

COMMERCE, JUSTICE, SCIENCE, AND RE- LATED AGENCIES APPROPRIATIONS FOR FISCAL YEAR 2017

THURSDAY, FEBRUARY 25, 2016

U.S. SENATE,
SUBCOMMITTEE OF THE COMMITTEE ON APPROPRIATIONS,
Washington, DC.

The subcommittee met at 10:30 a.m., in Room SD-192, Dirksen Senate Office Building, Hon. Richard C. Shelby (chairman) presiding.

Present: Senators Shelby, Collins, Graham, Boozman, Capito, Lankford, Mikulski, Feinstein, Shaheen, Coons, Baldwin, and Murphy.

DEPARTMENT OF JUSTICE

OFFICE OF THE ATTORNEY GENERAL

STATEMENT OF HON. LORETTA E. LYNCH, ATTORNEY GENERAL

OPENING STATEMENT OF SENATOR RICHARD C. SHELBY

Senator SHELBY. The subcommittee will come to order.

Madam Attorney General, welcome again to this Commerce, Justice, Science Appropriations Subcommittee hearing, where we will be examining the Department of Justice fiscal year 2017 budget request.

Today, the subcommittee will continue the important responsibility of reviewing spending at the Justice Department to ensure that it has the necessary resources to carry out national security and law enforcement missions.

Last month, you testified before this subcommittee about a set of executive actions recently issued by the President regarding gun control. At that time, I, along with other subcommittee members, expressed deep concerns about the constitutionality of key aspects of these executive actions.

The President's 2017 budget request for the Department of Justice submitted a few weeks after that hearing has paid no heed to a lot of our concerns.

The President proposes to increase spending at the Department of Justice by \$802 million in 2017, for a new total of \$29.9 billion. This includes \$66 million in additional funding for the Bureau of Alcohol, Tobacco, Firearms and Explosives for 200 new positions, 80 special agents, and 120 industry operations investigators. I continue to have significant reservations about the potential abuses

and harassment of law-abiding gun owners and purchasers that could result from bringing on these additional agents and investigators.

In addition, I expressed to you at our hearing in January my apprehension about the President's Clemency Initiative, given the numerous examples of sentences that have been commuted for criminals with firearms convictions. You pledged to review this situation and get back to the subcommittee on this troubling topic. I am still waiting for your response. Yet the Department's budget request for the Office of Pardon Attorney includes \$2.8 million to increase staffing for pardon and commutation petition reviews.

I find it hard to believe that the President could spotlight his commitment to reducing gun violence in America when his administration is granting clemency petitions for criminals convicted of gun crimes.

In another area, I note that spending for the Bureau of Prisons increases by \$238 million above 2016 levels, despite another projected reduction in our Federal prisoner population, which continues to decline. I hope you can shed some light this morning on why our prison budget continues to increase instead of demonstrating savings and cost reductions at a time when we have fewer Federal prisoners.

When it comes to law enforcement activities, counterterrorism and cybersecurity remain top priorities of this subcommittee. The massive recent cyber breach of the Office of Personnel Management computer network compromised the personal information of approximately 25 million Americans. That is an astounding number and reminds us what is at stake if the Federal Government is not prepared to combat cyber threats, both offensively and defensively.

The Department requests an increase of \$121 million for combating cyber threats, which includes \$85 million for the FBI, \$8 million for DEA, and \$26 million for the Department of Justice Information Sharing Technology account.

Despite the noteworthy funding increases for cybersecurity, I am disturbed by proposed cuts to other national security activities.

Finally, when it comes to counterterrorism, I was dismayed by the President's announcement on Tuesday of his plans to close the Guantanamo detention facility. This announcement came on the same day that Spanish and Moroccan police arrested four terrorist recruiters that included a former Guantanamo detainee who once fought with militants in Afghanistan.

Current law prohibits the terrorists held at Guantanamo from being transferred onto U.S. soil. I am left wondering what advice you possibly could have given the President that would make such a move legal.

I will highlight more specific topics in my questions, but I appreciate your being here today, and I look forward to your testimony.

Senator Mikulski.

STATEMENT OF SENATOR BARBARA A. MIKULSKI

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

And really a most cordial welcome to the Attorney General, Loretta Lynch. I look forward to hearing the Attorney General's testimony about the needs of the Justice Department and its impact on

meeting the needs of the American people to be safe and to be secure.

When we look at the many demands on the Department of Justice, they range from dealing with international efforts related to terrorism to the practices of organized crime, as much as drugs and cybersecurity.

We really want to thank all of the people who work at the Justice Department, those who carry the guns and those who carry the Constitution. Actually, they all carry the Constitution there. And we really thank them for their work that they do every day in every way.

I know Senator Shelby and I are committed to regular order in trying to move this subcommittee's appropriation, working also with Senator Cochran so that we do not get into sequester or all of those big tensions at the end.

So we look forward to hearing your testimony, so that we can move it.

I also want to particularly thank you on behalf of the citizens of Baltimore for your leadership during our Baltimore uprisings. Your work with the elected leadership, law enforcement, community leaders, and faith leaders was really enormously helpful, and for really helping us to enforce the law, living by law and order, for we must live by the law. A unique form of technical assistance was provided to us that helped our police department, but also helped our citizens, and now also helps our citizens have confidence in the police department.

We know we have a long road to go on that. But I want to particularly thank you, as we try to rebuild the trust between police and the communities they serve.

I know that this is faced in other parts of the country. That is why, in fiscal year 2016, working with Senator Shelby, we looked at how we could help modernize many of those efforts. So that is one issue.

The other issue that I am particularly interested in, and I know my colleagues are, particularly Senator Shaheen, is the scourge of heroin in our communities. As I look around here, we have excellent bipartisan attendance, and I would say that every single one of us is facing a heroin crisis in our State, whether rural, urban, et cetera.

We really need to come to grips with this. In my own home State last year, my State of Maryland, 5.5 million people, we had over 578 heroin deaths. I mean, this is just stunning.

So whether we are rural, urban, or suburban, we just cannot enforce our way out of this crisis. We need to break the cycle of addiction for drug users. We need to crack down on the big dealers and traffickers. And we also need to engage in preventive strategies.

I know, on February 2, the President announced \$1.1 billion in funding to tackle the heroin and opioid crisis with most of the funding going to Health and Human Services and the Justice Department. We look forward to hearing from you on this.

Also, we want to make sure that the FBI has the tools it needs. We thank you for what has been going on to give them the physical facilities they need.

But this subcommittee and I believe that we do have to live by the Constitution. I know we will be talking about guns in this hearing, and I support the Second Amendment. I also support the Fourth Amendment right against unwarranted searches and seizures. So I look forward to hearing how voluntarily we might be able to break through this Apple-FBI standoff.

I also support Article II, Section 2 of the Constitution that says that the President has the authority to nominate a Supreme Court Justice up until his last day of office.

Every day, we count on the Justice Department to fulfill its vital mission. And I want you to know, again, I support all 115,000 employees, many of whom live in my home State of Maryland.

So rather than me talking in more detail, we want to hear from you. But most of all, we really want to work on a bipartisan basis to keep America safe and keep it safe under a constitutional government.

That completes my remarks.

Senator SHELBY. Madam Attorney General, your written testimony will be made part of the record in its totality. You may proceed as you wish.

SUMMARY STATEMENT OF HON. LORETTA E. LYNCH

Attorney General LYNCH. Thank you, Mr. Chairman. Mr. Chairman and Vice Chairman Mikulski, and all the distinguished members of the subcommittee, with whom I have had the pleasure of working with on so many important issues, it is an honor to appear before you today to continue our dialogue about how we best protect the American people.

I am grateful for this opportunity to discuss the President's fiscal year 2017 budget for the Department of Justice. This budget reflects our enduring commitment to creating a stronger Nation and more empowered communities that every American deserves.

In the last year, thanks to the thousands of dedicated men and women who serve the Department of Justice, and thanks to the ongoing support of this distinguished subcommittee, we have taken tremendous steps toward that goal. We have prosecuted violent extremists and dangerous criminals. We have defended the integrity of our markets and the beauty of our natural resources. We have worked to end human trafficking, to disrupt the flow of illegal drugs and weapons, and to eradicate international corruption. And we have created new opportunities for second chances in our justice system and new foundations of trust in our cities and towns.

These are real and meaningful achievements, and the requests set forth in the President's fiscal year 2017 budget request will allow us to build upon this encouraging progress.

As always, the Justice Department's first and most important priority is the safety and the security of the American people. The President's budget would invest an additional \$781 million in our national security capabilities, including in critical measures to address the evolving challenges like homegrown extremism, online radicalization, and increasingly sophisticated encryption.

Now, among other items, that request also contains funds for a new state-of-the-art FBI headquarters, which would reduce inefficiencies. It would streamline internal communications, and it

would significantly boost our ability to thwart the emerging criminal and terrorist threats.

It devotes an increase of \$63 million to reinforcing our intelligence-sharing capabilities, allowing us to more rapidly coordinate with both our Federal partners and our counterparts overseas.

And it directs \$38 million toward developing the tools that we need to lawfully access encrypted data and communications, so that we can successfully investigate and prosecute criminals and terrorists who attempt to hide the evidence of their crimes.

Now, as we have seen recently, this is not a theoretical issue. As we have made clear, the growing dark problem is a very real threat to law enforcement's mission to protect public safety and to ensure that criminals are caught and held accountable.

It is a longstanding principle in our justice system that if an independent judge finds reason to believe that a certain item contains evidence of a crime then that judge can authorize the Government to conduct a limited search for that evidence. If the Government needs the assistance of third parties to ensure that the search is actually conducted, judges all over this country and on the Supreme Court have said that those parties must assist, if it is reasonably within their power to do so.

That is what we have been asking for. And we owe it to the victims and the public whose safety we must protect to ensure that we have done everything under the law to fully investigate terrorist attacks on American soil.

Now, of course, as technology continues to evolve, we are also focused on stepping up our work against those who attempt to use the Internet to attack America's infrastructure, to steal our trade secrets, and jeopardize the privacy and property of everyday citizens. Accordingly, the fiscal year 2017 budget would dedicate \$121 million in additional resources to investigating cybercrimes and to fortifying the Justice Department's vital information networks.

Now, the majority of those resources, \$85 million, would be used to enhance the FBI's capacity to collect and analyze digital evidence, and to increase the overall number of cyber investigations. Together, this important funding will allow us to keep pace with the fast-changing landscape of cybercrime.

Our commitment to protecting the American people is matched by our dedication to ensuring that they benefit from a criminal justice system that is fair, efficient, and responsive. The fiscal year 2017 budget requests an increase of \$247 million for one of our most successful and groundbreaking undertakings in that area, the Smart on Crime Initiative, which encourages alternatives to incarceration for low-level nonviolent offenders, which eases overcrowding in correctional facilities, and frees precious resources for the prevention and the deterrence of the most serious crimes.

Of that total Smart on Crime request, \$184 million will go to the Bureau of Prisons reentry, rehabilitation, and mental health programming, which are all essential components of our work to help formerly incarcerated individuals make the most of their second chance while also ensuring that our communities stay strong and safe, because those are the kinds of communities that we seek for every American.

And they require bonds of trust and respect between law enforcement officers and the people that we serve. Helping to repair those bonds where they have frayed is one of my top priorities as Attorney General. The President's request reflects that focus with an increase of \$25 million in a number of programs designed to foster collaboration between residents and law enforcement, including racial reconciliation and restorative justice initiatives, as well as improved data collection. It includes additional funds for the Department's Smart Policing program, which encourages local jurisdictions to improve police-citizen interactions while developing cost-effective solutions to crime in their communities.

And it enlarges our investment in the Community Oriented Policing Services hiring program. This program extends funding to State and local departments to hire or retain officers, so they can continue to meet the full range of their constituent needs.

Those of us who work in law enforcement have a special responsibility to protect the most vulnerable among us, and few crimes pray more savagely on the vulnerable than human trafficking, which destroys families, which weakens communities, and erodes our society's basic foundations of decency and security. The fiscal year 2017 budget sets aside \$89.3 million for the department's efforts to combat this scourge, including \$45 million for efforts to help the victims of trafficking rebuild their lives and reclaim their futures.

We have also resolved that each and every one of our young people should grow up in safety and security, which is why the budget includes a net increase of over \$64 million for the Office of Justice Program grants, or OJP, as we call it, focused on juvenile justice and at-risk youth, including an increase of \$25 million for the delinquency prevention program, which seeks to prevent young people from entering the criminal justice system in the first place by providing assistance and guidance as early as possible.

I look forward to working with this subcommittee and with Congress to ensure the timely passage of the President's budget, which asks for a total of \$29 billion in discretionary funding for the Department, including \$27 billion for Federal programs and \$2 billion for State, local, and tribal assistance programs.

This level of funding will ensure that the outstanding men and women of the Department of Justice, who I am so proud to lead, can continue their tireless work to protect America's citizens, to defend America's values, and to strengthen all of America's communities in the months and years ahead.

Thank you once again for the opportunity to appear before you today and to work with you in the future, and I am happy to answer any questions.

Thank you, Mr. Chairman.

[The statement follows:]

PREPARED STATEMENT OF HON. LORETTA E. LYNCH

Good morning, Chairman Shelby, Vice Chairwoman Mikulski, and other distinguished members of the subcommittee. I am honored to appear before you today to present the President's fiscal year 2017 budget for the Department of Justice, as well as highlight the excellent progress the Department has made over the past year. The Department looks to build on our successes and continue progress on the most pressing issues affecting our communities and our citizens.

The President's fiscal year 2017 budget requests \$29 billion in discretionary authority for the Department of Justice (the Department or DOJ), including \$27 billion for Federal programs and \$2 billion for State, local, and tribal assistance programs. This is a \$265 million increase over our fiscal year 2016 enacted funding level. The Department's fiscal year 2017 budget proposal supports Federal law enforcement priorities and the criminal justice priorities of our State, local, and tribal law enforcement partners. The request represents a comprehensive investment in the Department's mission and includes increases in funding for countering violent extremism and other national security areas, civil rights and advancing equality under the law, Smart on Crime activities, including increased funds for prisoner reentry initiatives, and other key enforcement initiatives.

The key DOJ funding priorities include:

- Security of the country and safety of the American people.*—The budget invests an additional \$781 million to counter violent extremism, improve intelligence gathering, strengthen foreign partnerships, and address the issue of Going Dark.
- Investigating and prosecuting cybercrimes and countering cyber threats.*—The budget provides an additional \$121 million to investigate and address computer intrusions and cybercrimes, secure the Department's critical information networks, and protect against insider threats.
- Augment the "Smart on Crime" initiative to continue to focus Federal criminal justice resources effectively.*—The budget invests an additional \$247 million in the Smart on Crime initiative, which focuses resources on the most important law enforcement priorities, reduces disparate impacts of the criminal justice system on vulnerable communities, and prioritizes crime prevention and recidivism reduction programs.
- Building trust between law enforcement and the communities they serve.*—The budget includes an increase of \$129 million to further the efforts the Department and its State and local law enforcement partners have made to build and sustain community trust. Through the Office of Community Oriented Policing Services (COPS), the Community Relations Service (CRS), the Civil Rights Division (CRT), and the Office of Justice Programs (OJP), the Department provides law enforcement with access to the tools and support they need to do their jobs safely and effectively.
- Protecting citizens and addressing threats as they emerge.*—The budget requests an additional \$164 million in investments to investigate and hold accountable those who break Federal laws and harm innocent citizens. This enhancement aims to combat violent crime and the increase in illicit drug use such as heroin, and strengthens the litigating divisions of the Department.
- Protecting the Nation's most vulnerable populations.*—The budget will provide an additional \$81 million in funds to ensure the rights and opportunities of the elderly, youth, and tribal populations, among other vulnerable groups in our society. This includes expanding civil and criminal litigation, providing support through grants, training, and technical assistance, and issuing guidance and regulations.
- Improving access to justice in both criminal and civil courts nationwide.*—The budget includes an increase of \$21.5 million to conduct research and build the Department's capacity to assist the States in improving their justice systems. Through the Office of Justice Programs and the Office for Access to Justice, the Department provides grants and technical assistance to jurisdictions to help justice systems work more fairly and efficiently by expanding access to counsel to low-income people.
- Address gaps in critical Department infrastructure.*—The budget invests an additional \$179 million to protect DOJ's critical information systems and information from attack and exploitation. Enhancements include facility construction, network improvements, and additional staff.
- Partnerships with State, local, and tribal entities.*—The budget provides \$4.7 billion in discretionary and mandatory funding for State, local, and tribal law enforcement assistance whereby the Department maintains its commitments to its partners without reducing its Federal operational role. Simultaneously, efficiencies are identified to ensure that Federal resources are being targeted to the most effective grant programs.
- Protecting citizens in Indian Country.*—The budget requests \$418 million in total resources for support activities across many DOJ components that address a range of criminal and civil justice issues facing Native American communities. The Department is requesting additional resources to facilitate tribal access to critical information sharing systems, strengthen enforcement of environmental

laws on tribal lands, and support consultation with tribes and coordination of tribal policies through the Office of Tribal Justice (OTJ).

NATIONAL SECURITY AND THE SAFETY OF THE AMERICAN PEOPLE

National security remains the Department's highest priority. The Department will always maintain its commitment and its responsibility to safeguard American citizens and defend the homeland, while maintaining American values. Threats are constantly evolving, requiring additional investments to adapt to those threats in innovative ways. In fiscal year 2015, the Federal Bureau of Investigation (FBI) opened more than 9,000 cases, of which approximately 1,100 were national security cases. During fiscal year 2015, the FBI's efforts resulted in over 27,000 arrests and more than 14,000 convictions. The fiscal year 2017 request continues to support a comprehensive national security strategy towards countering violent extremism (CVE) in U.S. communities. The recent tragedy in San Bernardino demonstrates the gravity of this threat, and the Department is committed to addressing it.

The fiscal year 2017 budget will enable the Department to continue to respond to evolving threats by providing \$781 million in program increases for five critical national security areas: (1) a new FBI headquarters; (2) countering violent extremism; (3) information sharing with the Intelligence Community (IC) and integrating new and enhanced biometric technologies into operations; (4) strengthening foreign partnerships and building new ones; and (5) addressing the Going Dark threat.

Today's national security and crime threats require that the FBI maintain an interconnected and nimble workforce. The complexities of today's national security work dictate that the FBI be in an interconnected workspace to promote internal information sharing. A new, modern FBI facility will consolidate disparate worksites into one common location and exploit synergies previously stovepiped in the FBI. The men and women of the FBI are critical to protecting national security, and this request demonstrates our commitment to invest in their safety and provide them with an appropriate environment conducive to their important work.

The Department requests an increase of \$17 million to deter radicalization and violent extremism within the United States through locally driven prevention and intervention efforts and research. Supported by COPS and OJP grants, the Department will foster community-led CVE efforts, conduct research on the causes of domestic radicalization and strategies for effective intervention and prevention, and emphasize trusted partnerships between public safety agencies and local residents and community organizations. Additionally, the U.S. Attorneys' Offices will expand their community presence through Community Resilience Coordinators, and enhance Federal engagement with and support to local communities as part of the CVE initiative. These efforts will work to counter violent extremism espoused by both international and homegrown actors.

To maintain its role as a national security leader, the Department requests an increase of \$63 million in fiscal year 2017 to continue to address worldwide threats by enhancing its intelligence capacity and capabilities and strengthening coordination with foreign partners. The requested funding will enhance collaboration with the IC through leveraging the IC Information Technology Enterprise (IC ITE) components and services. IC ITE lays the groundwork that will enhance the FBI's ability to share information through improved infrastructure, capabilities, business operations, governance, oversight, and strategic partnerships. The request also supports critical operational funds for the FBI's new Biometric Technology Center (BTC).

The Department is committed to building new foreign partnerships and improving existing ones. The budget request includes \$16 million in additional funding to enhance technical assistance and training, as well as transform the manner in which DOJ provides legal assistance to its international partners. In particular, the Criminal Division will receive an additional \$10 million in support of efforts to reform the Mutual Legal Assistance Treaty (MLAT) process. To protect our national security, we must transform the manner in which we conduct international mutual legal assistance in criminal and counterterrorism matters.

Through the International Criminal Investigative Training Assistance Program (ICITAP) and the Office of Overseas Prosecutorial Development Assistance and Training (OPDAT), DOJ plays a central role in policy formulation, strategic development, and implementation of global assistance programs that further U.S. national security interests. The fiscal year 2017 funding request will provide a permanent base budget for ICITAP's and OPDAT's headquarters operations to allow the Department to continue and expand its important work in this arena.

As an integral U.S. source for international law enforcement intelligence, INTERPOL Washington is experiencing a large increase in demand from State,

local, tribal, Federal, and international agencies for services and assistance due to significant increases in transnational crime and the threat of international terrorism. The requested funding increase of \$1.4 million will enable INTERPOL Washington to hire additional employees and contractor support to process the increase in query traffic over the past 5 years and expected future growth in traffic. Accurate and timely processing of incoming requests is critical to INTERPOL's ability to provide timely investigative support to our foreign and domestic law enforcement partners.

As technology and the means by which people communicate advance, the law enforcement community continues to lack the necessary tools to track dangerous criminals and terrorists. Law enforcement must adapt to evolving communication technologies, anonymization, and encryption. As a result, the law enforcement community faces an increased threat of Going Dark: the degradation of law enforcement's ability to lawfully access, collect, and intercept real-time communications and stored data. The FBI will use \$38 million in funding to develop and acquire tools for electronic device analysis, cryptanalytic capability, and forensic tools to address the threat Going Dark poses to law enforcement and national security.

COMBATING CYBERCRIME AND COUNTERING CYBER THREAT ACTORS

Cybercrimes are becoming more common, more sophisticated, and more dangerous. Our adversaries increasingly use computers and the Internet to further their illicit activities and threats to our security, welfare, and our way of life. The significant intrusions of private sector and government networks over the past 2 years, including the breaches into the Office of Personnel Management, have highlighted the increasing capabilities of these cyber actors. Safeguarding our essential information networks and the personal and private data that they hold is a top priority, and the Department is using every tool at its disposal to work proactively, respond swiftly, and adapt constantly to this threat.

The fiscal year 2017 budget provides \$121 million in additional resources to investigate and address computer intrusions and cybercrimes, defend the security of the Department's critical information networks, and protect against insider threats. The majority of this request provides \$85 million in additional funding to enhance the technical capabilities of FBI investigative personnel, increase the number of cyber investigations, and improve cyber collection and analysis. The requested funding will build on the progress and development of the FBI's cyber efforts.

An additional \$2 million is requested for OJP's Cybercrime and Intellectual Property Enforcement Program—for a total of \$15 million—to support efforts to combat economic, high technology, and Internet crimes, including the intellectual property crimes of counterfeiting and piracy. The program will also support crime analysis and delivery of evidence-based crime fighting technology—including information sharing systems, software and hardware development, mobile communications to support law enforcement, and reentry offender case management systems—through grants, training, and technical assistance.

The fiscal year 2017 budget request includes an \$8 million increase for the Drug Enforcement Administration (DEA) to enhance its cyber security posture. Requested funding will establish an insider threat program as mandated by Executive Order 13587, as well as build additional capability and capacity to monitor DEA's increasingly large and complex classified and sensitive information systems for threats that could degrade DEA operations. Additionally, a \$26 million increase is included for Justice Information Sharing Technology (JIST) to maintain and strengthen the Department's cyber security environment to counter cyber threats and to ensure our personnel have unimpeded access to the IT systems, networks, and data necessary to achieve their missions.

BUILDING UPON THE SMART ON CRIME INITIATIVE

In early 2013, the Justice Department launched a comprehensive review of the criminal justice system in order to identify reforms that would ensure Federal laws are enforced fairly and, in an era of reduced budgets, efficiently. The Smart on Crime initiative focuses Federal resources and places the harshest sentences on the most serious offenders rather than prioritizing the sheer number of prosecutions. Prioritizing crime prevention and recidivism reduction strengthens our justice system and places a lower financial burden on the budget so that funds can be spent on other essential public safety priorities.

Of the \$247 million requested in program increases for the Smart on Crime initiative in fiscal year 2017, \$91 million is dedicated to reentry- and recidivism-reducing programs at the Bureau of Prisons (BOP). More specifically, this funding will expand programming to strengthen familial bonds, fund innovative reentry programs,

increase Residential Reentry Center bed space capacity, and provide additional vocational and education training. At U.S. Attorneys Offices, an additional \$5 million will support prevention and reentry coordinators in 53 districts. Additionally, OJP will use a \$57 million increase to expand several key grant programs, to include its Residential Substance Abuse Treatment program and Second Chance Act grants with a goal of reducing recidivism rates.

As the President has stated, reducing recidivism requires paying more attention to the mental and physical health of inmates. BOP will use \$93 million for mental health treatment in the general inmate population, as well as at Residential Reentry Centers and other resources in Special Housing Units and Special Management Units. The enhancements will also be used for expanding Hepatitis C treatment, medically assisted treatment for individuals in the justice system dependent on opioids, and sex offender cognitive behavioral treatment. These enhancements reflect the President's directive to improve restrictive housing options by expanding mental health treatment options.

BUILDING COMMUNITY TRUST AND STRENGTHENING RELATIONSHIPS

Through the events involving adverse and sometimes tragic interactions between law enforcement officers and members of their communities over the past year, it is clear that the Department of Justice plays a role in strengthening the partnerships between community members and law enforcement professionals at every level of government. The Department is making good on its pledge to provide law enforcement with access to the tools and support they need to do their jobs as safely and effectively as possible. The President's Task Force on 21st Century Policing unanimously developed nearly 60 recommendations to pave the path toward the administration's two-part goal of crime reduction and building trust between law enforcement and local communities.

Law enforcement culture should build trust and legitimacy both within agencies and with the public. Toward that end, law enforcement agencies should adopt procedural justice as the guiding principle for internal and external policies and practices to guide interactions between law enforcement officers and the communities they serve. The fiscal year 2017 budget includes an additional \$63 million to advance the President's Community Policing Initiative through OJP and COPS. The budget invests \$20 million in the Procedural Justice—Building Community Trust program, which focuses on enhancing procedural justice, reducing bias, and supporting racial reconciliation in the criminal and juvenile justice systems. The Department's Smart Policing Program includes \$15 million in additional funds to improve police-citizen interactions while developing economical solutions to crime problems in their communities. This program includes the Body-Worn Camera (BWC) Partnership Program, which provides an additional \$8 million in grants covering up to half the cost of purchasing body-worn cameras for State and local law enforcement.

The law enforcement community has a unique opportunity to ensure fairness, advance bias-free policing, and strengthen community engagement and trust. The Department will tailor its efforts to the needs of the communities it serves through CRS, CRT, and OJP, with an increase of \$25 million to further such initiatives. CRS will implement racial reconciliation and restorative justice programs that address the lack of mutual trust between minority communities and law enforcement agencies; fund assistance to local agencies with potentially volatile minority communities; and invest in research on best practices for building collaborative efforts between law enforcement and the communities they serve. With the additional funding, CRT will augment its staff and expand its capacity to address cases involving the rights of children and people with disabilities who come into contact with the justice system. OJP's request supports its National Crime Statistics Exchange Initiative (NCS-X), which will collect and report crime statistics to inform crime control policies at all levels of law enforcement; improves police responses to individuals with mental illness, and helps law enforcement agencies improve their response to children and families who come into contact with law enforcement.

Community policing emphasizes working with neighborhood residents to advance public safety. With an additional \$42 million, the fiscal year 2017 budget will increase, through the COPS Hiring Program, the number of community police officers working with residents to identify crime problems particular to their neighborhoods and collaborating with them on implementing solutions that produce meaningful results for the community.

PROTECTING CITIZENS AND ADDRESSING THREATS TO PUBLIC SAFETY

The fiscal year 2017 budget request supports the President's initiatives on reducing gun violence, as well as significant investments that focus on combatting violent

crime throughout the United States. To this end, the Department requests \$164 million in additional investments. The request includes \$89 million to enhance the enforcement of existing Federal firearms laws and expand the Bureau of Alcohol, Tobacco, Firearms and Explosives' (ATF's) regulatory capacity. Funding will support National Firearms Act application processing, enhancements to the National Integrated Ballistics Information Network (NIBIN), and for the FBI to maintain fiscal year 2016 investments in the National Instant Criminal Background Check System (NICS).

The budget requests an additional \$39 million in resources to combat violent crime. This additional funding will support hiring of 54 additional Deputy U.S. Marshals, creating a new Regional Fugitive Task Force to apprehend violent fugitives, and improving Deputy U.S. Marshal safety equipment. In addition, the Organized Crime Drug Enforcement Task Forces (OCDETF) request operational funding increases in pursuit of Transnational Organized Crime (TOC) targets, such as those on the Top International Criminal Organizations Target (TICOT) list. Further, FBI will augment existing information technology (IT) systems to create a consolidated TOC watch list. The budget includes \$5 million for OJP to continue to expand the Violence Reduction Network, which leverages the vast array of existing resources across the Department to implement and administer a comprehensive approach to violence reduction in some of the country's cities with the highest violent crime rates.

The President's budget requests an additional \$17 million to counteract increased availability and abuse of heroin, including resources for the DEA to establish additional Heroin Enforcement Groups. The Department's request also provides increases to thwart international drug trafficking and to support high priority prosecutions against drug trafficking organizations along the Southwest Border. These investments illustrate DOJ's commitment to combatting the opioid epidemic and supporting the victims of this public health crisis.

PROTECTING THE MOST VULNERABLE POPULATIONS

The Department's priority of upholding the civil and constitutional rights of all Americans, particularly the most vulnerable members of our society, remains of the highest importance. The Nation's vulnerable populations deserve the same rights, opportunities, and protections from injustices as the rest of society. The administration and the Department are committed to accomplishing this goal and ensuring our vulnerable members are always protected—particularly those caught in the clutches of human trafficking, a heinous offense that has appropriately been described as modern-day slavery. Seeking justice for the victims of human trafficking is a cause that has long been close to my heart, and it is now one of my main priorities as Attorney General. Our fiscal year 2017 budget includes \$89.3 million to reinforce the Department's efforts to combat human trafficking and provide protection and services to victims. This includes \$45 million for OJP's Victims of Trafficking Program.

One particularly critical demographic of the country's vulnerable populations is our youth. It is of the utmost importance to provide services to children exposed to violence in order to break the cycle of violence and to address the needs of at-risk youth to prevent further contact with the criminal justice system. The fiscal year 2017 request includes a \$64 million net increase for OJP's Juvenile Justice Programs appropriation account, in addition to increases in related State and local law enforcement programs. An increase of \$25 million will augment the Delinquency Prevention Program, with the first goal being to prevent children from entering the criminal justice system by providing assistance, guidance, and support as early as possible. The budget requests \$30 million to reestablish the Juvenile Accountability Block Grant Program, which encourage States and units of local government to implement accountability-based programs and services and strengthen the juvenile justice system. The Department is committed to supporting and protecting this country's young people.

Additional resources are requested to ensure the Nation's police are properly trained to interact with children, people with mental illness, and people with disabilities, and to support enforcement, technical assistance, and the issuance of guidance and regulations related to the Americans with Disabilities Act. In addition, the Department is proud to protect the rights of our servicemembers, and this budget allows us to continue our commitment to defending the civil rights of active duty military and veterans.

IMPROVING ACCESS TO JUSTICE NATIONWIDE

The budget requests an increase of \$21.5 million for programs to help State, local, and tribal partners address the access to justice crisis with systematic improvements to their indigent defense and civil legal aid systems, as well as for research conducted by the National Institute of Justice and the Bureau of Justice Statistics. We have proposals to assist jurisdictions with training and technical assistance to improve their indigent defense programs, both for adults and juveniles. In another understudied area of our justice system, we propose a new grant program to incentivize States to create integrated civil legal aid delivery systems to better meet the legal needs of low- and moderate-income people. This funding would amplify the direct services provided by grantees of the Legal Services Corporation by engaging other stakeholders like the State judiciary to improve access to justice.

UPGRADING MISSION CRITICAL INFRASTRUCTURE

In order to maintain an effective and efficient organization, the Department must invest in its infrastructure to support its investigative and prosecutorial enterprises. The request of \$179 million builds on investments previously made to address gaps in critical infrastructure, including IT improvements that support both law enforcement and litigating components, facility construction and maintenance, policy oversight, and personnel security investments.

The resources requested for IT improvements total \$79 million to upgrade outdated IT systems and enhance the capabilities of existing systems for multiple law enforcement and litigation components. The upgrades will keep pace with security, stability, and scalability, and will result in operational efficiencies for mobile capabilities and improved information sharing. For facility construction and maintenance, \$93 million is requested for the FBI, the Executive Office for Immigration Review (EOIR), and the U.S. Marshals Service (USMS) for priority construction, infrastructure improvements, and detention housing of Federal prisoners. The Department requests \$8 million for policy offices (supported by the General Administration (GA) appropriation) and the USMS's Office of Professional Responsibility to enhance policy analysis, coordination, and compliance functions. The Department's grant-making components will continue to implement GrantsNet, an integrated shared services approach that enables common business processes, decreases the number of grants management solutions, and eliminates standalone systems and tools. Finally, \$277,000 is requested for personnel security to address the Department's current backlog of security investigations of both Federal employees and contractors and future security investigation needs.

INVESTING RESOURCES TO ASSIST STATE, LOCAL, AND TRIBAL PARTNERS

The fiscal year 2017 budget maintains the Department's commitments to State, local, and tribal law enforcement partners without reducing DOJ's Federal operational role. It also begins a 10-year, \$500 million per year commitment to funding criminal justice reform efforts nationwide. The fiscal year 2017 discretionary and mandatory request for State, local, and tribal law enforcement assistance is \$4.7 billion, including discretionary enhancements of \$443 million. This request also contains identified efficiencies to ensure that only the most effective grant programs receive Federal resources.

The fiscal year 2017 request for COPS totals \$286 million, and includes an increase of \$42 million for the COPS Hiring Program and \$3 million to supplement the CVE initiative. The Office on Violence against Women's (OVW) fiscal year 2017 request totals \$489 million, and includes increases of \$11 million for the Improving Criminal Justice Responses to Sexual Assault, Domestic Violence, Dating Violence and Stalking Program (formerly known as the Arrest Program) to support coordinated, effective police, prosecution, and judicial responses to these crimes; \$8 million to increase the availability of evidence-based legal services for victims; and \$6 million for OVW's Campus Program to continue and expand the work being done to address sexual assault on college campuses. The fiscal year 2017 request for OJP totals \$4.2 billion, including \$1.6 billion for discretionary grant programs and \$2.6 billion for mandatory grant programs. It includes \$326 million in discretionary enhancements, including increased funding for an indigent defense initiative, Second Chance Prisoner Reentry, Justice Reinvestment, and juvenile justice programs, new funding to support the Violence Reduction Network, and the CVE initiative and research on domestic radicalization.

PROVIDING PUBLIC SAFETY IN INDIAN COUNTRY

The United States has a unique legal and political relationship with American Indian tribes and Alaskan Native communities, as provided by the Constitution, treaties, court decisions, and Federal statutes. The Department of Justice, in particular, has an important legal and moral responsibility to prosecute violent crime in Indian Country. Federal investigation and prosecution of such matters is often the primary avenue of protection for the victims of these crimes.

The President's fiscal year 2017 budget requests \$418 million in total resources for public safety initiatives in Indian Country. Investments support activities across many DOJ components that address a range of criminal and civil justice issues facing Native American communities. A highlight is the COPS Tribal Resources Grant Program, which facilitates tribal access to critical information sharing systems. The increase will support the Department's Tribal Access Program for National Crime Information. Launched in August 2015, the program enables tribes to more effectively serve and protect their members by ensuring the exchange of critical data across systems, such as those managed by the FBI's Criminal Justice Information Services (CJIS) Division. The request also includes a 7 percent set-aside from OJP's discretionary grant and reimbursement programs for flexible tribal justice assistance grants. In addition, the Department requests resources to strengthen the enforcement of environmental laws on tribal lands, to support consultation with tribes and coordination of tribal policies through OTJ, and to help tribes hold non-Indian offenders accountable for domestic and dating violence committed in Indian country.

CONCLUSION

Chairman Shelby, Vice Chairwoman Mikulski, and members of the subcommittee, it is my pleasure to highlight recent DOJ successes as well as identified efficiencies that help strengthen the Department's ability to ensure fairness, equality, and justice for all Americans. I thank you for your past support of the Department's financial needs, and for the opportunity to present our fiscal year 2017 budget request. Progress within our Nation has always been driven by our desire to live up to our ideals of inclusiveness and opportunity, of equal rights and equal justice. I look forward to working with you through the upcoming fiscal year to ensure that the Department of Justice remains on solid financial footing and can accomplish its multiple and varied missions effectively.

GUANTANAMO BAY DETAINEES

Senator SHELBY. Thank you, Madam Attorney General.

Since President Obama took office, Congress has consistently, on a bipartisan basis, prohibited the closure of the terrorist detention facility at Guantanamo Bay through multiple pieces of legislation. This subcommittee once again included two prohibitions in the fiscal year 2016 spending bill restricting the transfer and housing of these terrorist detainees on U.S. soil, and the President signed that bill into law.

Yet, this week, the President has announced a new plan to close the detention facility at Guantanamo Bay. My questions: You have previously testified that Federal law prohibits the transfer of terrorist detainees from Guantanamo Bay to U.S. soil. How has your legal opinion changed, or has it, to warrant the President's announcement?

Attorney General LYNCH. Thank you, Mr. Chairman, for the opportunity to address that issue.

The President did submit a proposal to Congress this week regarding the closure of Guantanamo Bay, which has long been a priority of the administration, and which I support, as it does, in fact, lead to the unfortunate recruitment of additional terrorist individuals overseas.

Of course, as you note, the most recent legislation continues the prohibition on transferring detainees from Guantanamo Bay to American soil.

Senator SHELBY. That is the law right now, isn't it?

