintenance investigations in these states.
>
> During the time that I was Chief, no approval was given to this project. And it is my understanding that approval has never been given for that Section 8 list maintenance project to date. That means that we have entered the 2010 election cycle with eight states appearing to be in major noncompliance with list maintenance requirements of Section 8 of the NVRA. And, yet, the Voting Section, which has the responsibility to enforce that law, has yet to take any action.

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[203] According to Adams, "Section 8 is a general obligation to do [voter] list maintenance. In other words, no dead people can be on the voter rolls, no duplicates, people who have moved away. They have to be taken off the rolls." Adams Testimony, *supra* note 50, at 63-64.

[204] *Id.* at 64; *see also id.* at 76-77, 96; Coates Testimony, *supra* note 1, at 33-35. Before her appointment to the Justice Department, Ms. Fernandes had voiced objections regarding enforcement of § 8. *See generally Voting Section of the Civil Rights Division of the U.S. Department of Justice: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. 62 (2007), *available at* http://judiciary.house.gov/hearings/printers/110th/38637.PDF (last visited Dec. 28, 2010).

> From these circumstances, I believe that Ms. Fernandes's statement to the Voting Section in November 2009 not to, in effect, initiate Section 8 list maintenance enforcement activities has been complied with.[205]

Finally, Mr. Coates testified that the hostility to race-neutral enforcement of the voting rights laws was also reflected in the Department's actions regarding the pre-clearance requirements of Section 5 of the Voting Rights Act.

> If anyone doubts that the Civil Rights Division and the Voting Section have failed to enforce the Voting Rights Act in a race-neutral manner, one only has to look at the enforcement of Section 5's pre-clearance requirements.
>
> The statutory language of Section 5 speaks in terms of protecting all voters from racial discrimination. But the Voting Section has never interposed an objection under Section 5 to a voting change on the ground that it discriminated against white voters in the 45-year history of the Act.
>
> This failure includes no objections in the many majority-minority jurisdictions in the covered states. Indeed, the personnel in the Voting Section's unit which handles Section 5 submissions are instructed only to see if the voting change discriminates against racial, ethnic, and language minority voters.
>
> This practice of not enforcing Section 5's protections for white voters includes jurisdictions, such as Noxubee County, Mississippi, where the *Ike Brown* case arose, where white voters are in the racial minority. It is in those jurisdictions that the Voting Section's failure to apply Section 5's protections for white minority voters is particularly, in my opinion, problematic.
>
> On two occasions while I was Chief of the Voting Section, I tried to persuade officials at the Division level to change this policy so that white voters would be protected by Section 5 in appropriate circumstances, but to no avail. I believe that present management at both the Division and the Section are opposed to the race-neutral enforcement of Section 5 and continue to enforce those provisions in a racially selective manner.[206]

Without addressing the specific allegations of either Mr. Coates or Mr. Adams, the Department contends that it enforces the civil rights laws in a race-neutral fashion. In correspondence to the Commission, Assistant Attorney General Thomas Perez stated:

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[205] Coates Testimony, *supra* note 1, at 36.
[206] *Id.* at 24-26.

> There should be no misunderstanding: the Civil Rights Division is firmly committed to the evenhanded application of the law, without regard to the race of the victims or perpetrators of unlawful behavior. Any suggestion to the contrary is simply untrue.[207]

The position of the Department has been called into question not only by the testimony of Mr. Coates and Mr. Adams but by representations of a Department official who made comments to *Washington Post* reporters investigating the NBPP matter:

> Civil rights officials from the Bush administration have said that enforcement should be race-neutral. But some officials from the Obama administration, which took office vowing to reinvigorate civil rights enforcement, thought the agency should focus on cases filed on behalf of minorities.
>
> "The Voting Rights Act was passed because people like Bull Connor were hitting people like John Lewis, not the other way around," said one Justice Department official not authorized to speak publicly, referring to the white Alabama police commissioner who cracked down on civil rights protesters such as Lewis, now a Democratic congressman from Georgia.[208]

Such representations raise further doubts as to whether officials within the current Civil Rights Division have unilaterally limited the types of cases the Division will enforce.

iii. The Connection with the New Black Panther Party Lawsuit

In prior sections of this report, the factual arguments raised by the Department to justify the reversal in course of the NBPP litigation were examined. These arguments were challenged by the testimony of Christopher Coates and J. Christian Adams, and often at odds with internal DOJ documents received independently by the Commission. None of this evidence, however, presented a motive as to why the Department would reverse its course even though the NBPP defendants had conceded liability.

In his testimony before the Commission, Mr. Coates explained that he believes the change in course of the NBPP litigation was a direct result of the overall hostility within the Civil Rights Division to the neutral enforcement of voting rights laws.

> It is my opinion that the disposition of the Panther case was ordered because the people calling the shots in May 2009 were angry at the filing of the *Brown* case and angry at the filing of the *Panther* case. That anger

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[207] See Letter from Thomas E. Perez. Asst. Atty. Gen., Civil Rights Div., U.S. Dep't of Justice, to Gerald A. Reynolds, U.S. Comm'n on Civil Rights (Aug. 11, 2010), available at http://www.usccr.gov/NBPH/AR-M620U_20100811_173009.pdf.

[208] Markon & Thompson, *supra* note 82.

> was the result of their deep-seated opposition to the equal enforcement of the Voting Rights Act against racial minorities and for the protection of white voters who had been discriminated against.
>
> Ms. King, Mr. Rosenbaum, Mr. Kappelhoff, Ms. Clarke, a large number of the people working in the Voting Section and in the Civil Rights Division and many of the liberal [interest] groups at work in the civil rights field believe incorrectly but vehemently that enforcement of the protections of the Voting Rights Act should not be extended to white voters but should be extended only to protecting racial, ethnic, and language minorities.
>
> The final disposition of the *Panther* case, even in the face of a default by the defendants, was caused by this incorrect view of civil rights enforcement, and it was intended to send a direct message, in my opinion, to people inside and outside the Civil Rights Division. That message is that the filing of voting cases like the *Ike Brown* case and the *New Black Panther Party* case would not continue in the Obama administration.
>
> The disposition of the *Panther* case was not required by the facts developed during the case or the applicable case law, as has been claimed, but was because of this incorrect view of civil rights enforcement that is at war with the statutory language of the Voting Rights Act, which is written in a race-neutral manner, and at war with racially fair enforcement of federal law.[209]

The recent lawsuit by Judicial Watch indicates that documentary evidence exists which reflects frequent communications between the Civil Rights Division and political appointees within the Office of the Associate Attorney General and elsewhere. These communications should be provided, and the testimony of appropriate Department officials taken, to either prove or disprove these serious accusations.

iv. Reducing the Authority of Chris Coates

As further evidence of hostility to the Ike Brown and New Black Panther Party cases, Mr. Adams indicated that distrust of Mr. Coates began shortly after President Obama's Inauguration. He stated that, at that time, Acting Deputy Assistant General Steven Rosenbaum began to closely monitor Mr. Coates' work product.

> ADAMS: And at this time period, Rosenbaum was reviewing absolutely everything that Coates was doing, everything. And so he had a heavy workload because he was essentially acting in large status as the chief of the Voting section in place of Coates. So I can understand that Mr. Rosenbaum was probably backed up.

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[209] *Id.* at 23-25.

> QUESTION: All right. What you just mentioned, that Mr. Rosenbaum was monitoring Mr. Coates, when did that begin?
>
> ADAMS: After the inauguration and Mr. Rosenbaum moved into that position...
>
> QUESTION: All right. So it wasn't just the *Black Panther* case that precipitated this dispute or being reviewed. It was shortly after the election that Mr. Rosenbaum was overseeing Mr. Coates -- how do you put it -- rather closely or excessively closely?
>
> ADAMS: That's the gentle way... [E]very single paper that would go to court would have to be reviewed by Mr. Rosenbaum, which was a departure from the previous eight years, at least, the previous four years in my personal experience. No front office in my mind would have ever had the time to do that sort of thing, but they found it.[210]

Mr. Coates described the situation as follows:

> QUESTION: When Mr. Adams was here and testified, he indicated that after the election, when President Obama was elected, you were rather closely supervised. Could you describe what happened after the election?
>
> COATES: The relationships, the relationship, between Ms. King and Mr. Rosenbaum and I were not good. That relationship was not good.
>
> And as the -- as I continued to serve in the capacity as the Chief of the Voting Section, my -- the responsibilities and powers that a section chief in the Civil Rights Division normally has, such as assigning particular lawyers to cases, assigning the particular deputies to supervise cases, things of that sort, that those powers were taken away as the months went by in 2009, after the Obama administration came to power in January of 2009.[211]

Mr. Coates testified that his authority continued to diminish:

> [M]y powers to run the Section, to assign cases, to assign deputies, was being substantially reduced to where I believe that, by the late Fall of 2009, that I was serving as Chief only in name and that the decisions

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[210] Adams Testimony, *supra* note 50, at 41-42. The index produced in the *Judicial Watch* litigation reflects that all draft pleadings relating to the decision to limit the NBPP litigation were reviewed not only by Mr. Rosenbaum, but by members of the office of the Associate Attorney General as well. *See* Judicial Watch *Vaughn* Index, *supra* note 69, at http://www.judicialwatch.org/files/documents/2010/jw-v-doj-vaughn-09152010.pdf.

[211] Coates Testimony, *supra* note 1, at 48-49.

> were being made by other management people in the Section and at the Division level.
>
> And, of course, as a manager who has -- who is blamed when things go wrong, you don't want to be in a situation where you're supposed to be running a section when, in fact, you're not. And so I took that into consideration.
>
> I took into consideration I knew that a number of people in the Section did -- in the Division, I mean, the managers in the Division, some of them, did not want me as the Chief, including Ms. King, quite frankly, Mr. Rosenbaum, quite frankly.
>
> And there were a number of the people in the civil rights groups who did not want me as Chief of the Voting Section. And some of those groups, as I have described, have significant influence, I believe, in the Obama administration.[212]

At this stage in this investigation, the very serious allegations raised by Mr. Coates and Mr. Adams have been partially corroborated. Former Department attorneys Karl Bowers,[213] Hans von Spakovsky,[214] Asheesh Agarwal, Mark Corallo and Robert Driscoll[215] have all concurred that a generally hostile attitude toward race-neutral enforcement of civil rights laws exists among many career attorneys and some specific incidents of harassment have also been corroborated. Efforts to obtain evidence relating to the current administration's policies regarding race-neutral enforcement, however, have been met with extraordinary resistance by the Department.

The nature of these charges paints a picture of a Civil Rights Division at war with its core mission of guaranteeing equal protection of the laws for all Americans. During the Bush administration, the press reported ideological conflict within the Division.[216] If the testimony before the Commission is true, the current conflicts extend beyond policy differences to encompass allegations of inappropriately selective enforcement of laws, harassment of dissenting employees, and alliances with outside interest groups, at odds with the rule of law.

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[212] *Id.* at 64-65.

[213] *See* Sworn Statement of Karl S. Bowers, Jr., Jul. 15, 2010, *available at* http://www.usccr.gov/NBPH/BowersStatement_07-15-10.pdf.

[214] *See* von Spakovsky Affidavit, *supra* note 79.

[215] *Breaking: A Third Former DOJ Official Steps Forward to Support J. Christian Adams (Updated)*, PAJAMAS MEDIA, July 6, 2010, http://pajamasmedia.com/blog/breaking-former-doj-officials-stepping-forward-to-support-j-christian-adams/?singlepage=true (Last visited Dec. 28, 2010).

[216] *See* OFFICE OF THE INSPECTOR GEN. & OFFICE OF PROF'L RESPONSIBILITY, U.S. DEP'T OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING AND OTHER IMPROPER PERSONNEL ACTIONS IN THE CIVIL RIGHTS DIVISION (2008), *available at* http://www.justice.gov/oig/special/s0901/final.pdf (last visited Oct. 20, 2010); OFFICE OF PROF'L RESPONSIBILITY & OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL (2008), *available at* http://www.justice.gov/oig/special/s0807/final.pdf (last visited Oct. 20, 2010).

These issues need to be thoroughly investigated and properly resolved or public confidence in the Civil Rights Division will be seriously eroded.[217]

As part of any such review, it must be determined if the allegations of Mr. Coates and Mr. Adams regarding the alleged current hostility to race-neutral enforcement of civil rights laws are true. The best way to accomplish this task is to allow Department witnesses to appear before the Commission. Only then can Congress and the Administration determine what steps are necessary to re-establish public faith in the Civil Rights Division.

B. Prior Claims Of Voter Intimidation

In describing the decisions with regard to the New Black Panther Party litigation, the Department has indicated that potential voter intimidation cases that arose during the Bush administration underwent a similar process, sometimes resulting in matters that were not pursued. For example, in his written statement which accompanied his testimony before the Commission, Assistant Attorney General for Civil Rights Thomas Perez stated:

> One example is the recent instance we have identified that most clearly resembles the facts in [the NBPP case]. The Civil Rights Division received a complaint from a national civil rights organization regarding a matter in Pima, Arizona alleging that during the 2006 election, three well-known anti-immigration advocates – one of whom was wearing a gun – allegedly intimidated Latino voters at a polling place by approaching several persons, filming them, and advocating against printing voting materials in Spanish. In that instance, the Department declined to bring any action for alleged voter intimidation.[218]

Details of the alleged incident in Pima to some extent mirror the Fairmount Street incident in 2008. The incident in Pima was described as follows:

> Volunteer election monitors say three men armed with a video camera and a gun were intimidating voters at various polling stations throughout Tucson during voting on Tuesday.

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[217] By letter dated September 13, 2010, Glenn A. Fine, the Inspector General for the Department of Justice, provided notice to Congressmen Lamar Smith and Frank Wolf that his office was opening an investigation into "the types of cases brought by the Voting Section and any changes in these types of cases over time; any changes in Voting Section enforcement policies or procedures over time; whether the Voting Section has enforced the civil rights laws in a non-discriminatory manner; and whether any Voting Section employees have been harassed for participating in the investigation or prosecution of particular matters." Letter from Glenn Fine, Inspector Gen., U.S. Dep't of Justice, to Congressman Frank Wolf (Sept. 13, 2010), *available at* http://www.usccr.gov/NBPH/LetterFine2Wolfreenforcementcivilrightslaws_09-13-10.pdf.

[218] Perez Statement, *supra* note 53, at 3.

> From about 9:45 a.m. to noon, the men approached Hispanic voters as they attempted to enter Iglesia Bautista Kairos . . . said Diego Bernal, a lawyer with the Mexican American Legal Defense Fund.
>
> * * *A third man, wearing an American flag T-shirt and camouflage shorts, stood nearby with his hand on a handgun in a holster strapped around his hips, he said.
>
> * * *
> "It's pure, old-fashioned voter intimidation," he said. "If shoving a videotape [sic] in your face while someone with a gun stands next to you isn't intimidation, I don't know what is."[219]

The activities of Russ Dove and Roy Warden, two of the men involved in the alleged Pima voter intimidation, have been monitored by the Southern Poverty Law Center (SPLC). In a 2006 story called *Deadly Force* from the SPLC website:

> [A] Glock 9mm on his hip, and a bullhorn to amplify his outrage, Roy Warden . . . emerged this spring as one of the country's most controversial, volatile, and, many believe, dangerous characters of the anti-immigration movement. Along with . . . Russ Dove, a former militia leader and convicted car thief . . . Warden has burned and trampled Mexican flags in public, nearly started at least one riot, regularly wreaked havoc on Tucson City Council proceedings, and E-mailed a death threat to a prominent local public defender.[220]

Another press report presented a different version of events, claiming that only one man was carrying a gun, that he never came within 150 feet of any polling locations, and that he never had any interactions with voters.[221]

At this stage, the extent of the investigation undertaken by the Department with regard to the incident in Pima is unknown. In addition, the Commission has no information relating to the decisionmaking process that led to the determination not to pursue the matter federally. In their testimony before the Commission, J. Christian Adams indicated that he had no connection with the case,[222] while Christopher Coates had only a limited knowledge of what

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[219] Claudine Lomonaco, *Anti-Immigrant Activists Accused of Voter Harassment*, TUCSON CITIZEN, Nov. 7, 2006, *available at* http://tucsoncitizen.com/morgue/2006/11/07/31837-anti-immigrant-activists-accused-of-voter-harassment/ (last visited Oct. 20, 2010).

[220] Southern Poverty Law Center, *Deadly Force*, INTELLIGENCE REPORT, fall 2006, *available at* http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2006/fall/deadly-force?page=0,0 (last visited Oct. 20, 2010).

[221] *See* Quin Hillyer, *First Democratic Congressman Calls for Charges Against Black Panthers*, WASH. TIMES WATER COOLER, July 27, 2010, http://www.washingtontimes.com/blog/watercooler/2010/jul/27/first-democratic-congressman-calls-charges-against/ (last visited Oct. 20, 2010).

[222] *See* Adams Testimony, *supra* note 50, at 72.

had occurred.[223] In any case, this is an additional area of inquiry that should be included as part of this investigation.[224]

[223] *See* Coates Testimony, *supra* note 1, at 86-90. Coates testified, "I learned about it after it occurred and after it came to the Department. So I can talk to you more about it in 2008 than I can 2006 and 2007." He then described what knowledge he had about the case. *Id.* at 87.

[224] Other allegations of voter intimidation that were not ultimately pursued by DOJ include a cross-burning incident in Grand Coteau, Louisiana and mailings targeted at immigrants in Orange County, California. These also may be proper areas of inquiry.

PART IV: The Department's Lack of Cooperation and the Commission's Difficulty in Securing Cooperation Required by Law

A. Summary of Commission Information Requests and Department Responses

The U.S. Commission on Civil Rights is an independent, bipartisan agency established by Congress in 1957. Among its statutory duties, the Commission is charged with investigating complaints alleging that citizens have been deprived of their right to vote by reason of race, color, religion, sex, age, disability, or nation origin. In addition, the Commission is required to appraise federal laws and policies with respect to discrimination or denial of equal protection of the laws.

In accomplishing these tasks, Congress gave the Commission two main tools. First, Congress mandated that "All federal agencies shall cooperate fully with the Commission to the end that it may effectively carry out its functions and duties."[225] Second, the Commission was granted the power to "issue subpoenas for the attendance of witnesses and the production of written or other matter."[226] The Commission, however, does not have express authority to enforce its own subpoenas. Instead, the relevant statute provides that it is "the Attorney General [who] may in a Federal court . . . obtain an appropriate order to enforce the subpoena."[227]

In most cases, granting the Department of Justice sole discretion whether to enforce the Commission's subpoenas is of little consequence. Comity and good faith are presumed. When the Department is the subject of a Commission investigation, however, a potential conflict of interest exists.

As is reflected in the present case, the statutory mandate requiring federal agencies to cooperate with the Commission has much less force when the recalcitrant agency is the Department of Justice. The Department may refuse to provide information or witnesses safe in the knowledge that it will never enforce a subpoena against itself.

As more fully described below, the inability to appeal to an independent authority to enforce the Commission's information requests leaves the Justice Department as the sole arbiter of what will be produced. This is a situation of particular concern when the Department's enforcement policies are under scrutiny. The record in this case proves the point. The Department has provided only limited cooperation with the Commission, and attempted to prevent Christopher Coates and J. Christian Adams from testifying.[228] Absent the production of materials and information by third parties, the Department and its policies would have avoided the scrutiny that the Commission's charter requires.

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[225] 42 U.S.C. § 1975b(e).
[226] 42 U.S.C. § 1975a(e)(2).
[227] *Id.*
[228] While the Department has provided about 4,000 pages of documents, most of these relate to either already public documents, or documents relating to other voter intimidation cases. While useful, the documents provided do not go to the core issue of the decision making relating to the New Black Panther Party litigation. Indeed, the Department has gone so far as to withhold witness statements from the Commission and has yet to provide witnesses or information about alleged instructions by Deputy Assistant Attorney General Julie Fernandes or similar comments as to which no privilege could apply.

i. Initial Letters and the Basis for an Expanded Inquiry

The Commission's interest in the New Black Panther Party litigation began shortly after three of the defendants were dismissed from the case on May 15, 2009. In a letter sent on June 16, 2009, the Commission asked the Department to detail (i) its rationale for dismissing most of the case, (ii) its evidentiary and legal standards in voter intimidation cases, and (iii) any similar cases where the Civil Rights Division unilaterally dismissed charges against defendants.[229] The Department responded on July 24 that three of the defendants were dismissed because it was determined "after a careful and thorough review of the matter,"[230] that the "facts and the law" did not support pursuing claims against them.

The Commission found the Department's letter to be "largely non-responsive" to its specific questions and requests for information in which to form its own judgment on the matter.[231] The Commission next sought all documents relating to the NBPP case, including witness statements taken by the Department regarding the incident in Philadelphia.[232] On September 9, the Department informed the Commission that the NBPP matter had been referred to the Office of Professional Responsibility (OPR), and that the Department "will not provide further response until that review is complete."[233]

Congressmen Lamar Smith, House Judiciary Committee Ranking Member, and Frank Wolf, Ranking Member on the Commerce-Science-Justice Subcommittee, House Appropriations Committee, have pointed out that OPR restricts its investigations to whether attorneys have met basic ethical obligations, and that it is beyond the scope of OPR's duties to investigate the broader questions raised in the NBPP investigation.[234] It was also pointed out that any

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[229] Letter from Gerald A. Reynolds, Chairman, et al., U.S. Comm'n on Civil Rights, to Loretta King, Acting Asst. Atty. Gen., Civil Rights Div., U.S. Dep't of Justice (June 16, 2009), *available at* http://www.usccr.gov/correspd/VoterIntimidation2008LetterDoJ.pdf; *see also* Letter from Abigail Thernstrom, Vice Chairman & Ashley L. Taylor, Jr., Commissioner, U.S. Comm'n on Civil Rights, to Loretta King, Acting Asst. Atty. Gen., Civil Rights Div., U.S. Dep't of Justice (June 22, 2010), *available at* http://www.usccr.gov/correspd/Thernstrom_TaylorLetter2008.pdf.

[230] Letter from Portia L. Roberson, Dir., Office of Intergovernmental & Public Liaison, U.S. Dep't of Justice, to Gerald A. Reynolds, Chairman, U.S. Comm'n on Civil Rights (July 24, 2010), *available at* http://www.usccr.gov/correspd/Roberson_Reynolds-07-24-09.pdf. This letter claimed that one of the dismissed defendants, Jerry Jackson, lived at the building where the polling place was located. The Department later acknowledged that this claim was incorrect. *See* Discovery Responses, *supra* note 132, at 29-30 (Response to Document Request No. 22).

[231] *See* Letter from U.S. Comm'n on Civil Rights to Eric Holder, Atty. Gen., U.S. Dep't of Justice (Aug. 10, 2009), *available at* http://www.usccr.gov/correspd/Follow-upVoterIntimidation.pdf.

[232] The Department has not produced most of the witness statements taken by the Department in the case, including statements of poll watchers Mike Mauro, Chris Hill, Steve Morse, Wayne Byman, Joe Fischetti, Larry Counts, Angela Counts, and Harry Lewis; Republican Party officials Joe DeFelice and John Giordano; police officer Richard Alexander; and defendant Malik Zulu Shabazz.

[233] Letter from Portia L. Roberson, Dir., Office of Intergovernmental & Public Liaison, U.S. Dep't of Justice, to Gerald A. Reynolds, Chairman, et al., U.S. Comm'n on Civil Rights (Sept. 9, 2009), *available at* http://www.usccr.gov/correspd/LetterfromRoberson2ReynoldsetalrereferralDOJOfficeofProfessionalResponsibility_09-09-09.pdf.

[234] The independence of OPR and its ability to investigate sensitive cases are further called into question by reports of its ties to the White House. It was reported in February 2009 that the White House and the

potential investigation by OPR under the present circumstances is tainted by the fact that OPR reports directly to the Attorney General. As noted by Representative Wolf: "I do not believe that this office [OPR] is capable of conducting an unbiased and independent review of this case given that it reports to a political appointee – an inherent conflict-of-interest that can only be avoided by an independent inspector general (IG) investigation."[235] Similar concerns about the independence of OPR have also been raised by members of Congress with regard to investigations involving the Bush administration.[236]

Given these concerns, and the fact that OPR still has not completed its investigation, which has been pending for over a year, Representatives Smith and Wolf have repeatedly asked Department Inspector General Glenn Fine to investigate the Department's handling of the NBPP case and related issues.[237] For over a year, the Inspector General's position has been that his office does not have jurisdiction to investigate these matters because the allegations relate to Department attorneys exercising their authority to litigate and make legal decisions.[238] The two congressmen expressed their view that Mr. Fine's reading of both his jurisdiction and the NBPP matter was too narrow, as the NBPP matter is about more than litigation decisions.[239] In light of J. Christian Adams' testimony before the Commission, Representatives Smith and Wolf renewed their request for the Inspector General to investigate.[240]

Department were vetting the head of OPR, Mary Patrice Brown, for a federal judgeship. *See* Joe Palazzolo, *White House Vetting OPR Chief for Federal Judgeship*, MAIN JUSTICE, Feb. 8, 2010, http://www.mainjustice.com/2010/02/08/white-house-vetting-opr-chief-for-federal-judgeship/; Letter from Congressman Lamar Smith & Congressman Frank Wolf to Glenn A. Fine, Inspector Gen., U.S. Dep't of Justice (March 2, 2010), *available at* http://www.usccr.gov/NBPH/CongressionalCorrespondencereNBPP.pdf. In addition, the attorney assigned to the investigation is alleged to have made significant political contributions to recent Democratic Party campaigns. *See* Letter from Mary Patrice Brown, Acting Counsel, Office of Prof'l Responsibility, U.S. Dep't of Justice, to Congressman Lamar Smith (Aug. 28, 2009); Hans von Spakovsky, *Investigating the Black Panther Case*, NAT'L REVIEW ONLINE, Sept. 14, 2009, http://www.nationalreview.com/corner/187130/investigating-black-panther-case/hans-von-spakovsky (last visited Oct. 21, 2010).

[235] Letter from Congressman Frank Wolf to Glenn Fine, Inspector Gen., U.S. Dep't of Justice (Jan. 26, 2010), *available at* http://www.usccr.gov/NBPH/CongressionalCorrespondencereNBPP.pdf.

[236] *See* Ryan J. Reilly, *Internal DOJ Ethics Office is Broken, Panel Says*, MAIN JUSTICE, Feb. 25, 2010, http://www.mainjustice.com/2010/02/25/opr-report-shows-internal-doj-ethics-office-is-broken-say-panelists/ (last visited Oct. 20, 2010); Ryan J. Reilly, *OPR Report Kickstarts Push to Strengthen Inspector General*, MAIN JUSTICE, Mar. 19, 2010, http://www.mainjustice.com/2010/03/19/opr-torture-memos-report-kickstarts-push-to-strengthen-inspector-general/ (last visited Oct. 20, 2010).

[237] *See* Letter from Congressman Frank Wolf to Glenn Fine, Inspector Gen., U.S. Dep't of Justice (Jan. 26, 2010), *available at* http://www.usccr.gov/NBPH/CongressionalCorrespondencereNBPP.pdf; Letter from Congressman Lamar Smith & Congressman Frank Wolf to Glenn A. Fine, Inspector Gen., U.S. Dep't of Justice (Mar. 2, 2010), *available at* http://www.usccr.gov/NBPH/CongressionalCorrespondencereNBPP.pdf.

[238] *See* Letter from Glenn A. Fine, Inspector Gen., U.S. Dep't of Justice, to Congressman Frank Wolf (Feb. 2, 2010), *available at* http://www.usccr.gov/NBPH/CongressionalCorrespondencereNBPP.pdf (citing 5 U.S.C. App. 3 § 8E(b)(3); 28 C.F.R. § 0.29c(b)).

[239] *See* Letter from Congressman Lamar Smith & Congressman Frank Wolf to Glenn A. Fine, Inspector Gen., U.S. Dep't of Justice (Mar. 2, 2010), *available at* http://www.usccr.gov/NBPH/CongressionalCorrespondencereNBPP.pdf.

[240] *See* Letter from Congressman Frank Wolf to Glenn Fine, Inspector Gen., U.S. Dep't of Justice (July 14, 2010), *available* at http://wolf.house.gov/uploads/fine%207%2014_20100714124633.pdf (last visited Oct. 20, 2010); Letter from Congressman Lamar Smith to Glenn A. Fine, Inspector Gen., U.S. Dep't of Justice (Aug 3,

This most recent demand resulted in a change of position by the Inspector General. In a letter dated September 13, 2010 to Congressman Smith and Congressman Wolf, the Inspector General stated:

> Through this letter I want to inform you that the OIG plans to initiate a review of the enforcement of civil rights laws by the Voting Section of the Department's Civil Rights Division. This review will examine, among other issues, the types of cases brought by the Voting Section and any changes in these types of cases over time; any changes in the Voting Section enforcement policies or procedures over time; whether the Voting Section has enforced the civil rights laws in a non-discriminatory manner; and whether any Voting Section employees have been harassed for participating in the investigation or prosecution of particular matters.[241]

In the same letter, the Inspector General also noted that: "In response to my recent inquiry, OPR officials have informed us that they are near the end of their investigation and are beginning to draft their report of investigation."[242]

Regardless of belated actions by OPR and OIG, the Commission has an independent duty to investigate such civil rights law enforcement actions and report to Congress and the President its independent conclusions. The following sections detail the extent to which the Department has attempted to frustrate the Commission's investigation.

ii. Subpoenas Issued to Christopher Coates and J. Christian Adams

After the Commission voted on September 11, 2009 to make the NBPP investigation the subject of its annual enforcement report, and after another round of correspondence with the Department,[243] the Commission on November 18 subpoenaed two Department employees for deposition: Christopher Coates, the Chief of the Voting Section, and J. Christian Adams, a Voting Section attorney. Both attorneys had been part of the NBPP litigation team. In response, the Department told the Commission that Coates and Adams would not be permitted to "provide the Commission with any information (in writing, by testimony, or otherwise) unless and until the Department has had an opportunity to fully review and

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2010), *available at* http://republicans.judiciary.house.gov/Media/PDFs/080310_Smith%20to%20Fine.pdf (last visited Oct. 20, 2010).

[241] Letter from Glenn Fine, Inspector Gen., U.S. Dep't of Justice, to Congressman Frank Wolf (Sept. 13, 2010), *available at* http://www.usccr.gov/NBPH/LetterFine2Wolfreenforcementcivilrightslaws_09-13-10.pdf.

[242] *Id.*

[243] *See* Letter from Gerald A. Reynolds, Chairman, U.S. Comm'n on Civil Rights, to Eric H. Holder, Atty. Gen., U.S. Dep't of Justice (Sept. 30, 2009), *available at* http://www.usccr.gov/correspd/VoterIntimidationNBPP093009.pdf; Letter from Portia Roberson, Director, Office of Intergovernmental and Public Liaison, U.S. Dep't. of Justice to Gerald A. Reynolds, Chairman, U.S. Comm'n on Civil Rights (Nov. 16, 2009), *available at* http://www.usccr.gov/correspd/LetterfromRoberson2Reynoldsrerequestforinformation%20_11-16-09.pdf.

consider the Commission's demand."[244] The Commission was also copied on a letter from counsel for Mr. Adams, who made it clear that Adams had been ordered by the Department not to comply with the Commission's subpoena.[245] On January 29, 2010, the Commission asked the Department whether it would reconsider its position and permit Coates and Adams to testify.[246] On March 12, 2010, the Department said that it was still evaluating the request.[247]

Having not received a decision from the Department, the Commission asked the Department on March 30 to appoint a special counsel. The purpose of this request was to have an independent third party seek enforcement of the subpoenas directed to the Department and its employees. On April 16, 2010, the Department stated that it would not authorize Coates or Adams to provide testimony to the Commission. The Department did not respond to the Commission's request that a special counsel be appointed until May 13, 2010, stating that it "[did] not believe it [was] appropriate to appoint a special counsel," based on the Department's "need to protect the confidentiality of the work product of our attorneys."[248]

J. Christian Adams submitted his letter of resignation to the Department on or about May 14, due in part to what he characterized as the inaccurate testimony given by Assistant Attorney General Thomas Perez on that date to the Commission.[249] Adams's resignation was effective in June,[250] and he provided testimony to the Commission on July 6. Under oath, he testified that he resigned for two reasons: first, he believed he was placed in an untenable position in that the Department instructed him not to cooperate with a lawful subpoena issued by the Commission; and second, he believed the testimony of Perez before the Commission was inaccurate, despite Perez's having been briefed by the trial team the day before.[251] Pursuant to a majority vote of the Commission during its July 16, 2010 business meeting, the Commission offered on July 28 to limit its initial questioning of Mr. Coates to "non-deliberative statements or actions relating to whether there is a policy and/or culture within

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[244] *See* Letter from Joseph H. Hunt, Dir., Fed. Programs Branch, Civil Div., U.S. Dep't of Justice, to Gerald A. Reynolds, Chairman, U.S. Comm'n on Civil Rights (Nov. 24, 2009), *available at* http://www.usccr.gov/correspd/LetterfromHunt2Reynoldsrerequestforinformation_11-24-09.pdf.

[245] *See* Letter from Jim Miles to Joseph H. Hunt, Dir., Fed. Programs Branch, Civil Div., U.S. Dep't of Justice (Nov. 25, 2010), *available at* http://www.usccr.gov/correspd/LetterfromMiles2HuntreAdamstestimony_11-29-09.pdf; *see also* Adams Testimony, *supra* note 50, at 9.

[246] *See* Letter from David P. Blackwood, Gen. Counsel, U.S. Comm'n on Civil Rights, to Joseph H. Hunt, Dir., Fed. Programs Branch, Civil Div., U.S. Dep't of Justice (Jan. 29, 2010), *available at* http://www.usccr.gov/correspd/1-29-10_Blackwood2Hunt.pdf.

[247] *See* Letter from Joseph H. Hunt, Dir., Fed. Programs Branch, Civil Div., U.S. Dep't of Justice, to David P. Blackwood, Gen. Counsel, U.S. Comm'n on Civil Rights (Mar. 12, 2010), *available at* http://www.usccr.gov/correspd/03-12-10_DOJ-NPPP.pdf.

[248] Letter from Joseph H. Hunt, Dir., Fed. Programs Branch, Civil Div., U.S. Dep't of Justice, to Gerald Reynolds, Chairman, U.S. Comm'n on Civil Rights (May 13, 2010), *available at* http://www.usccr.gov/NBPH/UnfillDiscReq_05-13-10.pdf.

[249] *See* Adams Testimony, *supra* note 50, 69-70.

[250] *See* J. Christian Adams, *PJM Exclusive: Unequal Law Enforcement Reigns at Obama's DOJ*, PAJAMAS MEDIA, June 28, 2010, http://pajamasmedia.com/blog/j-christian-adams-you-deserve-to-know-%E2%80%94-unequal-law-enforcement-reigns-at-obamas-doj-pjm-exclusive/ (last visited Oct. 21, 2010).

[251] *See* Adams Testimony, *supra* note 50, at 68. Mr. Adams went on to state, "I have not said that he testified falsely. I have not said that he lied. I think he believes in some measure what he is saying." *Id.*

the Department of discriminatory enforcement of civil rights laws and whether there is a policy not to enforce Section 8 of the National Voter Registration Act."[252]
On August 11, 2010, Mr. Perez responded to the letters of July 28 and August 6, 2010. In that letter, Mr. Perez simply asserted that the Department applies civil rights laws in a race-neutral fashion (without admitting, denying, acknowledging, or attempting to explain the specific testimony to the contrary), and reiterated the Department's position that Christopher Coates would not be permitted to testify.

Like Mr. Adams, Mr. Coates testified that the information provided by Mr. Perez and the Department was misleading and inaccurate. As a result, he decided to testify before the Commission on September 24, 2010.[253] In describing his decision to appear before the Commission, he stated:

> [I] reviewed Mr. Perez's August 11th letter to the Chairman, in which he again denied your request that I be allowed to testify before you and in which he made various representations concerning the Department's enforcement practices.
>
> Based upon my own personal knowledge of the events surrounding the Division's actions in the *Panther* case, and the atmosphere that has existed and continues to exist in the Division and in the Voting Section against fair enforcement of certain federal voting laws, I do not believe these representations to this Commission accurately reflect what occurred in the *Panther* case and do not reflect the hostile atmosphere that has existed within the Division for a long time and against race-neutral enforcement of the Voting Rights Act.[254]

Given the wide discrepancy between the testimony of Mr. Perez and the testimony of Mr. Coates and Mr. Adams, a serious question exists as to whether the Department's attempt to prevent Mr. Coates and Mr. Adams from testifying was based on concerns other than protecting legitimate institutional privileges.

iii. Executive Privilege and Asserted Departmental Interests

Believing that the Department had largely failed to cooperate with its information requests, the Commission on December 8, 2009, served a subpoena on the Department propounding interrogatories and document requests. The instructions to the Department stated:

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[252] Letter from Gerald A. Reynolds, Chairman, U.S. Comm'n on Civil Rights, to Eric Holder, Atty. Gen., U.S. Dep't of Justice (July 28, 2010), *available at* http://www.usccr.gov/NBPH/Final_GAR_to_AGH_07-28-10.pdf; *see also* Letter from Gerald A. Reynolds, Chairman, U.S. Comm'n on Civil Rights, to Eric H. Holder, Jr., Atty. Gen., U.S. Dep't of Justice (Aug. 6, 2010), *available at* http://www.usccr.gov/NBPH/LetterfromChair2HolderreCoatesTest_08-06-10.pdf.

[253] Press reports indicate that the Department attempted to prevent Mr. Coates from testifying as late as the night before his appearance before the Commission. *See* Daniel Halper, *DOJ, the New Black Panther Party, and Integrity*, WEEKLY STANDARD BLOG, Oct. 1, 2010, http://www.weeklystandard.com/blogs/doj-new-black-panther-party-and-integrity (last visited Oct. 21, 2010).

[254] Coates Testimony, *supra* note 1, at 9.

> If any claim of privilege is raised relating to any document or information request, identify with specificity the privilege asserted, any legal authorities relied upon, and indicate whether any privilege so asserted can be addressed by agreements of confidentiality between the parties. If any claim of executive privilege is raised, identify the highest official within the Department connected with the specific document or information, and indicate whether the President of the United States has specifically exercised said privilege.[255]

The Department did not comply with this instruction. Many of its responses merely referred to "General Objections," which included objecting to each interrogatory and document request "to the extent they seek information protected by the attorney-client, attorney-work product, deliberative process, law enforcement, or other recognized privilege."[256] In addition, the Department seemed to create a new privilege, claiming that it was "constrained by the need to protect against disclosures that would harm its deliberative processes *or that otherwise would undermine its ability to carry out its mission.*" (emphasis added)[257] The Department simply ignored the question of whether the President, or any Department official on his behalf, had invoked executive privilege.

On March 30, the Commission asked the Department to specify the specific privileges asserted, and legal authorities relied upon, to justify withholding the information requested. The Department has never done so, "apparently seek[ing] to obfuscate the basis for its refusal to provide the requested information."[258]

On April 16, the Department indicated that Assistant Attorney General Thomas Perez would agree to testify before the Commission on May 14, 2010. In anticipation of Mr. Perez's testimony, Chairman Reynolds wrote to the Attorney General on May 9, 2010, asking whether President Obama or the Attorney General had invoked executive privilege and seeking an answer prior to Perez's scheduled testimony.[259] On May 13, the day before Mr. Perez's scheduled testimony, the Department stated for the first time that President Obama had not asserted and would not assert executive privilege, which Mr. Perez reiterated in his testimony the next day.[260]

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[255] *See* U.S.C.C.R. Discovery Requests, *supra* note 153, at 3

[256] Discovery Responses, *supra* note 132, at 1.

[257] Letter from Joseph H. Hunt, Dir., Fed. Programs Branch, Civil Div., U.S. Dep't of Justice, to Gerald A. Reynolds, Chairman, U.S. Comm'n on Civil Rights (Jan. 11, 2010), *available at* http://www.usccr.gov/correspd/1-12-10_Hunt2ReynoldsCL.pdf.

[258] Letter from David P. Blackwood, Gen. Counsel, U.S. Comm'n on Civil Rights, to Joseph H. Hunt, Dir., Fed. Programs Branch, Civil Div., U.S. Dep't of Justice (Mar. 30, 2010), *available at* http://www.usccr.gov/correspd/03-30-10_DOJ-NPPP.pdf.

[259] *See* Letter from Gerald A. Reynolds, Chairman, U.S. Comm'n on Civil Rights, to Eric Holder, Atty. Gen., U.S. Dep't of Justice (May 9, 2010), *available at* http://www.usccr.gov/NBPH/UnfillDiscReq_05-09-10.pdf.

[260] *See* Letter from Joseph H. Hunt, Dir., Fed. Programs Branch, Civil Div., U.S. Dep't of Justice, to Gerald Reynolds, Chairman, U.S. Comm'n on Civil Rights (May 13, 2010), *available at* http://www.usccr.gov/NBPH/UnfillDiscReq_05-13-10.pdf; Perez Testimony, *supra* note 53, at 90-91.

During the May 14 hearing, Mr. Perez was questioned regarding the rationale for the Department's refusal to appoint a special counsel.[261] Perez's answer was largely non-responsive, but seemed to focus on the fact that there was no explicit statutory provision addressing the issue.[262]

As with the Department's attempt to preclude Christopher Coates and J. Christian Adams from testifying before the Commission, vague and unexplained assertions of privilege by the Department raise serious questions as to the Department's degree of cooperation and whether its explanations serve the legitimate concerns of the agency.

iv. Judicial Watch Litigation and the Failure to Identify Allegedly Privileged Documents

The discovery requests served upon the Department included an instruction requiring the Department to identify any and all documents withheld based on alleged assertion of privilege. Specifically, Instruction No. 10 of the discovery requests provides, in part:

> [F]or all documents or information withheld pursuant to an objection or a claim of privilege, identify:
> A. the author's name and title or position;
> B. the recipient's name and title or position;
> C. all persons receiving copies of the document;
> D. the number of pages of the document;
> E. the date of the document;
> F. the subject matter of the document; and the basis for the claim to privilege.[263]

This demand was followed by correspondence on behalf of the Commission dated March 30, April 1, April 26, and May 13, 2010. Despite the Commission's demands, the Department refused to detail the types of documents it claimed were privileged. Instead, on May 13, 2010 the Department asserted: "We do not intend to provide a log of withheld materials; our confidentiality interests in attorney work product are so conventional that we do not see a basis for creating a log of these materials."[264]

Despite the Department's refusal to provide a log of withheld documents to the Commission, on September 20, 2010 it was learned that just such an index had been provided by the Department to Judicial Watch as a result of a Freedom of Information Act (FOIA) lawsuit

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[261] *See* Perez Testimony, *supra* note 53, at 90.
[262] *See id.* at 90-93.
[263] U.S.C.C.R. Discovery Requests, *supra* note 153, at 2-3.
[264] Letter from Joseph H. Hunt, Dir., Fed. Programs Branch, Civil Div., U.S. Dep't of Justice, to Gerald Reynolds, Chairman, U.S. Comm'n on Civil Rights (May 13, 2010), *available at* http://www.usccr.gov/NBPH/UnfillDiscReq_05-13-10.pdf.

filed by said organization.[265] The log provided to Judicial Watch, known as a Vaughn Index,[266] provides exactly the type of information originally requested by the Commission.[267]

The fact that the Department provided such information to Judicial Watch, but not to the Commission, is telling. The Department's duty to respond to the Commission is based on a statutory mandate requiring federal agencies to "cooperate fully" with the Commission.[268] The Department also is charged with enforcement of the Commission's subpoenas.[269] Thus, reliance on DOJ to follow the first statute above and to enforce the Commission's subpoenas in court arguably leaves the Commission without recourse in the event, as here, that the Department itself refuses to provide subpoenaed information and also refuses to even appoint a special counsel to represent the Commission's interests or independently evaluate its position.

While the Department refused to provide a log or otherwise identify the documents it has withheld documents to the Commission, the FOIA suit by Judicial Watch could not be similarly ignored. Unlike with the demands of the Commission, the Department is not the sole arbiter of what may be withheld from public scrutiny in FOIA cases. Given that the demands of both the Commission and Judicial Watch were similar in nature, the only explanation for the difference in treatment is that the information sought by the Commission could be withheld without judicial scrutiny – especially given the Commission's superior claim to the actual documents and not just an index of withheld materials. It is difficult to attribute the Department's different treatment to anything but a desire to avoid serious scrutiny into its decision making and to prevent disclosure of the extent to which political appointees played a role in the case.

As of September 20, 2010, the Commission has again renewed its demand that the Department provide a privilege log detailing those documents and information withheld pursuant to alleged claims of privilege.

v. Outstanding Discovery Issues

As of this writing, the Department has failed to produce the following information in response to the Commission's subpoenas from November and December 2009 (information similar to what the Commission has been seeking since its June and August 2009 letters):

1. The Department refused to authorize Christopher Coates and J. Christian Adams to testify before the Commission. These individuals appeared over the objections of the Department. Even then, Mr. Coates and Mr. Adams felt obligated to honor the

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[265] *See* Judicial Watch, Inc. v. U.S. Dep't of Justice, No. 10-CV-851-RBW (D.D.C.).
[266] *See* Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973).
[267] *See* Judicial Watch *Vaughn Index*, *supra* note 69.
[268] 42 U.S.C. § 1975b(e) provides, "All Federal agencies shall cooperate fully with the Commission to the end that it may effectively carry out its functions and duties."
[269] Under the terms of 42 U.S.C. § 1975a(e)(2), "[i]n case of contumacy or refusal to obey a subpoena, the Attorney General may in a federal court of appropriate jurisdiction obtain an appropriate order to enforce the subpoena."

Department's privilege claims that some on the Commission believe are not valid in the absence of an invocation of executive privilege.

2. With regard to documents withheld, the Department has not specified the privileges being invoked, other than implying in its May 13, 2010 letter that the Department's "well-established *confidentiality interests*" (emphasis added) override the statutory command that "[a]ll federal agencies shall cooperate fully with the Commission."[270] In addition, as discussed above, the Department has refused to provide a privilege log as requested by the Commission.

3. The Department refused to provide witness statements from poll watchers Mike Mauro, Chris Hill, Steve Morse, Wayne Byman, Joe Fischetti, Larry Counts, Angela Counts, and Harry Lewis; defendant Malik Zulu Shabazz; police officer Richard Alexander; and Republican Party officials Joe DeFelice and John Giordano.[271]

4. The Department heavily redacted the FBI incident reports that have been produced.

5. The Department refused to provide the draft pleadings that were the subject of the dispute between the trial team and the management team of Loretta King and Steve Rosenbaum.[272]

6. The Department refused to provide documents constituting and concerning the communications between the trial team and Loretta King and Steve Rosenbaum, including an April 2009 memorandum referenced in a press report, prepared by the trial team in response to Mr. Rosenbaum's concerns.

7. The Department refused to provide e-mails between Civil Rights Division officials, such as Loretta King and Steven Rosenbaum, and other Department officials, such as Assistant Attorney General Thomas Perrelli, Deputy Assistant Attorney General Sam Hirsch, and Deputy Attorney General David Ogden, relating to the NBPP case.

8. There are several documents referred to in the Appellate Section memo that have not been produced: an e-mail from the Voting Section to the Civil Rights Division of May 1, 2009; a Draft Motion for Default Judgment (dated April 30, 2009); a Draft Memorandum of Law in Support of Motion for Default Judgment (dated April 30, 2009); and a Draft Proposed Order (dated May 6, 2009).

In addition, the Department has refused to answer 18 interrogatories and refused to produce documents in response to 22 requests, usually citing the amorphous General Objections, as discussed above.

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[270] 42 U.S.C. § 1975b(e).

[271] *See* J. Memo, *supra* note 10; *see also* Remedial Memo, *supra* note 74, at 4. It should be noted that the Department never produced the three memos regarding the NBPP case that the Commission has obtained. These three memos were submitted to the Commission by Congressman Frank Wolf at its April 23, 2010 hearing.

[272] *See* J. Memo, *supra* note 10, at 13 n.15.

Finally, Christopher Coates's testimony and news reports indicate that documents relevant to this investigation may have been prepared in April and May 2010. The Commission requested on October 13, 2010, that the Department provide the following documents in an expedited fashion, which the Department has not provided as of this writing: e-mails or writings prepared by Coates and J. Christian Adams in the month preceding Thomas Perez's testimony to the Commission regarding the NBPP litigation or hostility to race-neutral enforcement of the voting laws.

The scope and the extent of the disagreement between the Commission and the Department calls out for resolution by a neutral party. Under the current statutory framework, however, it is the Department that, as a practical matter, has final word as to what, if any, information will be released.

PART V: Prior Enforcement of § 11(b) of the Voting Rights Act

As part of this report, the Commission has examined prior enforcement of Section 11(b) of the Voting Rights Act, the provision used to pursue the New Black Panther Party litigation. This section reviews the terms of the statute, its legislative history and purpose, and provides a short description of each prior case brought under Section 11(b).

A. The Statute

§ 11(b) of the Voting Rights Act provides:

> No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any person to vote or attempt to vote, or intimidate, threaten, or coerce any person for exercising any powers or duties under [relevant sections of this title].[273]

Under the terms of the statute, one does not have to successfully intimidate voters in order to be in violation of § 11(b). An attempt to intimidate is sufficient to establish liability.[274] In addition, as acknowledged by Assistant Attorney General Thomas Perez in his testimony before the Commission, the statute protects not only voters, but poll watchers as well.[275] Accordingly, in the New Black Panther Party litigation, Section 11(b) was used as the basis for four causes of action: (1) intimidation of voters; (2) attempted intimidation of voters; (3) intimidation of individuals aiding voters; and (4) attempted intimidation of individuals aiding voters.

B. Legislative History

The legislative history of § 11(b) reflects that no intent or discriminatory motive is required to prove a violation:

> While the purpose of the VRA was to eliminate racial discrimination in voting, § 11(b) of the act does not explicitly require proof that racial discrimination motivated the intimidation, threats, or coercion ...The House report on § 11(b) states that "[t]he prohibited acts of intimidation need not be racially motivated; indeed, unlike 42 U.S.C.

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[273] 42 U.S.C. § 1973i(b).
[274] Perez Testimony, *supra* note 53, at 45.
[275] *Id.* at 69.

> 1971(b) (which requires proof of a 'purpose' to interfere with the right to vote), no subjective purpose or intent need be shown."[276]

In addition, at least one legal authority with experience with § 11(b) cases, a former senior Department career attorney, contends that no proof of actual effect of voter intimidation is necessary to establish a violation:

> The legislative history of this law makes clear that Congress wanted to expand the scope of voter protection by enacting a law that would bar voter intimidation. In fact, Congress's explanations of the purposes behind Section 11(b) support the view that neither proof of *intent* to intimidate nor proof of any actual *effect* of voter intimidation must be shown to establish a violation of Section 11(b). Rather, as DOJ has read the statute, an interpretation I share, plaintiffs need only show that the conduct engaged in had a tendency to intimidate, threaten or coerce a reasonable voter. Importantly, there is no requirement that to prevail under Section 11(b) that a plaintiff prove any purpose of subjective intent to intimidate.[277]

Section 11(b) was part of the original Voting Rights Act of 1965 and was later codified as 42 U.S.C. § 1973i(c). The legislative history of this section illustrates that its purpose was to assure ballot security for the expanded franchise contemplated by the Voting Rights Act. At the time the statute was passed, Congress had previously enacted a provision designed to govern expenditures to influence voting in an election for a federal official.[278] Section 1973i(c) was intended as something more than a mere replication of the existing provision. Instead, its protections were extended to include coverage of local elections held in conjunction with those for federal office.[279]

C. Penalties

As originally enacted, § 11(b) was among those sections of the Voting Rights Act which

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[276] Willingham v. County of Albany, 593 F. Supp. 2d 446, 463 (N.D.N.Y. 2006) (citing H.R. REP. NO. 89-439, at 30 (1965), *as reprinted in* 1965 U.S.C.C.A.N. 2462).

