U.S. Department of Justice
Office of Information Policy
Suite 11050
1425 New York Avenue, NW
Washington, DC 20530-0001

Telephone: (202) 514-3642

May 18, 2016

Mr. Steven Aftergood
Project Director
Federation of American Scientists
1725 DeSales Street NW, Suite 600
Washington, DC 20016
saftergood@fas.org

Re: OLA/13-01851 (F)
VRB:DRH:NJS

Dear Mr. Aftergood:

This responds to your Freedom of Information Act (FOIA) request dated and received in this Office on February 8, 2013, for the Attorney General's written responses to post-hearing questions from the House Judiciary Committee following a hearing on June 7, 2012. This response is made on behalf of the Office of Legislative Affairs.

Please be advised that a search has been conducted of the electronic database of the Departmental Executive Secretariat, which maintain certain records for the Office of Legislative Affairs, including official correspondence, and two documents, totaling forty-one pages, were located that are responsive to your request. I have determined that this material is appropriate for release without excision and copies are enclosed. I apologize for the delay of this response.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. *See* 5 U.S.C. § 552(c) (2012). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

If you are not satisfied with my response to this request, you may administratively appeal by writing to the Director, Office of Information Policy (OIP), United States Department of Justice, Suite 11050, 1425 New York Avenue, NW, Washington, DC 20530-0001, or you may submit an appeal through OIP's FOIAonline portal at https://foiaonline.regulations.gov/foia/action/public/home. Your appeal must be postmarked or electronically transmitted within sixty days of the date of my response to your request. If you submit your appeal by mail, both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal."

Sincerely,

Vanessa R. Brinkmann
Senior Counsel

Enclosures

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

MAY 0 2 2013

The Honorable Bob Goodlatte
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Enclosed please find responses to questions for the record arising from the appearance of Attorney General Eric Holder before the Committee on June 7, 2012. We apologize for our delay and hope that this information is of assistance to the Committee. Please note that the Department is currently in litigation with Congress regarding the investigation pertaining to Operation Fast and Furious and, accordingly, we are not able to respond to questions related to that matter.

Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget has advised us that there is no objection to submission of this letter from the perspective of the Administration's program.

Sincerely,

Peter J. Kadzik
Principal Deputy Assistant Attorney General

Enclosure

cc: The Honorable John Conyers, Jr.
Ranking Member

Questions for the Record
Eric H. Holder, Jr.
Attorney General
U.S. Department of Justice

Committee on the Judiciary
U.S. House of Representatives

"Oversight of the United States Department of Justice"
June 7, 2012

QUESTIONS POSED BY CHAIRMAN SMITH

1. **I have learned through several channels of reports that certain recipients of grants from the Department of Health and Human Services ("HHS") and the Centers for Disease Control ("CDC") have used those federal funds to advocate for new or reformed legislation in state and local legislatures, councils, and departments.**

   I understand that on March 16, 2012, a group named "Cause of Action" submitted to the Department of Justice a letter detailing instances of this conduct and requesting an investigation.[1] A recent letter from Senator Collins to Secretary of Health and Human Services Kathleen Sebelius also describes similar activity.[2]

   The conduct detailed in both the Cause of Action letter and the letter from Senator Collins appears to contravene the Anti-Lobbying Act, codified at 18 U.S.C. § 1913—which the Justice Department is responsible for enforcing—and which prohibits the use of appropriated funds, "directly or indirectly . . . to influence in any manner" any state or local official to take any action for or against legislation.

   Moreover, as I noted in the Committee's report of April 30, 2012, detailing the Obama Administration's consistent disregard of the rule of law, "the Justice Department . . . has repeatedly put its partisan agenda ahead of its Constitutional duties [to enforce the law]."[3] The conduct reported here appears to be one more example of the Administration's campaign to enforce its own policy goals regardless of federal prohibitions to the contrary: HHS and the CDC are allowing federal funds to be used unlawfully to impose the administration's policy wish list on states and localities.

---

[1] *See* http://causeofaction.org/about/.
[2] *See* Letter from Sen. Susan Collins to Hon. Kathleen Sebelius, Secretary of the Dep't of Health and Human Services (May 1, 2012), *available at* http://www.collins.senate.gov/public/ index.cfm/ press-releases?ID=5eb56ba5-4c87-4e41-942d-8d16575f0d05.
[3] *See* U.S. House of Representatives, Committee on the Judiciary, *The Obama Administration's Disregard of the Constitution and the Rule of Law* (April 30, 2012), *available at* http://judiciary.house.gov/issues/issues_Reports.html.