Attorney General LYNCH. That is the current law, and it continues previous iterations of those statutes.

Certainly, I believe that is why the President's plan calls for him to work with Congress to discuss that particular issue. That is, I believe, the goal here.

Obviously, we will continue to manage the facility as long as it is open, but I believe the President is looking forward to working with Congress to discuss those issues. That will be something that I am sure will be a matter of discussion between the administration and this body.

Senator SHELBY. Have you advised the President on using executive actions to close the Guantanamo prison and transfer terrorist detainees to American soil, despite the law?

Attorney General LYNCH. I have neither been asked nor provided—

Senator SHELBY. You have not done that?

Attorney General LYNCH [continuing]. Advice on that, because the position is that the President will work with Congress to deal with the statutory limitations before any transfers could be made.

Senator SHELBY. Okay.

PROOF OF CITIZENSHIP FOR VOTERS

In the area of allowing noncitizens to vote, let me get into this topic with you a little.

Recent press reports have indicated that the Department of Justice has failed in its duty to properly defend the U.S. Election Assistance Commission, EAC, in a lawsuit involving the right of States to require proof of citizenship for voter registration.

It is my understanding that the Election Assistance Commission has approved the request of States, such as my own in Alabama, Georgia, and Kansas, to require such proof of citizenship, and various outside groups are challenging this approval in court.

Earlier this week, a Federal court denied a request for a temporary restraining order against the EAC's actions. But I was disturbed, Madam Attorney General, to learn about the conduct of the Department of Justice's lawyers in this case, who took the opposite position of your client, the Election Assistance Commission, instead of defending them.

My question is this, did you authorize, as the Attorney General, the Department's attorneys to argue for a temporary restraining order and possibly even a preliminary injunction against the actions of your own client, the Election Assistance Commission, in this case?

Attorney General LYNCH. Thank you, Mr. Chairman. As you have noted, the Department does represent the Election Assistance Commission, as we statutorily do represent virtually all Federal agencies and other departments here.

This matter is an open matter. It is in current litigation. So because it is in active litigation, it is not appropriate for me to comment at this time on those types of discussions. I would note that we did file papers in that matter, and our position is best set forth in those pleadings.

Senator SHELBY. Do you personally believe—you are the chief law enforcement officer of the country—that noncitizens should be allowed to vote in U.S. elections, although they are not American citizens?

Attorney General LYNCH. Senator, I believe the law is settled as to who is allowed to vote in terms of citizenship.

I believe this particular case focuses on matters of how documents will be prepared. As I indicated, we have filed pleadings in the matter, and I would refer you to those for the Department's position.

Senator SHELBY. Goodness.

SANCTUARY CITIES

Sanctuary cities, my last question to you. There is an ongoing problem that we all have talked about with sanctuary cities in our country. I do not believe that your department is addressing this, or the administration.

Madam Attorney General, let me preface this. I received a letter from Mr. Kadzik, not you, which states the administration is finally acknowledging and beginning to work on the problem of sanctuary cities.

How are you approaching that? Isn't this a real problem in this country?

Attorney General LYNCH. Thank you, Mr. Chairman, for raising this issue, because it certainly does reflect the numerous strands of tensions that arise as we try to carry out our obligations to work with our State and local partners, as well as deal with the issue of the need to remove individuals who are released from Federal custody and are deportable, and, therefore, are usually processed for removal by the Department of Homeland Security.

Also, I thank you for your communications on this matter to me several months ago. Certainly, as we have reviewed this issue and looked at policies to best handle it, all of those issues have been important, so I thank you for your attention to this matter as well.

As you note, Mr. Chairman, this has been an issue, and it raises a number of concerns about public safety as well as the comity and relationship between the Federal agencies and our State and local counterparts.

It arises because, in many situations, when individuals, noncitizens—particularly those who do not have legal status and are, therefore, going to be deported—are released from Federal custody, from the Bureau of Prisons custody, traditionally, if there are other law enforcement agencies that have an interest in prosecuting or investigating these individuals, they have filed detainers. Another State, for example, may need to prosecute that individual for another crime. Of course, we support those citizens' right to justice as well.

Typically, we would wait until the end of those other State adjudications before going forward with the Department of Homeland Security Immigration and Customs Enforcement (ICE) removal action, because to remove the defendant would mean the State would not be able to prosecute them, and those victims would not obtain justice.

However, in situations where, at the end of the State proceedings or the end of State custody, we were finding that the ICE removal orders were not being honored. This presented a problem where individuals were being released without the knowledge of the Federal Government, without our ability to intervene, and then move forward with those removal actions.

It has been further complicated by ongoing litigation in this matter. The Department is currently defending the Department of Homeland Security in two actions where jurisdictions are challenging their obligations to provide information to DHS, whether it is, for example, voluntary or mandatory. So those matters are ongoing, and we have had a ruling against us.

What we have decided to do, however, is to look at this matter from a way of what policy can be best set up that effectuates the goals of, first of all, public safety as well as respecting our State and local colleagues' needs.

So our current policy, as was outlined to you in your letter, in the letter that we provided to you, and has been recently announced, is that instead of the Bureau of Prisons placing the ICE detainer removal last in priority, they now have the right of first refusal. They are now first in priority when someone who is deportable is to be released from Federal custody.

What this means is that, if the individual is likely to go to a jurisdiction that would not work with us at the end of their adjudication, that is taken into consideration, and the individual can be removed rather than being released and, in fact, further harming public safety.

There are many jurisdictions that do work with us, however. So we do, as I mentioned, want to make sure that they can adjudicate their cases. So we want to have, essentially, the ICE removal detainer the first in line, and ICE will have the right of first refusal on removing someone.

We think that this will help us manage the situation, while still letting jurisdictions have those prosecutions.

Senator SHELBY. Do you believe that municipalities in this country, cities, that refuse to cooperate with the Federal immigration laws should be allowed to receive Federal law enforcement grant funding of any kind? They are in defiance of the State Department, Homeland Security, or the Justice Department.

Attorney General LYNCH. Thank you, sir.

Certainly, as we advise all those who apply for grants, they must comply with applicable Federal law. Certainly, where we receive allegations that they are not complying with the Federal laws that relate directly to those grants, we refer those matters to our Inspector General for investigation.

As I mentioned earlier, one of the issues that has developed, however, and I note that we are defending the Department of Homeland Security in two cases now, challenging whether or not that requirement to cooperate with us with respect to that particular law is mandatory or voluntary. In fact, in one circuit, there has been a holding that it is not mandatory.

So while we certainly will continue to advance our position in court, we also felt that, as a policy matter, having a policy that al-

lowed us to deal first with the removal matter would be more effective and, frankly, more timely.

Senator SHELBY. Thank you.

Senator Mikulski.

INTERNATIONAL ORGANIZED CRIME

Senator MIKULSKI. Thank you.

Madam Attorney General, I want to go to the international scene and discuss international organized crime. From meetings and hearings in both this subcommittee and the Intelligence Committee, we see that there is a growth of international organized crime. One of my questions would be, is that valid?

Second, is the scope of international organized crime growing, from either being contract killers for nation-states that do not want to get their hands dirty to human trafficking to fraud?

Also most recently, I know some of my colleagues, some in this room over the age of 65, got the kinds of phone calls that I did, which told me that I was being sued by the IRS for failure of payment. All I needed to do was give them my credit card and pin number, and all things would be well. Of course, we have taken proper action on that.

But that is pretty scary. It means that they are targeting people of a certain age. And it is one thing to get unsolicited phone calls to buy home alert systems. It is another to get this.

So my question to you is, number one, is organized crime growing internationally? And number two, do you have the resources, because they are at it on so many different levels, from terrorism to trafficking to international fraud, some very big, trying to hack our Medicare system at the Social Security Administration, to an individual unsuspecting taxpayer scared to death by a pretty rough and rude phone call.

Attorney General LYNCH. Thank you, Senator Mikulski.

You have raised some important issues, in particular, the fact that transnational organized crime is now cutting across a number of spheres of criminal activity.

Just to address initially the last issue that you raised about the IRS scam phone call that you received, this is, in fact, the type of scam that we are seeing on the rise. Many of the calls originate from within the country. Some of them originate from outside the country. They do target our vulnerable populations, in particular our older Americans.

That is why, not to focus specifically on transnational organized crime, but in terms of dealing with crime targeting our elderly citizens, one of the things that we are looking at is increased funding there that would give us 10 task forces around the country to focus specifically on elder-related crime.

But to your first point about transnational organized crime, the fiscal year 2017 request does include \$1.5 million to fund the Organized Crime Drug Enforcement Task Forces (OCDETF's) priority transnational organized crime initiative. In fact, that is one of the areas where we see this growing.

The FBI is embarking on a 2016 pilot effort to watch-list a certain number of transnational organized crime individuals. The goal is to provide a watch-listing capability that the Government can op-

erate similar to our terrorist screening center, so just because someone does not fall in the terrorist bucket, we can still set up a watch-list program for them that indicates they are involved in transnational organized crime.

This cuts across so many areas. Our cybercrime request, for example, deals with the issue of fraud and also computer intrusions. Many of the computer hackings that we have experienced, be it on a government level or directed against individuals or directed against segments of industry, originate from overseas. So for these cybercrime efforts, we are asking for a total of \$950 million in fiscal year 2017, which would give us the resources that we need within main Justice, with attorneys, with the FBI, with increased agents, to deal with that issue.

As it relates to human trafficking, that request is for \$89 million. That would also cover domestic and international efforts to deal with human trafficking. It would support the work we do with task forces with our State and local colleagues, as well as the investigations that we do overseas.

So this area is woven throughout the Department's budget, and I thank you for bringing attention to it.

Senator MIKULSKI. Well, it shows really how big this is, and I encourage my colleagues to look at it.

BODY CAMERAS

One last question. As you know, we are working very hard to establish trust between local law enforcement and the citizens they are sworn to protect. Do you think that body cameras are an important tool to establish this for not only evidentiary reasons, but trust reasons? Or do you see impediments and potholes to this? Could you tell us what you think about the efficacy of body cameras for both sides, law enforcement and citizens, that you have actively engaged with yourself?

Attorney General LYNCH. Thank you, Senator.

I think that this is one of the most important issues that we have facing the country, that is to say the trust connection between citizens and law enforcement. I think it is reflective of the bond between citizens and government writ large. So as we deal with this issue, we are strengthening and reinforcing that overall bond as well.

Body cameras are an important tool in this regard, as it relates to local law enforcement. We currently support a number of pilot programs that have enabled several jurisdictions to purchase body cameras and to also deal with issues of data storage and data retention and privacy issues that also arise therefrom as well.

I certainly think, in my travels across the country, as I have talked with law enforcement leaders and community leaders—I meet with them separately; I meet with them together. I talk to people who are actively working on this issue. The reason why I think it is still an important tool is that the conversations are helpful, but particularly in situations where the bond of trust is so frayed, having that third party sort of open eye can be very helpful.

In fact, in jurisdictions that have adopted the use of body cameras, so far, over the last several years, those jurisdictions almost uniformly have seen a reduction in the number of citizen com-

plaints against police officers. So citizens feel that, essentially, they have accountability. Officers who initially may be resistant to this, and it varies throughout the law enforcement community, depending upon the size of the department and the issues that it raises, but law enforcement may start out being resistant to this idea, but generally are finding it very, very helpful, because it also gives them the independent third eye as to what happened. And they have corroboration for their statements, and they have that useful evidence.

Of course, it does not capture an entire interaction. It does not answer all the questions. But it does give both sides in the debate something on which to rely. From that, you can also work toward rebuilding the relationship of trust that is so important.

So the jurisdictions that I have been speaking with are looking forward to receiving body cameras. Those that have them are finding them extremely useful. And I am getting very positive comments from community members as well.

Senator MIKULSKI. Thank you. That was very insightful.

Mr. Chairman, thank you.

Senator SHELBY. Senator Lankford.

SANCTUARY CITIES

Senator LANKFORD. Thank you, Mr. Chairman.

Good morning, again. I wanted to be able to follow up on a quick statement that you made, then I have multiple questions to go through.

The chairman asked you about sanctuary cities. You are saying that you have changed the internal processes for the ICE detainers so they go first in this and that DOJ is now attentive to cities that are traditionally cities that have not cooperated with us in making sure that we do our prosecutions or deportations before they get to the city. Did I get that correct?

Attorney General LYNCH. That is correct. Just to clarify, the policy is a DHS policy with BOP. But, yes, that is correct.

Senator LANKFORD. That is a real help, so I appreciate everyone getting the chance to start working through the process and trying to find some solutions.

GUANTANAMO BAY DETAINEES

Yesterday, you had conversations with the House Committee on Appropriations and this issue of Gitmo came up at that time as well. You gave very thorough answers, and I appreciate that as well.

One of the statements that you made, though, you were talking about individuals from Guantanamo Bay could be transferred, certain individuals, which is not the majority, but certain individuals could be transferred to other countries after significant vetting.

You made the statement, with respect to individuals being transferred to the United States, the law currently does not allow for that, does not allow individuals currently to be transferred from Guantanamo Bay to the United States.

So my question on that is, is that a current law, meaning Congress would have to pass something to change that? Or are you anticipating an expiration of some current law, and so there may be

a time people could come? So just identifying that word “currently” in what you said and trying to identify, is there a new law that needs to be passed before individuals could be moved from Guantanamo to the United States, or there is some law you’re watching for an expiration on?

Attorney General LYNCH. Senator, I do not have a plan on that. That is something I believe the White House is going to speak to Congress about, in terms of what should be done statutorily, in terms of how to best close Guantanamo Bay. Of course, as we have discussed, because of the current state of the law, both the most recent National Defense Authorization Act (NDAA) and previous iterations of that contain a prohibition on bringing any of those individuals to U.S. soil. That is something that would have to be resolved between the administration and Congress.

Senator LANKFORD. So I guess what I am asking is, do you anticipate Congress would have to pass something to change that or is there some expiration that you anticipate to say, after this date, the NDAA, for instance, currently it is in the law, but once NDAA expires this year, then maybe we could? That is what I am trying to identify.

Attorney General LYNCH. Senator, there are a number of options, but I certainly am not advocating anything at this point. I believe that is up to the President, as he intends to have those discussions. And I intend to let him have those discussions and bring that matter before Congress.

Senator LANKFORD. Sure. But, again, back to the same issue, would Congress have to pass something proactively for that to change? Or could the policy change based on expiration?

Attorney General LYNCH. I hate to give you the lawyer’s answer that it depends, but it certainly depends on the state of the law, and when the matter is up for consideration. Certainly, the current state of the law, I anticipate there will be discussions between the White House and Congress about how to best handle that issue.

I do not have any forward thinking on that for you to give. I am not looking to get ahead of the President on that issue.

Senator LANKFORD. Okay.

POTENTIAL GRANT DUPLICATION REPORTING

During fiscal year 2016 and 2017, the Department of Justice requested \$22 million as a carveout in the Byrne JAG funding for the bulletproof vest program. So instead of having it as its own separate line item, it would be within Byrne JAG and just be a carveout.

That is one that I have supported. It deals with some of the duplicative issues.

We had asked, in last year’s omnibus, to have a report on duplication. I have seen the report that has come back. It was due a couple weeks ago. The report was basically three pages of just very general statements saying we did not find much, but there was no real detail, and a more comprehensive report is coming at some point on duplication within programs.

When can we anticipate that that would happen? That would be helpful to us as we make decisions in the days ahead, to have a more complete report on duplication.

Attorney General LYNCH. Thank you for raising that. I certainly would appreciate the opportunity to respond to you at the staff level with more information on that.

Certainly, within this current budget, we are looking to avoid duplication and looking to where we may have had programs, in a very general sense, that were very similar to focusing on those that we found to be the most effective. The bulletproof vest program is certainly one that we feel has been very effective. But even within our grant programs, we are always looking for ways to make sure we are focusing on those that are most effective and not simply having multiple—

Senator LANKFORD. Correct. There is a difference between effective and duplicative. There may be several effective programs that we could add administrative functions together and be able to—

Attorney General LYNCH. And generate savings.

Senator LANKFORD. Correct. And be able to actually get additional bulletproof vests on the street rather than using it for administrative dollars.

CRIME VICTIMS FUND

One last thing, you made a comment in your budget, fiscal year 2017 budget, about the Crime Victims Fund, saying you are estimating \$10.2 billion in mandatory program authority. That was the request. But the actual request to spend was \$2 billion in disbursements. About \$2.7 billion, \$2.5 billion is actually coming into that Crime Victims Fund each year.

The \$2 billion that you made a request on, does that meet the needs of all the crime victims and the crime victims issues? Is that why there is a \$2 billion request when we have a larger amount than that that is actually coming in, a smaller amount that is actually the request? I assume that means that all requests have been fulfilled with your budget?

Attorney General LYNCH. Senator, what I can tell you today—and, certainly, again, with respect to those specific numbers, I appreciate the opportunity to get back to you at the staff level. But what I can tell you today is that, certainly, the budget does include the \$10.5 billion in the mandatory budget authority—

Senator LANKFORD. But only \$2 billion in disbursements.

Attorney General LYNCH. \$2 billion in disbursements from the Crime Victims Fund. And essentially, I know that this budget does focus on victims programs. And I know that the rest of that money is used in terms of an accounting method called scorekeeping.

But again, I would rather not misstate that for you today on the numbers, and would appreciate the chance to get back to you on that.

[The information follows:]

The President's budget requests that, of the estimated \$12.5 billion in the Crime Victims Fund in fiscal year 2017, \$2 billion be made available for obligation. The President's request will not meet the needs of all crime victims. However, this funding level builds on the \$2.361 billion enacted in fiscal year 2015 and the \$3.042 billion enacted in fiscal year 2016, continuing an unprecedented level of support for crime victims across the country. This request maintains strong support for formula grants to support victims compensation and services programs and will help ensure that victim's services providers will be able to responsibly implement the \$3 billion provided to support CVF programs in fiscal year 2016. The fiscal year 2017 Presi-

dent's budget request of \$2 billion will maintain the fiscal integrity of the Fund for future years.

Senator LANKFORD. Okay. Will do. Thank you.

I yield back.

Senator SHELBY. Senator Feinstein.

HUMAN TRAFFICKING

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

And welcome, Attorney General.

I want to begin by thanking you, Sally Yates, and the FBI, for your activity during the Super Bowl in California to counter human trafficking.

I have been very impressed with the coordination. San Francisco's FBI division oversaw more than 35 Super Bowl antitrafficking operations, and they did it very well.

In L.A., the sheriff has constituted a special unit of the department that takes the matter very seriously. They made 198 arrests. Only 13 of those were buyers that were booked. This is what I wanted to discuss with you today.

Senator Mikulski spoke about organized crime. Nothing is more organized than human trafficking. I think the Senate really stands as unanimously as we ever get to counter this.

I think a greater emphasis has to be placed on demand. That means arresting and booking buyers, not just citing them, and ensuring that they are prosecuted.

I understand that in certain local jurisdictions, enforcement is reluctant to arrest and hold the buyers if they do not believe local prosecutors will actually take the case. And now we have Federal law that is actually stronger than California law.

So I am hopeful that, because this is an organized crime effort, because it does go interstate and even international, that our Government will be willing to take a number of these cases as Federal cases and actually book and hold the buyers who buy children as well as adults.

It is just something that I do not think this country can countenance. So I would be very interested in your reaction to that.

Attorney General LYNCH. Yes, thank you, Senator. You have certainly touched on one of my top priorities.

I know that from your work with California law enforcement, you are aware of the efforts, the Herculean efforts, frankly, that they are undertaking to fight this scourge.

We have seen, in particular, the corridor up from California into the Washington State area as one that has been extremely prolific in terms of human trafficking over the years. I was privileged to be in Seattle late last year to discuss the awarding of some grants we were providing to them to increase enforcement there.

So at the local level, we are, in fact, providing the resources that we hope will generate more prosecutions. And, certainly, at the Federal level, we are looking to do that as well. We are expanding what is called the antitrafficking team initiative that gets local U.S. Attorneys involved in these cases also.

Our focus is, frankly, primarily on rescuing the victims and trying to get them out of this life. So to do that, we partner with a

lot of community resources and non-governmental organizations that can provide that kind of assistance.

But then our focus is also to generate significant prosecutions of the traffickers and the buyers, both to prosecute them and hold them accountable, but as a deterrent to others who would engage in this particular heinous crime.

So federally, we need certain types of jurisdiction for an individual buyer. That is why we do support the efforts of our State and local colleagues to generate those prosecutions as well.

As I said before, my local U.S. Attorneys are very involved in this. Every office now is required to be involved in a human trafficking task force. That is part of the coordination that I hope you saw prior to the Super Bowl, so that before events like the Super Bowl, large-scale events—if, for example, the Olympics were to be here again, there would be similar initiatives.

And the U.S. Attorneys coordinate and decide who will take this type of case. Again, for the individual buyers, those tend to be handled at the local level, but those discussions are also held in advance, so that our local colleagues are prepared to generate those types of cases.

Senator FEINSTEIN. Thank you. I really appreciate that.

In California, we are trying to develop sympathetic homes for girls that have been held. The captivity of these young girls, the way the pimps create—the fact that their survival is dependent upon them is really a very serious thing, and a lot of them are very young. So that is a work in progress.

But we do need strong enforcement, and we do need to say to people who buy young children and do these things that you are going to be arrested and you are going to be booked and you are going to jail for it. I think that is still missing, in a consistent basis.

So anything we can do, because we now have strong Federal law, stronger than California's, is very much appreciated.

Attorney General LYNCH. Yes, thank you. We are focused on that.

Senator FEINSTEIN. Thank you.

DEPARTMENT OF JUSTICE ASSISTANCE TO SAN BERNARDINO

If I might, I want to talk about the San Bernardino event for a moment. I recently met with San Bernardino County officials, including the district attorney, as well as city officials, who discussed the great financial costs resulting from the December 2 terrorist attack and the ongoing public safety needs to reassure people there.

The city has been through bankruptcy, so it does not have a lot of money. I think in cases of terrorism, it would be helpful to local communities if there were a one-stop shop of sorts at the Department of Justice where communities could go to understand all of the resources available and how to apply with them. We have that in FEMA cases, and I do think having some recourse within the department for that would be helpful.

Can you tell us what sort of assistance your department has already provided to the City and County of San Bernardino in the wake of that terrorist attack, and what you think the department can and should do to help prevent another one?

Attorney General LYNCH. Certainly. I will say that I am not intimately familiar with everything that we may have provided, but we, certainly, through our Office of Victims of Crime would have been providing assistance to the individual victims' families.

At the municipal level, though, I think you raise an excellent idea of finding a way in which we could collect all of our resources available to municipalities and make sure that they are aware of them. We typically do this through the Joint Terrorism Task Force at the law enforcement level, but there certainly are going to be other issues that I see that could arise from an incident like this that would not necessarily be tied in with the JTTF and might not have access to that information.

Senator FEINSTEIN. Well, it is one place where a county or a city or individuals can go. I would like to work with you on it, if I may, because San Bernardino is at a loss of where they are going to get the money to buy some of the materials, law enforcement materials, they need.

For example, they do not have long guns. For a police force today, that has to be changed.

So I would be very interested in working with you.

Attorney General LYNCH. We would appreciate that. Thank you, Senator.

Senator FEINSTEIN. Thank you.

Thank you, Mr. Chairman.

Senator SHELBY. Senator Capito.

EQUITABLE SHARING PROGRAM

Senator CAPITO. Thank you, Mr. Chairman.

Thank you, Attorney General. I had a couple questions.

I wanted to ask you, first of all, because we have heard from a lot of our State police, but some of our local law enforcement, county law enforcement, entities regarding the Asset Forfeiture Program's Equitable Sharing Program. You know that the funds have been withheld, and for some of these local entities, including our State police, these funds are pretty vital for them to move forward with their local law enforcement programs.

Could you give us an update on the budgetary status? I read it was considered a pause where the money was not going to be forwarded on to the local entities. What is the status of that? And how have you been communicating with the local law enforcement agencies to keep them apprised of what is going on?

Attorney General LYNCH. Thank you for raising this issue, because, again, it is certainly one of great importance, not only to our State and local colleagues, but to me as someone who, through the Department of Justice, relies very heavily on them for their participation in the work that leads to the funds that go into the Asset Forfeiture Program that we use for Equitable Sharing. It is based upon a very strong task force relationship that we have with local police, sheriffs, and other offices. And we value that contribution tremendously.

The situation, as you have indicated, is of recent vintage. We make our Equitable Sharing payments, again reflecting the law enforcement contributions of our State and local colleagues in these actions. We make these payments out of the Assets Forfeiture

Fund, which, of course, is dependent upon the proceeds that we receive throughout the year.

Generally, we work to make sure that we stay on track of the proceeds coming in and the proceeds going out. At the end of the last calendar year, after finalizing the fiscal year 2016 budget plan in late December, we received information that there was going to be a fairly large rescission from the Assets Forfeiture Fund, larger than in previous years. Certainly, while we typically have gotten rescissions in the \$200 million, \$300 million range and have always tried to plan to be able to make sure that those do not impact our operations, the rescission in late December, early January, was about \$1.2 billion.

So with that rescission coming out of the fund, it left the fund depleted. What we have indicated, and conveyed to our State and local colleagues, and to our police organizations, is that this is a temporary hold on Equitable Sharing payments, and that we anticipate and it is our intention that, as the Assets Forfeiture Fund is replenished, to resume those payments.

So we have communicated this by speaking to our law enforcement organizations. Members of my leadership team have had calls and meetings with them. I have communicated directly with the heads of law enforcement organizations, State and local counterparts, with whom I work with and met with, the National Sheriffs' Association also, and have raised this issue with them as well as the National District Attorneys Association.

We view this as a temporary cessation because the funds are not in the account at this point in time.

We have asked two things of our State and local colleagues. Number one, we have asked that they remain in the task forces, because we need them and they are vital to making sure that we work on public safety. They know this area like no one else does. But also so that as their work continues, we can in fact process the applications, and when the money is available, make those payments as soon as possible.

We have also advised them that even though we are not able to make the Equitable Sharing payments at this time, what is called the JLEO, or Joint Law Enforcement Operation payments, which primarily cover the overtime costs of State and local officers, are being made.

So we have asked our colleagues to stay in the task forces and to continue to submit all the forms they would ordinarily submit for that.

We have also advised them that we will update them on a monthly basis on this. We intend to do so. I spoke with them most recently over the course of January and this month and have gone into detail about how this issue occurred and our regret for it occurring, and stressed the importance of their contribution.

Senator CAPITO. I think they know that they shouldn't be counting on these funds to run their local departments. The temptation obviously, of course, over years in slim budget times, these become very vital funds for them.

Very quickly, because I am kind of out of time, ATF, you have an increase. We have that tracing facility in Martinsburg, West Virginia.

NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM

The other thing I wanted to talk about was the National Instant Criminal Background Check System (NICS). It is also located in West Virginia. I noticed in the statistics that we are doing twice as many background checks with 33 fewer people, and that you have asked for an additional 200 people, I am sure to meet the demands of the increasing workload there. How is the hiring going with that?

Attorney General LYNCH. Thank you.

As you know, this issue is also very important to us, given the importance of the NICS system to making sure that we can promptly and efficiently respond to the requests that we receive.

Because we are seeking to almost double the size of that facility, Federal hiring does take time, so we have begun the hiring already by hiring contractors who are able to come on board within the Federal system at a faster pace. So while we have not yet been able to add the total new number of people that we would like, it is proceeding.

At the same time we are going to begin to work with contractors, we still intend to proceed with the Federal hiring process so that we can have full-time Federal employees on board as well.

As you note, Senator, the applications for firearms transactions have increased dramatically, and we feel we have an obligation to respond as quickly and efficiently as possible to those dealers who submit information to us, as we ask them to do under the law, and to the individuals who also submit their information, as we ask them to do under the law.

Senator CAPITO. I appreciate that. And, I would say that you noted in your opening statement that you are going to be consolidating and modernizing your FBI headquarters. Since my predecessor, Senator Byrd, was able to get all those great FBI employees in West Virginia, I think you ought to scope it out there. I think it would be a great place to just relocate the whole DOJ—sorry to the ranking member over there.

Senator MIKULSKI. What are you relocating? [Laughter.]

Senator CAPITO. Anything I can get.

Senator MIKULSKI. I don't think I heard you right.

Senator CAPITO. Anyway, thank you very much.

Senator MIKULSKI. You know, Senator Byrd relocated everything to West Virginia. He was ready to relocate Virginia to West Virginia. [Laughter.]

Senator SHELBY. Senator Shaheen.

Senator SHAHEEN. Thank you, Mr. Chairman.

And thank you very much, Attorney General Lynch, both for your testimony this morning as well as your leadership at the Department of Justice on a daily basis.

ASSETS FORFEITURE FUND EQUITABLE SHARING

I want to pick up on Senator Capito's questions about the Assets Forfeiture Fund, because I have heard from everyone in New Hampshire, from our Attorney General to the Chiefs of Police Association to the average cop on the beat about the concerns that they have with what has happened.

I think there are several ramifications for us in New Hampshire. One is, because we are dealing with a crisis in opioid and heroin addiction, any loss of support makes it even more difficult for law enforcement to address that challenge. They have also expressed concern about the communications and how sudden it was to learn that they were not going to be able to have the Equitable Sharing payments that they were expecting. They have also expressed concern about the formula for those payments and concern that they're hearing that formula could change from 80/20 to 50/50.

You talked a little bit about your efforts to communicate on this issue, but can you talk about what more we can do so that local officials are not surprised by this kind of dramatic shift?

Attorney General LYNCH. Yes. Thank you, Senator.

Certainly, it highlights the issues that arose at the end of the year as we were absorbing this rescission. And in terms of my discussions with my local law enforcement counterparts, both the heads of the police organizations and the sheriffs organizations, I have conveyed my direct apology to them, because we typically are able to build in communications with them over the course of policy changes like this, and that did not happen on this occasion.

So it has caused an even greater hardship on our colleagues because they did not know it was happening. That, certainly, is not our intent and not our goal. So we have all been working on trying to resolve this issue in a way that restores the payments.

Our goal would be to restore the payments to the full formula that we have been using.

Senator SHAHEEN. So the 80/20?

Attorney General LYNCH. At this point, what we are doing is we are, on a monthly basis, keeping our State and local colleagues apprised of the progress of the Assets Forfeiture Fund, and we are doing this through communicating with the various law enforcement groups, major city chiefs, sheriffs, et cetera, as well as the DAs Association.

So we also are awaiting the results on our review of some settlements coming into the Assets Forfeiture Fund, because we have to determine how we will essentially manage the victim payments that are required out of those first.

Certainly, I know every law enforcement officer knows that the victims are why we do this. And of course, they take priority.

But even with that, our goal is to try to restore it to the same program as before. We have certainly heard the same concerns and certainly anticipate hearing more and want those concerns. We want the communication with the law enforcement, with our DAs, with our State attorneys general, on this.

We are keeping them apprised on a monthly basis of status.

Senator SHAHEEN. I know you are reluctant to be pinned down to a date when you expect those payments to begin again, but are you looking at something that is going to happen within the next couple of months? Within the next 6 months? Within the next year? All of that has an impact, as you know, at the local level.

Attorney General LYNCH. Yes, it does. It does. Certainly, as Senator Capito has raised, it has an impact on their operations.

But also, these are operations they are doing in conjunction with the Federal Government, so they are actually actively helping us.

So we certainly do feel the obligation there on that level, for that reason as well.

There has been discussion, and certainly I've gotten questions about whether or not the influx of asset forfeiture funds from some of our large settlements, which the settlements have been adjudicated, the monies coming in now can in fact restore these payments sooner rather than later. We are still, as I mentioned, working on dealing with the victim issue in those large settlements.

So once we have that formula resolved, we will have a better idea of funds that will be left from large settlements, as well as an idea of how the Fund is being replenished on a monthly basis.

Certainly, we have told our organizational colleagues that we will update them in mid-March. At this point, I do not have a date on when the payments would start. It is not our goal to delay them any longer than necessary. It certainly has never been our goal to stop them totally.

Senator SHAHEEN. Thank you. I appreciate that.

I think the more information that can be provided at the local level, the more helpful it will be as they are trying to deal with how to compensate for the lack of those payments.

HEROIN AND OPIOIDS

Mr. Chairman, I know that my time has expired, but I am hoping I can ask one more question.

Senator Mikulski, in her opening statement, referred to the scourge of heroin and opioid abuse. One of the things that we have seen in New Hampshire in response to that, and in our State, we are losing a person a day to overdose deaths, three times as many as we lost in traffic accidents last year.

So one of the things that is beginning to work in communities is that law enforcement is working with treatment professionals, with the medical community, with schools, to have a real comprehensive, cooperative approach to how to deal with this issue.

I have been disappointed that, at the Federal level, we do not have the same sense of urgency and cooperative approach to deal with this issue, where we are working across agencies, and there is a real understanding that, in 2014, we lost 47,000 people in this country to overdoses.

So can you reassure me that there is a sense of urgency and that this is something that, across agencies, there is an understanding that we have to do better to address?

Attorney General LYNCH. Senator, I cannot only reassure you of that, I can tell you that the Department is an active participant in a multiagency opioid task force that essentially pulls together the efforts in this to make this an all-administration effort, because we do recognize that it has so many factors. Even within DOJ, our Drug Enforcement Administration, or DEA, is dealing with this issue with what is called a 360 strategy, which is enforcement, talking also with the manufacturers at the corporate level, and the community education level as well. So recognizing that even for an enforcement agency, we have to have a multilevel approach.

There is, as I mentioned, this opioid task force that cuts across agencies, not just DOJ but Department of Health and Human Services (HHS). And Veterans Affairs is heavily involved in this. The

Office of National Drug Control Policy (ONDCP), all their various names.

But everyone is focusing on this, HHS, in particular, because this issue has to be dealt with on multiple levels. So we found that that is the most effective way to deal with it, so I can assure you that not only is it viewed as an urgent issue, as an epidemic and a crisis, it is being viewed as a multiagency one in how we have to resolve it.

Senator SHAHEEN. Well, thank you. I appreciate the President's request in the budget for over \$1 billion. I hope that Congress can provide the resources that are needed.

Thank you, Mr. Chairman.

Senator SHELBY. Thank you.

Senator Collins.

HEROIN AND OPIOIDS

Senator COLLINS. Thank you, Mr. Chairman.

Welcome, Attorney General. My questions also deal with the opioid and heroin crisis that is epidemic in my State as well.

Recently, Federal law enforcement officials briefed me on the link between straw purchasing of guns and the heroin crisis in my State. What they described to me is a scheme in which out-of-state drug dealers with ties to inner-city gangs or the Mexican drug cartel come to my State with heroin, find addicts with no records, clean records, to buy guns and then there is an exchange of guns for heroin.

In response to this problem, Senator Leahy and I have introduced a bill to greatly toughen the penalties for straw purchasing and illegal firearms trafficking, because right now, it is essentially treated as a paperwork violation, if you do not fill out the forms correctly.

Our bill, I should make clear, fully protects the rights of law-abiding gun owners and purchases.

Are you familiar with this link between gun trafficking, straw purchasing, and the heroin crisis?

Attorney General LYNCH. Senator, yes, I am familiar with that.

It is a matter of grave concern to us as we look at both of these issues, the firearms issues, but, in particular, the heroin crisis.

The use of straw purchasers not only inveigles these individuals into crime, but it exploits rather vulnerable people. As you note, the offenses right now tend to be considered paperwork offenses, it can be difficult to obtain cooperation from those individuals to allow us to work a Federal case up the chain, so to speak, and in fact, get those individuals who are really running a drug-trafficking ring across several States. And those are our targets.

So we support the efforts that you have outlined to in fact strengthen the statutory authority that we would have to prosecute straw purchasers in instances like these.

At this point, it would be extremely useful to have a stronger statute, because, first of all, it would hold individuals accountable for this behavior. As I mentioned, yes, they are vulnerable and they are being exploited, but individuals do have to be held accountable for their actions that they take. And it would give us the tools that we need to make those cases part of the larger cases, conspiracy

cases and trafficking cases, that would bring in all of that criminal activity.

Senator COLLINS. I look forward to working with you on trying to get our bill enacted into law.

COPS ANTI-HEROIN TASK FORCE

The Department's budget for fiscal year 2017 zeroes out the funding for the COPS anti-heroin task force. Congress has appropriated \$7 million in each of the last 2 years for this task force, which has funded competitive grants that have enabled law enforcement agencies in areas with high rates of heroin and opioid abuse to purchase drug detection equipment, expand data collection, strengthen information systems, all sorts of purposes.

Communities in my State, from Fort Kent in the north to Portland in the south, have reaped the benefits of this funding. I think it is important to note that the heroin epidemic affects tiny towns, rural areas, as well as our larger cities. It is literally everywhere.

As this epidemic continues to spread, I am very disappointed and, indeed, in some ways shocked, that the administration did not include any funding at all for this program, particularly since the Comprehensive Addiction and Recovery Act, which many of us have cosponsored, and which will be on the floor soon, specifically authorizes this task force. That is an indication of strong congressional support, as is the funding that it has received in each of the past 2 years.

Why is the Department eliminating funding for this very successful competitive grant program that has been so useful, particularly to small towns that just do not have the resources to combat this epidemic?

Attorney General LYNCH. Thank you for the chance to address this issue, because it is one of vital importance. And certainly, I regret the impression that has been given that we in some way are diminishing the importance of COPS efforts in this area, the COPS program efforts in this area, their effectiveness, or the need that exists there.

In constructing the current fiscal year 2017 budget and dealing with the heroin epidemic, what the Department has done is to include \$12.5 million and 42 positions for DEA to create four new heroin enforcement groups. These groups, as with most of our DEA groups, would also draw heavily on local law enforcement for members as well.

So we are trying to deal with the enforcement side of the increased heroin effort that way. So it is our hope that having greater Federal resources would relieve some of the burden on local law enforcement and, again, allow us to make those cases federally.