[277] J. Gerald Hebert, Rattling the Vote Cage – Part I, The Campaign Legal Center Blog, http://www.clcblog.org/blog_item-245.html (Aug. 8, 2008) (emphasis in original) (last visited Oct. 21, 2010). Mr. Hebert served at the Justice Department from 1973 to 1994. According to his website, he "served in many supervisory capacities, including Acting Chief, Deputy Chief, and Special Litigation Counsel in the Voting Section of the Civil Rights Division." He has also served part-time as a staff attorney for the national office of the Lawyers' Committee for Civil Rights Under Law and as the General Counsel to the National Redistricting Project for Congressional Democrats. *See* J. Gerald Hebert, P.C., Biography, http://www.voterlaw.com/bio.htm (last visited Oct. 21, 2010).

[278] *See* 18 U.S.C. § 597.

[279] *See* United States v. Simms, 508 F. Supp. 79, 1183 (W.D. La. 1979).

provided for fines and imprisonment for violations.[280] In 1968, this was revised, and currently the only available remedy under § 11(b) is injunctive relief.[281]

D. Past Department of Justice (DOJ) § 11(b) Litigation Initiated by DOJ

The Department of Justice reports that it has filed three civil lawsuits alleging voter intimidation under § 11(b), in addition to the New Black Panther Party case.[282] The three cases identified by the Department are *U.S. v. Harvey*, *U.S. v. North Carolina Republican Party et al.*, and *U.S. v. Brown*. These cases offer little insight into the requirements or effectiveness of § 11(b). In two of the cases, the matter was decided on other grounds, with the § 11(b) claim being rejected with minimal discussion. In the third suit, the case was resolved by consent decree, with no discussion of § 11(b) or its requirements.

What follows is a brief summary of each DOJ case:[283]

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[280] The original language stated, "Whoever shall deprive or attempt to deprive any person of any right secured by section 2, 3, 4, 5, 7, or 10 or shall violate section 11(a) or (b), shall be fined not more than $5,000, or imprisoned not more than five years, or both." Voting Rights Act of 1965, Pub. L. No. 89-110, § 12(a), 79 Stat. 437, 443.

[281] *Civil Rights Act of 1967: Hearing on S. 1026, S. 1318, S. 1359, S. 1362, S. 1462, H.R. 2516 and H.R. 10805 Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 90th Cong. (1967). During the debate in the Senate, an explanation of Amendment 554 (Dirksen Amendment) was provided by the Department of Justice. The explanation of the amendment stated that "[t]he penalty section of the Voting Rights Act of 1965 is modified to avoid duplication." STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS PART II, at 1692 (Bernard Schwartz ed., 1970).

[282] *See* Discovery Responses, *supra* note 132, at 14-16 (Response to Interrogatory No. 29).

[283] Section 11(b) suits may also be brought by private plaintiffs. The reported cases initiated by private plaintiffs tend to focus on technical issues. Nonetheless, in some of these cases the courts have provided guidance on standards for applying § 11(b). As Gregory Katsas pointed out in his testimony: There are cases holding that § 11(b) should be construed broadly rather than narrowly. *See* Jackson v. Riddell, 476 F. Supp. 849, 859 (D. Miss. 1979) (citing Whatley v. City of Vidalia, 399 F.2d 521, 525 (5th Cir. 1968)). And a case has held that no subjective intent or purpose need be shown on the part of the perpetrator. *See* Willingham v. County of Albany, 593 F. Supp. 2d 446, 462 (N.D.N.Y. 2006).

Whatley v. City of Vidalia, 399 F.2d 521 (5th Cir. 1968).

This case focused on whether 11(b) actions could be removed to federal court. The movants alleged that they were arrested by police officials while engaged in peaceful activity to encourage voter registration. The Fifth Circuit held that the matter was properly removed to federal court.

Bershatsky v. Levin, 99 F.3d 555 (2nd Cir. 1996).

Plaintiff sought injunctive relief and declaratory judgment that use of voter registration lists to select jurors infringed upon her right to vote. The Second Circuit affirmed the lower court's decision, ruling against the plaintiff.

Willingham v. Albany, 593 F. Supp. 2d 446 (N.D.N.Y. 2006).

The court dismissed a § 11(b) claim alleging that state actors manipulated the absentee ballot process. While the court held that the facts did not support the allegation of intimidation, it made the following observations relating to § 11(b).

United States v. Harvey, 250 F. Supp. 219 (E.D. La. 1966).

In *Harvey*, the U.S. sought an injunction enjoining defendants from employing coercive and intimidating economic penalties against African Americans who registered to vote, including termination of sharecropping and tenant farming relationships, eviction, termination of employment, and the imposition of rents on houses which were formerly occupied in connection with sharecropping or tenant farming agreements. The court, after questioning § 11(b)'s constitutionality, concluded that "the evidence in this case is completely and totally void of any proof of intimidation, threats, or coercion."[284] Further, the court noted that, even if the alleged acts were committed for the reasons asserted by the plaintiffs,

> [t]here is simply no way that legislation allegedly designed solely to protect the constitutionally guaranteed right to be free from discrimination in the exercise of franchise, which, in its operation, confiscates one's use of his private property and awards it to another as a penalty for the owner's individual acts of discrimination could be considered constitutional.[285]

While the purpose of the VRA was to eliminate racial discrimination in voting, § 11(b) of the act does not explicitly require proof that racial discrimination motivated the intimidation, threats, or coercion. Thus, a plain reading of § 11(b) refutes the contention of [the defendants] that proof of racial discrimination as a motive must be shown to establish a claim under this provision. *See Hayden v. Pataki,* 449 F.3d 305, 314 (2d Cir. 2006) (noting that statutory interpretation first requires examination of the language of the statute itself). Moreover, the legislative history of that section supports this plain reading. The House report on § 11(b) states that "[t]he prohibited acts of intimidation need not be racially motivated; indeed, unlike 42 U.S.C.1971(b) (which requires proof of a 'purpose' to interfere with the right to vote), no subjective purpose or intent need be shown." H.R. REP. NO. 89-439, at 30 (1965), *as reprinted in* 1965 U.S.C.C.A.N. 2462. Research has revealed no cases directly deciding this issue. Accordingly, given the plain language and the legislative history of § 11(b), the contention of [the defendants] that this section requires proof that they were motivated by racial discrimination must be rejected. 593 F. Supp. 2d 446, 462 (N.D.N.Y. 2006).

Willing v. Lake Orion Cmty. Sch. Bd. of Trs., 924 F. Supp. 815 (E.D. Mich. 1996).

The Court dismissed an 11(b) claim brought by a school district resident alleging improprieties in the conduct of school board elections. The Court found that the plaintiff failed to state a claim.

Pincham v. Illinois Judicial Inquiry Bd., 681 F. Supp. 1309 (N.D. Ill. 1988).

Pincham, a state appellate judge, gave a speech for Operation P.U.S.H. and made statements urging black voters to vote for a particular candidate. The Inquiry Board notified Pincham that they were considering filing a complaint against him for his remarks. Pincham filed a complaint alleging that the Board's complaint violated his right to free speech and equal protection, among other things.

Pincham then tried to amend his complaint to include a claim under 11(b) claiming that the Voting Rights Act prohibits punishment of black voters for political speech, and that no similar charges have ever been made against white judges who engaged in political speech. The Court held that the § 1973i(b) claim was without merit.

[284] 250 F. Supp. 219, 237 (E.D. La. 1966).

[285] *Id.* at 228.

United States v. North Carolina Republican Party et al., No. 91-161-CIO-5-F (E.D.N.C. 1992).

In this case, a suit was filed against the North Carolina Republican Party, the Helms for Senate Committee, and various others. The Complaint alleged violations of the Voting Rights Act (11(b) and 12(d) – 42 U.S.C. 1973i(b) and 1973j(d)) and the Civil Rights Act (131(c) – 422 U.S.C. 1971(b) and 1971(c)), based on a "ballot security program" "purportedly designed to combat and deter election fraud."[286] According to the complaint, the North Carolina Republican Party sent first class mailings and post cards, targeting black voters, pertaining to voter registration and voter addresses. The postcards contained false information regarding residency requirements and eligibility to vote.[287]

The consent decree, entered into prior to trial, provided that defendants (i) "are enjoined from engaging in any activity or program which is designed, in whole or in part, to intimidate, threaten, coerce, deter, or otherwise interfere with a qualified voter's lawful exercise of the franchise;" (ii) "are enjoined from engaging in any ballot security program directed at qualified voters in which the racial minority status of some or all of such voters is a factor in the decision to target those voters;" and (iii) "shall not engage in any ballot security program unless and until such program has been determined by this Court to comply with the provisions of this decree and applicable federal law."[288] The 1992 decree was to remain in effect until December 1, 1996.

United States v. Brown, 494 F. Supp. 2d 440 (S.D.Miss. 2007), *aff'd*, 561 F.3d 420 (5th Cir. 2009).

This case involved the anti-dilution provisions of the Voting Rights Act claiming that the defendants racially manipulated the electoral process in furtherance of an intent to discriminate against white voters. The Department sought (in addition to remedies under § 2 of the Voting Rights Act) an injunction under § 11(b) permanently enjoining defendants from coercing, threatening, or intimidating persons voting or attempting to vote. The allegations accused the defendants of such actions as berating a voter for casting her ballot for an African American defendant's white opponent, coercing a voter to vote by absentee ballot, failing to provide a voter privacy in which to cast his ballot, advertising in local newspapers that certain named white individuals would be prevented from voting, and impairing or coercing individuals attempting to exercise their right to vote. In its complaint, the Department identified the following specific acts as constituting intimidation and coercion in violation of § 11(b):

> (a) During the absentee in-person voting period before the 2003 primary election, Defendant Mickens [Circuit Court Clerk of Noxubee County] received an absentee ballot that had been voted in the courthouse by an

[286] Complaint for Declaratory and Injunctive Relief at 3, United States v. North Carolina Republican Party et al., No. 91-161-CIO-5-F (E.D.N.C. Feb. 26, 1992).
[287] *Id.* at 6-8.
[288] Consent Decree at 4-5, United States v. North Carolina Republican Party et al., No. 91-161-CIO-5-F (E.D.N.C. Feb. 27, 1992).

> eligible voter. After receiving the ballot form this voter, Mickens set it aside without placing it in a sealed envelope as required by law. When this voter objected and asked that the unsealed ballot be spoiled and that she be allowed to vote a new ballot, Defendant Mickens loudly and abusively berated the voter and complained to the voter that she had cast her ballot for Defendant Mickens' white opponent. As a result of this experience, this voter has resolved never to cast another absentee ballot at the courthouse as long as Defendant Mickens remains Circuit Clerk.
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> (b) Prior to the August 2003 primary election, Defendant Mickens and others acting in concert with him coerced a voter to vote by absentee ballot, failed to provide that voter privacy in which to case his absentee ballot at the Circuit Clerk's office, then instructed the voter on what candidates the voter should vote for, including Defendant Mickens, and looked on during the voting process to make sure that the voter followed the instruction.[289]

The court found for the plaintiff on § 2 grounds, but offered little discussion of § 11(b), noting only that, while there was a racial element to defendant's publication of a list of white voters who would be challenged if they attempted to vote in the Democratic primary, "the court does not view the publication as the kind of threat or intimidation that was envisioned or covered by Section 11(b)."[290] The court noted that "the Government has given little attention to this claim, and states that it has found no case in which plaintiffs have prevailed under this section."[291] The case was affirmed on appeal.[292]

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[289] Complaint at 11-12, United States v. Brown, 494 F. Supp. 2d 440 (S.D. Miss. 2007) (No. 4:05-cv-33-TSL-LRA).
[290] 494 F. Supp. 2d 440, 477 n.56.
[291] *Id.*
[292] *See* United States v. Brown, 561 F.3d 420 (5th Cir. 2009).

PART VI: Interim Findings and Recommendation

Findings

A. The Commission's organic statute authorizes it to subpoena witnesses and the production of written material in aid of its mission, and it authorizes the Attorney General to enforce the Commission's subpoenas in federal court if any person or entity refuses to comply. It is unclear, however, whether the Commission has legal recourse if the Attorney General refuses to enforce a subpoena directed at the Department of Justice or its employees. The Commission's statute also requires that "[a]ll Federal agencies shall cooperate fully with the Commission to the end that it may effectively carry out its functions and duties," 42 U.S.C. § 1975b(e), but it is equally unclear whether the Commission has recourse to seek judicial enforcement of this command, absent representation from the Department of Justice.

[Chairman Reynolds and Commissioners Gaziano, Heriot, Kirsanow, and Taylor voted in favor; Commissioners Melendez and Yaki voted against; Vice Chair Thernstrom was absent.]

B. Although the U.S. Department of Justice has cooperated with many previous Commission investigations and requests, the DOJ has an inherent conflict of interest when it would prefer not to cooperate fully with the Commission's investigations of DOJ actions. In the NBPP investigation that is the subject of this report, the Department of Justice refused to comply with certain Commission requests for information concerning DOJ's enforcement actions, and it instructed its employees not to comply with the Commission's subpoenas for testimony. Moreover, the Department's denial of the Commission's request for the appointment of a special counsel to help resolve the discovery disputes in federal court was communicated by a career attorney without addressing or acknowledging the Department's conflict of interest and without any indication the Commission's request was ever brought to the attention of the Attorney General.

[Chairman Reynolds and Commissioners Gaziano, Heriot, Kirsanow, and Taylor voted in favor; Commissioner Yaki voted against; Commissioner Melendez abstained; Vice Chair Thernstrom was absent.]

Recommendation

Congress should consider amendments to the Commission's statute to address investigations in which the Attorney General and/or the Department of Justice have a conflict of interest in complying fully with the Commission's requests for information. Options to address a potential conflict of interest might include the following:

- Enactment of a statutory procedure by which the Commission may request the Attorney General to appoint a special counsel with authority to represent it in federal

court, which request the Attorney General must personally respond to in writing within a specified period of time.

- Enactment of a statutory provision to clarify that the Commission may hire its own counsel and proceed independently in federal court if the Attorney General refuses to enforce a subpoena or other lawful request, especially those directed at the Department of Justice, its officers, or its employees.

- A conscious decision not to alter the Commission's statute or a statutory confirmation that the Attorney General and Department of Justice can act against the Commission's interest without any particular explanation.

[Chairman Reynolds and Commissioners Gaziano, Heriot, Kirsanow, and Taylor voted in favor; Commissioners Melendez and Yaki voted against; Vice Chair Thernstrom was absent.]

COMMISSIONER STATEMENTS, DISSENTS AND REBUTTALS

A. STATEMENTS

Statement of Commissioner Todd Gaziano[1] Joined by Commissioner Kirsanow

This Interim Report is the story of a cover-up of a possible racial double standard in law enforcement in the Civil Rights Division of the U.S. Department of Justice. The usual Washington refrain is that the cover-up is always worse than the original offense. But in this case, the underlying problem may be as damning as the wrongful cover-up—and possibly worse.

Two well-placed whistleblowers have now testified before the Commission, with convincing detail, that there is a pervasive hostility to the race-neutral enforcement of the civil rights laws in the Civil Rights Division. How long-standing and how wide-spread that culture is remains unclear, but the testimony of the DOJ witnesses and other sworn statements received into evidence indicate that at least several supervising attorneys and officers in the Civil Rights Division share this race-based view of law enforcement.

Such a racial double standard in law enforcement would be at war with the very notion of a federal Civil Rights Division devoted to the equal protection of the laws. Yet, the Department of Justice is unquestionably hostile to any serious investigation of these allegations.

The Department of Justice will neither admit *nor deny* whether the alleged racialist statements and instructions to its staff were uttered by its supervising attorneys and political appointees, even though it has a statutory duty to respond to such inquiries from the Commission. The Department refuses to allow those who allegedly made or heard these statements to testify freely. The Department steadfastly refuses to produce the documents and emails that describe these and similar statements, or for that matter, documents and emails that could refute them. The Department doggedly continues to obstruct this investigation.

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[1] Commissioner Kirsanow and I join each other's Statements. We also join Commissioner Heriot's Statement. The terms of office for Chairman Gerald Reynolds and Commissioner Ashley Taylor expired a few days after the adoption of the body of this report. Both Reynolds and Taylor voted to adopt the Interim Report, its findings and recommendation. Their support for the underlying investigating in numerous Commission votes is a matter of public record. At an open meeting on December 3, 2010, they expressed their view that commissioners could not submit or join any statement after the expiration of their terms. Although Chairman Reynolds joked that I could indicate that "Jerry agreed with me," no inference should be drawn from their lack of participation in commissioner statements.

Whether the Commission or some other institution succeeds in uncovering the facts relating to these matters, there is probably no more important issue to resolve in the area of federal civil rights enforcement than the truth of the whistleblowers' allegations. Until then, this Interim Report and accompanying commissioner statements will highlight what has been uncovered thus far, what questions remain unanswered, and what evidence exists but is being withheld that might be valuable in that investigation.

Introduction and Summary

On June 16, 2009, the U.S. Commission on Civil Rights sent a simple inquiry to the Department of Justice asking why it dismissed most of a voter intimidation lawsuit it had effectively won against members of the New Black Panther Party. We expected either a satisfactory explanation for the dismissal or word from the Department that it was undertaking a review of the matter. Instead, DOJ's written reply insisted that it made the right decision to dismiss the claims but offered no credible explanation for doing so and refused to supply the documents or witnesses that would allow the Commission to form its own conclusions. For the next 18 months, the Department tried to thwart the Commission's investigation in many ways, despite its statutory obligation to "cooperate fully" with our official requests for information.

After a year of DOJ's intransigence and baseless refusals to comply with our subpoenas, two Department attorneys bravely defied orders to testify before the Commission: the former Civil Rights Division Voting Section chief, Christopher Coates, and a lead trial attorney in the NBPP case, J. Christian Adams. Their testimony and the sworn affidavits from former DOJ staff portray a pervasive culture of hostility to race-neutral enforcement of civil rights laws in the Civil Rights Division. The detailed allegations include: a former section chief who doctored a memo to try to prevent a meritorious case from being filed against black defendants, racially offensive statements by several supervisors and staff, and repeated instances of harassment and intimidation directed against anyone willing to work on lawsuits against minority defendants.

Coates and Adams also assert, with substantial evidence, that this hostility is shared by several current supervising attorneys and political appointees. And they swear, without any reservation, that the reason their supervisors dismissed the New Black Panther Party lawsuit was because of their personal hostility to the race-neutral enforcement of the voting rights laws.

Notwithstanding these detailed and mutually-reinforcing allegations of wrongdoing, the Department still refuses to produce the most important documents, emails, and witnesses to the Commission. To this day, it has forbidden Coates and Adams from revealing the most crucial facts by wrongly invoking privileges that do not apply, with the implicit threat of professional ethics charges if they relate the remaining details of what they know.

This persistent interference prevented the Commission from forming definitive conclusions about some of the underlying actions and motives of Department of Justice officials. Although the Interim Report identifies key documents and emails which might

prove or disprove the charges made by Coates and Adams (see also infra), DOJ still refuses to produce them.

Until the Department is forced to disgorge the relevant witnesses and evidence, reasonable people will draw the logical conclusions from the weight of available evidence and from DOJ's seemingly guilty conduct in obstructing the investigation. Those who review the sequence of events, uncontested facts, and sworn statements before the Commission should be deeply troubled by the Department's refusal to cooperate as well as the credible testimony that offers a plausible, yet damning, explanation for what the Department has tried to hide. But it is still better that the whole truth be known, whatever that is. Thus, the stages of our investigation and the Department's unprecedented and wrongful resistance to it should be carefully examined so that others may pick up where the Commission (without the power to enforce its own subpoenas against DOJ) has run into the administration's stone wall.

Nevertheless, the Department of Justice's obstruction of the Commission's investigation did yield two modest but unusual findings of fact and one recommendation, joined by five of the seven commissioners who participated in the final decisions. Set forth in full in Part V of the Interim Report, the Commission's findings highlight the Department of Justice's conflict of interest in refusing to "cooperate fully" with the Commission's investigation as federal law requires, its refusal to appoint a special counsel to resolve its own conflict, and the lack of clear legal authority for the Commission to enforce its own subpoenas in court against DOJ when the Department refuses to comply with them and refuses to represent the Commission.

The Commission's sole recommendation is that Congress should consider the implications of a DOJ conflict of interest and refusal to cooperate and decide whether to alter the Commission's organic statute to address it. The non-exclusive suggestions for Congress to consider include:

- Consciously doing nothing;
- Requiring the Attorney General to personally respond to the Commission's request for representation or the appointment of a special counsel within a fixed number of days;
- Authorizing the Commission to litigate on its own if DOJ refuses to represent it.

In the absence of such a change in law, the Commission will continue to marshal facts and issue reports that are relevant for the nation to review.

The Original Lawsuit and Its Dismissal by DOJ

Although the circumstances that gave rise to the original lawsuit are far less important than DOJ officials' subsequent actions and the sworn testimony about their wrongful reasons for their subsequent actions, they are a necessary starting point for any investigation.[2]

As the body of this report describes in more detail, two members of the New Black Panther Party appeared at the 1221 Fairmount Avenue polling site in Philadelphia on election day 2008 wearing dark, paramilitary uniforms with combat boots, berets, and insignia of rank. That building houses an assisted living facility. Video clips of the scene were later broadcast on national news programs and posted on YouTube. King Samir Shabazz stood near the door slapping a billy club in his hand, and witnesses subsequently testified before the Commission that he spouted racially offensive and threatening comments at poll watchers, poll observers, and likely others.

Many neighborhood residents may have known of Shabazz's violent, racist views. A National Geographic documentary film on the NBPP and related hate groups featured Shabazz regularly canvassing the area with his racist tracts, and it also showed him at a neighborhood fair yelling through a bullhorn that blacks need to start killing whites and white babies.[3] A newspaper article that appeared the week before the Election Day incident described him as "one of the most recognized black militants in a city known, since the days of MOVE, for its vocal black-extremism community."[4] The attempt by Commissioners Melendez and Yaki to suggest that the paramilitary uniform worn by the NBPP thugs would not have evoked any negative feelings ignores that the uniforms were combined with threatening behavior. Their claim that no one could be intimidated by their appearance alone is wrong for other reasons as well.[5]

Jerry Jackson is Shabazz's official NBPP "deputy" in the neighborhood, and was also featured in the National Geographic documentary assisting Shabazz's racist stunts and public rants. On Election Day 2008, Jackson stood close to Shabazz in front of (and close to) the

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[2] Commissioner Heriot's observation in her accompanying statement is also correct that simple facts, or cases that might otherwise be "small potatoes," may be more helpful in illuminating underlying law enforcement policies.

[3] *Inside the New Black Panthers* (National Geographic television broadcast 2009). An excerpt of the documentary was shown at the Commission's first fact-finding hearing. See Commission Hearing Transcript (April 23, 2010).

[4] Dana Difilippo, "New Panthers' War on Whites," Philadelphia Daily News, Oct. 29, 2008.

[5] In their joint dissenting statement, Commissioners Melendez and Yaki admit that the New Black Panther Party is a racial-separatist hate group, but they claim that most residents in Philadelphia would not have known that and that they would have associated the NBPP uniform with the original Black Panther Party, which was "non-racist." The *National Geographic* documentary and the *Philadelphia Daily News* article both suggest that residents knew Shabazz and his associate to be hate-filled advocates of racial violence themselves (regardless of what they knew about the NBPP), so the addition of jackboots and paramilitary garb would only reinforce that perception. As for the dissenters' warm and fuzzy feelings toward the original Black Panther Party: "By now, a torrent of articles and books, many written by former sympathizers, has voluminously documented the Panther reign of murder and larceny within their own community. So much so that no one but a left wing crank could still believe in the Panther myth of dedicated young blacks 'serving the people' while heroically defending themselves against unprovoked attacks by the racist police." Sol Stern, "Ah, those Black Panthers! How Beautiful!" City Journal, May 27, 2003, *available at* http://www.city-journal.org/html/eon_5_27_03ss.html.

only entrance to the polling place. Witnesses testified the two moved in unison, and one witness also testified they even closed ranks when a poll watcher approached the door and made it more difficult for him to get by. Commissioners Melendez and Yaki make a fanciful effort in their dissent to depict Jackson as an innocent bystander, but the eyewitnesses paint a different picture of his conduct.[6]

At least two eyewitnesses, both of whom testified before the Commission, reported seeing some voters turn away from voting rather than run the gauntlet between the Panthers and the entrance to the polls. Two additional witnesses, one of whom testified before the Commission, reported that they saw voters hesitate or look apprehensive when approaching the entrance.[7] Whether the voters who left returned later is unknown (it is not legally necessary to show that any voters were actually prevented from voting to prove intimidation or attempted intimidation), but one witness who spoke with some of them had no doubt that their apprehension regarding the two uniformed Panthers was what caused them to leave.[8]

In early January 2009, DOJ filed a lawsuit against the two individuals at the polls, as well as against the Party and its Chairman, Malik Zulu Shabazz, for encouraging and endorsing the intimidating conduct. (Malik Shabazz said on national TV that he supported the use of the weapon at the polls to counter neo-Nazis who were there. He said he would provide evidence of the neo-Nazis' presence but never did. Other evidence of his and the Party's involvement is set forth in the body of the Interim Report and Appendix B.)[9] The suit was filed in federal district court in Philadelphia pursuant to section 11(b) of the Voting

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[6] See Testimony of Chris Hill, Bartle Bull, and Mike Mauro at the Commission Hearing on April 23, 2010. The dissent by Commissioners Melendez and Yaki repeatedly claims that Jackson did not join his NBPP superior in yelling offensive comments. Whether that is true or not (we have a limited record), it is not very important in evaluating whether he conspired with, aided, and abetted Shabazz. If a group of Klansmen in robes engaged in the exact same conduct at the polls and only one yelled racial epithets, those who were silent would not get a free pass. In such circumstances, actions speak louder than words.

[7] The dissent by Commissioners Melendez and Yaki attempts to nitpick the statements the eyewitnesses made about voters turning away or acting scared; according to the dissent, they should have been more closely questioned about the exact sequence of events that transpired. But three of the witnesses, Chris Hill, Bartle Bull, and Mike Mauro, testified before the Commission on April 23 (Hill and Bull testified they saw voters turn away; Mauro said he saw some voters hesitate and/or look apprehensive), so the dissenters could have asked them any question they wanted. It seemed like a strategic decision of theirs not to ask about the intimidated voters during the hearing, fearing that clarity would not help them defend DOJ's actions. Later, they may have forgotten the testimony and come to believe the much repeated talking point that no voter was intimidated. (It's always a risk to rely on spin rather than the actual evidence.) As late as November 19, 2010, Commissioner Yaki erroneously, and rather emphatically and rudely, denied anyone had ever testified that voters were turned away; he then was reminded of the facts. See Commission Meeting Transcript at 41-43 (Nov. 19, 2010). Shifting rapidly into reverse, the dissent now says the eyewitness testimony is unclear.

[8] See Testimony of Chris Hill at 50-51.

[9] The dissenting statement by Commissioners Melendez and Yaki oddly suggests that the Commission should have been equally as dismissive of both the NBPP's posted "national plan" to deploy 300 Panthers like Shabazz and Jackson at the polls and the lie by the NBPP chairman that neo-Nazis were at the polls in Philadelphia. But that makes no sense, even if one admits the NBPP likes to exaggerate its strength. In short, statements against interest are always treated differently in logic and law than self-serving ones. An inept militia group may lie about a lot of things, but if it announces plans for widespread acts of intimidation or other tortious conduct and it conducts at least one such act, that surely should be treated differently than a claim it later makes to evade responsibility. It also would not matter if can convince only two out of 300 followers to join in the wrongful acts in question to be jointly liable for those that take place.

Rights Act, which prohibits intimidating, and attempts to intimidate, both voters and those assisting voters, such as poll watchers.

Prior to filing the suit, the Justice Department trial team obtained witness statements, evidence about the operational structure of the NBPP, its stated nation-wide plan to "deploy" its members at the polls in November 2008, its record of racial hate incidents and objectives, and other evidence (at least some of which has never been turned over to the Commission). In preparation for trial, the trial team continued to secure other valuable evidence, including a declaration from a prominent 1960s civil rights advocate, Bartle Bull, who was an eye witness to the events in Philadelphia. In that affidavit, Bull declared that the events in Philadelphia in 2008 were "the most blatant form of voter intimidation I have ever encountered in my life ... even going back to the work I did in Mississippi in the 1960s."

The lawsuit was uncontested. Even though the NBPP Chairman, Malik Shabazz, is a lawyer and at least one of the other defendants also retained a lawyer, Michael Coard, none of the defendants filed an answer or otherwise contested the detailed allegations in the complaint. Accordingly, a default was entered in the docket of the federal court, and the district judge asked the Department to file its proposed injunction against all four defendants.

It was at that point, in late April and May of 2009, that a strange turn of events began. The Department initially asked the district judge for an extension of time to file its proposed order, and then, on May 15, it unilaterally dismissed the claims against three of the defendants and greatly reduced the injunctive relief sought against Samir Shabazz – the Panther carrying the billy club. The injunction against Samir Shabazz has been, and should be, derided by any experienced litigator for its remarkable narrowness.

Many of the events of those few weeks still are not known publicly (especially the content of internal conversations—and shouting matches—that DOJ claims are privileged information), but Coates and Adams later testified about the trial team's state of disbelief regarding the position advanced by their supervisors, working all night to prepare legal memos that were not even read by some of the decision-makers who requested them, confrontational meetings, and other unusual conduct relating to the decision to dismiss the charges.

The Commission Asks for an Explanation

Responding to press reports that DOJ had unilaterally dismissed a strong voting rights case and that the circumstances were highly unusual and possibly improper,[10] the Commission sent letters to DOJ on June 16 and 22, 2009 asking for an explanation.[11] DOJ's

[10] Jerry Seper, "Career Lawyers Overruled on Voting Case," The Washington Times, May 29, 2009; Michael Tremoglie, "Dept. of Justice Drops New Black Panther Case," Philadelphia Bulletin, May 29, 2009.

[11] Letter from Commission to Loretta King, Acting Assistant Attorney General (June 16, 2009). Commissioners Thernstrom and Taylor sent a letter to Ms. King on June 22, 2009, lending their support for the June 16 letter. Members of Congress Lamar Smith and Frank Wolf also sought information from the Department about the dismissals and were met with similar resistance. *See, e.g.,* Letter from Congressman Frank R. Wolf to Attorney General Eric Holder (June 8, 2009); Letter from Congressmen Lamar Smith and Frank R. Wolf to Attorney General Eric Holder (July 17, 2009); Letter from Congressman Frank R. Wolf to Attorney General Eric Holder

answer to the Commission's initial inquiry is one of the key moments in this story. Most of the commissioners expected DOJ to either have a reasonable explanation, perhaps by revealing facts that weren't widely known, or to say that it was reviewing the decision. I hoped that, barring the revelation of some unknown facts not in the complaint, DOJ would admit its error and re-file the civil lawsuit. Either of those responses very likely would have been the end of the matter as far as the Commission was concerned, at least until the review was completed.

Instead, DOJ dug in its heels and said that the "facts and law did not support pursuing" the case.[12] Yet, DOJ did not point to any unknown facts or circumstances that would explain the dismissal. Indeed, DOJ has *never* denied or disputed the lengthy facts set forth in the original lawsuit complaint. In short, we are all looking at the same set of facts.

The reasons the Department gave for the dismissal in its initial response were not only unconvincing, they also raised new concerns about the decision. For example, the Department falsely claimed that Jerry Jackson was a resident of the apartment building where the polling place was located. Cursory research called this claim into doubt, since 1221 Fairmount Avenue is an assisted living facility—and his poll watcher's certificate (that the Department's trial team obtained) showed he lived at a different address. The Department later admitted that Jackson did not live in the building.[13] Even if he was a resident of the building, this would not entitle him to intimidate voters who showed up to vote there.[14] So this excuse made no sense whatsoever.

The Department also noted Jackson was a certified poll watcher and that local police did not order him to leave the polling place, as they had ordered fellow Panther King Samir Shabazz. But those facts are also legally irrelevant, unless they counsel in favor of maintaining the lawsuit. Certified poll watchers are not allowed to intimidate voters or other poll watchers.[15] If anything, they should be held to a higher standard of knowledge about what is lawful and what is not. That Jackson was working for the Democratic Party also cut

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(July 31, 2009); Letter from Congressmen Lamar Smith and Frank R. Wolf to Attorney General Holder (Nov. 10, 2009); Letter from Congressman Frank R. Wolf to Inspector General Glenn Fine (Jan. 26, 2010); Letter from Congressmen Lamar Smith and Frank R. Wolf to Inspector General Glenn A. Fine (Mar. 2, 2010); Letter from Congressman Frank R. Wolf to Attorney General Holder (June 8, 2010); Letter from Congressmen Darrell Issa, Lamar Smith, and Frank R. Wolf to Attorney General Holder (July 29, 2010).

[12] Letter from Portia L. Roberson, Director, Office of Intergovernmental and Public Liaison, U.S. Department of Justice, to Chairman Gerald A. Reynolds. The letter was undated, but was stamped as received on July 24, 2009.

[13] Response to Document Request No. 22, Response of the Department of Justice to U.S. Commission on Civil Rights (Jan. 11, 2010).

[14] See Testimony of Christopher Coates Before the U.S. Commission on Civil Rights at 29 (Sept. 24, 2010)("Even if it was true that Panther Jackson resided there, it should be quite clear to all that such a fact would not have provided a legal basis for intimidating voters.").

[15] Testimony of J. Christian Adams Before the U.S. Commission on Civil Rights at 89-90 (July 6, 2010):

> Q: Does the fact that Mr. Jackson was a poll watcher have any bearing on his liability?
> Adams: No. Thank heavens, no. I mean, otherwise, you would appoint as poll-watchers the biggest and baddest thugs you have and give them credentials to roam about the community . .

the other way when Democrats controlled DOJ, a fact noted in more than one news story. Most importantly, local police do not enforce the federal voting rights laws; nor does the Department defer to their judgment of what constitutes federal violations for rather obvious historical and other reasons.[16]

It had taken almost six weeks for the DOJ to formulate a response to the Commission's initial request for information. During that period, other newspaper stories appeared and Members of Congress called on the DOJ Inspector General to investigate. After these adverse press accounts concerning its decision and given the dueling inquiries from the Commission and Members of Congress about it, the Department had a good reason to get its facts straight. But its dismissive three-page reply on July 24 had the opposite effect. The decision was still fresh on the minds of those who made it. If these were the true grounds for the dismissal, it was a decidedly ill-advised decision that needed to be reversed. The Department should have known that also; something wasn't right about its conclusory response.

Indeed, most commissioners were taken aback by this response for substantive reasons beyond the individual factual and legal errors therein. If the facts of the NBPP case were not a clear example of voter intimidation, what would be? More significantly, DOJ's response seemed to compound the apparent error of dismissing the suit. If DOJ had a different excuse that applied only to this case, it might not threaten to create a damaging precedent.

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[16] See Coates Testimony at 27-28 (Sept. 24, 2010):

> During my 13 and a half years in the Voting Section, I cannot remember another situation where a decision not to file a Voting Rights Act case, much less to dismiss pending claims and parties, as happened in the New Black Panther Party case, was made, in whole or in part, on a determination of a local police officer.
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> In my experience, officials in the Voting Section and the Civil Rights Division always reserved for themselves, and correctly so, the determination as to what behavior constitutes a violation of federal law and what does not. One of the reasons for this federal preemption is that local police officers are not normally trained in what constitutes a Voting Rights Act violation.
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> In addition, in the Philadelphia police incident report provided to this Commission by the DOJ, the Philadelphia police officer who came to the polling place did not determine that Black Panther Jackson's actions were not intimidating. Instead, he simply reported that Jackson was certified by the Democratic Party to be a poll watcher at the polling place and was allowed to remain.
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> Further, as the history underlying the enactment and the extension of the Voting Rights Act shows, local police have on occasion had sympathy for persons who were involved in behavior that adversely affected the right to vote or violated the protections of the Voting Rights Act.

See also Adams Testimony at 90 (July 6, 2010) ("[N]or does the fact that police let him stay have anything to do with it. The Federal Government has never taken the position, and hopefully never will, that local law enforcement officials can opine on matters of federal law. We have entirely different laws that we enforce.").

Yet the public statement to the Commission and several Members of Congress that DOJ did not believe the conduct recited in the complaint and partially caught on video stated a cause of action for voter intimidation seemed to constitute a dangerous shift in federal enforcement policy that the Commission was duty-bound to investigate, particularly since the Commission is specially charged with investigating federal enforcement of the voting rights laws. And if DOJ's avowed legal position was correct, then the Commission thought it should expose this flaw in the Voting Rights Act of 1965 and recommend that the law be changed.[17]

The Commission Begins Its Formal Investigation

Accordingly, the Commission followed up its earlier inquiry with a letter to the Attorney General signed by six commissioners (the remaining two abstained from the vote to send the letter) expanding our inquiry and requesting documents related to the case.[18] It explained that the Commission had an independent statutory duty to evaluate the facts and the law, rather than simply accept DOJ's assertion that it had made the right decision. It noted that the Department's July 24 letter was not only largely non-responsive to the Commission's requests for information, but also that what was related was both factually wrong and "even more corrosive to the rule of law than the dismissal without comment." The letter also expressed concerns about new revelations in a front-page newspaper story of July 31 regarding the Department's dismissal of the NBPP case, including that the Associate Attorney General was involved in the decision and that an NAACP Legal Defense Fund official had urged the Department to dismiss the lawsuit. Finally, the Commission's letter reminded the Attorney General that federal law obligated the Department to "comply fully" with the Commission's requests for information in the matter.[19]

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[17] Because of the Department's stonewalling, the Commission still doesn't have a lot of the evidence the NBPP trial team collected; nor does it have the record for other alleged incidents of intimidation. Thus, the Commission agreed not to make findings on the adequacy of the law until our investigation is complete. But based on the expert and other testimony received thus far, my view is that § 11(b) is not deficient if properly enforced.

[18] Letter from the Commission to Attorney General Holder (Aug. 10, 2009). The letter was signed by Chairman Gerald Reynolds, Vice Chair Abigail Thernstrom, and Commissioners Peter Kirsanow, Ashley Taylor, Gail Heriot, and Todd Gaziano. Commissioners Michael Yaki and Arlan Melendez abstained from the vote to send the letter.

[19] Id. at 4-5:

> In addition to our authority to subpoena documents and witnesses in aid of our mission, the Commission has even broader authority to require the cooperation of federal agencies. The Commission's organic statute provides: "All Federal agencies shall fully cooperate with the Commission to the end that it may effectively carry out its functions and duties." 42 U.S.C. § 1975b(e). The Department's previous response does not answer our most basic questions, which impairs our duty to investigate potential voting deprivations and federal enforcement policies. We trust that your response to this letter will provide us with the information necessary to make significant progress with our investigation.
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> The Commission has a keen interest in this case because of its special statutory responsibility to study the enforcement of federal voting rights laws. We believe the Department's defense of its actions thus far undermines respect for the rule of law and raises other serious questions about the Department's law enforcement decisions. The fundamental right that the Commission is investigating—the right to vote free of racially-motivated intimidation—has

Nevertheless, on September 9, 2009, DOJ effectively gave the Commission the back of its hand, saying it would not respond further until an internal ethics investigation was complete (which is still not complete some 16 months later).[20] This is analogous to a corporation announcing it would not cooperate with or respond to a DOJ investigation regarding an oil spill until its general counsel completed an internal ethics investigation. The DOJ would not, and should not, stay its investigation; nor should the Commission. It was then that the Commission deliberated and voted to make the implications of the DOJ's actions in the Panther case the subject of its statutory enforcement report for fiscal year 2010.

Our thinking in September of 2009, at least that of most commissioners, was as follows: Given the video evidence and the unchallenged allegations in the complaint, the dismissal was highly unusual and seemingly erroneous, and thus, the burden was on DOJ to explain it. That made DOJ's refusal to cooperate even more suspicious. We knew that, given the negative press reports on the NBPP case, DOJ had every incentive to provide a plausible rationale for dismissing the suit, if one existed. The stonewalling and absence of a plausible explanation under these circumstances suggested the Department had something to hide. Our Commission has been described as "the conscience of the nation."[21] Thus, we endeavored to uncover the facts and the truth behind them, using our subpoena power if necessary.

And while we thought it unlikely that DOJ would be vindicated regarding its cramped reading of the voter intimidation provision in the Voting Rights Act, we remained open to that possibility. Indeed, regardless of whether DOJ was right about that or not, the investigative plan adopted by the Commission still required us to consider what effect the case and DOJ's statements about the law might have for potential voter intimidation cases in the future.

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been called the cornerstone of other civil rights in our democracy. Until it is complete, this investigation will remain one of the Commission's top priorities.

Vice Chair Thernstrom's cryptic and unsupported claim in her accompanying statement that the "investigation lacked political and intellectual integrity from the outset" contradicts her own prior views and actions. Not only did Vice-Chair Thernstrom send her own letter on June 22, 2009 in support of the Commission's inquiry (which was the "outset" of the investigation), but she signed the August 10, 2009 letter quoted above, which greatly expanded the scope of the Commission's investigation. That letter ends with the promise that the investigation will remain "one of the Commission's top priorities" until completed, so the designation of the investigation as the annual statutory enforcement project the next month (though opposed by Thernstrom) did not change the investigation at all. There was no expansion of the probe until August 2010, and that was in light of dramatic testimony by a DOJ civil rights lawyer of a culture of hostility to the race-neutral enforcement of the civil rights laws. Since she did not even attempt to support, explain or prove her vague claims that the process was flawed, such statements are of no value. Although the exhaustive record of our proceedings reflects that she also offered no "principled critiques" of the investigation itself, the separate Joint Rebuttal Statement by Commissioners Kirsanow, Heriot and me addresses her regrettable personal hostility to others on the Commission, which seems to have led her to make revisionist claims about the investigation that are inconsistent with her earlier statements and actions.

[20] Letter from Portia L. Roberson, Director, Office of Intergovernmental and Public Liaison to Chairman Gerald A. Reynolds (Sept. 9, 2009).

[21] Andrew Goldstein, "Can the U.S. Commission on Civil Rights Be Saved?," Time, Feb. 9, 2002.

For example, several commissioners rhetorically asked whether the Department would file suit if Klansmen in white robes or neo-Nazis in militia uniforms stood directly in front of polling place doors yelling racial epithets since the rule announced for the NBPP case might limit DOJ's range of action in future cases. It might also send exactly the wrong message to would-be intimidators, especially existing hate groups like the NBPP. If the DOJ later wanted to change its position on the scope of VRA § 11(b), its official position in the NBPP case could be cited in court to undermine its new reading of the law.[22] So even if DOJ's position was arguably defensible, the matter was an important one for us to study and report on.

Starting in November 2009, the Commission subpoenaed the former defendants in the NBPP case, other fact witnesses present at the polls on Election Day, and two DOJ trial lawyers to testify. The Commission also sent DOJ interrogatories and subpoenaed relevant documents. In response, DOJ repeatedly ordered its subpoenaed employees not to speak to the Commission, and has for the most part not answered critical questions or produced documents or emails related to the core issues in the NBPP case, particularly those that might explain the motives of those who made the decisions.[23] For months, it provided few if any justifications for its unlawful refusal to cooperate, but it eventually began to raise spurious privileges that either do not exist or do not apply in investigations by Congress or the Commission on Civil Rights.

As the body of this Interim Report details, the Commission proceeded to depose the relevant fact witnesses in Philadelphia, including poll watchers for both major parties. The two former defendants who personally engaged in the intimidating conduct, Samir Shabazz and Jerry Jackson, invoked their Firth Amendment right against self incrimination rather than provide deposition testimony. A witness may only invoke that right if he "reasonably believes" that his testimony might implicate him *criminally*; it cannot be invoked to avoid civil liability or the inconvenience of testifying.[24] Thus, if the invocation was proper, it means the former defendants in a § 11(b) civil suit believe their conduct might be criminal. The NBPP Chairman, Malik Zulu Shabazz, filed an odd motion to quash his deposition. As of the time of writing, DOJ has not succeeded in compelling his testimony, and it is not clear it has tried very hard to do so.

Although hampered by the Department's refusal to allow the Commission to interview DOJ trial attorneys or produce the exhibits, witness statements, and other evidence in the possession of DOJ, the Commission held its first hearing on April 23, 2010 relating to the facts on Election Day 2008 in Philadelphia and whether there was a sufficient basis to file the original charges. Three eye-witnesses, including the prominent civil rights attorney Bartle

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[22] Under prevailing Supreme Court doctrine, courts normally accord deference to the reasonable interpretations of statutes by the agencies tasked with administering them, see *Chevron U.S.A. v. NRCD*, 476 U.S. 837 (1984), but not if the agency's interpretation is a mere litigation position, see *United States v. Mead Corp.*, 533 U.S. 218, 238 n.19 (2001); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988). Thus, once an agency announces one interpretation of a statute, its contrary position in a future litigation might not receive judicial deference.

[23] See Note 35, *infra*, regarding the marginal public documents, manuals and other items produced instead.

[24] *United States. v. Balsys*, 524 U.S. 666, 671-72 (1998); *Kastigar v. United States*, 406 U.S. 441, 444-45 (1972).

Bull, provided powerful and convincing testimony that the former defendants had engaged in intimidating conduct, and that voters had turned away from the polling place rather than walk within a billy-club swing of the entrance. Congressman Frank Wolf testified regarding his concerns about the case and his frustration with the lack of DOJ cooperation.

Former Acting Associate Attorney General Gregory Katsas, who previously supervised the work of the Civil Rights Division, testified about which officers in the Department would normally be involved in a decision to dismiss a suit of this nature and provided expert legal testimony on whether the allegations in the original complaint constitute voter intimidation under federal law. Mr. Katsas strongly refuted the Department's suggestion in internal memos that the suit implicated the First Amendment rights of those engaging in intimidating conduct at the entrance to a polling place.[25] He also questioned the other grounds for dismissing the suit, including the Department's stated concern about the vicarious liability of the NBPP. In sum, he testified that not only did the allegations in the complaint state a strong case for violation of section 11(b), but that the testimony he heard from the fact witnesses at the hearing reinforced his conclusion that the evidence was sufficient to maintain the lawsuit against all defendants.[26]

Thus, the testimony and other evidence at the April 23 hearing left little doubt that the original lawsuit against all four defendants was factually and legally justified, which only heightened the Commission's interest in the Department's assertions to the contrary and its simultaneous refusal to allow us to interview relevant witnesses or examine contemporaneous evidence of other possible reasons of those who decided to dismiss most of the lawsuit.

DOJ's Stonewalling and Spurious Assertions of Privilege

DOJ did not allow the Commission to interview any of the officials who were involved in the decision to dismiss the charges in the NBPP case[27] and has not produced documents or emails that memorialize the reasons or motives of those who made the decision. Relevant documents and emails include those sent within the Voting Section and the Civil Rights Division and those sent between the Civil Rights Division and more senior political appointees in the Department. Nor has it produced the emails and memos listed in an index provided to Judicial Watch pursuant to a FOIA suit Judicial Watch filed to secure similar information. And most recently, the Department has specifically refused to produce memos written by Christopher Coates or Christian Adams on or about April 26, 2010 and

[25] See the Interim Report's discussion of the non-existent First Amendment issue at 33-35. The dissenting statement by Commissioners Melendez and Yaki fault the trial team's J-memo for not mentioning the First Amendment issue, but that is not a fault. It didn't mention the Constitution's Preamble either, which is equally inapplicable.

[26] Interim Report at 28; Katsas Testimony at 145.

[27] Although the Department has done a lot to mislead and/or obscure who was involved in the decision to dismiss the case, there is now strong evidence in the record that at least the following six officials were involved: Attorney General Eric Holder, then Deputy Attorney General David Ogden, Associate Attorney General Thomas Perrelli, Deputy Associate Attorney General Sam Hirsch, then Acting Assistant Attorney General Loretta King, and then Acting Deputy Assistant Attorney General Steven Rosenbaum.

May 10, 2010, and the multiple emails between Sam Hirsch and Steven Rosenbaum in April and May of 2009.[28]

The Department even refused to provide a privilege log of documents it withheld from the Commission, which it gave to Judicial Watch, although the Commission asked for such a log in its initial requests for production of documents on December 8, 2009 and many times since then. DOJ knew a judge would require such a log in its litigation with Judicial Watch, so it complied with the usual court rules. But because the Commission's ability to appear in court to enforce its subpoenas may be limited to when the Attorney General represents it,[29] the Department denied the Commission even the courtesy of listing the documents and emails it is refusing to provide, despite a statutory duty that requires more cooperation from DOJ than is due a FOIA requester.

The Department eventually asserted the following real and fictitious privileges during the Commission's investigation: attorney-client, attorney-work product, deliberative process, law enforcement, "or other recognized privilege;"[30] private information prepared by or for the Department's Office of Professional Responsibility;[31] and, most oddly, disclosures "that otherwise would undermine [the Department's] ability to carry out its mission."[32] As detailed below, even the privileges that are recognized at law (as opposed to being newly invented) are not valid against the Commission, but even if one or more of them was, the Department should have long ago waived such privilege and produced the requested documents in response to the serious and credible allegations of wrongdoing that have emerged since early July 2010.

Beyond the Commission's general subpoena power, there are two other statutes that command DOJ's cooperation. The most straightforward one states: "All Federal agencies shall cooperate *fully* with the Commission to the end that it may effectively carry out its functions and duties."[33] The Commission has no law enforcement power; its most important duty, as DOJ knows, is to collect information on other agencies' enforcement of the civil rights laws (especially federal agencies) and issue reports on them. As for the subject matter of the dispute, investigating the enforcement of federal voting rights laws is a core statutory function of the Commission,[34] deeply rooted in the Commission's history, well-known to Congress, and recognized in the legislative history of the Voting Rights Act. Thus it is arguably our highest statutory duty to independently evaluate whether the NBPP case was

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[28] See Letter from Joseph H. Hunt to Commission General Counsel David Blackwood (Nov. 12, 2010). The relevance of the requested documents is explained in the Commission's letter of October 13, 2010.

[29] 42 U.S.C. § 1975a(2) ("In case of contumacy or refusal to obey a subpoena, the Attorney General may in a Federal court of appropriate jurisdiction obtain an appropriate order to enforce the subpoena."). This presents a conflict of interest, noted in this report's findings and recommendation, whenever the subject of the subpoena is the Department or its employees and DOJ would prefer not to comply.