Please provide written responses to the following questions:

A. Does the Anti-Lobbying Act prohibit the expenditure of federal grant funds to persuade state and local governments to adopt or modify laws and regulations?

Response:

Two statutes address the illegal use of appropriated funds for lobbying: the Anti-Lobbying Act, 18 U.S.C. § 1913, and the Byrd Amendment, 31 U.S.C. § 1352. The Anti-Lobbying Act prohibits the use of appropriated funds, directly or indirectly, "to influence in any manner a Member of Congress, a jurisdiction, or an official of any government" with respect to "any legislation, law, ratification, policy or appropriation." The pre-2002 version of this statute also provided that "[w]hoever, being an officer or employee of the United States or of any department or agency thereof, violates or attempts to violate this section," is subject to criminal fines and imprisonment. Citing this language, a federal district court concluded in 1982 that the Anti-Lobbying Act applied only to federal officers and employees. *Grassley v. Legal Services Corp.*, 535 F. Supp. 818, 826 n.6 (D.C. Iowa 1982).

In 2002, Congress amended the Anti-Lobbying Act by replacing the criminal sanction with civil penalties and making a violation of the Act a violation of 31 U.S.C. § 1352, the Byrd Amendment. The Byrd Amendment expressly prohibits "the recipient of a Federal contract, grant, loan, or cooperative agreement" from using appropriated funds to "influenc[e] or attempt[] to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress" in connection with specified "Federal action[s]." How these laws will apply in any given case depends on the particular facts, and the Department will appropriately pursue every serious allegation of illegal lobbying to the full extent of the law. Typically, such allegations would be investigated in the first instance by an agency's Office of the Inspector General.

B. Are you aware of the conduct of HHS and CDC grantees described by Cause of Action and by Senator Collins in their respective letters? If so, is the Justice Department investigating that conduct?

Response:

It has been reported that these allegations have been investigated by HHS's Office of the Inspector General.

C. How did you learn of the reported conduct by HHS and CDC grantees? Have you ordered, or do you plan to order, an investigation of the reported HHS and CDC grantee conduct?

Response:

See response to question 1(B), above.

D. In 2002, Congress amended the Anti-Lobbying Act to ban all expenditures of federal funds to lobby or urge state and local governments to change their law. What has the Justice Department done to implement and enforce these amendments? Has the Justice Department given any guidance to federal agencies, and specifically HHS or CDC, regarding the prohibitions and scope of the 2002 amendments?

Response:

To the best of our knowledge, no matters have been referred to the Department regarding improper lobbying activities directed at state and local governments, and thus the Department has not brought any such cases. With respect to your request regarding Department advice, the Department's Office of Legal Counsel has not published any guidance regarding the application of the 2002 amendments to the Anti-Lobbying Act. As a general matter, the Department does not disclose what legal questions it may have been asked to consider or confidential legal advice that it has provided. As noted, however, the Department is fully committed to ensuring compliance with all relevant constitutional and statutory requirements, including applicable anti-lobbying laws.

QUESTIONS FROM REPRESENTATIVE GALLEGLY

2. Please provide:

A. The number of arrests, prosecutions, and convictions for Medicare and Medicaid fraud cases, the amount of taxpayer money stolen in those cases and the amount recovered for the taxpayer.

Response:

For the period of FY 2007 through 2012, the U.S. Attorneys' Offices had the following totals as it relates to health care fraud cases: 2,846 cases filed, 5,639 defendants charged, 4,026 defendants convicted, and 2,334 sentenced to prison. The amount of taxpayer money stolen and recovered is only tracked with respect to Medicare Fraud Strike Force locations. The overall totals for the 9 Strike Force locations (FY07-FY12): 724 cases filed, 1476 defendants charged, 1023 convictions, 745 sentenced to prison and 90 sentenced to probation. These matters involved schemes that collectively billed federal government health care programs more than $4.6 billion and they resulted in orders for more than $1.4 billion in restitution and more than $95 million in forfeited amounts.

B. The number of arrests, prosecutions, and convictions for specific Medicare and Medicaid fraud enforcement actions taking place in California, in southern California, and specifically in Los Angeles and Glendale.

Response:

The totals for California, reflecting health care fraud enforcement actions in the United States Attorneys' Offices for the Central, Eastern, Northern, and Southern Districts of California (FY07-FY12): 201 cases filed, 396 defendants charged, 135 convictions, and 110 defendants were sentenced to prison.