So that is the direct answer to the specific issues as to why the COPS program was shifted in that way. We still, however, will be using the Community Oriented Policing Services (COPS) program to support local efforts, for example, the DEA meth lab cleanup program.

Within COPS, in particular, however, we do have an increased funding request for the COPS hiring and training program that would allow jurisdictions to literally hire and retain officers directly.

So we are hoping to increase those local efforts through COPS for our jurisdictions. We are hoping to increase the Federal cases that we can bring on the heroin level. And we are hoping to continue with the grant program in other areas.

Senator COLLINS. I hope, Mr. Chairman and Ranking Member Mikulski, this is an area that we can look at. It is a small amount of money, and it has done a lot of good.

And finally, just to follow up on Senator Mikulski's point about scams, the Aging Committee, which I am privileged to chair, the ranking member, Senator McCaskill, just put out a resource guide on the top 10 senior scams. That IRS scam is number one. We do need a more cooperative and aggressive approach to get after these terrible con artists who are frequently located overseas. Thank you.

Senator MIKULSKI. Mr. Chairman, may I respond just for a second to the gentlelady from Maine?

Senator SHELBY. Go ahead, Senator.

Senator MIKULSKI. First of all, that \$7 million was from when I was the chair of the committee. We kept it going as chairmanships shifted because it was what I was looking for, and I think your description of the way it has been utilized was that it was not only limited to just enforcement, but other activities related to enforcement.

But I would suggest for those of us who are interested in this, let's review all the programs here, as well as the President's initiative and the supplemental. Let's see what we can do to maximize this.

I agree. I think this is an issue of such bipartisan focus and cooperation, so I look forward to working with the gentlelady.

Senator SHELBY. Senator Baldwin.

BUILDING COMMUNITY TRUST

Senator BALDWIN. Thank you, Mr. Chairman.

Thank you, Attorney General Lynch, for your service.

As the ranking member mentioned in her opening statement, communities across the country have experienced unrest and uprisings following officer-involved shootings and other deaths in custody, often involving African-Americans.

In response, the President took action to help rebuild trust between law enforcement and local communities. In December, the Department of Justice COPS office announced the creation of a new Policing Practices and Accountability Initiative.

I have to tell you I was very pleased to see the Department choose former Madison, Wisconsin, Police Chief Noble Wray to lead this initiative.

Can you tell the subcommittee more about how the Department's budget request will support this new initiative, and how the program will help advance the recommendations of the President's 21st Century Policing Task Force to further improve relations between law enforcement and the communities that they serve across these United States?

Attorney General LYNCH. Thank you for the opportunity to talk about certainly what is one of my priorities as Attorney General, as well.

We greatly appreciate the efforts of the former Madison, Wisconsin Chief, and all of his colleagues who have been so instrumental in working with the Department to help us bring those experiences and ideas from the ground up into main Justice to inform our policies, to inform our support of their efforts. It has been tremendously helpful, and we have found that type of peer-to-peer relationship has been effective, as we try to provide support for law enforcement agencies across the board.

With respect to building community trust and community policing, for fiscal year 2017, those increases are \$129.4 million. They include \$7.5 million for the body-worn cameras; \$15 million for the Office of Justice Programs' Smart Policing program; \$20 million for the COPS Collaborative Reform program; and \$42 million for the COPS hiring program; under our Community Relations Services, funding for law enforcement reconciliation of \$3.5 million; and under our Civil Rights Division, funding for policing and criminal justice of \$2.7 million.

With all of those efforts, we are trying to take really a holistic approach to this issue and this problem. As you note, we have had a number of instances that have highlighted this broken trust. But I think we all have to agree that those incidents and the dissenting voices that arise from them are really drawing upon issues, situations, that were festering long before the law enforcement officer interacted with the individual and the tragedy resulted. So those issues also have to be dealt with.

Police accountability, and the body-worn cameras, something that we found very, very helpful to both law enforcement and the community in making sure there is that vehicle for accountability—

COLLABORATIVE REFORM INITIATIVE

Senator BALDWIN. I want to pivot to the Collaborative Reform Initiative. If I might, I certainly continue to hear from my constituents in Wisconsin who are deeply shaken by the deaths of Dontre Hamilton in Milwaukee, Tony Robinson in Madison, among others. They are also concerned by this growing chasm that is the critical trust that must be present between law enforcement and the people that they risk their lives to protect.

So the Milwaukee Police Department and the Department of Justice have joined together on such a Collaborative Reform Initiative to help speak to this problem. I want to just acknowledge that some of the Milwaukee constituents that I hear from believe that it is not a strong enough approach to the allegations of misconduct. I want to be sure that this effort leads to reforms and change.

So you have increased the commitment in the budget for this program, as you just outlined, some \$20 million. Can you talk about how those resources will help strengthen the work that they do in the Collaborative Reform Initiative?

And how do you respond to those criticisms of Collaborative Reform, that it is not enough to achieve accountability?

Attorney General LYNCH. Thank you.

Collaborative Reform is one of our most important tools. It is a tool that we both will offer to police departments, and one that

they will come to us and request. So that has been a very positive development in the interaction on this issue.

As always, an important part of it is the community response that you just outlined. In fact, my recollection and my notes indicate that in January, the first listening session regarding the Milwaukee Collaborative Reform, we were fortunate enough to have over 500 citizens come and express their views. This is vital.

And I will say that it is important that they continue to provide their views on whether or not Collaborative Reform is achieving the effects that we all desire. But it is a process, and it is one that will take time.

The listening is part of it, because it gives us an idea of how the community views the police department and whether or not the changes are effective. We are at the beginning of the process with Milwaukee, and we hope to continue working with them over the next 6 to 8 months to make those changes.

We have always told all police departments that Collaborative Reform may, in fact, be the best tool for you. Sometimes there are other tools that end up being more effective. And I have seen situations where communities throughout Collaborative Reform have continued to hold the view that it has not been effective. And I have also seen situations where, over time, they do believe that it is becoming effective.

In order for either of those views to be well informed, we have to have the dialogue. So part of the Collaborative Reform effort is building a process by which community members have insight into the department's current practices, proposed changes, and the opportunity to comment on them.

Senator SHELBY. Senator Coons.

Senator COONS. Thank you, Chairman Shelby and Ranking Member Mikulski, for this hearing.

Thank you, Attorney General Lynch, for your leadership of the department at this most difficult and important time.

I would like to thank everybody in Federal law enforcement for their service and their hard work to advance justice. There are so many things we could talk about today, from your vital work in combating violent extremism or fighting human trafficking or international corruption or the important work that remains unfinished in terms of healing the real divide between law enforcement and communities of color across our country that Senator Baldwin was just asking about.

VIOLENCE REDUCTION NETWORK AND CHILD ADVOCACY CENTERS

Let me focus more narrowly on my hometown of Wilmington, Delaware, for a moment, if I might, where I think there is a good news story, which is the Violence Reduction Network, now in its second year, which has proven to be a really effective program for small cities—like Flint, Michigan; West Memphis; Little Rock; Camden; Newark; and Wilmington—to access cutting-edge tools from law enforcement to partner with other agencies around the region and country and to make progress.

Our own Wilmington Police Department has had their clearance rate for homicides jump from an abysmally low rate to now 50 percent, and they are making real progress in cold cases. I just want

to specifically thank the Office of Justice Program grants (OJP) Bureau of Justice Assistance, and the team leader in Wilmington, John Skinner.

I hope you can commit to continuing this program. It is vanishingly small in the scope of your total budget. I think the line item was \$5 million, and I think we have gotten a real bang for our buck. I hope you will come and visit Wilmington and see its impact, and I hope you will continue to support it.

Let me mention one other program. The Victims of Child Abuse Act funding, 2 years ago Congress on a bipartisan basis unanimously reauthorized the programs that come under the Victims of Child Abuse Act. The Child Advocacy Centers that are funded under this law conduct forensic interviews of those who are victims of child abuse in a way that is both respectful of the significant needs of child victims, but also meets law enforcement needs.

I was very disappointed to see the President's budget once again request only half of the amount required for these programs, so I would like to hear your views on whether these are both of value, the Child Advocacy Centers and the Violence Reduction Network, and whether you think they are worthy of more robust funding and support in the years ahead.

Attorney General LYNCH. Thank you, for your comments on the work we are doing in Wilmington. And thank you also for raising the issue of the child abuse centers.

Certainly, it is an important issue for us. We have it contained within a whole host of juvenile justice issues in which that program is housed. The total budget is \$334 million, which is an increase over the current budget levels. So we are looking essentially at trying to, within that framework, fund a number of programs there. But it does not mean that we in any way view that program as not important or not helpful. So that is the comment there.

Our request for juvenile justice is going to focus on formula grant programs such as the Part B formula grants, and the Juvenile Accountability Block Grants. We do think that those will be effective as well.

But as I indicated before, it does not mean that we are not committed to that program. We are simply trying to work within the funding that we have.

Senator COONS. I understand the complexities of a very large agency with lots of different funding streams, but the Child Advocacy Centers are a specific law enforcement response to a specific problem of child sexual abuse that I think is worthy of a specific appropriation.

JUSTICE REINVESTMENT INITIATIVE AND ACCESS TO JUSTICE

Let me turn to two other things, if I might. The Justice Reinvestment Initiative that has had a strong and positive impact also in my home State of Delaware, which is now being looked to as a model for justice reinvestment. It helps States to fully implement reforms and measure their success through data collection and analysis in particular around reentry. If we are going to continue our journey toward criminal justice reform, we have to do a stronger job of managing reentry, and I am glad that your request increases funding for that.

Last, in Access to Justice, I just want to commend you for the \$13 million funding request for Access to Justice initiatives, indigent defense program for juveniles, for adults; a civil legal aid program; and one called Answering Gideon's Call that I think is of particular value.

So I see that my time has about run out, but if you had a moment to just tell us how you think these two initiatives—Justice Reinvestment and Access to Justice—will strengthen criminal justice and the ties between law enforcement and community, I would be grateful.

Attorney General LYNCH. Thank you so much. I am cognizant of the time as well.

I appreciate those comments, because the people in the Department of Justice who work on these issues care very deeply about them, as we all care about all of our issues under our purview. But in order to make sure that our justice system, both criminal and civil, is fair and responsive to everyone in this country, it has been clear for years that access to that system has to be as open as possible. If individuals do not have the ability to adjudicate even small disputes, there is a spillover effect in terms of their relationships between and among themselves and within the community.

So having that ability to know that there is a place that one could go to deal with even small issues is important. And having the resources dedicated to opening that up to everyone, be it counsel, be it language issues. Language barriers are a tremendous problem for so many individuals who are simply trying to advance the business of their lives. Those issues, I think it essentially helps us ensure that the promise of America remains open and real for everyone and not simply behind a door with a sign on it that people cannot read.

Senator COONS. Thank you, Madam Attorney General.

Senator SHELBY. Senator Murphy.

GIRLS IN THE JUVENILE JUSTICE SYSTEM

Senator MURPHY. Thank you, Mr. Chairman.

I am constantly impressed at your ability to handle the remarkable breadth, scope, and variety of questions that you get at these hearings. I have three to add to the list. I appreciate your indulgence.

The first is on a program that I know is very dear to your heart, and that is our continued efforts to create gender-responsive juvenile justice systems. In Connecticut, we have been a national leader in recognizing that girls, more than almost anyone else, tend to get the short end of the stick in our juvenile justice system. For instance, a lot of status offenders that are girls end up in prisons, simply because we do not have gender-appropriate alternatives to incarceration.

In the 2016 omnibus, there was \$2 million for competitive grants focused on girls in the juvenile justice system. DOJ, you have not requested additional funds for the girls in the juvenile justice system program for 2017. I just wanted to ask you why that is, if you think that we are still in the process of expending those earlier funds or if there are other parts of the budget that may help to seed some of the programming like that in Connecticut, which real-

ly has set some national models for how you treat girls in the juvenile justice system.

Attorney General LYNCH. Thank you for that important issue. It is, indeed, an important issue, and I actually do not have that information at my fingertips now. I would appreciate the opportunity to get back to you on that, because it is such an important issue. [The information follows:]

The fiscal year 2017 President's budget maintains the fiscal year 2016 funding level for Girls in the Juvenile Justice System of \$2 million. In fiscal year 2016, the program was funded as a set-aside in the Delinquency Prevention Program. The fiscal year 2017 President's budget requests \$2 million for this program as an independent line item.

I will also note that the issue of how we handle issues of gender is something that we take very seriously. We have been working with local law enforcement and with OJP. We just recently released guidance for State and local counterparts on reducing and eliminating gender bias in law enforcement. That was a collaborative effort and one that we think is going to be very helpful. It focuses not just on issues of domestic violence and sexual assault, but how law enforcement deals with young people who are dealing with gender issues, particularly our lesbian, gay, bisexual, and transgender (LGBT) youth community as well.

So it is something that we take very, very seriously, and I would appreciate the chance to respond to your direct question with the specifics that I would like to give you.

Senator MURPHY. I know of your personal commitment to this issue, so a response on that line item would be helpful.

Second, I want to turn to the President's executive actions to reduce gun violence. You and I have spoken about this.

GUN SAFETY TECHNOLOGY

One of the most interesting parts of it is a directive to DOJ, DOD, and Homeland Security to conduct and sponsor research into gun safety technology. My hope is that at the end of that period of research, that there is an effort to use the procurement ability of the Department of Justice, and perhaps other agencies, to spur additional private sector research and development into smart gun technology. I understand these types of weapons are not the answer for everyone in law enforcement or in the military, but there certainly is an ability to leverage purchasing power on our side to promote research on the private side.

I just wanted to get an update as to how that research is going and when we may expect some request for proposal (RFP) that prompts some private sector research.

Attorney General LYNCH. Thank you. This is a very important issue and has actually been one under consideration within government for some time, as law enforcement and, in particular, the Department of Defense want to make sure that we remain current in the weapons that we provide to our law enforcement individuals as well as our Armed Forces individuals.

So for approximately the past 2 years, there has been research being done, and the gun manufacturers have been very effective partners in this, in developing what are called the smart gun technology, various ways of making sure that you can limit who can

handle a firearm, who can fire a firearm. Of course, issues of safety and reliability are at the forefront of everyone's minds on this.

With respect to the President's directive that the Department of Justice, Homeland Security, and Department of Defense essentially focus on research, that is being done. Just within the past 2 months, our research arm, the National Institute of Justice, has initiated what they are calling a gun safety technology challenge to essentially assess the reliability of firearms that are currently available today, looking at the advanced gun safety that is integrated into the firearm, but also challenging our manufacturers, challenging our end-users to really focus on this issue and come up with the best product. We do not have a timetable yet for when we might be at the RFP stage.

Certainly, we are aware that with the large purchasing power of law enforcement and the Defense Department that we could influence this. But of course, we want to make sure those guns are as safe and reliable as possible.

Senator MURPHY. I appreciate that. As you know, manufacturers and retailers in the private sector who have attempted to lead on this issue of gun safety technology have been regularly blacklisted. It is a chilling mechanism on those who want to pursue this without some pressure coming from the Federal Government, some backstops, cover from the Federal Government, so I appreciate your work and your seriousness on this. Thank you very much.

Senator SHELBY. Senator Boozman.

Senator BOOZMAN. Thank you, Mr. Chairman.

And thank you very much for being here. I know that you have a lot going on, but this is really so very important.

I think this has been a good hearing. We covered a lot of ground.

I just want to reiterate, we talked in January about the Equitable Sharing Program. I know that several people brought that up today. I think that really does illustrate that it really is on our minds. Certainly, I know that you are working hard to get it straight. Anything that we can do as a subcommittee, I think I speak for all of us, we would certainly be glad to do that.

U.S. MARSHALS REGIONAL FUGITIVE TASK FORCE

A couple things that have not been mentioned that are just kind of things that are of some concern. I understand the U.S. Marshals are requesting funding for an additional regional fugitive task force. Can you explain the importance of the program and explain where it would be located?

Attorney General LYNCH. Thank you so much.

The regional task forces have been an important part of our violence reduction program over the past year. We find them to be a very effective counterpart to our State and local efforts at law enforcement. One of the things that we are looking to do is make sure that we do our part in keeping local communities as safe as possible. Where there are violent fugitives who, frankly, are often hiding in plain sight, but the local law enforcement agencies do not have the resources to track or apprehend them, the Federal Marshals Service will step in. In fact, that was one of the main reasons for the creation of the U.S. Marshals Service, that they tracked fu-

gitives, and they are very good at it. I am very proud of the work that they do.

So where we have been able to do that over the past year, we have seen an effective increase rate in capturing fugitives in communities across the country with the current task forces that we have. And we feel that adding this additional task force would help many communities who have this issue.

I am not exactly sure if I know where that would be located at this time. I will get back to you if I have that information.

[The information follows:]

The fiscal year 2017 budget proposes opening an additional U.S. Marshals Regional Fugitive Task Force in the Carolinas.

But essentially, it provides not just the manpower but the intelligence, the surveillance, all the information that goes into managing this difficult issue and obviously a dangerous issue. We have, of course, had some serious officer wounding situations resulting from these apprehensions.

But it is a cause they take very seriously. I take it very seriously. And I thank you for raising it, because I am tremendously proud of the work that they do.

Senator BOOZMAN. Very much so.

ATF HIRING

One of the things we hear a lot about is the National Firearms Act applications. I think you have addressed it somewhat in the sense of hiring ATF personnel.

Can you tell us how many people the agency intends to hire? Will they all be special agents, and specifically, will any of them be used to decrease the waiting period of the National Firearms Act?

Attorney General LYNCH. Thank you, sir.

The request for the ATF, \$54.3 million, would provide 230 positions for ATF. Two hundred would be a combination of Special Agents and Industry Operation Investigators—80 agents, 120 investigators.

The investigators are the individuals who primarily work with our licensed firearms dealers and community members. They man a booth at a gun show, for example, and provide information. The Special Agents will be focused on the enforcement operations involving violent crime, as I mentioned before, the rise of Internet firearms trafficking, and providing assistance to our State and local colleagues where they have serious firearms problems also.

The other individuals will be working within NIBIN network, which is our National Integrated Ballistics Information Network. It would upgrade the imaging hardware and software. That is where we share information across law enforcement platforms with State and locals as well, when we apprehend individuals when we come across firearms evidence.

In fact, 22 positions would support processing of all the license issues, which is the firearms licensees, the explosive licensees, as well as the National Firearms Act applications. We felt that it was important to increase the individuals who were processing those licenses because, number one, we may be asking more individuals to

apply to be licensed dealers, but also under the National Firearms Act, we have had a backlog in recent years in that area. So in order to be able to effectively process these as we ask individuals to essentially apply as individuals, we are requesting those resources.

Senator BOOZMAN. Thank you.

Thank you, Mr. Chairman.

Senator SHELBY. Senator Graham, any questions?

SEQUESTRATION

Senator GRAHAM. Thank you very much.

Senator SHELBY. Just in time.

Senator GRAHAM. Which is unusual for me.

Madam Attorney General, how bad is sequestration hurting your ability to defend the Nation and protect us domestically and internationally, if it goes back into effect?

Attorney General LYNCH. Senator, the most recent example of sequestration that we saw had the department losing approximately, I believe, 6,200 people, a combination of agents, attorneys, and staff members as well. That is a loss from which we have yet to recover, quite frankly.

Senator GRAHAM. Would there be more losses occurring, if sequestration kicks back in?

Attorney General LYNCH. There would be. There would be significant losses occurring, particularly at the investigative law enforcement level, if sequestration were to occur again. This would severely limit our ability to deal with the emerging areas and expanding areas of cybercrime, in particular international organized crime. And it would severely decrease our ability to provide the resources to our State and local counterparts that are so important to them as well.

Our grants were cut in half during sequestration. That was tremendously painful not just for the department but for those individuals who depend on those grants to fund operations and, frankly, help us with task force type operations.

Senator GRAHAM. Is the FBI fairly much under siege trying to track all the groups that could penetrate the homeland?

Attorney General LYNCH. Well, the FBI will tell you that they will respond to every crisis, and they do. I am tremendously proud of the work that they do. But the reason we are requesting more resources, particularly in the area of cybercrime, is because this is an area in which we need the resources to keep up with the technological capability of the criminals, which quite frankly is growing exponentially.

EXECUTIVE ACTIONS

Senator GRAHAM. So let's talk about executive action. If the President tomorrow issues an executive order to transfer prisoners out of a Guantanamo Bay, given the restrictions Congress has placed in the NDAA, would that be appropriate or lawful?

Attorney General LYNCH. Senator, I do not believe that is the President's intention at this point.

Senator GRAHAM. I know. But does he have that power?

Attorney General LYNCH. At this point, I have not been asked to opine on that by him. I certainly haven't provided advice on that.

Senator GRAHAM. Can I ask you to opine for me? You do not have to do it right this minute.

Attorney General LYNCH. Thank you, sir. As I have indicated, the current state of the law prohibits those transfers, which is why the President is indicating he wants to work with Congress to look at those statutory issues.

Senator GRAHAM. Did he talk to you—did you help draft this proposal that was sent over?

Attorney General LYNCH. No, sir. That was, I believe, the Department of Defense.

Senator GRAHAM. Did they talk to you at all?

Attorney General LYNCH. No, I was not involved in those discussions.

Senator GRAHAM. Okay. Interesting.

I am going to ask you, does he have that authority, from the Attorney General's point of view? You can just write back to me later. Is that fair?

Attorney General LYNCH. Thank you, sir.

Senator GRAHAM. Thank you.

Executive action. The President has given legal status to how many million people who are here illegally?

Attorney General LYNCH. I am sorry?

Senator GRAHAM. The legal status given to illegal immigrants, how many people have been affected by his executive orders?

Attorney General LYNCH. Sir, I do not have those numbers at the top of my head.

Senator GRAHAM. There are two groups. The Deferred Action for Childhood Arrivals (DACA) kids, who came here as small children, right?

Attorney General LYNCH. Well, I believe that they would have deferred status.

Senator GRAHAM. Right. And now it is their families, is that right? What he did the second time?

Attorney General LYNCH. Well, I believe that particular action is currently enjoined, so none would have been provided.

Senator GRAHAM. But he tried to do it, and the court said slow down. Is that fair to say? That he has been enjoined from doing what he thought he could do?

Attorney General LYNCH. Yes, that injunction is—

Senator GRAHAM. He thought he had the legal authority.

What limits would there be on a President, in terms of just giving legal status to people here illegally? Are there any limits that you can think of?

Attorney General LYNCH. Senator, I certainly think that, as we have discussed previously, when it comes to immigration laws, one starts with the statutes and then one looks at the court decisions. As you craft policy, you will have to look at those particular issues as well as any applicable regulations to determine whether or not—

Senator GRAHAM. Is there any court decision that would allow the President of the United States—any President—to issue an executive order to say that 3 million people here illegally now have legal status? Is there any Supreme Court case that would acknowledge Article I power to do that, that you know of?

Attorney General LYNCH. Senator, I am not aware that issue has been presented to the court, certainly, so I would not be able to give you that information now.

Senator GRAHAM. Okay. From your point of view, prosecutorial discretion is, "I could prosecute somebody, but I choose not to for a variety of reasons," right?

Attorney General LYNCH. That is part of it, sir.

Senator GRAHAM. Okay. Isn't this different from saying, "I am not going to prosecute you because I choose not to," versus giving you legal status? Is that prosecutorial discretion, to give some legal status?

Attorney General LYNCH. Senator, prosecutors do not have the authority to confer or take away a status regarding immigration or any other legal issue. That is determined by statute and by the courts.

Senator GRAHAM. What makes the President different than a prosecutor, in that regard? What authority does he or she have to do that? Because prosecutorial discretion is not the legal basis. I think you are right about that.

And I will wrap this up. If you can't do it through prosecutorial discretion, a prosecutor can't, what authority does the Chief Executive have, inherit statutory or Supreme Court decision-wise, to allow him to do this?

Attorney General LYNCH. When you say "this," sir, what are we referring to?

Senator GRAHAM. What he did, give legal status to millions of people by executive action.

Attorney General LYNCH. Well, Senator, I am not aware that is the actual result of that. Certainly, I would have to refer you to——

Senator GRAHAM. I know our time is up, but he did give legal status to millions of people who I am willing to deal with through the statutory process. He did that, didn't he, the President?

Attorney General LYNCH. I am not going to be able to give you a legal opinion on the effect as——

Senator GRAHAM. I am not asking your legal advice. I am just saying that is what he did.

I mean, he did that. He issued an executive order saying you can stay here, didn't he?

Attorney General LYNCH. I would have to refer you to the terms of the executive order.

Senator GRAHAM. Okay. Thank you.

Senator SHELBY. Thank you, Senator Graham.

ADDITIONAL COMMITTEE QUESTIONS

If there are no further questions this afternoon, Senators may submit additional questions for the subcommittee's official hearing record.

We request, Madam Attorney General, the Department of Justice's responses within 30 days.

[The following questions were not asked at the hearing, but were submitted to the Department for response subsequent to the hearing:]

QUESTIONS SUBMITTED TO HON. LORETTA E. LYNCH

QUESTIONS SUBMITTED BY SENATOR RICHARD C. SHELBY

Question 1a. Why does the administration fail to recognize—and subsequently fail to support—the valuable work that TEDAC accomplishes?

Lead-in information from original document.—

Recently, I joined FBI Director James Comey at a ribbon cutting event for the Terrorist Explosive Device Analytical Center—or TEDAC—which is America's single Federal laboratory and repository for terrorist improvised explosive devices, or I.E.D.'s. Counterterrorism is a top priority for this subcommittee, and the work TEDAC conducts is critical given that I.E.D.'s are still prevalent and dangerous tools used by terrorists at home and abroad. Even the President acknowledged the importance of gathering explosive intelligence against terrorists during his press conference regarding Guantanamo Bay. He specifically cited the successful prosecutions of the shoe bomber, the terrorist who tried to blow up a plane over Detroit, the terrorist who put a car bomb in Times Square, and the Boston Marathon bomber. The explosives forensics investigations that led to the convictions of these terrorists were conducted by TEDAC personnel. So you can understand my disappointment with the Department's 2017 budget request that includes a \$74 million reduction-in-base to TEDAC, a \$9 million rescission of prior year funds for TEDAC operations, and no money requested for TEDAC construction, which is a reduction of \$52 million below the fiscal year 2016 level.

Answer. The Department appreciates the additional funding provided in the fiscal year 2016 Omnibus. The resources will provide mostly non-personnel and some positions to enhance important programs like TEDAC and HDS. The FBI will add 30 positions to the footprint at Redstone Arsenal, as reported in the fiscal year 2016 Spend Plan; however, the FBI is committed to maintaining these positions from within base resources in fiscal year 2017 if required. The \$52 million in construction resources for TEDAC funded specific construction requirements in fiscal year 2016.

While the Department's fiscal year 2017 budget request includes a \$74 million program non-recur for the fiscal year 2016 increases, only a portion applies to TEDAC. Additionally, the request includes a \$9 million rescission of excess prior year TEDAC balances, but will not reduce TEDAC operations. Further, prior year funding provided for construction of projects at TEDAC is sufficient to fulfill the construction needs of the facility.

Question 1b. What metrics was the administration using when deciding to cut counterterrorism funding such as TEDAC?

Lead-in information from original document.—

Recently, I joined FBI Director James Comey at a ribbon cutting event for the Terrorist Explosive Device Analytical Center—or TEDAC—which is America's single Federal laboratory and repository for terrorist improvised explosive devices, or I.E.D.'s. Counterterrorism is a top priority for this subcommittee, and the work TEDAC conducts is critical given that I.E.D.'s are still prevalent and dangerous tools used by terrorists at home and abroad. Even the President acknowledged the importance of gathering explosive intelligence against terrorists during his press conference regarding Guantanamo Bay. He specifically cited the successful prosecutions of the shoe bomber, the terrorist who tried to blow up a plane over Detroit, the terrorist who put a car bomb in Times Square, and the Boston Marathon bomber. The explosives forensics investigations that led to the convictions of these terrorists were conducted by TEDAC personnel. So you can understand my disappointment with the Department's 2017 budget request that includes a \$74 million reduction-in-base to TEDAC, a \$9 million rescission of prior year funds for TEDAC operations, and no money requested for TEDAC construction, which is a reduction of \$52 million below the fiscal year 2016 level.

Answer. Please see the response to 1a.

Question 2a. If the President feels that State and Federal data sharing is so important, why has he proposed to cut funding in recent years for grants to States to upgrade criminal and mental health records for the National Instant Criminal Background Check System?

Lead-in information from original document.—

The President's recent Executive actions on gun control include a call to: "Ensure States are providing records to the background check system, and work cooperatively with jurisdictions to improve reporting." Many of our local law enforcement agencies have limited resources to make technology improvements, and at our hearing in January the subcommittee heard statistics which clarify this need. That's why this subcommittee has consistently provided funding for NICS grants to State and local law enforcement agencies to make the technology upgrades to enable better criminal data sharing. In fact, I recently provided \$73 million for these State and local grants in the fiscal year 2016 funding bill, despite the fact that the President had proposed to cut these grants by \$18 million. Now, unbelievably, the President's fiscal year 2017 budget proposes to cut these grants by \$23 million on the heels of issuing his Executive actions.

Answer. Since 2009, \$310 million has been appropriated so that more records can be entered into our background check systems. In fiscal year 2015, 21.3 million background checks were submitted to NICS. Meanwhile, the NICS background check system has blocked over 2 million purchasers from getting firearms that they are not legally permitted to have.

The Department, through the Office of Justice Program's Bureau of Justice Statistics (BJS), administers two grant programs that support improvements to criminal history records: the National Criminal History Improvement Program (NCHIP) and the National Instant Criminal Background Check System (NICS) Act Record Improvement Program or NARIP.

NCHIP has a broader scope and less restrictive eligibility requirements than NARIP and can provide the same support for efforts to improve the availability and quality of criminal history records as NARIP. The Department is requesting \$50 million for NCHIP in fiscal year 2017—a \$2 million increase over the fiscal year 2016 enacted level. In fiscal year 2015, BJS made awards to 38 States and territories, totaling \$34.2 million through the NCHIP.

NARIP supports States in providing certain information, particularly mental health records that prohibit the purchase or possession of firearms, to the NICS. In fiscal year 2017, the Department is requesting \$5.0 million for NARIP—a \$20.0 million decrease from the fiscal year 2016 enacted level. In fiscal year 2015, BJS made awards to 22 States, totaling \$22.7 million through the NARIP.

Currently, 29 States qualify for funding under NARIP. BJS continues to work closely with the Federal Bureau of Investigation (FBI) and ATF to assist States in improving their participation in the NICS Index. Progress has been limited in States where meeting the NICS eligibility criteria requires changes in State laws and regulations. In contrast, all 50 States, the territories, and the District of Columbia qualify for NCHIP.

Overall, the fiscal year 2017 request continues these efforts by seeking a total of \$55 million for the NCHIP and NICS programs.

The fiscal year 2017 request for these two programs is consistent with the President's Executive Actions to Reduce Gun Violence (<https://www.whitehouse.gov/the-press-office/2016/01/04/fact-sheet-new-executive-actions-reduce-gun-violence-and-make-our>). The Executive actions are focused primarily on administrative actions that could be taken within the Federal Government to make our communities safer from gun violence and keeping guns out of the wrong hands. This included improving the regulatory and enforcement functions at ATF and implementing improvements to the NICS.

In addition to these grant requests, the department is also asking for critical funding to adequately staff the NICS in order to meet the increasing volume of Federal checks for a total of \$35 million.

In total, the fiscal year 2017 request continues these important efforts by seeking a total of \$90 million.

Question 2b. After our recent January hearing highlighted these vital funding needs, why did you, Madam Attorney General, propose these cuts to NICS grants in the 2017 budget request?

Lead-in information from original document.—

The President's recent Executive actions on gun control include a call to: "Ensure States are providing records to the background check system, and work cooperatively with jurisdictions to improve reporting." Many of our local law enforcement agencies have limited resources to make technology improvements, and at our hearing in January the subcommittee heard statistics which clarify this need. That's why this subcommittee has consistently provided funding for

NICS grants to State and Local law enforcement agencies to make the technology upgrades to enable better criminal data sharing. In fact, I recently provided \$73 million for these State and local grants in the fiscal year 2016 funding bill, despite the fact that the President had proposed to cut these grants by \$18 million. Now, unbelievably, the President's fiscal year 2017 budget proposes to cut these grants by \$23 million on the heels of issuing his executive actions.

Answer. See the response to Shelby 2a above.

Question 3a. In such cases, are the settlement payments restricted to being used exclusively to remedy the communal harm caused by defendants?

Lead-in information from original document.—

Concerns have been raised about third-party (or community service) payments in settlements of Federal enforcement actions related to natural resource law violations (oil and chemical spills, negligent fires or discharges, etc.).

Answer. The Department has long been authorized to manage the Federal Government's litigation interests (subject to certain exceptions not relevant here)—a responsibility that includes the authority to settle or compromise cases upon such terms as negotiated by the Department.¹ This authority, and its long history, is described in an opinion by the Department's Office of Legal Counsel (OLC).² Pursuant to this authority, the Federal Government has entered into settlements or resolutions that involved payments by the settling parties to third-party entities.³

Community service payments in environmental crimes cases are governed by the United States Attorneys' Manual § 5–11.115 “Global Settlements”; Community Service” and § 9–16.325 “Plea Agreements, Deferred Prosecution Agreements, Non-Prosecution Agreements and ‘Extraordinary Restitution’”; and the “Guidance on Restitution, Community Service, and Other Sentencing Measures Imposed in Environmental Crimes Cases” (the Guidance) (see all in attachment 3 in the appendix at the end of the hearing).⁴ As discussed in section II of the Guidance, a prosecutor may consider imposition of community service in sentencing only after addressing restitution to identifiable victims of the crime and the payment of criminal fines. Once determined to be appropriate, the “community service must have a ‘nexus,’ that is, a relationship, to both the geographic area of the crime and the environmental medium affected by the crime.” As the Guidance explains: “[A]lthough the individual victims may not be identifiable, those living in the area affected by the crime are benefited by the service.” The Guidance also discusses why community service payments to third parties are necessary in some cases: “Furthermore, because the offender itself may not be equipped to implement the community service, the offender may provide the funds for another party with expertise specifically in the necessary remedial work to carry out valuable service that has the required ‘nexus’ to the offense of conviction.”

Question 3b. Does DOJ operate under internal guidance for third-party payments? If so, when was the internal guidance developed?

Lead-in information from original document.—

Concerns have been raised about third-party (or community service) payments in settlements of Federal enforcement actions related to natural resource law violations (oil and chemical spills, negligent fires or discharges, etc.).

Answer. Yes. See the policies cited in the response to question 3a. The relevant portions of the U.S. Attorneys' Manual sections date back to 2008. Then-Assistant Attorney General for the Department's Environment and Natural Resources Division Ronald J. Tenpas issued the Guidance on January 16, 2009.

Question 3c. When third-parties are used, how does the Department identify potential recipients and what minimum qualifications must be met?

¹ See e.g., 28 U.S.C. § 516; United States Attorneys' Manual, Section 4–3.100, available at <http://www.justice.gov/usam/usam-4-3000-compromising-and-closing>.

² The Attorney General's Role as Chief Litigator for the United States, OLC Opinion January 4, 1982 (see attachment 1 in the appendix at the end of the hearing).

³ Application of the Government Corporation Control Act and the Miscellaneous Receipts Act to the Canadian Softwood Lumber Settlement Agreement, OLC Opinion August 22, 2006 (see attachment 2 in the appendix at the end of the hearing).

⁴ The Department of Justice's Environment and Natural Resources Division has on a few occasions provided for payments to States, municipalities, or other governmental entities in civil consent decrees approved by the court. Those cases are not included in these responses.

Lead-in information from original document.—

Concerns have been raised about third-party (or community service) payments in settlements of Federal enforcement actions related to natural resource law violations (oil and chemical spills, negligent fires or discharges, etc.).

Answer. For appropriate environmental cases, the Guidance outlines considerations for developing a community service project. These include, among others, that the community service amount should not exceed 25 percent of the total value of any sanction package; any trust fund involved must be managed by a non-Federal entity chosen without favoritism; community service must not accrue unintended benefits to the defendant; and funds directed to a third party to carry out community service must not be used for political or litigation activities. The Guidance also directs prosecutors to “avoid[d] any general appearance of impropriety (e.g., a personal affiliation or interest in the entity).” Guidance at 11. The sentencing court must approve any criminal plea agreement and any community service in environmental crimes cases.

Question 3d. In the case of the 2010 *Deepwater Horizon* disaster and the third-party payment that resulted from the case’s partial resolution, what steps has the Department of Justice taken to ensure that the funds have, in fact, been used to remedy the communal harm caused by the oil spill? Is there a reporting requirement? Can you provide examples of how the funds are being used to remedy the harm caused by the spill? Why was the third-party in question chosen? Is the third-party subject to audit? If so, by whom and under what authority?

Lead-in information from original document.—

Concerns have been raised about third-party (or community service) payments in settlements of Federal enforcement actions related to natural resource law violations (oil and chemical spills, negligent fires or discharges, etc.).

Answer.

- (1) In the case of the 2010 *Deepwater Horizon* disaster and the third-party payment that resulted from the case’s partial resolution, what steps has the Department of Justice taken to ensure that the funds have, in fact, been used to remedy the communal harm caused by the oil spill?

Judgments entered by the District Court in connection with cases involving BP Exploration & Production, Inc. (“BP”) (No. 12-cr-00292 (E.D. La.)) and Transocean Deepwater, Inc. (“Transocean”) (No. 13-cr-001 (E.D. La.)) ordered the defendants to make what could be considered third-party payments pursuant to the court’s discretionary authority to impose probationary conditions pursuant to 18 U.S.C. § 3563(b)(22). Both BP and Transocean were ordered to make payments to:

- The National Academy of Sciences (“NAS”) and
- The National Fish and Wildlife Foundation (“NFWF”).