[30] Response of the Department of Justice to U.S. Commission on Civil Rights at 1 (Jan. 11, 2010).

[31] *Id.*

[32] Letter from Joseph H. Hunt, Director, Federal Programs Branch to Chairman Gerald A. Reynolds (Jan. 11, 2010).

[33] 42 U.S.C. § 1975b(e) (emphasis added).

[34] 42 U.S.C. § 1975a(1) (The Commission "shall investigate allegations . . . relating to deprivations . . . because of color, race, religion, sex, age, disability, or national origin; or . . . as a result of any pattern or practice of fraud; of the right of citizens of the United States to vote and have votes counted . . . .").

properly handled, which the Commission repeatedly explained in its correspondence with the Department.

The statutory command that all federal agencies "cooperate fully" with the Commission's requests contains no exception like those in the Freedom of Information Act and analogous statutes. Congress knows how to create or codify government privileges, but it chose not to create any exception to the command to comply with Commission requests. And it seems quite obvious that the inclusion of the word "fully" in the command to "cooperate fully" was intended to prevent federal agencies from picking and choosing what to produce to the Commission and still claim compliance with the Commission's statute. In short, it doesn't matter how many marginal or unhelpful documents the Department has dumped if it steadfastly refuses to produce the ones that are most revealing.[35]

Although a constitutional, "executive" privilege might be asserted by the President in appropriate circumstances (see further below), there are several reasons why the common-law privileges asserted are not valid to thwart the Commission's request for information. The first is that the common-law privileges that apply in court against non-governmental parties, such as attorney-client, work product, and the like, are not well taken against other entities in the federal government. One reason for that is that we all work for the same client—the United States government. It makes about as much sense for DOJ to assert an attorney-client privilege in response to an inquiry from the Treasury Department as to assert it against the Commission. DOJ might have fewer reasons to resist Treasury's inquiry and the separation-of-powers issues are certainly different (both Treasury and DOJ report to the President), but asserting an attorney-client privilege against the Treasury Department (or the Commission) is equally inapplicable.

The Department's own Office of Legal Counsel has issued at least two opinions, which are binding on the Department unless overruled, that came to the same conclusion and further explain why this is so. They hold that the interests served by the attorney-client privilege are subsumed within the executive privilege, which is the privilege that vindicates the separation of powers interests at stake when other government entities request information from the executive branch.[36] The OLC opinions were issued in the context of a

[35] The Department claims that its production of 4000 pages of documents to the Commission is proof of its cooperation, but only DOJ's enablers and apologists would measure the degree of cooperation by the number of pages produced rather than the highly-relevant items withheld. Any first-year litigation associate would be fired for accepting a similar story from opposing counsel. For what it is worth, almost all the documents produced are either publicly available (about 70% of the material)—such as court pleadings or newspaper articles—or correspondence with outside groups. For example, there are about 864 pages of letters from Members of Congress and others to DOJ and 350 pages of DOJ publications, including an employee manual. Yet, the Department probably could have produced 40,000 pages of marginal or non-helpful documents to the Commission with less effort than it has spent to withhold the ones that reveal the heart of the matter the Commission is investigating. The few documents that don't fit the above categories include about five witness declarations in the NBPP case that were originally heavily redacted (but not their original statements) and a few select emails that would otherwise be covered by DOJ's broad privilege claims, but that were nevertheless produced because DOJ apparently believed they helped its position.

[36] 10 Op. O.L.C. 68, 78 (April 28, 1986) ("The interests implicated under common law by the attorney-client privilege generally are subsumed by the constitutional considerations that shape executive privilege, and therefore it is not usually considered to constitute a separate basis for resisting congressional demands for

congressional inquiry, but as the Commission's general counsel explained in a letter to DOJ on December 8, 2009, the Supreme Court has equated the Commission's investigatory function to that of a congressional oversight committee.[37] That we all work for the United States government is unassailable.

In addition to the binding nature of Office of Legal Counsel opinions on DOJ and their underlying logic that only a separation-of-powers-based executive privilege applies as against other federal entities, the other reason why common-law privileges (or those made up out of whole cloth by DOJ) would not apply to defeat the Commission's requests is that Congress can always override a common-law privilege (and those made up by DOJ) and it has done so with the statutory command that all federal agencies must "cooperate fully" with the Commission. DOJ's interest in its internal ethics investigation is admirable (if genuine), and no one likes another entity's review of its actions, but those agency "interests" simply cannot override Congress's statutory determination that all federal agencies must cooperate *fully* with the Commission's legitimate requests for information.

Because no common-law or statutory privilege shields the Department from its obligation to comply with the Commission's subpoenas, the only possible exception is a constitutional "executive" privilege. The "deliberative process" and "law enforcement" privileges are recognized categories of the President's executive privilege (as are national security and foreign policy privileges, which are not at issue). Nevertheless, there are three independent reasons why *no* executive privilege shields DOJ from complying with the Commission's inquiry in the NBPP matter. It is especially ironic, however, that DOJ would even mention a "law enforcement" privilege, which is generally limited to prevent disruption of potential or on-going investigations or litigation.[38] DOJ's position is that the NBPP civil suit should never have been filed against three defendants and dismissed it against them about 20 months ago. Although section 11(b) does not have an express statute of limitations,

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information."); 6 Op. O.L.C. 481, n.24 (Aug. 2, 1982) ("[T]he interests implicated by the attorney-client privilege generally are subsumed under a claim of executive privilege when a dispute arises over documents between the Executive and Legislative Branches, and the considerations of separation of powers and effective performance of constitutional duties determine the validity of the claim of privilege.").

[37] See *Hannah v. Larche*, 363 U.S. 420, 489-90 (1960) (The concurrence noted that the Commission was "charged with responsibility to gather information as a solid foundation for legislative action," and that the hearing in question was "in effect a legislative investigation.") (Frankfurter, J, concurring). More explicitly, "Congress has entrusted the Commission with [the role of] investigating and appraising general conditions and reporting them to Congress so as to inform the legislative judgment. Resort to a legislative commission as a vehicle for proposing well-founded legislation and recommending its passage to Congress has ample precedent." *Id.* at 492-93. (Frankfurter, J, concurring). See also *Berry v. Reagan*, No. 83-3182, 1983 WL 538, *2 (D.D.C. 1983) ("[I]n making investigations and reports thereon for the information of Congress under [the Commission's statute], in aid of the legislative power, it acts as a legislative agency.") (internal citation omitted); *Buckley v. Valeo*, 424 U.S. 1, 137 (1976) (Powers and functions that "are essentially of an investigative and informative nature" fall "in the same general category as those powers which Congress might delegate to one of its own committees.").

[38] The Fifth Circuit held that the privilege only applies to on-going investigations. *In re United States Department of Homeland Security*, 459 F.3d 565, 570 n.1 (5th Cir. 2006). The Second Circuit suggested the privilege might continue beyond one investigation if "future investigations may be seriously impaired if certain information is revealed to the public." *Dinler v. City of New York*, 607 F.3d 923, 944 (2d Cir. 2010) (quotation marks omitted). Even assuming the Second Circuit is correct, those circumstance do not exist in disparate § 11(b) investigations.

federal courts would likely borrow an analogous two-year limit, which has now run on the November 2008 conduct. Thus, no legitimate law-enforcement privilege would apply, even if President Obama actually tried to invoke it.

The simplest and most powerful reason why no constitutional, executive privilege can support DOJ's stonewalling against the Commission is that DOJ eventually admitted last May that the President's executive privilege has not been invoked.[39] Because there is a separation-of-powers interest on both sides of the ledger when a separation-of-powers-based executive privilege is invoked, the Supreme Court has quite logically held that an executive privilege does not automatically exist upon the insistence of some low-level official who wishes to thwart a subpoena from another branch or entity of government. Instead, the Supreme Court has held that the President or department head acting on his behalf are the only officers who can assert an executive privilege, and it must be asserted formally and explicitly.[40]

Like its various other supposed "interests" in not complying with the Commission's subpoenas, DOJ may have a real "interest" or desire to keep its deliberations regarding past law enforcement decisions confidential. But those interests don't rise to the level of a valid privilege to defeat a Commission subpoena, unless an appropriate executive privilege has been properly invoked.[41] If the contrary proposition prevailed (if low-level agency officials could simply recite the agency's interest in the confidentiality of its deliberative process to defeat an otherwise lawful subpoena—without an invocation of executive privilege), that would effectively overrule the Supreme Court's careful and sound decision in *United States v. Reynolds* that the President or a department head must personally and formally invoke executive privilege. In short, why would the President ever take the political heat for invoking executive privilege (which is what *Reynolds* held the separation-of-powers required) if a low-level career lawyer like Joseph Hunt (who wrote most of the responses for DOJ) could simply recite the agency's "interests" in the principles the executive privilege is designed to protect? *That* would make no sense at all.

The Department's formal Office of Legal Counsel opinions are fully in accord with this analysis, for they properly explain that the "interests" that exist in the common-law privileges are subsumed within executive privilege when the request is from a government

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[39] Letter from Joseph H. Hunt, Director, Federal Programs Branch to Chairman Gerald Reynolds (May 13, 2010).

[40] See *United States v. Reynolds*, 345 U.S. 1, 7-8 (1953) ("[The privilege] is not to be lightly invoked. There must be formal claim of privilege, **lodged by the head of the department which has control over the matter**, after actual personal consideration by that officer.") (emphasis added) (citations omitted). Executive privilege is sometimes called "Presidential" privilege. *Nixon v. Admin. Gen'l Serv.*, 433 U.S. 425, 439 (1977) ("the Presidential privilege of confidentiality"); U.S. Department of Justice, Office of Legal Counsel, Memorandum Opinion for the Associate Counsel to the President, 2001 WL 36209373, *4 (June 20, 2001) ("executive (sometimes styled 'Presidential') privilege"). Then Attorney General Michael Mukasey, rather than asserting executive privilege himself, wrote a letter to President Bush requesting that the President assert the privilege with regard to certain executive-branch documents. *Citizens for Responsibility & Ethics v. U.S. Dep't of Justice*, 658 F. Supp. 2d 217, 221 (D.D.C. 2009).

[41] The deliberative process privilege is part of executive privilege. The Supreme Court described it as "the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties." *United States v. Nixon*, 418 U.S. 683, 705 (1974).

entity such as Congress or the Commission. The interest exists independently of the executive privilege, but a separate privilege does not. The contrary proposition would also effectively overrule the Supreme Court's decision in *United States v. Reynolds.* And what is true for recognized common-law privileges is doubly true for vague, newly-invented privileges, to wit: that the Department may prevent any disclosure "that would otherwise undermine the ability of DOJ to carry out its mission." Many an agency would like that open-ended privilege (what does "undermine" mean?) since few officials want to disclose wrongdoing or embarrassing information, but it would be more sweeping than any current Presidential privilege, a point noted by at least one newspaper editorial board.[42] It was quite disappointing that DOJ, of all agencies, would claim such a privilege.

If the President or the Attorney General acting on his behalf personally invoked executive privilege in the future regarding the deliberations in the NBPP case, there are two other reasons why it would likely not shield most of the information sought by the Commission or Members of Congress from disclosure. The first is that the deliberative process privilege (which is the only category of executive privilege that arguably would apply) only covers certain types of high-level executive deliberations.[43] The second is that even executive privilege is not absolute. As the Supreme Court famously held during the Watergate affair, the president's executive privilege may be overcome in an investigation of wrongdoing.[44] The detailed and credible allegations of wrongdoing sworn to by DOJ lawyers (Coates and Adams) and other affiants not only would make any future invocation of executive privilege untenable, but they also strongly counsel the Attorney General to waive any other asserted privilege that he may sincerely believe exists. In short, if even a valid invocation of executive privilege is defeated by credible allegations of wrongdoing, then surely some lower species of privilege or purported "interest in confidentiality" should also yield.

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[42] Editorial: "Menacing turn in Black Panther case," The Washington Times, Jan. 13, 2010 ("Not even President Nixon at the nadir of Watergate asserted such a broad privilege against outside review.").

[43] A careful determination would have to be made between what material might arguably be covered and what is not. It does not apply to witness statements the Department is withholding. It would not apply to non-deliberative documents. Given DOJ's current testimony, it is doubtful that it would apply to most conversations between attorneys within the Civil Rights Division. This is because the Department's oft-repeated position that the decision to dismiss the NBPP suit was made exclusively by career attorneys in the Civil Rights Division would tend to undermine any later assertion that the conversations within the Voting Section or the Civil Rights Division were part of the advice provided to the President or other "high Government officials," see *Nixon* at 706, although it might apply to the advice provided to the Attorney General, Deputy Attorney General, and Associate Attorney General.

[44] See *United States v. Nixon*, 418 U.S. 683, 706 (1974) ("[N]either the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances. The President's need for complete candor and objectivity from advisers calls for great deference from the courts. However, when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises."). Indeed, the *Nixon* case now stands for the proposition that executive privilege cannot be invoked to shield such wrongdoing; the "presumptive privilege must be considered in light of our historic commitment to the rule of law." *Id.* at 708.

Yet, the simple fact remains that DOJ has admitted that the President has not asserted executive privilege to withhold information from the Commission.[45] Thus, DOJ has not validly asserted executive privilege or any common-law or other privilege subsumed within it. In sum, it has no lawful ground to withhold witnesses, documents or emails from the Commission.

My point in describing the law requiring disclosure is two-fold: (1) so that congressional or other investigators may consider its implications going forward, and (2) to explain what conclusions the Commission began to draw from the many months of stonewalling and frivolous claims of privilege. As severe winter storms in Washington[46] gave way to spring, the continued, frustrating correspondence with the Department began to reinforce the conclusion that something much stronger than ordinary bureaucratic resistance was at play.

It is helpful to compare DOJ's behavior in the NBPP investigation with the history of cooperation between the Commission and DOJ on other reports and investigations. The level of resistance from the Department in the NBPP investigation appears to be unprecedented in the Commission's recent records and the memory of our professional staff. Normally, DOJ's cooperation—and that of other federal agencies—is open and collaborative, as it was in the first two statutory reports I was involved with on the Commission. (The first involved religious liberties in prisons; the second focused on civil rights issues relating to the mortgage crisis. The second was somewhat critical of the agencies involved, but DOJ openly cooperated with it.) On other occasions, our records show the Commission issued lengthy subpoenas to DOJ on other voting rights issues, but there was still a high degree of cooperation with the Commission's requests. The extreme lack of cooperation this year was quite unusual.

Moreover, the continuing correspondence with DOJ in the NBPP investigation showed none of the comity or professionalism normally shown by the Department. For example: the Department refused repeated requests for meetings to discuss the significant discovery impasse;[47] it would not acknowledge or answer simple questions (e.g., most recently it has refused to even acknowledge our question whether Deputy Assistant Attorney General Julie Fernandes made certain troubling statements); it wouldn't provide a log of withheld documents; and it took months for DOJ to respond to whether the Attorney General would appoint a special counsel to help resolve the conflict of interest surrounding its failure to comply with Commission subpoenas (answer: no) and whether the President had invoked executive privilege (answer: no).

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[45] Letter from Joseph H. Hunt, Director, Federal Programs Branch to Chairman Gerald Reynolds (May 13, 2010). We can reasonably infer the President or Attorney General has not secretly invoked executive privilege since May 13, including that such private invocation would contravene *Reynolds* that it must be formally claimed and "lodged."

[46] The two storms nicknamed Snowmageddon and Snowpocalypse in early February 2010 shut down the federal government for days and caused the Commission to delay its first NBPP hearing, originally scheduled for Feb. 12.

[47] There was one meeting between the Commission General Counsel and mid-level career staff at DOJ in May 2010 to allow our staff to look at a few photos and exhibits, but DOJ refused to discuss the more basic discovery disputes.

Because I used to work in DOJ's Office of Legal Counsel (in Republican and Democratic administrations) and know of the high-caliber work of the Department, the odd privilege claims raised in the NBPP investigation[48] were another indication that something was wrong. In short, when the unlawful resistance dragged on, this suggested to me that those who acted like they had a guilty mind might not just have something embarrassing to conceal, but perhaps something even more troubling to hide.

Testimony of Thomas Perez

The only witness DOJ eventually offered to appear for the Department was Assistant Attorney General for Civil Rights Thomas Perez, though the Commission did not ask for his testimony since he did not take office until well after the NBPP case was dismissed.[49] Nevertheless, the Commission welcomed Perez's testimony at a hearing on May 14, 2010 in hopes that he would shed light on some of the issues. His testimony has since been called into serious doubt in several respects, and like DOJ's initial letter to the Commission, has done more to undermine the logic of the Department's avowed position than support it.

Commissioner Heriot has addressed certain DOJ legal positions Perez was not prudent enough to abandon, including the claim that it is harder to secure a judgment when civil defendants do not contest the allegations than when they do, or that making a proffer of evidence to the judge could not cure any perceived problem with a default judgment. The notion that acting political appointees (King and Rosenbaum) were not acting *as* political appointees when they ordered the trial team to dismiss the NBPP suit is an odd one, but their political connections may be irrelevant unless they were influenced in part by a desire for other political appointments. Because Commissioner Heriot distinguishes possible political and ideological influences, I will only discuss two factual issues and the most important legal concern with Perez's testimony.

Perez repeatedly emphasized that no one higher than the acting head of the Civil Rights Division in the first half of 2009 (Loretta King) was "involved in" making the decision to dismiss the NBPP case. This testimony was highly doubtful when uttered and subject to some interesting cross-examination about the role the Attorney General and

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[48] I do not recall any suggestion the Office of Legal Counsel has endorsed the legal theories advanced by others in this matter, but it would be disappointing if pressure has been or is brought to bear on OLC to sanction them.

[49] On November 12, 2010, more than a month after the final draft of the Interim Report was sent to commissioners for review (which was already delayed more than two months by DOJ's refusal to produce Coates), the Department said it would permit King, Rosenbaum, and Fernandes to be deposed if the Commission agreed to certain conditions DOJ knew were unacceptable. The Department refused to waive its alleged privileges, rendering inquiry into the conversations and deliberations about the dismissal off limits. The Department made it clear it would not produce relevant documents and emails, severely limiting the value of any deposition. Finally, the Department kept referring to this Interim Report as a "final report" and insisted that the Commission agree to postpone its scheduled vote to adopt the Interim Report and to incorporate new testimony in a new report that DOJ could review, etc. Knowing that the our last meeting of the year was December 3, this last condition alone would have killed the Interim Report and put the Commission in violation of its statutory obligation to issue at least one such enforcement report per year. Thus, the Commission's General Counsel replied that relevant documents must be produced and the witnesses testify without such conditions, after which DOJ retracted its conditional offer to produce the witnesses.

Associate Attorney General could play in such an unusual decision, but Perez stuck by his story that these officials were merely given notice of the decision. Such a claim, if it was ever believable, has since been seriously undermined by the email logs that DOJ produced in FOIA litigation brought by Judicial Watch.[50] On crucial days in late April/early May 2009 when decisions were being made, 22 emails were sent between the acting leaders of the Civil Rights Division and senior political appointees who supervise the Division. On May 8, when an extension of time to file the injunction was granted in federal court, there was a chain of emails between Acting Deputy Assistant Attorney General Steven Rosenbaum and Deputy Associate Attorney General Sam Hirsch. On May 14, there were three emails between Hirsch and Associate Attorney General Thomas Perrelli concerning the NBPP case. On May 15, when most of the case was dismissed, there were four emails between Civil Rights Division leadership and Hirsch, and six emails between Hirsch and Perrelli.

And according to the email headers as well as the Department's invocation of relevant FOIA exemptions (for deliberative and predecisional communications), these emails contain deliberative discussions between the Division and its political supervisor about what should be done in the litigation; these are not merely emails to supervisors giving them a heads up. One contains the Deputy Attorney General's "current thoughts" about the case. The Deputy Attorney General is the second highest ranking official in the Justice Department, and I have no doubt his current thoughts were given great weight. As late as November 12, 2010, the Department's written excuse not to produce emails between the Civil Rights Division and Sam Hirsch to the Commission is that they are privileged *deliberative* emails. Yet, Perez has still not corrected his testimony to the Commission. The Department simply can't have it both ways.

To be perfectly clear, political appointees should be involved in decisions about whether to bring or dismiss important cases, especially the dismissal of a case the Department had essentially won involving a high-profile incident. And it is not a problem for political appointees to overrule six career attorneys in two offices, if their reasons are not wrongful. But what does it mean when the Department and its officials repeatedly try to obscure their involvement? And why not come clean now? The fact that Thomas Perez and others at DOJ have gone to so much trouble to mislead the public about how involved senior Obama appointees were in making the decision says a lot about how they think the public would react to the truth.

At the May 14 hearing, I asked Perez several times whether he had investigated the allegations in news reports that there was hostility to race-neutral enforcement of the civil rights laws in the Civil Rights Division. Perez tried to evade the question, but he eventually responded curtly, "We don't have people that are of that ilk" in the Division.[51] Among other contrary evidence, the Commission later received sworn testimony that Deputy Assistant Attorney General Julie Fernandes, who is Perez's senior politically-appointed deputy in charge of voting issues, had previously instructed the entire Voting Section that the Obama

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[50] *Judicial Watch v. U.S. Dep't of Justice*, No. 10-cv-00851 (D.D.C. filed May 24, 2010) (Civil Rights Division Index of Withheld Documents).

[51] Testimony of Thomas Perez, Assistant Attorney General, Before the U.S. Commission on Civil Rights at 35 (May 14, 2010).

administration would bring only traditional civil rights cases on behalf of minorities.[52] Of even more relevance to the cover-up, however, we now have sworn testimony that Perez was aware when he testified that other of his deputies might be hostile to race-neutral enforcement of the law. Perez was briefed on such allegations orally and possibly in writing in the week prior to giving his testimony.[53]

In fact, Coates and Adams testified that Coates personally briefed Perez about the hostility to race-neutral enforcement of the civil rights laws the day before Perez testified before the Commission.[54] If Perez did not believe any of the stories or allegations, it still was incumbent on him to explain what steps he had taken to investigate the allegations in response to my question—or to acknowledge the stories and allegations but explain why he didn't believe them. It was misleading, at best, for him to emphatically claim there was no one "of that ilk" in his Division without more. Why wasn't he forthcoming about the incidents of harassment within his Division? Why not at least admit what he had heard and discuss it honestly? Finally, it is troubling that Perez refuses even now to admit or deny whether his deputy, Julie Fernandes, made the statements subsequently attributed to her. Under circumstances that cry out for a confirmation or denial, his silence is deafening.

Perez also repeatedly testified that the NBPP case was dismissed *solely* because the facts and the law did not support it.[55] As with DOJ's original letter to the Commission, this statement was inherently suspect for several reasons: (1) Unless the facts were different than what was stated in the complaint (and none were disputed), no honest civil rights lawyer could really believe the law did not justify the lawsuit, and if any did, that itself would be a scandal. (2) DOJ would not release the documents or allow the relevant attorneys to provide testimony that would prove or disprove whether the facts and law were the only basis for the decision. (3) Perez had a terrible time coming up with an explanation of why the facts did not support voter intimidation claims against, for example, Election Day co-conspirator Jerry Jackson. Perez repeated the lame excuse that the local police did not order Jackson to leave, which is an absurd defense to clear acts of *federal* voter intimidation for numerous historical and other reasons.[56]

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[52] Coates Testimony at 32-33.

[53] Coates Testimony at 134.

[54] Coates Testimony at 134; Adams Testimony at 68 (testifying the briefing was the day before Perez testified).

[55] See, e.g., Perez Testimony at 23, 33, 53, 63, 104, 107. Unless Perez conducted his own thorough investigation of the deliberations that took place April/May of 2009, it is unclear how he could know what the real motives or reasons were for those who made the decision. Did he quiz Attorney General Holder, Deputy Attorney General Ogden, Associate Attorney General Perrelli, and Deputy Associate Attorney General Hirsch, and read all the emails and other documents between them and his Division? We don't know. Indeed, we don't know if he had any solid basis to testify why the decision was made to dismiss the suit or whether he was simply following a script.

[56] In a belated attempt to re-interpret what Perez really meant, the dissenting statement of Commissioners Melendez and Yaki claims that Perez and DOJ only cited the police for the truth of the factual matters they related. This is not a fair reading of Perez's testimony or DOJ's earlier correspondence for several reasons. The first is that the body of the police report is about 30 words long and does not relate any facts that exonerate Jackson or anyone else. The heavily redacted FBI report of one officer's statement does not support the dissent's theory either. For example, it does not say who the police interviewed besides the defendants so the cryptic responses about who was or was not intimidated are meaningless. The second problem is that Perez and DOJ did not point to any facts in the police report or FBI interview (the FBI interview is never even mentioned) that support Perez's conclusion that Jackson's "*actions* did not warrant his removal from the premises." Perez

Testimony of Christopher Coates and Christian Adams

Besides undermining DOJ's position and leading journalists to suggest he may have committed perjury, Perez's testimony did have one dramatic consequence: J. Christian Adams, who was a lead trial attorney on the NBPP team, submitted his resignation to the Department after listening to Perez's testimony, which he later explained was "inaccurate."[57] Since DOJ had forbidden Adams to testify and he still felt lawfully obligated to comply with our subpoena, he resigned his position first and then provided whistleblower testimony on July 6, 2010.

Former Voting Section Chief Christopher Coates, who led the NBPP trial team, was also distressed by Perez's inaccurate testimony. DOJ repeatedly forbade Coates to talk to the Commission. Coates later said he hoped, after Adams testified, that the Department would amend its representations to the Commission and Congress about what happened in the Panther case.[58] Based on additional contact between his private lawyer and the Department, it became clear this was not going to happen. Coates then decided to become a whistleblower and appear before the Commission at risk to his career, since he is still a Department employee.[59] The afternoon before he testified, Congressman Frank Wolf sent a letter to Attorney General Holder cautioning against interfering with Coates's testimony.[60] Instead, the Department sent an email to Coates late that night instructing him again not to follow-through with his plans.[61] Based on memos he sent and conversations he had with his superiors, the Department knew much of what he had to say. What was the Department trying so hard to conceal? We now know.

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and DOJ rely exclusively on the fact that the police allowed Jackson to stay as proof that he had done nothing wrong. Indeed, Perez went further, stating that "The [the local police] concluded that the activities did not rise to the level of intimidation. And that was certainly a fact that was a fact of relevance." Perez Testimony at 70-71. But there is absolutely nothing the police report or FBI interview that supports this factual claim. In the absence of something more, it is embarrassing at best for DOJ to cite the particular, local police action to support their federal law enforcement decision.

[57] Adams Testimony at 69.

[58] Coates Testimony at 92-93.

[59] Coates's background is summarized in the report on page 49:

> Before beginning his work at the Department, Mr. Coates served with the Voting Rights Project of the American Civil Liberties Union in Atlanta, Georgia. During his time there, he litigated cases on behalf of African-American clients, particularly those challenging at-large election procedures. In 1993 he argued a case before the United States Supreme Court on behalf of six African-American citizens in the local NAACP chapter in Bleckley County, Georgia. For his service with the ACLU he was awarded the Thurgood Marshall Decade Award by the Georgia Conference of the NAACP, as well as an award from the Georgia Environmental Association for his representation of African-American clients opposing the installation of a landfill in their neighborhood. Mr. Coates began his career at the Department of Justice in 1996 during the Clinton administration. During that administration, he was promoted to Special Litigation Counsel and served in that position until 2005.

[60] Letter from Congressman Frank R. Wolf to Attorney General Holder (Sept. 23, 2010).

[61] Daniel Harper, "DOJ, the New Black Panther Party, and Integrity," The Weekly Standard blog, Oct. 1, 2010, *available at* http://www.weeklystandard.com/blogs/doj-new-black-panther-party-and-integrity.

Coates and Adams both felt constrained to abide by the Department's highly questionable privilege claims with regard to the NBPP case deliberations and documents,[62] but they felt free to describe the prevailing attitude regarding suits brought against black defendants generally. Both Coates and Adams described a deep-seated culture within the Civil Rights Division that is hostile to race-neutral enforcement of the law.[63] They said there is a widespread belief that cases should not be brought against blacks or other racial minorities if the victims happen to be white. And they testified that this race-based approach to law enforcement is shared by current political appointees in the Civil Rights Division.

For example, Coates and Adams both testified that Deputy Assistant Attorney General Julie Fernandes stated in a meeting with Voting Section attorneys that the Obama administration *only* wants to bring "traditional" civil rights cases on behalf of minorities.[64] Coates testified that no one in the meeting had any confusion about what she meant: there would be no more cases like the NBPP case or the Ike Brown case filed against racial minorities.[65] Fernandes also said in another meeting with Voting Section attorneys that the Obama administration is not interested in enforcing Section 8 of the National Voter Registration Act, which requires states to take ineligible voters off voter rolls.[66]

The office statements attributed to Fernandes by Coates and Adams may be incredible to most Americans (perhaps this is why Vice Chair Thernstrom said it was impossible that Fernandes would "*announce that* ... unless she is some sort of moron"),[67] but the alleged remarks are entirely consistent with statements Fernandes made when she was with the Leadership Conference on Civil Rights before she joined the Obama administration. Fernandes claimed that the Voting Rights Act was not written to protect all voters regardless of race:

> 'People are wondering why aren't you bring [sic] cases with voting and African-Americans—what is the issue,' said Julie Fernandes of the Leadership Conference on Civil Rights. 'How can it be that the biggest case involving discrimination in Mississippi [*United States v. Ike*

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[62] Legal ethics rules provide that a lawyer may not reveal a valid client confidence (except under certain narrow exceptions) even after the representation is over. The Department had asserted that the deliberations over the NBPP case were covered by the attorney-client privilege, and while Coates and Adams might have agreed the assertion was wrongful, disclosing an *alleged* client confidence that did not satisfy one of the exceptions would have possibly subjected Coates and Adams to the expense and harassment of bar disciplinary proceedings.

[63] See Coates Testimony at 9-10, 16-18, 20, 23-26, 31 (Sept. 24, 2010); Adams Testimony at 47-50, 54-63, 65-67 (July 6, 2010).

[64] Coates Testimony 32-33; Adams Testimony at 63-64 (July 6, 2010).

[65] Coates Testimony at 33; *United States v. Brown*, 494 F. Supp.2d 440 (S.D. Miss. 2007), *aff'd*, 561 F.3d 420 (5th Cir. 2009).

[66] *Id.* at 33-36; Adams Testimony at 63-64.

[67] Commission Business Meeting Transcript at 24-25, August 13, 2010 (emphasis added). It is unclear whether Vice Chair Thernstrom found it difficult to believe someone at Fernandes's level at DOJ would believe such a notion or merely that it was hard for her to believe someone like Fernandes would "announce that" at DOJ.

> *Brown and Noxubee County*] was brought on behalf of white voters ... **The law was written to protect black people.**' [68]

Nor is Fernandes alone in this wrong-headed, race-based interpretation of federal civil rights law. Commissioner Heriot notes in her accompanying statement how common that race-based view of the law is in certain academic and activist circles. And Vice Chair Thernstom should not have forgotten that two former members of our Commission (including its former Chair, Mary Frances Berry) not only held such an erroneous view, they asserted that position in a report of this Commission:

> In their statement concerning *Stotts*, once again our colleagues in the majority insist on putting blinders on society concerning the tragic present and past effects of discrimination. **Civil rights laws were not passed to give civil rights protection to *all* Americans, as the majority of this Commission seems to believe. Instead, they were passed out of a recognition that *some* Americans already had protection because they belonged to a favored group; and others, including blacks, Hispanics, and women of all races, did not because they belonged to disfavored groups.**[69]

Fernandes was also publicly critical of laws designed to protect the integrity of the ballot box because of the disparate impact she thought these measures might have on minorities.[70] In short, Fernandes was not reluctant to publicly state her belief that the civil rights laws should only be enforced on behalf of certain minorities.

Because of DOJ's privilege claims, Coates and Adams both declined to reveal the content of conversations and arguments they had with the acting officers appointed by the Obama administration to head the Civil Rights Division (Loretta King and Steven Rosenbaum) when the NBPP case was dismissed, but Coates testified plainly and without equivocation that the reason they ordered the dismissal was because they harbored hostility to cases brought against black defendants.[71] Coates said that he would return and provide the

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[68] Steven Rosenfeld, "Is the Justice Department Conducting Latino Outreach on Behalf of the GOP?," AlterNet (Oct. 22, 2007) (second bracket and ellipsis in original; emphasis added), *available at* http://www.alternet.org/story/65749/.

[69] U.S. Commission on Civil Rights, Toward an Understanding of *Stotts* 63 (Jan. 1985) (Statement of Commissioners Blandina Cardenas Ramirez and Mary Frances Berry) (emphasis added).

[70] Sylvia A. Smith, "High Court to consider Indiana law on voter ID," Fort Wayne Journal Gazette (IN), Jan. 6, 2008 ("Julie Fernandes, an analyst with the Leadership Conference on Civil Rights, said voter ID laws are akin to poll taxes....") *available at* http://www.journalgazette.net/apps/pbcs.dll/article?AID=/20080106/NEWS03/801060306/1002/LOCAL; see also Hearing Before the Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the House Committee on the Judiciary, 110th Cong. at 62 (Oct. 30, 2007) (statement of Julie Fernandes, Senior Policy Analyst and Special Counsel, Leadership Conference on Civil Rights) (criticizing voter ID laws and voter integrity initiatives by DOJ), available at http://judiciary.house.gov/hearings/printers/110th/38637.PDF.

[71] Coates Testimony at 23-24 ("It is my opinion that the disposition of the Panther case was ordered because the people calling the shots in May 2009 were angry at the filing of the *Brown* case and angry at the filing of the Panther case. That anger was the result of their deep-seated opposition to the equal enforcement of the Voting

relevant context and reasons for his conclusion if the Department waived its assertion of privilege or if the privilege claims were overruled in court. Yet, on November 12, the Department again refused to waive its alleged privileges and allow Coates to testify about the conversations he had with King and Rosenbaum regarding the NBPP dismissal. Thus, the Department should not be heard to complain about the lack of detail in the attorneys' conclusions regarding the NBPP case itself.

Nevertheless, Coates's conclusion that the hostility to race-neutral enforcement of the laws is widespread in the Division is illustrated by many anecdotes he and Adams described. They provided example after example of unequal treatment or racial bias, including harassment of black employees who worked on a case in which the defendants were black. As background, the Ike Brown case was a voting rights suit brought by Christopher Coates, Christian Adams, and a few other attorneys in the Voting Section in 2005 against the leader of the Democratic Party in Noxubee County, Mississippi, which is a majority-black county. The defendants in the case were black and the victims were both black and white voters. DOJ won the case in district court and it was affirmed by the Fifth Circuit. Among other incidents, Coates and Adams described the following:[72]

- Several attorneys refused to work on the Ike Brown case. At least one attorney stated, "I'm not going to work on the case because I didn't join the voting section to sue black people."
- Joseph Rich, a former Voting Section chief, doctored a memo from Voting Section lawyers to senior Division staff, changing their recommendation to file the Ike Brown lawsuit to the opposite recommendation, due to Rich's hostility to race-neutral enforcement of the voting laws.
- Mark Kappelhoff, the chief of the Criminal Section, at a meeting of the chiefs of the Civil Rights Division, allegedly stated about the Ike Brown case, "That's the case that has gotten us into many problems with the civil rights groups."
- Coates testified that Robert Kengle, deputy chief in the Voting Section, stated to him during a trip to investigate the Ike Brown case, "Can you believe we are being sent down to Mississippi to help a bunch of white people?" Kengle recently admitted that he complained about the trip and said something like that. While he invents a wholly implausible relative-racial-need-theory excuse for his complaint, his own statement makes him sound culpable, and his newly-invented excuse has now been refuted.[73]

Rights Act against racial minorities and for the protection of white voters who had been discriminated against.").

[72] See Interim Report at 51-56. See also Coates Testimony at 13-18, 105-06.

[73] See Letter from Hans A. von Spakovsky to the Honorable Gerald A. Reynolds (Oct. 28, 2010), *refuting* Declaration of Robert A. Kengle (Oct. 18, 2010) (both are available on the Commission website). Although Kengle says he does not remember the precise words he used, he admits that he was upset that he was sent to Mississippi to monitor the local Democratic primary and he complained about it to several people, not because that trip would help whites—per se—but supposedly because there were relatively more deserving reports involving minority voters that were not being addressed. Kengle Declaration, ¶¶ 4-5. Kengle also states that he did not explain this relative-racial-need-theory for his complaints at the time because, in essence, Republican supervisors were against him. *Id.* at ¶ 5. So by his own admission, he complained about being sent to Mississippi to protect white voters, but only because he privately knew he was needed *more* to protect minority voters. Although Kengle's belated excuse for his righteous-sounding anger seems questionable on its face (especially given the serious allegations of voter fraud in the Ike Brown case), it can't stand up to even casual

- Attorneys in the civil rights division allegedly told Adams that "until blacks and whites achieved economic parity in Mississippi, we had no business bringing this case."
- A similar comment about economic parity was made by a career attorney to Mr. Coates.
- Adams testified that a non-lawyer minority employee at the Department was "relentlessly harassed by voting section staff for his willingness as a minority to work on the case of *United States v. Ike Brown*."
- Coates testified further that the minority employee's mother, who worked in another section of the Division/Department, was also harassed because her son worked on the Ike Brown case.
- Adams testified: "Others assigned to the case were harassed in other ways, such as being badgered and baited about their evangelical religious views or their political beliefs. In these instances, the victimized employee was openly assumed to espouse various political positions hostile to civil rights, simply because he worked on this case."
- Adams also testified: "There was outrage that was pervasive that the laws would be used against the original beneficiaries of the civil rights laws. Some people said 'we don't have the resources to do this. We should be spending our money elsewhere.' And that was how they would cloak some of these arguments."
- In another instance, "[a]nother deputy in the section said in the presence of Mr. Coates, 'I know that Ike Brown is crooked, and everybody knows that, but the resources of the division should not be used in this way.'"

Several of these detailed anecdotes were corroborated by both Coates and Adams, by other sworn affiants, or by an admission of someone who uttered the statement. In addition, Coates and Adams were able to relate troubling incidents concerning King and Rosenbaum that are not client confidences. The first, involving Rosenbaum, is that he did not even bother to read the comprehensive legal memo prepared by the trial team on the NBPP case before he made up his mind to dismiss the charges.[74] Given the sequence of events that led to the confrontation in question (see the full narrative in the body of this Interim Report), it certainly undermines the claim that he was interested, and only interested, in the objective

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scrutiny. As Hans von Spakovsky's letter explains—and the press releases he attaches from DOJ's website prove—DOJ greatly expanded the number of federal election monitors in 2002 (over the previous mid-term election) and in 2004 (compared to 2000). In 2004, for example, DOJ supervised 162 elections in 105 political subdivisions in 29 states with a total of 1,463 federal observers and 533 Division personnel. This was a dramatic increase (2.5 times the Clinton Administration figures for the 2000 general election) and shattered the previous record. With the exception of a few sent to Noxubee County, Mississippi between 2003 and 2006, all of the remaining observers were sent to protect the rights of racial, ethnic, and language minorities. So the truth is that Kengle was upset that *any* observers were sent to protect the rights of white voters, because any is relatively too many. How else can one explain his claim that the first and then only deployment to protect white voters (of a handful of observers) was relatively too many and a doubling of federal observers (by many hundreds) to protect against perceived threats to minority voters was too low of a percentage? Apparently to Kengle, less than 1% of staff assisting white voters is too many. That sure seems like a racial double standard to me. See also note 81, for why the dissenters' attempt to dismiss von Spakovsky's letter is sadly misguided.

[74] Adams Testimony at 30.

facts and law governing the case. It strongly suggests something other than the usual facts and law were at play.

The incident involving King followed from the refusal of some Voting Section staff to work on the Ike Brown case and the harassment of other Section staff who agreed to do so. After he secured a victory in that case, Coates began asking job applicants whether they would be willing to work on other cases brought on behalf of white victims against minority defendants. He said no one ever expressed any discomfort with the question or answered negatively. Yet, Coates testified that when Loretta King was appointed acting head of the Civil Rights Division in the Obama administration she told him that he must stop asking that question.[75] From his years working with King and her behavior in the NBPP and Ike Brown cases, Coates said he knew why the order was given: King does not believe in "race-neutrality" or the "equal enforcement of the provisions of the Voting Rights Act," and thus, she didn't want to exclude people who thought like her.[76]

Conclusion

Loretta King was unquestionably involved in the decision to dismiss the NBPP suit as acting head of the Division (she now is a Deputy Assistant Attorney General for Civil Rights under Thomas Perez). I asked Perez if he thought it would taint a decision to file or dismiss a case against a minority defendant if the decision-maker did not believe the voting rights laws should be applied against minority defendants. Perez refused to answer the question, claiming he had no people "of that ilk" in his Division. But the sworn testimony before the Commission is that Loretta King is of that ilk. The same testimony implicates Steven Rosenbaum, currently Chief of the Housing and Civil Enforcement Section, and Julie Fernandes, Perez's Principal Deputy Assistant Attorney General. And what about other senior political appointees in the Department who were involved in dismissing the NBPP suit?

Until the Department produces the relevant emails and documents from the decision makers about their basis for dismissing the NBPP case, reasonable people will draw the logical conclusion from the objective facts (that the case was very strong and should not have been dismissed), from the lack of a plausible rationale to the contrary, from the unprecedented stonewalling, from the claims of privilege that would make even Watergate figures blush, and from the detailed and credible allegations of wrongdoing by Coates, Adams, and other affiants.

Even so, neither Coates nor Adams has been allowed to tell his whole story. On October 13, 2010, the Commission asked the Attorney General to waive any alleged privilege, given the credible allegations of wrongdoing; produce the emails in the Judicial Watch email log; produce any documents that Coates and Adams wrote, especially those written on or about April 26 and May 10 to help Thomas Perez prepare for his testimony before the Commission; and allow Adams, Coates and other DOJ employees with

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[75] Coates Testimony at 20.
[76] Coates Testimony at 19-21.

information about possible malfeasance to testify freely to the Commission.[77] All those requests were denied on November 12, 2010.

Nevertheless, I hold out hope that the Attorney General will review the record of the Commission's investigation and do the right thing by putting an end to the obstruction and ordering the Department to "cooperate fully" with the Commission as federal law requires.

While the Commission and others pursue this important inquiry, I also urge Attorney General Holder to issue a formal memorandum to all Department employees that they shall not make law enforcement decisions based on the race of the defendants or victims. I also believe that if there is a serious question about whether someone has made statements indicating they are opposed to such a directive, the Department should relieve the officer or employee of law enforcement responsibilities until a thorough investigation of the matter is concluded.

Rebuttal to the Statement of Commissioners Melendez and Yaki

The usually clever statements of Commissioners Melendez and Yaki follow an unfortunate pattern of interposing process objections after the report is completed that were never raised during the investigation. Yet, their joint dissent this year is even more revealing in what it does not address:

- The compelling testimony from DOJ whistleblowers that there is a pervasive hostility to the race-neutral enforcement of the law within the Civil Rights Division as well as incidents of harassment and intimidation of those who have tried to enforce the civil rights laws in a race-neutral manner.
- The refusal of DOJ to cooperate with the investigation and turn over the most important documents, emails, and witnesses—and the logical inferences that follow from such conduct.

The entire premise of the joint dissent is this: if they can come up with a plausible explanation why DOJ might have dismissed the NBPP voter intimidation claims, then the Commission was wrong to seek the actual reason for DOJ's actions. Although their attempt to come up with a plausible rationale for DOJ's actions is counterfactual and unconvincing, their approach is still more suited to a pro-administration pundit than members of the Commission with the responsibility to evaluate the actual law enforcement decisions made by DOJ. The dissenters assert that they "did not interpret all evidence in light of any foregone conclusions." That seems doubtful, but it is far more significant that they labored for 16 months to prevent the most important evidence from coming to light that could be subject to *any* interpretation.

1. DOJ Enablers.

In the main, the dissenters aided and abetted DOJ's stonewalling, for whatever reason, time after time. They voted against official letters that merely requested critical

[77] These are contained in two letters from Commission to Attorney General Holder (Oct. 13, 2010).

documents and witnesses. They opposed the original proposal to subpoena and depose any witnesses—although they now complain the Commission did not formally depose some who they secretly wanted deposed. It is certainly possible to oppose the original investigative plan yet provide constructive suggestions to improve it, but that is not a fair characterization of their efforts. The transcripts of our monthly meetings show that, from September 2009 to the present, they opposed almost every single request or other effort to obtain DOJ documents, emails, and DOJ witnesses.

There is a confused footnote in the dissent questioning why the Commission majority was interested in whether the President had invoked executive privilege,[78] but there is not even the flimsiest attempt by the dissent to justify DOJ's refusal to produce the most relevant evidence to the Commission. The dissenters even opposed the Commission's letter renewing its request for an index of the documents and emails that were withheld. Why didn't they at least want to know the nature of the documents being withheld? Were they afraid of what that would reveal?

There is no attempt in the joint dissent to defend DOJ's spurious claims of privilege, which makes sense since there is no lawful defense. On the merits of the original dismissal, the dissenters spin long-winded, counterfactual, Republican conspiracy theories DOJ never advanced, but even the dissenters are silent on DOJ's refusal to produce critical evidence. Given the nature and seriousness of the discovery disputes, the dissent's silence is quite telling.

It is even more disappointing that the dissenters, while purporting to keep an open mind, opposed almost every effort (and made no effort themselves) to secure the information from DOJ that would have tended to prove or disprove DOJ's assertions. The Department's statutory obligation to produce requested information to the Commission has no exception. All commissioners should have assisted the Commission in securing that evidence from DOJ, whatever interpretation they later placed on it. But the dissenters, who now seem interested in the most tangential minutiae about Republican poll watchers, would not join in requesting the emails from Steven Rosenbaum, Loretta King, Sam Hirsch, and others in DOJ that go to the heart of the matter the Commission has the duty to investigate: the actual reason for the law enforcement decisions at issue and whether they were well founded or illegitimate.

Even if the dissenters only objected to the form of the Commission's requests for information (which is implausible since they never offered substitute language), they also

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[78] Perhaps the dissenters would have understood why the Commission wanted to know whether executive privilege had been invoked if they read the official correspondence between the Commission and DOJ, instead of reflexively opposing every letter after August 2009. Although the reason the Commission was interested in that question is set forth in more detail in the Interim Report and this statement above (in the absence of an invocation of executive privilege, there is not even a colorable basis for DOJ to withhold information from the Commission), it was first articulated in a five-page letter sent with the first interrogatories and formal requests for production of documents from the Commission to DOJ. See the Letter from David Blackwood to Joseph Hunt, Director, Federal Programs Branch, DOJ (Dec. 8, 2009) on the Commission's website. That letter was frequently referenced in later correspondence from the Commission, for example, as a reminder that the Commission had asked for an index of withheld documents if DOJ continued to withhold them.

never sent their own letters asking for the same or similar information. Instead, they expended lots of energy and time at Commission meetings opposing the requests that were made.

2. See No Evil, Hear No Evil, and Speak *of* No Evil.

The most telling omission from the dissent, however, is almost any mention of the sworn testimony by Christopher Coates and Christian Adams of the repeated instances of harassment and intimidation of anyone in the Civil Rights Division (including minority staff) who was willing to work on voting rights cases involving minority defendants. As the Interim Report, this statement and those of Commissioners Kirsanow and Heriot detail, the testimony is both quite detailed and consistent. It was corroborated by other sworn affidavits received into evidence.

It is also corroborated by various news accounts, including racialist statements obtained from Civil Rights Division officials during an investigation by *The Washington Post*.[79] Indeed, a fair-minded reader of the *Post*'s front-page investigative reporting would conclude from that newspaper alone that there are attorneys in the Civil Rights Division who are hostile to the race-neutral enforcement of the law. That harassment was directed against those who did not share this caustic approach is also chronicled by the *Post* reporting and provides a strong reason to believe that decisions by those who hold such a racial double standard would be tainted in a case involving black defendants.[80]

Other than one sad attempt to soften the import of a troubling statement by Robert Kengle,[81] the joint dissent makes no effort to dispute the many other anecdotes regarding harassment or intimidation of those who would enforce the civil rights laws in a race-neutral manner. Nor does the dissent address the conclusion that the hostility to race-neutral enforcement of the civil rights laws is widespread in the Civil Rights Division, the evidence that Loretta King and Steven Rosenbaum share that hostility, and the direct, unequivocal

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[79] Jerry Markon and Krissah Thompson, "Dispute over New Black Panthers case causes deep divisions," The Washington Post, p. 1, Oct. 22, 2010; see also Jerry Markon, "Civil rights panel postpones vote on New Black Panthers report after members walk out," The Washington Post, Oct. 29, 2010 (describing DOJ obstruction).

[80] The sworn affidavits and public testimony that was subjected to cross examination by the Commission are more valuable evidence, but for those who distrust the Commission, the *Post*'s investigative reporting is hard to dismiss.

[81] The dissent suggests that Hans von Spakovsky's Oct. 28, 2010 letter and all its attachments, see note 73 and accompanying text, which renders Robert Kengle's statement even more troubling, should be ignored because the letter is not sworn. Putting aside Commissioner Yaki's unfair personal attacks on von Spakovsky that arise from time-to-time, the dissent's attempt to dismiss his factual recitation just draws more helpful attention to it. I am confident von Spakovsky (who is my think tank colleague) would be willing to swear to the factual matters contained in his letter, but it should be noted that the dissenters have never asked that DOJ letters be disregarded because they are unsworn. The creative reason for the dissent's special rule is that von Spakovsy's letter responds to a sworn statement, but many DOJ letters also respond to sworn statements of our witnesses. And as a matter of logic, factual letters can refute sworn statements. Indeed, von Spakovsky's Oct. 28, 2010 letter almost exclusively reports factual matters and attaches DOJ press releases that are subject to independent review. I suspect the dissenters have already verified the factual matters in von Spakovsky's letter that thoroughly undermine Kengle's declaration, and that is why they attempt to dismiss it with a phony form argument rather than address its substance.

testimony that this was the reason King and Rosenbaum dismissed most of the claims in the NBPP voter intimidation lawsuit.

Because these allegations of racial double standards in law enforcement are so damning and so thoroughly undermine the central purpose of the Civil Rights Division, the absence of any analysis of them by the dissent would lead a reasonable person to conclude they have no basis to question the allegations, and they simply hope to distract as much attention from them as possible. Thus, their entire dissent has an Oz-like quality, in which the Dissenters-of-Oz invoke manufactured flames and floating faces involving irrelevant or insignificant issues, and then when the curtain of racial double standards is drawn back by the whistleblowers' testimony, they say nothing more than "pay no attention to the [DOJ wrongdoers] behind the curtain." Indeed, the analogy also fits Vice Chair Thernstrom, who at least claims to be interested in the question of whether racial double standards exist in the Civil Rights Division, but instructs everyone, as the Wizard of Oz did, to "come back tomorrow" when DOJ will tell us what to think.

Let us assume, only for the sake of argument, that the dissenters' central claims are correct, namely that: (1) there could have been a plausible reason why someone might have dismissed most of the NBPP voter intimidation lawsuit, and (2) the Commission was wasting its time trying to find out what the real reason was. Ignore also that the second proposition doesn't necessarily follow from the first. Even by their strange logic, however, the Commission still stumbled upon sworn testimony and other evidence of a pervasive culture of hostility to the race-neutral enforcement of the civil rights laws in the Civil Rights Division and possibly with other more senior DOJ officials who were involved in the NBPP dismissal. Why ignore that evidence?