The totals for the United States Attorney's Office for the Central District of California, in which Los Angeles and Glendale are located (FY07-FY12): 160 cases filed, 298 defendants charged, 84 convictions, and 82 defendants were sentenced to prison.

C. Please provide the number of worksite enforcement prosecutions for each of the last four years, and the number of prosecutions of illegal workers who have used fraudulent documents.

Response:

The United States Attorneys' Offices track neither criminal work site enforcement actions nor undocumented worker fraud prosecutions as a discrete category of cases. Rather, both types of cases are tracked within the more general categories of immigration crimes and identity theft. In addition, federal prosecutors can charge these crimes using federal criminal statutes, such as 18 U.S.C. sections 1001 and 1028, which apply to offenses beyond work site enforcement and undocumented worker fraud. While we therefore cannot provide the numbers of such prosecutions, we are committed to bringing criminal charges, as appropriate based on the facts

and the law, against those businesses and corporate executives who knowingly illegally employ undocumented aliens and those who abusively exploit their undocumented workers.

QUESTIONS FROM REPRESENTATIVE FORBES

3. **I know you have filed actions against Arizona, South Carolina, Utah and Alabama – all Republican Governors. Would you give us a list of any similar actions, of a similar profile, you have filed against any states with Democratic Governors?**

Response:

The political affiliation of a state's governor plays no part in our consideration of whether to sue a State or challenge a state law. The United States' lawsuits against the listed States were the result of thorough legal analysis which considered the substance of the state laws at issue. Notably, with respect to the United States' challenge to Arizona's immigration statute, the majority of the claims of the United States have been upheld by the Supreme Court.

4. **Please provide a list of any and all meetings with the White House and members of the campaign about any of the messaging that took place regarding the cases mentioned above, as well as the decisions to not take action against states with Democratic Governors?**

Response:

Please see the response to question 3, above.

QUESTIONS FROM REPRESENTATIVE KING

USDA Discrimination Settlements

5. How much money has been distributed from the *Pigford I* and *Pigford II* settlements?

Response:

No money has been distributed in *Pigford II*. Including cash awards, debt relief, and tax payments, approximately $1 billion was distributed to class members who won Track A claims in *Pigford I*. Including cash awards and debt relief, approximately $48 million was distributed to *Pigford I* class members who won Track B claims.

A. How many plaintiffs have received a settlement?

Response:

Approximately 15,650 claims were approved in *Pigford I*. We don't know yet how many *Pigford II* class members will prevail on their claims.

B. Which lawyers and law firms received compensation from the *Pigford* settlement funds?

Response:

The *Pigford* Consent Decree identified Alexander J. Pires and Phillip L. Fraas as "class counsel," and J.L. Chestnut, Roe Frazer, Hubbard Sanders, Othello Cross, Gerald Lear, and William J. Smith as "of counsel to the class." Class counsel and J.L. Chestnut (or his partners) received the vast majority of fee awards. Class members were free to hire their own attorneys who were entitled to fees for each successful claim they brought.

C. How many attorneys were involved in the settlement?

Response:

Please see response to question 5(B), above.

D. How were the fees calculated and distributed?

Response:

Fees on credit claims were paid out of the Judgment Fund, 31 U.S.C. 1304, using the Laffey Matrix, unless the regular rate for an attorney who was neither "class counsel" nor "of counsel to the class" was lower than the Matrix allowed, in which case his/her fees were calculated at the attorney's normal hourly rate.

6. How many claimants who were denied relief in *Pigford I* took part in *Pigford II*?

Response:

Pigford I class members whose timely claims were denied were barred from participation in *Pigford II.* We defer to class counsel, who are in the best position to know how many claims have been filed in *Pigford II.*

A. How many of those claimants were awarded a settlement?

Response:

No claimants have been paid in *Pigford II.* About 15,656 class members have been paid in *Pigford.*

7. Were all of the named plaintiffs in the original *Pigford* suit successful?

Response:

No.

A. Did they all eventually receive a settlement from the United States government?

Response:

All successful class members received awards from the United States government.

8. What is the status of the required GAO audits regarding the claims process?

Response:

We defer to the U.S. Government Accountability Office (GAO), which would be in the best position to respond to this question.

9. How many outstanding claims exist?

Response:

One *Pigford* Track A claim remains outstanding. There are a handful of cases in which the parties disagree about the amount of debt forgiveness to which a class member is entitled. There is litigation brought by three Pigford class members concerning the relief to which they were

entitled under the Consent Decree. We defer to *Pigford II* class counsel, who are in the best position to respond with respect to that case.