(See Order entered against BP dated Jan. 29, 2013 (“BP Probation Order”) at ¶34 (ordering payment of \$350,000,000 to NAS) and ¶35 (ordering payment of \$2,394,000,000 to NFWF); Order entered against Transocean dated Feb. 14, 2013 (“Transocean Judgment”) at 5 (ordering the payment of \$150,000,000 to NAS and \$150,000,000 to NFWF).)

The court orders entered against both BP and Transocean control the use of funds given to NAS and NFWF.

Payments to NAS must be used “for the purposes of oil spill prevention and response in the Gulf of Mexico.” (e.g., BP Probation Order at ¶34.) NAS executed agreements with both BP and Transocean that further specify what the funds must be used for. Specifically, the NAS program subsidized by these funds must “. . . seek to advance scientific and technical understanding to enhance the safety of offshore oil drilling and hydrocarbon production. . . .” These efforts include “assessment and evaluation of strategies and technologies with the objective of enhancing the protection of human health and environmental resources in the Gulf of Mexico and on the United States’ outer continental shelf.”

Payments to NFWF must be used to “conduct or fund projects to remedy harm to resources where there has been injury to, or destruction of, loss of, or loss of use of those resources resulting from the Macondo oil spill.” (See, BP Probation Order at ¶37.) NFWF must carry out or fund that remediation of harm, or reduction of risk to future harm such that about one-half of the work or funding goes to specified project types related to coastal habitats in Louisiana; the other half is allocated by percentage across the other four Gulf States. (*Id.*) In addition, NFWF is directed to consult with the appropriate State and Federal resource managers “to identify and maximize the environmental benefits of” those projects. (*Id.*) At the sentencing hear-

ings for both BP and Transocean, a representative from NFWF informed the District Court that NFWF agreed to be bound by the terms of the plea agreements, as subsequently entered as orders of the District Court.

Both NAS and NFWF are recognized as national leaders in their respective fields, and have been periodically reporting to both the Department of Justice and the Probation Officer about their use of the funds received from BP and Transocean.

Halliburton Energy Services, Inc. (“Halliburton”) also made a voluntary and unconditional payment in the amount of \$55,000,000 to NFWF. Halliburton subsequently pleaded guilty and this payment was recognized by the Department of Justice. (See No. 13-cr-00165 (E.D. La.).)

(2) Is there a reporting requirement?

NFWF is a congressionally-chartered organization subject to statutory auditing and reporting requirements. See 16 U.S.C. § 3707 (audits and reports to Congress). As noted above, NFWF agreed to be bound by the terms of the District Court orders against both BP and Transocean, which require that, in addition to its statutory reporting requirements, NFWF must provide annual reports “regarding the status and disposition of money it has received . . . until all such money has been spent.” (BP Plea Agreement Ex. B at ¶37(d).) As noted above, NFWF has been providing such reports to the Department of Justice.

NAS is also a Federal-chartered private corporation. See 26 U.S.C. §§ 150301, *et seq.* NAS also entered into separate agreements with both BP and Transocean regarding its use of funds received, both of which agreements also include reporting and auditing requirements. (See, e.g., BP Plea Agreement Ex. B–1, at ¶14 (periodic and final reporting), ¶15 (publication of a publicly available annual report), and ¶20 (accounting per generally accepted accounting principles and annual audit by independent accountant).)

(3) Can you provide examples of how the funds are being used to remedy the harm caused by the spill?

NFWF provides information on its Web site about projects it has funded. See <http://www.nfwf.org/gulf/Pages/gulf-projects.aspx> for a list of projects funded to date. Similarly, information on the Gulf Research Program established by the NAS can be found at <http://www.nationalacademies.org/gulf/index.html>.

The Plea Agreements for BP and Transocean can be found publicly in a number of places, including here: <http://www.nfwf.org/gulf/Pages/plea-agreements.aspx>.

(4) Why was the third-party in question chosen?

Both NAS and NFWF are congressionally-created organizations, nationally-recognized in their fields. They also were willing to take on the contemplated work in conformance with subject matter limits, reporting requirements, and other terms specified by the plea agreements and court orders entered in these cases.

(5) Is the third-party subject to audit?

Yes, as described above.

(6) If so, by whom and under what authority?

As described above, NAS and NFWF are subject to audit under both statute and the terms of the judgments imposed by the District Court against BP and Transocean.

Question 3e. In prosecutions of natural resource law violations, the Government represents the interests of the communities or parties harmed by the violations. In the last 20 years, how many times have harmed communities or parties complained through the court, or to DOJ directly, that they did not support the remedies instituted or that the remedies fell short of correcting the harm inflicted? In each case, what was the basis of the objection or concern? In cases where plea agreements in prosecutions for natural resource law violations did not involve third-party payments to address communal harm, how, specifically, in those cases, was communal harm intended to be remedied? How would perpetrators be responsible for remedying communal harm other than through third-party payments? In cases where communal harm was not remedied, what recourse would injured parties or communities have to rectify wrongs?

Lead-in information from original document.—

Concerns have been raised about third-party (or community service) payments in settlements of Federal enforcement actions related to natural resource law violations (oil and chemical spills, negligent fires or discharges, etc.).

Answer. The Department's Environment and Natural Resources Division is not aware of any case that it has prosecuted where communities or individuals who have been adversely affected by an environmental crime have complained that the Department failed to seek a result that was in their best interests. When there are identifiable victims of crimes as defined by the Victims' Rights and Restitution Act, 42 U.S.C. § 10607, the Department often seeks court orders of restitution. Individuals and organizations directly and proximately harmed by an offense can be considered to be crime "victims"; however, the laws addressing crime victims generally do not identify communities as crime victims (though individuals within those communities may be victims). There are two provisions in the U.S. Code that specifically authorize and mandate restitution—18 U.S.C. § 3663 and 18 U.S.C. § 3663A, respectively—but they do not include criminal offenses under the environmental statutes. Instead, in environmental crimes cases, the Department has relied upon 18 U.S.C. § 3563(b)(2), which allows for but does not mandate restitution as a special condition of probation or supervised release following incarceration.

When a community has been adversely affected and restitution is unavailable or inadequate, the Department has used community service to address the environmental impact. For example, community service has directed funds to support a community medical clinic where illegal and excess air emissions travelled to the community, to pay for medical monitoring for people illegally exposed to asbestos, and to clean up a stream polluted by an unlawful discharge.

In many instances, the community requests incorporation of a community service payment in a resolution and strongly supports a resolution that includes such a payment. An example is *United States v. Tonawanda Coke*, a case involving criminal violations of the Clean Air Act and Resource Conservation and Recovery Act in which numerous community members, multiple State and local officials, and a Member of Congress expressed to the court their support for projects to address the harm the violations had caused to the community.

When a community has been adversely affected, it may also have recourse to civil remedies.

Question 3f. It has been suggested that direct payments to individuals harmed, rather than payments to third-parties, is preferable in cases involving violations of natural resource law. In terms of remedying environmental harm, what difficulties do you foresee in limiting restitution to harmed individuals?

Lead-in information from original document.—

Concerns have been raised about third-party (or community service) payments in settlements of Federal enforcement actions related to natural resource law violations (oil and chemical spills, negligent fires or discharges, etc.).

Answer. As noted in the response to question 3a, prosecutors must address restitution to identifiable victims of environmental crimes before considering the propriety of community service. As the Guidance recognizes, however, the "unique characteristics" of environmental crimes and those who commit them make community service a necessary consideration:

As to those unique characteristics, first, environmental offenses often involve harm that cannot be directly remedied. For example, the actual pollutants unlawfully emitted into the air cannot be recaptured through community service several years after their dispersion. Similarly, pollutants unlawfully discharged into a river cannot be cleaned up long after the current has swept them downstream. Second, individual victims—those who actually may have inhaled the contaminated air or been in contact with the polluted river—often cannot be identified.

Guidance at 3–4.

QUESTIONS SUBMITTED BY SENATOR SUSAN M. COLLINS

Question 1. Can you explain why the Department continues to target the RISS program for cuts, despite the fact that its importance and positive impact has been lauded by the Department?

Lead-in information from original document.—

During last year's hearing we talked about a very important and successful program called the Regional Information Sharing System, known as "RISS." The program links thousands of criminal justice agencies through secure communications and information sharing services to help combat multi-jurisdictional crimes. Last year, we agreed that this system is particularly effective and

serves the law enforcement community well. This year's budget request, however, again recommends cutting funding for the RISS program by \$10 million.

Answer. The requested funding level of \$25 million for Regional Information Sharing Systems (RISS) reflects one of many difficult choices made in development of the President's budget. Although the RISS program does provide valuable services to State, local, and tribal law enforcement, and has done so for a number of years, it is difficult to sustain the fiscal year 2016 funding level for this program in the face of the many competing priorities the Department is responsible for addressing. The fiscal year 2017 request for this program is sufficient to sustain its current level of activity and will not result in any significant effects on program performance.

Question 2a. Could you tell us which office or division within the DOJ covers scams that have an international component?

Lead-in information from original document.—

The Senate Aging Committee, which I chair, recently held a hearing on a new scam that targets seniors who inadvertently become international drug smugglers. We learned from Immigration and Customs Enforcement that at least 145 unsuspecting "couriers" have been arrested by foreign governments after they became ensnared in this scam, and 30 Americans, including one of my constituents—a 77-year old man from Dresden, Maine—are still being held in foreign prisons as a result of their involvement in this type of scam.

Answer. The Department is working diligently to seek justice on behalf of society's most vulnerable victims. These efforts, including initiatives to investigate and prosecute international schemes, extend across the Department. For instance, the Department's Elder Justice Working Group features representatives from the Civil and Criminal Divisions, the U.S. Attorney community, and our grant making components. As each case is unique, the determination of which entities will investigate or pursue a particular matter will depend on the facts and circumstances of the matter, and governing law and policies.

Question 2b. What specific resources from Congress are needed to help DOJ combat this growing problem?

Lead-in information from original document.—

The Senate Aging Committee, which I chair, recently held a hearing on a new scam that targets seniors who inadvertently become international drug smugglers. We learned from Immigration and Customs Enforcement that at least 145 unsuspecting "couriers" have been arrested by foreign governments after they became ensnared in this scam, and 30 Americans, including one of my constituents—a 77-year old man from Dresden, Maine—are still being held in foreign prisons as a result of their involvement in this type of scam.

Answer. The fiscal year 2017 President's budget includes \$101.48 million to support our Nation's vulnerable populations, who deserve the same rights, opportunities, and protections from injustice as the rest of society. This includes a program increase for the Civil Division's Elder Justice Initiative of \$558,000 (2 positions and 1 FTE). This increase would allow the Elder Justice Working Group to continue to expand its efforts to combat senior fraud and abuse that affects millions of older Americans each year, including financial scams targeting our Nation's seniors. Additionally, the Criminal Division's Organized Crime and Gang Section (OCGS) is involved in identifying and targeting transnational organized crime enterprises, including those which engage in various criminal schemes that defraud seniors.

Question 3. Have you made progress in gaining more cooperation from countries where criminal scammers are operating? How many cases have been extradited?

Lead-in information from original document.—

DOJ has explained that the cooperation of the country where criminals are operating is critical to the Department's ability to extradite those criminals to the U.S. for prosecution.

Answer. The Department of Justice targets criminal drug enterprises through the Drug Enforcement Administration (DEA) and handles all extradition cases through the Criminal Division's Office of International Affairs (OIA). OIA assists prosecutors and law enforcement personnel in the United States to secure the return of international fugitives to the United States for prosecution. The Office coordinates international fugitive matters with the Department of State and serves as DOJ's central point of contact for all requests for the extradition to the United States of fugitives located abroad. Every formal request for international extradition based on Federal

or State criminal charges must be reviewed and approved by OIA. Moreover, OIA works to expand our cooperation with other countries through legal trainings and the negotiation of mutual legal assistance treaties.

DEA personnel assigned to foreign offices focus their investigative efforts on major criminal enterprises and Priority Target Organizations (PTO), which engage in the highest levels of drug trafficking and/or drug money laundering operations that significantly impact drug availability in the United States. DEA's ultimate objective is to dismantle these organizations so that reestablishment of the same criminal organization and their schemes is impossible and the source of the drug is completely eliminated.

The Department continues to work with partner agencies, such as the Department of Homeland Security (DHS), to investigate and prosecute crimes where appropriate at the Federal level. In fiscal year 2015, OIA received 814 requests for extraditions relating to a variety of crimes, but none of these extradition requests are for criminals who target seniors who inadvertently become international drug smugglers.

QUESTIONS SUBMITTED BY SENATOR MARK KIRK

Question 1a. How many arrests were made by these new counter-gang units each year since they were formed?

Lead-in information from original document.—

This year, there have already been 444 people shot in the city of Chicago and 96 homicides. Chicago police have attributed most of this gun violence to criminal gangs. For this reason, this Committee created counter-gang units (\$17.5 million over the past 3 years) within each of the United States Marshals Service's Regional Fugitive Task Forces.

Answer. During the latter part of fiscal year 2014, the United States Marshals Service (USMS) established full-time Counter Gang Units (CGU) based within each of its seven Regional Fugitive Task Forces (RFTFs).

The CGUs are permanent, full-time enforcement units. Their mission is to conduct proactive investigations focused on specific gang sets or individual gang members. Working in collaboration with Federal, State, and local law enforcement, the CGUs target these specific gang sets through active criminal investigations that lead to arrest by the most immediate and prosecutorially advantageous method possible. CGUs seek to apprehend the most dangerous and violent gang members, collect investigative intelligence, seize criminal evidence, and disrupt criminal enterprises.

In addition, the USMS also employs targeted gang initiatives which are mobile, short in duration, and cost effective. Under this scenario, the USMS works with its State and local law enforcement partners, frequently at their request, to identify specific gang sets that are vulnerable to strategic targeting. These efforts often focus on condensed areas such as housing projects, neighborhoods, or police precinct areas. This results in a significant, immediate impact on the community at large by removing violent offenders and associated illegal guns, narcotics, and currency.

In fiscal year 2015, the CGUs were responsible for 557 arrests of violent gang members and the associated seizure of 112 illegal firearms, 43.52 kg of illegal narcotics, and more than \$578,000 in U.S. currency.

As of the first quarter in fiscal year 2016, USMS is on pace to exceed fiscal year 2015 results. During the first quarter, the seven CGUs were responsible for 302 arrests of violent gang members. The CGUs also seized 64 illegal firearms, 86.07 kg of illegal narcotics, and more than \$567,000 in U.S. currency.

Question 1b. How many arrests were made by the Chicago-based counter-gang unit?

Lead-in information from original document.—

This year, there have already been 444 people shot in the city of Chicago and 96 homicides. Chicago police have attributed most of this gun violence to criminal gangs. For this reason, this Committee created counter-gang units (\$17.5 million over the past 3 years) within each of the United States Marshals Service's Regional Fugitive Task Forces.

Answer. The USMS Chicago-based CGU, which is co-located with the Great Lakes Regional Fugitive Task Force (GLRFTF), has taken a proactive and collaborative approach to disrupting violent criminal street gangs. Since its inception, the GLRFTF-CGU has made 78 arrests of violent gang members and has seized 53 illegal fire-

arms, nearly three kg of illegal narcotics, and more than \$555,000 in U.S. currency through their targeted efforts.

Question 1c. What are the Marshals and the rest of your Federal law enforcement agencies doing to remove gangs like the Gangster Disciples from neighborhoods like the new National Monument area Pullman?

Lead-in information from original document.—

This year, there have already been 444 people shot in the city of Chicago and 96 homicides. Chicago police have attributed most of this gun violence to criminal gangs. For this reason, this Committee created counter-gang units (\$17.5 million over the past 3 years) within each of the United States Marshals Service's Regional Fugitive Task Forces.

Answer. The USMS in Chicago leads the GLRFTF, which partners with law enforcement agencies in the Chicago metropolitan area to arrest violent offenders. Through its CGU, the GLRFTF coordinates with the Chicago Police Department; the United States Attorney's Office; Cook County State Attorney's Office; the Bureau of Alcohol, Tobacco, Firearms, and Explosives; the Federal Bureau of Investigation; and the Drug Enforcement Administration to address gang violence within Chicago.

The CGU's efforts include investigations of criminal activity by gang members, intelligence collection from sources, and the dissemination of gathered intelligence to law enforcement partners. This collaboration ensures that partners are deconflicting investigative targets and tasking their work product in the most effective manner possible. Additionally, in an effort to mitigate the risk of pursuing and arresting gang members and violent criminals, the GLRFTF trains over 1,000 law enforcement officers each year in its Chicago training center.

The Pullman District National Monument neighborhood is a large industrial area which, like many Chicago neighborhoods, has been plagued by gang activity and other violence. Similarly, the Gangster Disciples is just one known street gang that is active throughout the City of Chicago. Since October 1, 2014 (the first full fiscal year for which CGU data is available), 161 documented members of the Gangster Disciples have been arrested by the GLRFTF (including the CGU), with 176 warrants cleared.

Question 1d. How does the DOJ plan to focus resources, including grants, on areas plagued by violence caused by gangs of national significance? What metrics does the Department use to determine which areas to focus resources?

Lead-in information from original document.—

This year, there have already been 444 people shot in the city of Chicago and 96 homicides. Chicago police have attributed most of this gun violence to criminal gangs. For this reason, this Committee created counter-gang units (\$17.5 million over the past 3 years) within each of the United States Marshals Service's Regional Fugitive Task Forces.

Answer. Combating violent crime and gangs of national significance remains a top priority of the Department. The Violence Reduction Network (VRN) is a comprehensive partnership that brings together local law enforcement agencies with multiple DOJ components, including the Office of Justice Programs (OJP), the Federal Bureau of Investigation (FBI), the Drug Enforcement Administration (DEA), the U.S. Marshals Service (USMS), the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), the Executive Office of the U.S. Attorneys (EOUSA), the Office of Community Oriented Policing Services (COPS), and the Office on Violence Against Women (OVW). The partnership leverages programmatic and training and technical assistance resources to assist VRN cities, including Chicago, with sustained high rates of violence. Deputy Attorney General Sally Q. Yates announced on March 1, 2016 that three new cities—New Orleans, Louisiana, St. Louis, Missouri, and Milwaukee, Wisconsin—will be joining the VRN in fiscal year 2016. The Department is requesting \$5 million in dedicated funding in the fiscal year 2017 President's budget to support the continued expansion of the VRN.

The Violent Gang and Gun Crime Reduction Program (also known as Project Safe Neighborhoods) is designed to create safer neighborhoods through a sustained reduction in gang violence and gun crime. This program's effectiveness is based on the cooperation of local, State, and Federal agencies through a collaborative task force led by the local U.S. Attorney. Each U.S. Attorney's Office (USAO) is responsible for implementing Project Safe Neighborhoods (PSN). USAOs work closely with their Federal partners, including FBI, ATF, USMS, and DEA, as well as local law enforcement agencies to bring criminal gangs to justice. Each task force implements

gang violence and gun crime enforcement, intervention, and prevention initiatives within the most violent neighborhoods in the areas they serve based on the five key elements: (1) partnerships, (2) strategic planning, (3) training, (4) outreach, and (5) accountability. In the fiscal year 2017 President's budget, the Department is requesting \$5 million to continue the work of this program.

The fiscal year 2016 Violent Gun and Gang Crime program solicitation is currently open for applications and will close on May 17, 2016. For more details, please refer to the solicitation online at <https://www.bja.gov/Funding/PSN16.pdf>. OJP anticipates that awards under this solicitation will be announced by late summer of 2016.

To determine in which areas resources will be focused, OJP bureaus and offices use the same general process in identifying criteria by which competitive discretionary grant awards are made. Each grant solicitation will identify the specific criteria used. For grant programs focusing on gang violence and prevention, OJP does not have a threshold of crime that is used to make determinations of eligibility for funding. While solicitations do ask applicants to include "gun and gang" crime data, OJP does not require that an applicant's crime rates exceed national averages. Instead, we require that applicants show that they have a significant gun and gang issue and leave it to them to describe the severity of that issue. Some solicitations have required geo-spatial analysis of violence, but have not required a per capita de-minimis.

During the peer review process, reviewers may factor in local Uniform Crime Report (UCR) rates and specific crime data in their application ratings. Additionally, other Federal agencies are often consulted as part of the recommendation process. For example, as part of the review of Project Safe Neighborhoods site-based applications, the Bureau of Justice Assistance in OJP consults with EOUSA, the Department of Justice's Criminal Division, FBI Safe Streets Task Forces, and the National Gang Intelligence Center personnel to provide a more detailed understanding of the sites' gang and gun issues.

Additionally, Federal agencies located in the Northern District of Illinois employ a vigorous antiviolence strategy in Chicago. Representatives from the USAO, FBI, ATF, USMS, DEA, High Intensity Drug Trafficking Area (HIDTA), and Organized Crime Drug Trafficking Enforcement Task Forces (OCDETF) meet regularly with local city, county, and State law-enforcement agencies to assess Chicago's greatest violent-crime threats, target the worst of the worst offenders and gang leaders, and deploy the resources necessary to apprehend and prosecute violent criminals. This coordinated effort relies on ongoing data assessments from Federal agencies and the Chicago Police Department. Deployments may be neighborhood-based, where there may have been a prevalence of recent shootings, or targeted on individuals whom agencies have identified as having a connection to violence. Federal agencies are particularly focused on stopping trigger-pullers and individuals responsible for driving violence in Chicago, and have taken proactive measures to prevent violence. Among these measures, the USAO, Cook County State's Attorney's Office, ATF, and the Chicago Police Department have hosted offender-notification meetings, which target parolees whom data have revealed are at-risk of reoffending or becoming shooting victims themselves, and strategic violence-reduction "call-ins," which present a focused-deterrence, group-accountability message to gang-involved individuals. Academic evaluations of both the offender-notification meetings and the group-accountability call-ins show success in the form of a reduction in recidivism and overall gun violence. The USAO is attempting to replicate this success with a similar intervention targeting juveniles.

The Department's Law Enforcement Components, ATF, DEA, FBI, and USMS, utilize the multi-jurisdictional task forces they operate or participate on to combat violent and gang crime. The National Gang Targeting, Enforcement and Coordination Center (GangTECC) within DEA's Special Operations Division (SOD) combines the abilities of its member agencies (Federal Bureau of Investigation, U.S. Marshals Service, and Bureau of Alcohol, Tobacco, Firearms and Explosives) to coordinate information and enforcement activities to disrupt and dismantle regional, national, and international gang threats. More locally, enforcement efforts are focused through an understanding of the local crime trends. ATF, for example, uses its intelligence-driven domain assessments to identify and analyze significant violent crime problems within each field division's area of responsibility. Field Divisions propose a plan of action within the limits of available resources to mitigate or eliminate these threats. Similarly, the FBI's Violent Gang strategy is designed to reduce gang related violence by identifying, prioritizing, and targeting the most violent gangs whose activities constitute criminal enterprises. In addition, OCDETF has concentrated its efforts to reduce violence caused by significant gang activity in the Chicago metropolitan area through its co-located Chicago OCDETF Strike Force. Its

participants include multiple Federal law enforcement officers from DEA, FBI, IRS, DHS/ICE, USMS and the United States Attorney's Office for the Northern District of Illinois, along with the Cook County State's Attorney's Office, the Chicago Police Department, the Illinois State Police, and multiple other State and local law enforcement agencies.

The Chicago OCDETF Strike Force conducts long-term, intelligence-driven investigations and prosecutions involving multiple defendants, who participate in violent criminal organizations operating throughout the metropolitan area, the Northern District of Illinois and surrounding Federal districts. The primary goal of the Strike Force is to disrupt and dismantle major drug trafficking, money laundering and criminal organizations, to reduce both the availability of drugs and violent crime in the area. It accomplishes this goal by aggressively targeting the highest level criminal organizations engaged in this activity, including those designated as Consolidated Priority Organization Targets ("CPOTs") and Regional Priority Organization Targets ("RPOTs") and their affiliates throughout Chicago and the Federal district in which it is located.

By targeting the distribution of controlled substance by Mexican drug trafficking organizations to Chicago-based street gang networks, the Chicago OCDETF Strike Force is able to cut off the movement and supply of firearms associated with violent criminal activity, along with the illicit proceeds generated at the retail level which fuel the criminal activities of the command and control elements of the major drug trafficking organizations operating along the Southwest Border of the United States. A key unit within the Chicago OCDETF Strike Force is the Choke Point Unit, which targets the intersection between the Mexican drug trafficking organizations and violent street gangs, who are the customers of the Mexican organizations and the primary distributors of drugs throughout the Chicago area.

Currently, the Chicago OCDETF Strike Force is targeting the illegal activities of the Conservative Vice Lords street gang, among others, whose activities span throughout Illinois, Iowa, Indiana, Wisconsin and Michigan and whose members are believed to be responsible for numerous murders, weapons violations, intimidation and the distribution of multi-kilogram quantities of heroin, cocaine, crack, and marijuana throughout Metropolitan Chicago.

By coordinating the efforts of multiple Federal agencies, the members of the Chicago OCDETF Strike Force are able to eliminate superfluous effort, save valuable resources and produce the most successful cases against national, and international, criminal organizations.

Additionally, OCDETF's Great Lakes Region has identified and targeted 18 organizations, including 13 Regional Priority Organization gang targets, who engage in violence to both protect and expand their drug sales territories, to fend off rival gangs, and to enforce gang rules within their ranks, such as the Black Disciples, Black P Stone Nation, Bloods, Gangster Disciples, Insane Spanish Cobras, Latin King Nation, Sureños, and Vice Lords. During fiscal year 2015, OCDETF's Great Lakes Regional Gangs Strategic Initiative demonstrates its commitment to targeting drug trafficking organizations that engage in criminal activities such as firearms/weapons violations, murder, material support to terrorist groups, or other violent activity. In fiscal year 2015, the Gangs Strategic Initiative led to the indictment of 362 defendants, as well as conviction of 396 defendants. The Chicago U.S. Attorney alone has investigated more than 30 OCDETF gang cases since 2013.

As part of the fiscal year 2017 President's budget, the Department requests \$31 million to enhance USMS enforcement operations, hire additional Deputy U.S. Marshals (DUSMs), establish a new Regional Fugitive Task Force and provide equipment and training to existing DUSMs to support their violent fugitive enforcement efforts. The Department is also requesting \$36 million for additional ATF special agents and industry operations investigators to enforce existing Federal firearms laws, take violent criminals off the street, prevent firearms from getting into the wrong hands, and enhance ATF's ability to perform its regulatory duties.

Finally, DOJ's Criminal Division (CRM) focuses on the most serious violent offenders as targets for Federal prosecution, working closely and collaboratively with law-enforcement partners. CRM's Organized Crime and Gang Section prosecutes gangs of national significance, participates in the formulation and implementation of criminal enforcement policy, and provides advice and assistance to law-enforcement agencies and USAOs to thwart those gangs, including the USAOs in Illinois.

Question 2a. Why has DOJ not prosecuted Backpage.com in the same way it did My-Redbook.com?

Lead-in information from original document.—

Human trafficking is a growing problem nationally and internationally. Last month, 35 Illinois police and sheriff departments wrote to you asking for help

in bringing a halt to the Nation's sex trafficking enterprises. Unfortunately, organizations like Backpage.com continue to traffic in children and young women without impunity and make millions of dollars each year off of these transactions. DOJ was successful in prosecuting, and convicting My-Redbook owner, Eric "Red" Omuro for similar actions.

Answer. The Department shares Congress' grave concerns about the role of Web sites in the commercial sexual exploitation of minors. As with all investigations and prosecutions, we will follow the evidence where it leads. The Department has vigorously pursued sex traffickers, including those who use the Internet to illegally exploit minors, and thoroughly investigates Web sites that may be aiding and abetting child sex trafficking. Where evidence of criminality exists, the Department will aggressively investigate offenses of this kind. When we can prove violations beyond a reasonable doubt, as we could with respect to the case against Eric Omuro and myRedBook.com, the Department will bring appropriate prosecutions.

DOJ routinely prosecutes sex traffickers who use Web sites to advertise their victims for prostitution. For example, DOJ's Child Exploitation and Obscenity Section (CEOS) and the U.S. Attorney's Office for the Middle District of Louisiana are currently prosecuting five members of a sex trafficking ring. This case arose out of an undercover operation to locate a juvenile female engaged in prostitution. Investigators received a tip that the juvenile was being trafficked by a pimp in Baton Rouge and was advertised online. The undercover operation resulted in the arrests and subsequent prosecutions of several individuals for sex trafficking related offenses. In September 2015, Jeremie Tate, the leader of the sex trafficking ring, was sentenced to 115 months in prison for operating an interstate prostitution enterprise. Tate had earlier pleaded guilty to conspiracy to unlawfully use interstate facilities in aid of racketeering, two counts of use of interstate facilities in aid of racketeering and enticing another to travel interstate for prostitution. In connection with his plea, Tate admitted that he operated a prostitution business based in Baton Rouge involving at least one minor. Tate admitted that he personally recruited individuals to engage in prostitution and advertised for and scheduled prostitution sessions. Tate further admitted that he used proceeds from the enterprise to purchase controlled substances, which he distributed to the victims and others to manipulate and intimidate them.

In early January 2016, Kellie M. Dominique, who ran the sex trafficking ring with Tate, pleaded guilty to conspiring to engage in sex trafficking of a minor. Sentencing has not yet been scheduled for Dominique. In connection with her plea, Dominique admitted that she conspired with others to promote the prostitution of a minor female out of Dominique's home and other venues. Dominique also admitted that under her direction, the minor female posted classified advertisements on Backpage.com for commercial sex acts in Louisiana and elsewhere. Dominique further admitted that she introduced the minor female to illegal drugs and used such drugs with the minor female. Three other defendants, Jon Garon, Roxanne Merritt, and Payton Shelton, pleaded guilty to conspiracy to use interstate facilities to promote a business enterprise involving prostitution. These defendants facilitated the operation by placing advertisements online to promote the prostitution business.

Question 2b. How is DOJ investigating other websites that may involve sex trafficking?

Lead-in information from original document.—

Human trafficking is a growing problem nationally and internationally. Last month, 35 Illinois police and sheriff departments wrote to you asking for help in bringing a halt to the Nation's sex trafficking enterprises. Unfortunately, organizations like Backpage.com continue to traffic in children and young women without impunity and make millions of dollars each year off of these transactions. DOJ was successful in prosecuting, and convicting My-Redbook owner, Eric "Red" Omuro for similar actions.

Answer. The Department cannot confirm, deny, or provide information on any ongoing investigations. The FBI continuously assesses various online platforms/Web sites for their involvement with sex trafficking and works with Federal prosecutors to bring cases against those who violate relevant Federal statutes. The FBI also reviews open source data for information that might be of evidentiary value to existing cases and/or justify the initiation of new cases.

In addition to investigating Web sites that may be connected with sex trafficking, the FBI annually conducts Operation Cross Country (OCC), a national operation focused on the recovery of juveniles from domestic sex trafficking. OCC is part of the overarching FBI Innocence Lost National Initiative (ILNI), which addresses the commercial sexual exploitation of children. The FBI currently has 72 child exploi-

tation task forces throughout the country, which are comprised of representatives from local, State, and Federal partners, as well as non-profit organizations, and an international task force to combat the threat.

Question 2c. How is DOJ working with local law enforcement to attack this issue?

Lead-in information from original document.—

Human trafficking is a growing problem nationally and internationally. Last month, 35 Illinois police and sheriff departments wrote to you asking for help in bringing a halt to the Nation's sex trafficking enterprises. Unfortunately, organizations like Backpage.com continue to traffic in children and young women without impunity and make millions of dollars each year off of these transactions. DOJ was successful in prosecuting, and convicting My-Redbook owner, Eric "Red" Omuro for similar actions.

Answer. The FBI is the Department's law enforcement agency responsible for investigating and combatting human trafficking crimes. This includes investigations in online domains, performing regular operations, and maintaining child exploitation task forces. As noted above, the FBI currently has 72 child exploitation task forces throughout the country, which are comprised of representatives from local, State and Federal partners, as well as non-profit organizations. The FBI annually conducts Operation Cross Country, a national operation focused on the recovery of juveniles from domestic sex trafficking. The last iteration of Operation Cross Country took place in 135 cities, and involved over 500 law enforcement officials from Federal, State, and local agencies.

OJP Programs

The Office of Juvenile Justice and Delinquency Prevention (OJJDP) administers the Internet Crimes Against Children (ICAC) Task Force Program, which is part of Project Safe Childhood, a Department initiative established to combat the sexual exploitation of children. The ICAC Task Force Program is a national network of law enforcement and prosecutorial agencies that prevent, interdict, and investigate technology-facilitated child sexual exploitation and Internet crimes against children. The Program is comprised of 61 coordinated task forces representing more than 3,500 Federal, State, tribal and local law enforcement and prosecutorial agencies. These agencies are engaged in both proactive and reactive investigations, forensic investigations, and criminal prosecutions. In May 2011, DOJ expanded Project Safe Childhood to encompass all Federal crimes involving the sexual exploitation of a minor, including sex trafficking of a minor and crimes against children committed in Indian Country. As such, all 61 task forces receive training related to child sex trafficking, as well as investigate and prosecute child sex trafficking crimes within their task force regions. In addition, the ICAC Task Force Program partners with the National Center for Missing and Exploited Children (NCMEC), which is also funded in large part by OJJDP, in investigating CyberTipline reports. The CyberTipline receives leads and tips regarding suspected crimes of sexual exploitation committed against children, including child sex trafficking.

NCMEC currently has 11 full-time analysts within the Child Sex Trafficking Team, four Missing Child Case Management teams and a Child Sex Trafficking Specialist dedicated to supporting law enforcement working to identify and recover children victimized through sex trafficking. NCMEC's comprehensive approach provides analysis, technical assistance, victim support services and case management to support law enforcement in their efforts to recover victims and build strong cases against individuals involved in trafficking children. Local and State law enforcement also receive direct technical assistance and support on child sex trafficking investigations through the request and use of analytical resources at NCMEC. In 2015 NCMEC's Child Sex Trafficking Team provided analytical support in response to 183 requests from local and State law enforcement. These requests made by local and State law enforcement may include some officers who are also working as part of a Federal task force combating child sex trafficking. Local and State law enforcement often request analytical support about any information relevant to a child sex trafficking case regardless of whether it involves a currently missing child.

Enhanced Collaborative Model Task Force Program

DOJ's Office for Victims of Crimes (OVC) has administered the Victims of Trafficking Program since 2003 providing comprehensive and specialized services for victims. In 2010, OVC and the Bureau of Justice Assistance (BJA) began funding law enforcement agencies and victim services providers through the Enhanced Collaborative Model Task Force program. This program supports multidisciplinary task forces with Federal, State, and local law enforcement, Federal and State prosecutors, service providers, and community- and faith-based organizations to ensure that

trafficking victims are identified and referred for appropriate services, and that these cases are investigated and prosecuted. The following link contains a map of funded task forces across the country: <http://ovc.ncjrs.gov/humantrafficking/map.html>.

Funding for task forces helps law enforcement agencies and victim service providers:

1. Create a structure that engages representatives of all essential agencies, organizations, and individuals with clear operational protocols that outline roles and responsibilities;
2. Hold task force meetings at least quarterly;
3. Develop plans for routine collection of critical data as well as sharing and analyzing data;
4. Develop a plan for evaluating task force performance and effectiveness and using findings to improve task force performance;
5. Develop training and public awareness materials with a shared message;
6. Ensure that relevant stakeholders receive training;
7. Conduct proactive investigations of all forms of human trafficking, including sex trafficking and labor trafficking; and
8. Assemble a comprehensive array of victim-centered and trauma-informed services that address the individual needs of victims of all forms of human trafficking.

Question 3a. Under current law can the President legally transfer any of these detainees to the United States?

Lead-in information from original document.—

Since the administration called for transferring terrorist detainees at Guantanamo Bay to the United States (specifically, to the Thomson Correctional Center in Thomson, Illinois) in 2009, Congress has prohibited the transfer of detainees from Guantanamo Bay to the United States and prohibited construction or modification of any Bureau of Prisons facilities designed to house these detainees.

Answer. The National Defense Authorization Act for fiscal year 2016 prohibits the Department of Defense from using funds to transfer, release, or assist in the transfer or release of individuals detained at the Naval Station Guantanamo to or within the United States through December 31, 2016. Further, the Fiscal Year 2016 Consolidated and Further Continuing Appropriations Act also prohibits the Department from using funds to transfer, release or assist in the transfer or release of detainees at Naval Station Guantanamo. I understand that the President is focused on working with Congress to lift the restrictions on transfer and to work to close the detention facility at Guantanamo Bay.

Question 3b. Has the President asked for a legal opinion from the Department regarding the transfer of Guantanamo detainees to the United States?

Lead-in information from original document.—

Since the administration called for transferring terrorist detainees at Guantanamo Bay to the United States (specifically, to the Thomson Correctional Center in Thomson, Illinois) in 2009, Congress has prohibited the transfer of detainees from Guantanamo Bay to the United States and prohibited construction or modification of any Bureau of Prisons facilities designed to house these detainees.

Answer. The Department of Justice has participated in an ongoing interagency dialogue regarding responsibly and securely closing the detention facility at Guantanamo Bay. Without addressing what requests for legal advice the President or others in the administration may or may not have made, I can report that, in view of the current prohibitions against transfer (see answer 3a), that dialogue has included discussions of working with the Congress to establish a location in the United States to securely hold detainees who cannot at this time be transferred to foreign countries or who are subject to military commission proceedings.

QUESTIONS SUBMITTED BY SENATOR JOHN BOOZMAN

Question 1a. How do I explain to my fellow Arkansans that your Department, whose job is to protect them, is willing to release these most violent criminals back on the streets of our communities, and lower the sentences for future violent crimes?