Instead of confronting the unequivocal testimony that the NBPP claims were dismissed because the decisionmakers imposed a racial double standard—or seeking critical evidence from DOJ that could prove or disprove that most troubling allegation—the dissenters seem desperate to invent a new rationale that could have been a basis for someone to dismiss the case. The most important evidence of why the claims were dismissed might be in the emails that were sent by those heavily involved in the dismissal decision (Sam Hirsch, Steven Rosenbaum, and Loretta King) or the testimony of other witnesses about the deliberations regarding the decision (even Coates and Adams have not testified about that). But when DOJ does not deny that the specific racialist statements and troubling, race-based instructions were uttered, there is much less reason to doubt the basic truth of Coates's and Adams's testimony regarding the existence of a racial double standard. Given that, the dissenters' effective silence on the alleged guarantee of *un*equal justice (the most important issue the Commission has confronted in years) is deafening.

3. Belated Process Objections.

Turning to the heretofore secret process objections in the joint dissent, it's difficult not to overstate how silly they are without falling prey to their attempt to distract attention from the DOJ wrongdoers behind the curtain. Nevertheless, a brief rejoinder is possible.

First, and perhaps most importantly, the transcript of our September 11, 2009 meeting adopting the statutory report topic shows that Commissioner Yaki was asked to serve on the Discovery Subcommittee with Commissioner Kirsanow and me, but he refused to do so.[82] Although Commissioner Melendez was not in the room for part of the discussion (he had earlier walked out of the room with Commissioners Yaki and Thernstrom in an attempt to defeat a quorum), Commissioner Yaki reported that Melendez also was not willing to serve. The motion to create the Subcommittee was then amended to allow either Democratic commissioner to join the Discovery Subcommittee at any time they so chose.[83] Neither one ever did.

According to the investigative plan adopted by the Commission, the Discovery Subcommittee would advise the Chairman and General Counsel regarding what evidence to pursue and in what order, and to raise other discovery issues with the full Commission. If Commissioners Melendez or Yaki were really interested in providing constructive advice on what witnesses to depose and what evidence to obtain, they had a very effective way to do so. Instead, they refused the request to serve—preferring instead to withhold any constructive input into the discovery process and creating the wholly self-fulfilling accusation that the investigation lacked "bipartisan" support.

Even so, most of the witnesses the dissenters say they want to hear more from were interviewed by the Commission General Counsel.[84] The dissenters never asked for them to be deposed until after the report was adopted. Assuming that deposing them might have provided some slight additional evidence and that the expenditure of time and money justified the effort, the dissenters should not be heard to complain now if they didn't request it earlier. This follows the pattern from prior years. Last year, they dissented from the Commission's report on the mortgage crisis, in part, because they said a steering hypothesis was not adequately explored, but which they never raised until after the report was adopted.[85]

The dissenters also complain about the expense of the investigation, even though the expense has been less than previous years' statutory report projects.[86] It is odd they did not want to subpoena important DOJ officials who actually made the decisions at issue, but they now say we should have flown attorneys to Denmark to depose a videographer who taped the incident in Philadelphia in 2008.[87] More importantly, they have not joined the Commission

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[82] Meeting Transcript at 61-62 (Sep. 11, 2009).
[83] Id. at 68-70.
[84] The General Counsel or his staff interviewed Wayne Byman, Joe Fischetti, and Mike Roman.
[85] See Statement of Gaziano, Reynolds, Kirsanow, and Taylor, U.S. Commission on Civil Rights, Civil Rights and the Mortgage Crisis, 217 (Sept. 2009), *available at* http://www.usccr.gov/.
[86] For fiscal year 2010, the Commission spent approximately $173,000 on the investigation and Interim Report, most of which were salaries to Commission employees. The cost to both the Commission and DOJ likely would have been less if DOJ hadn't expended so much effort fighting the inquiry. The Civil Rights Division budget for FY 2010 was $145.4 million. The Division has 815 positions with 399 attorneys. The Voting Section alone has 118 positions and 43 attorneys. Yet, the Section has filed a total of only four lawsuits under the Voting Rights Act in the past two years, only one of which is still being litigated. I suspect a further examination of Division's cost effectiveness would not be impressive compared to the Commission staff who worked on the NBPP investigation.
[87] The videographer, Stephen Morse, told Adams he was only on the scene in Philadelphia for 15 minutes, so it is doubtful he would have provided much useful information compared to those who where there longer.

in seeking to obtain the original written witness statements the DOJ has for these individuals, which are still being withheld. Those statements are even more relevant for the Commission's investigation than what the same witnesses might say now because it is more important to understand what DOJ officials knew or should have known at the time they dismissed the suit than to play CSI-style detective to develop a new rationale for DOJ's actions.[88]

It is highly doubtful these marginal witnesses would add anything significant to the other eye-witness accounts (the conspiratorial interpretation of an extra minute of the Philly video tape in the dissent is reminiscent of those questioning the Warren Commission's lone-gunman finding with novel, frame-by-frame analyses of the Zapruder film).[89] Nevertheless, I would support the new Commission majority if it continued the investigation and sought the witness statements and more relevant evidence from DOJ on what their actual reasons were for dismissing the NBPP claims. Otherwise, arguments about these extraneous witnesses are simply red herrings to distract attention from the Commission's central inquiry regarding why DOJ officials ordered the dismissal, and specifically, whether they were motivated by a race-based vision of civil rights enforcement.[90]

Finally, the Commission did more than enough to confirm that the original allegations in the complaint were well founded. Beyond that, it was incumbent on DOJ to explain its actions, not on the Commission to disprove every possible theory that might have motivated its actions.

4. Grasping at Straws.

Some of the remaining factual and quasi-legal claims in the dissent are hard to fathom, except as a further attempt to distract attention from the serious allegations of wrongdoing and the troubling evidence that current supervisors and political appointees in the Civil Rights Division think a racial double standard should apply in the enforcement of

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Moreover, any deposition outside the United States would have had to be voluntary, if it could have been conducted at all.

[88] DOJ has refused to provide the witnesses statements for any of the witnesses sought by the dissent, including Wayne Byman, Joe Fischetti, Stephen Robert Morse, Harry Lewis, and Justin Myers. There is reason to believe witness statements exist for at least some of them because sworn declarations were prepared for some. Since DOJ won't even provide a list of withheld documents it is impossible for us to know what statements exist.

[89] Prior to the April 23, 2009 hearing, the Commission General Counsel screened the longer National Geographic documentary film that featured the NBPP defendants and two complete videos taken of the scene in Philadelphia. All three were received into evidence in full, but only the most relevant excerpts were shown during the April 23 hearing. To ascribe some ulterior motive to the decision to show only an excerpt of two of the videos at the hearing is absurd. If the dissenters thought other portions of those tapes were highly relevant, they could have drawn it to everyone's attention. Neither they nor the DOJ witness who testified the following month did so, and no one did so for the next six months. Indeed, the dissenters could have asked the full clip to be played at any subsequent hearing or business meeting from April 23 through December 3, 2010. In any event, the complete tape has now been posted on the Commission's website for all to see that there is no there there.

[90] In addition to the documentary and email evidence that DOJ has refused to produce thus far, it would make sense next to hear the unrestricted testimony from Coates, Adams, others on the trial team, and perhaps others at DOJ. It is also safe to assume that if the DOJ had cooperated with our investigation, we would be in a much better position to know by now whether re-interviewing these witnesses would add any value.

civil rights laws. Nevertheless, here are quick reactions to some of the dissent's peculiar arguments:

- The dissent claims that the J-memo "badly inflates the evidence in the trial team's possession," but how do they know the opposite is not true? DOJ refused to produce the trial team's evidence. The dissent also tries to diminish the Division's Appellate Section's conclusions because those attorneys believed that evidence existed to back up the J-memo. The evidence discussed in the J-memo is strong enough for the career Appellate Section lawyers to conclude that the claims should not have been dismissed against any defendant, but it is also likely from the language of their memo that the Appellate Section's lawyers knew of other evidence that has not yet been produced.
- The dissenters continue to assert in part IV of their statement that "no actual voters were intimidated." *Attempted* intimidation of voters or poll watchers also violates the Voting Rights Act, so it wouldn't matter if they were right. And yet, they are wrong. They are so wedded to their false talking point that they ignore the two witnesses who testified seeing voters turn away from the polls in Philadelphia and the two others who reported seeing voters hesitate and act apprehensively about entering the polling place. Perhaps the dissent would continue to deny that voters were turned away or were intimidated if the proverbial "twenty bishops" so testified, but four uncontroverted eyewitnesses should be enough.
- The dissenters also periodically assert there is "no evidence of" or "no proof for" some other proposition, but the Commission knows no such thing. The Commission still has little knowledge of what evidence exists, except for three memos that were leaked to Congressman Frank Wolf and subsequently provided to the Commission. It would be nice if we had all the trial team's evidence and exhibits that were being prepared for trial as well as the emails relating to the decision to dismiss the claims. We don't even know whether there are hundreds or thousands of pages of *relevant* evidence on the NBPP decision,[91] even ignoring the evidence of harassment of those who rejected a racial double standard in law enforcement. We also don't know what the trial team might have been able to discover had the case been allowed to proceed to an evidentiary hearing.[92]
- What the dissenters must mean is that they can think of no evidence supporting some proposition they want to question. Commissioner Yaki's emphatic claim in November 2010 that no witness ever claimed voters were turned away (ignoring two such witnesses) shows that at least his grasp of our record is fairly spotty. But since the most relevant evidence is being withheld by DOJ, the absence of evidence in our record doesn't mean it does not exist.
- It's highly doubtful Christian Adams thought he literally "needed" to find a Republican or minority poll watcher to say that he or she was intimidated (people often express their wants as needs, as in "I need another cookie"). Voter intimidation does not require a partisan or racial component or motive, and any voting rights litigator would know that.
- It makes absolutely no difference if Adams once did believe he needed a Republican or minority witness to make his case because the allegations in the complaint were more

[91] The thousands of pages of marginal or irrelevant material DOJ did produce are described in note 35.

[92] For example, Christian Adams testified he had some leads regarding complaints that NBPP members were present at the Democratic primaries intimidating supporters of Hillary Clinton. See Adams Testimony at 22 (July 6, 2010).

than sufficient to state a strong cause of action for voter intimidation under the Voting Rights Act.

- The J-memo shows that Adams understood that Angela and Larry Counts were "African-American poll watchers *for* the Republican Party" even if he or others used the ambiguous term "Republican poll watchers" at times. Indeed, Adams knew they were registered Democrats, but it makes absolutely no difference if he didn't know that. The testimony is that the Countses told Joe Fischetti that King Samir Shabazz had called them "race traitors" and threatened them "if they stepped out of the building." The bare threat was enough to violate § 11(b), without any partisan issue involved. Beyond that, the supposed affront that motivated the threat from Shabazz was that they were blacks who worked for the Republican Party. It is possible Shabazz would have thought them even worse "race traitors" if he learned they were (black) Democrats working for the Republican Party.
- It is disappointing that DOJ selectively produces a few emails it thinks will help its story and withholds the rest, but the dissent's interpretation of Adams's emails is highly implausible. A good litigator is always looking for more evidence to bolster even a strong case, and those who communicate that they are especially eager to obtain such additional evidence are more likely to get it. The dissent's idea that Adams was "desperate" is itself desperate.
- From the few emails released, it is difficult to determine whether Adams was in more of a rush to obtain evidence in support of the NBPP lawsuit than usual (as the dissent surmises) or if that is his normal energetic style. For example, Adams testified that he doesn't "ever leave any stone unturned on these kind of cases."[93] But if Adams was trying to act more expeditiously than usual, that would make perfect sense given his knowledge of the harassment of those who worked on the Ike Brown case and the possibility that the incoming administration might appoint political supervisors who also were hostile to suits against minority defendants.
- The dissent also attempts to nitpick several statements and alleged actions by Bartle Bull, Chris Hill, and Mike Mauro, desperately trying to manufacture a Republican conspiracy theory to explain why voters might have turned away from the polls (other than the presence of the Panthers in paramilitary garb swinging a weapon in front of the door). Yet, all of this imaginative ground could have been covered in questions posed by the dissenters when Bull, Hill and Mauro appeared at our hearing to testify. It was not. The conspiracy theory is unsupported and fanciful, but it also suffers from the fact that the creative minds who dreamed it up did not think it sufficiently credible to raise with the supposed bad actors or at any of the other three hearings conducted by the Commission.[94]

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[93] Adams Testimony at 22 (July 6, 2010).

[94] The dissent also falsely alleges that "the Majority abused its powers and limited [the dissenters'] ability to question witnesses." The time limits for questioning hearing witnesses were scrupulously fair, and it was only during Coates's hearing that Chairman Reynolds heard any disagreement about when to end the questioning. The record of that hearing shows that both Commissioner Yaki *and I* wanted another round of questioning. Far from abusing his authority, Chairman Reynolds ultimately yielded to our dual requests with a compromise agreement among all commissioners as to how much extra time Commissioner Yaki and I would receive. See Hearing Transcript at 135-39 (Sept. 24, 2010). But former Chairman Reynolds surely knows by now that no good deed goes un-misrepresented.

5. The Blame Bush Ploy.

Finally, the dissenters have raised, in a rather slipshod manner, other allegations of voter intimidation during prior administrations in which no lawsuit was filed. It might not be worth responding to the dissent on these careless assertions, except that Assistant Attorney General Thomas Perez and some left-wing bloggers have also chimed in on this theme.

The most obvious response is that even assuming the characterizations of these other incidents were true, that would hardly be a defense to dismissing the NBPP case. Nevertheless, I have frequently expressed interest in comparing the NBPP facts and disposition with other cases and past DOJ investigations. The Commission actively sought such information in the investigative plan I proposed 16 months ago. Needless to say, the Commission is seriously disappointed with the inadequate response from DOJ on these other incidents. More certainly could have been produced on these other alleged incidents because I discovered more from informal sources (including newspaper stories) than DOJ provided from its records.

One relevant point of comparison is a section 11(b) victory by DOJ in February 1992 that the dissent briefly mentions. A sweeping injunction was secured against the North Carolina Republican Party and the Helms for Senate Committee because some of their staff mailed thousands of postcards that erroneously stated that voters must have lived in the precinct for at least 30 days previous to the election to be eligible to vote.[95] This precedent is relevant for four reasons. First, it undermines the "hyper-partisan-Republicans-did-the-same-thing" claim, since the case was filed and won during a Republican administration against a state Republican Party. (Clinton was elected in late 1992.) Second, it shows the Republican-led DOJ interpreted section 11(b) very broadly so that even false or misleading postcards were equated with "intimidation," and a federal judge readily upheld that interpretation.[96] Third, DOJ during that time period had no qualms about seeking a sweeping, state-wide injunction against the Republican Party on a vicarious liability theory (i.e., the Party was liable because of the individual actions of its officers and/or employees) even though there was no Party policy to send misleading postcards. Fourth, Steven Rosenbaum was one of the DOJ attorneys who secured the state-wide injunction against the Republican Party even in the absence of evidence the Party had an official policy of sending false or misleading postcards, but based purely on the actions of a few of its alleged agents.

The dissenters and Thomas Perez also cited an incident from Arizona in 2006. The allegation is that in Pima County, Arizona three men affiliated with the Minutemen intimidated Latino voters "by approaching several persons, filming them, and advocating and printing voting materials in Spanish," with one of the men carrying a gun. Depending on other facts, the alleged behavior certainly might violate § 11(b). One report says that the man

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[95] *United States v. North Carolina Republican Party et al.*, No. 91-161 (E.D.N.C. filed Feb. 26, 1992).

[96] The dissent seems to argue, without any real analysis, that false postcards are more intimidating than live, racist thugs, in paramilitary uniforms, moving in concert, yelling racial epithets, and swinging nightsticks about ten-feet in front of the only door to a polling place. Even if that were so (?!), that does not mean the NBPP conduct was lawful.

carrying the gun never came within 150 feet of a polling place, had a permit to carry his gun, and never interacted with any voters.[97] That paints a different picture.

Christopher Coates testified that a DOJ attorney was sent to Pima County in 2006 to investigate the allegations.[98] Coates didn't remember much of the evidence adduced, except that he thought there was no evidence the men had entered the prohibited space around the polling place; nevertheless, he added that "anything that happens in a polling place that might keep voters from voting is a serious, serious matter."[99] He also explained that DOJ subsequently sent observes to Pima in 2008, based in part on the earlier report.[100]

It is curious Commissioner Yaki would try to obtain the relevant evidence from a man (Coates) who had been shipped off to South Carolina months earlier, did not have possession of the DOJ files, and was using vacation days from work to testify as a private citizen. DOJ should have produced the entire case file and identified those who conducted the investigation so that we might learn what evidence DOJ was able to obtain on the incident, rather than hear the one-sided and misleading snippets from Perez and other activists. All that DOJ produced was a news article, a short memo referencing the article and ordering a preliminary investigation, and a "Notice to Close File." What about all that which logically came between the first memo and the "Notice to Close File?" Surely there are memos from the attorney sent to investigate the matter, perhaps witness statements, possible pictures of the polling place, emails, and other material.Why withhold this old evidence from a now time-barred case from the Commission?

Another old allegation is that armed Mississippi state police investigating possible voter fraud in municipal elections entered elderly people's homes and asked them who they voted for, even though it is against state law to ask that question. If true, this could violate section 11(b). But the Department has produced even less on this incident regarding what evidence exists that the alleged conduct took place. Some reports are shown to be false. Some lead nowhere, even if diligently pursued. Some are not reported to DOJ. What was the evidence supporting the allegations in Mississippi? What did DOJ know and when did it know it?

In short, the strength of possible charges for the Arizona and Mississippi incidents are very unclear. It appears DOJ did not have a video of the alleged conduct in either case. The nature of any witness testimony is unknown. And in neither matter did DOJ file a strong case and then unilaterally dismiss it after a default was entered against the defendants. Nevertheless, I would still like to learn more about the strength of the evidence and the decision-making process in the Arizona and Mississippi incidents. I certainly wish DOJ had done a professional job of producing the evidence relating to these incidents, rather than

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[97] See Quin Hillyer, "First Democratic Congressman Calls for Charges Against Black Panthers," Washington Times Water Cooler, July 27, 2010, *available at* http://www.washingtontimes.com/blog/watercooler/2010/jul/27/firstdemocratic-congressman-calls-charges-against/.

[98] Coates Testimony at 88.

[99] Coates Testimony at 92.

[100] Coates Testimony at 88.

misleading the Commission (in sworn testimony) concerning what it actually knew about them.

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Statement of Commissioner Gail Heriot
Joined by Commissioners Kirsanow and Gaziano

The lawsuit underlying this investigation—*United States v. New Black Panther Party*—has been called "very small potatoes."[1] And although I might hesitate to describe a case involving fundamental voting rights in quite those terms, in some ways it was indeed small. This was not a case requiring an army of government lawyers to litigate.

But sometimes the smallest cases are the most revealing. While a large case can be so complex that it obscures the enforcement policies that underlie it, a simple case can function like a well-crafted law school hypothetical, laying bare those policies as well as the attitudes and biases of the policymakers behind them.

When the Commission decided to conduct this investigation as its annual statutorily-mandated enforcement report, I hoped and believed that it would shed useful light onto the Civil Rights Division's behind-closed-doors enforcement policies—policies that some had feared lack race neutrality. I have not been disappointed.[2] At this point, even Commissioner Michael Yaki, one of the investigation's most vituperative critics, has publicly admitted that some of the allegations of racial favoritism we have uncovered, if true, are very disturbing. Specifically, he said that if the allegations against Deputy Assistant Attorney General Julie Fernandes are true, she should be fired.

> Commissioner Yaki: "[L]et me just say this for the record. If someone made that statement within the Department of Justice, that person should be fired. That person should be tossed out on their ear in two seconds flat."[3]

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[1] See Abigail Thernstrom, The New Black Panther Case: A Conservative Dissent, National Review Online (July 6, 2010) ("Forget about the New Black Panther Case; it is very small potatoes"), available at http://www.nationalreview.com/articles/243408/new-black-panther-case-br-conservative-dissent-abigail-thernstrom. Small cases are not unusual at the Division. See United States Department of Justice, Civil Rights Division, Cases and Matter, available at http://www.justice.gov/crt/records/.

[2] The decision to conduct this investigation as the Commission's 2010 statutorily-mandated enforcement report came on September 11, 2009. See Transcript, Meeting of the U.S. Commission on Civil Rights at 70 (September 11, 2009). Prior to that date, the Commission had sent a letter of inquiry asking why the Division had decided to dismiss three of the four defendants and to request an extremely narrow remedy as to the fourth. See Letter from Commission to Loretta King, Acting Assistant Attorney General (June 16, 2009). When the response proved surprisingly inadequate, see Letter from Portia L. Roberson, Director, Office of Intergovernmental and Public Liaison to Chairman Gerald A. Reynolds (received July 24, 2009), the proposal to conduct this investigation was made and adopted. For a chronological discussion of the investigation, see Statement of Commissioner Todd Gaziano, at 90-115..

[3] Transcript, Meeting of the U.S. Commission on Civil Rights at 59 (July 16, 2010). It is unclear whether he has the same view of other troubling allegations against Division attorneys, but it is hard to imagine why he would regard them as innocuous if he viewed Fernandes's alleged statement demonstrating a lack of racial neutrality as a firing offense.

Despite this concession, at our November 19, 2010 meeting, Commissioner Yaki argued adamantly that the Commission should have chosen to investigate the bullying of young gay men and women instead. Transcript,

The most important question, therefore, is whether the allegations about Fernandes and her colleagues are true—or at least whether there is enough evidence to warrant further inquiry, since the Commission has not yet gained access to all the evidence. Let's take it step by step, beginning not with the specifics of *New Black Panther Party*, but with the big-picture allegations, since they are of the greatest concern going forward. They also help put *New Black Panther Party* in perspective.

I. There is Considerable Evidence of a Culture of Hostility to the Race-Neutral Enforcement of the Law Within the Division–Evidence that Can Only be Dismissed by Those in Basic Sympathy With that Culture.

According to two witnesses, Deputy Assistant Attorney General Fernandes announced soon after arriving at her new post that she and her fellow political appointees in the Division oppose bringing lawsuits like *United States v. Brown* and *United States v. New Black Panther Party*. Put differently, but not unfairly, she allegedly announced that staff attorneys should not bring voting rights cases against African American defendants under Section 2 or Section 11(b) of the Voting Rights Act–evidently in the belief that civil rights laws are meant to protect African Americans and other minorities and not the rights of all persons, regardless of race.

If Fernandes did issue such a directive, I believe she and her colleagues have misconstrued Section 2 and Section 11(b). The language of both is entirely race neutral, and there is every reason to believe that Congress intended it that way. Moreover, I believe they have misconstrued the Constitution, which demands that all laws and policies be race neutral except in the most unusual of circumstances. But it is unnecessary to dwell on the legal

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Meeting of the U.S. Commission on Civil Rights at 35 (November 19, 2010). The Commission's statute, however, requires it to report once a year on some issue of civil rights law *enforcement*. 42 U.S.C. 1975(a)(c)(1). As Commissioner Yaki described the topic, it does not qualify as an enforcement issue. It is also worth noting that in 2009 when we adopted the 2010 enforcement report topic, he did not suggest bullying as an alternative topic. The November 19, 2010 meeting was the first time he mentioned it—more than a year too late.

In his Joint Dissent(along with Commissioner Arlan Melendez), Commissioner Yaki appears to have implicitly backed away from his previous clear and unequivocal position that the accusations against Ms. Fernandes, if true, are very serious. Conspicuously absent from the text of that document is any mention of Ms. Fernandes. Indeed, there is hardly any mention of the alleged culture of hostility toward the race-neutral enforcement of the civil rights laws, which, in my view at least, lies at the heart of this investigation. Instead, the document focuses almost wholly on the details of the events of Election Day of 2008. It includes a few astonishing flights of fancy. At one point, for example, the dissenting commissioners suggest that a Republican poll watcher who objected to the presence of armed New Black Panther Party members at the polling station, Christopher Hill, was the real source of voter intimidation and that the New Black Panther Party members were essentially his victims. At another point, the dissenting commissioners imagine that Republican poll watchers Larry and Angela Counts may have been frightened not by the New Black Panther Party members, but by an unfounded belief that white supremacists were on their way to the 1221 Fairmount Street polling place. At a third point, they seem to be suggesting that the witnesses to this investigation have deluded themselves into believing that the fate of the Republic hinges on the success of the New Black Panther Party case. In all the ruckus they create, Ms. Fernandes is relegated to a footnote. Joint Dissentat 181-4, 180, 186, and n 54, respectively.

arguments here, since these points do not now appear to be in dispute. Assistant Attorney General Thomas E. Perez, who presumably speaks for the Department, has now agreed on the record that the voting rights laws "should always be enforced in a race neutral manner."[4] Indeed, even Commissioners Yaki and Melendez seem to endorse this view.[5]

It is worth pointing out, however, that not everyone would make that concession. Among the small and insular group of attorneys who specialize in voting rights, many of whom work for the Division, there is a significant (though in my view quite misguided) school of thought that Section 2 and Section 11(b) only apply or only should apply when minority members are victimized. Indeed, one voting rights specialist has written in a leading law review that until quite recently "almost no one thought Section 2 of the Voting Rights Act would apply to whites."[6] The author, who was writing before the New Black Panther Party incident, presumably meant almost no one in this small and insular group, which makes his statement all the more useful for the purpose of this investigation.

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[4] Transcript, Hearing of the U.S. Commission on Civil Rights at 32-36 (May 14, 2010).

In *United States v. Brown*, 494 F. Supp 2d 440 (S.D. Miss. 2007), aff'd, 561 F.3d 420 (5th Cir. 2009), the court held no trouble concluding that Section 2, which prohibits the abridgement of the right to vote on account of race, applies equally to all races. It noted that the Supreme Court had already held that Section 2, as originally enacted, "was unquestionably coextensive with the coverage provided by the Fifteenth Amendment; the provision simply elaborated upon the Fifteenth Amendment." *Chisom v. Roemer*, 501 U.S. 380, 391-92 (1991). It further noted that the Supreme Court has already held in *Rice v. Cayetano*, 528 U.S. 495, 512 (2000), that while the Fifteenth Amendment's immediate purpose was to guarantee recently-emancipated African American slaves the right to vote, "[t]he Amendment grants protection to all persons, not just members of a particular race." See *United States v. Reese*, 92 U.S. 214, 218, 23 L. Ed. 563 (1876) ("If citizens of one race having certain qualifications are permitted by law to vote, those of another having the same qualifications must be'). See also *White v. Alabama*, 74 F.3d 1058, 1073-74 (11th Cir. 1996) (holding that the rights of "non-black voters" to be free from race discrimination under Section 2 were violated by a settlement agreement that apportioned state judicial offices by race); *McMillan v. Escambia County*, 748 F.2d 1037, 1042 n. 9 (5th Cir. 1984). Finally, the Court concluded that none of the amendments to Section 2 were intended to cut back on its scope. Rather, just the opposite is true. See also *Hayden v. Pataki*, 449 F.3d 305, 353 (2d Cir. 2006) (stating that "from its inception and particularly through its amendment in 1982, Congress intended that § 2 . . . be given the broadest possible reach").

Section 11(b), which prohibits the intimidation of voters or of persons urging or aiding any person to vote, doesn't even mention race. And the legislative history of the Voting Rights Act of 1965 makes it clear this was purposeful: "The prohibited acts of intimidation need not be racially motivated; indeed unlike 42 U.S.C. 1971(b) (which requires proof of a 'purpose' to interfere with the right to vote) no subjective purpose or intent need be shown." H.R. Rep. at 30 (1965). While at least one court, apparently unaware of this history, has held that proof of racial intent is necessary despite the lack of textual support for such a holding, see *Gremillion v. Rinaudo*, 325 F. Supp. 375, 376-77 (E.D. La. 1971), no court that I am aware of has ever suggested that Section 11(b) applies only to certain races.

[5] See also Dissent of Vice Chair Abigail Thernstrom at 176 (stating that if racial double standards "can be convincingly demonstrated, it will be a grave indictment of this administration").

[6] See Nathaniel Persily, The Promise and Pitfalls of the New Voting Rights Act, 117 Yale L.J. 174, 217 (2007) (suggesting that and attempting to explain why, among voting rights attorneys, there is a school of thought that Section 2 of the Voting Rights Act applies only when minorities are victimized and that prior to the filing of *United States v. Brown* by the Bush administration "almost no one thought section 2 of the [Voting Rights Act] would apply to whites"). For a discussion of the complicated history of the Voting Rights Act, see Abigail Thernstrom, Voting Rights—And Wrongs: The Elusive Quest for Racially Fair Elections (2009); Abigail Thernstrom, Whose Votes Count? Affirmative Action and Minority Voting Rights (1989).

Some background is essential to place the allegations against Fernandes and her colleagues in context: *United States v. Brown*, which was brought largely under Section 2 of the Voting Rights Act, and *United States v. New Black Panther Party*, which was brought under Section 11(b), were the only two voting rights cases in the Division's history to be brought against African American defendants.[7] Both cases, according to our witnesses, had been intensely controversial among career attorneys at the Division. Despite the controversy, both received authorization to move forward from the Bush administration appointees then in charge–much to the consternation of the career lawyers who objected to such lawsuits.[8]

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[7] Unlike *New Black Panther Party*, which was brought under Section 11(b), *Brown* was predicated mainly on Section 2 of the Voting Rights Act. The latter section states:

> "(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its member have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered. Provided, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their participation in the population."

Section 2 is suited for lawsuits against persons or entities in a position to impose a "voting qualification or prerequisite to voting or standard, practice, or procedure" like the Noxubee County Election Commission, the major party institutions and persons who exercised authority under state law as election judges, poll watchers, and providers of absentee ballots.

Section 11(b), which is used less frequently, is best suited for cases like *New Black Panther Party*, in which, for the most part, the alleged wrongdoer is not acting under color of law. It reads:

> "No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any person to vote or attempt to vote, or intimidate, threaten, or coerce any person for exercising any powers or duties under section 3(a), 6, 8, 9, 10, or 12(e)."

Section 11(b) was rejected for use by the court in *Brown*. The particular threats that had formed the basis of the Section 11(b) claim involved the publication in a local newspaper of a list of names of persons who would be challenged if they attempted to vote. The court decided that such a threat (essentially the persons would be prevented from voting only if that person were found not to be legally entitled to vote) was not cognizable under Section 11(b). Note that neither section contains any language to suggest its application only to voters of a particular race. Indeed, Section 11(b) makes no reference to race at all. See supra at n. 4.

[8] Statement of Christopher Coates 3 (September 24, 2010) ("Opposition within the Voting Section was widespread to taking actions under the [Voting Rights Act] on behalf of white voters in Noxubee County, MS ...."). Those who object to this kind of lawsuit are not confined to the Division. And some of those outside the

As a pair, the two cases had obvious similarities, but also important differences. The events in *Brown*, for example, took place in Noxubee County, Mississippi, a majority-black county where 93% of elected officials were African American. The lead defendant, while an ex-felon, was nevertheless in a position of authority--Noxubee County Democratic Executive Committee chairman Ike Brown. *New Black Panther Party*, by contrast, concerned African Americans defendants whose only claim to fame was their membership in a recognized hate group on the fringes of decent society.[9]

Nobody could in good faith call Brown "very small potatoes"—not unless all cases concerning voter fraud and harassment are starchy vegetables. The defendants in that case—Ike Brown himself, the Noxubee County Democratic Executive Committee, and the Noxubee County Election Commission–were accused of wide-ranging election wrongdoing. That wrongdoing included a massive fraudulent absentee ballot program as well as multiple instances of good old-fashioned election thuggery and much more.[10] After a two-week trial, the trial court found "ample direct and circumstantial evidence of an intent to discriminate against white voters which [had] manifested itself through practices designed to deny and/or

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Division are unguarded in their criticism. Main Justice, the on-line magazine specializing in reporting on the Department of Justice, has referred to New Black Panther Party as "Turning the Voting Rights Act on its head." See The Black Panther Case: A Legacy of Politicized Hiring, Main Justice (December 23, 2009) available at http://www.mainjustice.com/tag/j-gerald-hebert/. Facing South, the on-line magazine for the Institute for Southern Studies, used almost identical language to describe Brown. See Chris Kromm, DOJ Turns Voting Rights Act on Its Head, Facing South (May 3, 2006)(also calling the case "ridiculous"), available at http://southernstudies.org/2006/05/doj-turns-voting-rights-act-on-its.html. Another new media source called Brown "a tragi-comic inversion of the Voting Rights Act of 1965." See DOJ Wins Mississippi White Voter Suppression Case, PERRspectives (June 30, 2007), available at http://www.perrspectives.com/blog/archives/000655.htm.

[9] The Anti-Defamation League is among the organizations that have recognized the New Black Panther Party, a black nationalist organization, as a hate group. Its founder, Khallid Abdul Muhammad, established the new group after being dismissed from his position as a senior advisor to the Nation of Islam's Louis Farrakhan. Farrakhan dismissed Muhammad following a controversial 1993 speech that made questionable comments about whites, Jews, Catholics, and other African-American civil rights leaders. See Jayson Blair, "K.A. Muhammad, 53, Dies -- Ex-Official of Nation of Islam -- Obituary," *The New York Times,* February 18, 2001, available at http://www.nytimes.com/2001/02/18/nyregion/ka-muhammad-53-dies-ex-official-of-nation-of-islam.html?ref=khalidabdulmuhammad (last accessed December 17, 2010). See Appendix B of this report for additional details about the history of the New Black Panther Party.

The dissenting commissioners argue that the New Black Panther Party is a fringe group. Joint Dissent at 178. And so it is. Mercifully, the same can be said for all hate groups operating in the United States. The purpose of this investigation, however, was not to establish that the New Black Panther Party is or is not a significant threat to the security of the nation. Rather, this is an inquiry into whether the Division is committed to the race-neutral execution of the law. The question is not whether the New Black Panther Party is a fringe group. The question is whether the New Black Panther Party and its members were given the same legal treatment as would be given to fringe hate groups whose members are white—like the Ku Klux Klan and the Aryan Nations.

[10] Two examples of Brown's personal thuggery should suffice. When a poll watcher for a white candidate for sheriff attempted to explain that her candidate was legally entitled to four poll watchers at a precinct, she was told by Brown, "I said you can only have one," and "This isn't Mississippi state law you're dealing with. This is Ike Brown's law." When the poll watcher protested and asserted that her candidate planned to stand on his rights in this matter, Brown told her, "Fine, fine, have as many as you want. I'll send the police on around to arrest you." United States v. Brown, 494 F. Supp. 2d at 472 n.51. On another occasion, he threatened to arrest a candidate for office attempting to approach his polling precinct in order to vote. *Id.* at 472.

dilute the voting rights of white voters in Noxubee County."[11] A remedial injunction was issued that sharply limited the ability of Brown and his cronies to control elections in the future.[12] By contrast, *New Black Panther Party* was much simpler and would have required fewer resources to litigate even if the defendants had appeared in court to answer the allegations against them (which they did not).

Timing and the ultimate disposition of the cases were also very different, leading some observers to wonder whether, under Obama administration leadership, the Division was no longer willing to litigate Section 2 or Section 11(b) cases against African American defendants or on behalf of white voters. *Brown* was filed in 2005, tried before a federal judge in 2007, and argued on appeal in 2008. When the new administration began in 2009, there was nothing left to do except wait for the expected favorable decision of the appellate court, which came just a few weeks later. It was a done deal. *New Black Panther Party*, on the other hand, was filed in early 2009–just weeks before the new administration began. As the foregoing Sections of this Interim Report show, it ultimately took a very different course. Control of this very small case was wrested from the career attorneys who had been handling it by attorneys appointed to interim supervisory positions in the Obama administration. Under their direction and over the objections of the career attorneys, three of the four defendants were dismissed and the remedy against the fourth scaled back considerably.[13]

Fernandes, of course, did not join the Department until after these cases had been disposed of. She took part neither in the controversy over the filing of Brown nor in the battle over *New Black Panther Party's* disposition. Prior to her appointment, she was employed by a civil rights advocacy group–the Leadership Conference for Civil Rights–although she, like many lawyers working for such advocacy groups, had been employed by the Division earlier in her career.[14]

There is, however, evidence that she took a keen interest in *Brown*, even while employed by the Leadership Conference on Civil Rights. During that period, she was quoted in a political blog expressing hostility to the Division's decision to bring the case:

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[11] The evidence of intent to discriminate against white voters was indeed overwhelming. As the Court put it: "[T]here is no doubt from the evidence presented at trial that Brown, in particular, is firmly of the view that blacks, being the majority race in Noxubee County, should hold all elected offices, to the exclusion of whites; and this view is apparently shared by his 'allies' and 'associates' on the NDEC, who, along with Brown, effectively control the election process in Noxubee County. This is a view that Brown has expressed publicly and privately over the years, and one that has been the primary driving force in his approach to all matters political since his first involvement in Noxubee County politics in the 1970s." *Id.* at 449. And there was nothing subtle about it. One witness, a white Democratic poll watcher reported that Brown was not above racial electioneering at the polling place, speaking loudly that "'You've got to put blacks in office, our candidates, because we don't want white people over us anymore.'" Id. at 450.

[12] See *United States v. Brown*, 2007 U.S. Dist. Lexis 63228 (August 27, 2007), aff'd 561 F.3d 420 (5th Cir. 2009).

[13] See Part II of this Interim Report, supra at 15-47. See also infra at Section II of this Statement (examining several of the alternative, non-race explanations for why the career attorneys handling *New Black Panther Party* might have been ordered, over their objections, to abandon the case against three of the four defendants and sharply limit the remedy as the fourth).

[14] See Statement of Christopher Coates 13 (September 24, 2010).

> People are wondering why aren't you bring[ing] cases with voting and African-Americans—what it the issue," said Julie Fernandes of the Leadership Conference on Civil Rights. How can it be that the biggest case involving discrimination in Mississippi [United States v. Ike Brown and Noxubee County] was brought on behalf of white voters ...The law was written to protect black people.[15]

It is unclear what caused her to conclude that the events in Noxubee could not possibly have been the most significant case of voter intimidation in Mississippi at the time. The level of wrongdoing proven in *Brown* was unusually high. It is difficult to avoid the conclusion that her view was driven by bias. As she put it herself, "The law was written to protect black people." To Fernandes this seems to have meant that the rights of blacks merit more energetic protection than the rights of non-blacks.

Her superior at the Leadership Conference on Civil Rights, president Wade Henderson, went further in his testimony before the House Judiciary Committee on March 22, 2007. In a statement that was sharply critical of the Division under the Bush Administration, he complained:

> Recently, the Civil Rights Division has come under intense scrutiny from civil rights organizations and community leaders regarding cases that have been filed that appear to extend beyond the Division's historical mandate. Perhaps the most scrutinized of these cases was the Voting Section's recent litigation on behalf of white voters in Noxubee, Mississippi. This case recently went to trial and a decision is pending. However, the Division must deal with and respond to growing distrust among minority communities who feel increasingly abandoned and marginalized by the Division's litigation choices and priorities.[16]

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[15] Steven Rosenfeld, Is the Justice Department Conducting Latino Outreach on Behalf of the GOP?, Alternet (October 22, 2007) (ellipsis and second bracketed insert in original), available at http://www.alternet.org/rights/65749/?page=1. Alternet is described in Wikipedia as "a progressive/liberal activist news service."

[16] Testimony of Wade Henderson Before the House Committee on the Judiciary (Oversight of the Civil Rights Division) 6 (March 22, 2007), available at http://judiciary.house.gov/hearings/March2007/Henderson070322.pdf.

At our hearing on September 24, 2010, Christopher Coates testified as follows:

> [E]ven after the favorable ruling in the Ike Brown case, opposition to it continued. At a meeting with Division management in 2008 ..., I pointed to the ruling in Brown as precedent supporting race-neutral enforcement of the Voting Rights Act. Mark Kappelhoff, then Chief of the Division's Criminal Section, complained that the Brown case had caused the Division, the Civil Rights Division, problems in its relation with civil rights groups.
>
> Mr. Kappelhoff is correct in claiming that a number of these groups are opposed to the race-neutral enforcement of the Voting Rights Act, that they only want the act to be enforced for the benefit of racial minorities, and that they had complained bitterly

This is not the statement one would expect from a lawyer who believes that Section 2 and Section 11(b) should be applied in a race-neutral manner. Instead, Henderson has made it clear that he believes that by bringing an action to protect white voters, the Division has "gone beyond [its] historical mandate" and somehow "abandoned and marginalized" minorities.[17]

Fernandes and Henderson were not the only civil rights advocates (and the Leadership Conference was not the only civil rights advocacy group) to object to *Brown*. Mississippi NAACP state president Derrick Johnson called the case "blatantly outrageous."[18] Similarly, the Alliance for Justice included an allegation that "the civil rights division also brought the first case ever on behalf of white voters, alleging that a black political leader in Noxubee County, Miss., was intimidating whites at the polls ..." in a litany of grievances against the Bush era Division.[19] It is unclear why the bringing of *Brown* should constitute a grievance unless the Alliance for Justice believes that the Voting Rights Act should be inapplicable to white voters.

The direct evidence of the allegations concerning Ms. Fernandes's directive is as follows: At our hearing on July 6, 2010, J. Christian Adams, a career attorney in the Division who had resigned position in protest his over *New Black Panther Party* controversy, testified that Fernandes had told a gathering of lawyers from the Voting Section, including himself, that "cases are not going to be brought against black defendants for the benefit of white victims, that if somebody wanted to bring these cases it was up to the U.S. Attorney, but the

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> to the Division about the Ike Brown case. But, of course, what Mr. Kappelhoff had not factored in his criticism of the Brown case was that the primary role of the Civil Rights Division is to enforce the civil rights laws enacted by Congress, not to serve as a crowd pleaser for many of the civil rights groups.
>
> Transcript, Hearing of the U.S. Commission on Civil Rights at 18-19 (September 24, 2010).

[17] As Fannie Lou Hamer put it, "Nobody's free until everybody's free." That should certainly include freedom from voter intimidation. It is one thing to complain that the authorities have *failed* to bring a case that would have protected African Americans that he believes should have been brought. But to complain that they did bring a case to vindicate the rights of a different group is wholly inappropriate.

[18] See Ari Shapiro, White Voters in Mississippi Allege Voting Discrimination, NPR (November 14, 2005) (quoting Mississippi NAACP state president Derrick Johnson calling *Brown* "blatantly outrageous").

[19] See The Politicization of Justice under the Bush Administration, Alliance for Justice (no date) available at http://www.afj.org/crdivision.pdf. Academics also criticized the Division for *Brown*. University of Virginia professor of politics Matthew Holden, Jr., in an academic presentation, went on at length about *Brown*, arguing that "[t]he case should never have been brought" and that politically biased reporting in the *New York Times* made the case seem more serious than it was. Although Dr. Holden did not reveal his evidence for his conclusion, he stated that "the best interpretation is that this was a case where the political appointees exercised their authority to override career line lawyers who denied the legitimacy of the case" and that "Noxubee County Republicans, white people," had somehow used their political influence to ensure that a case would be brought. A fair reading of his discussion, however, would lead one to the conclusion that his opinion was driven largely if not solely by the race of the parties to the case. Matthew Holden, Jr., The Justice Department and American Politics: Functions, Process and Question [sic] about Current Politics 4-8 (April 7, 2007).

Civil Rights Division wasn't going to be bringing it."[20] Specifically, Adams reported that Fernandes told them that the Civil Rights Division was "in the business of doing traditional civil rights work," which meant "helping minorities."[21]

In addition, Adams accused Ms. Fernandes of directing a subsequent gathering of Voting Section attorneys not to bring lawsuits to enforce Section 8 of the National Voter Registration Act–the law that requires state and local governments to undertake reasonable efforts to remove deceased, re-located and otherwise-ineligible voters from the voting rolls. According to Adams, Fernandes said, "We have no interest in enforcing this provision of the law. It has nothing to do with increasing turnout, and we are just not going to do it."[22]

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[20] Transcript, Meeting of the U.S. Commission on Civil Rights at 63-64 (July 6, 2010) (Adams' words, not a direct quote of Fernandes). Adams pointed out that since voting rights issues are not within the expertise of U.S. Attorneys' Offices, such cases were very unlikely to be filed by anyone.

[21] *Id.* Although quotation marks were not used in the transcript, this appears to be an effort by Adams to quote Fernandes' words from memory.

[22] Transcript, Meeting of the U.S. Commission on Civil Rights at 63-64. (July 6, 2010). Specifically, Section 8 of the National Voter Registration Act, which requires state and local governments to implement "a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of ... the death of the registrant; or ... a change in the residence of the registrant." 42 U.S.C. section 1973gg-(6)(a)(4).

The discussion went this way:

> MR. BLACKWOOD: You mentioned Ms. Fernandes. There is a press report also that in front of the entire Voting Section, all of the career staff, she explicitly told them this administration would not be enforcing Section 8 of the National Voter Registration Act. Were you there, and did –
>
> MR. ADAMS: I was there–
>
> MR. BLACKWOOD: –she say that?
>
> MR. ADAMS: I was there for that, and it – I can tell you more about that ....
>
> MR. ADAMS: ... [A] meeting of the entire Voting Section was assembled to discuss NVRA 8. This occurred in November of 2009.
>
> Deputy Assistant Attorney General Julie Fernandes, when asked about Section 8 said, "We have no interest in enforcing this provision of the law. It has nothing to do with increasing turnout, and we are just not going to do it."
>
> Everybody in the Voting Section heard her say this. Mr. Coates heard her say it. If he were allowed to comply with the subpoena, he would testify to the exact same thing.
>
> MR. BLACKWOOD: And you heard it as well, though.
>
> MR. ADAMS: Absolutely. I was shocked. It was lawlessness.

Such a policy is partisan in the truest sense of that term. The National Voter Registration Act, also known as the Motor Voter Act, was intended as a compromise between those members of Congress whose main concern was making it easy to register (and hence increasing turnout) and those whose main concern was maintaining the integrity of the election process. While most members were concerned about both problems, those who emphasized turnout were more often Democrats, who, rightly or wrongly, perceived that high turnout would favor their candidates, while those who emphasized election integrity more often were Republicans, who, again rightly or wrongly, believed that election fraud would work against theirs. The National Voter Registration Act would never have passed without provisions that addressed both problems. De-coupling them at the enforcement stage, as Fernandes was allegedly doing, would thus be wholly inappropriate.

Commissioner Yaki has insisted, of course, that Ms. Fernandes never made the statements Adams attributed to her. Adams must be lying or he misunderstood the incidents he was reporting–or so Commissioner Yaki asked us to believe. But on September 24, 2010, Adams' allegations were specifically corroborated by Christopher Coates, who, like Adams, was testifying under oath. Coates was able to furnish the Commission with a written statement, so his accusation was more elaborate than Adams'. He read it aloud:

> Ms. Fernandes began scheduling luncheons in the conference room of the Voting Section at which the various statutes the Voting Section has the responsibility for enforcing were discussed as well as other enforcement activities.
>
> In September 2009, Ms. Fernandes held a meeting to discuss enforcement of the anti-discrimination provisions of Section 2 of the Voting Rights Act. At this meeting, one of the Voting Section trial attorneys asked Ms. Fernandes what criteria would be used to determine what type of Section 2 cases the Division front office would be interested in pursuing.
>
> Ms. Fernandes responded by telling the gathering there that the Obama administration was only interested in bringing traditional types of Section 2 cases that would provide equality for racial and language minority voters. And then she went on to say that this is what we are all about or words to that effect.
>
> When Ms. Fernandes made that statement, everyone in the room, talking about the conference room on the seventh floor, where the Voting Section is located, understood exactly what she meant: no more cases like Ike Brown and no more cases like the New Black Panther Party case.[23]

[23] Transcript, Hearing of the U.S. Commission on Civil Rights at 32-33 (September 24, 2010). According to Mr. Coates, Ms. Fernandes repeated her statement "that the Voting Section's goal was to ensure equal access for voters of color or language minority" three months later at another meeting on the subject of federal observer election coverage. *Id.* at 33. Mr. Adams also testified about this second occasion, but his testimony

was that he had heard about this incident from Mr. Coates, not that he had been present himself. Transcript, Hearing of the U.S. Commission on Civil Rights at 62 (July 6, 2010).

Coates further elaborated on this during the question and answer period:

> COMMISSIONER GAZIANO: I would like to go back to that September 29 lunch meeting that Julie Fernandes, who is the politically appointed Deputy Assistant Attorney General, led. And your testimony about that is as follows, and I quote, "Ms. Fernandes responded by telling the gathering that the Obama administration was only interested in bringing traditional types of Section 2 cases that would provide political equality for racial and language minority voters. And she went on to say that this was what we all about or words to that effect."
>
> Mr. Adams' testimony a few months ago was almost exactly the same. And you both drew almost exactly the same conclusion. Your testimony says you understood that everyone in the room -- this is your testimony -- understood exactly what she meant: no more cases like Ike Brown or NBPP. Now, by "no more cases like Ike Brown or NBPP," I don't think you mean with those names. You mean no more cases where the defendants are black or minority. Is that what you mean?
>
> MR. COATES: Right.
>
> COMMISSIONER GAZIANO: Now, it is your job as Chief of the Voting Section at that time to understand the instruction that is being given. And it is your job to make sure that people under you understand what the instruction was. You had subsequent -- by the way, this isn't deliberative process. This is an instruction, an order. You had subsequent conversations, I assume, with other employees under you. Did anyone come to any different conclusion about what Ms. Fernandes was ordering?
>
> MR. COATES: No. The people who came and talked to me -- I don't remember how many in the Section, but the people who talked to me after Ms. Fernandes gave that instruction all construed her directive in the same way that I did.
>
> COMMISSIONER GAZIANO: Okay. Well, this is Mr. Adams' understanding of what those exact same words meant, "Cases are not going to be brought against black defendants for the benefit of white victims, that if someone wanted to bring these cases, it was up to the U.S. Attorney." By the way, U.S. Attorneys aren't going to bring civil rights cases in your specialty. But, anyway, "But that the Civil Rights Division was not going to be bringing it." Is that consistent with your understanding of what she was telling you to do?
>
> MR. COATES: Yes.
>
> COMMISSIONER GAZIANO: And you say no one in your Section had any different understanding?
>
> MR. COATES: Nobody came to me and said, "Notwithstanding what Ms. Fernandes said, I think that if I come across another Ike Brown case, I would be free to investigate."
>
> COMMISSIONER GAZIANO: Well, what is the likelihood, what is the chance, you think -- is it slim, moderate, high? -- that you all misunderstood what she was saying, that her phrase, "traditional civil rights" --
>
> MR. COATES: "Traditional Section 2."