A. How many have applied?

Response:

We defer to class counsel with respect to *Pigford II*. In *Pigford I*, 22,792 eligible applicants filed Claim Forms.

B. How many have been paid?

Response:

Please see response to question 6(A), above.

10. What is the geographic breakdown of *Pigford* claimants?

Response:

Pigford I claims were filed by farmers throughout the country. The largest numbers of claims were filed by farmers in Mississippi, Georgia, Alabama, and North Carolina.

11. Were you aware of the number of black farmers and black farms in America when you announced the *Pigford II* settlement on February 18, 2010?

Response:

We defer to the U.S. Department of Agriculture (USDA), which would be in the best position to respond to this question.

12. Please provide, in a searchable format, the names of all claimants, the dates of their applications, their addresses, and the dates and outcomes of their applications.

Response:

We are barred from disclosing this information by the Privacy Act and a court order.

13. What number of *Pigford I* and *Pigford II* claimants were denied a settlement?

Response:

About 7,000 claims were denied in *Pigford I*. No claims have been finally decided in *Pigford II*.

14. Please produce a report describing how the Department of Justice's Judgment Fund operates.

Response:

The Judgment Fund is operated by the Treasury Department, and all questions regarding the Fund should be directed to that Department.

A. What is the size of the Judgment Fund?

Response:

Please see response to question 14(A).

B. How much is annually paid from the Judgment Fund?

Response:

Please see response to question 14(A).

15. What is the current dollar amount of cash distributions to claimants in the *Pigford II* settlement?

Response:

As of this time, no cash distributions have been made in *Pigford II.*

16. What is the total dollar amount of loan forgiveness of claimants in the *Pigford II* settlement?

Response:

As of this time, no loans have been forgiven in *Pigford II.*

17. What entity processes the settlements for *Pigford I* and *Pigford II*?

Response:

In *Pigford I,* the Department made requests for payment of awards on credit claims to the Judgment Fund. Non-credit claims were paid out of USDA appropriated funds. Information about the processing of payments in *Pigford II* should be directed to class counsel.

A. What entity receives the claimant's application?

Response:

In *Pigford I*, the Facilitator receives the claims. In *Pigford II*, the Administrator receives the claims.

B. Who reviews the application?

Response:

In *Pigford I*, the applications are reviewed by the Facilitator, the Adjudicator, the Arbitrator, and the Monitor, as appropriate. In Pigford II, the applications are reviewed by the Administrator, the Adjudicator, and the Arbitrator, as appropriate.

C. What entity distributes cash settlements?

Response:

Please see response to question 15, above.

D. What is the oversight process of this entity?

Response:

In *Pigford II*, USDA's Inspector General (IG) is directed to audit adjudicated claims, and GAO is directed to report to Congress twice a year on the operation of the internal controls established by the Settlement Agreement. The Settlement Agreement created an "Ombudsman," who is obliged to make periodic reports to the court on the "good faith implementation of the Settlement Agreement." Also, the district court has continuing jurisdiction until the settlement processes have been completed. In *Pigford I*, the court-appointed Monitor was authorized to act on requests by class members and the government that it order the Adjudicator or Arbitrator, as appropriate, to reexamine adverse decisions. USDA's IG had authority to act on allegations of impropriety in the claims process. Also, the district court was authorized to consider requests for enforcement by any party.

18. Is the DOJ aware of any (new or old) allegations of fraud regarding the disbursement of funds relating from the *Pigford, Garcia, Love*, and *Keepseagle* settlements? Please describe them.

Response:

In *Pigford*, the Department is aware that a fraud ring was discovered, and all but one member of the ring pled guilty to fraud. The remaining class member's claim was originally decided in her favor, but class counsel agreed to withdraw that person's claim after the government filed a motion in the district court requesting that the decision be vacated. Another, unrelated claimant admitted to filing a fraudulent claim decided in his favor. Class counsel did not file a response to

the government's motion to vacate the decision, which remains pending in the district court. Also, in 2001 a criminal investigation was conducted by the FBI of claims filed in *Pigford.*

No claims have been decided in *Love* or *Garcia.*

In *Keepseagle*, the Department learned that a certain individual had created a book that he sold to class members for anywhere from $1,000-$10,000 to allegedly assist in the claims process. This book was prepared after the preliminary approval of the settlement agreement. It was conveyed to the Department that this book generally contained publicly available documents, but also contained misinformation. Although this individual at one time worked with class counsel, we understand that this relationship stopped years ago. However, we also understand that this individual currently represents himself as working for class counsel. In addition, this individual allegedly had meetings with claimants to help prepare claims forms, and charged substantial money for this service. He also allegedly collected money from class members to cover the cost of his traveling to Washington, D.C. to try to convince the district court to allow certain claims to be permitted without documentation. The Department transmitted these allegations to USDA's Inspector General.