Lead-in information from original document.—

Your office is supporting Federal sentencing reform that in some cases removes minimum mandatory sentences for some of the most violent offenders in the Federal system, such as armed career criminals, armed robbers, home invaders, and car-jackers, and it makes those changes retroactive. It has also claimed that the Bureau of Prison's overcrowding and costs are reasons behind reformation. However, due to the initial batch of 6,000 early released prisoners from the 2014 Sentencing Commissions actions, you were able to close 5 facilities, which is indicated by your budget request's 78.7 percent decrease for BOP buildings and facilities. There is also a \$210.8 million dollar "population decline adjustment." Your budget request says, quote, "The requested offset is due to the anticipated population decline from sentencing reform and fewer Federal prosecutions. This downward population trend is expected to continue into fiscal year 2017." On multiple occasions now, you have testified before Congress stating that your top two priorities as Attorney General, are "the safety of our citizens and our national security." Aside from the fact that your own Department states that there will be fewer Federal prosecutions, your own Department also states that the Federal prison population has declined and will continue to decline.

Answer. It is critical that our sentencing and corrections policies protect the public, are fair to both victims and defendants, reduce recidivism, and control the prison population. I am proud of the progress the Department has made in improving the criminal justice system, and I support additional reforms. The Smart on Crime Initiative is allowing the Justice Department to help ensure that our sentencing laws are sensible, effective, and proportional to the crime; to hold offenders accountable; to conserve precious public safety resources; and to improve outcomes. We have incentivized crime prevention, community oriented policing, and enhanced services for victims and for reentry.

Since the start of the Smart on Crime Initiative, the number of Federal drug cases has indeed declined, but the average guideline minimum sentence for drug trafficking cases has risen, indicating a focus on more serious cases and more significant or violent defendants. Moreover, the rate of guilty pleas has risen and, despite concerns raised by some, drug defendants have cooperated with the Government at the same rate as before the Initiative. There is more work to be done, though.

To most effectively address the issue, congressional action is necessary. We applaud sentencing reform legislation that has passed the House and Senate Judiciary Committees. The fact that both Democrats and Republicans, in both the House and Senate, have advanced reform bills shows there is a bipartisan consensus that reform is urgently needed. The Department of Justice strongly supports sentencing reform for low-level, non-violent drug offenders and wants to do everything we can to ensure meaningful sentencing reform is enacted this Congress. I am hopeful that legislation that combines front-end and back-end reform can pass Congress to ensure that we maximize our resources most effectively to enhance public safety.

Question 1b. How do we explain this to the victims of these crimes?

Lead-in information from original document.—

Your Office is supporting Federal sentencing reform that in some cases removes minimum mandatory sentences for some of the most violent offenders in the Federal system, such as armed career criminals, armed robbers, home invaders, and car-jackers, and it makes those changes retroactive. It has also claimed that the Bureau of Prison's overcrowding and costs are reasons behind reformation. However, due to the initial batch of 6,000 early released prisoners from the 2014 Sentencing Commissions actions, you were able to close 5 facilities, which is indicated by your budget request's 78.7 percent decrease for BOP buildings and facilities. There is also a \$210.8 million dollar "population decline adjustment." Your budget request says, quote, "The requested offset is due to the anticipated population decline from sentencing reform and fewer Federal prosecutions. This downward population trend is expected to continue into fiscal year 2017." On multiple occasions now, you have testified before Congress stating that your top two priorities as Attorney General, are "the safety of our citizens and our national security." Aside from the fact that your own Department states that there will be fewer Federal prosecutions, your own Department also states that the Federal prison population has declined and will continue to decline.

Answer. See response to Boozman 1a. That response is the collective response for Boozman 1a and 1b.

Question 2a. How do these programs target violent offenders, illegal firearms traffickers, and dangerous individuals acquiring firearms?

Lead-in information from original document.—

Federal prosecutions of gun crimes have continually and significantly declined since the President has taken office. Reports show that Federal criminal weapons convictions are down 34.8 percent from 2005. In the President's own Executive actions, he stated through the Smart on Crime Initiative, the Department focuses resources on the most impactful cases, including targeting violent offenders, illegal firearms traffickers, and dangerous individuals who bypass the background check system. Now, in your testimony, the funding priorities have appeared to changed. Of the \$247 million requested, \$91 million is for reentry programs, and \$93 is million for general inmate population mental health treatment, Hepatitis C treatment, and sex offender treatment.

Answer. The Smart on Crime Initiative focuses on effectively using Federal resources for the most significant Federal law enforcement priorities, including violent crime, rather than prioritizing the sheer number of prosecutions. By marshalling our investigative and prosecutorial resources more effectively, we see that average sentences are increasing as we continue to focus on the most violent and dangerous offenders and prevent new offenders from entering the justice system. This demonstrates the value of the Smart on Crime Initiative. Our request this year features resources for complementary programs addressing the second half of the Justice process, after the investigation and the prosecution. Through these requests, we are now addressing needs that exist in our prison population to further reduce recidivism.

Question 2b. Are the Holder memos that directs Federal prosecutors to not charge violations that trigger mandatory minimum sentences including drug offenses involving large amounts still in effect?

Lead-in information from original document.—

Federal prosecutions of gun crimes have continually and significantly declined since the President has taken office. Reports show that Federal criminal weapons convictions are down 34.8 percent from 2005. In the President's own Executive actions, he stated through the Smart on Crime Initiative, the Department focuses resources on the most impactful cases, including targeting violent offenders, illegal firearms traffickers, and dangerous individuals who bypass the background check system. Now, in your testimony, the funding priorities have appeared to changed. Of the \$247 million requested, \$91 million is for reentry programs, and \$93 is million for general inmate population mental health treatment, Hepatitis C treatment, and sex offender treatment.

Answer. In August 2013, the Department of Justice launched the Smart on Crime Initiative, which still reflects current policy. The goals of the Initiative are to (1) ensure finite resources are devoted to the most important law enforcement priorities; (2) promote fairer enforcement of the laws and alleviate disparate impacts of the criminal justice system; (3) ensure just punishments for low-level, nonviolent convictions; (4) bolster prevention and reentry efforts to deter crime and reduce recidivism; and (5) strengthen protections for vulnerable populations. Attorney General Holder issued guidance as part of the Initiative, which remains in effect, directing prosecutors to decline to charge mandatory minimum sentencing statutes for any defendant who is a low-level, nonviolent drug offender, who has no ties to large-scale organizations, gangs, or cartels, and who has no significant criminal history. Since the start of the Smart on Crime Initiative, the average minimum sentence under the sentencing guideline for drug trafficking cases has actually risen, indicating a focus on more serious cases and more significant or violent defendants. Moreover, the rate of guilty pleas has risen and, despite concerns raised by some, drug defendants have cooperated with the Government at the same rate as before the Initiative.

Question 3a. With the President's Executive action to hire over 200 new NICS examiners, and the FBI already having the funding to do that, what is the problem?

Lead-in information from original document.—

I have heard from a number of constituents who are concerned with the FBI's reassignment of NICS examiners, leaving no one to work on appeals and creating a massive appeals backlog. These appeals are primarily law abiding folks

who happen to have a name, date of birth, or social security number similar to that of a prohibited person.

Answer. The FBI works diligently to not only hire these positions, but resume hiring for the natural attrition that occurs throughout the year. While the President's fiscal year 2017 budget included a request to hire over 200 new NICS positions (Federal and contractors), it remains a multi-year effort. The FBI's fiscal year 2016 operating plan funds an additional 75 FBI positions and 68 contractors for NICS, and the fiscal year 2017 President's budget includes funding to sustain these positions as well as employ additional contractors.

The FBI has made great strides in hiring these positions. The 68 contractor positions are already on board, and the FBI hopes to have the bulk of the Government positions on board by the end of fiscal year 2017. Training this many positions poses a significant challenge to onboarding. A new NICS position generally requires up to 1 year of on-the-job experience before reaching full proficiency in the processing of firearm background checks. The FBI fully understands the impact of temporarily reassigning appeals examiners, but is working to mitigate the impact of these temporary reassignments on the appeals workload and anticipates the increase in personnel over the next few years will significantly diminish the need for this surge in the future.

Question 3b. Is the FBI going to have examiners work on these appeals, and when can we expect that to happen?

Lead-in information from original document.—

I have heard from a number of constituents who are concerned with the FBI's reassignment of NICS examiners, leaving no one to work on appeals and creating a massive appeals backlog. These appeals are primarily law abiding folks who happen to have a name, date of birth, or social security number similar to that of a prohibited person.

Answer. The volume of firearm background checks typically decreases during the summer months. As the volume begins to decrease, the FBI will return Appeal Examiners to their normal duties of processing the appeal requests. In addition, the FBI is in the process of hiring Federal Government staff and contractor staff. Once they complete the training requirements, these employees will be able to assist with the incoming firearm background checks, thus allowing the Appeal Examiners to be devoted to processing the appeal backlog.

Question 3c. Please tell me the amount of appeals cases that are currently backlogged.

Lead-in information from original document.—

I have heard from a number of constituents who are concerned with the FBI's reassignment of NICS examiners, leaving no one to work on appeals and creating a massive appeals backlog. These appeals are primarily law abiding folks who happen to have a name, date of birth, or social security number similar to that of a prohibited person.

Answer. As of May 31, 2016 approximately 7,353 appeal cases are pending resolution.

Question 4. In regards to your budget request for \$10 million to reform the Mutual Legal Assistance Treaty (MLAT) process, can you explain to me exactly how you plan to reform that system? Specifically, how will the \$10 million be spent?

Lead-in information from original document.—

I understand that national security is a top priority of the Department, and cooperation with foreign partners in international criminal investigations is critical.

Answer. In an increasingly transnational criminal landscape, the Office of International Affairs (OIA) is at the center of DOJ's law-enforcement mission, with expertise regarding novel and complex international legal issues that arise in the pursuit and prosecution of cybercriminals, terrorists, and leaders of sophisticated organized-crime and fraud networks. Specifically, OIA's mission is to secure the return of fugitives from abroad and to request evidence and other assistance from foreign partners for U.S. criminal investigations and prosecutions. OIA also ensures that the United States meets its reciprocal obligations to assist foreign partners with fugitives and evidence located in the United States.

The U.S. implements bilateral Mutual Legal Assistance Treaties (MLATs) and multilateral agreements that provide for mutual assistance with over 100 foreign

partners. And the globalization of crime has led to a dramatic increase in the number of MLAT requests, most significantly in requests for electronic evidence. Since fiscal year 2000, the number of requests for assistance from foreign authorities handled by OIA has increased nearly 85 percent, and the number of requests for computer records has increased over 1,000 percent. This explosion in requests is partly due to the growth in cybercrime and partly due to the increasing use of electronic evidence in a broad spectrum of cases.

OIA initiated a reform of the MLAT process, beginning with development of a new framework anchored by a three-component strategy: (1) centralization, (2) training and outreach, and (3) reducing the backlog. In terms of centralization, OIA has established a Cyber Unit (dedicated to reviewing, analyzing, and executing foreign requests for electronic evidence) and the Incoming MLAT Unit (dedicated to reviewing, analyzing, and executing foreign requests for bank and third party records) in the District of Columbia. Further efforts toward centralization, enabled by hiring permanent resources in the form of attorneys and professional staff for these Units, will significantly expand our ability to address the ever-increasing caseload.

In addition to the changes implemented by OIA the FBI has established a dedicated unit to support the centralization, streamlining, and expedition of the Department's response to foreign MLAT requests. This unit supports the intake, tracking and management of MLAT requests that require FBI support, and filter evidence associated with MLAT requests, training of FBI Legal Attachés (Legats) and foreign counterparts, and outreach to Internet service providers. This unit also supports the efforts of OIA to enhance the U.S. Government's ability to respond to MLAT requests in an efficient manner.

Moreover, training our foreign counterparts, particularly those using different legal systems, continues to be critical to improving the MLAT process. Many foreign partners require assistance in formulating requests that contain sufficient information to meet demanding U.S. legal standards for production of evidence, especially the content of communications. With additional resources, OIA would encourage foreign governments to empower their MLAT "Central Authorities" (or equivalents) to screen their own requests for evidence located in the U.S. The quality of the requests received should improve which would result in faster processing times.

Finally, additional resources are needed to address the current backlog of pending MLAT requests that will not be processed by the Cyber or Incoming MLAT Units. These additional personnel will not only handle any existing backlog, but will also take on new MLAT and extradition requests, and some will be dedicated to supporting the necessary operation of OIA, including legislative and policy development, litigation, and management.

The complexity of its national security mission has required OIA to reorganize, improve business processes and procedures, and hire and train additional personnel to conduct legal analysis and litigation. Centralization is designed to create greater efficiencies with new dedicated units charged with the execution of foreign requests seeking electronic and other evidence. The growth of transnational crime and national security threats will continue to challenge OIA's capacity to respond to the increased demand for its service.

In May 2015, a one-time transfer of funds helped initiate these required improvements and has resulted in a positive impact in the near term; however, long-term solutions require additional funding to sustain and continue to build upon the progress made. The fiscal year 2017 President's budget requests an enhancement of \$10 million to provide base funding for the 64 positions that are being filled with the one-time transfer funding, and for an additional of 33 positions to more fully support the MLAT reform as described above.

QUESTIONS SUBMITTED BY SENATOR JAMES LANKFORD

Question 1. Will this funding be used for States and localities and modernize their systems to move from paper to electronic submissions, or will it be used for something else?

Lead-in information from original document.—

The fiscal year 2017 budget request calls for \$50,000,000 for grants to States to upgrade criminal and mental health records for the National Instant Criminal Background Check System (NICS).

Answer. Modernizing systems from paper to electronic submissions is one of many purposes of the requested \$50 million for the National Criminal History Improvement Program (NCHIP). Other enhancements are needed to State databases and systems such as:

1. Computerized Criminal History (CCH) Systems—the backbone of the State’s criminal history record repository.
2. Automated Fingerprint Identification Systems (AFIS)—a critical system that is necessary for the rapid transmission of electronic fingerprints to the FBI systems.
3. Operational back-up systems for use in the event of failure of the primary criminal history record system to ensure access to critical criminal justice data at all times.
4. Statewide integrated system strategies which interface all components of the criminal justice system, including law enforcement, prosecutors, courts, and corrections, to the extent that such expenditures improve the availability of criminal record data including protection orders.
5. Digitization and cataloging of old fingerprint records.
6. Upgraded security and firewalls systems to ensure compatibility with FBI CJIS security policies.
7. Interfaces with National Incident-Based Reporting System (NIBRS). Funds can be used to interface with any State system which is compatible with NIBRS for purposes of identifying convicted of crimes against children, the elderly, or the disabled, and/or identification of records involving firearm crimes for operation or research purposes.

Additionally, NCHIP funds can support the following:

1. State participation in the FBI’s Next Generation Identification (NGI) program.
 - a. NGI, developed over multiple years, is an incremental replacement of the FBI’s Integrated Automated Fingerprint Identification System (IAFIS). The capabilities of NGI expand the collection, storage, and search of biometrics beyond the traditional 10-print images. One component, in addition to supporting efforts to expand the capture and submission of mugshots and palm prints, is “rap back.” A “rap back” or “hit notice” program informs a law enforcement/criminal justice agency, an employer, or other designated entity of the arrest of an individual whose fingerprints have been retained by the criminal history repository as a result of a fingerprint-based background check. The fingerprints are matched against a database that contains the fingerprints that were initially submitted, and the designated entity is notified of the individual’s arrest.
 - b. Livescan technology replacement to ensure the majority of persons fingerprinted at the local level are electronically captured and automatically submitted and linked to the arrest charge.
2. Full State participation in the Interstate Identification Index (III), the National Crime Prevention and Privacy Compact (Compact) and the National Fingerprint File (NFF) which increase the interstate accessibility and timeliness of criminal history records.
 - a. Funds are used to research and link court dispositions to arrests and fingerprints (but not all records requiring research and update are firearm disqualifying histories).
 - b. Synchronizing State-held and FBI-held records. There are instances of records bring held at the State level, but not being available within the III. The FBI offers a synchronization process to State entities as a way to ensure that arrests held in State criminal history repositories are likewise available at the national level within the III. Funds are used to identify the non-synced records and make them available through III. Another important data quality service that the FBI utilizes is known as a pointer process. State entities can elect to choose whether they prefer for their State-held record to respond to inquiries into the III or the FBI-held record (in essence which record does the system point to as the primary response). Funding can be utilized to ensure that the most complete, up-to-date and accurate record responds to incoming III inquiries.
 - c. Ensure proper sealing and expunction (deletion) of records.
 - d. Funds may be used to cover costs associated with State review and enactment of the Compact and with development and implementation of procedures (including purchase of equipment and development of software) necessary to facilitate operations pursuant to Compact protocols, including efforts relating to participation in the FBI’s National Fingerprint File (NFF).
 - e. NCHIP funds can be used for States to develop and implement the necessary system components to become an NFF State. NFF is a system and procedures designed as a component of the III system, which when fully implemented, becomes a totally decentralized system for the interstate exchange of criminal history records.

3. Criminal history record audits, data quality assessments, and training.
 - a. NCHIP funds all States to conduct periodic audits to identify discrepancies in records, fingerprinting, and disposition information maintained by the local submitting agency and the central repository. Through auditing and training, criminal history auditors assist in updating and automating case outcomes in States records and the FBI's systems.
 - b. NCHIP funds are also used for training and participation in seminars and meetings. Limited funds may be used to cover costs of training and participation in State, regional, or national seminars or conferences (including travel, where necessary).

Question 2. What response have you received from States so far, and have you received any commitments from any States indicating that they take steps to submit additional records into the NICS Index?

Lead-in information from original document.—

As part of his announced Executive actions on firearms, the President indicated that you wrote a letter to States highlighting the importance of receiving complete criminal history records and criminal dispositions, information on persons disqualified for mental health reasons, and qualifying crimes of domestic violence.

Answer. The Office of Justice Program's Bureau of Justice Statistics (BJS) continues to work closely with the Federal Bureau of Investigation (FBI) and the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) to assist States in improving their participation in the National Instant Criminal Background Check System (NICS) Index. Tremendous progress has been made in records added to the NICS Index mental health file in particular. There are still several States that are not actively pursuing implementation of a relief program for the mental health prohibitor; however, the majority of these States are still providing records to the NICS Index with National Criminal History Improvement Program (NCHIP) funding or other Federal funding, or through existing State resources. (States are not required to have a relief program in place in order to submit records to the NICS Index. The relief program is a requirement in order to qualify for funding under the NICS Act Record Improvement Program (NARIP).) Additionally, States continue to make available criminal history records identifying felonies and misdemeanor convictions for domestic violence as well as active warrants and protection orders.

Currently 29 States have a mental health relief from disabilities program that is certified by ATF and qualify for funding under NARIP. Those States are Alabama, Alaska, Arizona, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Missouri, Nebraska, Nevada, New Jersey, New York, North Dakota, Oklahoma, Oregon, South Carolina, Tennessee, Texas, Utah, Virginia, West Virginia, and Wisconsin.

Colorado and North Carolina have enacted legislation that would qualify for certification, but have not submitted a certification form for approval by ATF. Additionally, Connecticut's 2011 certification is no longer considered qualified or approved by ATF due to 2013 changes in the State's mental health law. Connecticut will have to reapply to ATF for approval. BJS is aware of at least one other State that is pursuing implementation of a relief program and has sought guidance from ATF.

In support of the publication of NICS Index participation by State/contributor on March 18, 2016, the FBI NICS Section held two teleconferences with State Point of Contact agencies and CJIS Systems Officers in January 2016 and March 2016. During these calls, the NICS Section explained the NICS Index statistics and answered specific questions from the States. The calls focused on explaining the numbers and preparing States to answer questions they may receive. The States were provided access to the detailed listing of December 31, 2015 NICS Index statistics in January 2016 in order to provide adequate time for their own review of their data.

Several States have contacted the FBI NICS Section with questions related to their own State statistics. BJS also participated on the March 2016 calls to discuss the grant funding opportunities available to improve record reporting to NICS.

As a result of the on-going conversations between the FBI NICS Section and the States, the following has occurred:

- Puerto Rico inquired about submitting mental health records to the NICS Index;
- Hawaii prepared their own press release regarding their statistics;
- Indiana discovered a data entry error which prevented felonies from being entered into the NICS Index. Once resolved, Indiana submitted almost 180,000

records into the NICS Index. Indiana also developed a Web site in support of publication of the NICS Index statistics;

- Multiple agencies have requested a spreadsheet containing all of their submissions to ensure their data corresponds to the data located in the NICS Index. This is a service the NICS Section has always offered to submitting agencies;
- New Mexico has shown interest in submitting records more frequently to the NICS Index;
- Maine has discussed providing records for other categories in addition to Felony and Mental Health; and
- Since the HIPAA regulation change effective on February 5, 2016, Montana has discussed potential NICS Index participation.

Question 3. If we have databases that have essentially the same information, other than one may have incomplete records, is there a need to maintain three separate databases—the Interstate Identification Index, the NICS Index and the National Crime Information Center (NCIC)—or could they be consolidated?

Lead-in information from original document.—

Madame Attorney General, when we last spoke, I asked about the lack of records in the NICS Index, specifically felonies. It is my understanding that felonies should be entered in the Interstate Identification Index (III), but if required information is lacking to enter the record in III, the incomplete record could be entered into the NICS Index instead.

Answer. All three databases contain separate fields and data and are used for different purposes. It is only for firearm background checks that all three are used in conjunction. The Interstate Identification Index (III) houses criminal history information, which is available to all law enforcement, but many of the records in III are missing final dispositions and require additional research. The NICS Index is a repository of records, maintained by the NICS Section, that are Federal or State disqualifying records that do not appear in any databases searched by the NICS. Records within the NICS Index are utilized only for firearm and explosives purposes by authorized law enforcement agencies. NCIC is accessed by law enforcement for warrants, protection orders, and missing persons. The NCIC database should be kept separate to immediately receive actionable information.

Question 4. Do you believe Congress has a responsibility to conduct oversight of the Department of Justice, and that the Department has a responsibility to cooperate and be forthcoming with documents and other information when Congress conducts oversight over the Department?

Lead-in information from original document.—

Under the current court order, the Department must turn over Fast and Furious documents by April 8th.

Answer. Congressional oversight plays an important role in Government transparency. The Department seeks to accommodate the needs of congressional oversight committees, consistent with the Department's law enforcement responsibilities.

Question 5. Do you agree that the Department, in 2011, provided false or misleading information to the House Oversight and Government Reform Committee and since then has obstructed the Committee's Fast and Furious investigation of the Department?

Answer. The Department acknowledged that it had provided incorrect information about Operation Fast and Furious and corrected that information. Consistent with the Department's law enforcement responsibilities, the Department has worked with the House Oversight and Government Reform Committee to accommodate its information needs.

Question 6. How many open beds does the Bureau of Prisons (BOP) currently have?

Answer. Capacity utilization within BOP varies by security level and facility. At the minimum security level, BOP currently has 17,579 inmates in 7 facilities with a capacity of 19,105. At the low security level, BOP currently has 40,943 inmates in 31 facilities, with a capacity of 33,727. At the medium security level, BOP currently has 53,638 inmates in 47 facilities, with a capacity of 42,753. At the high security level, BOP currently has 20,810 inmates in 17 facilities, with a capacity of 14,825. At these overall levels, BOP facilities are currently overcrowded at the following rates: low = 21 percent, medium = 25 percent, high = 40 percent. After USP

Yazoo City and Thomson are fully activated, the high security overcrowding rate would drop to 21 percent.

Question 7. For those inmates released from BOP custody as a result of actions taken by the Sentencing Commission or the President's clemency authority, how many are considered to be non-violent offenders? How many of those, if any, who were released as non-violent offenders, originally plead down to a lesser charge from a violent crime charge?

Answer. The Department does not collect in a readily available form charges originally brought but that were later dropped as part of a plea agreement. The analysis required to determine non-violent offenders and those who may have pled down to a lesser charge would require extensive resource allocation and man-hours to conduct. Even upon conducting a review, the Department may not be able to accurately assess these categories since it would rely on the review of every case individually via each Pre-Sentencing Report (PSR) or Statement of Reasons (SOR), which may or may not contain necessary information to make a determination on other charges.

Executive Clemency cases are decided solely by the President. A list of pardons and commutations granted by the President can be found here: <https://www.justice.gov/pardon/clemencyrecipients>. This list includes the name of the offender, the offense, district and date of sentencing, the sentence, and the terms of the grant of pardon or commutation.

As to offenders who received reduced sentences as a result of the retroactive guideline reductions in 2007, 2011, and 2014, the Sentencing Commission collects and reports data on its Web site on the characteristics of such offenders. The reports are available here: <http://www.ussc.gov/research-and-publications/retroactivity-analyses-and-data-reports/retroactivity-analyses-and-data-reports>. The Commission has also done a thorough study of recidivism among those who received a retroactive sentence reduction under the 2007 amendment, which can be located here: http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20140527_Recidivism_2007_Crack_Cocaine_Amendment.pdf. In addition, an extensive report about the impact of the Fair Sentencing Act of 2010 can be located here: <http://www.ussc.gov/news/congressional-testimony-and-reports/drug-topics/report-impact-fair-sentencing-act-2010>. For Amendment 782 (drug guideline amendment) cases, the U.S. Sentencing Commission's *2014 Drug Guidelines Amendment Retroactivity Data Report* is available here: (<http://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/drug-guidelines-amendment/20151203-drug-amendment-report.pdf>).

Question 8a. How are the new enforcement groups different from current interdiction taskforces working across the country?

Lead-in information from original document.—

The fiscal year 2017 budget requests 42 positions (including 32 Special Agents and 4 Intelligence Analysts) at the Drug Enforcement Administration (DEA) and \$12,483,000 for increased heroin-related enforcement efforts, including 4 new enforcement groups.

Answer. While there are complex issues affecting spikes in heroin use and overdoses, including prescription drug abuse, the same significant poly-drug trafficking organizations responsible for other illicit drug threats are also responsible for the vast majority of the heroin supply. The composition of the requested heroin groups would mirror that of existing groups with the Special Agent and Intelligence Analyst resources increasing DEA's focus on heroin. Two chemists are also requested to support the new groups. Chemist support for this initiative is critical, as the backlog of evidence awaiting analysis has reached historically high levels, and the two chemists requested will ensure that the anticipated increase in heroin seizures will not exacerbate the backlog problem. Additionally, DEA has requested over \$3 million in operational funding devoted specifically to heroin investigations. This funding is significantly greater than the average operational funding for enforcement groups and will allow DEA to target the heroin threat more aggressively, increase the size/scope of the investigations, and address the threat regionally. These aggressive heroin enforcement actions will also support the Department's efforts to combat violent crime as drug trafficking has a proven linkage to gangs and other violent criminal organizations.

Question 8b. How are the existing taskforces being evaluated for effectiveness?

Lead-in information from original document.—

The fiscal year 2017 budget requests 42 positions (including 32 Special Agents and 4 Intelligence Analysts) at the Drug Enforcement Administration (DEA)

and \$12,483,000 for increased heroin-related enforcement efforts, including 4 new enforcement groups.

Answer. DEA uses its task forces as a force multiplier in carrying out DEA's mission. DEA-led task forces are made up of multiple Federal, State and local law enforcement agencies within a specific region. They facilitate investigations by enhancing interagency coordination and intelligence sharing, leveraging Federal resources, and combining DEA expertise with local officers' investigative talents and knowledge of their respective jurisdictions.

DEA Task Force Officers (TFOs) are well versed and practiced in the local judicial systems and their support has been critical and timely with respect to serving warrants and assisting with the identification and seizure of assets that may not have been identified solely by DEA.

The partnership with State and local personnel also allows DEA access to additional resources. TFOs allow for: (1) close alliances with State and local agencies; (2) the use of platforms for surveillance assets (pole cameras and, in many locations, radio systems and frequencies); (3) access to city facilities and equipment as well as events, meetings, and conferences with a criminal justice agenda; and, (4) access to local and State intelligence databases to include drug databases, gang information, and local identifiers of significant drug trafficking areas.

DEA measures the effectiveness of all its law enforcement initiatives, which generally include the broad integration of TFOs, by the overall impact they have on major international, national and regional Drug Trafficking Organizations. DEA implemented its Priority Targeting program in April 2001 to identify, target, investigate, and disrupt or dismantle those international, national, regional, and local impact drug trafficking and/or money laundering organizations having a significant impact on drug availability within the United States. DEA domestic field divisions (including task forces located within those field division areas of responsibility) identify and target major drug threats known as Priority Targets. Specifically, DEA domestic field divisions focus their investigative efforts on Priority Targets with a direct connection to the Department of Justice's (DOJ) Consolidated Priority Organization Targets (CPOT), which include the most significant international command and control organizations threatening the United States as identified by the Organized Crime Drug Enforcement Task Force (OCDETF) member agencies. Two of DEA's drug related performance measures under DOJ's Strategic Goal 2 relate to Priority Targets:

- PTOs Linked to CPOTS Disrupted or Dismantled. In fiscal year 2015, DEA disrupted 169 and dismantled 132 PTOs linked to CPOT targets.
- PTOs not Linked to CPOTS Disrupted or Dismantled. In fiscal year 2015, DEA disrupted 846 and dismantled 743 PTOs not linked to CPOT targets.

SUBCOMMITTEE RECESS

Senator SHELBY. The subcommittee now stands in recess until Thursday, March 3, at 10:30 a.m., when we will take the testimony of Department of Commerce Secretary Penny Pritzker.

The committee is adjourned.

[Whereupon, at 12:14 p.m., Thursday, February 25, the subcommittee was recessed, to reconvene at 10:30 a.m., Thursday, March 3.]

APPENDIX

MATERIALS SUBMITTED FOR THE RECORD

ATTACHMENT 1

The Attorney General's Role as Chief Litigator for the United States

[The following memorandum describes the development and present scope of the Attorney General's role in representing the United States and its agencies in litigation. It discusses the policy reasons for the centralization of litigation authority in the Department of Justice, and analyzes the Attorney General's relationship with client agencies. It also touches on the Attorney General's authority to settle and compromise cases, and on his authority over litigation in international courts. It concludes that, absent clear legislative directives to the contrary, the Attorney General has plenary authority and responsibility over all litigation to which the United States or one of its agencies is a party, and that his discretion is circumscribed only by the President's constitutional duty to "take Care that the Laws be faithfully executed."]

January 4, 1982

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

You have asked this Office to outline the role and responsibilities of the Attorney General in representing the United States in litigation in which the United States, or a federal agency or department, is a party. In particular, you asked that we consider the Attorney General's authority and responsibility to make decisions with respect to litigation, even if those decisions may conflict with the views, desires, or legal analyses of other departments or agencies of the United States, including those which may be "clients" in the particular litigation. Litigation involving agencies which have been granted express exclusive authority by Congress to conduct their own litigation is not within the scope of this memorandum.¹ Rather, the focus of this memorandum is litigation involving

¹ Circumstances in which the Attorney General lacks supervisory authority over litigation on behalf of the United States include: (1) Litigation in United States courts where the Attorney General has no authority to determine who shall represent the United States, such as the United States Tax Court (26 U.S.C. § 7452 specifies that the United States shall be represented by the Chief Counsel for the Internal Revenue Service or his delegate) and the United States Court of Military Appeals (10 U.S.C. § 870 specifies that the United States shall be represented by the Judge Advocate General or his delegate); (2) Litigation involving independent regulatory agencies which have been given the express statutory authority to conduct their own litigation using agency attorneys, e.g., the National Labor Relations Board (29 U.S.C. § 154(a)); the Federal Power Commission (16 U.S.C. § 825m(e) power transferred to Federal Energy Regulatory Commission (42 U.S.C. § 7172(a)(2)(A) (Supp. IV 1980)), the Interstate Commerce Commission (49 U.S.C. § 16(11) (Supp. IV 1980)); and (3) Litigation involving Executive Branch agencies which have been granted independent litigating authority by Congress, e.g., the Secretary of Labor is authorized to appoint attorneys to represent the Secretary or the Benefits Review Board in actions under the Longshoremen's and Harbor Workers' Compensation Act, except in the Supreme Court, under 33 U.S.C. § 921a.

There are also circumstances in which certain agencies have assumed, notwithstanding their lack of express statutory authority, full responsibility for their own trial and appellate litigation, so far without objection from the Attorney General. These agencies, such as the Tennessee Valley Authority and the Federal Deposit Insurance Corporation, have not been required to submit to the Attorney General's supervisory authority, apparently for

Continued

those agencies whose litigating authority is clearly subject to the Attorney General's direction, or whose statutory grants of authority are ambiguous or insufficient to remove them from the Attorney General's supervision.

We conclude that, absent clear legislative directives to the contrary, the Attorney General has full plenary authority over all litigation, civil and criminal, to which the United States, its agencies, or departments, are parties. Such authority is rooted historically in our common law and tradition, *see Confiscation Cases*, 74 U.S. (7 Wall.) 454, 458–59 (1868); *The Gray Jacket*, 72 U.S. (5 Wall.) 370 (1866) and, since 1870, has been given a statutory basis. *See* 5 U.S.C. § 3106, and 28 U.S.C. §§ 516, 519. *See generally United States v. San Jacinto Tin Co.*, 125 U.S. 273 (1888). The Attorney General's plenary authority is circumscribed only by the duty imposed on the President under Article II, § 3 of the Constitution to "take Care that the Laws be faithfully executed."

I. Historical Development of the Role of the Attorney General

Plenary power over the legal affairs of the United States was vested in the Attorney General when the Office of the Attorney General of the United States was first created by the Judiciary Act of 1789. Act of September 24, 1789, ch. 20, § 35, 1 Stat. 92.²

The Attorney General's statutory authority to conduct litigation to which the United States, its departments, or agencies, is a party was more fully developed by Congress in 1870, in the same legislation that provided for the creation of the Department of Justice. Act of June 22, 1870, ch. 150, 16 Stat. 162. Prior to 1870, however, the Attorney General's authority in litigation matters involving the United States had been recognized by the Supreme Court. In *The Gray Jacket*, 72 U.S. (5 Wall.) 370 (1866), the Court held that no counsel would be heard for the United States in opposition to the views of the Attorney General. In the *Confiscation Cases*, 74 U.S. (7 Wall.) 454 (1868), the Court concluded that:

Whether tested, therefore, by the requirements of the Judiciary Act, or by the usage of the government, or by the decisions of this

historical reasons, some of which relate to their financial independence as government corporations. *See* Daniel J. Meador, Assistant Attorney General, Office for Improvements in the Administration of Justice, Draft Memorandum to the Attorney General and the Assistant Attorneys General Re: Government Relitigation Policies (May 21, 1979). Memorandum to the Attorney General from William D. Ruckelshaus (Mar. 5, 1970). The operative statutes in these two cases, 16 U.S.C. § 831c(h), 831x (TVA) and 12 U.S.C. § 1817(g) (FDIC), merely give the agencies the authority to sue and be sued—not to litigate independently of the Department of Justice. Presumably, the Attorney General may reassert his supervisory authority at any time.

² Section 35 of the Judiciary Act provided in pertinent part that

[T]here shall . . . be appointed a meet person, learned in the law, to act as attorney-general for the United States, who shall be sworn or affirmed to a faithful execution of his office; whose duty it shall be to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned, and to give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments, touching any matters that may concern their departments.

"District attorneys," now known as "United States Attorneys," were to be appointed to conduct litigation in the lower courts of the United States but were not placed under the Attorney General's authority until 1861. Act of Aug. 2, 1861, ch. 37, 12 Stat. 285. From 1820 until 1861, the "district attorneys" were supervised by the Department of the Treasury. Act of May 15, 1820, ch. 107, 3 Stat. 592.

court, it is clear that all such suits, so far as the interests of the United States are concerned, are subject to the direction, and within the control of, the Attorney-General.

74 U.S. (7 Wall.) at 458–59.

The 1870 Act established the Department of Justice and designated the Attorney General as its chief legal officer. The Act provided that certain specified “solicitors” performing legal functions within the various agencies “shall be transferred from the Departments with which they are now associated to the Department of Justice, . . . and shall exercise their functions under the supervision and control of the head of the Department of Justice.” (§ 3, 16 Stat. 162.)³ The Act also authorized the Attorney General to designate any officer of the Department of Justice, including himself, to conduct and argue any case in which the government is interested, in any court of the United States, whenever he deems it necessary for the interest of the United States. (§ 5, 16 Stat. 162.) In addition, the Act gave the Attorney General supervisory authority over the conduct and proceedings of the various attorneys for the United States in the respective judicial districts, “and also of all other attorneys and counsel[]ors employed in any cases or business in which the United States may be concerned.” (§ 16, 16 Stat. 164.) And finally, the Act forbade the Secretaries of the Executive Departments to employ other attorneys or outside counsel at government expense, but “shall call upon the Department of Justice . . . , and no counsel or attorney fees shall hereafter be allowed to any person . . . , besides the respective district attorneys . . . , for services in such capacity to the United States, . . . unless hereafter authorized by law, and then only on the certificate of the Attorney-General that such services . . . could not be performed by the Attorney-General, . . . or the officers of the Department of Justice.” (§ 17, 16 Stat. 164.) 16 Stat. 162.

The initial motivation for this legislation was the desire to centralize the conduct and supervision of all litigation in which the government was involved, as well as to eliminate the need for highly paid outside counsel when government-trained attorneys could perform the same function. Other objectives of the legislation that were advanced in the congressional debates were to ensure the presentation of uniform positions with respect to the laws of the United States (“a unity of decision, a unity of jurisprudence . . . in the executive law of the United States”),⁴ and to provide the Attorney General with authority over lower court proceedings involving the United States, so that litigation would be better handled on appeal, and before the Supreme Court. *See* Cong. Globe, 41st Cong., 2d Sess., Pt. IV, 3035–39, 3065–66 (1870). *See generally* Bell, *The Attorney General: The Federal Government's Chief Lawyer and Chief Litigator, or One Among Many?*, 46 Fordham L. Rev. 1049 (1978); Key, *The Legal Work of the Federal Government*, 25 Va. L. Rev. 165 (1938).