Similarly, he corroborated Adams' testimony with regard to Section 8 of the National Voter Registration Act. Again, his testimony was in greater detail than Adams':

> In November 2009, a similar lunch was held by Ms. Fernandes, probably more accurately described a brown bag lunch, at which people would bring their lunches and meet in the conference room.
>
> That meeting was held on the subject of the National Voter Registration Act. ... In discussions specifically addressing the list maintenance provision of Section 8 of the National Voter Registration Act, Ms. Fernandes stated list maintenance had to do with the administration of elections.
>
> She went on the say that the Obama Administration was not interested in that type of issue but, instead interested in issues that pertained to voter access.
>
> During the Bush Administration, the Voting Section began filing cases under the list maintenance provisions of Section 8 to compel states and local registration officials to remove ineligibles from the list. These

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> COMMISSIONER GAZIANO: Let me get the exact, "traditional types of Section 2 cases that would provide political equality for racial and language minority voters" really meant for other types of voters, too. Is there a possibility -- how likely is it that you misunderstood what she was trying to tell you?
>
> MR. COATES: No. I understood it and everybody else in the room understood it. Because the history had taken place before the Bush administration in, nobody in the Civil Rights Division had filed the kind of case that we had filed in Ike Brown and in New Black Panther Party. A new administration comes in. A woman is appointed Deputy Assistant Attorney General from the -- one of the premier civil rights groups in the country, Leadership for Civil Rights [sic]. And she comes in. And so if she had wanted, if Julie had wanted to ensure people that if you came across an Ike Brown case or New Black Panther case, bring it to the front office and we would be willing to -- they would be willing to look at it, she would have chosen different words. She chose the words that I have ascribed to her and that Mr. Adams had ascribed to her because she intended to tell people that the kind of cases that have been brought in Noxubee County and with regard to the Philadelphia Panthers is not going to continue.
>
> COMMISSIONER GAZIANO: And so your statement is these may be some sort of code word, but they weren't subtle code words. Everyone understood what they meant?
>
> MR. COATES: That's right.

Transcript, Hearing of the U.S. Commission on Civil Rights at 130-33 (September 24, 2010).

> suits were very unpopular with a number of the groups that work in the area of voting rights or voter registration.[24]

Despite this corroboration, Commissioner Yaki has continued to insist that the allegations against Ms. Fernandes lack even a modicum of credibility.[25] She simply could

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[24] *Id.* at 33-35. Mr. Coates's statement that "[Section 8] suits were very unpopular with a number of the groups that work in the area of voting rights or voter registration" rings true with me. In connection with a recent briefing, the Commission made what I viewed as an even-handed and non-controversial recommendation: "The Department of Justice should remain actively involved in, and devote adequate resources to, the investigation of voter fraud and voter intimidation." U.S. Commission on Civil Rights, Voter Fraud and Voter Intimidation at 17 (September 2007). Much to my surprise, Commissioner Yaki strongly objected. In his Statement to that report, he complained of "aggressive questioning of voters at the polls; unduly restrictive and illegal identification requirements announced by election officials; and rudeness to minorities by election workers," but argued that voter fraud is a made-up problem. He further stated:

These examples I cite are but a tip of the intimidation iceberg that lurks in the waters of the American voting system. To state that enforcement of voter fraud should receive equal treatment (and, I presume, resources) is to make a mockery of a real problem and elevate a false one. It would divert badly needed and scarce resources to chase a phantom that does not exist. Which, I am sure, is exactly what the conservative right wishes to do with the scarce funding given to the Justice Department.

> .... Rather than throw obstacles such as untested, ill-conceived voter identification requirements in the way of our citizenry, ... we should be doing everything we can to encourage participation in our democracy.

Id. at 27.

[25] Transcript, Meeting of the U.S. Commission on Civil Rights 17-18 (November 19, 2010). In his remarks at that meeting, Commissioner Yaki claims the allegations of Mr. Adams and Mr. Coates (and presumably of Mr. Bowers and Mr. von Spakovsky, see infra at n 33) have been "contravened by what has actually been produced in the record." *Id.* at 18. In fact, however, nothing in the record contradicts any of the very specific allegations made by Mr. Adams and Mr. Coates, and at no point has the Department of Justice indicated that it contests anything said by either of them. The only whisper of disagreement came in the hearing testimony of Assistant Attorney General for Civil Rights Thomas Perez, who testified at a very general level that it was his policy and the policy of the Division was to administer the law race neutrally. Perez, however, was not employed by the Department of Justice until after October 6, 2009, the date of his Senate confirmation. He could not possibly have had first-hand knowledge of Ms. Fernandes's statement, which was alleged to have been made in September of 2009. Nor was he aware of the public allegations made by Mr. Adams and Mr. Coates, since his testimony occurred before theirs. At the time of his testimony, therefore, there was nothing to respond to.

Commissioner Yaki and Commissioner Melendez's Joint Dissentis remarkable for how little it addresses the allegations of Adams and Coates against Fernandes. There is nothing in the text. The only mention of the issue is buried in Footnote 54.

Footnote 54 questions Coates's credibility and appears to suggest that Coates is inclined to interpret statements as anti-white when they may not have been so intended by the speaker. As proof, they cite a supposed inconsistency between the testimony of Adams and of Coates. According to Commissioners Yaki and Melendez, "Adams described [Fernandes's] statement this way: 'we were in the business of doing traditional civil rights work, and, of course, everyone knows what that means.'" By contrast, they state, "In Mr. Coates's recollection ... Ms. Fernandes explicitly told the audience what Adams said she only implied: 'My recollection is that she used the term "traditional types" of Section 2 cases and that she used the term "political equality for racial and language minority groups."'" As they describe it, Coates seems to believe that he heard an outright assertion that civil rights laws are about benefiting minorities while Adams believed that statement was only implied.

not have articulated the policies that Adams and Coates attribute to her.[26] But he has nothing upon which to base that conclusion. Two witnesses have testified under oath that they heard the statement. Both are attorneys who well understand the seriousness of their oath and the need for accuracy. The Department, on the other hand, has never denied that Ms. Fernandes made these statements.[27] To the contrary, it has only permitted staff members who could shed light on the matter—including Ms. Fernandes—to testify only under conditions that are unacceptable to the Commission.[28] As a result, Ms. Fernandes herself has not been

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The allegation of inconsistency is just plain silly. In fact, Adams's and Coates's testimony on this point is remarkably consistent. Both appear to be making an effort to remember Fernandes's actual words. Neither purports to have gotten it exactly right. Indeed the sentence fragment that the dissenting commissioners quote from the Coates Statement reads in full: "Ms. Fernandes responded by telling the gathering that the Obama administration was only interested in bringing traditional types of Section 2 cases that would provide political equality for racial and language minority voters, and she went on to say that this was what we are all about *or words to that effect*." Statement of Christopher Coates at 13-14 (emphasis added).

Both report that Fernandes used the words "traditional" to describe the kind of Section 2 cases that the front office wished to pursue. Both report that she referred to minorities in explaining her position. The sentence fragment from Adams testimony that the dissenting commissioners quote reads in full, "The statement was that we were in the business of doing traditional civil rights work, and, of course everybody knows what that means, and helping minorities—helping—litigating on their behalf." Hearing Transcript 62 (July 6, 2010). Both witnesses explain how in the context of the situation—given *Brown* and *New Black Panther Party*—everyone in the room understood the term "traditional" meant cases brought on behalf of minority members and that her directive amounted to a ban on cases on the model of *Brown* and *New Black Panther Party*. If the dissenting commissioners are looking for inconsistencies in statements made in the course of this investigation, they will need to look elsewhere.

[26] Commissioner Yaki is not the only member of the Commission to take this position.

> VICE CHAIR THERNSTROM: Well, a couple things. It seems to me it's strange. It is simply impossible to believe that Julie Fernande[s] said anything remotely like "We are not going to enforce civil rights laws when blacks are defendants."
>
> I mean, she cannot have said that. Maybe she said something that some people interpreted as saying that. But she surely didn't announce that. I mean, unless she is some sort of moron -- and she certainly could not have been speaking for the Department if she was a moron.
>
> CHAIRPERSON REYNOLDS: How do we go about settling this factual dispute over this allegation?
>
> VICE CHAIR THERNSTROM: I think we should assume that the Justice Department does not have a racial double standard? I mean, give them a break.

Transcript of Business Meeting, U.S. Commission on Civil Rights, August 13, 2010, 24-5. But see Letter from Commission to the Honorable Eric Holder (August 10, 2009) (signed by Vice Chair Thernstrom and stating that the Commission has a "keen interest" in the New Black Panther Party case and that the case "will remain one of the Commission's top priorities").

[27] In addition, the Washington Post has reported that, although the Department was willing to comment on other aspects of New Black Panther Party, "Fernandes declined to comment through a department spokeswoman" about the accusations against her. Jerry Markon & Krissah Thompson, Dispute Over New Black Panther Case Causes Deep Divisions, Washington Post (October 22, 2010).

[28] Well after this Interim Report was drafted, on November 12, 2010, the Department of Justice sent a letter to the Commission's General Counsel stating that it would permit Ms. Fernandes to testify in front of the Commission. But in that same letter, the Department refused to provide documents requested by the witness

questioned about what she said at those brown bag lunches. Nor has she been questioned about her earlier comments as a staff member at the Leadership Conference on Civil Rights. Her lips are sealed.[29]

No one has suggested that she made these statements out of the blue or that her policy preference was the result of her stint at a civil rights advocacy organization and was unusual at the Division. Rather, it is the position of the witnesses that "a hostile atmosphere" had "existed within the [Division] for a long time against racial-neutral enforcement of the Voting Rights Act."[30] Coates, who had worked for the Division for fourteen years, testified that large numbers of present and former attorneys within the Division as well as civil rights advocates outside the Division, "believe incorrectly but vehemently that enforcement of the protections of the Voting Rights Act should not be extended to white voters, but should be extended only to protecting racial, ethnic and language minorities."[31] He gave many examples, among them incidents he recalled in connection with his efforts to staff Brown:

> I talked with one career attorney with whom I had previously worked successfully in a voting case and ask[ed] him whether he might be interested in working on the Ike Brown case. He informed me in no uncertain terms that he had not come to the Voting Section to sue African American defendants. One of the social scientists who worked in the Voting Section and whose responsibility it was to do past and present research into a local jurisdiction's history flatly refused to participate in the investigation. On another occasion, a Voting Section career attorney informed me that he was opposed to bringing voting rights cases against African American defendants, such as in the Ike Brown case, until we reached a day when the socio-economic status of African Americans in Mississippi was the same as the socio-economic status of whites living there. Of course, there is nothing in the statutory language of the [Voting Rights Act] that indicates that DOJ attorneys can decide not to enforce the race-neutral provisions in the Act ... until socio-economic parity is achieved

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subpoenas. The Commission maintains that the withheld documents are necessary in order for us to depose the witnesses effectively. In addition, the Department demanded that Fernandes's testimony be integrated into the Interim Report, rather than included in the final report. The effect of this demand would have been to ensure that the Interim Report would not be completed until after the terms of Chairman Gerald Reynolds and Commissioner Taylor had expired and President Obama had appointed their successors. See Letter From Joseph H. Hunt to David Blackwood, November 12, 2010 *(available at* http://www.usccr.gov/NBPH/11-12-10_BlackwoodLetter.pdf.) The Commission maintains that the withheld documents are necessary in order for us to depose the witnesses effectively.

[29] Given the importance of the allegations, one would expect not only that the Department would deny them, but that it would issue a clarification to its career attorneys in the Voting Section to ensure that any misunderstandings were corrected. As far as the Commission has been told, no such clarification has issued.

[30] Statement of Christopher Coates at 2.

[31] Statement of Christopher Coates at 9. Coates identified in particular Loretta King, Steven Rosenbaum, Mark Kappelhoff, and Kristen Clarke in this statement.

> between blacks and whites in the jurisdiction in which the case arises.[32]
>
> Two other former Civil Rights Division attorneys have filed affidavits with the Commission generally corroborating the culture of hostility to the race-neutral enforcement of the law at the Civil Rights Division.[33] In addition, three current Division attorneys appear to have spoken to a reporter for the Washington Post on the condition of anonymity and tend to confirm the existence of this culture.[34]

Moreover, the actual activities of the Voting Section have been consistent with the policy statements Ms. Fernandes is alleged to have made and not with Assistant Attorney General Thomas Perez' efforts to assure the Commission that the Division operates race

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[32] Statement of Christopher Coates at 5.

[33] See Affidavit of Karl S. Bowers, Jr., para. 8 (July15, 2010)("In my experience, there was a pervasive culture in the Civil Rights Division and within the Voting Rights Section of apathy, and in some cases outright hostility, towards race-neutral enforcement of voting rights laws among large segments of career attorneys."), available at http://www.usccr.gov/NBPH/BowersStatement_07-15-10.pdf; Affidavit of Hans A. von Spakovsky, para. 22 (July 15, 2010) ("While I was not at the Division at the time the New Black Panther Party case arose, I can confirm from my own experience as a career lawyer that there was a dominant attitude within the Division and the Voting Section of hostility toward the race-neutral enforcement of voting rights laws by many of the career lawyers and other staff."), available at http://www.usccr.gov/NBPH/vonSpakovskyAffidavit_07-15-10.pdf

[34] The Washington Post reported:

> Coates and Adams later told the civil rights commission that the decision to bring the Brown case caused bitter divisions in the voting section and opposition from civil rights groups.
>
> Three Justice Department lawyers, speaking on the condition of anonymity because they feared retaliation from their supervisors, described the same tensions, among career lawyers as well as political appointees. Employees who worked on the Brown case were harassed by colleagues, they said, and some department lawyers anonymously went on legal blogs "absolutely tearing apart anybody who was involved in that case," said one lawyer.
>
> "There are career people who feel strongly that it is not the voting section's job to protect white voters," the lawyer said. "The environment is that you better toe the line of traditional civil rights ideas or you better keep quiet about it, because you will not advance, you will not receive awards and you will be ostracized."
>
> The 2008 Election Day video of the Panthers triggered a similar reaction, said a second lawyer. "People were dismissing it, saying it's not a big deal. They said we shouldn't be pursuing that case."

Jerry Markon & Krissah Thompson, Dispute Over New Black Panther Case Causes Deep Divisions, Washington Post (October 22, 2010).

The Commission would very much have liked to have spoken with these anonymous witnesses. But given their perception that they would be "outed" by unsympathetic persons within the Commission, I am not surprised that we did not have that opportunity.

neutrally (made long before Adams's and Coates's whistle-blowing testimony). The New Black Panther Party case was indeed disposed of over the vociferous objections of the line attorneys who had worked on the case and against the advice of career attorneys in the appellate section.[35] This is exactly what one would expect if the allegations against Ms. Fernandes were true. No further voter intimidation cases (whether brought under Section 11(b) or the more commonly used Section 2) have been filed against African American defendants—again, exactly as one would expect.[36]

Similarly, *United States v. Missouri*, the list maintenance lawsuit brought under Section 8 of the National Voter Registration Act during the Bush administration, was dropped despite the failure of Missouri to improve its efforts.[37] No further Section 8 cases under the National Voter Registration Act have been investigated or filed—just as one would expect. Coates testified about his efforts to interest the administration in such cases:

> In June 2009, the Election Assistance Commission issued a biannual report concerning what states appeared not to be in compliance with Section 8's list maintenance requirements.
>
> The report identified eight states that appeared to be the worst....
>
> These are states that reported that no voters had been removed from any of their voters' lists in the last two years. Obviously this is a good indication that something is not right....
>
> As Chief of the Voting Section, I assigned attorneys to work on this matter. And in September 2009, I forwarded a memo to the Division front office asking for approval to go forward with the Section 8 list maintenance investigations in these states.
>
> During the time that I was Chief, no approval was given to this project. And it is my understanding that approval has never been given for that Section 8 list maintenance project to date. That means we have entered the 2010 election cycle with eight states appearing to be in major noncompliance....

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[35] Christopher Coates testified that Appellate Section attorneys Marie McElderry and Diana Flynn agreed that the suit should proceed. See Transcript of September 24, 2010 at 52. Copies of the e-mails that McElderry and Flynn wrote explaining why the NBPP case should go forward are also available online at http://www.usccr.gov/NBPH/DOJcomments_05-13-09_reproposeddefaultjudgment.pdf.

[36] Also consistent with the accusation of a culture of hostility towards a race neutral application of the law is the fact that the Division has never objected to a request for pre-clearance under Section 5 of the Voting Rights Act on the ground that the proposed change had a racially discriminatory purpose or would have a racially discriminatory effect on white voters despite the fact that there are quite a few jurisdictions where minorities are in the majority and hence in control of election processes. See Statement of Christopher Coates at 12.

[37] *United States v. Missouri*, 535 F.3d 844 (8th Cir. 2008).

> From these circumstances, I believe that Ms. Fernandes's statement to the Voting Section in November 2009 not to, in effect, initiate Section 8 list maintenance enforcement activities has been complied with.[38]

Furthermore, public comments made by present and former Division attorneys, although sometimes phrased somewhat cagily, tend to confirm that there is a significant school of thought to the effect that rights of white voters either are not covered by the Voting Rights Act or are not due the same priority as the voting rights of other voters.[39]

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[38] Coates at 35-36. Coates notes that while a letter to the Commission from Assistant Attorney General Perez states that the Division is currently conducting a number of investigations under Section 8 of NVRA, those investigation concern a different part of Section 8 and not list maintenance concerns. Id at 36.

[39] For example, in an article concerning *United States v. Brown*, the *Christian Science Monitor* quoted former Division attorney Steven Mulroy in a statement critical of the decision to file that case:

> "Traditionally, 'our primary enforcement would be on groups that had historically suffered from a legacy of discrimination,' says Professor Mulroy, the former Justice Department lawyer. 'As far as enforcement, you might not put whites in the South at the top of that list.'"

Patrik Jonsson, Mississippi Election Row Sees Race Roles Reversed, Christian Science Monitor (August 17, 2007).

Joseph Rich, chief of the Voting Section until 2005, admitted that the case against Ike Brown had legal merit, but argued that it was "'really a question of priority'" given the limited resources available to the Division. He did not mention any particular case that he regarded as more meritorious on its facts. Rather the point seemed to be that discrimination against African Americans should be given very strong priority over discrimination against whites. As Rich put it, "'The Civil Rights Division's core mission is to fight racial discrimination.'" "'That doesn't seem to be happening in this administration.'" It is unclear why he did not consider the case against Ike Brown to be fighting race discrimination. See Paul Kiel, Under Bush, Civil Rights Division Works to Protect ... Whites, TPMmuckraker (April 6, 2007). See also John Fund, Voting Rights Turnabout: A Victory for Disfranchised Mississippi Voters—And They Happen to Be White, Opinion Journal (WSJ) (July 2, 2007).

J. Gerald Hebert, a former acting chief of the Voting Section, complained, "Sadly, the only two [section 11(b) cases that have been brought by the [Bush] department have been on behalf of whites." The Black Panther Case: A Legacy of Politicized Hiring, Main Justice (December 23, 2009). Hebert's statement is highly misleading. Section 11(b) is rarely used at all. The number of cases brought over the last two decades may be countable on one hand. The "weapon of choice" is Section 2, which applies to conduct under color of law (while Section 11(b) also covers wholly private conduct). By far most of the Section 2 cases brought during the Bush administration concerned Hispanic voters, who, due to language issues, may be somewhat more likely to give rise to enforcement actions. See Testimony of John Tanner, Voting Section of the Department of Justice, Hearing Before the Subcommittee On the Constitution, Civil Rights and Civil Liberties of the Committee on the Judiciary, House of Representatives (110th Cong.) (October 30, 2007) (available at http://judiciary.house.gov/hearings/printers/110th/38637.PDF).

Finally, the Washington Post has reported:

> Civil rights officials from the Bush administration have said that enforcement should be race-neutral. But some officials from the Obama administration, which took office vowing to reinvigorate civil rights enforcement, thought the agency should focus primarily on cases filed on behalf of minorities.

Under the circumstances, it is difficult to understand how anyone could take the position that it is quite impossible that Fernandes could have given the directives she is alleged to have given. To the contrary, the evidence adduced so far is very strong that she did.

II. The Disposition of the New Black Panther Party Case Was Itself an Example of the Division's Hostility Toward the Race-Neutral Enforcement of the Law.

The most basic facts of *United States v. New Black Panther Party* are well known: On Election Day in 2008, two members of the New Black Panther Party stood immediately outside the doors of a Philadelphia polling place, dressed in paramilitary gear, one slapping a nightstick into his palm, hurling racial epithets at voters and poll workers. Rather than rehearse the details of the case and its procedural history here, I refer the reader elsewhere in this Interim Report.[40] It is worth noting, however, that Bartle Bull, a seasoned poll watcher, lawyer and former publisher of the Village Voice, who observed the incident first hand, stated that it was "the most blatant form of voter intimidation I have encountered in my life in political campaigns in many states, even going back to the work I did in Mississippi in the 1960's."[41] Even Commissioner Yaki, who has so vehemently opposed this investigation, has publicly admitted, "In my opinion there was intimidation."[42]

The issue for the Commission is: Why was the case largely abandoned? Was its unusual final disposition, over the objections of the career attorneys who originally were assigned to it, an example of the general hostility towards race neutrality in civil rights enforcement that our witnesses warned of? Or was it motivated by something else?

Part of the reason *New Black Panther Party* attracted the attention of the Commission is that it is well-suited for an examination of the Division's race neutrality. For one thing, all four of the defendants in the case had failed to appear in court to answer the allegations against them. The significance of that default is not easily overstated. One of the difficulties

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> "The Voting Rights Act was passed because people like Bull Connor were hitting people like John Lewis, not the other way around," said one Justice Department official not authorized to speak publicly, referring to the white Alabama police commissioner who cracked down on civil rights protesters such as Lewis, now a Democratic congressman from Georgia.

See Jerry Markon & Krissah Thompson, "Dispute Over New Black Panthers Case Causes Deep Divisions," *The Washington Post*, October 22, 2010 (*available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/10/22/AR2010102203982_3.html?sid=ST2010102300136).

[40] See Parts I-II of this Interim Report.

[41] Declaration of Bartle Bull (April 7, 2009). For reasons I do not fully understand, Commissioners Yaki and Melendez challenge Bull's assessment of his experience in this regard. Bull has indeed seen a lot in his years as a poll watcher—including a polling place at which nooses had been hung on a nearby tree. Contrary to Commissioners Yaki and Melendez's understanding, Bull did not testify that the nooses were put there by white supremacists. Presumably, he did not know who placed them there—misguided, youthful pranksters, hardened criminals or someone else entirely. Bull's point was that men with a weapon standing directly in front of the doors of a polling place hurling racial epithets is as blatant and elemental form of voter intimidation as one is likely to find. Ultimately, however, it doesn't matter if the Philadelphia incident was the most blatant incident of voter intimidation he had ever seen or the fifth most blatant. It was blatant.

[42] Transcript, Meeting of the U.S. Commission on Civil Rights at 111 (April 23, 2010).

that oversight bodies have in keeping tabs on law enforcement agencies is that there is always at least one neutral-sounding reason for declining to file a case: Resources are limited. Not every meritorious case can be brought. If the New Black Panther Party case had never been brought, it is entirely possible, even likely in my opinion, that the media controversy over its ultimate disposition would never have occurred.[43] Indeed, if the project had been aborted midway through the litigation, it may have raised a few eyebrows, but it would have been difficult to gainsay Department officials if they had argued that the case was going to require more resources than Department was able to spare.

But that is not what happened. The New Black Panther Party case had been brought. An investigation had been conducted, witnesses had been interviewed, and a complaint filed.[44] Moreover, as a result of the defendants' decision not to appear, the case had essentially been won. Affidavits had been collected from witnesses in anticipation of a judgment and injunction. It required far more resources to fight the internal battle over whether to gut the case than it would have to obtain a default judgment enjoining all of the defendants from committing similar acts in the future. Whatever purpose was served by dismissing the case against three of the four defendants and limiting the remedy as to the fourth, it was not to conserve Division resources.[45] The case seems to have had symbolic value for the players on both sides of the debate.

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[43] The only fact about the New Black Panther Party case that causes me to hesitate in making that assertion is the fact that part of the incident was captured on videotape. It is thus possible that the failure to bring an enforcement action would have gotten some media attention. I remain persuaded, however, that far more likely than not, it would not have or it would have gotten very little.

[44] Commissioners Yaki and Melendez have suggested on several occasions that the speed with which Christian Adams conducted the investigation demonstrates that he wanted to file the case as expeditiously as possible. I do not know why they believe this to be so, but it would not surprise me. Government attorneys frequently have a lot to do. Moreover, Adams and Coates testified that it was common for career attorneys at the Division to oppose the race neutral application of the law and that it was Bush administration attorneys who authorized the *Brown* case. Under the circumstances, it would hardly be shocking (or inappropriate) for a career attorney interesting in applying the law neutrally to prefer to take his chances with the outgoing administration rather than the incoming one. The evidence thus far indicates that events have unfolded in a way that would vindicate that judgment, if indeed such a judgment was made. See Joint Dissentat 191.

[45] In the Department's response to our initial letter of inquiry, see Letter from Portia L. Roberson, Director, Office of Intergovernmental and Public Liaison to Chairman Gerald A. Reynolds (received July 24, 2009), it challenged the notion that a case in which the defendants have defaulted is essentially won. The letter seems to be suggesting that converting the default to a default judgment would have been a major undertaking, fraught with difficulties.

This letter convinced me that the disposition of the case might merit more careful scrutiny than I had originally judged. A default is an extremely favorable event for a plaintiff. I have seen plaintiffs' attorneys literally jump for joy at the mere possibility of a default. And if Department attorneys were suggesting otherwise, there was reason to be concerned about their judgment.

While Fed.R.Civ.P. 55 permits courts to require plaintiffs to prove their case through the use of affidavits or testimony (and it is good practice for them to do so rather than simply rubber stamp the plaintiffs' requested remedy), this is usually fairly easy, even perfunctory at times. In this case, the attorneys handling the case had already put in the work of gathering affidavits from the witnesses when control of the case was wrested from them. They had every reason to regard this as an effort to snatch defeat from the jaws of victory.

The cases cited by the Department in its letter do not suggest anything to the contrary. *United States v. $55,518.05 in U.S. Currency*, 728 F.2d 192 (3d Cir. 1983), for example, was a civil forfeiture case that proves

Add to that the fact that the case spanned two administrations, making it plausible that its ultimate disposition was the result of a change in policy.[46] No one claims that anything had changed in connection with the case itself between the time it was filed and the time that three of the four defendants were dismissed and the injunction against the fourth narrowed considerably. The witnesses had neither died nor disappeared. There had been no changes in the law. The case remained as strong as it had been the day it was filed. The only important change in circumstances was external to the case—the change in administration. That meant a different set of decision makers were calling the shots–decision makers who may have been more in sympathy with the notion that Section 2 and Section 11(b) of the Voting Rights Act should be used only to protect the interests of African Americans and other minorities.

That brings us back to the issue: What was the motive? Is the case an example of the alleged culture of hostility to the race-neutral enforcement of civil rights laws at the Division? Or is there a more benign explanation for the decision?

The Commission has no smoking gun in this case that directly demonstrates that a lack of race-neutrality motivated the disposition. But that is because Department has refused to hand over most of the documents in this case that might have allowed the Commission to track the actual thinking of the lawyers involved. The two witnesses who provided testimony to the Commission–Adams and Coates–felt compelled by the Department's claim of privilege not to answer questions concerning the fractious deliberations that apparently surrounded that disposition.[47] If there is a smoking gun, the Commission has no access to it.

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just how easy it is to secure a default judgment. It is not clear whether the trial court judge required affidavits, testimony, or other types of documents before entering the default judgment. But when the appellant sought to set aside a default judgment on grounds that would excite sympathy in the minds of many, the trial court was unmoved. The appellate court, while acknowledging that sometimes default judgments should be vacated, affirmed the trial court's decision to let it stand. Similarly, *Hritz v. Woma Corp.*, 732 F.2d 1178 (3d cir. 1984), is a case in which the Court refused to set aside a default judgment, again belying the idea that it is somehow difficult to obtain. *Shields v. Zuccarini*, 254 F.3d 476 (3d Cir. 2001), is not even a default case, so it is not clear why it was cited.

The Department is correct that a default judgment is not "automatic" after the entry of default. But judgment is not "automatic" after a jury verdict either. The point is simply that the fact of the defendants' default had made the Department's job relatively easy, and it is hardly surprising that the attorneys handling the case viewed it as essentially won. Any attorney would. Moreover, the efforts put into the internal struggles over the disposition of the case dwarf the efforts that would have been necessary to wrap up the case in default.

[46] Given that the political appointees involved in the disposition–Loretta King and Steven Rosenbaum–were career attorneys put in charge of the Division, it is certainly plausible that any such change in policy was in keeping with the policy preferences of a significant number, if not a majority, of career attorneys at the Division. See *infra* at Part I of this Statement.

[47] I take no position in this Statement as to whether the assertion of privilege over matters of the deliberative process was proper. Although I am impressed by Commissioner Gaziano's discussion of the privilege issues in his Statement as well as his experience as an attorney in the Department's Office of the Legal Counsel, where these issues are frequently presented, I have not had the opportunity to study them personally. At this point, I note only (1) that the Commission has a statutory duty to investigate and report on issues of civil rights enforcement and that the Department has a statutory duty to cooperate in the Commission's investigations; (2) that the Commission's ability to conduct this investigation has been significantly impaired by the Department's unwillingness to turn over crucial documents or to allow witnesses to testify freely and (3) that any privilege

The only way to demonstrate that the race of the defendants was a contributing factor to the decision is to eliminate one by one the many alternative motivations that have been offered by the Department and its defenders.

Surprisingly, this has turned out not to be as difficult a task as it sounds. So far at least, no plausible alternative reason for the full scope of the Division's decision has been offered. Far more plausible is the testimony of Adams and Coates as well as the affidavits of Bowers and von Spakovsky that point to a general hostility toward the race-neutral application of the law at the Division.

(1) ***Jerry Jackson***: The Department advanced several reasons for why it insisted, over the objections of the career attorneys handling the case, that defendant Jerry Jackson be dismissed from the New Black Panther case despite his failure to appear in court to defend himself. Those reasons were: (a) He was a designated poll worker on behalf of the Democratic Party at the time of the incident; (b) He was a resident of the building where the

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could have been waived by the Department if it had wished to do so. See 42 U.S.C. section 1975(b)(e): "All Federal agencies shall cooperate fully with the Commission to the end that it may effectively carry out its functions and duties."

The legislative issue addressed in this Interim Report – whether Congress should amend the Commission's authorizing statute to address the conflict of interest that arises when DOJ is asked to enforce a subpoena against itself – is a serious one. This report lays out several alternatives, each with advantages and disadvantages. See supra at 114-7. I take no position on them. I am, however, baffled by Commissioner Yaki's remark that we are somehow grabbing power that even Congress doesn't have. As he put it:

> COMMISSIONER YAKI: All I can say is that is one, I think this is an attempt to arrogate to ourselves power exceeding that of Congress and other agencies. It is very unprecedented ....

Transcript, Meeting of the U.S. Commission on Civil Rights at 58 (November 19, 2010).

It is well-established, of course, that Congress's investigatory and contempt powers are implicit in the grant of legislative power. See *McGrain v. Daugherty*, 273 U.S. 135, 177 (1927).

Both the House and Senate also have authorized special standing committees to seek civil enforcement of subpoenas. See, e.g., H.Res. 1420, 94th Cong. 2d Sess. (1976) (authorizing the Chairman of the House Interstate and Foreign Commerce Subcommittee on Oversight and Investigations to intervene in *United States v. American Telephone & Telegraph*, 419 F. Supp. 454 (D.D.C. 1976)); H.Res. 899, 121 CONG. REC. 918-19 (1975) (authorizing the Chairman of the House Interstate and Foreign Commerce Subcommittee on Oversight and Investigations to intervene in *Ashland Oil Inc., v. FTC*, 409 F. Supp. 297, 307 (D.D.C. 1976)) (cited in Morton Rosenberg and Todd Tatelman, CRS Report for Congress: Congress's Contempt Power, Law, History, Practice, and Procedure (April 23, 2008) (available at http://www.fas.org/sgp/crs/misc/RL34097.pdf). The notion that we are asking for powers that even Congress doesn't have is pure nonsense.

Indeed, the notion that we are asking for increased power at all is nonsense. One of our proposed alternatives is that Congress do nothing at all to amend the applicable law. Our recommendations do not ask Congress to select a particular course of action. They merely draw the issue to Congress's attention. The most likely explanation for Commissioner Yaki's heated accusation is that he had not in fact read the (then-proposed) recommendations.

incident took place; and (c) The Philadelphia police officer who responded to the call about the incident made the determination that, unlike King Samir Shabazz, Jackson should be allowed to remain at the polling place. All three arguments are wholly without merit.

First of all, poll workers are not exempt from laws against voter intimidation. If anything, they should be held to a higher standard. They have been trained to understand that a polling place is a sensitive place at which a high level of decorum (as well as personal security) is necessary. There can be no excuse for their dressing up in paramilitary gear, blocking the doors to the polling station and shouting racial epithets at those who try to get by. As for whether Jackson should be allowed to remain at the polling station because he was a resident of the building, it should be noted that voter intimidation laws apply to building residents too. Moreover, Jackson apparently was not a resident of the building. This "fact" was apparently taken from a local news report on the incident; the building at issue is in fact a home for senior citizens, not for Jackson. A cursory examination of the case file prepared by the career attorneys originally in charge of the case would have revealed this.[48] Finally, the fact that a Philadelphia police officer ordered King Samir Shabazz to leave the premises, but let Jerry Jackson remain is irrelevant to the issue before the Division. The Philadelphia police officer made a mistake. This is something human beings are prone to. In his defense, it is unlikely that this incident was the only problem he had to deal with that day. Moreover, the police officer was not an expert in election law—as Coates, Adams and their fellow Voting Section attorneys are.

But it is inappropriate for federal officials to defer to a Philadelphia police officer on questions of federal law enforcement. As Coates testified:

> During my 13 and a half years in the Voting Section, I cannot remember another situation where a decision not to file a Voting Rights Act case, much less to dismiss pending claims and parties, as happened in the New Black Panther Party case, was made, in whole or in part, on a determination of a local police officer. In my experience, officials in the Voting Section and the Civil Rights Division always reserved for themselves, and correctly so, the determination as to what behavior constitutes a violation of federal law and what does not. One of the reasons for this federal preemption of the determination of what constitutes a Voting Rights Act violation is that local police officers are normally not trained in what constitutes a Voting Rights Act violation. In addition, in the Philadelphia police incident report provided to this Commission by the DOJ, the Philadelphia police officer who came to the polling place did not determine that Black Panther Jackson's actions were not intimidating. Instead, he simply reported that Jackson was certified by the Democratic Party to be a poll watcher at the polling place and was allowed to remain.

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[48] In his Statement, Assistant Attorney General Thomas Perez appears to have abandoned this argument. See Statement of Assistant Attorney General Thomas Perez (May 14, 2010).

> Further, as the history underlying the enactment and the extension of the Voting Rights Act shows, local police have on occasion had sympathy for persons who were involved in behavior that adversely affected the right to vote or violated the protections of the Voting Rights Act... Based upon my experience, this reasoning is extraordinarily strange and an unpersuasive basis to support the Division's disposition of the Panther case.[49]

Commissioners Yaki and Melendez argue that the Division deferred not to the police officer's conclusions of law, but only to his findings of fact—that Jackson did not intimidate, threaten or coerce anybody. The problem with this argument is that the police officer made no such finding of fact. The police report indicates only that Jackson was a certified poll watcher and that he was allowed to stay.[50] We have no way of knowing whether the police officer left Jackson alone because he concluded (as a matter of fact) that Jackson was not intimidating or because he concluded (as a matter of law) that poll watchers have a right to be present at polling stations even if they have been engaging in conduct that might otherwise cross the line.[51] The argument that the Division was deferring to his finding that Jackson was not intimidating is simply frivolous. The fact that this seems to be the best anyone can offer is deeply troubling.

It is worth noting that even if the police officer had found that Jackson was not intimidating, he arrived on the scene late. The eyewitnesses who did observe Jackson agreed that he was intimidating. Take Wayne Byman, the African American Republican poll watcher who was first on the scene on the incident.[52] His declaration states:

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[49] Transcript, Hearing of U.S. Commission on Civil Rights Hearing at 27-29 (September 24, 2010).

[50] See Philadelphia Police Department, Complaint or Incident Report (November 4, 2008).

[51] Given the wording of the police report, the latter seems overwhelmingly more likely. The report records that Jackson had credentials as a poll watcher. It does not record that he, unlike King Samir Shabazz, was not menacing voters. Id. A video clip of the encounter provides further evidence that Jackson was not allowed to stay because his conduct was acceptable. When the police arrived they had no opportunity to observe any differences between the conduct of King Samir Shabazz and that of Jackson. All they could tell was that King Samir Shabazz was wielding a nightstick and that Jackson was not. This fact alone obviously did not impress them. The officer in charge demanded that both men follow him to his squad car. When Jackson did not immediately come, the officer made it crystal clear that he did indeed mean *both* men. When the police officers allowed Jackson to resume his position in front of the polling place doors, it was apparently after he had shown them his credentials, not because he had persuaded them that his conduct was less menacing than his comrade's. The police officers would surely not have taken Jackson's word for it that his conduct was less menacing. They would have interviewed the witnesses. See Video of Police Encounter with New Black Panther Party Members at Polling Place (November 4, 2008), available at http://www.youtube.com/watch?v=19pUz89FaaU.

[52] Commissioners Yaki and Melendez lament that Byman and Joseph Fischetti were not brought to Washington to testify. They quote from this Interim Report—"'[t]he Commission attempted to interview and take the deposition of as many people as it could locate who were identified as having been at the polling site'"—and argue that this statement is "at odds" with the Commission's decision not to call Byman and Fischetti as witnesses at one of the hearings held before the full Commission. But both Byman and Fischetti were interviewed by the Commission's General Counsel, David Blackwood. There is no truth to the suggestion that the Commission simply ignored these witnesses or any other witnesses. Blackwood, under the direction of the Commission's Discovery Subcommittee, made the determination that neither Byman nor Fischetti were needed as witnesses at the full Commission hearing, since what they had to say was limited and would have been duplicated by Bartle Bull, Christopher Hill and Mike Mauro, all of whom had been at the scene for a longer period of time than either Byman or Fischetti and all of whom did testify.

> On the morning of November 4, 2008, I went to the polling place at 1221 Fairmount Street in the City of Philadelphia. I there observed two men wearing black uniforms with New Black Panther Party insignia, black boots and black berets. The two men were positioned directly in front of the entrance to the polling place at 1221 Fairmount Street. ... In my opinion, the two uniformed men created a menacing

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Of course, if Commissioners Yaki and Melendez had been interested in having Byman or Fischetti testify at our first hearing (or indeed at any subsequent hearing), all they would have needed to do is say so and their request would have been respected. Indeed, it is not too late. As a result of the difficulty the Commission has had in securing the cooperation of the Department, this is only an Interim Report. Not only have Yaki and Melendez chosen not to do so thus far, they have instead complained and continue to complain that the Commission was spending too much time and money on this investigation. Joint Dissentat 178. In addition, when the Commission has sought to call witnesses or to authorize the Chairman and the Discovery Subcommittee to subpoena witnesses, Commissioner Yaki voted no, and Commissioner Melendez has been absent. See, e.g., Transcript, Telephonic Meeting of the U.S. Commission on Civil Rights at 25 (October 30, 2009). On the most recent occasion, Commissioner Yaki did not simply vote no, he voted a "big resounding no." Transcript, Meeting of U.S. Commission on Civil Rights at 12 (October 8, 2010). All of this belies the dissenting commissioners' notion that "Since we did not approve the investigation at all, we would rather that no witnesses had been called. However, since an investigation was going to be done ..., it should have been done in a ... thorough ... manner." Joint Dissentat 178-9.

Yaki and Melendez also attempt to suggest that a two-minute video showing police arriving at the scene at 1221 and questioning King Samir Shabazz and Jerry Jackson was somehow ignored, because it was not "screened" at the Commission's public meeting. The fact that a video was not "screened" does not mean it was not carefully reviewed by the General Counsel or his staff or by Commissioners. In this case, the General Counsel made the determination that the video was not important enough to devote time during the public meeting to screen it. Instead it was made available to all Commissioners in a disk. I've seen it. Obviously Commissioner Yaki and/or Commissioner Melendez and/or one or more of their assistants have seen it. I concur with the General Counsel's judgment. The description of the final seconds of the video in the Joint Dissentis overdramatic. Someone (it is not clear to me who) attempted to discourage the videographer from following the police officers who had taken King Samir Shabazz and Jerry Jackson back to their squad car for questioning. It has no bearing on the strength of the case against the defendants in *New Black Panther Party* and no bearing on the reasons the case was largely abandoned, except insofar as it tends to discredit the dissenting commissioners' arguments as to Jerry Jackson. See supra at n. 51.

I should note that the reason for the dissenting commissioners' disagreement with the majority is not that the Commission did not seek their input on such matters. Commissioner Yaki was asked to serve on the Commission's Discovery Subcommittee in order to make it bipartisan. He declined in no uncertain terms. See Transcript, Meeting of the U.S. Commission on Civil Rights at 61 (September 11, 2009). At the December 16, 2009, Commissioner Yaki was again asked to serve on the subcommittee. His response was "Absolutely not." Transcript, Meeting of the U.S. Commission on Civil Rights at 39 (December 16, 2009).

It is characteristic of Commissioner Yaki and Melendez to submit hyperbolic dissenting Statements in which they argue that one or more aspects of the research undertaken by the Commission staff have been inadequate—even when the topic is far less controversial than this one. It has been my experience, however, that they are usually careful not to air their arguments until it is too late to correct the supposed problems they complain of. Moreover, their particular complaints tend to be whimsical and misinformed. See, e.g., U.S. Commission on Civil Rights, Enforcing Religious Freedom in Prisons, September 2008, at 109-117) Statement of Commissioners Yaki and Melendez) (reciting a sometimes-quirky litany of ways in which the Commission staff's research did not satisfy them); U.S. Commission on Civil Rights, Enforcing Religious Freedom in Prisons September 2008 at 118-129 (Statement of Commissioner Heriot) (responding to this litany).

> and intimidating presence at the entrance of the polls. I intentionally attempted to avoid any contact with them, because of this menacing and intimidating presence.[53]

Similarly, Michael Mauro, an attorney and Republican poll watcher, stated in his declaration, "In my opinion, the two uniformed men created an intimidating presence at the entrance of the polls."[54]

There was clearly no need to dismiss the case against Jackson for any of the reasons cited by the Department.

(2) ***Actual Voter Intimidation:*** The Department does not argue that there was no evidence of actual voter intimidation in the New Black Panther Party incident in Philadelphia. But Commissioners Yaki and Melendez have, as have others in the media, so I address the claim, which turns out to be another easy one to rebut.[55] The answer is threefold. First, there is

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[53] Declaration of Wayne Byman (April 1, 2009) (emphasis added), available at http://www.usccr.gov/NBPH/DeclarationofWayneByman%284-1-09%29.pdf. The Department has declined to furnish the Commission with Mr. Byman's witness statement. See also Declaration of Michael Mauro (March 31, 2009) ("In my opinion, the *two* uniformed men created an intimidating presence at the entrance of the polls") (emphasis added), available at http://www.usccr.gov/NBPH/DeclarationofMichaelMauro%283-31-09%29.pdf.

[54] See Declaration of Michael Mauro (March 31, 2009) (emphasis added), available at http://www.usccr.gov/NBPH/DeclarationofMichaelMauro%283-31-09%29.pdf. Commissioners Yaki and Melendez argue that there is no evidence that Jackson personally hurled racial epithets. If so, it wouldn't matter. If two men enter a liquor store together and stand shoulder to shoulder while the one with the gun demands money, his partner's silence is certainly not enough to establish innocence. It is more than sufficient in this case that the two men "formed ranks by standing in such a way to make them a significant obstacle" for those seeking entry to the polls and "attempted to impair [Christopher Hill's] entry into the polling place." Declaration of Christopher Hill para. 4 (April 1, 2009) available at http://www.usccr.gov/NBPH/DeclarationofChristopherHill%284-1-09%29.pdf.

[55] See Joint Dissent at 198 (alleging "no actual voters were intimidated"). For claims that the defendants' conduct did not constitute voter intimidation, see, e.g.., David A. Graham, "The New Black Panther Party Is the New ACORN," Newsweek, July 14, 2010, available at http://www.newsweek.com/2010/07/14/the-new-black-panther-party-is-the-new-acorn0.html (last accessed December 9, 2010): "As voter-intimidation exercises go, this wasn't much. " *See also* David Weigel, "Second Thoughts on New Black Panthers," The Daily Dish, available at http://andrewsullivan.theatlantic.com/the_daily_dish/2010/07/second-thoughts-on-the-new-black-panthers.html (last accessed December 9, 2010): " [I]t's not pleasant to watch racist idiots yell at people as they do in a pre-election day video [Glenn] Beck keeps playing, but it's not illegal. For those of us who live in cities and have to sneak into metro stations past the Black Israelites and other such nincompoops, it's not even unusual." See also Transcript, Hearing of the U.S. Commission on Civil Rights 130 (April 23, 2010)(remarks of Vice Chair Thernstrom disagreeing that the incident was "a clear instance of intimidation"). But see also Abigail Thernstrom, Lani's Heir: The New, Old Racial Ideology of the Holder Justice Department, National Review Online (December 21, 2009)(criticizing Attorney General Holder for his "questionable judgment" in dismissing the cases against members of the New Black Panther Party "who engaged in blatant voter intimidation at a Philadelphia polling place").

Interestingly, before submitting the Joint Dissentto the Commission, Commissioner Yaki did appear to concede that voter intimidation took place in Philadelphia that day. At the April 23 hearing, he said on the record: "The fact of the matter is that -- is that I am not as -- I am not as concerned about whether or not -- relitigating the issue whether there was intimidation or not. In my opinion, there was intimidation." See Transcript of the April 23, 2010 Hearing at p. 111. It is odd, then, that much of the Joint Dissentthat he joined appears devoted precisely to such relitigation of the underlying case.

evidence of actual voter intimidation. Christopher Hill, a senior registrar at the University of Pennsylvania Hospital and certified poll watcher, testified before the Commission on April 23, 2010: [56]

> People were put off when -- there were a couple of people that walked up, couple of people that drove up, and they would come to a screeching halt because it's not something you expect to see in front of a polling place. As I was standing on the corner, I had two older ladies and an older gentleman stop right next to me, ask what was going on.
>
> I said, 'Truthfully, we don't really know.' All we know is there's two Black Panthers here." And the lady said, "Well, we'll just come back." And so they walked away. I didn't see anybody other than them leave, but I did see those three leave.[57]

Second, even if no actual voter had been intimidated, threatened, or coerced the statute prohibits attempts to intimidate, threaten or coerce too.[58] Third, the statute prohibits the intimidation of persons who aid in the vote as well as voters themselves. Christopher Hill testified that certified Republican poll worker Larry Counts "was called a race traitor for being a poll watcher,"[59] that Mr. Counts "was threatened if he stepped outside of the building, there would be hell to pay," and that as a result Counts was "pretty shaken up" and "visibly upset."[60] Hill also testified that the King Samir Shabazz and Jerry Jackson had attempted (evidently without success) to intimidate Hill himself:

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[56] Vice Chair Thernstrom emphasized at the hearing that it is not known if these voters came back and voted later and seemed to suggest that if they did their return would have some legal significance. Transcript, Hearing of U.S. Commission on Civil Rights at 97 (April 23, 2010). There is, however, no requirement that the United States prove that intimidated voters didn't come back, so it wouldn't matter if they had. Voters are not supposed to have to dodge election thugs in order to vote. It is wholly insufficient to tell them that they should have returned later. It is difficult not to doubt whether this argument would have been made if the defendants had been dressed in KKK robes.

[57] Id. at 50-1. See also Transcript, Hearing of U.S. Commission on Civil Rights 57 (April 23, 2010) (Bartle Bull testifying that he witnessed "voters" walk up, observe the situation and walk away).

[58] Section 11(b) of the Voting Rights Act, codified at 42 U.S.C. 1973(i)(g), reads: "No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any person to vote or attempt to vote, or intimidate, threaten, or coerce any person for exercising any powers or duties under section 3(a), 6, 8, 9, 10, or 12(e)."

[59] Transcript, Hearing of U.S. Commission on Civil Rights at 48 (April 23, 2010).

[60] *Id.* Larry Counts and his wife, Angela Counts, who was also a poll watcher that day, have not confirmed what Christopher Hill said about their experiences at the polling place that day. See Deposition Transcript of Larry Counts, January 12, 2010, 8-20 (*available at* http://www.usccr.gov/NBPH/LarryCountsDepositionTranscript.pdf); Deposition Transcript of Angela Counts, January 12, 2010, 9-27 (*available at* http://www.usccr.gov/NBPH/AngelaCountsDepositionTranscript.pdf). They say they never saw King Samir Shabazz or Jerry Jackson. But given that Mr. and Mrs. Counts live in the Philadelphia neighborhood where this incident took place, it should not be a surprise if they are reluctant to come forward with testimony that would corroborate Hill's statements. The Commission's own experience with defendant King Samir Shabazz suggests that he is not above attempting to intimidate those who are in some way connected to the investigation into *New Black Panther Party*. He attended the Commission hearing in Washington, D.C. on April 23, 2010 at which Bartle Bull, Christopher Hill, Michael Mauro and others testified. During the testimony, he took photographs of several of those connected to the investigation in a way

> MR. BLACKWOOD: Did he [King Samir Shabazz] say anything to you?
>
> MR. HILL: Immediately started with, "What are you doing here, Cracker? And he and Mr. Jackson attempted to close ranks. I went straight between them through the door to find our poll watcher, who was inside the building at the time.

There is an abundance of evidence of the kind of threats, intimidation and coercion that are prohibited by Section 11(b), also including the affidavit of Wayne Byman, also a certified poll worker, which stated, "I intentionally attempted to avoid any contact with [the two New Black Panther Party members], because of this menacing and intimidating presence."[61] This argument is seriously put forth only by those who are unfamiliar with the law or with the record.[62]

(3) ***Racial Motivations:*** Another frequently-heard argument from some critics of the Commission's investigation (but not from the Department) is that the defendants did not intend to intimidate, threaten or coerce voters or poll watchers on the basis of race when they showed up at a majority-black voting precinct and shouted racial insults like "Now you will

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that seemed to be designed to unnerve. While such conduct may be only buffoonish in a government building in Washington, D.C., it could well seem very different to someone who lives or works in the neighborhood with King Samir Shabazz.

Commissioners Yaki and Melendez place emphasis on the fact that Mr. and Mrs. Counts testified that they are not actually Republicans, but Democrats who were being paid to be Republican poll watchers that day. It is not clear why the dissenting commissioners consider this fact to be significant. It is unlikely that Mr. and Mrs. Counts had a conversation with the members of the New Black Panther Party members about their political or ideological beliefs prior to the alleged harassment. If King Samir Shabazz and Jerry Jackson were harassing them as "race traitors" because they thought they were African American Republicans, they probably wouldn't think highly of them for working for the Republicans either. If anything, the Countses' testimony about the actual party affiliation would help explain the contradictions between Christopher Hill's testimony and their own. If the Countses were really Democrats, they may be less interested in getting involved in the lawsuit. If they are really Republicans now pretending to be Democrats, it suggests that they really have been effectively intimidated. Joint Dissentat 179-181.