A. Has the DOJ undertaken any investigations into alleged fraud in these settlements or does it plan to do so in the future?

Response:

Please see response to question 18, above.

Iowa SAVE denials

19. The Secretary of State of my home state, Iowa, along with other states has requested the use of the Department of Homeland Security's Systematic Alien Verification for Entitlements (SAVE) program as an aid in determining the eligibility of voters. According to DHS's Privacy Impact Assessment for SAVE, IIRIRA provides "for customer agencies to use SAVE for any legal purpose such as background investigations and voter registration."

DHS has responded to the Iowa Secretary of State's office that "SAVE personnel have contacted the Office of the Iowa Secretary of State on April 17, 2012, to better understand Iowa's intended use (e.g., verification of existing voters or registering voters) and determine if it is able to comply with all SAVE procedures, including providing the numeric identifiers found on each voter's immigration-related documents and copies of those documents, if requested. Once we receive more information from Iowa, we will be in a position to respond to the request." Despite providing the information requested by DHS, the State of Iowa has yet to hear back from DHS.

In a letter dated May 10, Colorado was denied use of the SAVE system by DHS saying that "While this additional information (alien registration numbers for

registered voters) may facilitate the use of SAVE for this verification purpose, we must further assess serious legal and operational issues before we can make a determination on your request."

Additionally, DHS has stated in its letter to Iowa that USCIS needs to ensure that verifying the citizenship status of current and future voters using the SAVE Program does not conflict with the Voting Rights Act. As such, USCIS has sought guidance from the Department of Justice Voting Rights Section on this issue and we are now waiting on the Department's response.

A. Has the Department provided USCIS with an opinion as to whether verifying the citizenship status of current and future voters using the SAVE Program conflicts with the Voting Rights Act?

Response:

The Systematic Alien Verification for Entitlements (SAVE) Program is a program of the Department of Homeland Security (DHS). The Department of Justice does not control access to DHS's SAVE database. Our understanding is that DHS has programmatic requirements that must be met for the SAVE database to be used accurately, including appropriate identification numbers and underlying documentation. DHS, not DOJ, determines whether a state can meet those programmatic requirements. Where a state can do so, DHS has arranged for access.

As with any program that allows state governments to use federal data, states are expected to comply not only with all applicable programmatic requirements, but also with all applicable civil rights and nondiscrimination statutes -- whether under the Voting Rights Act, the National Voter Registration Act, the Help America Vote Act, the Civil Rights Act, or other statutes. If a state gains access to the SAVE Program and uses that data in a way that implicates the laws we enforce, we will look very closely at it and take appropriate action.

B. If not, when can it be expected? It is imperative that it is provided in a reasonable time (at least 120 days) before the election.

Response:

Please see response to question 19(A), above.

Internet Gambling

20. How does the Department explain its reversal of its decades long interpretation of the Wire Act? Seeing as the Wire Act is not the only provision making internet gambling illegal, couldn't that reversal be seen as in direct defiance of those laws?

Response:

The best explanation of the legal basis for the Department's current view regarding the interpretation of the Wire Act is contained in the published OLC opinion on that question. It is available at http://www.justice.gov/olc/2011/state-lotteries-opinion.pdf. The opinion addresses only the interpretation of the Wire Act as applied to non-sports wagering and does not address the interpretation of the Unlawful Internet Gambling Enforcement Act, 31 U.S.C. §§ 5361-5367 (2006), or any other law. The OLC opinion does not change the Wire Act's applicability to sports wagering. Our policy has been – and remains – to prosecute internet gambling companies, and individuals associated with them, for non-sports wagering under other statutes available to us, including, for example, the Illegal Gambling Business Act, 18 U.S.C. § 1955.

GPS Tracking

21. In early June, 2012, the DOJ told Ninth U.S. Circuit Court of Appeals that it still has the right to place Global Positioning System tracking devices on cars without obtaining a search warrant—despite a January Supreme Court ruling that the warrantless installation of such a device violated the Constitution.