³ Prior to the Act, Congress had provided for the existence of “solicitors” in the various departments and agencies, who were responsible for the legal affairs of their respective departments. *See generally* Key, *The Legal Work of the Federal Government*, 25 Va. L. Rev. 165 (1938).

⁴ Cong. Globe, 41st Cong., 2d Sess., Pt. IV, 3035, 3036 (1870).

The Supreme Court considered this legislation in *United States v. San Jacinto Tin Co.*, 125 U.S. 273 (1888) and concluded that the Attorney General was “undoubtedly the officer who has charge of the institution and conduct of the pleas of the United States, and of the litigation which is necessary to establish the rights of the government.” *Id.* at 279. Emphasizing the centralizing function of the Department of Justice and the Attorney General, the Court reasoned that the power to control government litigation must lie somewhere—that there must exist some officer with authority to decide when the United States should sue, and to oversee the execution of such a decision—and that the Attorney General was designated such appropriate officer, in the Judiciary Act of 1789, by reference to the historical practice in England.⁵ 125 U.S. at 278–80. In 1921, the Court added that the Attorney General’s authority to conduct such litigation could be affected only by clear legislative direction to the contrary. *Kern River Co. v. United States*, 257 U.S. 147, 155 (1921). See also 21 Op. Att’y Gen. 195 (1895). (The Secretary of the Navy was not warranted in employing counsel in a foreign country to institute suit in behalf of the United States, but should have referred the matter to the Department of Justice, “which is charged with the duty of determining when the United States shall sue, for what it shall sue, and that such suits shall be brought in appropriate cases,” *id.* at 198.)

Lower courts reached similar conclusions with respect to subsequent recodifications of the 1870 legislation. The Court of Claims summarized the legislation in the following manner:

These provisions are too comprehensive and too specific to leave any doubt that Congress intended to gather into the Department of Justice, under the supervision and control of the Attorney-General, all the litigation and all the law business in which the United States are interested, and which previously had been scattered among different public officers, departments, and branches of the Government, and to break up the practice of frequently employing unofficial attorneys in the public service.

Perry v. United States, 28 Ct. Cl. 483, 491 (1893). Speaking for the Second Circuit Court of Appeals, Judge Learned Hand emphasized the centralizing function of the Attorney General’s role as chief litigator for the United States and the necessity that that role be committed exclusively to the Attorney General:

The government has provided legal officers, presumably competent, charged with the duty of protecting its rights in its

⁵ This reference is to the origin of the office of Attorney General, which was first created in the Judiciary Act of 1789, and derived its function from the role of the Attorney General in England. The Court stated,

The judiciary act of 1789 . . . which first created the office of Attorney General, without any very accurate definition of his powers, in using the words that “there shall also be appointed a meet person, learned in the law, to act as Attorney General for the United States,” 1 Stat. 93, c. 21, § 35, must have had reference to the similar office with the same designation existing under the English law. And though it has been said that there is no common law of the United States, it is still quite true that when acts of Congress use words which are familiar in the law of England, they are supposed to be used with reference to their meaning in that law.

125 U.S. at 280

courts. . . . Congress, having so provided for the prosecution of civil suits, can scarcely be supposed to have contemplated a possible duplication in legal personnel. The cost of this is one consideration, but far more important is the centering of responsibility for the conduct of public litigation. The Attorney General has powers of "general superintendence and direction" over district attorneys (title 5, U.S. Code, § 317 [5 USCA § 317]), and may directly intervene to "conduct and argue any case in any court of the United States" (title 5, U.S. Code, § 309 [5 USCA § 309]). . . . Thus he may displace district attorneys in their own suits, dismiss or compromise them, institute those which they decline to press. *No such system is capable of operation unless his powers are exclusive, or if the Departments may institute suits which he cannot control. His powers must be coextensive with his duties.*

Sutherland v. International Insurance Co., 43 F.2d 969, 970 (2d Cir. 1930), *cert. denied*, 282 U.S. 890 (1930) (emphasis added).

In 1933, as part of a crusade to consolidate as much of the government's business as necessary to increase operating efficiency, President Roosevelt issued an executive order to supplement the existing legislative mandate of centralized litigation authority. Executive Order No. 6166 (June 10, 1933), which requires all claims by or against the United States to be litigated by, and under the supervision of, the Department of Justice, is still in effect. The order provides in pertinent part:

Claims by or against the United States.

The functions of prosecuting in the courts of the United States claims and demands by, and offenses against, the Government of the United States and of defending claims and demands against the Government, and of supervising the work of United States attorneys, marshals, and clerks in connection therewith, now exercised by any agency or officer, are transferred to the Department of Justice.

As to any case referred to the Department of Justice for prosecution or defense in the courts, the function of decision whether and in what manner to prosecute, or to defend, or to compromise, or to appeal, or to abandon prosecution or defense, now exercised by any agency or officer, is transferred to the Department of Justice.

Reprinted in 5 U.S.C. § 901 note (1976).

II. Present Statutory Bases of the Attorney General's Authority

These attempts to centralize the litigating function and authority of the federal government in the Department of Justice, with the Attorney General at its helm,

are now codified in 5 U.S.C. § 3106 and 28 U.S.C. §§ 515–516. Section 3106 of Title 5 forbids the employment of outside counsel by executive agencies for litigation involving the United States unless Congress has provided otherwise, requiring instead that the matter be referred to the Department of Justice.⁶ Although we have found no case law interpreting this provision, the language of § 3106 appears to limit the prohibition of payment to outside counsel for litigation, and litigation-related matters. However, in view of the centralization and uniformity purposes underlying the 1870 Act and its progeny, we believe that, absent statutory authority to the contrary, the prohibition should be broadly interpreted to preclude payments to non-agency or non-Justice Department attorneys for (legal) advisory functions as well. See Scalia, Assistant Attorney General, Office of Legal Counsel, Letter to Hoffman, General Counsel, Department of Defense (Mar. 26, 1975).⁷ See also *Boyle v. United States*, 309 F.2d 399, 402 (Ct. Cl. 1962) (quoting from a 1957 letter by the Comptroller General: “[I]n the absence of urgent and compelling reasons, a Government agency may not procure from an independent contractor services normally susceptible of being performed by Government employees.”). Nevertheless, the Attorney General may employ outside counsel to perform legal duties under his direction. Sections 515 and 543 of Title 28⁸ authorize the Attorney General to commission “special attorneys” to assist United States Attorneys, or to “conduct any kind of legal proceeding, civil or criminal, . . . which United States attorneys are authorized by law to conduct”

⁶ 5 U.S.C. § 3106 provides in pertinent part that:

[e]xcept as otherwise authorized by law, the head of an Executive department or military department may not employ an attorney or counsel for the conduct of litigation in which the United States, an agency, or employee thereof is a party, or is interested, or for the securing of evidence therefor, but shall refer the matter to the Department of Justice.

⁷ Although the Scalia letter was written in response to an inquiry regarding the use of outside counsel by an agency in connection with the investigation or prosecution of administrative claims, the principles expressed therein are broadly applicable.

In prohibiting the use of outside counsel by the several departments, Congress concentrated all the Government’s law business in the Department of Justice—not only litigation, but also *advisory functions*. This was thought to be necessary in order to provide for uniform legal interpretations throughout the Executive branch Congress later departed from the principle that *all* legal activities of the Government were to be carried out by the Department of Justice; subsequent legislation, authorizing and funding agency legal staffs, permitted legal matters not involving litigation to be handled in the various agencies. Those changes were taken into account when Congress, in 1966, codified the various provisions of the law going back to the Department of Justice Act of 1870. See, e.g., Historical and Revision Notes to 5 U.S.C. 3106 and 28 U.S.C. 516. There is, however, no indication of a Congressional intent to relax the prohibition against engagement of outside counsel by agencies other than the Department of Justice. This principle remains in effect with respect to both litigation reserved to the Department of Justice and nonlitigative matters handled within the several agencies.

Letter at 4–5 (footnotes and citations omitted) (emphasis added).

⁸ 28 U.S.C. § 515(a), provides in pertinent part that:

[t]he Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal . . . which United States attorneys are authorized by law to conduct, whether or not he is a resident of the district in which the proceeding is brought

28 U.S.C. § 543 provides:

(a) The Attorney General may appoint attorneys to assist United States attorneys when the public interest so requires
(b) Each attorney appointed under this section is subject to removal by the Attorney General.

Sections 515–519 of Title 28 codify the law growing out of the 1870 Act which consolidated the power to conduct litigation involving the United States in the Department of Justice, and granted the Attorney General supervisory authority over such litigation. The principal provisions granting such authority are §§ 516 and 519. Section 516 provides that

[e]xcept as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.

Section 519 provides that

[e]xcept as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States attorneys, assistant United States attorneys, and special attorneys appointed under section 543 of this title in the discharge of their respective duties.

However, as with the previous legislative and executive efforts designed to centralize the litigating functions of the United States, these provisions have been undercut by exceptions authorized by Congress which grant agencies or departments litigating authority independent of the Department of Justice. *See Bell, The Attorney General: The Federal Government's Chief Lawyer and Chief Litigator, or One Among Many?*, 46 *Fordham L. Rev.* 1049 (1978); Memorandum to the Attorney General, from William D. Ruckelshaus (Mar. 5, 1970); Key, *The Legal Work of the Federal Government*, 25 *Va. L. Rev.* 165 (1938).⁹ As of 1978, some 31 Executive Branch and independent agencies were authorized to conduct at least some of their own litigation. Bell, *supra*, at 1057. Although this memorandum does not address those cases in which agencies have been granted independent litigating authority, the lines between the Attorney General's authority and that which has been delegated to the agencies have at times been drawn ambiguously, and in those cases, the Attorney General frequently asserts his historic authority over the litigation proceedings.

⁹ Congress has thus far maintained virtually unimpaired the Attorney General's control over the initiation of criminal proceedings. *See, e.g.*, 15 U.S.C. § 771(b) (SEC), 16 U.S.C. § 825m(a) (FPC). The preservation of such authority in the Attorney General is, we believe, sound constitutional policy, in view of the Executive's constitutional mandate to take care that the laws be executed faithfully. Such a responsibility carries with it the vindication of public rights through the institution of criminal proceedings against those who violate the laws which the Executive administers. As the Executive's chief legal officer, the Attorney General is singularly suited to carry out this responsibility.

Similarly, the Attorney General's authority to conduct cases in the Supreme Court has remained undiluted. Section 518 of Title 28, which reserves the conduct and argument in the Supreme Court of suits and appeals "in which the United States is interested" to the Attorney General and Solicitor General, does not contemplate existing or future statutory authorizations to the agencies, as do §§ 516 and 519. However, § 518 does permit the Attorney General to "direct otherwise," in particular cases.

III. Supervisory Authority in the Context of Jointly Conducted Litigation

A. Policy Considerations

The policy considerations which support the centralization of federal litigating authority in the Department of Justice, under the supervision of the Attorney General, are many. In addition to the "unity of decision, unity of jurisprudence" goals that were articulated in the 1870 congressional debates, the centralization of authority and supervision over federal litigation in the Department of Justice meets several other objectives: (1) the coordination of lower court proceedings, which enhances the ability of government lawyers to select test cases presenting the government's positions in the best possible light; (2) the facilitation of presidential supervision, through the Attorney General, over Executive Branch policies that are implicated in litigation; (3) the allowance for greater objectivity in the filing and handling of cases by attorneys who are not themselves the affected litigants; and (4) the increased effectiveness in the handling of appeals and Supreme Court litigation which results from centralized control over lower court proceedings. *See generally* Memorandum to the Attorney General from William D. Ruckelshaus, Re: Encroachments upon the Authority of the Attorney General to Supervise and Control the Government's Litigation (Mar. 5, 1970). *See also* Harmon, Office of Legal Counsel, Memorandum for the Associate Attorney General (Dec. 11, 1980).

Centralization of federal litigating authority in the Department of Justice, under the supervision of the Attorney General, is vitally necessary to ensure the Attorney General's proper discharge of his duty to oversee the legal affairs of the United States with which Congress has entrusted him. Centralization ensures that the Attorney General is properly informed of the legal involvements of each of the agencies for which he is responsible; supervisory authority permits him to act on that knowledge. In this way, the Attorney General is better able to coordinate the legal involvements of each "client" agency with those of other "client" agencies, as well as with the broader legal interests of the United States overall. Yet, while the "client" agencies may be involved, to varying degrees, in carrying out the litigation responsibilities necessary to assist the Attorney General in representing the agency's particular interests, it is essential that the Attorney General *not* relinquish his supervisory authority over the agency's litigation functions, for the Attorney General alone is obligated to represent the broader interests of the Executive. It is this responsibility to ensure that the interests of the United States as a whole, as articulated by the Executive, are given a paramount position over potentially conflicting interests between subordinate segments of the government of the United States which uniquely justifies the role of the Attorney General as the chief litigator for the United States. Only the Attorney General has the overall perspective to perform this function.

Nevertheless, it must be stressed that in exercising supervisory authority over the conduct of agency litigation, the Attorney General will generally defer to the

policy judgments of the client agency. This deference reflects a recognition of the agency's considerable expertise in the substantive area with which it is primarily concerned. Strictly speaking, "policy" judgments are confined to those substantive areas in which the agency has developed a special expertise and in which the agency is vested by law with the flexibility and discretion to make policy judgments. However, it is increasingly the case that policy concerns are implicated in decisions dealing with litigation strategy, and in such cases, the Attorney General will accommodate the agency's policy judgments to the greatest extent possible without compromising the law, or broader national policy considerations.

It is in the context of these dual representation functions—in which there exists inherent potential for conflict between "clients"—that questions of representation arise. Circumstances frequently develop in which the Attorney General and client agencies disagree as to the proper course of the litigation—including strategy, legal judgments, settlement negotiations, and policy judgments which impact on the litigation. Such circumstances frequently present the question whether the Attorney General should continue to represent the client.

The simple answer is yes. The Attorney General has not only the statutory authority to represent the agencies over whose litigation he exercises supervisory authority, but, indeed, the *duty* to do so, "[e]xcept as otherwise authorized by law." 28 U.S.C. §§ 516, 519. The Attorney General's authority and duty to represent these agencies are described more particularly by the specific legislation which sets forth his and the agencies' respective litigation responsibilities, and occasionally, in "Memoranda of Understanding" entered into by the Attorney General and specific agencies apportioning such responsibilities. Nevertheless, unlike the private attorney, the Attorney General does not have the option of withdrawing altogether from the representation of client agencies, as long as interests of the United States for which he is held responsible are at stake.

However, recognition of the very real difficulties which are posed in the context of litigation jointly conducted by the Attorney General and "client" agencies—particularly in view of the agencies' greater staffing resources, more intimate familiarity with the subject matter of the litigation, greater visibility to the public as a litigant, and more involvement in the day-to-day administration of field offices—tends to suggest that a more practical understanding of the Attorney General's authority and duty to represent client agencies may be needed. Distinguishing policy judgments from legal judgments in litigation matters—the former being primarily the province of the agencies and the latter being reserved to the Attorney General—helps to provide not only a more reasonable and efficient use of government resources, but a workable framework for resolving most disputes that may result in representation crises. Nevertheless, because of his unique responsibilities in representing government-wide interests as well as those of particular "client" agencies, the final judgment concerning the best interests of the United States must be reserved to the Attorney General.

B. Legislative Exceptions to the Attorney General's Authority

Although Congress has over the years responded, in varying degrees, to the multitude of pressures exerted by agencies seeking independent litigating au-

thority, the courts have continued to give greater weight to the strong policy objectives which recommend centralization. As a result, the "otherwise authorized by law" language creating the exception to the Attorney General's authority in 28 U.S.C. §§ 516 and 519 has been narrowly construed to permit litigation by agencies only when statutes explicitly provide for such authority. See *Marshall v. Gibson's Products, Inc.*, 584 F.2d 668, 676 n.11 (5th Cir. 1978); *ICC v. Southern Railway*, 543 F.2d 534, 535-38 (5th Cir. 1976); *In re Grand Jury Subpoena of Persico*, 522 F.2d 41, 54 (2d Cir. 1975); *FTC v. Guignon*, 390 F.2d 323 (8th Cir. 1968); *United States v. Tonry*, 433 F. Supp. 620 (E.D. La. 1977).

Although the legislative history of Sections 516 and 519 is relatively sparse—in fact, the "history" is contained almost entirely in the "Historical and Revision Notes" prepared by the revisers of Title 5 in 1966—the courts' strict interpretation of these provisions is supported not only by the historical antecedents of these statutes and the policy considerations discussed above, but also by the Reviser's Notes to the 1966 amendments.¹⁰ The revisers state, with respect to both Sections 516 and 519, that the sections were revised to express the effect of existing law, which does permit agency heads, "with the approval of Congress, [to employ] attorneys to advise them in the conduct of their official duties. . . ." 28 U.S.C. § 516 note (emphasis added). The revisers further state that "[t]he words 'Except as otherwise authorized by law,' are added to provide for existing and future exceptions (e.g., section 1037 of title 10)." § 516 note; 28 U.S.C. § 519 note. Thus the revisers have indicated that existing and future grants of litigating authority that are at least as express as the language contained in 10 U.S.C. § 1037 are to be excepted from the Attorney General's broad grant of authority under §§ 516 and 519 of Title 28. Section 1037 of Title 10 permits the Secretaries of the various military departments to "employ [private] counsel" for the "representation" of persons subject to the Uniform Code of Military Justice "before the judicial tribunals and administrative agencies" of foreign nations. While nothing in the legislative history of § 1037 indicates a congressional intent to create an exception to the predecessors of §§ 516 and 519, Congress made clear in 1966 that the operative language, "the Secretary concerned may employ counsel . . . incident to the representation before . . . judicial tribunals" was sufficient to trigger the exception.¹¹ See H.R. Rep. No. 1863, 84th Cong., 2d Sess. (1956); S. Rep. No. 2544, 84th Cong., 2d Sess. (1956). See generally Office of Legal Counsel, Memorandum to Peter R. Taft (Aug. 27, 1976).

In order to come within the "as otherwise authorized by law" exception to the Attorney General's authority articulated in 28 U.S.C. §§ 516 and 519, it is necessary that Congress use language authorizing agencies to employ outside

¹⁰ 28 U.S.C. §§ 515-526 (1976), Pub. L. No. 89-554, § 4(c), 80 Stat. 613 is the most recent codification of the provisions contained in the 1870 Act creating the Department of Justice. Prior to 1966, these provisions were codified in Title 5.

¹¹ 10 U.S.C. § 1037 was adopted in 1956, prior to the 1966 adoption of 28 U.S.C. §§ 516 and 519, and provides in pertinent part:

(a) Under regulations to be prescribed by him, the Secretary concerned may employ counsel, and pay counsel fees, court costs, bail, and other expenses incident to the representation, before the judicial tribunals and administrative agencies of any foreign nation, of persons subject to the Uniform Code of Military Justice.

counsel (or to use their own attorneys) to represent them in court. *See, e.g.*, 49 U.S.C. § 16(11) (Interstate Commerce Commission); 16 U.S.C. § 825m(c) (Federal Power Commission); 12 U.S.C. § 1464(d)(1) (Federal Home Loan Bank Board); 29 U.S.C. § 154(a) (National Labor Relations Board);¹² 5 U.S.C. § 7105(h) (Supp. IV 1980) (Federal Labor Relations Authority).¹³ However, even agencies to which Congress has granted independent litigating authority may be prohibited from conducting their own litigation in the Supreme Court. *See, e.g.*, 42 U.S.C. § 2000e-4(b)(2) (Equal Employment Opportunity Commission); 5 U.S.C. § 7105(h) (Supp. IV 1980) (Federal Labor Relations Authority).¹⁴ More ambiguous language, which, for example, authorizes an agency to "sue and be sued,"¹⁵ "bring a civil action," or "invoke the aid of a court," has been considered by some courts to be insufficient to confer independent litigating authority. *See, e.g., ICC v. Southern Railway*, 543 F.2d 534 (5th Cir. 1976); *FTC v. Guignon*,

¹² These statutes provide as follows.

I.C.C.—49 U.S.C. § 16(11)

The Commission may employ such attorneys as it finds necessary for proper legal aid and service of the Commission or for proper representation of the public interests in investigations made by it . . . or to appear for or represent the Commission in any case in court.

F.P.C.—16 U.S.C. § 825m(c)—language substantially similar to that provided for I.C.C.

Federal Home Loan Bank Board—12 U.S.C. 1464(d)(1)

The Board shall have power to enforce this section and rules and regulations made hereunder. In the enforcement of any provision of this section or rules and regulations made hereunder, the Board is authorized to act in its own name and through its own attorneys . . .

National Labor Relations Board—29 U.S.C. § 154(a)

Attorneys appointed under this section may, at the direction of the Board, appear for and represent the Board in any case in court.

(Emphases added.) Of course, these authorizations must be read within the context of the whole statutory scheme of which they are a part—in some instances these agencies are represented by the Department of Justice.

¹³ Language similar to that contained in the statutes cited in n. 12, *supra* was recently held by the District Court for the District of Columbia to confer independent litigating authority on the Federal Labor Relations Authority (FLRA), including the litigation of proceedings under the Freedom of Information Act, 5 U.S.C. § 552. *See AFGE v. Gordon*, C.A. No. 81-1737 (D.D.C. Oct. 23, 1981). The statute construed by the court as granting the FLRA independent litigating authority, 5 U.S.C. § 7105(h) (Supp. IV 1980), provides:

Except as provided in section 518 of title 28, relating to litigation before the Supreme Court, attorneys designated by the Authority may appear for the Authority and represent the Authority in any civil action brought in connection with any function carried out by the Authority pursuant to this title or as otherwise authorized by law.

The Appellate Section of the Civil Division has recommended that the Department of Justice not appeal this decision. Nevertheless, the Department has maintained vigorously in the past, and will continue to maintain, that broad grants of independent litigating authority, similar to those discussed above, do not encompass cases arising under administrative statutes that apply government-wide. This view is supported by the strong policy imperatives of "unity in the executive law of the United States," *infra* at 5, as well as some legislative history. *See H.R. Conf. Rep. No. 539*, 95th Cong., 1st Sess. 72 (1977), reporting on the Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565, which established the Federal Energy Regulatory Commission.

¹⁴ 42 U.S.C. § 2000e-4(b)(2) provides:

Attorneys appointed under this section may, at the direction of the Commission, appear for and represent the Commission in any case in court, provided that the Attorney General shall conduct all litigation to which the Commission is a party in the Supreme Court pursuant to this subchapter.

5 U.S.C. § 7105(h) (Supp. IV 1980) provides:

Except as provided in section 518 of title 28, relating to litigation before the Supreme Court, attorneys designated by the Authority may appear for the Authority and represent the Authority in any civil action brought in connection with any function carried out by the Authority pursuant to this title or as otherwise authorized by law.

(Emphases added.)

¹⁵ The Office of Legal Counsel views "sue and be sued" language as merely designating the agency as a "juridical entity" which may sue or be sued in its own name, and not as removing the agency's representation from the domain of the Department of Justice pursuant to 28 U.S.C. §§ 516 and 519. *See Meador*, Draft Memorandum Re Government Rehtigation Policies, *supra*, at 19, n. 51, citing an interview with H. Miles Foy III, Department of Justice, Office of Legal Counsel.

390 F.2d 323 (8th Cir. 1968). *See generally* Harmon, Office of Legal Counsel, Memorandum for the Associate Attorney General (Dec. 11, 1980); Meador, Office for Improvements in the Administration of Justice, Draft Memorandum (May 21, 1979); Office of Legal Counsel, Relationship of Proposed Amendments to the Administrative Procedure Act . . . to the Department of Justice Policy of Opposition to Litigation Power Outside of the Department (Apr. 29, 1974); Memorandum to the Attorney General from William D. Ruckelshaus, *supra*; but *see SEC v. Robert Collier & Co.*, 76 F.2d 939 (2d Cir. 1935).

Other language which does grant agency attorneys authority to litigate, but provides that such authority shall be exercised under the direction and control of the Attorney General, provides the framework for "Memoranda of Understanding" (MOUs) between the agencies and the Department of Justice, which apportion the litigation responsibilities between the Department and the agencies. *See, e.g.*, 29 U.S.C. § 204(b) (Fair Labor Standards Act); the Age Discrimination Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602.¹⁶ These memoranda usually specify both the categories of cases in which agency counsel may appear and the nature of the Attorney General's continuing control and supervision over such cases. We believe that the sharing of litigation responsibilities under MOUs is proper, as long as the Attorney General retains ultimate authority over the litigation. Moreover, the rationale underlying these arrangements is an eminently sensible one. The efficiency and expertise objectives in government litigation are thereby maximized, without sacrificing the Attorney General's statutory role as chief government litigator, and the responsibilities and prerogatives which attach thereto.

Nevertheless, as a practical matter, MOUs do compromise the Attorney General's control, if not authority, over the conduct of agency litigation. Agencies eager to control their own litigation may proceed to negotiate settlement agreements, send out "no action" letters, depose witnesses, and otherwise represent the agency's position to the public without consultation or assistance from the Attorney General, leaving the Attorney General with a *fait accompli* and a potential equitable barrier to his subsequent assertion of control over the litigation.¹⁷ Such occurrences effectively undermine the Attorney General's

¹⁶ 29 U.S.C. § 204(b) permits Department of Labor attorneys to "appear for and represent" the Administrators of the FLSA and ADEA "in any litigation," but subjects all such litigation "to the direction and control of the Attorney General." The Secretary of Labor and the Attorney General have entered into a series of understandings which provide that Department of Labor attorneys will ordinarily handle all appellate litigation pursuant to the Acts, but permit the Attorney General to take part in the conduct of such cases as he deems to be in the best interest of the United States.

¹⁷ We do not mean to suggest that agencies acting beyond the scope of their litigating authority in settling claims *legally* bind the United States; rather, we refer only to the confusion, ill will, and lack of confidence that would accrue to the agency in its public relations should the Attorney General reverse the agency's actions, as well as the practical difficulties inherent in such a reversal. *See Dresser Indus., Inc. v. United States*, 596 F.2d 1231, 1236 (5th Cir. 1979), *cert. denied*, 444 U.S. 1044 (1980):

It is well established that the federal government will not be bound by a contract or agreement entered into by one of its agents unless such agent is acting within the limits of his actual authority.

. . . As the Supreme Court stated in [*Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947)]:

Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority. The scope of this authority may be explicitly defined by Congress or be limited by delegated legislation, properly exercised through the rule-making power. And this is so even though . . . the agent himself may have been unaware of the limitations upon his authority. 332 U.S. at 384.

ability to perform the dual litigating functions with which he is charged. Recognizing that the efficiency and expertise objectives in government litigation necessitate the sharing of litigation responsibilities in most cases, care should be taken to make explicit in these arrangements the Attorney General's overriding authority in directing the litigation. While the Attorney General may delegate some litigating authority under the MOUs, he may not delegate the ultimate responsibility which is by law vested exclusively in the Attorney General. *See* Harmon, Office of Legal Counsel, Memorandum for the Associate Attorney General (Dec. 11, 1980). Thus, the Attorney General should make clear to the client agency his willingness to support the Assistant Attorney General and line attorneys in the enforcement of his prerogatives under the MOU.¹⁸

IV. Settlement and Compromise Authority

Included within this broad grant of plenary power over government litigation is the power to *compromise* and settle litigation over which the Attorney General exercises supervisory authority. This power "to compromise any case over which he has jurisdiction upon such terms as he may deem fit" is "in part inherent in [the Attorney General's] office and in part derived from statutes and decisions." 38 Op. Att'y Gen. 124 (1934). This authority was the subject of President Roosevelt's Executive Order No. 6166, (June 10, 1933), *reprinted in* 5 U.S.C. § 901 note (1976), which provided that "... the function of decision whether ... to compromise ... appeal ... [or] abandon prosecution or defense, now exercised by any agency or officer [of the United States], is transferred to the Department of Justice." *See infra* at 7-8. With respect to the power to compromise, Attorney General Cummings observed that

it is a power, whether attaching to the office or conferred by statute or Executive order, to be exercised with wise discretion and resorted to only to promote the Government's best interest or to prevent flagrant injustice, but that it is broad and plenary may be asserted with equal assurance, and it attaches, of course, immediately upon the receipt of a case in the Department of Justice, carrying with it both civil and criminal features, if both exist, and any other matter germane to the case which the Attorney General may find it necessary or proper to consider before he invokes the aid of the courts; nor does it end with the entry of judgment, but embraces execution (*United States v. Morris*, 10 Wheat. 246).

¹⁸ Additional litigating authority, independent of the Attorney General, was granted to certain agencies by the Hobbs Act, 28 U.S.C. §§ 2342, 2348 (1976 & Supp. IV 1980). The Hobbs Act grants specified agencies authority to *intervene in appellate proceedings* "of their own motion and as of right," even though the Attorney General "is responsible for and has control of the interests of the Government" in the proceedings. Notwithstanding the Attorney General's overall authority, he "may not dispose of or discontinue the proceeding" over the objection of the intervening agency, and the agency "may prosecute, defend, or continue the proceeding unaffected by the action or inaction of the Attorney General."

38 Op. Att'y Gen. 98, 102 (1934).¹⁹ In these opinions, Attorney General Cummings concluded that the Attorney General's authority to settle cases extended even beyond that which would have been available to the agency charged with administering the underlying law.²⁰

Executive Order No. 6166, together with Sections 516 and 519 of Title 28 of the U.S. Code (and their predecessor provisions), have been interpreted consistently by the courts to vest the Attorney General with virtually absolute discretion to determine whether to compromise or abandon claims made in litigation on behalf of the United States. See *New York v. New Jersey*, 256 U.S. 296, 308 (1921); *United States v. Newport News Shipbuilding & Dry Dock Co.*, 571 F.2d 1283 (4th Cir.), cert. denied, 439 U.S. 875 (1978); *Smith v. United States*, 375 F.2d 243 (5th Cir.), cert. denied, 389 U.S. 841 (1967); *Halbach v. Markham*, 106 F. Supp. 475, 479–81 (D.N.J. 1952), aff'd, 207 F.2d 503 (3d Cir. 1953). In deciding to settle or abandon a claim, or not to prosecute at all, the Attorney General is not restricted to considerations only of litigative probabilities, but rather may make a decision, in his discretion, on the basis of national policies espoused by the Executive. *Smith v. United States*, supra. The only limitations placed on the Attorney General's settlement authority are those which pertain to his litigating authority generally—i.e., explicit statements by Congress circumscribing his settlement authority,²¹ see, e.g., 8 U.S.C. § 1329 (1976) (prohibiting settlement of suits and proceedings brought under Title II of the Immigration Act without consent of the court in which the suit or proceeding is pending), and the duty imposed on the President by Article II, § 3 of the Constitution to “take Care that the Laws be faithfully executed. . . .” See generally Office of Legal Counsel, Memorandum for Sanford Sagalkin (Sept. 4, 1980); Office of Legal Counsel, Memorandum to James W. Moorman (Oct. 30, 1979). To guide the Attorney General in the exercise of his settlement discretion, the 1934 opinions of Attorney General Cummings proposed a “promote the Government's best interest, or . . . prevent flagrant injustice” standard. See 38 Op. Att'y Gen. at 102.

¹⁹ As early as 1831, Attorney General Taney observed that

An attorney conducting a suit for a party has, in the absence of that party, a right to discontinue it whenever, in his judgment, the interest of his client requires it to be done. If he abuses this power, he is liable to the client whom he injures.

An attorney of the United States, except in so far as his powers may be restrained by particular acts of Congress, has the same authority and control over the suits which he is conducting. The public interest and the principles of justice require that he should have this power. . . . [S]ince he cannot consult his client (the United States), the sanction of the court is regarded as sufficient evidence that he exercised the power honestly and discretely.

2 Op. Att'y Gen. 482, 486–87. Attorney General Cummings cited this opinion approvingly. 38 Op. Att'y Gen. at 99.

²⁰ The opinions found in 38 Op. Att'y Gen. at 94, 98, 124 discuss the Attorney General's authority to compromise income tax cases in the absence of *bona fide* disputed questions of fact. Attorney General Cummings concluded that he did possess the authority to settle such cases, even though the Secretary had no statutory authority to compromise income tax cases in those circumstances.

²¹ With respect to actions brought under the Federal Tort Claims Act, 28 U.S.C. §§ 2671–2680 (1976), for example, the Attorney General or his designee now has the authority to arbitrate, compromise, or settle claims brought under the Act after January 17, 1967. 28 U.S.C. § 2677 (1976); prior to the 1966 amendments, court approval was required before the Attorney General was permitted to effect a settlement. Congress also prescribed a procedure in the 1966 amendments which granted agencies authority to settle claims under \$25,000 without prior written approval by the Attorney General of that specific settlement arrangement, as long as the arrangement was made in accordance with general regulations prescribed by the Attorney General. 28 U.S.C. § 2672 (1976).

V. Litigation in International Courts

Similarly, the Attorney General's authority over litigation involving the United States before the International Court of Justice (ICJ) is plenary. Although the Attorney General's supervisory authority has been challenged only once since the 1966 codification of the broad grant of authority contained in 28 U.S.C. §§ 516 and 519, that challenge was resolved by reference to the broad scope of the statutory provisions as well as Department of Justice regulations contained in Title 28 of the Code of Federal Regulations.

In the connection with the litigation between the United States and Iran in 1980, a dispute arose between the Department of State and the Department of Justice concerning the Attorney General's authority to represent the United States before the ICJ. The Legal Adviser expressed the view that the State Department, by virtue of its premier role in United States foreign policy and international relations, had been historically charged with the responsibility for international affairs involving the United States, including legal matters. In response, Attorney General Civiletti cited the unambiguous language of §§ 516 and 519, and noted the absence of both statutory law and formal opinions which would "otherwise authorize" the Department of State to conduct litigation independent of the Attorney General's supervision. Attorney General's letter to the Legal Adviser, Department of State (Apr. 21, 1980).²² In addition, 28 C.F.R. § 0.46 (1980)²³ makes clear that the Attorney General's litigation authority is not limited to domestic matters, but rather includes litigation "in foreign courts, special proceedings, and similar civil matters not otherwise assigned." *See generally* D. Deener, *The United States Attorneys General and International Law* (1957),²⁴

VI. Conclusion

In short, the Attorney General, as the chief litigation officer for the United States, has broad plenary authority over all litigation in which the United States,

²² At President Carter's request, Attorney General Civiletti personally conducted the Iran litigation before the ICJ, assisted by the Legal Adviser to the State Department, whom the Attorney General commissioned as a "Special Assistant," pursuant to 28 U.S.C. § 515.

²³ 28 C.F.R. § 0.46 (1980) provides:

The Assistant Attorney General in charge of the Civil Division shall, in addition to litigation coming within the scope of § 0.45, direct all other civil litigation including claims by or against the United States, its agencies or officers, in domestic or foreign courts, special proceedings, and similar civil matters not otherwise assigned, and shall employ foreign counsel to represent before foreign criminal courts, commissions or administrative agencies officials of the Department of Justice and all other law enforcement officers of the United States who are charged with violations of foreign law as a result of acts which they performed in the course and scope of their Government service.

²⁴ Deener discusses the historical role of the Attorney General in providing legal advice on questions of international law and concludes:

The Judiciary Act of 1789 did not specifically charge the Attorney General with the duty of giving legal advice on questions of international law. On the other hand, the act did not restrict the "questions of law" that could be referred to the Attorney General to those involving domestic matters only. Actually, almost from the very beginning, the President and the department heads submitted questions involving the law of nations to the chief law officer, and succeeding Presidents and cabinet officers have continued to submit such questions as a matter of established practice. Congress apparently recognized this practical interpretation of the statutes defining the Attorney General's duties. At any rate, Congress has never deemed it necessary to change the statutes in this respect.

Deener, *supra*, at 10-11 (footnotes omitted).

or its federal agencies or departments, are involved. This authority is wideranging, embracing all aspects of litigation, including subpoena enforcement, settlement authority, and prosecutorial discretion. The reservation of these powers to the Attorney General is grounded in our common law tradition, Acts of Congress (principally, 5 U.S.C. § 3106, and 28 U.S.C. §§ 516 and 519), various executive orders, and a long line of Supreme Court precedent. These powers can be eroded only by other Acts of Congress, and the Executive's constitutional command to faithfully execute the laws.

Implicit in this broad grant of authority is the recognition that the Attorney General must serve the interests of the "client" agency as well as the broader interests of the United States as a whole in carrying out his professional duties. The Attorney General is obligated to administer and enforce the Constitution of the United States and the will of Congress as expressed in the public laws, as well as the more "private" legal interests of the "client" agency. It is because of this diversity of functions that situations may arise where the Attorney General is faced with conflicting demands, *e.g.*, where a "client" agency desires to circumvent the law, or dissociate itself from legal or policy judgments to which the Executive subscribes; where a "client" agency attempts to litigate against another agency or department of the federal government; or where a "client" agency desires a legal result that will benefit the narrow area of law administered by the agency, without regard to the broader interests of the United States government as a whole. In such cases, the Attorney General's obligation to represent and advocate the "client" agency's position must yield to a higher obligation to take care that the laws be executed faithfully. In every case, the Attorney General must satisfy himself that this constitutional duty, delegated from the Executive, has not been compromised in any way, and that the legal positions advocated by him do not adversely affect the interests of the United States.

THEODORE B. OLSON
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ATTACHMENT 2

**Application of the Government Corporation Control Act
and the Miscellaneous Receipts Act to the Canadian
Softwood Lumber Settlement Agreement**

An aspect of the proposed agreement between the United States and Canada settling various disputes regarding trade in softwood lumber products, in which duties now held by the United States would be distributed by a private foundation to “meritorious initiatives” related to, among other things, timber-reliant communities, would not violate the Government Corporation Control Act or the Miscellaneous Receipts Act.