[61] Declaration of Wayne Byman at para. 2 (April 1, 2009).

[62] Vice Chair Thernstrom has argued that the "legal standards that must be met to prove voter intimidation—the charge--are very high." Abigail Thernstrom, The New Black Panther Case: A Conservative Dissent, National Review Online (July 6, 2010), available at http://www.nationalreview.com/articles/243408/new-black-panther-case-br-conservative-dissent-abigail-thernstrom. It is not clear what she meant to say here. But if she meant to suggest that the standard of proof applicable to this case is any different from the standard applicable to any other civil case—preponderance of the evidence—then she is incorrect. Her use of the term "charge" suggests she might be confusing this case with a criminal proceeding, which would indeed have a high standard of proof. As for applicable legal standards, there is no law suggesting that Section 11(b)'s use of the words "intimidate, threaten or coerce" should be read to mean "intimidate, threaten or coerce with in a particularly spectacular way." Nor is there any law requiring "any voter" to be read to mean "any twenty voters." As the Supreme Court stated in *Church of the Holy Trinity v. United States*, 143 U.S. 457, 463 (1892), "[I]t is to be assumed that words and phrases are used in their ordinary meaning." The words are themselves the applicable legal standards. Any suggestion to the contrary is incorrect.

see what it means to be ruled by the Black Man, Cracker" and "race traitor."[63] If they had intended to intimidate whites, they would have gone to a majority-white precinct, since they would have found more whites to intimidate or threaten there.[64] This does not follow. The best place to intimidate any group is where their numbers are small, not where they are large, and both white voters and black Republicans were apparently in short supply at 1221 Fairmount Street in Philadelphia that day. All one has to do is read what was said to understand that King Samir Shabazz and his comrade Jerry Jackson had racial motivations for their conduct. But even if racial motivation were difficult to prove, it wouldn't matter. The statute does not require the Department to prove racial motivations for intimidation. Indeed, the word "race" does not even appear in Section 11(b). And indeed, the legislative history of the Voting Rights Act demonstrates that this was intentional. It states, "The prohibited acts of intimidation need not be racially motivated; indeed unlike 42 U.S.C. 1971(b)(which requires proof of a 'purpose' to interfere with the right to vote) no subjective purpose or intent need be shown."[65]

(4) ***Narrow Injunction as to King Samir Shabazz:*** The Department has argued that it was obligated under the law to narrow the injunction even as to King Samir Shabazz. But having reviewed their arguments, I cannot agree that the Department was legally constrained to act as it did.

In the original Complaint, the Department had asked for a broad injunction against all defendants. It would have "[p]ermanently enjoin[ed] Defendants, their agents and successors in office, and all persons acting in concert with them, from deploying athwart the entrance to polling locations either with weapons or in uniform of the Defendant New Black Panther Party, or both, and from otherwise engaging in coercing, threatening, or intimidating behavior at polling locations during elections." Over the objections of the career attorneys originally assigned to the case, that request was severely cut back on.

I believe this initial version of the requested injunction could have been improved upon. In particular, I would have liked to see the boundaries of "poll locations" defined precisely right down to the number of feet the defendants had to keep between themselves and the actual location. The final injunction requested by the Department and granted by the court, however, went far beyond that in its narrowness. It merely required King Samir Shabazz (the other three defendants having been dismissed) to refrain from "displaying a weapon within 100 feet of any open polling location on any election day in the city of Philadelphia., or from otherwise violating 42 U.S.C. section 1973i(b)." The injunction, which was issued on May 18, 2009, was good only until November 15, 2010.[66]

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[63] The quotation "Now you will see what it means to be ruled by the Black Man, Cracker" appears in *Id.*, 58.

[64] See, e.g., Adam Serwer, "Section 11(b) and Why the NBPP Case Was Dropped," The American Prospect, July 12, 2010, *available at* http://www.prospect.org/csnc/blogs/adam_serwer_archive?month=07&year=2010&base_name=section_11b_and_why_the_nbpp_c (last accessed December 9, 2010): "My own observation is that a black polling place isn't a very productive place to go to intimidate white voters."

[65] H.R. Rep. at 30 (1965). While at least one court has held to the contrary, see *Gremillion v.Rinaudo*, 325 F. Supp. 375, 376-77 (E.D. La. 1971), it appears the court may have been unaware of this legislative history.

[66] Order, *United States v. New Black Panther Party for Self Defense*, Civil Action No. 09-65 (May 18, 2009); Judgment, *United States v. New Black Panther Party for Self Defense*, Civil Action No. 09-65 (May 18, 2009)

Such an injunction could have been easily circumvented simply by hopping a bus to the Philadelphia suburbs. It is essentially useless. The question, of course, is what would motivate the Division to seek such a toothless injunction? Does the law really demand it? Or is something else at work here?

Some have defended the narrow injunction on the ground that the court's geographic jurisdiction does not run beyond Philadelphia. This is incorrect. The United States District Court for the Eastern District of Pennsylvania includes all of eastern Pennsylvania, well beyond the Philadelphia city limits. But even if it did not, it would not matter. It is an elementary principle of equity that the court's injunctions operate in personam, not in rem, and thus a court has jurisdiction to command a defendant who is properly before it to act or refrain from acting anywhere.[67] Nationwide injunctions in appropriate cases are routine.[68] Indeed, international injunctions are common, even for state courts.[69] It is frivolous to suggest that federal (or for that matter state courts) do not have the power to issue nationwide injunctions.

Courts are usually hesitant to issue nationwide injunctions against corporate defendants whose wrongdoing was confined to one or two localized bad apples, since complying with an injunction can impose burdens on innocent players.[70] But King Samir Shabazz is not a corporation. He is a bad apple himself. There is no reason to apply such a rationale to his case.

In his Statement, Assistant Attorney General Thomas Perez cited cases that hold that "'an injunction must be no broader than necessary to achieve its desired goals,' Madsen v. Women's Health Center, 512 U.S. 753, 765 (1994)." It is not clear what he means by this. It cannot be that the goal of this litigation was to prevent voter intimidation by King Samir Shabazz in Philadelphia, but not in Pittsburgh or St. Louis. Moreover, none of the cases cited by Perez supports the proposition that it would have been inappropriate to enjoin the defendant from intimidation outside the city of Philadelphia. (Some do support the notion that the injunction should have precisely defined how close the defendant could come to a polling place, but that has nothing to do with why the ultimate injunction secured by the Division was controversial. It is the limitation to the City of Philadelphia that has astonished observers and caused them to question the Division's motives.)

The real question is whether there was sufficient reason to believe that King Samir Shabazz might engage in intimidation at a polling place in the future somewhere other than

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(emphasis added).

[67] See Douglas Laycock, Modern American Remedies 240 (2d ed. 1994) (calling it "an ancient maxim of equity that it acts *in personam*–on the person of the defendant" and that as a result a court may order a defendant "to act or refrain from acting anywhere in the world").

[68] See, e.g., *Califano v. Yamasaki*, 442 U.S. 682, 701-703 (1979).

[69] See, e.g., *Dayan v. McDonald's Corp.*, 382 N.E.2d 55 (Ill. App. 1978) (ordering McDonald's Corp. not to cancel a franchise in France).

[70] See *Marshall v. Goodyear Tire & Rubber Co.*, 554 F.2d 730 (5th Cir. 1977) ("[A] nationwide or companywide injunction is appropriate only when the facts indicate a company policy or practice in violation of the statute").

Philadelphia, since courts will not issue injunction where there is no threat of wrongdoing.[71] But this is an easy case for that. The evidence against King Samir Shabazz on this count was more than sufficient. First, he was an adjudicated wrongdoer who had engaged in such behavior in the past. Second, he has expressed no contrition and indeed has essentially thumbed his nose at the lawsuit filed against him by the United States by declining to appear. Third, he is part of an organization that has advocated racial hatred and that purports to have deployed hundreds of its members to polling places across the country. The case for a national injunction is overwhelming.

All of this suggests that, like the decision to dismiss Jackson, the Division's decision to limit the injunction against King Samir Shabazz cannot explained by the arguments the Department has advanced.

(5) ***Liability of Malik Zulu Shabazz and the New Black Panther Party:*** The Department also takes the position that there was insufficient evidence to find Malik Zulu Shabazz and the New Black Panther Party itself civilly liable for the conduct of King Samir Shabazz and Jerry Jackson (even in a proceeding based on the defendants' default). Unlike its position on Jerry Jackson, I do not consider this position to be frivolous. Nevertheless, it persuaded neither me nor the career appellate attorneys who were requested to weigh in on the dispute between the attorneys who had been handling the case and their supervisors.[72] Even if it had persuaded us, however, it would not explain the dismissal of Jackson or the strangely narrow injunction against King Samir Shabazz.

The allegations in the complaint are in order. They stated:

> 12. Defendants New Black Panther Party for Self-Defense and Malik Zulu Shabazz managed, directed and endorsed the behavior, actions and statements of Defendants Samir Shabazz and Jackson at 1221 Fairmount Street on November 4, 2008, alleged in this Complaint. Prior to the election, the New Black Panther Party for Self-Defense made statements and posted notice that over 300 members of the New Black Panther Party for Self-Defense would be deployed at polling locations during voting on November 4, 2008, throughout the United States. After the election, Defendant Malik Zulu Shabazz made

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[71] See *Humble Oil & Refining Co. v. Harang*, 262 F. Supp. 39 (E.D. La. 1966) (textbook case in which court declines to issue injunction prohibiting defendant from destroying documents in connection with the litigation on the ground that no evidence that defendant was inclined toward any such misconduct was presented).

[72] A chain of e-mails from DOJ appellate attorneys Marie McElderry and Diana Flynn on this subject has been provided to the Commission and is available on our website at http://www.usccr.gov/NBPH/DOJcomments_05-13-09_reproposeddefaultjudgment.pdf In this chain of messages, career DOJ appellate attorney Diana Flynn and Marie McElderry note some of the weaknesses in the case against Malik Zulu Shabazz and the national New Black Panther Party organization. Still, neither recommended dropping the case altogether because of these concerns. McElderry appears to think that crafting a sufficiently narrowly tailored injunction against the parties would be a sufficient way around these problems. Flynn observes that the Voting Section has evidence supporting the case against Malik Zulu Shabazz, including "discussion in the internal papers of the history of the organization with respect to voter intimidation with the use of weapons and uniforms," discussion which would support the case against them. She ultimately concluded that "we probably should not back away from these allegations."

> statements adopting and endorsing the deployment, behavior and statements of Defendants Samir Shabazz and Jackson at 1221 Fairmount Street in Philadelphia, Pennsylvania.

No one disputes the authenticity of the video announcing the deployment of party members to polling stations.[73] It seems clear that the appearance of King Samir Shabazz and Jackson in Philadelphia, dressed in their makeshift uniforms with prominent New Black Panther Party insignias, was a part of that deployment effort.[74] Nor does anyone dispute the video showing an obviously sarcastic Malik Zulu Shabazz purporting to chastise King Samir Shabazz, while clearly proud of his Election Day misbehavior. Even if the former had been insufficient to convince a court that the Party and its president were the initiators of the wrongful conduct, the latter could demonstrate that the conduct had been approved and

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[73] See AOL Video, http://video.aol.com/video-detail/dr-malik-shabazz/1916264308/?icid=VIDLRGOV07 (follow hyperlink to FoxNews).

[74] One of the more curious arguments made by the dissenting commissioners is that these uniforms would not have been recognized by the average voter as derivative of "the uniform of the Italian Fascist Party." Joint Dissent at 184. It is wholly unclear why they consider that significant. It appears they have misunderstood a statement made by Bartle Bull in response to a question by Commissioner Yaki. Yaki asked, "What about the uniform was it that made them intimidating?" Bull replied that the uniforms—black berets, black shirts and jackets, military-style boots and insignia—have a history behind them. "[T]his is the way paramilitaries dressed in fascist Italy and Nazi Germany ...," he said. "They wore jackboots like these gentlemen. They wore caps like these gentlemen. They wore uniforms with their own regalia like these gentlemen." Commissioners Yaki and Melendez purport to take Bull to mean that the average American is specifically familiar with the uniform of the Italian Black Brigades. But that was obviously not his point, and I am surprised to have to address such an argument. Bull was pointing out that Americans are familiar with the traditions and practices of paramilitary organizations in general. Black berets have been worn not just by the Italian Black Brigades, but by Che Guevara, original Black Panthers Huey Newton and his colleagues, members of the Symbionese Liberation Army and the Provisional Irish Republican Army, and many more. Few Americans can tell you exactly what members of the Italian Black Brigades wore, just as few can tell you exactly whether an organization like the Black Beret Cadre of Bermuda even existed. But that doesn't mean they will look at two men wearing black berets, military-style boots, New Black Panther Party insignia, black pants, shirts and jacket and a night stick and not realize that they are looking at menacing thugs emulating the dress of paramilitary and similar organizations of the past. Americans are not fools. No one mistook King Samir Shabazz and Jerry Jackson for a pair of existential philosophers on their way to sip coffee at a sidewalk café in Paris.

Similarly, it is not clear why Commissioners Yaki and Melendez regard it as significant that these uniforms were not precisely uniform. Indeed, the irregularities in the uniform simply drive home the fact that these men were not peace officers there to maintain order at the polls. They were thugs.

Perhaps the oddest aspect of this argument is that only two years ago, Commissioner Yaki argued that voters could be intimidated by DOJ poll watchers' wearing dark suits. At a June 6, 2008 Commission briefing, Commissioner Yaki, who was then convinced that voter intimidation was a significant problem and that the Bush Justice Department wasn't doing enough to combat it, observed that "But anecdotally, there have been some instances where individuals from the criminal prosecutor's offices of Justice go out as monitors and some people have found them to be as intimidating, if not more intimidating, than the people who allegedly they're supposed to try to keep in check, simply because I don't know, maybe they wear the dark suits and flash a badge or what have you." U.S. Commission on Civil Rights, Transcript of Briefing, 69-70 (June 6, 2008.) Yet DOJ lawyers' suits also are not precisely alike. One DOJ lawyer from a pair of poll watchers might wear solid navy from Brooks Brothers and the other charcoal pinstripe from J. Press. It is unclear if, in the future, Commissioner Yaki will take these equally subtle sartorial distinctions into account when analyzing whether DOJ poll watchers are working together to intimidate voters.

ratified by the Party and its leader, thus clarifying that it was the conduct of the Party itself. Liability would thus ensue.

One might pause to wonder, of course, how any organization could approve and ratify the conduct of a man like King Samir Shabazz. This is a man who has been caught on tape at a Philadelphia outdoor market calling out to the crowd with a microphone, "I hate white people. All of them. Every last iota of a cracker I hate him. ... You want freedom? You're gonna have to kill some crackers. You're gonna have to kill some of their babies." Why would a reputable organization be willing to tolerate such a man in its ranks? But the New Black Panther Party is not a reputable organization, and King Samir Shabazz is not even the first member of the party to be caught on video giving a murderous racist rant. Khalid Abdul Muhammad, national chairman of the New Black Panther Party until his death in 2001 and considered by some to be the father of the movement, once told a cheering crowd:

> I said if we're going to be merciful we give 'em [whites] 24 hours in South Africa to get out of town by sundown. I said if they don't get out of town; we kill the men; we kill the women; we kill the children; we kill the babies; we kill the blind; we kill the cripple; we kill the crazy; we kill the faggots; we kill the lesbians; I said goddamnit, we kill 'em all.[75]

Sadly, it would not take a lot to convince a court that the New Black Panther Party planned, directed, approved and endorsed the actions of King Samir Shabazz and Jackson.

Some critics have suggested that Malik Zulu Shabazz and his fellow members of the New Black Panther Party have First Amendment rights to vent their rage against white people however misguided that rage may be (so long as they do it somewhere other than the entrance to a polling place). And so they have. But they who sow the wind must reap the whirlwind.[76] A court of law is well within its authority to take their statements into account in determining whether it is more likely than not that defaulting defendants King Samir Shabazz and Jerry Jackson were acting as agents of the defaulting defendants New Black Panther Party and Malik Zulu Shabazz when they stood outside the doors of the polling place at 1221 Fairmount Street. The Division was not obliged by law to dismiss the case against the New Black Panther Party or Malik Zulu Shabazz.

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[75] Malik Zulu Shabazz has called Khalid Abdul Muhammad "one of the greatest Black leaders ever to live" and "helped to shape my life and was a captain and minister over me." Charlene Muhammad, Community Tributes Khallid Abdul Muhammad, FinalCall.com News (July 21, 2005), available at http://www.finalcall.com/artman/publish/article_2110.shtml. See also New Black Panther Party for Self-Defense: Malik Zulu Shabazz Speaks at Carnegie-Mellon University, Anti-Defamation League (February 23, 2005) (quoting Malik Zulu Shabazz as stating that Jewish rabbis "set the stage for the African holocaust" and that "the very nature of white people" causes problems in the world).

[76] Hosea 8:7.

III. The Dissenting Commissioners Apparently Do Not Claim that New Black Panther Party Was Not an Example of the Division's Hostility Toward the Race-Neutral Law Enforcement; Rather They Attack a Straw Man by Arguing that the Case's Disposition Was Not Motivated By a Desire to Support Black Supremacist Groups.

Another curious aspect of their dissent is its insistence that the motives of Civil Rights Division attorneys are inherently unknowable together with the implication that any investigation into those motives is therefore illegitimate. As they put it:

> Our dissent does not attempt to make definitive claims about the motives or actions of the United States Department of Justice ... past or present. We have no special insight into the hearts or minds of the people working at the Department.[77]

I know of no other occasion on which Commissioners Yaki and Melendez have shrugged their shoulders in the face of an allegation of wrongdoing and asked, "Who can ever know?" Indeed, my experience with them recently has been the opposite. In their Joint Dissent, they have been inclined to see—or at least purport to see—malicious motivations that do not exist. For example, they accuse unnamed witnesses (presumably Christian Adams and Christopher Coates) of being "disgraced and disgruntled" and out "to settle personal and political scores."[78] There is no evidence of this, and indeed the evidence shows these attorneys have particularly good records as staff members.[79] Similarly, they accuse members of the Commission of having an "illegitimate and contemptible purpose" in examining the Department's enforcement policies in connection with the New Black Panther Party incident.[80]

As the U.S. Commission on Civil Rights, it is frequently our job to investigate whether executive branch agencies are executing the law in a non-discriminatory manner and report to Congress, the President and the American people if they are not. Indeed, our statute demands that we examine the enforcement of the civil rights law by agencies like the Department. That is not always the easiest of jobs—especially when agencies shirk their statutory responsibility to cooperate with the Commission's investigation and members of the Commission itself attempt to thwart that investigation. But it is our job.

Commissioners Yaki and Melendez erect a straw man and then attack it by arguing that "we do not feel the need to adopt bizarre explanations that envision the Obama Administration doing favors for a black supremacist group." But as the dissenting commissioners surely understand, no such allegation had been made in this report. The

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[77] Joint Dissent at 177.
[78] Joint Dissent at 198
[79] Christopher Coates testified before the Commission that in 2007, he received the Civil Rights Division's second highest award (the Hubble Award) for effective advocacy. U.S. Commission on Civil Rights, Transcript of Hearing, September 24, 2010 at 47. Coates has also received awards from the Georgia Conference of the NAACP and the Georgia Environmental Association. Id. at 46-7. Adams testified that he was promoted two weeks before he resigned from the Department and that he was at the top of the federal pay scale when he left. U.S. Commission on Civil Rights, Transcript of Business Meeting, July 6, 2010 at 128.
[80] Joint Dissent at 198.

allegations are that the Division does not treat Section 2 or Section 11(b) cases like *Brown* and *New Black Panther Party* the same way they do the cases Ms. Fernandes labeled "traditional." In short, the Division treats cases differently depending upon whether defendants are black or white. The Commission has obviously never seriously (or even not-so-seriously) considered whether Assistant Attorney General Perez, Ms. Fernandes, Ms. King and Mr. Rosenbaum are chummy with the likes of the defendants in *New Black Panther Party*. I am confident that they do not travel in the same social circles.

Commissioners Yaki and Melendez also argue that this investigation and report "have been a tremendous waste of scarce government resources."[81] They argue that this investigation "was, from the very beginning, an effort to direct the resources of the Commission toward ... harassing the new Administration."[82] The figure they cite—$173,000—is actually somewhat less than what the Commission has historically spent on its annual statutorily-required enforcement report. Admittedly, it does not include all the expenses that might plausibly be associated with the report. For example, it does not include the transportation and lodging expenses for Commissioners to meet on October 29, 2010 to consider this Interim Report. On that date, quorum failed because Commissioner Yaki refused to come in from the hallway to join the meeting and declaring it to be "not his problem" if the rest of the Commission could not muster a quorum. It is my hope that the taxpayer did not pay for his trip to Washington or indeed the cost to bring any of the Commissioners to Washington on that occasion.

All of this conduct in connection with the New Black Panther Party incident is quite inconsistent with Commissioner Yaki's earlier declaration that if Deputy Assistant Attorney General Julie Fernandes made the statement she is alleged by Christian Adams to have made, she "should be fired." As he so colorfully put it, "That person should be tossed out on their ear in two seconds flat." If so, how can it be that an investigation into the matter is illegitimate?[83]

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[81] Joint Dissentat 177

[82] Joint Dissentat 198.

[83] Vice Chair Thernstrom has also argued that this investigation has been somehow illegitimate, though she offers little in the way of specifics. It should be noted, however, that the Vice Chair was originally in favor of the investigation. While she was not present at the June 12, 2009 business meeting at which the Commission decided to send its June 16, 2009 letter of inquiry, she and Commissioner Ashley Taylor, Jr. (who also missed that meeting) followed up with their own joint letter of inquiry dated June 22, 2009. In it, they concurred in the Commission's original letter. Using language that was stronger than that of the Commission's original letter, the Vice Chair and Commissioner Taylor wrote, "We are gravely concerned out the Civil Rights Division's actions in this case and feel strongly that the dismissal of this case weakens the agency's moral obligation to prevent voting rights violations, including acts of voter intimidation or voter suppression." "We cannot understand the rationale for this case's dismissal," they continued, "and fear that it will confuse the public on how the Department of Justice will respond to claims of voter intimidation or voter suppression in the future."

For a more detailed response to the Vice Chair, see Joint Statement of Commissioners Peter Kirsanow, Gail Heriot and Todd Gaziano to the Vice Chair at 200-4.

IV. The New Black Panther Case Is Not Best Seen as an Effort by Partisan Political Appointees Improperly to Overrule Non-Partisan Career Attorneys; Rather Should Be Viewed as a Struggle Between Those Who Would Enforce the Laws and the Constitution in Good Faith and Those Who Prefer to Pursue Instead Their Own Policy Preferences.

Both critics and defenders of the Department's handling of the New Black Panther Party case seem to agree on one thing: When political appointees overrule the judgment of career attorneys, something is deeply wrong. The difference between them is that critics believe that this is exactly what happened with the New Black Panther Party case. Defenders, on the other hand, argue that the case is better understood as a clash between two sets of career attorneys, since Loretta King and Steven Rosenbaum, while Obama administration appointees, were originally career attorneys within the Division.[84]

Both sides have it wrong. The Constitution states that the President of the United States "shall take Care that the Laws be faithfully executed."[85] There is nothing in the Constitution about the need for his appointees to defer to the judgment of an unelected and unaccountable career staff. Rather, if political appointees see that career staff has run amok with the law and the Constitution, it is their duty to intervene.[86] Policy is supposed to be set by political appointees; it is not supposed to be set by the staff members they supervise. If indeed there is a culture of hostility toward the race-neutral enforcement of civil rights laws, it is the duty of political appointees to root it out.

In the case of the New Black Panther Party case, the problem is not that the wrong persons made the decision. The problem is that the wrong decision appears to have been

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[84] See, e.g., Statement of Assistant Attorney General Thomas E. Perez 8 (May 14, 2010). "The decisions regarding the disposition of the case ... ultimately was [sic] made by the career attorney who was then serving as the Acting Assistant Attorney General for the Civil Rights Division. Another attorney who was then serving as the Acting Deputy Assistant Attorney General who responsibility for supervising the Voting Section also participated directly in the decision-making process."

[85] U.S. Const. art. II, sec. 3, cl. 4.

[86] In evaluating arguments between career attorneys and the political appointees who manage them, it is always important to remember that "career" in this context does not mean non-partisan or non-ideological. It simply means that the employees were hired and retained under what used to be called the "civil service" procedures, which among other things, forbid consideration of the employee's political views in deciding whether to hire or fire. It has been my experience that career employees who inhabit policy-oriented parts of the federal bureaucracy, like the Division, are often highly ideological and sometimes quite partisan too.

I tend to prefer the terms "partisan" and "ideological" to the more all-encompassing "political," because I think they make a distinction that is worth making. A person is "partisan" if he is motivated by party loyalty and non-partisan if he is not. A person is "ideological" if he subscribes to a set of ideas and principles, not shared by everyone, that drive his preferences on public policy issues in an organized and predictable manner; he is non-ideological if his policy preferences are not so organized or predictable or if they are organized on the basis of such things as personal loyalties or antipathies or immediate self-interest. I do not mean either term as an insult; nor do I mean them as praise. Some ideological persons are also partisan; some are not. Some partisan persons are also ideological, some are not. As I use the term "ideological" and "partisan," I do not mean impervious to evidence, since in my experience some are and some are not, just as some non-ideological and non-partisan persons are and some are not.

made. Nobody in the Division should be deciding which cases to bring under Section 2 or Section 11(b) based on the race of the defendants–not political appointees, not career attorneys, not anybody.

Statement of Commissioner Peter N. Kirsanow[1]
Joined by Commissioner Gaziano

The Commission's investigation into the Department of Justice's ("DOJ" or "the Department") near-total dismissal of *United States v. New Black Panther Party* ("NBPP" or "NBPP case")—a voter intimidation case it had essentially won—raises troubling questions that strike at the heart of DOJ's fidelity to the Constitution's equal protection guarantee. Specifically, does the Department's Civil Rights Division ("CRD" or "the Division"), the primary entity charged with enforcing voting rights for *all* Americans, maintain or tolerate a culture in which some Americans' voting rights are deemed more worthy of protection than others based on their race? Relatedly, is there a class of defendants CRD exempts from vigorous prosecution for voting rights violations based on those same impermissible considerations? If the Civil Rights Division is permeated by a culture hostile to the race-neutral enforcement of the laws, what, if any, measures have Department officials taken to rectify the problem?

The Commission's pursuit of the answers to these questions has been stymied by a Department that has consistently tried to cultivate the public appearance of cooperation with the Commission's investigation, while engaging in a degree of stonewalling and obstruction inexplicable for an agency professing clean hands. We have heard compelling testimony from former Voting Section attorneys Christian Adams and Christopher Coates—corroborated in part by the sworn affidavits of former Department employees,[2] along with press statements made by three anonymous current Department employees too afraid to speak publicly for fear of retribution[3]—of this culture of hostility. If these collective sources

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[1] Commissioner Gaziano and I join each other's Statements. We also join Commissioner Heriot's Statement.

[2] *See* Affidavit of Karl S. "Butch" Bowers, Jr., ¶ 8 (July15, 2010) ("In my experience, there was a pervasive culture in the Civil Rights Division and within the Voting Rights Section of apathy, and in some cases outright hostility, towards race-neutral enforcement of voting rights laws among large segments of career attorneys."), at http://www.usccr.gov/NBPH/BowersStatement_07-15-10.pdf; Affidavit of Hans A. Von Spakovsky, ¶ 22 (July 15, 2010) ("While I was not at the Division at the time the New Black Panther Party case arose, I can confirm from my own experience as a career lawyer that there was a dominant attitude within the Division and the Voting Section of hostility toward the race-neutral enforcement of voting rights laws by many of the career lawyers and other staff."), at http://www.usccr.gov/NBPH/vonSpakovskyAffidavit_07-15-10.pdf.

[3] Jerry Markon and Krissah Thompson, *Dispute Over New Black Panthers Case Causes Deep Divisions*, WASH. POST (Oct. 22, 2010), available at http://www.washingtonpost.com/wpdyn/content/article/2010/10/22/AR2010102203982.html?sid=ST2010102300136 ("Three Justice Department lawyers, speaking on the condition of anonymity because they feared retaliation from their supervisors, described the same tensions, among career lawyers as well as political appointees. Employees who worked on the Brown case were harassed by colleagues, they said, and some department lawyers anonymously went on legal blogs 'absolutely tearing apart anybody who was involved in that case,' said one lawyer. 'There are career people who feel strongly that it is not the voting section's job to protect white voters,' the lawyer said. 'The environment is that you better toe the line of traditional civil rights ideas or you better keep quiet about it, because you will not advance, you will not receive awards and you will be ostracized.'").

are to be believed, what emerges is the picture of a Civil Rights Division fundamentally "at war with its core mission."[4]

It is against this backdrop that the Department's reversal in the NBPP case must be considered. The case was solid on the merits, though not without its imperfections (not unusual, as far as most cases go), and no less than six career attorneys agreed that the Department should move forward with its request for default judgment.[5] Nonetheless, the case was dismissed as to three of the four defendants and the sanctions requested against the remaining defendant were dramatically reduced. To the extent that this drastic reversal of course is a window into a broader culture in the Division that is unable or unwilling to administer voting rights laws on a race neutral basis, the case is significant indeed.

If polled, I suspect that most Americans would agree with the proposition that while "the history and condition of black Americans were the impetus for the Civil Rights Division's creation and much of its work. . .its mission [today] extend[s] to all Americans."[6] (The same can be said of the Commission's present-day mission). Yet our investigation has revealed that there are many within both the career and current political ranks at DOJ who hold a very different view. Observers have noted "deep divisions within the Justice Department that persist today over whether the agency should focus on protecting historically oppressed minorities or enforce the laws without regard to race."[7] It would be difficult to explain why the *United States v. Brown* and *NBPP* cases—the only two cases ever prosecuted by the Department to protect the voting rights of whites—were the source of so much bitter consternation within the Department's ranks otherwise.

For its part, if "Step One" requires admitting that it has a problem, the Department of Justice remains in denial. It has essentially admonished us to "pay no attention to the man behind the curtain." It has refused to answer or address the specific allegations made by Coates, Adams and others in any meaningful way other than with blanket assurances of its even-handed enforcement.[8] It has also denied the Commission access to vital documents,

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[4] U.S. COMMISSION ON CIVIL RIGHTS, RACE NEUTRAL ENFORCEMENT OF THE LAW? DOJ AND THE NEW BLACK PANTHER LITIGATION: AN INTERIM REPORT 63 (2010).

[5] These attorneys included members of both the Voting and the Appellate Sections: then-Chief Christopher Coates, Deputy Chief Robert Popper, Christian Adams and Spencer Fisher (Voting) and Chief Diana Flynn and Deputy Marie McElderry (Appellate).

[6] Testimony of Theodore M. Shaw Before the United States Senate Committee on the Judiciary, *Hearing on The 50th Anniversary of the Civil Rights Act of1957 and its Continuing Importance* (Sept. 5, 2007), available at http://judiciary.senate.gov/hearings/testimony.cfm?id=2885&wit_id=6632.

[7] Markon and Thompson, *supra* note 2.

[8] "The Civil Rights Division is firmly committed to the evenhanded application of the law, without regard to the race of the victims or perpetrators of unlawful behavior. Any suggestion to the contrary is simply untrue." Letter from Assistant Attorney General Thomas Perez to Chairman Reynolds (Aug. 11, 2010), at http://www.usccr.gov/NBPH/AR-M620U_20100811_173009.pdf . Notably, Mr. Perez was not yet at DOJ at the time the Division made its decision to dismiss the NBPP case, and thus would have no knowledge of the particulars and only limited knowledge of the existence of long-term hostility to race-neutral enforcement of civil rights laws there.

In an Oct. 4, 2010, press conference regarding unrelated matters, Attorney General Holder was asked about the Department's commitment to the race-neutral enforcement of the civil rights laws and made a blanket assertion similar to that of Mr. Perez: "The notion that we are enforcing any civil rights laws—voting or others—on the

correspondence, witnesses and other information that would have enabled us to fully complete this investigation. In so doing, it has deliberately tried to thwart the Commission's efforts, secure in its ability to do so because of the Attorney General's total discretion over whether or not to enforce Commission subpoenas coupled with the Commission's lack of recourse to a neutral third party when there are disputes, even in the face of a conflict of interest as egregious as the one presented by this case. As a result, the Commission transmits this interim report to the President and Congress with limited findings and only one recommendation directed at addressing future, similar impasses.[9] In the meantime, the Commission's investigation should continue and I encourage other entities with civil rights oversight responsibilities to undertake formal investigative efforts as well.[10]

On the merits, the Commission has gathered evidence around four principal areas of inquiry: (1) whether high-level political appointees within the Department of Justice have enunciated a policy or tolerate a practice of enforcing certain civil-rights laws in a racially discriminatory manner; (2) whether high-level political appointees within the Department of Justice have enunciated a policy or tolerate a practice of not enforcing Section 8 of the National Voter Registration Act; (3) whether there is pervasive hostility within the ranks of the Civil Rights Division toward enforcing the nation's civil-rights laws in a color-blind manner; and (4) why the Department of Justice dismissed most of the claims of voter intimidation in the New Black Panther Party voter-intimidation lawsuit after there had been an entry of default in the matter.

I. Culture of Hostility: Race-Based and Politicized Enforcement of Neutral Voting Rights Laws

On September 24, 2010, over the Department's objection, the U.S. Commission on Civil Rights heard the testimony of Christopher Coates, a distinguished, veteran career Department attorney and former Chief of the Voting Section. Mr. Coates testified to "systemic problems regarding race-neutral enforcement of the voting rights laws by the Civil Rights Division that were manifested in the DOJ's disposition of the New Black Panther Party case . . . ."[11] His testimony corroborates that of former Voting Section attorney J.

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basis of race, ethnicity or gender is simply false." Mike Levine, *Holder Vows Equal Enforcement; Calls Allegations to Contrary Simply False,* FOXNEWS.COM (Oct. 4, 2010), at http://politics.blogs.foxnews.com/2010/10/04/holder-vows-equal-enforcement-calls-allegations-contrary-simply-false.

[9] Some Commissioners have questioned on the record the Commission's issuance of an interim, rather than a final, report. That the Commission might from time to time need to issue interim reports due to the ongoing nature of its investigations was an uncontroversial proposition recognized in the earliest proposals for the Commission's existence. *See* Letter from Attorney General Herbert Brownell, Jr., to Vice President Richard M. Nixon and Speaker of the House Sam Rayburn (Apr. 9, 1956) (transmitting the Eisenhower Administration's proposal for what would become the 1957 Civil Rights Act), at http://www.eisenhower.archives.gov/Research/Digital_Documents/Civil_Rights_Civil_Rights_Act/New%20PDFs/Cabinet_Paper_CP5648310_1956_04_01.pdf.

[10] Rep. Frank Wolf, ranking member on the House Commerce-Justice-Science Appropriations subcommittee at the time our investigation began, appeared before the Commission to testify regarding his office's inquiries into the NBPP dismissal and culture of hostility at the Department. Rep. Lamar Smith, then-ranking member on the House Judiciary Committee and now Chairman, has joined Mr. Wolf in doggedly pursuing the case.

Christian Adams regarding a CRD culture hostile to the color-blind enforcement of federal voting rights laws such as the Voting Rights Act and the National Voter Registration Act.

Based on the subpoenaed witnesses' testimony, offered at great professional risk to themselves, this culture manifested itself in various ways, including, but not limited to: career attorneys allegedly refusing to work on voting rights cases involving black defendants, such as *Brown* and *NBPP*; other Voting Rights personnel objecting to the use of departmental resources to bring cases against minority defendants; still others expressing the opinion that voting rights laws should be selectively enforced so as to only protect minorities and not white victims; others citing the trouble such filings created between CRD and civil rights groups as a reason not to do so; and still others allegedly harassing individuals who worked on (and, in one instance, even the mother of an employee who worked on) *Brown*.[12] Furthermore, Coates testified that a preliminary case-justification document he prepared in *Brown* was altered to eliminate a substantial portion of his original recommendation, which advocated filing the case even though it involved black defendants.[13] There are also alleged incidents of retaliation against Mr. Coates for his willingness to bring such cases, including the effective stripping of his management duties as Voting Section Chief.[14]

More disturbingly, the culture of hostility described by Messrs. Adams and Coates was apparently not limited to rank-and-file career attorneys within the Division. Rather, their testimony shows that the tone appears to have been set from the top, permeating the ranks of Civil Rights Division management. Senior career officials such as Mr. Rosenbaum and Ms. King (who at the time of the NBPP case dismissal served in political positions pursuant to the Vacancies Reform Act), and later, political appointees such as Deputy Assistant Attorney General for Civil Rights Julie Fernandes all allegedly held, and in some notable cases, actually expressed hostility towards race-neutral enforcement of civil rights laws.[15]

The uncontroverted testimony of J. Christian Adams is that Ms. Fernandes gave instructions that the Voting Rights Section was not going to bring cases "against black

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[11] Transcript, Testimony of Christopher Coates, Hearing of the United States Commission on Civil Rights at 10 (Sept. 24, 2010), http://www.usccr.gov/NBPH/09-24-2010_NBPPhearing.pdf (hereinafter "Testimony of Christopher Coates").

[12] U.S. COMMISSION ON CIVIL RIGHTS, RACE NEUTRAL ENFORCEMENT OF THE LAW? DOJ AND THE NEW BLACK PANTHER LITIGATION: AN INTERIM REPORT 52-54 (2010).

[13] Testimony of Christopher Coates, *supra* note 10 at 15; *see also* Affidavit of Hans A. Von Spakovsky, ¶¶ 17-19, *supra* note 1.

[14] Testimony of Christopher Coates at 48-49, 64; *see also*, Transcript, Testimony of J. Christian Adams, Hearing of the U.S. Commission on Civil Rights at 41-43 (July 6, 2010), at http://www.usccr.gov/NBPH/07-06-2010_NBPPhearing.pdf.

[15] Ms. Fernandes joined the Civil Rights Division after *Brown* and *NBPP* were concluded, but was a harsh critic of race-neutral enforcement of the laws before assuming her current post there. For example, she made public statements while employed by the Leadership Conference on Civil Rights in the wake of the Department's decision to file *Brown* that align her with those who share racialist sentiments about the Department's core mission. *See* Steven Rosenfeld, *Is the Justice Department Conducting Latino Outreach by the GOP?* Alternet, Oct. 22, 2007, at http://www.alternet.org/rights/65749/?page=entire (last visited Oct. 5, 2010)). ("People are wondering why aren't you bring cases with voting and African-Americans–what is the issue,' said Julie Fernandes of the Leadership Conference on Civil Rights. 'How can it be that the biggest case involving discrimination in Mississippi [United States v. Ike Brown and Noxubee County] was brought on behalf of white voters. . . .The law was written to protect black people.'").

defendants on the benefit of white victims."[16] As the number two official in the Civil Rights Division with oversight responsibility over the Voting Section, Ms. Fernandes' statements would have been understood as an expression of Department policy by rank-and-file attorneys within the Section regarding DOJ's civil rights enforcement approach.

Messrs. Adams and Coates both testified that they understood Ms. Fernandes' alleged directive to be instituting a policy in conflict with the equal enforcement of the nation's civil rights laws. For example, Mr. Coates testified that in September 2009, Ms. Fernandes held a meeting to discuss enforcement of the anti-discrimination provisions of Section 2 of the Voting Rights Act at which she allegedly told those assembled that "the Obama administration was only interested in bringing traditional types of Section 2 cases that would provide equality for racial and language minority voters. And then she went on to say that 'this is what we are all about' or words to that effect."[17]

Mr. Coates testified that everyone in the room "understood exactly what she meant: no more cases like Ike Brown and no more cases like the New Black Panther Party case."[18] He testified further that she reiterated that directive in another, similar meeting in December 2009 regarding federal observer election coverage, during which she stated that the "Voting Section's goal was to ensure equal access for voters of color or language minorit[ies]" without reference to or emphasis on its obligations to ensure equal access for *all* voters.[19] Adams, Coates and others within the Voting Section understood this directive to mean that cases would not be brought by the Civil Rights Division against black defendants for the benefit of white victims.[20] If such a directive were in place at the Department, it would mean that factors other than the facts and the law (which Mr. Perez testified is what dictated the NBPP reversal) are at play when the Department decides whether and how to enforce certain civil rights laws—impermissible factors like the race of the defendants or victims.

Even Commissioner Yaki, who has been a persistent critic of this investigation, admitted that if such statements were made, they would be grounds for Fernandes's immediate dismissal.[21] Racialist sentiments like those attributed to Fernandes demonstrate a deeply flawed understanding of the Voting Rights Act, whose plain language protects all American voters, not just members of minority groups. Nor can the application of race-neutral statutes in a color-conscious fashion credibly be said to fall within the Department leadership's discretion over policy, priority-setting and resource allocation. Once CRD commits resources for a specific enforcement purpose—ensuring "equal access" to the ballot, for example—it treads on constitutionally treacherous ground where it identifies the beneficiaries of its enforcement efforts on the basis of race. To put it differently, it cannot announce or engage in a policy of pursuing meritorious voter intimidation cases, but only where black or other minority voters are targets of the intimidation. It similarly cannot rule out prosecuting an entire class of potential defendants on the basis of their race. Our Constitution forbids this type of gross, race-based

[16] Testimony of J. Christian Adams, *supra* note 13 at 61-63.
[17] Testimony of Christopher Coates at 32.
[18] *Id.*
[19] *Id.* at 33.
[20] *Id.* at 129-131.
[21] Testimony of J. Christian Adams, *supra* note 13 at 59.

meting out of benefits and burdens. Historic grievances and the lingering effects of past discrimination do not vitiate this basic principle. Racialist applications of the Department's prosecutorial discretion are likely to corrode the public trust and deepen, rather than lessen, perceived racial divides.

When Assistant Attorney General Thomas Perez appeared before the Commission in May 2010, he was asked whether he would investigate charges that supervising attorneys or political appointees in the Civil Rights Division made statements indicating that the Administration should not or would not bring voting rights cases for the protection of white voters or against blacks or other minorities because of their race.[22] He stated that if the Commission had such a statement it should "bring such a statement to [the Department's] attention."[23]

After Mr. Adams' testimony, Chairman Reynolds sent a letter to Mr. Perez regarding the alleged statements, inquiring about whether the Department would investigate whether Mr. Adams' allegations were accurate and requesting the testimony of Mr. Coates.[24] In Mr. Perez's subsequent response, he failed to address any of the Commission's questions with respect to Ms. Fernandes' alleged statements.[25] Following that exchange, Mr. Coates came forward and testified to the same statements having been made by Ms. Fernandes—statements made pursuant to a directive she conveyed to members of the Voting Section that the race of violators and victims is an appropriate consideration in the Division's enforcement decisions.

The uncontroverted testimony of Messrs. Coates and Adams also identify Ms. Fernandes as having explicitly told a brown-bag lunch gathering of the entire Voting Section that the administration would not enforce the list maintenance provisions of Section 8 of the National Voter Registration Act ("NVRA").[26] The purpose of Section 8 is two-fold: its list-maintenance provisions place an affirmative duty on jurisdictions to ensure that persons ineligible to vote in the jurisdiction no longer appear on its rolls (for example, those who have died) and its notice provisions set forth certain notice requirements that are to be followed by the jurisdiction in order to legally remove persons from its voter registration list.

During the Bush Administration, the Division had begun filing suits in states with jurisdictions maintaining voter registration lists with more names than actual, eligible voters in those jurisdictions and that had not scrubbed their roles in many years. When the Election Assistance Commission in 2009 identified eight states in which no voters had been removed from the rolls in over two years, an indicator of problems with the states' voter registration

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[22] Transcript, Testimony of Thomas Perez, Hearing of the U.S. Commission on Civil Rights 37, 63-64 (May 14, 2010), at http://www.usccr.gov/NBPH/05-14-2010_NBPPhearing.pdf.

[23] *Id.* at 64.

[24] Letter from Chairman Gerald A. Reynolds to Assistant Attorney General for Civil Rights Thomas Perez (July 14, 2010), at http://www.usccr.gov/NBPH/GARtoTP_07-14-10.pdf.

[25] Letter from Assistant Attorney General for Civil Rights Thomas Perez to Chairman Gerald A. Reynolds (Aug. 11, 2010), at http://www.usccr.gov/NBPH/AR-M620U_20100811_173009.pdf.

[26] Fernandes was heard saying, "We have no interest in enforcing this provision of the law. It has nothing to do with increasing turnout, and we are just not going to do it." Testimony of Christian Adams at 64; *see also* Testimony of Christopher Coates at 33-35.

list maintenance efforts according to Mr. Coates, he sought permission from the Department to conduct investigations in those states. He never received it, nor was permission granted for such investigations after he left his post as Voting Section Chief. He attributes that fact to Ms. Fernandes's directive having been followed.[27] In fact, the new Division authorities dropped a solid case—*United States v. Missouri*[28]—filed under the Bush Administration to enforce such list maintenance provisions against the habitually non-compliant state of Missouri. As Commissioner Heriot similarly notes in her concurring statement, if the dual purpose of the NVRA is to increase turnout (a priority typically emphasized by Democrats) while also requiring jurisdictions to maintain accurate rolls to prevent the opportunity for voter fraud (a priority typically emphasized by Republicans), it seems the Division under new leadership was not terribly concerned with the latter. By severing these provisions from one another, once-neutral enforcement of the NVRA becomes enforcement (or non-enforcement, as in this case) targeted for partisan advantage.

The Department declined to allow Ms. Fernandes to answer questions about these allegations herself when it ultimately refused to honor the Commission's subpoena for her appearance.[29] For her part, when asked directly by reporters, Ms. Fernandes declined to comment.[30] Because the Department has never acknowledged the statements attributed to Ms. Fernandes and has not released her to testify, the Commission lacks even basic information as to whether the Department conducted any investigation into the matter. Likewise, if Ms. Fernandes did make the statements attributed to her, the Commission has no knowledge of any steps taken by the Department to ensure that members of the Civil Rights Division do not operate under the impression that the race of violators or victims is a permissible factor in determining whether it should investigate or bring civil rights cases or that the Division is entitled to exercise its prosecutorial discretion in a way that abuses the intent of Congress by not enforcing carefully crafted laws like the NVRA aimed at carefully balancing partisan interests.

II. The Department's Questionable Dismissal of the Meritorious New Black Panther Party Case

The Commission's interim report chronicles in detail the 2008 Philadelphia polling place incident wherein two men dressed in paramilitary garb, one of them brandishing a night stick, positioned themselves at the entrance to a polling place shouting racial slurs at various individuals. The individual with the billy club (King Samir Shabazz) tapped it in his hand

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[27] Testimony of Christopher Coates, *supra* note 10, at 36.

[28] 535 F.3d 844 (8th Cir. 2008).

[29] In a letter dated November 12, 2010, the Department claimed it was prepared to offer the testimony of Julie Fernandes, Loretta King, and Steven Rosenbaum, but with limitations and on conditions that would have rendered such testimony meaningless to the Commission's investigation. Letter from Jody H. Hunt to David Blackwood (Nov. 12, 2010) (on file with the Commission, Office of the General Counsel). The Department subsequently withdrew its offer to have the witnesses testify.

[30] When *Washington Post* reporter Jerry Markon asked the Justice Department several times if Fernandes made the comments attributed to her, its response to him, which he noted did not actually answer the question, was to say that "its policy is to enforce the laws equally, without regard to race." When asked directly, Markon noted, Ms. Fernandes declined to comment. Jerry Markon and Krissah Thompson, New Black Panthers case: Voter intimidation at Philadelphia voting location in 2008, Live Q & A, *Wash. Post*, at http://live.washingtonpost.com/black-panther-party-10-22-10.html.

menacingly, according to eyewitnesses. The men were members of the New Black Panther Party for Self Defense—a recognized racial separatist hate group. During the waning days of the Bush Administration, the Civil Rights Division's Voting Section filed a civil suit in the case against the two men, the Chairman of the New Black Panther Party, and the Party itself for violations of Section 11(b) of the Voting Rights Act, which prohibits voter intimidation and attempted voter intimidation. The defendants in the case failed to appear to defend themselves, essentially admitting liability. Despite the court's entry of a default in DOJ's favor, in May 2009 the Department, under new management as the result of the 2008 presidential election, abruptly reversed course in the case. It dismissed the charges against all but one of the defendants and as to the remaining defendant, significantly weakened the original sanctions it sought against him. In its notice of dismissal, it cited as its rationale only that the defendants failed to appear and respond.[31]

Unlike other instances of intimidation or attempted intimidation, this incident was captured on videotape. It was broadcast widely on Election Day and in the days following by various media outlets. A quick look at just one of the numerous You Tube entries featuring this video shows that it has been viewed well over a million and a half million times. Since CRD is the primary entity charged with enforcing voting rights laws, including prohibitions against voter intimidation, one might expect the Department to swiftly address such a highly-visible affront to the sanctity of the polling place. Part of its goal in doing so would be to foster broader compliance with the voting rights laws. Instead, it did exactly the opposite.

The highly visible nature of the incidents giving rise to the case, the Department's curious and sudden reversal, the timing of the reversal, and the case's relationship to the Commission's core function of appraising federal laws and policies with respect to voting rights, caused it to pique this Commission's curiosity. We were concerned at the outset—and most of us remain so—about the signal the Department's treatment of the NBPP case might send to future would-be violators. Most of us assumed that the Department had either come across additional evidence that warranted the case's near-total dismissal that it would share with us or that it would reconsider its position and re-file the case against all four defendants in response to our inquiries.

We could not have been more wrong. Instead, what the Commission got in response to its initial letters was a series of shifting and odd rationales for why the reversal had occurred and subsequently why it would not provide the information the Commission requested to get at the legal and policy standards it applied in reversing course. The Department's public rationale was that it pursued the course that it had because the defendants failed to respond to the lawsuit. In a response to one of the Commission's early letters of inquiry, it then claimed that the "facts and the law" supported its dismissal. But in my questioning of Mr. Perez, he admitted that the Department adduced no new facts in the

[31] In our earliest letters of inquiry to then Acting Assistant Attorney General for Civil Rights, Loretta King, we noted the peculiarity of this rationale and its tendency to send the wrong message entirely to would-be violators "that attempts at voter suppression will be tolerated so long as the groups or individuals who engage in them fail to respond to the charges leveled against them." Furthermore, we were troubled by the fact that the rationale would "equally support dismissal of all claims in this case, not just the dismissal against some defendants." U.S. Commission on Civil Rights Letter to Loretta King (Jun. 16, 2010), at http://www.usccr.gov/correspd/VoterIntimidation2008LetterDoJ.pdf.

case between the time it notified defendants that it would file a motion for default judgment and when it then filed for an extension of time with the court to do so, only to voluntarily dismiss most of the case.

The "facts and the law" cited to justify the reversal included the following: (1) that it might be difficult to win a motion for default judgment in the case; (2) that the Department did not have a robust history of utilizing Section 11(b) of the voting rights act before; (3) that defendants had significant First Amendment interests that needed to be balanced against the Department's interest in enforcing the voting rights laws; (4) that any calls by the NBPP for its members to appear at the polls were not accompanied by directives for them to appear at those polls armed; (5) that the Party's post hoc denunciation of its members' conduct was sufficiently indicative of the Party's lack of complicity; (6) that Mr. Jackson—whose conduct differed from billy club-wielding King Samir Shabazz's only in that he did not carry a weapon—was a resident of the building wherein the polling place was located and so was entitled to be there (an assertion that turned out to be false—he did not live at the assisted living facility that was the site of the polling place); and (7) that the local police who responded to complaints about the presence of the NBPP members at the polling place permitted Mr. Jackson to remain at the polling location because he was a credentialed Democrat party poll watcher. One or more of these talking points has been repeated by members of the press, defenders of the Department's actions, and sadly, some members of our own Commission, to justify the Department's reversal.

Each of these defenses fails upon closer scrutiny and I direct readers to the concurring statement of Commissioner Heriot, in which I join, where she eviscerates some of the most egregious. Equally ineffective are suggestions that there is no evidence that voters were turned away from the polls. Commissioner Heriot addresses this point effectively as well, so I note only the obvious point that the Commission heard testimony from eyewitness Christopher Hill that directly contradicts this assertion. Again, even Commissioner Yaki, this investigation's fiercest critic, concedes that intimidation likely occurred.

After the dust settles, we are left with the impression that the NBPP dismissal was about something more than "career people disagreeing with career people," despite what Mr. Perez claimed. Former Acting Associate Attorney General Greg Katsas testified that the political leadership of the Department would have to have been consulted in the case of such a dramatic reversal, especially given the change in presidential administrations, which would have raised significant institutional interests for DOJ:

> In contrast [to the decision to bring the case], the decision at the end of the case would have been anything but straightforward. They amounted to nothing less than a decision by DOJ, following a change in presidential administrations, to reverse legal positions asserted in a pending case. Such reversals are extremely rare—and for good reason: they inevitably undermine DOJ's credibility with the courts, and they inevitably raise suspicion that DOJ's litigating positions may be influenced by political considerations. Accordingly, while a new Administration obviously has wide discretion to change its enforcement priorities and even its litigating positions in new cases,

it is extremely rare for DOJ to shift course so dramatically in the course of a pending case.[32]

I agree with Commissioner Heriot that the involvement of political appointees in the ultimate disposition of this case is not in and of itself the issue, though I do find it curious that in his testimony before the Commission, Mr. Perez seems to have gone to great lengths to attribute the decision to career people without acknowledging the role of high-level political appointees in the decision-making.[33]

What is problematic is that after dispensing with all of the non-credible explanations proffered for why the case was dismissed, the only plausible explanation pointed to by the evidence is the culture of hostility to the race-neutral enforcement of civil rights laws alleged by Adams, Coates and others. If this is not the case, the Department would have every motive to cooperate fully with this Commission's investigation. Instead, it has sought to thwart it at multiple turns.

III. Stonewalling of the Commission's Investigation by the Department of Justice

Both the interim report and Commissioner Gaziano's concurring statement, in which I join, have done a thorough job of chronicling the extraordinary lengths to which the Department has gone in withholding vital information from the Commission in hindrance of its investigation and in violation of the Congress command that it "cooperate fully" with the Commission. I will not recount all those circumstances here, except to note some of the many times where the Commission sought in good faith to find common ground with the Department over the discovery disputes and was met with bad faith in return.

For example, the Department prevented subpoenaed officials from appearing for their depositions and hearings even though it had previously supplied witnesses to the Commission in other voting rights related hearings.[34] Over a two month period, it refused no less than five separate requests regarding whether it would release Department personnel to testify with regard to the New Black Panther Party litigation saying only that it would "continue[] to evaluate the Commission's requests."[35] It instructed Coates and Adams that it would not enforce the Commission's lawful subpoenas against them and repeatedly directed them not to testify. After a significant delay, it then declined to appoint a special counsel to enforce the Commission's subpoena request, despite its obvious conflicts of interest.

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[32] Prepared Testimony of Gregory Katsas, Hearing of the U.S. Commission on Civil Rights (Apr. 23, 2010), at http://www.usccr.gov/NBPH/Katsas_04-23-2010.pdf.

[33] The privilege log obtained of Department communications related to this case by Judicial Watch show its political appointees heavily involved in discussions surrounding the ultimate disposition of this case.

[34] *See* Briefing of the U.S. Commission on Civil Rights, *DOJ Voting Rights Enforcement for 2008 US Presidential Election* (Jun. 6, 2008) (Mr. Coates, then-Acting Voting Section Chief, was permitted to appear before the Commission to discuss the Voting Section's preparations to ensure adequate election monitoring during the 2008 election cycle.).

[35] See Letter from David Blackwood to Joseph H. Hunt at 2 (Mar. 13, 2010), http://www.usccr.gov/correspd/03-30-10_DOJ-NPPP.pdf.

Furthermore, it maintained its refusal to allow Coates to testify even when the Commission took specific steps to try to accommodate some of its deliberative process privilege concerns. For example, the Commissione offered to limit its examination of subpoenaed witnesses to matters unrelated to NBPP case deliberation, i.e., whether high-level political appointees within the Department of Justice have enunciated a policy or tolerate a practice of enforcing certain civil rights laws in a racially discriminatory manner; whether high-level political appointees within the Department of Justice have enunciated a policy or tolerated a practice of not enforcing Section 8 of the NVRA; and whether there is pervasive hostility within the ranks of the Civil Rights Division toward enforcing the nation's civil rights laws in a color-blind manner. None of these matters is privileged. Again, the Department refused to fulfill its statutory obligations to cooperate with the Commission's investigation and produce the requested witnesses able to testify about these matters. Adams and Coates decided to testify despite the risk to their careers in order to correct inaccuracies in the testimony of Mr. Perez.[36] Mr. Adams resigned from the Department to do so.

When Commission staff offered to meet with Department personnel to discuss other possible discovery concerns so as to avoid extensive discovery delays over possible claims of privilege, the Department rebuffed the effort, with no such meeting ever taking place. Having rejected the opportunity to meet, the Department refused to provide any substantive response to the Commission's discovery requests relating to the New Black Panther Party litigation. It refused to identify the specific nature of the privileges it asserted and failed to provide the Commission with a requested log of items withheld, although it ultimately provided a similar log to Judicial Watch pursuant to a private lawsuit filed by the group. The Commission had to obtain that log from Judicial Watch, since the Department refused to provide it even after having turned it over in the private litigation.

IV. Conclusion

The United States Commission on Civil Rights and the Division are statutory cousins, tracing their beginnings to the same source—the Civil Rights Act of 1957. The central thrust of that Act was voting—it prohibited any interference with any individual's right to vote in a federal election, regardless of whether such interference was motivated by race or committed under the color of law—and it was adopted in the face of massive resistance in certain areas of the country to the promise of the Fifteenth Amendment. In furtherance of eliminating such impediments to the vote, the 1957 Act conferred on the Department of Justice, through the newly-created Civil Rights Division, the enforcement authority to seek injunctive relief from

[36] Transcript, Testimony of Christopher Coates at 9-10 ("Based upon my own personal knowledge of the events surrounding the Division's actions in the *Panther* case, and the atmosphere that has existed and continues to exist in the Division and in the Voting Section against fair enforcement of certain federal voting laws, I do not believe these [Perez's] representations to this Commission accurately reflect what occurred in the Panther case and do not reflect the hostile atmosphere that has existed within the Division for a long time against race-neutral enforcement of the Voting Rights Act"). Mr. Coates then noted that while he does not believe that Mr. Perez knowingly provided false testimony, Mr. Perez was not present in the Division at the disposition of the *NBPP* case and might not yet be fully aware of the long-term hostility to race-neutral enforcement within the Division. *Id.*

federal courts to prevent race discrimination in voting by both private individuals and voting authorities.

The right to vote free of interference, intimidation and coercion was perceived as a fundamental right that, once vindicated, would serve as the building block by which other rights could be secured. Voting rights thus lie at the very core of both the Division and Commission's historic mandates. In fact, data gathered by the Commission, in its earliest hearings in Alabama formed the basis for the Voting Rights Act of 1965, which included the voter intimidation provision—Section 11(b)—at the center of the New Black Panther Party case. The Division used its authority to seek injunctive relief as a powerful means of enforcing that Act. That the Department would decide to shy away from its distinguished history simply because the NBPP case involved New Black Panthers and not Klansmen seems to me a betrayal of that history and a decision fundamentally at odds with the spirit of the times in which the Division was founded, where color-blindness was a critical first principle.

Appraising federal laws and policies with respect to the equal administration of justice is also a part of the Commission's statutory charge.[37] From time to time, the Commission has had to exercise its responsibility as the "conscience of the nation" to prod enforcement entities like the Department to acknowledge where there are serious problems within its ranks that threaten its constitutional obligation to administer justice equally and without regard to factors like race. The evidence adduced by the Commission in its investigation thus far point to a culture within the Department hostile to the race-neutral enforcement of voting rights laws and the NBPP case dismissal appears, regrettably, to be a symptom of that broader culture.

[37] 42 U.S.C. § 1975a(a)(2)(B) ("The Commission shall make appraisals of the laws and policies of the Federal Government with respect to discrimination or denials of equal protection of the laws under the Constitution of the United States because of color, race, religion, sex, age, disability, or national origin, or in the administration of justice.").

B. DISSENTS

Statement of Vice Chair Abigail Thernstrom

New Black Panther Party Report:
Dissent of Vice Chair Abigail Thernstrom
December 19, 2010

I cannot support the majority report on the New Black Panther Party investigation.

This investigation lacked political and intellectual integrity from the outset, and has been consistently undermined by the imbalance between the gravity of the allegations and the strength of the evidence available to support such charges. Some commissioners offered serious, principled critiques of the process, and questioned the evidentiary record. Their views were contemptuously ignored by the commission's majority.

The majority charges that racial double standards govern the enforcement of the Voting Rights Act in the Holder Justice Department. If that can be convincingly demonstrated, it will be a grave indictment of this administration.

But that evidentiary showing awaits further investigation by the Department of Justice and Congress. I applaud that investigation, and hope that it will shed more light on this important question than the tendentious report provided by the commission's majority.

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Commissioner Arlan Melendez and Commissioner Michael Yaki
Regarding

Race-Neutral Enforcement of the Law?
Department of Justice and the New Black Panther Party
An Interim Report

December 12, 2010

INTRODUCTION:

The Commission's investigation into, and this Report concerning, the New Black Panther Party ("NBPP") have been a tremendous waste of scarce government resources. They have wasted our own resources at the Commission[1] but those of the Department of Justice as well. In addition to squandering time, money and attention, the majority has further squandered the reputation of the United States Commission on Civil Rights as it spent more than a year on an Ahab-like quest to hobble the Obama Administration[2] and to attempt to rehabilitate the disgraced record of the previous Administration's Department of Justice.

Our dissent does not attempt to make definitive claims about the motives or actions of the United States Department of Justice ("Department") past or present. We have no special insight into the hearts or minds of the people working at the Department. Where we differ from our colleagues is that we did not enter into this investigation having already made up our minds that there was wrong-doing by the Department. Therefore, we did not interpret all evidence in light of any foregone conclusions or ignore any evidence that flatly contradicted any conclusions.

We cannot prove, and do not bother to try to prove, that the Obama Administration is not rife with covert NBPP sympathizers. Since there are reasonable explanations for the Department's actions, we do not feel the need to adopt bizarre explanations that envision the Obama Administration doing favors for a black-supremacist group.[3] It will suffice for us to detail and explain the short-comings with the original case, as well as short-comings in how the case and the broader issue of civil rights enforcement were discussed in the Commission hearings and in this Report. It is in this light that our comments such as, "X should have been called as a witness," should be read. Since we did not approve of the investigation at all, we

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[1]Ryan J. Reilly, *Conservative Civil Rights Commission Spent $173K Exclusively On Black Panther Query*, TPMMUCKRAKER, Oct. 25, 2010. The figure cited in the article underestimated the cost to the Commission on account of Commissioner and Commissioner Assistant salaries not being included.

[2] Ben Smith, *A Conservative Dismisses Right-wing Black Panther 'Fantasies'*, POLITICO, Jul 19, 2010, ("My fellow conservatives on the commission had this wild notion they could bring Eric Holder down and really damage the president.") *available at* http://www.politico.com/news/stories/0710/39861.html

[3]J. Christian Adams, Pigford and New Black Panthers: Friends at DOJ, Dec. 2, 2010. ("Did Perrelli's zeal to have the case dismissed have anything to do with the New Black Panther's endorsement of candidate Obama during the primaries?") *available at* http://biggovernment.com/jcadams/2010/12/02/pigford-and-new-black-panthers-friends-at-doj/

would rather that no witnesses had been called. However, since an investigation was going to be done over our objections, it should have been done in a fair. thorough, and impartial manner.

Our dissent should also not be read as a defense of the NBPP. The NBPP is a hate group whose views are as ugly as they are outlandish. We would not even bother to include this disclaimer were it not for the fact that a good deal of this Report relies on sources who maintain absurd beliefs in the out-sized significance and influence[4] of what is in reality a tiny fringe group. Among the many ironies surrounding this NBPP hullabaloo is the fact that the NBPP's exaggerated sense of its own importance (or menace) and its conspiracy theory mentality is matched (or even exceeded) by the Commission's majority and its ideological allies in the news media and in government. A further irony is the fact that, but for the constant promotion of this partisan investigation by FOX News and the USCCR, the NBPP might well have vanished into even further obscurity these last two years. We must posit that the USCCR majority has given the NBPP more media attention than it ever could have garnered or purchased on its own.

I. The Philadelphia Incident

Byman & Fischetti

Despite the presence of a videographer and multiple eye-witnesses, the details of what actually took place at the polling place at 1221 Fairmont Street in Philadelphia on Election Day 2008 remain unclear to this day. The original Justification Memo ("J Memo") sketches out a rough account of the events. Roving Republican poll monitor Wayne Byman was apparently the first person to note the presence of the NBPP members outside the polling place.[5] The J Memo suggests that Mr. Byman did not speak to the NBPP members, but merely reported their presence to another Republican poll watcher, Joe Fischetti.[6]

We were unable to question Mr. Byman about his experiences on Election Day 2008 because he was neither deposed nor called as a witness at a Commission hearing. We believe this to be at odds with the Report's claim that, "[t]he Commission attempted to interview and take the deposition of as many people as it could locate who were identified as having been

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[4]Christian Adams "Friends in High Places" http://biggovernment.com/jcadams/2010/12/02/pigford-and-new-black-panthers-friends-at-doj/

[5]12-22-08 J Memo, p. 5.

[6] In his questioning of Larry Counts, General Counsel Blackwood mentions a conversation he, Mr. Blackwood, may have had with Mr. Byman, in which the latter claims to have spoken to Mr. Counts. Larry Counts Deposition, p. 18. In a series of email exchanges prior to the drafting of the J. Memo, Christian Adams expresses the importance to the case of finding an African-American poll-worker who was harassed, as well as his inability to find any. He mentions believing that he thought he knew someone who was an African-American Republican who had been harassed by the NBPP, but having interviewed that person he was mistaken. It seems likely that the person Mr. Adams spoke to was Wayne Byman. See, DoJ Doc. Request #29, p. 144-45. ("Under the Statute, a black poll watcher for you being abused or insulted is critical, and thus far, I don't have one. I thought it was [redacted], but we interviewed him and it wasn't.") Since we have no record of any conversations with Mr. Byman and the account of his contact with the Counts is at odds with both the Mr. Adams's e-mails, the J. Memo's account and Mr. Counts's sworn statement, we can only repeat that it is unfortunate that the Commission did not see fit to call Mr. Byman as a witness.

at the polling site."[7] Unfortunately, Mr. Byman was not the only person who was clearly identified as having been at the polling site whom the Commission failed to use as a witness for this Report.

The J Memo notes that Joe Fischetti was the next Republican poll watcher to arrive on the scene.[8] According to the J. Memo Mr. Fischetti saw the Panthers and also spoke to Larry and Angela Counts, whom he identified as Republican poll watchers. According to the J Memo, the Countses expressed their fear of the Panthers to Mr. Fischetti. Also according to the J Memo, Mr. Fischetti claimed that the Countses were hiding inside the polling place out of fear of the Panthers.

We cannot confirm whether the J Memo accurately reflects Mr. Fischetti's account or even whether Mr. Fischetti's account accurately reflects the events that took place. This is because the Commission also failed to depose Mr. Fischetti or call him as a witness to one of the Commission hearings. The J Memo merely states in a cursory manner that Justice Department employees subsequently questioned the Counts and that the answers given in this subsequent interview corroborated Mr. Fischetti's account. As this Report notes, the account of events in the J Memo differs sharply with the account of events described in the Commission's depositions of Mr. and Mrs. Counts.[9]

Angela & Larry Counts

This Report infers that the discrepancy between the J Memo's account and the sworn statements that the Counts made to the Commission were due to the Countses' persisting fear of the NBPP. We cannot say whether this is the case or not. We wish only to note other outstanding issues regarding the differing stories about the Counts' experiences on Election Day.

The first issue is that the DoJ employees who interviewed the Countses, J. Christian Adams and Spencer Fischer, failed to learn that the Countses were not actually Republicans, but were in fact registered Democrats.[10] Their purpose for working as poll watchers for the Republicans was not political or ideological, but rather that it was an easy job for which each would be paid $200 (plus some free meals) for remaining inside the polling place for the entire day. The failure on the part of the litigation team to uncover this very basic and significant fact about Mr. and Mrs. Counts is perhaps the result of the rushed nature of the trial team's investigation, which we will discuss at greater length later. Furthermore, the actual Party status of Mr. and Mrs. Counts raises doubts about the narrative that the trial team and some of its witnesses provided.[11]

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[7] Report, p. 11.
[8] 12-22-08 J. Memo, p. 5.
[9] Report, p. 10-11.
[10] Angela Counts Deposition, p. 4; Larry Counts Deposition, p. 5-6.
[11] In the exchange of emails noted above, Mr. Adams repeatedly stresses how crucial it was for him to substantiate rumors that the NBPP harassed a Republican poll worker or workers and called him/them "race traitor(s)." See, *supra* note 6 ("Under the Statute, a black poll watcher for you [Mike Roman, a Republican political consultant] being abused or insulted is critical, and thus far, I don't have one") The vagueness in the

Another is issue is how, when, or even whether, the NBPP might have had contact with the Countses. In none of the documents available to the Commission is a time of arrival for the NBPP members even proposed (much less confirmed).[12] According to Mrs. Counts' deposition, she and her husband arrived at 6:00 a.m. and no one, was at the polls, including the NBPP members.[13] The Countses testified that from that point on, until the end of the day, they remained inside the building. No witness has reported seeing the Countses outside of the building, nor did any witness allege that either of the NBPP members entered the polling place.

While it is true that some witnesses have alleged that the Countses were frightened by the NBPP members, none of these witnesses have provided an account of when and how the Countses supposedly were threatened. The J Memo's account of the interview of the Countses does not make it clear whether the Countses theoretically were afraid of the NBPP because they themselves were threatened by the NBPP members, or whether they were concerned about the alleged threat of white supremacists, or whether they thought that the NBPP members might cause some sort of disturbance into which the Countses might be inadvertently drawn. Inasmuch as the DoJ interviewers were convinced that the Countses were Republicans (or were desperate for them to be Republicans), and so failed to establish that the two were actually Democrats, it is also appropriate to note that the interviewers also failed to correctly establish, what, if anything, transpired between the Countses and the NBPP and what the former might have been concerned about on Election Day.

The J Memo mentions that Mrs. Counts had wondered whether someone might "bomb the place."[14] It is somewhat difficult to understand where this idea of bombing the place might have come from. Despite their violent rhetoric and penchant for displaying weapons in public, it is difficult to conceive that anyone would think that the NBPP had an interest in bombing a building or a polling place in an overwhelmingly African-American neighborhood. Perhaps the mention of a bombing was somehow associated with the rumored white supremacists whom the NBPP claim were at, or were going to be at, the polling place. However improbable the claim was that white supremacists were going to show up at the Fairmount St. polling place might be, there is at least an internal logic (and historical precedent) for a fear that white-supremacists might target groups of African-Americans with explosives, as opposed to black-supremacists doing so.

Lastly, no account has been provided as to how the NBPP members supposedly concluded that the Countses were either Republicans or were at least working for the Republican Party, if in fact they had contact with the Countses at all. Some have argued that the NBPP was attempting to bully those whom they "apparently believed did not share their

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chronology and what was said to whom (if anything), is only marginally resolved in the J. Memo that prepared shortly thereafter the noted email exchange.

[12] In DoJ Doc. Request #3, p. 6, the police incident report lists 10:40am as the time the officers intervened at the Fairmount St. polling place.

[13] Angela Counts Deposition, p. 6-7.

[14] J Memo, p. 6.

preferences politically."[15] It is not clear how this motive on the part of the NBPP was ascertained or how members of the NBPP would act, or did act, on this motive.

This is especially true in light of the fact that NBPP is a radical political organization and that some of its members—including Minister King Samir Shabazz—believe that President Barack Obama is "a puppet on a string""[16] If Mr. Shabazz believed that then-Senator Obama was going to be "the next slave master,"[17] what bearing would this have on Mr. Shabazz's alleged efforts to intimidate Republican poll-workers? The explanation seemingly embraced by the trial team was that the Countses were Republicans and the NBPP members were Democrats. Unfortunately for the majority, this explanation is at odds with the facts. Perhaps, had the trial team investigated the case more thoroughly, it would have avoided these erroneous conclusions.

Mauro, Hill & Bull

At some point after Mr. Fischetti left the polling place, Mike Mauro and Chris Hill arrived at the Fairmount St. Polling Place.[18] The record is ambiguous as to the order of events which took place after the men's arrival on the scene. The declarations which these men provided the trial team make no mention of people whom they believed to be voters stopping in front of or turning away from the polling place.[19] As a result, it is difficult to establish whether these alleged would-be voters were noticed and spoken to by Mr. Mauro and Mr. Hill either before or after Mr. Hill confronted the NBPP members and entered the polling place.

It is unclear why none of the declarations concerning alleged voter intimidation by the NBPP make any mention of the people whom Mr. Mauro and Mr. Hill claim to have seen be intimidated by the NBPP presence. The J Memo mentions that Mr. Mauro and Harry Lewis observed people they assumed to be voters stop before entering the polling place.[20] No mention of Mr. Hill's[21] or Bartle Bull's[22] similar stories are mentioned in the J Memo. The absence of these additional allegations of instances of intimidation is puzzling. In crafting a

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[15] DoJ Doc. Request #23, p. 10. (Declaration of Bartle Bull). Mr. Bull, in his declaration, states that the views of the NBPP members were "made apparent by the uniform" that the two were wearing. Inasmuch as Mr. Bull seems to have read an endorsement of Candidate Obama, for instance, into the uniform of King Samir Shabazz, it would seem the message the uniforms were meant to convey (if any) was ambiguous. The J. Memo also attributes to the NBPP members a desire to intimidate voters into supporting their preferred candidate. J. Memo, p. 11.

[16] See generally, the Anti-Defamation League's account of the NBPP: http://www.adl.org/main_Extremism/new_black_panther_party.htm?Multi_page_sections=sHeading_5

[17] Id.

[18] They were accompanied by an additional attorney-poll watcher, probably named Justin Myers. J. Memo, p. 6. For reasons undisclosed to me/us, Mr. Myers was not called to testify at our hearing, despite the fact that he was identified as an eye-witness on the scene. Another attorney-poll watcher named Harry Lewis was also on the scene. It may have been Mr. Lewis who had arrived with Hill & Mauro, and Mr. Myers arrived with videographer Stephen Robert Morse—or Morse may have arrived with a different man. The record is not clear and neither the J. Memo nor the Commission's investigation bothered to clarify.

[19] See DoJ Document Request #23, p. 6-12.

[20] J. Memo, p. 6.

[21] 4/23/2010 Hearing, p.97-99.

[22] Id., p.99.

justification for a voter intimidation case, one would think that including every credible witness statement concerning intimidated voters would strengthen the argument. Perhaps the absence was due to concerns about the credibility of some of the claims, or perhaps it might simply be due to the trial team having failed to ask all the witnesses about supposedly-intimidated voters as it moved in undue haste to put to the case together.

Also unclear from the record is what happened between Mr. Hill and the NBPP members. In his declaration,[23] Mr. Hill states:

> When I attempted to exercise my rights as a credentialed poll watcher, and enter the polling place, the two men formed ranks and attempted to impair my entrance into the polling place. They formed ranks by standing in such a way to make them a significant obstacle to my entrance . . . . I was forced to avoid their formation in order to enter the polling location. I did not make physical contact with either of them.

In the first segment of the video shot by Stephen Robert Morse, the two men do appear to be standing close together, although it would be a stretch of the imagination (or a lack of familiarity with military formations) to claim that they were in any sort of "formation"—at least at the time the video had recorded.

This account of the NBPP "forming ranks" and thereby forcing Mr. Hill to go around them, even if credible, is at odds with the account that he provided to FOX News's Rick Leventhal[24] as well as the account that he provided to the Commission: "[H]e and Mr. Jackson attempted to close ranks. I went straight between them through the door to find our poll watcher."[25] At a later point in the hearing, Mr. Hill describes his encounter with the NBPP thusly, "Not on my watch, ma'am. I was standing there. I saw these guys. They attempted to intimidate me. I'm Army Infantry. I don't intimidate."[26]

It is impossible to determine, based on our scanty and gap-laden record, whether Mr. Shabazz was immediately hostile to Mr. Hill and others, or whether Mr. Shabazz's invectives came as a result of Mr. Hill walking in between Mr. Shabazz and Mr. Jackson while the two NBPP members were standing "shoulder to shoulder, or close to shoulder to shoulder." [27] Mr. Hill stated that his encounter with the NBPP, in Mr. Hill's words, "got my Irish up."[28] The timing of events is, of course, important, since any instances of would-be voters pausing or turning away from the polls might have been a result of Mr. Hill storming between the

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[23] See DoJ Document Request #23, p. 7.

[24] http://www.youtube.com/watch?v=94b78rnWMP4&feature=related ("As I walked up they closed ranks next to each other—you know, I'm an Army veteran. That doesn't scare me—So I walked directly in between them and went inside.") Mr. Hill goes on to tell Mr. Leventhal that after he left the building, Mr. Shabazz turned to Mr. Hill and said, "We're tired of white supremacy." Considering Mr. Hill's confrontational tactics, this remark by Mr. Shabazz might have been based less on a generalized hatred of white people and more in response to Mr. Hill's provocations."

[25] 4/23/2010 Hearing Transcript, p. 47.

[26] Id., p. 98.

[27] Id., p. 33.

[28] Id., p. 109

NBPP members and the resulting fracas that ensued. Mr. Hill himself mentioned that the unidentified female poll watcher in the video claimed that it was Mr. Hill, and not the NBPP, that was intimidating voters.[29]

Unfortunately, the videographer, Mr. Morse, was not yet present on the scene in time to record any of the Republican poll watchers' interactions with the NBPP or with members of the public. The only video footage that the Commission received that is not publicly available, and that records the actions of Republican poll watchers, comes from a longer version of the video that shows the police arriving at Fairmount Street.[30] In the video edited and released by Election Journal, the police arrive, they approach the NBPP members, and then they order them to step away from the polling place. The video fades as the police officers and the NBPP members walk over to the police car.

The longer cut of the video was given to the Commission as part of its document requests from DoJ. In the video, the cell phone camera continues recording after the police begin to walk the NBPP members to their police car. Mr. Morse tries to follow the police, but almost immediately one of the officers turns to the camera and points while saying, "You stay over there." Someone off-screen, to Mr. Morse's left, says, "I got him, I got him," to the police officer. Someone then, seemingly Mr. Hill (although the audio is poor and the voice is coming off-screen) says, "Put it [the camera] down. You've got enough." The screen begins to shake, and to Mr. Morse's right, Bartle Bull is heard to shout, "Don't you threaten him with your hands. You're threatening him."

At this point the person to the left says, "Put the phone away." Mr. Bull, shouting even louder than before, says, "Don't you use your hands!" At this point, the person seems to have tried to grab Mr. Morse's arm or phone as the image on the screen moves erratically and Mr. Morse excitedly or fearfully exclaims, "I'm a [expletive] professional videographer. I was paid [unintelligible] to come from L.A. today."

The person to Mr. Morse's left seems to back away a bit and one can now see his arm and part of his shirt, which resemble the shirt that Mr. Hill is wearing earlier in the same video. The person who seems to be Mr. Hill says, "That's enough, you're gonna cause us more issues." To which Mr. Morse replies, "No I'm not!"

At this point, there is much cross-talk between the three of them. Also, at least two other voices from off-screen. Someone says, "We're on the same team." Mr. Morse says, "I work for Joe." One or two speakers are continuing to tell Mr. Morse to stop recording. One of them says, "You're [expletive] up the story. Don't [expletive] up the story." Shortly thereafter, Mr. Morse says to his interlocutors, "You guys are lawyers, I'm a videographer."

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[29] Id., p. 53 ("And all I heard her say was, 'The white guys in suits are trying to stop people from voting."). In the video footage that records the police arrival, the same woman can be heard saying to the police with regards to the NBPP members, "They're not stopping anybody." *Available at* http://www.youtube.com/user/ElectionJournal#p/f/4/IFOKnJ0oXYY

[30] 4/16/10 DoJ Documents, Bates No. 0002177. For reasons never shared with us, this polling place video was not screened as part of the video evidence presented at the first NBPP Hearing, despite the fact that several witness were featured in the video.

To which Mr. Hill responds, "And I'm the ..." at which point he plays a brief recording of a bugle reveille. After a few more seconds, the clip ends.

Bartle Bull

As mentioned above, Mr. Bull's declaration makes no mention of his seeing people whom he thought were voters turning away at the sight of the NBPP members. The reason for this omission, as with the same omission in all of the other declarations, is unspecified in the record and unfortunately remains unclear.

As with Christopher Coates' testimony in this matter, much has been discussed both in the news media and in this Report concerning Mr. Bull's history of association with liberals and liberal causes. Particular emphasis has been given to Mr. Bull's time campaigning in Mississippi during the latter days of Jim Crow. In light of his experience, we are troubled by Mr. Bull's characterization of the 2008 Philadelphia incident as being worse than anything he had ever seen in Mississippi in the 1960s.[31]

Even if the NBPP actions in 2008 had lived up to the claims of the DoJ trial team, they would still be negligible when compared to the persistent fear and intimidation that millions of African-Americans endured for decades in the Deep South. Even if one were to give a narrow reading to Mr. Bull's claim, that is to say that he is comparing what he saw, in person, with his own eyes,[32] in Philadelphia, Pennsylvania, to what he saw in Midnight, Mississippi, the comparison still falls short. As Mr. Bull noted, in Midnight, Mississippi, white supremacists had left nooses hanging from trees and Mr. Bull had required that the vote be stopped until the nooses were removed.[33]

Additionally, Mr. Bull claimed that the NBPP uniforms had a clear and obvious link to the Fascist uniforms of the 1930s that would be readily apparent to the viewer. Leaving aside the fact that it is far from clear how many people in the contemporary United States would immediately recognize the uniform of the Italian Fascist Party (as opposed to Klan robes or even Nazi uniforms), in actuality, there is little in the NBPP uniform that even resembles the Italian Fascist outfit aside from the color of their respective shirts. A further irony, of course, is that Jerry Jackson and Minister King Samir Shabazz are themselves not even wearing exactly the same outfit.[34]

Lastly, there is great irony in Mr. Bull's having crossing paths with Mr. Shabazz on Election Day 2008. Mr. Bull stated that his motive for visiting polling places in Philadelphia in 2008 was a fear that hordes of fraudulent voters under the auspices of the Association of Community Organizations for Reform Now[35] would be trying to steal an election for a man

[31] 4/23/2010 Hearing Transcript, p. 116.
[32] Id., p. 117.
[33] Id., p. 116.
[34] Mr. Jackson seems to be wearing a leather jacket while Mr. Shabazz appears to be wearing a jacket of a different cut, made of some kind of synthetic material.
[35] Id., p. 123.

whom Mr. Bull refers to as "a hustler."[36] Mr. Shabazz, on the other hand, allegedly showed up at the polls to ward off an equally questionable threat of Election Day disruption by members of the Aryan Nation.

Stephen Robert Morse

Although the Commission screened the first of Mr. Morse's videos that was hosted by the website Election Journal, the Commission failed to screen all of footage in its possession that Mr. Morse had recorded. The Commission also failed to depose Mr. Morse or to invite him to testify at any of our multiple hearings. As Mr. Morse was obviously both present at the polling place and readily identifiable, this omission is worth noting as further indication of the majority's pre-investigation bias. Since then, much of the commentary around the NBPP incident has pointed to the one minute of edited video as an almost self-evident display of poll-worker intimidation.[37]

Since this investigation—at least as initially conceived—was meant to focus upon the alleged incidences of intimidation at the Fairmount Street polling place, we believe that it might have been illuminating to ask Mr. Morse to compare the intimidation that he allegedly experienced from Mr. Shabazz with the alleged intimidation, apparently at the hands of Chris Hill, , witnessed by Bartle Bull in the video mentioned above. Such an inquiry might have better clarified what key witnesses considered "intimidating behavior," as well as who was in fact engaging in the supposed intimidation.

II. The Initial Investigation/Litigation

As Commissioner Yaki noted at the September 24th, 2010 hearing, the NBPP litigation bears many signs of having been terribly rushed, especially as compared with other voting rights cases.[38] Communications between J. Christian Adams and Republican operatives reveal that, less than two weeks before the creation of the J Memo, the trial could not establish even a basic outline of the events that took in Philadelphia. The trial team had found their desired defendants, but could not find any voters or poll workers who were reportedly intimidated by them.

Ultimately, it seems that the account of the events that the trial team settled upon was provided to them by Republican political consultant Mike Roman.[39] On December 11, 2008—eleven days before the J Memo was issued--Mr. Roman offered to provide Mr. Adams with a "definitive chronology" and informed Mr. Adams that he planned to "make

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[36] *Civil Rights Attorney on Accusations vs. DOJ*, FOX News, Jul. 1, 2010, *available at* http://video.foxnews.com/v/4267253/civil-rights-attorney-on-accusations-vs-doj/ (Mr. Bull raises the specter of 400,000 "ACORN voters" in this interview as well).

[37] Despite the fact that Mr. Morse clearly fails to identify himself as a poll-watcher for the Republican Party, and instead claims to merely be a student and concerned citizen. The other puzzling thing about Mr. Morse's situation is that although the J. Memo describes him as "scared to death," of the Panthers, it was Mr. Morse who confronted Mr. Shabazz (in broad daylight surrounded by poll observers with cell phones). J. Memo, p. 6.

[38] See, 9/24/2010 Hearing, p. 118-26.

[39] Mr. Roman is, among other things, the operator of the website that hosted Stephen Robert Morse's NBPP videos. http://www.electionjournal.org/new-about-page/

contact with each [Republican voter in the precinct] to determine if they felt any intimidation at the polling location."[40] Mr. Adams described Mr. Roman's offer to interview witnesses for him as "fantastic."[41]

Mr. Adams concluded one of his emails to Mr. Roman with a comment noting that, if correctly understood, might help to explain the thinking behind the hurried NBPP litigation. Mr. Adams states, "A concern some have stated is that if something isn't done about the panther deployment in 2008, then there is nothing to stop deployment of armed hate groups at polls in future elections."[42] There is ambiguity in the statement's reference to 2008—does it refer to the year of the incident or that "something" that needs to be done? Nonetheless, the general tenor of Mr. Adams's emails with Mr. Roman and others is that of haste. Therefore, the latter interpretation is the more likely.

Regardless of the statement's minor ambiguity regarding the date, it is the conclusion of the statement that is most puzzling. Why is the NBPP litigation the *only* thing that will stop armed hate groups from appearing at polls? Obviously, an injunction against the entire Party might serve to deter NBPP members or even members of similar organizations from appearing at polling places with weapons. Although, since presumably §11(b) is not going to be repealed, it stands to reason that the choice to bring or not to bring one case does not preclude future cases.[43]

The spirit that seems to be motivating this, "Now or never!" line seems to be the theory, advanced by Bartle Bull to Megyn Kelly,[44] that there's a slow-motion putsch going on in the U.S. wherein community organizing groups, like the now-defunct ACORN, set up a conspiracy involving hundreds of thousands of illegal voters, primarily in minority neighbors. These hundreds of thousands of illegal voters carry out their conspiracy thanks to the assistance of a nation-wide deployment of hundreds of Mussolini-inspired NBPP members, this in turn earns them "friends in high places" who ignore their conspiracy and instead reward them with undeserved riches.[45] This cycle was apparently supposed to

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[40] DoJ Doc. Request #29, p. 143.

[41] Id., p. 141. In light of allegations—discussed at length below—that the Department would allow local police to have so much sway over the NBPP case, it is interesting that the Commissioners who were concerned about the local police's role, did not question Mr. Adams about Mike Roman's role in the case.

[42] Id.

[43] For example as is noted in the Report, the Bush Administration did not bring a voter intimidation case against a Minutemen militia member bearing a gun in Pima, AZ. That did not prevent the Bush Administration from later bringing a voter intimidation case against the NBPP.

[44] *Civil Rights Attorney on Accusations vs. DOJ*, FOX News, Jul. 1, 2010, *available at* http://video.foxnews.com/v/4267253/civil-rights-attorney-on-accusations-vs-doj/

[45] J. Christian Adams, Pigford and New Black Panthers: Friends at DOJ, 12/2/2010. http://biggovernment.com/jcadams/2010/12/02/pigford-and-new-black-panthers-friends-at-doj/ Since leaving the Department, Mr. Adams seems to have made a career out of promoting conspiracy theories about a nexus between community organizers, the NBPP and the Obama Administration. He has done this both as a blogger and as a lawyer for the King Street Patriots, *see e.g., at* http://www.kingstreetpatriots.org/king-street-invites-doj-to-true-the-vote-poll-watcher-training, http://www.kingstreetpatriots.org/king-street-patriots-special-meeting-august-9th, Tea Partiers: Minority Voting Drive Is The New Black Panther Party, Ryan J. Reilly, October 20, 2010, http://tpmmuckraker.talkingpointsmemo.com/2010/10/tea_partiers_minority_voting_drive_new_black_panth.php I/

continue on with increasing numbers of illegal voters added to the polls and increased wealth given to them as rewards. The recent 2010 election cycle, that featured neither armed hate groups at polling places nor ever- greater electoral success for Democrats and their supposed allies, would seem to suggest that Mr. Bull's and Mr. Adams's theories may not be well-founded.

We did not get an opportunity to question Mr. Adams about the J Memo or any other matter, because the Commission majority scheduled his hearing during the week of the July 4th holiday on very short-notice. And, as was the case with so many other seemingly-important witnesses, Mr. Roman was also not called to testify before the Commission.

The J Memo

The J Memo is filled with errors and omissions which are most likely the result of its hasty drafting and the biases of its authors. This can be seen on its first page when it describes the NBPP as "a well organized and well known group." It is true that today, thanks to the efforts of FOX News and the Commission's majority, the NBPP is much better known than it was before Election Day 2008. Presumably, the reason that the J Memo calls the NBPP "well known" is in order to provide a pretense for the trial team's claim that voters would have recognized Mr. Shabazz and Mr. Jackson as members of the NBPP (and thereby immediately associate the two of them with disturbing NBPP beliefs—which are also not terribly well-known). The truth is that most people—including the voters of Philadelphia, are and were likely to share Larry Counts's surprise that the Panthers had not long ago died away.[46] Without the immediate association of their clothing with certain ideas—as would be the case with people in Klan robes or Nazi uniforms—one cannot claim that the NBPP non-uniform, uniforms would be objectively intimidating.

As for being "well organized," that too is a stretch. The J Memo makes much of the militaristic nature of the NBPP— a characterization which this Report further repeats and emphasizes. It is true that the NBPP fetishizes military rank and title, but that does not instantly confer organization and discipline onto a group. Anybody can pin four stars onto his collar. That does not transform him into a general.[47]

The best example of the lack of discipline and organization within the NBPP can be found in the argument used to establish liability for the Party and its Chairman. Statements were made by members of the NBPP, both before and after the election, of a plan to send

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We find it both noteworthy and troubling that Mr. Adams should seek to associate himself with the website Big Government, which traffics in deceptively edited videos, including one that purported to show an Obama Administration official admitting that she discriminated against white people while carrying out her duties. It was quickly discovered that in the longer, unedited version of the video, the official's remarks make it clear that she was speaking both of a period in time prior to her work in government and that the actions she took were not discriminatory against white people. Brian Stelter, *When Race Is the Issue, Misleading Coverage Sets Off an Uproar*, N.Y. TIMES, July 26, 2010, B1. Mr. Adams's willingness to associate himself with people who have a history of mendacious race-baiting severely undermines the credibility of his accounts of racial bias at the Department.

[46] Larry Counts Deposition, p.14.

[47] Report, p. 34.

NBPP members to polling places. The number of members who were alleged to be "deployed" (to use the militaristic term favored by the J Memo) was three hundred or more.[48] Aside from the two NBPP members present at the Fairmount Street polling place, there is no record of any other NBPP members present at any polling place anywhere in the country.

If the NBPP is a hierarchical organization, and a command was given by its chairman to several hundred of its members to "deploy" to polling stations around the country, and only two "deployed," that means that the chairman's deployment had a 99% failure rate. That does not sound "well organized." It is interesting that the trial team and the Commission's majority are willing, on the one hand, to conclude from the lack of evidence of white supremacists at Fairmount Street that there were no white supremacists present, and yet, on the other hand, the lack of an NBPP presence beyond the Fairmount Street polling place is not grounds for concluding the NBPP did not have a national "deployment" plan. This inconsistency underscores the inference that the majority knew what it wanted to believe before it had the evidence to sustain such perceptions.

The simpler and truer explanation is that the NBPP and its chairman are prone to making self-aggrandizing and self-promoting statements in order to get attention and to impress the easily impressionable. The reality is that they are a marginal group of black-separatists who could not manage to meet the membership standards of the Nation of Islam. The disproportionate attention that has been paid to this group in the last year grossly exceeds their importance. To treat them as a Menace to the Republic instead of racist buffoons playing "army," is to view them as they imagine themselves.

In addition to all of the J Memo's profusion of militaristic mischaracterizations of the NBPP members,[49] [50] the J Memo also badly inflates the evidence in the trial team's possession. Having failed to find *any* voter who claimed to have been intimidated, the trial team resorted to the argument that *all* voters had in fact been intimidated—as any citizen would be who had to "run a gauntlet of billy clubs in order to vote."[51] Perhaps to leave room

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[48] J. Memo, p. 7.

[49] In addition to the variations on "deploy," (e.g. "not . . . deployed askew the entrance") the J. Memo describes the Panthers as "standing athwart," "in formation" wearing a "well-recognized military-style uniform. J. Memo, pp. 3, 10-11. These military characterizations of the NBPP seem to have been credulously adopted by Mr. Adams from statements made by Chris Hill, just as Mr. Adams relied on Mr. Hill's attestation concerning the significance of Mr. Shabazz's lanyard. J. Memo, p. 3; 4-23-2010 Hearing, p. 47. The McElderry Memo, also notes the Mr. Adams's peculiar use of the word "deploy" in the injunctive relief. McElderry Memo, p. 5.

[50] The J. Memo also inaccurately describes Mr. Jackson's conversation with FOX News reporter Rick Leventhal. The J. Memo states that Mr. Jackson told Mr. Leventhal that "no one had ever been at the polling station with a baton." J. Memo, p. 4. When asked about the presence of the nightstick, Mr. Jackson says, "Nobody here has a nightstick." When challenged by Mr. Leventhal that there's was a man with a nightstick, Mr. Jackson makes clear that he was only speaking in the present tense, saying, "I don't care about what 'was.' I'm talking about what 'is.'" Although this is a minor point, the fact that the J. Memo cannot even accurately manage to paraphrase a simple conversation casts doubt on its thoroughness in other places. An example of this is the failure to distinguish the armed, epithet-spewing Mr. Shabazz from the silent, unarmed Mr. Jackson. Instead they are described as "armed, uniformed men . . . making racial slurs." J. Memo, p. 12. As discussed further below, the failure of the trial team to consistently and accurately characterize the two men in their writing might be a partial explanation as to why they found it shocking that upon review other lawyers saw fit to distinguish Mr. Shabazz from Mr. Jackson.

[51] J. Memo, p. 11.

for the possibility that there had been voters who were harassed by Mr. Shabazz (despite the lack of evidence to that effect), the memo states, "*Many* of the threatening actions and statements by the NBPP members were specifically directed at poll watchers."[52]

None of the witnesses who testified before the Commission and who were in Philadelphia on Election Day have claimed to have witnessed the NBPP members say anything, threatening or not, to any voter, of any race. The only Commission witness to have made such a claim was the Department's former Voting Section Chief, Christopher Coates. Mr. Coates testified, "They were hurling racial slurs, including to white voters, 'How do you think you're going to feel with a black man ruling over you?' at the voters."[53] These assertions are puzzling since they are at odds with all available evidence. The fact that Mr. Coates believes white voters were the target of racial slurs hurled by both of the NBPP members—despite the absence of evidence to this effect—might help to explain his anger at the Department's decision to drop its case against Jerry Jackson and his angry outburst against Steve Rosenbaum.[54]

The Default

There is little to say about the default other than to note in passing that the Report finds it "particularly curious" that the NBPP failed to respond to the Department's lawsuit

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[52] Id., p. 12 (emphasis added). Note, the quoted passage attributes threatening actions and statements to both men. We do not dispute that Mr. Shabazz directed statements toward poll-watcher Hill, for example,, we simply wish to note that the evidence available only supports the claim that statement were only directed toward poll-watchers, and only by Mr. Shabazz.

[53] 9/24/2010 Hearing, p. 57.

[54] 7/6/2010 Hearing, p. 30. There seems to be a pattern of Mr. Coates' projection and supposed recollection of instances of white victimization. Mr. Coates claims that Robert Kengle said to him, "Can you believe we are being sent down to Mississippi to help a bunch of white people?" Id., p. 105. Mr. Kengle, in an sworn declaration sent to the Commission, denies that he said, "to help a bunch of white people." Kengle Declaration, p. 1. Mr. Kengle provides context for his comment to Mr. Coates, namely that there were many other potential cases which Mr. Schlozman and Mr. von Spakovsky were ignoring which Mr. Kengle believed were of relatively greater significance than the Ike Brown case. The race of the people involved was not what was of issue. Apparently Mr. Coates, like Mr. Adams, believes that race is always at issue in these decisions and any facially-justified explanations are mere pretense. Report, p.76 ("Adams testified: 'There was outrage that was pervasive that the laws would be used against the original beneficiaries of the civil rights laws. Some people said 'we don't have the resources to do this. We should be spending our money elsewhere.' And that was how they would cloak some of these arguments.'")

Unlike Mr. Adams however, Mr. Coates seems to believe he hears what Mr. Adams believes is only implied. For instance, concerning Julie Fernandes's alleged comment concerning "traditional civil rights," Mr. Adams describes her statement this way: "we were in the business of doing traditional civil rights work, and, of course, everybody knows what that means." 7/6/2010 Hearing, p. 62. In Mr. Adams' recollection, there was a meaning to Ms. Fernandes's statement which everyone understood (even if, like Mr. Adams, they disagreed with the implication), but it was subtext. In Mr. Coates's recollection, however, Ms. Fernandes explicitly told the audience what Mr. Adams said she only implied: "My recollection is that she used the term 'traditional types' of Section 2 cases and that she used the term 'political equality for racial and language minority groups.'" 9/24/2010 Hearing, p. 146.

It strikes us as unusual that Mr. Adams would say, "everyone knows what that means" in a case where Ms. Fernandes explicitly said what he thinks she implied. Had she explicitly proved Mr. Adams conjecture, no doubt he would have quoted her as having done so. Of course, the Commission was given the opportunity to ask Ms. Fernandes what she said. 11-12-10 Letter to Blackwood. However, the majority declined the Department's offer to allow Ms. Fernandes and others to come before the Commission. 11-15-10 Letter to Hunt.

despite the fact that Jerry Jackson and King Samir Shabazz were represented by a lawyer and Malik Zulu Shabazz is himself an attorney.[55] Based on the Commission's own unfortunate legal experience with Malik Zulu Shabazz and the ultimate non-responsiveness of the person purporting to have been representing the other two NBPP members, "disappointingly consistent" would seem to be a more accurate description of the phenomenon.

III. The Decision to Review

Members of the trial team and others claim that the Department's decision to review and reverse course in the NBPP litigation was unjustifiable and therefore based on impermissible motives and biases. Obviously, even if the review and reversal were completely justified—and we believe they were—it is impossible to prove conclusively that facially-justified actions were not taken for hidden impermissible motives. Because the stated justification for the Commission's investigation of the NBPP litigation was allegedly to look for an explanation for the review and reversal in the NBPP litigation (since the Commission's majority apparently found it inexplicable), it seems to us that offering a plausible account of the review and reversal is sufficient to satisfy what the Commission claimed it was interested in investigating.

The Obligation in Cases of Default

Critics of the Obama Administration inaccurately, yet loudly, claim that the Department had already "won" the case against the NBPP because the latter failed to respond to the suit, and that all that was left was to move for a default judgment against them. As made clear by the Assistant United States Attorney General ("AAG") Tom Perez however, the Department was under a greater and a continuing obligation:

> Although none of the defendants responded to the complaint, that did not absolve the Department of its legal and ethical obligations to ensure that any relief sought was consistent with the law and supported by the evidence. The entry of a default judgment is not automatic, and the Pennsylvania Bar Rules impart a clear duty of candor and honesty in any legal proceeding; those duties are only heightened in the type of ex parte hearing that occurred in this matter. See Pa. RPC 3.3(d). At the remedial stage, as with the liability stage, the Department remains obliged to ensure that the request for relief is supported by the evidence and the law. In discharging its obligations in that regard, the Department considered not only the allegations in the complaint, but also the evidence collected by the Department both before and after the filing of the complaint.[56]

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[55] Report, p.22, 40. Malik Zulu Shabazz seems to have an idiosyncratic view of his legal profession. He styles himself an "Attorney at War," Id., p. 129, and he also claims the title "Doctor" on account of possessing a "doctorate in jurisprudence" (i.e. a J.D.). See, *The Strategy Room* (Fox News Internet broadcast Nov. 7, 2009), *available at* http://video.foxnews.com/v/3917372/dr-malik-shabazz.

[56] Perez Statement, 5/14/2010. p. 5.

As we will discuss at greater length below, the Report contains many omissions and mischaracterizations of AAG Perez's statements to the Commission. The Report portrays the Department's internally initiated objections, review and subsequent handling of the NBPP default as mysterious.[57] AAG Perez's written statement provides many answers to questions regarding the objections, review and subsequent handling of the NBPP litigation. Despite the fact that AAG Perez provides answers to questions the Report purports an interest in, the Report does not cite AAG Perez's explanation. These omissions are telling. So long as the Commission's majority is willing to pretend that no answers have been offered, it can continue asserting that the Department is refusing to answer its questions.