August 22, 2006

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
UNITED STATES TRADE REPRESENTATIVE

The United States and Canada have negotiated an agreement settling various disputes regarding trade in softwood lumber products. You have asked whether one aspect of the proposed settlement, in which duties now held by the United States would be distributed by a private foundation to “meritorious initiatives” related to, among other things, timber-reliant communities, would violate the Government Corporation Control Act, 31 U.S.C. § 9102 (2000), or the Miscellaneous Receipts Act, *id.* § 3302(b). We conclude that this aspect of the settlement would not violate either statute. We express no opinion on other features of the settlement agreement.

I.

One of the disputes regarding trade in softwood lumber products involves the “Byrd Amendment” to title VII of the Tariff Act of 1930. *See* Continued Dumping and Subsidy Offset Act of 2000, Pub. L. No. 106-387, § 1003, 114 Stat. 1549, 1549A-73 (2000) (codified at 19 U.S.C. § 1675c (2000)). That Amendment requires the Commissioner of the United States Bureau of Customs and Border Protection (“Customs”) to deposit into “special accounts” in the United States Treasury “all antidumping and countervailing duties (including interest earned on such duties) that are assessed after the effective date [of the statute]” under antidumping or countervailing duty orders entered by the Commissioner. *Id.* § 1675c(e). Customs must annually distribute the duties in these special accounts to “affected domestic producers” as a “continued dumping and subsidy offset.” *Id.* § 1675c(a).¹

¹ Congress repealed the Byrd Amendment in the Deficit Reduction Act of 2005 but provided that “[a]ll duties on entries of goods made and filed before October 1, 2007, that would, but for [the repeal], be distributed under [the Byrd Amendment] shall be distributed as if [the Byrd Amendment] had not been repealed.” Pub. L. No. 109-171, § 7601(b), 120 Stat. 4, 154 (2006).

Several producers and exporters of softwood lumber products (“Canadian Producers”) have challenged in the United States Court of International Trade the application of the Byrd Amendment to goods imported into the United States from Canada. The Canadian Producers have argued that such application violates a clear statement requirement of the North American Free Trade Agreement (“NAFTA”) Implementation Act under which any amendment to title VII of the Tariff Act “shall apply to goods from a NAFTA country only to the extent specified in the amendment.” 19 U.S.C. § 3438 (2000). In April 2006, the court held that “Customs has violated U.S. law, specifically a provision of the NAFTA Implementation Act in applying the Byrd Amendment to antidumping and countervailing duties on goods from Canada and Mexico, 19 U.S.C. § 3438.” *Canadian Lumber Trade Alliance v. United States*, 425 F. Supp. 2d 1321, 1326 (Ct. Int’l Trade 2006).² We understand that the Canadian Producers also have challenged before a NAFTA arbitration panel the authority of the United States to collect the antidumping and countervailing duties to which the Byrd Amendment applies.

The settlement that the United States, through the Trade Representative (“USTR”), has negotiated with Canada would, among other things, terminate numerous suits in various forums regarding trade in softwood lumber products. *See generally* Draft Softwood Lumber Agreement Between the Government of Canada and the Government of the United States of America (Aug. 1, 2006) (“Settlement Agreement” or “Agreement”). The Settlement Agreement would enter into force only if the parties to the disputes identified in the Agreement execute a “Termination of Litigation Agreement,” which is “a full and complete settlement of the issues raised by all of the parties.” Settlement Agreement art. II; *id.* annex 2A. In addition, although the *Canadian Lumber* suit would not be terminated, the Settlement Agreement would terminate the application of the Byrd Amendment to duties involving softwood lumber products from Canada, by having the United States agree to revoke the applicable antidumping and countervailing duty orders. The United States would refund to certain “Importers of Record” (the vast majority of whom are Canadian Producers) or to their designees the funds concerning such products held in special accounts (approximately \$5 billion). *Id.* art. III. According to the Agreement, most of the Importers of Record are expected to enter into escrow arrangements with the Government of Canada or its agent to sell their rights to the refunds and accrued interest to Canada in exchange for an immediate lump sum payment from Canada equal to approximately 80% of the deposits and interest. An additional \$1 billion (approximately equal to the remaining 20% of the refunds) would be distributed, via the Government of Canada or its agent, to three escrow accounts identified by the United States, “whose beneficiaries are respectively”: (1) “members of the Coalition for Fair Lumber Imports,” (2) “a binational industry council” whose creation Canada and

² The court also dismissed for lack of standing the Government of Canada, which had joined the Canadian Producers as a plaintiff. *See Canadian Lumber*, 425 F. Supp. 2d at 1349–52.

Canadian Softwood Lumber Settlement Agreement

the United States would encourage, and (3) “meritorious initiatives in the United States identified by the United States in consultation with Canada as described in Article XIII(A).” From that \$1 billion, Canada would “distribute . . . \$US 450 million for the meritorious initiatives account.” *Id.* annex 2C; *see also id.* art. XIII (discussing the council and the meritorious initiatives) & annex 13.

Your question involves this “meritorious initiatives account.” The Settlement Agreement generally describes as follows the uses to which the \$450 million shall be put:

The funds shall support meritorious initiatives in the United States related to:

- (a) educational and charitable causes in timber-reliant communities;
- (b) low-income housing and disaster relief; or
- (c) educational and public-interest projects addressing: (i) forest management issues that affect timber-reliant communities; or (ii) the sustainability of forests as sources of building materials, wildlife habitat, bio-energy, recreation, and other values.

Id. art. XIII(A)(2). Article XIII further provides that “[b]y September 1, 2006, the United States, in consultation with Canada, shall identify the meritorious initiatives to receive the funds that are to be set aside for that purpose under Annex 2C.” *Id.*; *see also id.* annex 2C (“meritorious initiatives in the United States” are to be “identified by the United States in consultation with Canada as described in Article XIII(A)”).

Your office has explained that the “beneficiary” of the third escrow account is not precisely “meritorious initiatives” themselves but rather a foundation that will control the “meritorious initiatives account” receiving the \$450 million. The foundation will distribute these funds consistent with the three categories listed in Article XIII(A)(2).

The Settlement Agreement is silent on how the United States will identify this foundation, except to state the date—September 1—by which it should be done. Even if a later date is used in the final version of the Agreement, you expect that the deadline for identifying the foundation will predate the effective date of the Agreement, although identification of the foundation is not a condition for the Agreement to enter into force. *See* Settlement Agreement art. II. Beyond that, your office has explained to us as follows how the United States plans to proceed:

Th[e] foundation will be established in accordance with the terms of the settlement agreement by a board of directors of non-government employees (which will include two non-voting Canadian board

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members). Those directors will also control the foundation once it is established.

The directors will be chosen by a bi-partisan group of non-government employees who are identified by USTR after consultation with the Presidential Personnel Office and with interested members of Congress. Neither the bi-partisan group nor the board members selected by this bi-partisan group will receive government appointments. Neither will they be subject to direction and control by any federal official. Although the bi-partisan group will be vetted by the Presidential Personnel Office, the board members selected by this bi-partisan group will not . . . themselves be vetted by the White House or by . . . any government agency.

E-mail for C. Kevin Marshall, Deputy Assistant Attorney General, Office of Legal Counsel, from David Apol, Office of the General Counsel, United States Trade Representative (July 28, 2006). You have since informed us that the White House Council on Environmental Quality (“CEQ”) has been working with USTR in choosing the bipartisan group. Apart from the requirements quoted above—that the directors be “non-government employees,” receive no “government appointments,” and not be “subject to direction and control by any federal official”; and that the choice of directors not be vetted by any government agency, including the White House—there will be no restrictions on whom the bipartisan group may select as directors. You have asked whether the establishment of this foundation, and the foundation’s using its portion of the settlement funds to support “meritorious initiatives,” are consistent with the Government Corporation Control Act and the Miscellaneous Receipts Act. We address each statute in turn.

II.

The Government Corporation Control Act (“GCCA”) provides in relevant part that “[a]n agency may establish or acquire a corporation to act as an agency only by or under a law of the United States specifically authorizing the action.” 31 U.S.C. § 9102. We assume that the foundation will be “a corporation.” But based on the facts described above, we conclude that it will almost certainly not be “establish[ed] or acquire[d]” by an agency; and that, even if it were, the foundation clearly will not “act as an agency.” Accordingly, the GCCA does not require a specific authorizing law.³

³ Neither the “bi-partisan group of non-government employees . . . identified by USTR” to choose the foundation’s board of directors nor the directors themselves would be subject to the conflict of interest restrictions applicable to officers and employees in the Executive Branch. In a 2002 opinion, we summarized those laws and rules and explained that, to be subject to them, a person must be “required by law to be appointed in the civil service by [the President, a court of the United States, the

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In answering this question, we rely on our extensive analysis of the GCCA in a published opinion in 2000, which in turn followed earlier, unpublished analyses from 1995 and 1990. See *Applicability of Government Corporation Control Act to "Gain Sharing Benefit" Agreement*, 24 Op. O.L.C. 212 (2000) ("NASA Opinion"); see also *id.* at 214 n.1 (discussing earlier opinions). With regard to the phrase "establish or acquire," we there explained that "an agency probably cannot be said, within the meaning of the [GCCA], to have established or acquired a corporation to act as an agency unless the government *holds an ownership interest or exercises legal control*." *Id.* at 215 (emphasis added; internal quotation marks omitted). We treated this rule as conclusive for the question of "acquir[ing]" a corporation, but recognized that the term "establish" was somewhat ambiguous, particularly given that, prior to a recodification, the statute had referred to establishing, creating, or organizing a corporation. *Id.* at 216 n.2. We therefore further advised that, "even where there is no such ownership or control[,] an agency should *avoid excessive government involvement* in the formation or operation of a corporation in the absence of a law authorizing the agency to do so." *Id.* at 215 (emphasis added). An agency could "*encourage* private parties to form a corporation" and "*make suggestions* about the substance of the corporate charter or by-laws," *id.* (emphases added), but should leave the corporation "free to adopt and change its charter and by-laws to the same extent as any other non-government corporation," *id.* (internal quotation marks omitted).

Applying these standards, we concluded that the National Aeronautics and Space Administration had not "acquired" a particular corporation because it "does not own stock or any other equity interest and, to our knowledge, has no representative on the corporation's Board of Directors." A mere "contractual right" of NASA "to cash payments that are determined by reference to the value of the corporation's stock"—the gain-sharing benefit in question—did not create ownership or legal control. With regard to "establish," we concluded that NASA was not "excessively" involved in the formation and operation of the corporation because the corporation was "created by private investors who have no direct or

head of an Executive agency, or the Secretary of a military department] acting in an official capacity" or "appointed in the civil service by one of [a larger category of officials] acting in an official capacity"; (2) "engaged in the performance of a Federal function under authority of law or an Executive act"; and (3) "subject to the supervision" of a federal official. *Application of Conflict of Interest Rules to Appointees Who Have Not Begun Service*, 26 Op. O.L.C. 32, 33 (2002). The bipartisan group would, at least, probably not satisfy the first element, and would certainly not satisfy the third. Regarding the third, we have explained that "a person . . . hired to conduct a study using his own judgment and resources and then turn over the end product to the agency . . . would probably be regarded as an independent contractor" rather than an employee. *Conflict of Interest—Status of an Informal Presidential Advisor as a "Special Government Employee"*, 1 Op. O.L.C. 20, 21 (1977). The bipartisan group, even if it might be understood to be "turn[ing] over" to USTR its "end product" of a board of directors (a debatable proposition), would be using its own judgment and resources. Similarly, the directors themselves would, at least, not meet the first and third elements of the test set out in the 2002 opinion.

indirect association with NASA”; it “was formed without any support or encouragement from NASA”; it “adopted its by-laws and charter without any input from NASA”; and it “remains free to make its own business decisions and to change its by-laws and charter as appropriate without interference or approval by NASA.” There was no “evidence of any government involvement in the company’s formation or operation,” even though NASA and the corporation had collaborated since the corporation’s formation and the corporation depended on that collaboration. We specifically reaffirmed the permissibility of “joint activities with private corporations” by agencies, “so long as the agency acts exclusively in the interest of the United States.” *Id.* at 216.

A similar analysis applies here and should lead to the same conclusions, even though the federal government will have some role in the foundation’s formation. As you have explained the process, neither USTR nor any other entity of the federal government will hold an ownership interest in or exercise legal control over the foundation. No governmental entity or official will own any stock or equity interest in the foundation. Nor is the involvement of the United States in the foundation’s formation “excessive.” Although USTR (and CEQ) are arguably more involved initially in the foundation’s creation than NASA was with the corporation in our NASA Opinion, their role is limited to choosing the bipartisan group that will in turn select the foundation’s board of directors. They will have no control over whom the bipartisan group selects and no control over the directors once the group has selected them; the bipartisan group even would be free to select themselves as the initial directors so long as the group in fact made this decision independently of any governmental direction (whether from USTR, CEQ, or others)—such that the United States could not be said to have named the directors and thereby itself organized the foundation. Finally, under our NASA Opinion governmental involvement in not only the “formation” but also the “operation” of a corporation is relevant, and here the directors in operating the foundation would remain free to adopt and change the foundation’s charter and by-laws (including revising the board itself) to the same extent as any other non-government corporation and to make its own business decisions. Based on these facts, USTR’s involvement should be understood as encouraging the formation of the corporation through selection of the bipartisan group. As indicated in the NASA Opinion, we have approved at least this much involvement. The role of the Presidential Personnel Office in consulting on the selection of the bipartisan group is even more distant and does not raise any additional issue.

Although we thus think that the better view is that no agency will “establish or acquire” the contemplated foundation, we need not answer that question definitively here, because the foundation clearly will not “act as an agency.” This is a separate, additional requirement (albeit one that is related and somewhat overlapping analytically) for the GCCA to apply, and it is not met here. Again we follow our NASA Opinion, as well as a subsequent analysis that reaffirmed this aspect of

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the NASA Opinion. See *Status of National Veterans Business Development Corporation*, 28 Op. O.L.C. 70, 76–78 (2004) (“NVBDC Opinion”).

The term “agency” for purposes of title 31, of which the GCCA is a part, is defined as “a department, agency, or instrumentality of the United States Government.” 31 U.S.C. § 101 (2000). In our NASA Opinion, we explained: “In common usage, an instrumentality is a thing through which a person or entity acts. The term implies both [1] that the thing is *controlled* by another actor and [2] that the thing is or may be deliberately *used* to accomplish the actor’s objectives.” 24 Op. O.L.C. at 218–19 (emphases added; internal quotation marks omitted). Based on this understanding, as well as the usage of the term “instrumentality” in other legal contexts, we have used a four-factor test “in deciding whether a corporation is a government instrumentality”: (1) “whether the entity was created by the government”; (2) “the extent of government control over its operations”; (3) “the purposes for which it was created and the functions it performs”; and (4) “the source of the entity’s funding.” *Id.* at 219. The final factor “is more important here than it might be in other contexts,” because “the purpose of the [GCCA] was to assert greater federal dominion over the financial affairs of entities controlling federal funds.” *Id.* at 219 n.4 (internal quotation marks omitted). See also NVBDC Opinion, 28 Op. O.L.C. at 76–77 (reiterating and applying four-factor test to the first use of the term “agency” in the GCCA).

In the NASA Opinion, we concluded that the corporation in question did not “act as an agency” because (1) it was “created by private individuals who are not associated with NASA”; (2) “NASA owns no part of [the corporation] and exercises no control over its operations”; (3) the corporation “was not formed for NASA’s exclusive benefit, nor to carry out any statutory function delegated to the agency by Congress”; and (4) the corporation “is funded by private sources, not funds drawn from the federal Treasury or other federal assets.” 24 Op. O.L.C. at 220–21. By contrast, in our NVBDC Opinion, we determined that the National Veterans Business Development Corporation was an “agency,” and thus subject to the GCCA, because it (1) was “created by the government” (namely, by statute); (2) was subject to “a considerable degree of control” by the government (the voting members of its board being appointed by the President and the non-voting members being Executive Branch officers); (3) was established “to perform functions on behalf and for the benefit of the United States” (providing various statutorily mandated services to veterans); and (4) “receives federal appropriations, even as it seeks to develop private sources of funds.” 28 Op. O.L.C. at 77–78 (quotations omitted).

Under that analysis, it is clear that the foundation will not “act as an agency” within the meaning of the GCCA. First, largely for the reasons given above with regard to the question of acquiring or establishing a corporation, the foundation is not going to be “created by the government.” Unlike with the NVBD Corporation, the foundation is not being created by statute (or even by the Settlement Agree-

ment). In the NASA Opinion, we found the first factor not satisfied because the corporation “was created by private individuals who are not associated with NASA,” even though it was “formed in response to NASA’s published notice of its intent to enter collaborative . . . commercial agreements with private business partners.” 24 Op. O.L.C. at 220. Similarly, here, as described above in Part I, the bipartisan group that selects the foundation’s directors will be “non-government employees”; neither the group nor the directors “will receive government appointments”; “neither will they be subject to direction and control by any federal official”; and the choice of directors will not be vetted by any federal entity. You have not expressly stated that the directors too will be non-government employees, but that is implicit in their receiving no government appointments, not being subject to federal direction or control, and not being vetted. Although, much as with the corporation at issue in the NASA Opinion, the foundation would not be formed but for some governmental action, and the government could prevent its creation by not proceeding with the settlement (as could Canada and others), “but for” governmental involvement does not equal *creation by* the government.

Second, for the reasons discussed above with regard to ownership, legal control, and involvement in operations, the extent of any governmental control over the foundation’s operations after its establishment appears negligible at most.

Third, the purpose of the foundation is not to perform functions on behalf of and for the benefit of the United States. In contrast with the NVBD Corporation, here no statutory mandate or purpose is at issue. In the NASA Opinion, even though NASA would benefit from the collaborative agreement with the corporation, we found this factor not satisfied because the corporation was “not formed for NASA’s exclusive benefit, nor to carry out any statutory function delegated to the agency by Congress.” 24 Op. O.L.C. at 221. Similarly here, the foundation’s purpose is to receive funds over which the United States disclaims any ownership interest (because of the Byrd Amendment) and to disburse these funds for the benefit of private entities. The United States may indirectly benefit only because the foundation’s establishment provides one of the many pieces of a comprehensive settlement in which it has an interest, but this incidental benefit—which also accrues to Canada and all of the other entities who settle their suits as part of the Agreement—does not amount to a governmental function or purpose.

Finally, although the proper way to characterize the source of the foundation’s funding is not beyond dispute—the ownership of those funds is one of the matters to be resolved—for purposes here it is best characterized as funding from private entities, not the United States. The United States has never asserted a claim to the \$450 million held in the special accounts that will eventually reach the foundation, and the immediate source from which the foundation will receive those funds will not be the United States but rather the Government of Canada, as explained above in Part I. In addition, and in contrast to the NVBD Corporation, the foundation will receive no appropriated funds. The one countervailing fact is the decision of the

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Court of International Trade in *Canadian Lumber*, which could lead to the duties held pursuant to the Byrd Amendment reverting to the General Fund of the Treasury. Thus, one could say that, in some sense, the United States has a claim on the money that will fund the foundation. But the United States disagrees with this view, and thus disclaims any interest in the funds; in addition, pursuant to the NAFTA arbitration noted above in Part I, there also is a question whether the United States had authority even to collect the duties, and we understand that the United States foresees a low probability of success in that forum. In nearly every respect, the strongest claims to the money in the special accounts are those of private parties—either the Canadian exporters or the domestic producers. Under those facts, there is little if any basis for considering the \$450 million to be “federal funds,” see NASA Opinion, 24 Op. O.L.C. at 219–20 & n.4, for purposes of the GCCA.

Thus, not only is the foundation not being acquired or established by the federal government, but it also will not be acting as an agency of the federal government. For both of these reasons, the foundation is not subject to the GCCA.

III.

The Miscellaneous Receipts Act (“MRA”) requires that “an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim.” 31 U.S.C. § 3302(b). This provision constrains the government’s ability to enter into settlements involving payments not made into the General Fund of the Treasury. In 1980, we said that it would violate the MRA for the United States to settle a suit it had brought against a polluter by requiring the polluter to donate money to an environmental organization designated by the government, rather than pay a penalty. Under the MRA, “[t]he fact that no cash actually touches the palm of a federal official is irrelevant . . . if a federal agency [1] could have accepted possession and [2] retains discretion to direct the use of the money.” *Effect of 31 U.S.C. § 484 on the Settlement Authority of the Attorney General*, 4B Op. O.L.C. 684, 688 (1980).

To avoid the government’s constructively “receiving money for the Government” through a settlement, we have consistently advised that (1) the settlement be executed before an admission or finding of liability in favor of the United States; and (2) the United States not retain post-settlement control over the disposition or management of the funds or any projects carried out under the settlement, except for ensuring that the parties comply with the settlement. See, e.g., Memorandum for the Files, from Rebecca Arbogast, Attorney-Adviser, Office of Legal Counsel, *Miscellaneous Receipts Act and Criminal Settlements* (Nov. 18, 1996) (advice transmitted to U.S. Attorneys’ offices). If these two criteria are met, then the governmental control over settlement funds is so attenuated that the government cannot be said to be “receiving money for the Government.” In our 1980 opinion,

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for example, we recommended a restructured settlement “that attributes the entire sum of money received to our co-plaintiff, the Commonwealth of Virginia,” which had “an independent claim to these damages” and an independent right to compensation for oil spills. “If the damages are received and directed to a charity by the state plaintiff, [the MRA] would not be implicated.” 4B Op. O.L.C. at 688–89.

In the ordinary settlement implicating the MRA, the United States has brought a claim against a private party for funds in the form of damages or penalties. Here the reverse is the case. Although the same general principles under the MRA apply notwithstanding this difference, we find no violation in the planned arrangement for the foundation.

Initially, it is doubtful that the United States, even though having physical custody of the special accounts under the Byrd Amendment, “could . . . accept[] possession” of those funds “for the Government,” such that the MRA would create an issue. As explained above in Part II, the United States disclaims any interest in the funds, and the strongest claims are those of private parties. The real issue in dispute is to whom the United States should give the funds—to private American parties pursuant to the Byrd Amendment, or to the Canadian Producers as a refund pursuant to federal law, *see, e.g.*, 19 U.S.C. § 1673f (2000) (permitting the “refund[s]” of duties that were improperly assessed). Just as there is little if any basis for considering the \$450 million to be federal funds for purposes of the GCCA, so also here, and by analogy to our 1980 opinion, there is little basis for attributing any of the \$450 million to the United States. Nevertheless, because it is conceivable—if the Court of International Trade decision is not appealed or is affirmed, and the United States wins the NAFTA arbitration—that the special account funds could become United States funds, it is prudent, as you have recognized, to analyze under the MRA’s requirements the provisions for the \$450 million pursuant to the Agreement.

Here, the arrangement for the foundation and the transfer of the \$450 million would easily satisfy both of the MRA’s requirements. First, we understand that the Settlement Agreement would be executed before any party admits liability—and certainly before the United States claims or is conceded any right to the funds. Second, no governmental agency will exercise any control of the funds after the settlement has been executed, because the foundation and any further detail regarding “meritorious initiatives” will be “identified” by the United States prior to execution, as we explained above in Part I (in light of the MRA, you should ensure that this occurs); the foundation’s directors will control the foundation; and the directors will not be subject to direction and control by any federal official.

A separate but related question is the relevance of decisions of the Comptroller General determining that agencies did not have authority to require violators owing penalties to the Government to fund research projects in lieu of paying the penalties into the Treasury. *See* Letter for John D. Dingell, Chairman, Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, House

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of Representatives, B-247155.2, 1993 WL 798227 (Comp. Gen. Mar. 1); Letter for John D. Dingell, Chairman, Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, House of Representatives, B-247155, 1992 WL 726317 (Comp. Gen. Jul. 7); *Nuclear Regulatory Commission's Authority to Mitigate Civil Penalties*, 70 Comp. Gen. 17 (1990) ("NRC Opinion"). In those decisions, the Comptroller General read the agency's statutory authority to "compromise" or "mitigate" monetary penalties owed to a governmental agency as "not empower[ing] [the agency] to impose punishments unrelated to prosecutorial objectives," such as "contribut[ing] funds to an institution that . . . has no relationship to the violation and has suffered no injury from the violation." *E.g.*, NRC Opinion, 70 Comp. Gen. at 19. A broader interpretation, he explained, would permit the agencies to augment their appropriations by funding pet projects, and would therefore "require us to infer that the Congress intended to allow [the agencies] to circumvent 31 U.S.C. § 3302 and the general rule against augmentation of appropriations." *Id.*

These decisions are inapposite here. First, given the posture of the suits to be settled—involving the atypical scenario of the United States being a defendant and acting pursuant to longstanding refund authority regarding customs duties—there is no issue here of the scope of the authority of the United States to "compromise" or "mitigate" civil penalties. Second, the MRA does not apply here, for the reasons given above. There is thus no issue of a possible statutory exception to the MRA.

C. KEVIN MARSHALL
Deputy Assistant Attorney General
Office of Legal Counsel

ATTACHMENT 3

5-11.115 - "Global Settlements"; Community Service

- A. Without the express approval of the Assistant Attorney General, Environment and Natural Resources Division, in any criminal case arising under the statutes identified in USAM 5-11.101 no plea agreement will be negotiated which compromises the right of the United States to any civil or administrative remedies under those statutes. Efforts by defendants to effect such results may arise in the context of so-called "global settlement" offers. See ENRD Directive 99-20 (April 20, 1999).
- B. Environmental crimes often can result in widespread degradation of the environment and threaten the health and safety of entire communities. In such circumstances, community service may be used in conjunction with traditional criminal sentencing options, provided that the community service comports with applicable law and furthers the purposes of sentencing set forth in 18 U.S.C. § 3553. Community service is authorized as a discretionary condition of probation under 18 U.S.C. § 3563(b)(12) and it is addressed in U.S.S.G. § 8B1.3.
- United States Attorneys' Offices considering the use of community service shall consult with ECS for guidance. See USAM 9-16.325. A guidance document addressing its use is available on the Environmental Crimes intranet website.

[updated November 2008] [cited in USAM 9-16.325]

5-11.116 - Protecting Federal Interests in Plea Agreements

All plea agreements in environmental crimes cases should include language that protects the government's other enforcement options, making it clear that the agreement (1) does not release from criminal liability any person not specifically covered by it (and, particularly, corporate plea agreements should not release any individuals from liability); (2) does not apply to crimes committed in any other federal district; and (3) does not provide or promise any waiver of any civil or administrative actions, sanctions, or penalties that may apply, including, but not limited to, penalties, claims for damages to natural resources, suspension, debarment, listing, licensing, injunctive relief, or remedial action to comply with any applicable regulatory requirement.

[added November 2008]

5-11.117 - Handling of Appeals

All appeals in criminal cases arising under the statutes identified in USAM 5-11.101 shall be handled as provided for in USAM 5-8.300 and Title 2. When a United States Attorney's Office makes a request to handle an appeal, such a request will be resolved by agreement between the United States Attorney's Office and the Chief of the Appellate Section of the Environment and Natural Resources Division. In jointly resolving such a request, the following factors, among others, should be considered on a case-by-case basis and, if necessary, discussed:

- The relative advantages of staffing the appeal with an Assistant United States Attorney who tried the case or with an appellate lawyer who was not involved in the trial;
- The relative advantages of the United States Attorney's local perspective or the Environment and Natural Resources Division's national perspective;

either a plea to a mandatory restitution charge, or an acknowledgement by the defendant in the plea agreement that a mandatory restitution charge gave rise to the plea agreement, which acknowledgement will trigger the mandatory restitution provisions of 18 U.S.C. § 3663A. 18 U.S.C. § 3663A(c)(2).

Fourth, prosecutors should also be mindful that the United States Sentencing Guidelines (USSG) generally require the imposition of restitution when it is authorized by the law, and should not enter into agreements regarding restitution that would violate the Sentencing Guidelines. See USSG § 5E1.1; USAM 9-27.400.

Fifth, supervisory attorneys who approve plea agreements, as is required by the Principles of Federal Prosecution (USAM 9-27.450), should ensure that plea agreements comply with the law and these guidelines. The Principles of Federal Prosecution list the factors that should be considered when determining whether to enter into a plea agreement. These factors include, among other factors, the effect the plea agreement will have upon a victim's right to restitution. USAM 9-27.420- 430.

[updated November 2000] [cited in Criminal Resource Manual 1977: 1989]

9-16.325 - Plea Agreements, Deferred Prosecution Agreements, Non-Prosecution Agreements and "Extraordinary Restitution"

Plea agreements, deferred prosecution agreements and non-prosecution agreements should not include terms requiring the defendant to pay funds to a charitable, educational, community, or other organization or individual that is not a victim of the criminal activity or is not providing services to redress the harm caused by the defendant's criminal conduct.

Such payments have sometimes been referred to as "extraordinary restitution." This is a misnomer, however, as restitution is intended to restore the victim's losses caused by the criminal conduct, not to provide funds to an unrelated third party.

Apart from the limited circumstances described below, this practice is restricted because it can create actual or perceived conflicts of interest and/or other ethical issues.

This section does not, of course, restrict a defendant's own decision, outside the context of a plea agreement, deferred prosecution agreement or a non-prosecution agreement, to unilaterally pay monies to a charitable, educational, community, or other organization or individual, and then to request leniency from the judge at sentencing based upon such action.

This section also does not restrict "community restitution" payments made pursuant to 18 U.S.C. § 3663(c). That section provides guidance for such payments where the defendant is convicted under 21 U.S.C. § 841, § 848(a), § 849, § 856, § 861 or § 863. Among other factors, that section requires the absence of identifiable victims, as well as a nexus between the payment and the offense.

Neither does this section restrict the use of community service provisions in plea agreements, deferred prosecution agreements or non-prosecution agreements resolving environmental matters. United States Attorneys' Offices contemplating such community service in a matter

involving environmental crimes shall consult with the Environmental Crimes Section of the Environmental and Natural Resources Division, which has issued guidance to ensure that the community service requirements are narrowly tailored to the facts of the case. The guidance also requires that any funds paid by a defendant as community service be directed to an entity in which the prosecutors have no interest that could give rise to a conflict and that is legally authorized to receive funds. See [USAM 5-11.115](#).

[updated February 2010] [cited in [USAM 5-11.115](#)]

9-16.330 - Plea Agreements and Sentencing Appeal Waivers

Some districts incorporate waivers of sentencing appeal rights and post-conviction rights into plea agreements. The use of these waivers in appropriate cases can be helpful in reducing the burden of appellate and collateral litigation involving sentencing issues. See the [Criminal Resource Manual at 626](#) for a more extensive discussion of the law on this issue.

9-16.400 - Inadmissibility of Pleas—Federal Rule of Criminal Procedure 11(e)(6)

See the [Criminal Resource Manual at 627](#).

9-16.500 - Identifying Uncharged Third-Parties During Plea and Sentencing Proceedings

In the absence of some significant justification, it is generally not appropriate for a United States Attorney to identify (either by name or unnecessarily-specific description), or cause a defendant to identify, a third-party wrongdoer unless that party has been officially charged with the misconduct at issue. When referring to the uncharged third party, the use of non-generic descriptors, like a person's actual initials, is usually an unnecessarily-specific description and should not be used. See [USAM 9-11.130](#); [9-27.760](#).

[updated December 2014] [cited in [USAM 9-11.130](#)]

◀ [9-15.000 - International Extradition And Related Matters](#)

[up](#)

[9-17.000 - Speedy Trial Act Of 1974](#) ▶

January 16, 2009

MEMORANDUM

To: Environmental Crimes
Section Attorneys

From: Ronald J. Tenpas
Assistant Attorney General

Re: Guidance on Restitution,
Community Service, and
Other Sentencing Measures
Imposed in Environmental
Crimes Cases

INTRODUCTION

Environmental crimes can result in widespread detrimental effects upon the environment and threaten the health and safety of both individuals and entire communities.^[1] Those circumstances cannot be remedied by the traditional criminal sanctions of imprisonment or fines. However, in some instances it may be possible to address these effects through other^[2] forms of sentencing, including restitution or community service.

Restitution focuses upon reimbursing defined losses sustained by specifically identifiable victims of particular crimes, while community service often is aimed at circumstances, such as general environmental degradation, in which individual victims cannot be identified. Community service and other forms of sentencing (such as remedial orders and required publication of information on a crime) may provide additional deterrence against criminal behavior, encourage better compliance with environmental laws, and advance important priorities such as pollution prevention, promoting more efficient environmental technologies and improved corporate management practices.

This guidance sets out the policies and practices of the Environmental Crimes Section of the Environment and Natural Resources Division (ECS) with respect to restitution, community service, and other elements of a criminal sanction other than fines and imprisonment. It is intended to guide ECS prosecutors and to assist other federal prosecutors in environmental criminal cases to craft sentences which include these measures when appropriate. This guidance is designed to ensure that these sentencing measures are effective, fairly applied, have a sound legal basis and are consistent with Department and Division policies.

This guidance focuses primarily upon corporations and other organizational defendants, although it also may apply to individual defendants in appropriate circumstances. Regardless of the nature of the offender, in all cases, restitution, community service, and the other elements of sentencing considered and discussed should be applied *in addition to and not in lieu of* the fundamental criminal sanctions of fines and terms of incarceration.

This guidance is broken down into three parts: (1) a discussion of the legal authorities for restitution and community service; (2) guidance on the application of restitution and community service obligations in environmental criminal cases; and (3) a discussion of other possible sentencing provisions.

For further information or guidance in crafting restitution and community service, prosecutors should contact the Environmental Crimes Section at 202-305-0321.

I. LEGAL AUTHORITIES FOR RESTITUTION AND COMMUNITY SERVICE

Because restitution and community service often are significant factors in sentencing in environmental crimes cases, it is important for prosecutors to know and understand the legal bases which authorize and limit their use. Those authorities are found in the Title 18 provisions that apply to federal crimes, generally, and in the Federal Sentencing Guidelines. They are creatures of statute; they are not matters of inherent judicial authority.^[3]

A. Restitution

Three provisions in Title 18 specifically provide courts with the authority to impose restitution. Only one of these provisions, however, applies to offenses under the environmental statutes. First, 18 U.S.C. § 3663 provides that courts have discretion to order that a defendant provide restitution to victims of Title 18 crimes and for certain other listed federal offenses (which do not include offenses under environmental statutes). Second, restitution, under certain circumstances for certain listed types of crimes, is mandatory under 18 U.S.C. § 3663A (also not including offenses under environmental statutes). To the extent that a defendant in an environmental criminal case is convicted of a Title 18 offense, the provisions of these two sections may apply.

Restitution, however, is authorized in criminal cases involving violations of environmental statutes by a third provision, 18 U.S.C. § 3563. That section establishes the authority of the courts to set conditions of probation. Sub-section (b) (2) of that provision states that the court has the discretion to order a defendant to “make restitution to a victim of the offense under section 3556 (but not subject to the limitation of section 3663(a) or 3663A(c)(1)(A)).” This provision, therefore, makes restitution available for crimes other than those specified in those two sub-sections; however, it must be as a condition of probation and it is discretionary, not mandatory.^[4]

Restitution is to be paid to the victim of a crime, and 18 U.S.C. § 3663(a)(2) defines a victim as “a person directly and proximately harmed” as a result of the offense.^[5] It may be difficult in some environmental cases to identify victims “directly and proximately harmed” by the violation.^[6]

Courts generally have concluded that the government may be defined as a “victim” for purposes of restitution when it has suffered harm, including monetary loss, directly from the offense.^[7] For example, federal, state, or local governments may be defined as victims and claim restitution in situations where environmental, public health, emergency response, or regulatory agencies expend resources to respond to contamination resulting from criminal environmental violations.^[8] However, courts also have held that the government is not a victim of an offense when it voluntarily incurs costs that result from the violation, such as investigation and prosecution costs.^[9]

B. Community Service

The statutory authority for community service as part of a criminal sentence is 18 U.S.C. § 3563(b)(12), which allows the discretionary imposition of “work in community service as directed by the court.”^[10] However, that provision offers no specific guidance on community service beyond that clause, including, for example, what kinds of activities constitute “community service” or a definition of the term.

The Sentencing Guidelines do provide some guidance on the use of community service for organizations in a non-binding policy statement in U.S.S.G. § 8B1.3.^[11] First, community service is to be “reasonably designed to repair the harm caused by the offense.” Second, according to the guideline commentary, “[a]n organization can perform community service only by employing its resources or paying its employees or others to do so. * * * However, where the convicted organization possesses knowledge, facilities, or skills that uniquely qualify it to repair damage caused by the offense, community service directed at repairing damage may provide an efficient means of remedying harm caused.” Thus, the Commission’s focus is on using community service to remedy the harmful effects of the crime of conviction itself, not effects that may be indirectly related to the type of crime committed. While the commentary speaks of the violator’s taking a direct hand in the work involved, it also contemplates the defendant’s paying others to do the work.

The Commission’s limitation of community service to the damage caused by the offense is not supported by the wording of 18 U.S.C. § 3563(b)(12) and it does not take into account the unique characteristics of environmental crimes and those who commit them. On the other hand, the guideline’s general direction – using community service to correct harm related to an offense – is sound. It also reflects a valid concern that conditions imposed as community service retain a discernible connection to the crimes actually committed by defendants.

As to those unique characteristics, first, environmental offenses often involve harm

that cannot be directly remedied. For example, the actual pollutants unlawfully emitted into the air cannot be recaptured through community service several years after their dispersion. Similarly, pollutants unlawfully discharged into a river cannot be cleaned up long after the current has swept them downstream. Second, individual victims – those who actually may have inhaled the contaminated air or been in contact with the polluted river – often cannot be identified.