Concerns about the Case

As has been noted above in our dissent and at the September hearing by Commissioner Yaki, the investigation and litigation concerning the Philadelphia incident proceeded much more rapidly than was typical of the Department's voting rights cases. This produced reasonable grounds for concern, as the development and analysis of fact and law might well have been cursory.[58] Added to that, as AAG Perez noted, the litigation was ex parte due to the NBPP non-responsiveness. Without active defense counsel examining the government's case, errors or omissions concerning fact or law—which might be more common than is typical due to the relative hastiness of the investigation and litigation—might go undiscovered. Lastly, due to the extraordinary politicization of the Civil Rights Division during the Bush Administration,[59] the long-time veteran career staff who were the acting-heads of the Division were properly suspicious of those hired or promoted during that period of politicization.[60] This is especially true of Christopher Coates, who was considered a

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[57] Report. p. 17.

[58] The best example of the legal inadequacy of the J Memo is that it makes no mention of possible First Amendment concerns. The McElderry Memo supports our contention that the J. Memo inadequately addressed serious questions concerning Party/Chairman liability and defenses arising from the First Amendment. We differ from the McElderry analysis only in that we believe it takes certain presumptions of the trial team for granted and as a result, draw the wrong conclusions. We shall discuss this further below.

[59] See generally; An Investigation of Allegations of Politicized Hiring in the Department of Justice Honors Program and Summer Law Intern Program, June 24, 2008, *available at* http://www.justice.gov/oig/special/s0806/final.pdf. An Investigation of Allegations of Politicized Hiring by Monica Goodling and Other Staff in the Office of the Attorney General, July 28, 2008, *available at* http://www.justice.gov/oig/special/s0807/final.pdf; An Investigation into the Removal of Nine U.S. Attorneys in 2006, Sept. 2008, *available at* http://www.justice.gov/oig/special/s0809a/final.pdf

[60] The Report's section discussing the Vacancies Reform Act serves no useful purpose in the Report—other than to provide a legal patina for the obviously, intentionally ambiguous references to "actions of DoJ political appointees." Report, p. 37-38. *See e.g.* Jennifer Rubin, *Friends in High Places*, WEEKLY STANDARD, June 12, 2010, *available at* https://www.weeklystandard.com/articles/friends-high-places. Rhetorically, "political appointees" is meant to connote high-ranking officials and perhaps suggest a political influence, while not having to commit to providing evidence regarding any particular official or level in the Department hierarchy.

Similarly, there was a bizarre focus in this investigation on whether there was an exercise of executive privilege and if so, who invoked the privilege. See, Report, p. 73-75. Since the invocation of executive privilege is a rare thing, there should not be a presumption that the privilege has been invoked and a burden on the Executive to affirmatively note when it is *not* invoking the privilege. This investigation—presumably since it aimed to "bring Eric Holder down" was strangely focused on this privilege that would require involvement from high-ranking officials or the President himself. Since the investigation presumed these officials involvement,

"true member of the team" by one of the people most closely associated with the politicization of that period.[61]

The Report attempts to portray and explain away the objections raised against the NBPP. Since we do not believe the Report's treatment of these objections are adequate to satisfy them, we shall explain how the Report—and the Department memoranda it relies upon—are flawed.

First Amendment

Where the remedial memo errs in its treatment of First Amendment issues is in its presumption that the attire worn by the two NBPP members was the "recognizable uniform of a hate group."[62] As discussed above, neither the NBPP itself nor its varied garb was common knowledge during the 2008 election. As a result, the mere fact that either NBPP member was dressed the way he was did not amount to an objective case of intimidation (and thereby avoid falling under the protection of the First Amendment).

Steve Rosenbaum seems to be of this opinion because (as noted in the McElderry Memo, the Front Office, "does 'not seek to enjoin the wearing of the NBPP uniform at the polls.'"[63] This is an important point that the Report omits. The Report merely states that the Remedial and McElderry memos argue, "First Amendment concerns could be successfully addressed and would not preclude a default judgment." The McElderry Memo is operating on the assumption that the injunctive relief is no longer going to look like it originally did, that is to say, the Department is no longer going to ask to enjoin members of the NBPP from merely appearing at a polling place in uniform.[64]

The analysis that Ms. McElderry then pursues concerning First Amendment issues related to enjoining the wearing of uniforms is premised on there being a weapon present in addition to the uniform. She concludes that the question needs further study, but that an

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there seems to have been a presumption that they would have invoked the privilege that only they could have invoked. This seems entirely backward. See supra *note* 2.

[61] 9/24/2010 Hearing, p. 143-44. (Commissioner Yaki, quoting Bradley Schlozman). Mr. Coates, in turn, said that he considers Mr. Schlozman a friend. Id, p. 145.

[62] Remedial Memo, p. 3. As noted by the Southern Poverty Law Center's report on the NBPP, members of the original Black Panther Party are upset with the NBPP's appropriation of their Black Panther name and symbol. *See*, http://www.splcenter.org/get-informed/intelligence-files/new-black-panther-party In wearing Black Panther symbols, as they did, Mr. Jackson and Mr. Shabazz were not making clear to observers that they belonged to a racist-separatist group, but were rather (intentionally or not) sending the message that they might have been affiliated with (or sympathetic toward) the original (non-racist, non-separatist) Black Panther Party.

[63] McElderry Memo, p.5.

[64] See, Report, p. 17. ("deploying athwart the entrance to polling locations either with weapons or in the uniform of the Defendant New Black Panther Party, or both). Interestingly, Ms. McElderry seems to think that Mr. Adams's use of "deploy" is puzzling. Mr. Adams seems to use deploy in its proper way, as an action that a commander (in his imagining, Malik Zulu Shabazz) performs on their troops. But at other times the J Memo used "deploy" to mean 'standing in a military fashion' or as something that troops can do to themselves (e.g. "They were not milling about or deployed askew to the entrance." J. Memo p. 3). Some of Ms. McElderry's confusion may be the result of the fact that the original injunctive relief applied to low-ranking Mr. Shabazz and Mr. Jackson as well as to the Party and its Chairman, the latter two being presumed to be in a capacity to "deploy" their minions.

argument could be made that a weapon in the hands of someone in a uniform could be more intimidating than a weapon brandished by a person in street clothes. Her grounds for this conclusion are that a uniform may convey, "some kind of authority to take action," and so make observers more fearful because the observers would be lead to believe that the weapon is more likely to be used.[65]

We think the McElderry Memo errs slightly in its characterization of the NBPP uniforms. It is not clear (and based on her description, it seems unlikely) that Ms. McElderry had seen what the NBPP outfits look like. She takes as a given the trial team's assertion that they are "military-style." She then goes on to suggest that, being a military sort of uniform, it would strike the observer as conveying that "authority to take action." It is hard to believe that anyone looking at Mr. Shabazz at the Fairmount Street polling station would draw the conclusion that he was carrying the night-stick because he possessed some special (or in fact, any) authority to do so.

We strongly object to the gratuitous and poorly aimed charges of hypocrisy that the Report levels at Mr. Rosenbaum concerning the First Amendment. On the one hand, in the Jesse Helms case, the post cards were not merely "misleading,"[66] but implicitly threatened their recipients with criminal prosecution.[67] On the other hand, Mr. Rosenbaum, as is clear from the McElderry Memo—and even more clear from the injunction which he supported against Mr. Shabazz—does not think "wielding a nightstick at a polling site" is a form of conduct protected by the First Amendment. We would like to note that is bizarre comparison has been made elsewhere and we believe that its author, Hans von Spakovsky, should receive the recognition that he deserves.[68] Since we object to the insinuation of hypocrisy that *is* in the Report, we are relieved that the Report does not make the additional insinuation of racism found in Mr. von Spakovsky's blog post.[69]

Jerry Jackson

The Report fails to recognize a number of important distinctions regarding the treatment of Mr. Jackson in the J Memo, the Remedial Memo and the McElderry Memo. The Report describes the situation thusly:

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[65] McElderry Memo, p. 6.
[66] Report, p.25.
[67] The postcards which were largely directed to African Americans made false claims concerning voter residency requirements and warned recipients that it was a "federal crime to knowingly give false information about your name, residence or period of residence to an election official," See, *Democratic National Committee v. Republican National Committee*, 671 F.Supp.2d 575, 581 (DNJ 2009). The case cited makes reference to the earlier case that is under discussion. We would have preferred to cite the original case, but it seems not to be electronically available to the Commission at the time of drafting this dissent.
[68] Hans von Spakovsky, With Due Apologies to Abigail Thernstrom . . ., July 28, 2010, http://www.nationalreview.com/corner/233685/due-apologies-abigail-thernstrom-hans-von-spakovsky
[69] Id. (Was it because they were white? We don't know, but the contrast between how these two cases were handled by Rosenbaum is quite stark.")

> The nature of their joint liability is reflected in the fact that at no point in the internal memoranda of the Department was a distinction drawn between the potential liability of King Samir Shabazz and that of Mr. Jackson. The J Memo and the Remedial Memo prepared by the trial team, as well as the review prepared by the Appellate Section, did not even raise, let alone address, the issue.[70]

Instead of a source of reassurance, the non-existent treatment of the issue of joint liability is in fact a sign of the haste and sloppiness of the trial team's legal work. As mentioned above,[71] the J Memo does not bother to establish whether Mr. Jackson spoke to anyone other than Mr. Shabazz at the polling station prior to the arrival of the police. Since the McElderry Memo takes the facts as presented by the trial team, Ms. McElderry may have presumed that Mr. Jackson hurled racial slurs at voters or poll-workers. Since the two NBPP members are sometimes described as "armed, uniformed men," it is possible that she incorrectly assumed that both were carrying weapons. This would be consistent with her reading a presumed modifier of "with weapons" into the injunction's prohibition on both "deploying and appearing."[72]

The Report tries to strengthen its case for joint liability by repeating variations of "moving" or "acting" "in concert"[73] to describe the two NBPP members' behavior. This construction seems to have been derived from Chris Hill's description of the two men. At his hearing, Mr. Hill said of the two:

> Mr. Jackson took direction from Mr. Shabazz constantly. When he moved, Mr. Jackson moved, and it was a definite pattern. I don't know if they worked it out ahead of time, but they were definitely moving in concert. [74]

It is unclear what these synchronized moves were that made such an impression upon Mr. Hill. It is also unclear why the discipline and order on display for Mr. Hill vanished by the time Mr. Morse arrived with his cell phone camera. Even before Mr. Morse confronts Mr. Shabazz, it is apparent that the two NBPP are neither standing shoulder to shoulder, nor in any sort of military posture or formation. At Mr. Morse's approach, the two men do not "form ranks." Instead, Mr. Jackson remains standing in place while Mr. Shabazz walks around him.

If Mr. Hill either did explain or could explain the discrepancy between the NBPP members' video-recorded behavior and his eye-witness account, or if some of Mr. Morse's omitted footage contained images of the Panthers "moving in concert,"

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[70] Report, p. 25.
[71] Supra note 39.
[72] McElderry Memo, p. 5.
[73] Report, pp. 5, 6 (twice), 25.
[74] 4/23/2010 Hearing, p. 129. As we mentioned above and will discuss further below, it is interesting that those on the Commission who have expressed concern that Department dismissed its case against Mr. Jackson based on conclusions drawn by the local police, did not express equal concern that the trial team seems to have relied on Mr. Hill's conclusions about Mr. Jackson's relationship with Mr. Shabazz to have established the former's liability.

that would certainly be helpful to establish joint liability. It is also possible that the "acting in concert" that is found in the original injunction was meant as a work of catch-all in order to ensure that merely staying quiet and standing near a objectively intimidating person like the weapon-brandishing Mr. Shabazz is sufficient to trigger the injunction's issuance. Since the eventual injunction dropped that aspect, it remains unclear whether such a potentially broad and vague provision would have passed muster.

We are disappointed that the Report badly misconstrued AAG Perez's statement concerning the role the police report played in the decision to drop the case against Mr. Jackson. During AAG Perez's hearing,[75] he was repeatedly as he tried to explain why the local police report mattered to the Department. It was insinuated that the Department concluded that §11(b) did not apply to poll-workers because the local police officer, having seen Mr. Jackson's poll-watcher's credentials concluded that Mr. Jackson was not violating any voting rights laws.

AAG Perez, when he is finally allowed to speak without being interrupted, makes clear the obvious point that neither he nor the Department defer to local first responders to interpret federal law, but rather—as is obvious—local police can provide eye-witness accounts of what they themselves see and what witnesses on the scene tell them. We do not share the incredulity of some of our colleagues over the fact that the AAG and others at the Department would consider the contemporaneous reporting of a neutral third-party to be more credible that a series of contradictory accounts , made by a Partisan operative and recorded well after the events.[76]

As we have explained above, none of the poll-watchers alleged that Mr. Jackson said anything to them, much less anything threatening. This was probably heard by the police as well. The closest thing to a threatening action that has been alleged against Mr. Jackson (other than that fact that he was wearing his NBPP outfit) was that Mr. Jackson either formed or attempted to form "ranks" with Mr. Shabazz, leading Mr. Hill to either walk around the two or walk between the two.[77]

Despite the fact that AAG clearly told the Commission that the Department does not and did not rely on the VRA-expertise of local police officers, this canard was repeated during the Adams hearing.[78] It is unclear why this was done other than it

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[75] 5/14/2010 Hearing, p. 69-72.

[76] The fact that Mr. Adams and Mr. Coates also seemed to think Mr. Hill—despite his contradictory stories—was more credible that the police officers is also telling. The greater irony of Commissioner Heriot wishing that the Department favor the testimony of Mr. Hill over that of local police, is that Mr. Hill, in his on-scene interview with FOX News reporter Rick Leventhal was—like the local police—happy to distinguish between Mr. Shabazz and Mr. Jackson. In the interview, both Mr. Hill and Mr. Leventhal concur that Mr. Jackson is a poll-watcher, after which Mr. Hill says, while nodding, "And he lives here." Mr. Leventhal then says, "And he has every right to be here," to which Mr. Hill nods in agreement and adds, "And he can wear whatever he wants," which Mr. Levenahal repeats in agreement. Video available at http://www.youtube.com/watch?v=JwNDMdrqKcc.

[77] See, *supra* notes 23, 24, 25.

[78] 7/6/2010 Hearing, p. 89-90.

seems to have been a talking-point of sorts.. We find it especially hard to believe and more than a little disconcerting that Mr. Coates would devote a page[79] of his prepared remarks to suggest that AAG Perez said that the Department allowed the local police to make litigation decisions for the Department.

AAG Perez made it crystal clear: the Department interprets what the law requires. In the case of §11(b) the Department comes up with an interpretation about what conditions would need to exist for someone to be committing voter/poll-watcher intimidation. Hypothetically, the Department might interpret §11(b) to, among other things, apply to people displaying weapons or shouting racial slurs. They also might interpret §11(b) not to apply to people standing quietly, without weapons and who are wearing clothing that is not readily associated with a hate group.

Where the police (and any other credible witness) come into the process is by relating the facts as they saw them. In the case of the Philadelphia police, they saw some things, and they interviewed some people and questioned those people about what they saw. In the case of the NBPP, witnesses obviously told the police that one of the men was creating a disturbance by yelling slurs and waving a weapon while the other man just stood there. In addition to the ruckus that he was causing, the first man was standing near a polling place and was neither a voter nor a credentialed poll-watcher. The quiet man was also standing near a polling place but was a poll–watcher and was not causing a disturbance, so the police allowed him to stay. There is no indication that if Mr. Shabazz was credentialed but was also carrying on as he did, the police would have allowed him to stay at the polling place (nor that the Department would not have brought suit against him[80]). There is also no indication that had Mr. Jackson lacked poll-watching credentials, the police would have allowed him to loiter near the polling place.

The basic point is this: the police supplied an account of the facts which some in the Department found more credible than the account of the facts presented by Mr. Hill and the other Republican poll-workers. The Department lawyers then applied the law to the facts that they found most credible. This is not an inappropriate delegation of decision-making authority. This is elementary legal practice. We find it unbelievable that -experienced lawyers such as Mr. Coates and those on the Commission do not understand the distinction between "fact" and "law."

Not wishing to believe that any of them never learned this distinction or somehow forgot it, we must conclude that they are willfully mischaracterizing AAG

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[79] Coates Statement, p. 11.

[80] AAG Perez suggests as much in his statement, "A report of the local police officer who responded to the scene, which is included in the Department's production to the Commission, indicates that the officer interviewed Mr. Jackson, confirmed that he in fact was a certified poll watcher, and concluded that his actions did not warrant his removal from the premises." Perez Statement, p. 8. It is clear from this passage that Perez is saying that the police officer allowed Mr. Jackson to remain not simply because of his poll-watcher certificate, but also because the latter's actions "did not warrant his removal from the premises" (i.e. that if Mr. Jackson had behaved like Mr. Shabazz, the police would not have allowed him to remain and the Department would have treated him differently too.)

Perez. Evidence for this conclusion can be seen in the selective editing that Mr. Coates performed when reiterating what AAG Perez said at the latter's hearing. Mr. Coates says:

> In this case, however, the fact that one Philadelphia police officer did not require Black Panther Jackson to leave the area became such a compelling piece of evidence that it was cited by the Assistant Attorney General in his May 14, 2010 written statement to this Commission. There Mr. Perez stated that, "The Department placed significant weight on the responses of the law enforcement first responder to the Philadelphia polling place" in allowing Black Panther Jackson to escape default judgment and escape the entry of injunctive relief against his future actions. Based upon my experience, this reasoning is extraordinarily strange and an unpersuasive basis to support the Division's disposition of the *Panther* case.[81]

In so paraphrasing AAG Perez's statement, Mr. Coates removes the pertinent passage we quote in the previous footnote. The Report fails to point out Mr. Coates's misleading deletion from AAG Perez's statement. Mr. Coates claims that, like Mr. Adams before him, he was driven to testify before the Commission by the inaccuracies in AAG Perez's testimony and a need to set the record straight concerning the Department's actions. As a result, we find their distorted quotations of AAG Perez's written statement to be "extraordinarily strange and an unpersuasive basis to support" their claims of being honest and courageous whistle-blowers, as opposed to being simply "true members" of the von Spakovsky/Schlozman Team.

The Department's decision to not pursue the default judgments against Malik Zulu Shabazz and the Party itself are as easily explicable as the decision not to pursue a default judgment against Jerry Jackson. In fact, the argument is even easier, for as Diana Flynn notes in her email, "The most difficult case to make at this stage is against the national party and Malik Shabazz." Ultimately Flynn (and McElderry) side with pursuing the case even though they think it is weak and problematic. Their grounds for doing so focus less on the law, however, and more on the assurances from the trial team that the latter have strong evidence.[82]

The Report rests its argument for Party/Chairman complicity on the contradictory statements that members of the Party made before and after the election. The thinking seems to be, "Why would they say there's going to be a massive deployment if there wasn't going to be one?" As we mentioned above, the simplest answer is that the NBPP Chairman says whatever he thinks is most expedient at any given time and to any given audience, all in order to gain attention and followers. The more skeptical approach is simply to look at the claims: 300+ NBPP members deployed to polls in 15+ cities. Then look at the reality: two NBPP members, both at the same location in the same city. As was mentioned above, this is a less than 1% compliance rate. There need not be perfect and absolute control to

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[81] Coates statement, p. 11-12.

[82] "Voting does seem to have evidence in support of the allegations." Flynn email.

create a principal-agent situation, but at only two-thirds of one-per-cent, there's probably a better chance that more members of the NBPP will accidentally run into each other at a particular polling station than showed up to either allegedly provide security on Fairmount Street, or any of the other nonsensical argument that have been presented in the course of this investigation.

Lastly, the allegations that the relief in the NBPP case was greatly reduced need to be addressed and explained. In brief, and as AAG Perez explained in the frequently ignored statement that he provided to the Commission, the original injunctive relief sought was problematic partly because it was "one-size fits all." Instead of tailoring the relief to the individual defendants, the injunction aimed at an organization that has chapters in multiple cities was the same one for a single individual residing in a single city. The fact that the relief was shrunk down from nation-wide to city-wide is the product of the decision that the NBPP could not be held liable for what Mr. Shabazz did in Philadelphia.

As for the reduction in duration: a permanent injunction with no enforcement limits is at odds with the relief received in voting rights cases such as the Ike Brown[83] case and the US v. North Carolina case.[84] In both cases, the injunctions were set to last for roughly two election cycles. The same is true of the NBPP relief. If one wants to describe the injunction Mr. Rosenbaum approved for Mr. Shabazz as a "slap on the wrist," one needs to do the same for the injunction Mr. Coates approved for Ike Brown.

IV. USCCR Investigation

We believe that this investigation was, from the very beginning, an effort to direct the resources of the Commission toward the illegitimate and contemptible purpose of harassing the new Administration. There was a time when the Commission devoted itself to bipartisan investigations of serious instances of voting rights violations. In stark contrast to our admirable past, the present Commission spent this last year devoting most of its attention to a voter intimidation case in which no actual voters were intimidated[85], and to providing an avenue by which disgraced and disgruntled remnants of the previous Administration could attempt to settle personal and political scores.

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[83] Contrary to Mr. Adams's definite- and dire-sounding prediction during his testimony before the Commission, the Department did, in fact, ask the Court on July 13, 2010 to extend the injunction in Ike Brown. (*See* United States' Motion for Additional Relief Against Defendants Ike Brown and the Noxubee County Democratic Executive Committee, U.S. v. Ike Brown, et al., Civil Action no. 4:05-cv-33). We find it noteworthy that, as with other statements made by AAG Perez, the Report completely fails to mention the fact that the relief was extended. Rather, the Report claims that AAG Perez's statements about this highly-relevant topic were merely generalized and often non-responsive. This assertion is pure fallacy.

[84] Report, p. 84.

[85] We understand that §11(b) applies to both voters and those who assist them. Even with this caveat, it is still telling that the evidence regarding the intimidation of poll-workers is either thin or contradictory enough that the trial team and members of the Commission have had to exaggerate the notoriety of the fringe NBPP in order to claim they are the equivalent of the KKK and their mere presence is objectively intimidating.

Though we did not and do not support this investigation, we do believe that for sake of the integrity of the Commission, once it was embarked upon, the investigation should have been rigorous. Of course since the aims of the investigation were at their inception illegitimate, it is perhaps inevitable that the investigation and subsequent report would have to lack rigor—otherwise the illegitimacy of the whole project would be revealed.

As we have mentioned above, many witnesses, including many who were present in Philadelphia on Election Day, were not called to testify before the Commission. When witnesses were invited to speak, the Majority abused its powers and limited our ability to question witnesses. In the case of Mr. Adams, the Majority made little effort to schedule the hearing for a date when all Commissioners could be available. In the case of Mr. Coates, the Chairman abruptly called a break in the hearing[86] the majority left the room with Mr. Coates, and when they returned, the Chairman announced that he was going to "wind this matter down" and not allow any additional questions of Mr. Coates.[87] Considering the tremendous importance that the majority had placed on Mr. Coates's appearance and the substantial amount of the hearing that was consumed by Mr. Coates reading his lengthy statement, the abbreviated amount of time permitted for questions showed a lack of interest in true inquiry. Instead, the hearing seemed much more like a mere opportunity to allow Mr. Coates to personally get his opinions into the record as opposed to having them communicated by way of Mr. Adams or "anonymous sources" to the Washington Times or the Weekly Standard.

We also wish to highlight the fact that the Report operates on the bizarre evidentiary principle that unsworn statements and blog posts should be allowed to rebut sworn statements. Joseph Rich submitted a sworn affidavit[88] challenging statements made in Mr. von Spakovsky's earlier sworn statement. In response, Mr. von Spakovsky did not submit another sworn statement (as Mr. Rich would do again to rebut claims by Mr. von Spakovsky and Mr. Adam[89]). Instead, Mr. von Spakovsky resorted to a blog post.[90] Later, Mr. von Spakovsky went on to submit an unsworn statement[91] in the attempt to challenge the sworn statement made by Robert Kengle.[92] Since Mr. von Spakovsky was willing and able to submit a sworn declaration originally, we believe that his failure to do so in his purported rebuttals to Mr. Rich and Mr. Kengle was both deliberate and suggests that neither the Report, nor anyone else, ought to be confident in their veracity.

For all of these reasons, we dissent from this report and the investigation which preceded it.

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[86] 9/24/2010 Hearing, p. 134 ("We're out of time. At this point we are going to take a break.").
[87] Id. Vice-Chair Thernstrom was subsequently able to persuade the Chairman to provide a small amount of time for additional questions.
[88] Rich Declaration 9/23/10.
[89] Rich Declaration 10/20/10.
[90] Hans von Spakovsky, *Enough Is Enough, Joe Rich: An Uncivil Man from the Civil Rights Division*, PAJAMASMEDIA,Sept. 20, 2010, http://pajamasmedia.com/blog/enough-is-enough-joe-rich-an-uncivil-man-from-the-civil-rightsdivision; Report, p. 78, fn197.
[91] von Spakovsky Letter 10/28/10.
[92] Kengle Declaration; Report p. 75, fn188.

C. REBUTTALS

Joint Rebuttal Statement of Commissioners Peter Kirsanow, Gail Heriot and Todd Gaziano in Response to the Vice Chair

We would give almost anything not to have to write this statement. All of us have long been admirers of the Vice Chair's work in civil rights, which stretches back several decades.[1] Some of those who made up the Commission's majority in adopting this report have regarded her in the past not just as a friend, but as a mentor.[2] Sadly, circumstances have made continued silence impossible. The Vice Chair has publicly accused the five commissioners who supported this investigation of having the "wild notion" that we could topple Attorney General Holder and damage President Obama.[3] Her accusation is imaginative, but untrue.

Her accompanying Statement is just four short paragraphs long—less than 150 words.[4] In it, she asserts that this investigation "lacked political and intellectual integrity from the outset." We are accused of having "contemptuously ignored" her views. But she offers no specifics. That is because the Vice Chair's accusations are inspired not by a concern for the investigation's political or intellectual integrity, but from personal pique. One by one, she has become alienated from her former allies on the Commission. In no case has this alienation had anything to do with a substantive issue. It is wholly personal.

The Vice Chair strongly supported this investigation until the day she changed her mind and stormed out of a Commission meeting over what she evidently perceived as a personal slight, and the personal slight didn't even have anything to do with the New Black Panther Party (NBPP) investigation.[5] After that she opposed the Commission's majority on almost every subject[6] and called the NBPP matter we were investigating "very small potatoes" which did not merit the time the Commission was devoting to it.[7] Her attendance at meetings dwindled as she participated in less than 45% of the official meetings and events of the Commission in 2010.[8] On those occasions she did attend, she strongly criticized the NBPP investigation:

> VICE CHAIR THERNSTROM: Well, a couple things. It seems to me it's strange. It is simply impossible to believe that [Deputy Assistant Attorney General Julie Fernandes] said anything remotely like "We are not going to enforce civil rights laws when blacks are defendants."
>
> I mean, she cannot have said that. Maybe she said something that some people interpreted as saying that. But she surely didn't announce that. I mean, unless she is some sort of moron -- and she certainly could not have been speaking for the Department if she was a moron.
>
> CHAIRPERSON REYNOLDS: How do we go about settling this factual dispute over this allegation?

> VICE CHAIR THERNSTROM: I think we should assume that the Justice Department does not have a racial double standard? I mean, give them a break.[9]

In her Statement she reverses course yet again—something that has become characteristic of the Vice Chair—and purports to applaud further investigation into the incident, so long as that investigation is by the Department itself or by Congress and not this Commission. "The majority charges that racial double standards govern the enforcement of the Voting Rights Act in the Holder Justice Department," she now writes. "If that can be convincingly demonstrated, it will be a grave indictment of this administration."

We agree with part of that statement: If a racial double standard in the Voting Section has been demonstrated (or is demonstrated in the future), it is and will continue to be a very serious matter. The Commission and its staff tried in good faith to collect all available evidence that will tend to prove or disprove it. Indeed, given the Department's refusal (1) to disclose the documents that relate specifically to deliberations over the NBPP case or (2) to allow any of the witnesses to testify as to those deliberations, we believe the Commission and its staff have done an impressive job.[10] Two career attorneys have testified at length under oath as to this racial double standard.[11] Two more attorneys have submitted affidavits supporting that testimony.

Significantly, no one at the Department has denied the sworn testimony of Christian Adams and Christopher Coates that Deputy Assistant Attorney General Fernandes has repeatedly directed career Voting Section attorneys to apply a racial double standard in its decisions to bring lawsuits.[12] And the actions of the Division—in connection with New Black Panther Party as well as with other cases—have been consistent with those allegations and not with the other attempted explanations that have been offered.

We are baffled by the Vice Chair's repeated assertions that the investigation has uncovered no evidence of wrongdoing.[13] The sworn testimony of Adams and Coates and the affidavits of Bowers and von Spakovsky are exactly that. The only interpretation of the Vice Chair's statements that we have been able to come up with is that she is looking for specific testimony in connection with the New Black Panther Party case itself. If so, Coates testified unequivocally that the case was dismissed because his superiors harbored hostility to the race-neutral application of the law, but perhaps she wants written proof from one of the decision makers. Yet, that is exactly the kind of evidence the Department has denied the Commission access to.

There may well be a smoking gun out there somewhere. But there is no way to know if it exists given that much evidence, including the direct evidence relating to the deliberations to dismiss the voter intimidation claims, is being deliberately withheld. All of this has been explained to the Vice Chair on more than one occasion. But while she currently professes interest in obtaining evidence, her statements are belied by her past conduct, when she has either refused to help or attempted to prevent the Commission's efforts to obtain it.[14]

In the meantime, the sworn allegations that have been uncovered—of an announced racial double standard policy—are more troubling than the original allegations of wrongdoing in connection with the New Black Panther Party case specifically. Unlike the accusations pertaining to the New Black Panther Party, these allegations will continue to be highly significant in the future. We cannot understand her assertion that the Commission should not even try to pursue them.[15]

Contrary to the Vice Chair's assertion, the Commission has not yet "charged" and may well never charge the Department with wrongful conduct in connection with the New Black Panther Party case. This is an Interim Report. It was the unanimous position of those who voted in favor of the report that it should not draw final conclusions about the facts of the case until all the evidence is in. Instead, this report draws Congress's attention to the evidence that has been produced thus far and what we regard as a possible flaw in the statute that chartered this Commission. (Only the Department is specifically authorized to represent the Commission in court to enforce our duly authorized subpoenas—a procedure that has proven unworkable when the subpoena is directed to the Department itself and the Department refuses to comply with it.) To call such a report "tendentious," as the Vice Chair does, is itself tendentious. We have difficulty imagining a more restrained report given the explosive nature of the subject matter.

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[1] See, e.g., Abigail Thernstrom, *America in Black and White: One Nation, Indivisible* (1997) (co-authored with her husband, Harvard University Professor Emeritus Stephan Thernstrom).

[2] The five commissioners who supported this investigation throughout were Chairman Gerald Reynolds, Peter Kirsanow, Ashley Taylor, Jr., Gail Heriot and Todd Gaziano. Shortly after the Interim Report was approved, the terms of Chairman Reynolds and Commissioner Taylor expired. They therefore are not entitled to file statements to this report or to join in this Joint Rebuttal Statement.

[3] Ben Smith, "A Conservative Dismisses Right-Wing Black Panther 'Fantasies,'" Politico (July 19, 2010) (quoting the Vice Chair as accusing the Commission's majority as having "had this wild notion they could bring Eric Holder down and really damage the President").

[4] Statement of Vice Chair Abigail Thernstrom.

[5] Business Meeting Transcript, United States Commission on Civil Rights, 56 (September 11, 2009). The Vice Chair and Commissioner Ashley Taylor, Jr. were not present at the June 12, 2009 business meeting at which the Commission decided to send its June 16, 2009 letter to Acting Assistant Attorney General Loretta King inquiring about the Division's disposition of the New Black Panther Party case. They nevertheless followed up with their own joint letter to King dated June 22, 2009 in which they concurred in the Commission's letter. Their letter was in some ways stronger than the Commission's original letter. In it, the Vice Chair and Commissioner Taylor wrote, "We are gravely concerned about the Civil Rights Division's actions in this case and feel strongly that the dismissal of this case weakens the agency's moral obligation to prevent voting rights violations, including acts of voter intimidation or voter suppression." "We cannot understand the rationale for this case's dismissal," they continued, "and fear that it will confuse the public on how the Department of Justice will respond to claims of voter intimidation or voter suppression in the future."

On July 24, 2009, the Commission received what a majority of its members considered an inadequate response from Portia L. Roberson of the Department's Office of Intergovernmental and Public Liaison. This time, the Vice Chair was present at the meeting that considered the response. She had every opportunity to influence how that letter would be phrased. She signed the letter, dated August 10, 2009. In it, she and her Commission colleagues declared:

> The Commission has a keen interest in this case because of its special statutory responsibility to study the enforcement of federal voting rights laws. We believe the Department's defense of its actions thus far undermines respect for the rule of law and raises other serious questions about the Department's law enforcement decisions. The fundamental right that the Commission is investigating—the right to vote free of racially-motivated intimidation—has been called the cornerstone of other civil rights in our democracy. Until it is completed, this investigation will remain one of the Commission's top priorities.

All of these letters are available on the Commission's web site.

[6] On January 15, 2010, the Vice Chair voted against the decision to send a letter to the Securities and Exchange Commission asking for information about a new regulation concerning corporate board diversity that was widely criticized by opponents of racial preferences. See U.S. Commission on Civil Rights, Transcript of Business Meeting, 62 (January 15, 2010).

At two business meetings held in June and July of 2010, the Commission voted on a report, *Encouraging Minority Students in Science Careers*, that examined how racial preferences have led minority students to be disproportionately concentrated near the bottom of their college classes and thus explains their disproportionately low numbers in science and engineering. The report called on universities not to admit students with large credential deficits relative to the median student and to disclose voluntarily to admitted students information about how students with similar credentials performed academically once enrolled. Yet the Vice Chair abstained or voted against all the findings and recommendations associated with the report, save one finding about the importance of science and technology to the national economy and another about using pay incentives to recruit qualified K-12 math and science teachers. Notably, she even voted against a finding that reads: "In addition to providing other appropriate support and advice to students interested in STEM majors and careers, high school guidance counselors should advise these students about the significant impact of large deficits in academic credentials on college performance." See U.S. Commission on Civil Rights, Transcript of Business Meeting, 10-52 (June 11, 2010); U.S. Commission on Civil Rights, Transcript of Business Meeting, 107-138 (July 16, 2010).

The Vice Chair's votes on this topic are particularly curious given that she voted for every single one of the findings and recommendations that accompanied the Commission's briefing report *Affirmative Action Report in American Law Schools* (2007). U.S. Commission on Civil Rights, Transcript of Business Meeting, 107-196 (April 13, 2007). Like its science-focused successor, this report examined the mismatch problem in the law school context. Also like its successor, its recommendations called for law schools to stop admitting students with large credentials deficits relative to the mean and for voluntary disclosure of information about how students with certain credentials perform once admitted.

The Vice Chair also declined to support Commissioner Kirsanow's proposal for a briefing on the civil rights implications of eminent domain takings. U.S. Commission on Civil Rights, Transcript of Business Meeting, 41 (Dec. 3, 2010) (calling eminent domain abuse a "non-issue" at 9 and a "topic whose time has come and gone" at 25.)

[7] See Abigail Thernstrom, "The New Black Panther Case: A Conservative Dissent," National Review Online (July 6, 2010) (urging the reader to "Forget about the New Black Panther Case" and calling it "very small potatoes").

[8] See various meeting, briefing, telephonic meeting, and national conference transcripts available at the Commission's website.

[9] Business Meeting Transcript, United States Commission on Civil Rights, 24-25 (August 13, 2010).

[10] For a discussion of the wrongfulness of the Department's assertions of privilege and decision to withhold that evidence, see the accompanying Statement of Commissioner Todd Gaziano at notes 27-48 and accompanying text.

[11] Christian Adams and Christopher Coates had been ordered by the Department not to testify as to the actual deliberations surrounding the New Black Panther Party case, and they obeyed that order. Their testimony instead centered on policy directives made by political appointees and the general climate of opinion at the Division, neither of which would be covered by any asserted privilege of the Department. It is likely that Adams

and Coates would have had much to say about the deliberations surrounding the New Black Panther Party case if they had been permitted to testify. Adams quit his job in connection with the Department's actions with the New Black Panther Party case, but he still honored the Department's privilege claims regarding actual case deliberations. Coates said he would return to testify about the deliberations if permitted to do so.

[12] For a discussion of the evidence of the Division's general climate of hostility toward the race-neutral application of the law, see Statement of Commissioner Gail Heriot at 128-145, Statement of Commissioner Peter Kirsanow,at 165-169 and Statement of Commissioner Todd Gaziano at 111-115.

[13] On July 16, 2010, ten days after the hearing at which Christian Adams testified, the Vice Chair stated, "As I keep saying to members of the media who ask me about this, look, I'm an evidence girl. All I want is evidence, and so, you know, fine. At the point at which we have it, I am going to be really happy." Business Meeting Transcript, United States Commission on Civil Rights, 33 (July 16, 2010).

[14] The Vice Chair's professed interest in obtaining evidence to support or refute what she now concedes is a grave accusation is inconsistent with her actual conduct. She generally opposed the Commission's efforts to obtain evidence the Department was withholding, and she declined to develop the evidence from the two most important witnesses who appeared before the Commission. For example, Christian Adams resigned as a Department trial attorney to give testimony on the reason for the dismissal of the New Black Panther Party claims. The Vice Chair did not attend the hearing, but instead she announced to the world a few hours before the hearing began in an online op-ed that the matter the Commission was investigating was "small potatoes" unworthy of the time the Commission was devoting to it. See note 7. After Adams's testimony, she also refused to join a letter to the Department requesting that Christopher Coates—someone she previously said she "would love to hear firsthand from," see note 7—be permitted to testify. Business Meeting Transcript, United States Commission on Civil Rights, 27 (July 16, 2010). And when Christopher Coates chose to testify two months later against the advice of the Department, the Vice Chair acted out of character again. Although the Vice Chair is normally a loquacious and active questioner who yields her time to no one during Commission hearings, she didn't ask a single question of Coates. Instead, she yielded all her allotted time to Commissioner Michael Yaki.

Moreover, she declined an opportunity after Adams and Coates testified to support two letters to Attorney General Holder and to the Department requesting that they allow Coates, Adams, and other DOJ witnesses to testify to the deliberations over the New Black Panther Party case and to furnish the Commission with specific memos written by Coates and Adams and other documents on that topic. Business Meeting Transcript, United States Commission on Civil Rights (October 8, 2010) (Although the Vice Chair and Commissioner Melendez were not in attendance, the vote was officially left open for them. Commissioner Melendez took advantage of this opportunity. The Vice Chair did not.) And the Vice Chair simply ignores Adams's and Coates's testimony when she asserts there was "no evidence" of a racial double standard in the Civil Rights Division.

[15] See supra at pages 199-200 of this Joint Rebuttal Statement. Although the Vice Chair says in her Statement that she is interested in any results from investigations by Congress or the Department itself on these matters, at the December 3, 2010 Commission meeting she declined to support a motion for the Commission to continue to receive information relating to this topic.

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APPENDIX A: Background on the New Black Panther Party for Self Defense

The Election Day 2008 incident in Philadelphia raises questions as to the power the New Black Panther Party for Self Defense (NBPP) exercises over its members, as well as the extent of such control over the activities of King Samir Shabazz and Jerry Jackson on Election Day. While the Commission has attempted to depose King Samir Shabazz, Jerry Jackson, and Malik Zulu Shabazz, the first two have refused to testify, asserting their Fifth Amendment rights against self-incrimination,[1] while the Chairman of the Party, Malik Zulu Shabazz, has contested the Commission's subpoena in court. Accordingly, the following section examines the publicly available information on this issue.

The NBPP is a recognized hate group that is explicitly anti-Semitic and anti-white.[2] The NBPP is based on hierarchical principles with a military structure. Party members often appear in public wearing paramilitary uniforms and carrying weapons. According to Party rules, all panthers must learn to operate and service weapons correctly.[3] In addition, officials are given military titles and the Party advocates armed struggle and violence against its enemies.[4] Even its membership application form reflects a military-style orientation, seeking information about an applicant's military training, martial arts skills and whether one has served as a Navy Seal, Army Ranger or in other special forces.[5]

The Party openly acknowledges its hostility to police and governmental authorities. Its ten-point platform contains the following representative statements:

> We believe the Black People should not be forced to fight in the military service to defend the racist government that holds us captive and does not protect us. We will not fight and kill other people of color in the world who, like black people, are being victimized by the white racist government of America. We will protect ourselves from the force and violence of the racist police and the racist military, by any means necessary. (emphasis added)[6]

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[1] *See* Deposition of King Samir Shabazz at 4-6, U.S. Comm'n on Civil Rights, Phila., Pa., Jan. 11, 2010, *available at* http://www.usccr.gov/NBPH/KingSamirShabazzDepositionTranscript_01-11-10.pdf; Deposition of Jerry Jackson at 6-8, U.S. Comm'n on Civil Rights, Phila., Pa., Jan. 11, 2010, *available at* http://www.usccr.gov/NBPH/JerryJacksonDepositionTranscript_01-11-10.pdf.

[2] The Anti-Defamation League called the NBPP "the largest organized anti-Semitic and racist black militant group in America." Anti-Defamation League, New Black Panther Party for Self Defense: Introduction, http://www.adl.org/main_Extremism/new_black_panther_party.htm (last visited Oct. 21, 2010).

[3] *See* MySpace Groups, New Black Panther Party for Self Defense, Rules of the New Black Panther Party, Rule No. 16, http://groups.myspace.com/index.cfm?fuseaction=groups.groupprofile&groupID=103327617 (last visited Oct. 21, 2010).

[4] *See* Markon & Thompson, *supra* note 82, Mike Roman, New Information Raises More Questions About DOJ and the Black Panthers, BIGGOVERNMENT.COM, http://biggovernment.com/mroman/2010/09/22/new-information-raises-more-questions-about-doj-and- the-black-panthers/ (last visted Dec. 28, 2010).

[5] New Black Panther Party, Membership Application, http://www.newblackpanther.org/newsite/membership2.html (last visited Oct. 21, 2010).

[6] New Black Panther Party, 10 Point Platform, http://www.newblackpanther.org/newsite/102.html (last visited Oct. 21, 2010).

> We believe we can end police brutality in our community by organizing black self-defense groups (Black People's Militias/Black Liberation Armies) that are dedicated to defending our Black Community from racist, fascist, police/military oppression and brutality. The Second Amendment of white America's Constitution gives a right to bear arms. We therefore believe that all Black People should unite and form an African United Front and arm ourselves for self defense.[7]

The Party even has a requirement that "If we ever have to take captives do not ill-treat them."[8]

All members must submit to the authority of officers within the Party. The Party reserves the right to impose discipline or suspend its members. As noted in its Rules:

> Every member of the New Black Panther Party throughout this country of racist America must abide by these rules as functional members of this party. Central Committee members, Central Staffs and Local Staffs, including all captains subordinated to either national, state, and local leadership of the Black Panther Party will enforce these rules. Length of suspension or other disciplinary action necessary for violation of these rules will depend on national decisions by national, state or state area, and local committees and staffs where said rule or rules of the New Black Panther Party were violated. Every member of the party must know these verbatim by heart. And apply them daily. Each member must report any violation of these rules to their leadership or they are counter-revolutionary and are also subjected to suspension by the Black Panther Party.[9]

The head of the New Black Panther Party is Malik Zulu Shabazz, designated as its chairman and "attorney at war." He often appears in the media making statements on the goals and actions of the Party. In these appearances, he often wears elaborate uniforms marked with stripes, insignia and symbols of his rank, including four stars on his lapel.[10]

The Philadelphia Chapter is recognized as a key unit within the Party. As noted by Malik Zulu Shabazz:

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[7] *Id.*

[8] MySpace Groups, New Black Panther Party for Self Defense, 8 Points of Attention, Point No. 8, http://groups.myspace.com/index.cfm?fuseaction=groups.groupprofile&groupID=103327617 (last visited Oct. 21, 2010).

[9] MySpace Groups, New Black Panther Party for Self Defense, http://groups.myspace.com/index.cfm?fuseaction=groups.groupprofile&groupID=103327617 (last visited Oct. 21, 2010).

[10] *See, e.g.*, David Holthouse, Southern Poverty Law Center, *New Black Panther Party Holds Strategy Summit*, HATEWATCH, Oct. 17, 2007, http://www.splcenter.org/blog/2007/10/17/new-black-panther-party-holds-strategy-summit/ (last visited Oct. 21, 2010).

> "We're going to be very active in Philadelphia," says Malik. "We're going to work on the minds and hearts of black people to eliminate the negative habits that keep us in a raggedy condition in Philadelphia. Philadelphia is a key city. I see it as being one of our best cities."[11]

This assertion was made in the same magazine article in which the head of the Philadelphia Chapter, King Samir Shabazz, is quoted as making virulent statements advocating violence against whites. In the article, King Samir Shabazz is described as "readying for war," wearing "battle dress" and acting as a "soldier."[12] He is quoted as describing the white man as "our open enemy." Other statements include the following:

> He's [Whitey] never going to let us live inside the Constitution," he says. "Until we realize that, we're going to remain dumb, deaf and blind. I can't wait for the day that they're all dead. I won't be completely happy until I see our people free and Whitey dead."
>
> By "dead," King means socially, economically, politically – and, if necessary, yes, physically.
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> * * *
>
> "I'm proud to be a Panther," says King. "We won't ease up. We're going to keep putting our foot up the white man's ass until they understand completely. We want freedom, justice and muthafuckin' equality. Period. If you ain't gonna give it to us, muthafucka, we're gonna take it, in the name of freedom."[13]

The article goes on to describe that weapons training is part of King Samir Shabazz's Party duties.

> Thursday is military training night for the New Black Panthers. King goes over how to pat someone down for weapons and how to enforce security for high-ranking officials at public events. Arms training, CPR and guerilla warfare are reviewed.[14]

Although Malik Zulu Shabazz, the chairman of the Party, is also quoted in the article, and presumably was aware of these statements, there is no public indication that Malik Zulu Shabazz or the Party used its authority to discipline King Samir Shabazz in any way for the above statements.

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[11] Kia Gregory, *F*** Whitey's Christmas*, PHILA. WEEKLY, Dec. 17, 2003, *available at* http://www.philadelphiaweekly.com/news-and-opinion/cover-story/the_cats_came_back-38373074.html (last visited Oct. 21, 2010).

[12] *Id.*

[13] *Id.*

[14] *Id.*

In July 2008, the NBPP generally, and the Philadelphia Chapter in particular, were featured in a broadcast by National Geographic.[15] In the broadcast, Party members are shown marching on, and burning an American flag. Other members are shown posing with weapons.

In perhaps the most searing moments of the broadcast, King Samir Shabazz is filmed bluntly denouncing and advocating direct violence against whites. His statements include:

> I hate white people. All of them. Every last iota of a cracker, I hate him.
>
> * * *
>
> There's too much serious business going on in the black community to be out here sliding through South Street with white, dirty, cracker, whores [bleep] on our arm. And we call ourself black men with African garb on. What the hell is wrong with you, black man? . . . We keep beggin' white people for freedom. No wonder we not free. Your enemy cannot make you free, fool. You want freedom, you going to have to kill some crackers. You're going to have to kill some of their babies.[16]

Although much of the broadcast focused on King Samir Shabazz, two members who were later named in the NBPP litigation were also shown. The first of these was Jerry Jackson, who later appeared with King Samir Shabazz at the polling location on Fairmount Street. In the National Geographic broadcast, Mr. Jackson is shown playing a subordinate role to King Samir Shabazz, following his lead, working in tandem, and always appearing in his paramilitary uniform. He is described as Mr. Shabazz's chief of staff. In several scenes, Mr. Jackson poses with King Samir Shabazz with firearms. He also is shown handing out pamphlets as King Samir Shabazz made the above statement, urging the killing of "crackers" and their babies.

Also appearing in the broadcast is the Party's Chairman, Malik Zulu Shabazz. His appearance would seem to indicate that he approved of the broadcast and did not object to its contents.[17] As with the *Philadelphia Weekly* article, there is no public record that Malik Zulu

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[15] *See Inside the New Black Panthers* (National Geographic television broadcast 2009).

[16] *Id.* (beginning at the 13:34 mark). The statements of King Samir Shabazz mirror reported statements made by Malik Zulu Shabazz several years earlier:

> At an April 2002 protest outside B'nai B'rith headquarters in Washington, DC, he [Malik Zulu Shabazz] said, "Kill every goddamn Zionist in Israel! Goddamn little babies, goddamn old ladies! Blow up Zionist supermarkets!"

Richard J. Rosenthal, *The New Black Panther Mouthpiece*, FRONTPAGEMAGAZINE.COM, February 9, 2004, http://archive.frontpagemag.com/readArticle.aspx?ARTID=14294 (last visited Oct. 21, 2010).

[17] *See Inside the New Black Panthers* (National Geographic television broadcast 2009)

Mr. Shabazz was asked about King Samir Shabazz's statement about killing "crackers" in an interview with Fox News reporter Megyn Kelly. This interview occurred on July 9, 2010 while Malik Zulu Shabazz was under

Shabazz or the Party in any way repudiated or denounced the statements or actions of King Samir Shabazz in the National Geographic video, including advocating violence and posing before the camera with firearms. Given the Party's avowed powers of discipline, the lack of any such action following the inflammatory statements of King Samir Shabazz is relevant to the events that occurred on Fairmount Street and afterwards.

In sum, the publicly available evidence suggests that at no point did Malik Zulu Shabazz, or the NBPP as an organization, exert any discipline or rebuke to either King Samir Shabazz or Jerry Jackson prior to the filing of the lawsuit arising out of the events on Election Day 2008. To the contrary, Malik Zulu Shabazz and the NBPP appear to have approved and supported the arms training, threats of violence, and openly racist statements of King Samir Shabazz and his subordinate, Jerry Jackson.

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subpoena by the Commission and after J. Christian Adams had testified. The reluctance of Malik Zulu Shabazz to criticize the statements of King Samir Shabazz is captured in the following colloquy:

MEGYN KELLY: I mean, that's disgusting, isn't it, sir?

SHABAZZ: I would say that he should be careful in how he speaks, but I would still say that his words are being manipulated by a right-wing conspiracy here, and the Republicans are manipulating his words into, again, an attack on blacks and to drum up racial fears . . .

[Two voices simultaneously]

MEGYN KELLY: What part—Let me ask you, do you agree that white people . . .

SHABAZZ: . . . and to increase voter turnout.

MEGYN KELLY: Do you agree that white people should be killed, and their babies should be killed?

SHABAZZ: That is not the position of our organization, that is not the position of myself. We have an official platform and a position. That is not our position.

[Two voices simultaneously]

MEGYN KELLY: So you say that's not the position, I'm just asking you as a human being, sir. That is a disgusting comment he made, and do you agree with it, or don't you?

SHABAZZ: No, I do not agree that he should have said that, no I do not.

MEGYN KELLY: No, no, I'm not asking about whether he should have said it. I'm asking about whether you agree with the sentiment.

SHABAZZ: No, ma'am, I don't.

America Live (Fox News television broadcast July 9, 2010), *available at* http://video.foxnews.com/v/4277314/new-black-panther-party-head-responds-to-allegations (last visited Oct. 20, 2010).

WITNESSES

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Department of Justice
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Federal Bureau of Investigation
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Drug Enforcement Administration
Administrator Michele Leonhart

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Office of Justice Programs
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