According to 18 U.S.C. § 3563(b), conditions of probation must be “reasonably related” to the factors set forth in 18 U.S.C. § 3553(a)(1), which requires the sentencing court to consider the “nature and circumstances of the offense.” *See also* 18 U.S.C. § 3583(d) (similar requirements for conditions of supervised release). The commentary under U.S.S.G. § 8B1.3 underscores this, noting that, in the past, some community service orders have not been related to the purposes of sentencing. For example, according to that commentary, a community service order requiring a defendant to endow a chair at a university or contribute to a local charity would be inconsistent with the guidelines unless it furthered a “preventative or corrective action directly related to the offense” and, therefore, served one the purposes of sentencing set out in 18 U.S.C. § 3553(a). *See also United States v. Missouri Valley Construction Company*, 741 F.2d 1542, 1549 (8th Cir. 1984) (donation to foundation to endow university chair for ethics struck down as violation of the Federal Probation Act).

The U.S.S.G. § 8B1.3 commentary reflects a concern over community service requirements that are “not related to the purposes of sentencing.” Its wording suggests, though, that community service of other than the nature described in that guideline could be acceptable if “such community service provided a means for protective or corrective action directly related to the offense and therefore served one of the purposes of sentencing set forth in 18 U.S.C. § 3553.” That statutory provision says, “A court in determining the particular sentence to be imposed, shall consider . . . the nature and circumstances of the offense . . . [and] the need for the sentence imposed . . . to promote respect for the law . . . to afford adequate deterrence to criminal conduct . . . [and] to protect the public from further crimes of the defendant . . .” Those thoughts taken together (and with the discretionary authority of a court under 18 U.S.C. § 3563(b)(22) to require a defendant to “satisfy such other conditions as the court may impose”) should provide sufficient authority for the types of community service that are consistent with this guidance.

II. POLICY AND GUIDANCE ON RESTITUTION AND COMMUNITY SERVICE FOR SENTENCING IN ENVIRONMENTAL CRIMES CASES

This section provides guidance on restitution and community service as applied to environmental crimes cases. It is based upon both prosecutorial experience and the legal authorities discussed in Part I, above, and it is intended to assure compliance with those authorities and with the policies of the Department.^[12]

A. General Sentencing Guidance: Absent Unusual Circumstances, Restitution to Identifiable Victims and Criminal Fines Always Should Be Sought

For purposes of monetary sanctions in an environmental crimes case, the order of priority is restitution, fine, and community service. Prosecutors first should be certain that restitution is paid to any identifiable victim(s) of the offense and then seek the payment of fines commensurate with the severity of the offense in order to maintain an effective deterrent and insure appropriate punishment. Community service involving monetary payments should neither replace an appropriate criminal fine nor be accepted in exchange for a reduction of such a fine.

According to 18 U.S.C. § 3572(b), if the defendant is required to pay restitution to the victim(s) of the offense, a court shall impose a fine or penalty “only to the extent that such fine or penalty will not impair the ability of the defendant to make restitution.” The federal organizational sentencing guidelines, U.S.S.G. § 8B1.1(c), mirror this precedence of restitution over fine by stating, “If a defendant is ordered to make restitution to an identifiable victim and to pay a fine, the court shall order that any money paid by the defendant shall first be applied to satisfy the order of restitution.”^[13] Therefore, in crafting a plea agreement, prosecutors first should make sure that full restitution is made to any identifiable victim(s) of the offense. This may include (1) persons who are physically harmed by the environmental violation; (2) persons (including governments or other artificial entities) whose property is damaged by the violation; or (3) the government for emergency response or remedial costs to control or cleanup the environmental contamination.

After restitution, if any, has been resolved, prosecutors then should seek the payment of fines in accordance with Part 8C of the Sentencing Guidelines (if the fine provisions apply to the particular crime) and/or the Alternative Fines Act, 18 U.S.C. § 3571. Only after restitution and the fine have been addressed should the prosecutor consider the possibility of community service.^[14]

B. Community Service

Community service imposed as a part of sentencing in an environmental crimes case must take into account both the unique characteristics of environmental crimes and the pertinent statutory and guideline authorities. Therefore, based upon the foregoing legal authorities, it is the policy of the Environment and Natural Resources Division that community service must have a “nexus,” that is, a relationship, to both the geographic area of the crime and the environmental medium affected by the crime. Thus, in the air pollution example above, a community service requirement would have to be undertaken in the geographic area where the offense occurred and it would have to deal with improving air quality in that area. Similarly in the water pollution example, community service would have to be directed to improving water quality relating to the water body involved in the crime. Even several years after the crime has been committed the general nature of the harm or risk of harm from the offense conduct still can be identified and projects can be selected to reasonably offset that harm to the affected medium in the same ecosystem or general geographic area impacted by the violation. Thus, although individual victims may not be identifiable, those living in the area affected by the crime are benefited by the service.

Furthermore, because the offender itself may not be equipped to implement the

community service, the offender may provide the funds for another party with expertise specifically in the necessary remedial work to carry out valuable service that has the required “nexus” to the offense of conviction. That is consistent with the U.S.S.G. § 8B1.3 commentary that one option for an organization’s performing community service is by “paying . . . others to do so.”

In sum, the practice of environmental crimes prosecutors allowing defendants to pay for remedial work that has a geographical and medium nexus to the crime at issue is consistent with the purpose of 18 U.S.C. § 3563(b)(12). That provision (alone or in conjunction 18 U.S.C. § 3563(b)(22)) does not appear to preclude a somewhat broader interpretation than the Sentencing Commission’s focus only upon the harm caused by the crime of conviction.

Community service as a sentencing option may or may not be appropriate in a given case. The general sentencing provision, 18 U.S.C. § 3553(a)(1), requires the court to consider the “history and characteristics of the defendant” in establishing the conditions of probation. Those are among the factors that prosecutors should consider in deciding whether community service is appropriate. If the defendant’s enforcement history shows chronic violations, a serious analysis should be undertaken to determine whether the defendant can be trusted to comply with the terms of a community service probationary or supervised release condition.

Decisions regarding appropriate community service as a condition of probation or supervised release should be guided by the statutory limitations and policy considerations addressed below.

1. The Miscellaneous Receipts Act

The Miscellaneous Receipts Act (MRA)^[15] requires that any money received “for the Government” from any source be deposited into the United States Treasury. Because criminal fines are miscellaneous receipts, they must be deposited into a special account of the Treasury known as the Crime Victims Fund for use in funding state-run crime victims compensation programs, among other things.^[16]

Consistent with earlier guidance, the inclusion of a term of community service in a plea agreement must satisfy the constraints of the MRA.^[17] If used appropriately, though, community service is a sentencing option that does not constitute a diversion of funds that should be deposited in the Treasury.

2. Separation of Community Service from a Fine

As noted above, community service should be considered apart from the issue of a criminal fine and should not be offered in exchange for a reduction in the appropriate fine. Accordingly, the provision in a plea agreement for community service should avoid any suggestion of a trade-off between the fine and the agreement to perform community service. From the beginning of a negotiation a prosecutor should consider a fine and community service independently of one another, not as one number later to be sub-divided between the two.

3. Specific Guidance for Sentencing That Includes Community Service

The following guidance addresses issues that often may arise in the context of sentencing involving community service.

Except Under Extraordinary Circumstances, Community Service Should Amount To No More Than 25 Percent of the Total Value of Any Sanction Package^[18]

Community service can yield valuable results. However, for reasons including those discussed below, except in limited circumstances^[19] monetary value of a community service requirement should not exceed 25 percent of the total dollar value of the entire criminal sanction package.^[20]

1. In the commentary to the policy statement in U.S.S.G. § 8B1.3, the Sentencing Commission expressed its view that community service is less desirable than a fine. Community service constituting an inordinately large percentage of the total package may convey a contrary message, that is, that community service is being treated as *more* desirable than a fine.

2. Congress has made the decision that most federal fines shall go to a fund to benefit the victims of a wide variety of crimes, not to the general fund.^[21] Thus, some of the money collected as fines in environmental crimes cases should come back through the Crime Victims Fund to the affected community by a different channel. Community service, of course, also is Congressionally authorized in 18 U.S.C. § 3563(b)(12). Judicious use of the latter authority should avoid any conflict between it and the congressional mandate in 42 U.S.C. § 10601.

3. Community service can send a mixed message that must be borne in mind. Specifically, it tends to blur the line between criminal and non-criminal behavior, softening the stigma that attaches to egregious anti-social conduct. The traditional criminal penalties of fines and imprisonment make it clear to the public – and to the offender – that the individual or organization has committed a serious violation of the law to which attaches a moral opprobrium. Other types of sanctions, though, can

make the behavior seem less than criminal to both the public and the offender. They can raise the issue of why a violator should be criminally prosecuted at all – and perhaps in a larger sense play into arguments that environmental crimes really are not crimes at all – if the result is not readily distinguishable from what could result from a civil or administrative enforcement action.

4. Large community service payments combined with comparatively small fines can give the appearance that a wealthy defendant can buy its way out of the criminality and the attendant social stigma of a fine.^[22] The total sentencing package should leave no question but that the behavior was criminal.

5. Disproportionately large community service payments in comparison to fines can create inappropriate appearances. To some it may seem that the criminal process is being used as a screen for the prosecutor's efforts to provide funding that has not been authorized by Congress, thereby usurping the role of Congress.

Community Service Must Not Be Inconsistent With the Law

Depending upon the activity contemplated by the community service, it could relate to a number of statutes, regulations, and permits at federal, state, and local levels. It is essential that all such requirements be reviewed in advance of any agreement and that there be no inconsistency between those requirements and the community service. The prosecutor may have to coordinate with state and local officials in order to avoid legal conflicts.

Nexus Required Between Community Service and Violation

There must be a clear nexus,^[23] discussed above, between any community service imposed and the criminal violation. Regarding the harm caused by the offense and the remedy proposed by the community service, both a geographical and an environmental medium nexus must be present.

In other words, if the effect of the violation is upon air or water quality or wildlife, for example, the community service should be aimed at that specific medium.^[24] Geographic nexus, on the other hand, may present a somewhat more complex situation.

When the effect of the violation is limited to one site and it is feasible to tailor community service to that site, that is where the effort should be focused. On the other hand, when the effect is general, such as a crime involving an air or water pollutant dispersed into a general area or the depletion of a fish species in a large water body, the general nature of the harm or risk of harm still can be identified and projects can be selected to reasonably offset that harm in the same ecosystem or general geographic area impacted by the violation. This approach is consistent with the purposes of U.S.S.G. § 8B1.3.

Community Service Should Not Augment Resources for an Activity Otherwise Required of a Federal Agency

Prosecutors should make sure that community service does not impinge on the appropriations process by funding a federal program or performing an agency function. When community service is required as a part of sentencing, it cannot be of such a nature that it satisfies an obligation imposed by statute upon a federal agency, provides additional resources for the performance of an activity for which Congress specifically has appropriated funds, or provides additional resources for activities by federal employees.^[25]

Appropriate Regulatory and Technical Assistance Should Be Obtained During Development of a Community Service Requirement

Community service may require the defendant to perform or fund cleanups and/or other actions that are highly technical and take several years to accomplish. In those instances, at the time of negotiating a plea and at sentencing prosecutors should take steps up front to help insure effective compliance and enforcement of community service.

First, before agreeing on a community service project, the prosecutor should obtain technical or regulatory assistance from an agency with the necessary expertise.^[26] Involving the agency can compensate for any lack of expertise at the Probation Office, the court, or the prosecutor's office. Early agency assistance can insure that the community service will be feasible and practical and also may help persuade the court to impose the community service. When agency experts will be needed to perform an oversight role, arrangements must be made in advance to insure that the agency is committed to the task and will devote any necessary personnel and resources.

Second, as noted earlier, 18 U.S.C. § 3553(a)(1) requires consideration of the "history and characteristics of the defendant" in establishing the conditions of probation. Those are factors on which regulatory personnel may be able to shed light. Regulatory personnel should know the defendant's enforcement history. If it is one of chronic violations, then community service may be inappropriate.

Consultations between prosecutors and regulators also should address the relationship between community service and agency programs in order to avoid either duplication of effort or conflicting activities and to assure that the community service is not improperly funding what is a federally budgeted program.

Oversight Provisions Should be Included

Although the government cannot retain any control over funds for a community service project, there should be clear monitoring and enforcement provisions to assure that it is properly carried out. A mechanism should be established to insure that any party receiving the funds spends them in a manner consistent with intent of the community service requirement. Given the complexities that may attend an environmental case, the Probation Office may not be well-equipped to evaluate compliance with the community service aspect of a sentence.

There are a number of methods of providing the necessary oversight. One is to have the organization charged with implementing the environmental project provide an accounting, perhaps on an annual or quarterly basis, of how it has spent the funds. Reports should be provided to the Probation Office, the investigating agency, and the prosecutor's office. While such self-reporting does have some inherent weaknesses, it is at least a check on the spending of the funds. Moreover, any false statements in reports could be considered violations under 18 U.S.C. § 1001. If the organization has an audit done of its books and records, that too should be provided.

For larger community service requirements involving environmental projects, the employment of an outside auditor or consultant to insure the implementation of the sentence may be appropriate. For example, if the project involves the commitment of over one million dollars, a relatively small proportion of those funds could be devoted to hiring an outside firm to ascertain how those funds were spent and report to the Probation Office, the investigating agency, and the prosecutor's office.

Finally, although reports are useful in monitoring any community service requirement, they have their limitations. Therefore, among the conditions of probation should be provisions allowing right of entry, including unannounced entry, onto the site of the community service project by whoever is monitoring it for purposes of inspecting physical conditions, taking samples as necessary, interviewing employees, and reviewing relevant documents.

Any Trust Fund Involved with Community Service Must be Managed by a Non-Federal Entity Chosen Without Favoritism

As with any entity that may be involved in carrying out community service, if the vehicle for that service is a trust fund, no federal agency personnel should control or manage that trust fund.^[27] Trust funds should be managed by neutral third parties, such as local government officials or financial institutions, or the money involved may be deposited in an escrow account and distributed at regular intervals until the community service is completed. Federal officials, however, may provide technical oversight to insure that any projects performed are implemented in accordance with the community service requirement of the plea agreement and may report any non-compliance to the Probation Office, the court, and the prosecutors.

Additionally, the choice during a plea negotiation of an entity to manage a trust fund established for community service must reflect neither any favoritism nor any appearance of favoritism on the part of the government in that selection process.^[28]

The Terms of a Community Service Should Be Evaluated to Insure That No Unintended Benefits Accrue to the Defendant

The defendant should not receive any unintended or inappropriate advantages from the community service. Thus, the defendant should not receive credit for capital improvements or other changes already planned or already required to comply with civil consent decrees, permits, or regulations, obtain tax relief,^[29] or hold out

activities performed under a sentence in order to gain favorable publicity. Allowing the defendant to reap these types of collateral benefits from sentencing requirements undermines the seriousness of the defendant's criminal environmental violations and the purposes of criminal sentencing. Therefore, if a case is resolved by a plea, prosecutors should require specific language in the plea agreement prohibiting the defendant from obtaining any tax benefits or seeking to gain any advantageous publicity from its environmental projects or payments.^[30]

Funds Directed to a Third Party Shall Not Be Used for Political or Litigation Activities

When funds are directed to a third party to carry out a community service (or any other) condition of probation, there should be a clear requirement that no part of those funds shall be used for either political or litigation activities. This limitation does not apply to community service directed at activities that support government enforcement efforts.

Congressionally Chartered Entities that are Statutorily Authorized to Accept Donations

In Appendix 1 at the end of this document is a list of Congressionally chartered foundations, funds, organizations, and/or corporations that are statutorily authorized to accept donations. In environmental crimes cases entities from this list often have been designated to receive funds and carry out community service. However, they are not the only organizations that can be designated and funded for community service purposes. When negotiating on an entity to carry out community service, a prosecutor should be mindful of the criteria already discussed in this memorandum while also avoiding any general appearance of impropriety (*e.g.*, a personal affiliation or interest in the entity).

III. OTHER POSSIBLE FORMS OF SENTENCING IN ENVIRONMENTAL CRIMES CASES

Discussed below are several other forms of sentencing that have been applied in environmental crimes cases. Some of them may appear very similar to community service, but there are distinctions.^[31] The major distinction is that actions such as audits, compliance plans, employee training, and pollution prevention all operate for the benefit of the violator in its operations, improving the likelihood of future compliance and perhaps making a corporation more efficient with respect to productivity. They may yield positive results; however, in contrast to outwardly directed community service, members of the public are only indirect beneficiaries. Trust funds also are distinct from community service, but in a different manner. Community service is limited by the length of the probation. *See* 18 U.S.C. § 3561 (c). A trust fund, on the other hand, although it initially may be established as a condition of probation, can continue to yield good results far into the future and beyond the limited life of probation.^[32]

Environmental Audits, Comprehensive Compliance

Programs, and Employee Training

In order to detect and prevent any future violations and improve environmental and regulatory compliance, defendants in some cases have been required to perform environmental audits of their facilities, to design and implement comprehensive environmental compliance programs, or to conduct employee training.^[33] (Prosecutors should be certain that the terms of an agreement do not allow a defendant thereafter to claim any privilege with respect to the audit.) In some plea agreements defendants have extended such requirements to facilities owned by the offender beyond the one directly involved in the violation at issue in a given case.^[34]

Pollution Prevention

Some defendants have been required to undertake pollution prevention projects, which have two primary benefits: (1) they can result in the defendants' taking steps within their own operations that go beyond what environmental laws, regulations, and permits otherwise may require; and (2) they encourage defendants to find new and more efficient ways to operate while generating less waste and pollution. Under the terms of a plea agreement such requirements may extend beyond just the facility involved in a case to other facilities operated by the defendant.

Trust Funds

The Sentencing Commission in U.S.S.G. § 8B1.2(b) explicitly allows a court to require the defendant organization to create a trust fund to address future or expected harm. It is a tool that can be especially apt when the damage caused by environmental violations is widespread, long-lived, and persistent, and will continue to be a problem long after conventional cleanup activities have ceased and well beyond the authorized period of probation. Therefore, some plea agreements have required defendants to make payments to environmental trust funds that will operate into the future to monitor, restore, and preserve the environment and natural resources impacted by the violations. Any long-term trust fund should be for activities that have a medium and geographical nexus just as with community service work that is directly funded or carried out in the nearer term.

Public Admissions and Speeches

Defendants have been required to make public admissions of their environmental violations and sentencings in the media and to make speeches to trade groups about the potential sanctions imposed on those who commit environmental crimes.^[35] Either can serve as an additional penalty for the violator and an effective deterrent to potential violators.

Some prosecutors also favor the media publication of apologies, approved by the government, by defendants in environmental crimes cases. For those interested in that option, ECS can furnish examples of such apologies. Not all prosecutors believe that apologies accomplish any more than do public admissions alone and that they may even soften the impact of a conviction.

APPENDIX 1

**Congressionally chartered foundations,
funds, organizations and/ or corporations
that are statutorily authorized to accept
donations:**

FEDERAL ENTITY	TITLE	CHAPTER
National Park Foundation	16	1
National Conservation Recreational Areas	16	1
Boston Harbor Islands National Recreation Area	16	1
Santa Monica Mountains National Recreation Area	16	1
Land and Water Conservation Fund	16	1
National Trust for Historic Preservation in the U.S.	16	1A
National Forest Foundation	16	3
Junior Duck Stamp Conservation and Design Program	16	7
National Wilderness Preservation System	16	23
Marine Sanctuaries Program	16	32

Forest and Rangeland Renewable Resources Planning Research Programs	16	36
National Fish and Wildlife Foundation	16	57
Wildlife Partnership Program	16	57A
Multinational Species Conservation Fund	16	62
African Elephant Conservation	16	62
Asian Elephant Conservation	16	62A
Rhinoceros and Tiger Conservation	16	73
Neotropical Migratory Bird Conservation	16	80
Great Ape Conservation	16	82
Marine Turtle Conservation	16	85
Take Pride in America Program	16	66
Exotic Bird Conservation Fund	16	69
National Natural Resources Conservation Foundation	16	78
Coral Reef Conservation Fund	16	83
National Environmental Education and Training Foundation	20	65
Udall Scholarship and Excellence in National Environmental Policy Foundation	20	66
Abandoned Mine Reclamation Fund	30	25
National Sea Grant College Program	33	22

Future Farmers of America Program	36	709
National Academy of Sciences	36	1503
National Tropical Botanical Garden	36	1535
Society of American Florists and Ornamental Horticulturalists	36	2001

^[1]This document is the work product of the Environment and Natural Resources Division of the United States Department of Justice. It provides internal guidance only for prosecutors in that Division. It does not create any rights, substantive or procedural, that are enforceable at law by any party. No limitations are hereby placed on otherwise lawful prerogatives of the Department of Justice.

^[2] This guidance does not address the most common criminal sanctions of fines and imprisonment.

^[3]See *Affronti v. United States*, 350 U.S. 79, 80 (1955) (courts have no inherent authority to impose probation); *United States v. Casamento*, 887 F.2d 1141, 1177 (2d Cir. 1990) (courts have no inherent authority to impose restitution).

^[4]Under 18 U.S.C. § 3563(b)(2), restitution can be imposed only as a condition of probation or supervised release. (The discretionary conditions in 18 U.S.C. § 3563(b) can be applied to supervised release following incarceration pursuant to 18 U.S.C. § 3583(d).) Since this is the only authority for imposition of restitution for environmental crimes, in the case of an individual defendant, restitution is due immediately only if the defendant has been put on probation with no incarceration. Otherwise, it is not payable until he or she is put on supervised release following incarceration. An unfortunate and perverse situation can arise, though, in a case where incarceration is imposed upon an individual defendant for an environmental crime, but restitution cannot be required until that defendant emerges from prison. That is precisely what occurred in a knowing endangerment case, *United States v. Elias*, 269 F.3d 1003 (9th Cir. 2001) (as amended). In *Elias* the defendant was sentenced to one of the longest prison terms to date in an environmental case, while a victim of the offense was left with permanent brain damage. It will be years before the victim may collect any restitution and, if the defendant should die in prison, no restitution ever will be paid.

Note that 18 U.S.C. § 3664(f)(1)(A) requires that an order of restitution be for the “full amount of each victim’s losses as determined by the court and without consideration of the economic circumstances of the defendant.”

[5] See *United States v. Casamento*, 887 F.2d 1141, 1177-78 (2^d Cir. 1989) (order requiring defendants guilty of narcotics conspiracy to pay restitution to a fund for treatment of persons injured by addiction to narcotics struck down because the district court “identified no individual victims who suffered injury attributable to the appellant’s crimes”).

[6] Both 18 U.S.C. § 3663(a)(1)(A) and 18 U.S.C. § 3663A(a)(3) state that a court may order, “if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense”. Additionally, 18 U.S.C. § 3663(a)(3) provides that the court may order restitution in “any criminal case to the extent agreed to by the parties in a plea agreement.” That language means that restitution can extend to the harm caused by the defendant’s entire course of criminal conduct, not just to the harm caused by the specific count(s) to which he has pled guilty. See, e.g., *United States v. Peterson*, 268 F.3d 533, 535 (7th Cir. 2001); *United States v. Thompson*, 39 F.3d 1103, 1105 (10th Cir. 1994); *United States v. Soderling*, 970 F.2d 529, 532-534 (9th Cir. 1993); *United States v. Arnold*, 947 F.2d 1236, 1237-38 (5th Cir. 1991); *United States v. Domincio*, 765 F. Supp. 1259, 1260 (E.D. Va. 1991). Any such restitution beyond the count(s) of conviction, though, must be specifically agreed to by the parties. See, e.g., *United States v. Blake*, 81 F.3d 498, 507 (4th Cir. 1996); *United States v. Broughton-Jones*, 71 F.3d 1143, 1147-48 (4th Cir. 1995); *United States v. Tunning*, 69 F.3d 107, 115-16 (6th Cir. 1995); *United States v. Silkowski*, 32 F.3d 682, 688-89 (2^d Cir. 1994). The language in 18 U.S.C. §§ 3663(a) and 3663A(a) does not mean that restitution can be extended to persons who are not victims of the defendant’s criminal conduct. For example, LMN Company illegally disposes of hazardous wastes on four different properties, and all four property owners incur the costs of cleaning up the disposals. LMN pleads guilty to two of those disposals, but not to the other two. If agreed to by the parties, the plea agreement may require LMN to pay restitution to all four of the property owner victims of its violations. However, the agreement could not require LMN to make a payment to an environmental conservation foundation *as restitution*, since the foundation was not a victim.

[7] See *United States v. Gibbens*, 25 F.3d 28, 32-33 (1st Cir. 1994) (“[I]t is now well settled that a government entity (local, state, or federal) may be a ‘victim’ for purposes of . . . [18 U.S.C. §§ 3663-3664] (and may be awarded restitution) when it has passively suffered harm resulting directly from the defendant’s criminal conduct, as from fraud or embezzlement.”); see also *United States v. Martin*, 128 F.3d 1188, 1190-92 (7th Cir. 1997) (collecting cases); *Ratliff v. United States*, 999 F.2d 1023, 1027 (6th Cir. 1993) (collecting cases); *United States v. Ruffen*, 780 F.2d 1493, 1496 (9th Cir. 1986).

The relevant Title 18 provisions do not limit the concept of victim for purposes of restitution to only American governmental or other entities. At this writing on appeal in the Second Circuit is a case from the Southern District of New York involving lobsters poached from South African waters. *United States v. Bengis* (2d Cir., No. 07-4895-cr). While matters of ownership of the lobsters (and, therefore, whether South

Africa *was* a victim in this instance) are at issue in the case, notably absent is any challenge to the notion that, as a matter of law, South Africa *can be* a victim for purposes of federal restitution laws.

[8] See *United States v. West Indies Transport*, 127 F.3d 299, 315 (3^d Cir. 1998). In this case, the Third Circuit ordered the defendants to pay restitution based on the Coast Guard's estimates of costs for cleanup of environmental damage caused by the defendants' criminal violations of the CWA. The court noted that a court order of restitution under 18 U.S.C. § 3663(a)(1)(A) is only authorized for violations of Titles 18 and 49, but upheld the district court's order, because the CWA violations were combined with Title 18 violations. 127 F.2d at 315. As discussed above, though, under 18 U.S.C. § 3563(b)(2), restitution ordered as a discretionary condition of probation is not limited to Title 18 offenses. See *United States v. Phillips*, 367 F.3d 846, 863 (9th Cir. 2004) (holding in a Clean Water Act case – that also led to a cleanup under CERCLA – that “site investigation costs may be recoverable through restitution orders. * * * To determine whether the Government may receive restitution, we must explore the dividing line between criminal investigation costs (which are not recoverable) and other investigation costs (which may be recoverable). * * * We ask whether the costs were incurred as a ‘direct and foreseeable result’ of the defendant’s wrongful conduct. * * * A site investigation to determine what damage the defendant’s conduct caused and to design an appropriate cleanup plan is likely not a routine matter in all such criminal cases. Rather, the Government incurs such expenses as a direct result of the *offense*, not as a direct result of the criminal prosecution. In such situations, ‘investigation costs are a . . . subset of cleanup costs’ and recoverable to the same extent.”); *United States v. De La Fuente*, 353 F.3d 766, 773-74 (9th Cir. 2003) (upholding restitution order for cleanup and decontamination costs incurred by Postal Service and county agencies after defendant mailed letters that claimed to contain anthrax); *United States v. Quillen*, 335 F.3d 219, 225-26 (3^d Cir. 2003) (requiring defendant to pay restitution for cost of employing hazardous materials cleanup team after defendant mailed a threatening letter containing a white powdery substance to the state parole board); *United States v. Overholt*, 307 F.3d 1231, 1253-54 (10th Cir. 2002) (upholding award of restitution for “the cost to the Coast Guard of removing the storage tanks . . . and cleaning up the area” that defendant had contaminated through illegal disposal of hazardous wastewater). However, it could be argued that emergency response and remedial costs are no more involuntary than are investigation and prosecution costs; hence they should not be viewed as subject to restitution. See *District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1080 (D.C. Cir. 1984) (“The general common-law rule in force in other jurisdictions provides that, absent authorizing legislation, the cost of public services for protection from fire or safety hazards is to be borne by the public as a whole, not assessed against the tortfeasor whose negligence creates the need for the service.”) (internal quotation marks omitted).

[9] See *United States v. Menza*, 137 F.3d 533, 539 (7th Cir. 1998) (“[T]he district court must consider whether the costs the DEA incurred from the clean-up, destruction, and disposal of the chemicals and laboratory equipment were matters of routine policy and procedure within the agency, which may prevent recovery, or

whether the costs incurred were unique to this case and accrued solely and directly as a result of Menza's criminal conduct."); *United States v. Meacham*, 27 F.3d 214, 218 (6th Cir. 1994); *Ratliff v. United States*, *supra*, 999 F.2d at 1027 ("[R]estitution may not be awarded under [18 U.S.C. § 3663] for investigation and prosecution costs incurred in the offense of conviction. * * * The fact that a defendant may have entered into an agreement to pay the costs of investigation to the government does not alter this conclusion.").

^[11] For individuals, U.S.S.G. § 5F1.3 says only, "Community service may be imposed as a condition of probation or supervised release." The commentary speaks of limiting it to no more than 400 hours, but adds nothing more.

^[12] On May 14, 2008, the Deputy Attorney General approved an addition to the United States Attorneys Manual, USAM 9-16.325, entitled "Plea Agreements, Deferred Prosecution Agreements, Non-Prosecution Agreements and 'Extraordinary Restitution'". That provision limits the authority of prosecutors to enter into agreements that include so-called "extraordinary restitution"; however, it expressly excludes from its operation the practice, to which this guidance relates, of including community service as a condition of probation in environmental crimes case resolutions. For USAOs contemplating community service as a condition of probation, it *requires* consultation with ECS.

^[13] For individual defendants, the same language appears in U.S.S.G. § 5E1.1(c). The guidelines do not suggest how this is to be effected in a situation where an

individual defendant is sentenced to imprisonment, fine, and restitution for an environmental crime. While the fine and imprisonment would have immediate effect, the restitution would have to be a condition of probation, hence not take effect until the end of the incarceration.

^[14] See also the commentary to the policy statement in U.S.S.G. § 8B1.3, where the Sentencing Commission expressed its view that community service is less desirable than a fine.

^[15] Specifically, 31 U.S.C. § 3302(b), reads as follows:

Except as provided in section 3718(b) of this title, an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim.

By requiring that government officials deposit in the Treasury any funds received, rather than expend such funds for other purposes, the MRA implements the constitutional principle that Congress controls public expenditures through exercise of its appropriations power. See U.S. Const., art. I, § 9, cl. 7 (“It, along with a portion of the Anti-Deficiency Act, 31 U.S.C. § 1341(a)(1)(A) (set out below), prohibits a federal agency from supplementing its own appropriated funds except as authorized by Congress.

Limitations on expending and obligating amounts

(a)(1) An officer or employee of the United States Government or of the District of Columbia government may not--

(A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; [31 U.S.C. § 1341(a)(1)(A)]

Arguably, they implement the “anti-augmentation” provision of the Constitution, which reads, No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.”) Const., Art. I, sec. 9, cl. 7.

^[16] See 42 U.S.C. § 10601 and www.ovc.gov. Except for several specifically identified situations in which fines are directed elsewhere (see, e.g., 42 U.S.C. § 10601(b)(1)(A)(i) and (ii) and (B)(iii) relating to the Endangered Species Act, the Lacey Act, and the FWPCA), all fines from federal crimes go to the Crime Victims Fund. Monies from that fund are applied to activities that include the Victim Witness Coordinator positions in United States Attorneys’ Offices and the FBI, victim notification, improving services for the benefit of crime victims, direct reimbursements for victims (e.g., for medical, counseling, or funeral expenses), victims of terrorism, victims of crimes against the elderly, safe houses and shelters

for battered women and children, abused (especially sexually abused) Native American children, college campus victims, and drug-endangered children found in methamphetamine houses.

^[17] During the development of this guidance this issue was the subject of extensive consultation among attorneys from ECS and from the Department's Office of Legal Counsel (OLC).

^[18] Note that this limitation does not apply to pollution or wildlife offenses that are Class B or Class C misdemeanors with their low fine maximums. *See* 18 U.S.C. § 3559 for classifications of federal crimes.

^[19] Such circumstances might include a situation in which the highest fine available against an entity or individual does not amount to sufficient punishment for the offense at issue.

^[20] Because it is an equitable matter of reimbursing a specific victim for particular losses and that reimbursement should be in full, for purposes of this percentage restitution is not considered a part of the "criminal sanction package". Additionally, expenses such as those for undertaking a corporate compliance plan, because they are for the benefit of the defendant, are not part of the calculation. Any community service project proffered by an offender, regardless of its size or proportion, should be closely scrutinized to assure that it is not over-priced in order to inflate its apparent value.

^[21] *See* footnote 16, *supra*.

^[22] This would be similar to an individual defendant's being able to pay for a large community service project while not going to prison, thereby giving an appearance of the person's having "bought" his or her way out of incarceration.

^[23] Although it was developed for civil settlement purpose, EPA's Supplemental Environmental Projects Policy (effective May 1, 1998), www.epa.gov/compliance/civil/seps/, provides useful guidance on the concept of a nexus. It is the relationship between the violation and the proposed activity. The relationship exists if the work is designed to reduce the likelihood that similar violations will occur in the future; it reduces the adverse impact to public health or the harm to which the violation at issue contributes; or it reduces the overall risk to public health or the environment potentially affected by the violation at issue.

^[24] It may not be possible, though, to address precisely the same aspect of that medium. For example, XYZ Corporation discharges ammonia in excess of its NPDES permit limitation into a river. With the pollutant effects dispersed downstream, it may not be possible to take any remedial action, the best course being for the river to heal itself. However, XYZ could be required to restore a nearby wetland that would keep other pollutants from entering the same river. The community service would not deal precisely with the effects of the violation, since

those effects could not be directly remedied. However, it could improve the quality of the affected water body in the area of the violation.

^[25]The Comptroller General has interpreted the MRA to the effect that government agencies may not augment their funds beyond those allocated to them by Congress. *See Matter of: Federal Emergency Management Agency - Disposition of Monetary Award Under False Claims Act*, 1990 WL 268526 (Comp. Gen.), 69 Comp. Gen. 260. OLC has taken the position that the opinions of the Comptroller General are useful, although they are not binding on Executive Branch agencies, because of the Constitution's principle of separation of powers. *See* Memorandum from Richard L. Shiffrin, Deputy Assistant Attorney General, Office of Legal Counsel, to Emily C. Hewitt, General Counsel, General Services Administration (August 11, 1997).

^[26]If the case involves a parallel civil enforcement proceeding, the prosecutor also should coordinate with the civil enforcers involved on any community service requirement that is being considered.

^[27]31 U.S.C. § 1341(a)(1).

^[28]*See United States v. Blue Mountain Bottling Co.*, 929 F.2d 526, 529 (9th Cir. 1991); *Missouri Valley*, *supra*, 741 F.2d at 1549; *United States v. Wright*, 728 F.2d 648, 653 (4th Cir. 1984).

^[29]The Tax Reform Act of 1969, 26 U.S.C. § 162(f), does not allow tax deductions "for any fine or similar penalty paid to the government for the violation of any law." However, if payment is not viewed as punishment, but rather as "compensatory or remedial" in nature, then it may be deductible. *See True v. United States*, 894 F.2d 1197, 1204 (10th Cir. 1990) ("compensatory or remedial payments are beyond the scope of section 162(f)"). If a defendant is allowed to claim a tax deduction to pay for a community service, the public, in effect, is subsidizing part of the criminal sentence for the defendant.

^[30]*See, e.g., United States v. Multi-Flow Dispensers, L.P.*, Criminal No. 98-239 (E.D. Pennsylvania):

Defendant agrees to perform organizational Community Service pursuant to § 8B1.3 of the Federal Sentencing Guidelines and in furtherance of satisfying the sentencing principles provided for under 18 U.S.C. Section 3553(a). Accordingly, the Parties agree that on the day of sentencing or within one day thereafter, the defendant shall pay a total of \$100,000.00 to the City of Philadelphia Water Department for use in its "Cross-Connection Repair Program." The goal of the defendant's Community Service is to assist in this program mandated by the Pennsylvania Department of Environmental Protection to reduce pollutants entering rivers and streams from the City's storm sewers and includes a focus on identifying and correctly realigning lateral pipes that are cross-connected. Because the payment to the Foundation is Community Service by an organization, defendant further agrees that it will not seek any reduction in its tax obligation as a result of this Community Service nor will the

defendant characterize, publicize or refer to the Community Service as a voluntary donation or contribution.

[31] The comments earlier about the need for oversight, agency support, no unintended benefits to the defendant, and the like should be borne in mind with respect to these sanctions just as they are regarding community service.

[32] Conditions beyond community service under 18 U.S.C. § 3563(b)(12) may be based upon the more general authority of 18 U.S.C. § 3563(b)(22). They also may relate directly to the requirement in 18 U.S.C. § 3553(a)(1)(C) that a sentencing court consider “protect[ing] the public from further crimes of the defendant”.

[33] U.S.S.G. § 8D1.4(c) and its Application Note authorize a court to order, as a condition of probation, an “effective compliance and ethics program”, and the program should be “reasonably calculated to prevent and detect criminal conduct.” That provision in combination with 18 U.S.C. § 3563(b)(22) should be sufficient authority for imposing requirements involving comprehensive environmental compliance programs, audits, court-appointed monitors, and employee training.

[34] While any of these requirements may be comprehensive, going beyond just the facility and the medium involved in the crime of conviction, at a minimum they should have both a geographic and a medium nexus to that crime. For example, a compliance plan, although it may extend to all aspects of a company’s operations, specifically should include air pollution compliance at the plant where the air pollution violation that was the focal point of the prosecution occurred. Any pollution prevention project, *infra*, also should have both a geographic and a medium nexus.

[35] The condition that a violator make a public statement in the media admitting to its unlawful behavior is directly addressed in U.S.S.G. § 8D1.4(a). Such a statement has the clear potential for providing both specific and general deterrence, while also educating the public.