A Department spokesperson said "that a warrant is not needed for a GPS search, as the Court...did not resolve that question," but said that the department has "advised agents and prosecutors going forward to take the most prudent steps and obtain a warrant for new or ongoing investigations" in most cases.

A. How many GPS tracking devices or other tracking devices did the DOJ/FBI have at the time of the Supreme Court's decision in *United States v. Jones?*

Response:

The Department's law enforcement components had more than 300 GPS tracking devices lawfully in use in support of investigations and operations at the time of the Supreme Court decision in *Jones v. United States*.

B. How many of those had to be subsequently turned off?

Response:

Most of the active GPS devices have been turned off subsequent to the *Jones* decision. For example, approximately two thirds of the active GPS devices used by the FBI were turned off as a result of the *Jones* decision.

C. How did the DOJ and the FBI recover those devices that were turned off?

Response:

The vast majority of the GPS devices that were turned off were physically retrieved. For example, of the GPS devices in use by the FBI that were turned off, approximately 87 percent

were physically retrieved by the FBI, while the remainder were left in place. Of those left in place, approximately half were unable to be retrieved and the rest were turned back on when legal authority to use the device was obtained.

D. How has the Bureau and the DOJ advised agents to deal with tracking devices going forward?

Response:

The *Jones* decision left open the question of whether a warrant is required to install and use a GPS device. Nonetheless, as a matter of prudence, the Department's law enforcement components now generally obtain warrants before installing and using GPS devices, unless an exception to the warrant requirement (such as consent or exigency) applies.

E. Why did the Department of Justice not testify during the recent May 17th hearing of H.R. 2168 (the Geolocational Privacy and Surveillance Act)?

i. Further, with June 12th rapidly approaching, has the Department of Justice prepared its answers to Senator Franken's questions regarding the use of GPS technology and the Department's possible evasion of the *Jones* decision?

Response:

The Department was not able to provide a witness at the May 17, 2012 hearing. The Department responded to Senator Franken's questions in a letter dated June 8, 2012, a copy of which is attached hereto.

QUESTIONS FROM REPRESENTATIVE POE

Voter Fraud

23. Are you familiar with the Pew study[4] showing that there are almost 2 million ineligible voters on the rolls in this country including roughly 1.8 million dead people?

Response:

We are aware of the Pew study.

A. Considering that many of our elections are determine by a few hundred or a few thousand votes, this is obviously very significant. If our current Voter identification systems across the country are this flawed, how else can we ensure the validity of our elections without Voter ID? Clearly the current systems are not working.

Response:

The Department has not seen reliable evidence indicating that there is any significant amount of in-person voter-impersonation fraud at polling places. Indeed, cases regarding voter fraud very rarely concern in-person voter impersonation, and particularly not instances that would be affected by any changes regarding in-person voter-identification requirements.

B. Can you tell us today that you are 100% confident that voting fraud has not – or could not –sway the decision of a US election?

Response:

The Department has uncovered no evidence suggesting that in-person voter-impersonation fraud presents a significant risk to the integrity of elections in this country. Where the Department has found evidence of voter fraud that violates federal law, it has undertaken vigorous efforts to prosecute such crimes.

24. Are you familiar with the Florida Secretary of State's discovery of 53,000 dead voters[5] on the rolls when he started using the Social Security Death Index for list matching?

Response:

We are aware of the news reports.

25. Section 8 of the National Voter Registration Act gives you power to bring cases against states to ensure dead and ineligible voters are not on the rolls. How many Section 8 cases has your voting section brought since you became Attorney General?

---

[4] *See* http://www.pewstates.org/research/reports/inaccurate-costly-and-inefficient-85899378437 .

[5] *See* http://www.foxnews.com/politics/2012/05/17/florida-voter-rolls-suspected-having-roughly-53k-dead-2600-ineligible/ .

Response:

The Department has brought one new case under Section 8 of the NVRA since January 20, 2009.

A. **Why have you not brought more cases considering that independent analysis finds that as many as 1.8 million dead voters could be on our voting rolls? How can you explain this lack of action on the part of the Department of Justice?**

Response:

The Department has devoted significant resources to enforcement of Section 8 of the NVRA. About 16 of the 22 complaints filed by the Department of Justice since the NVRA went into effect in 1995 have stated claims for violations of Section 8 of the NVRA. The Department has a number of open investigations into NVRA compliance around the country, and will take appropriate enforcement action where violations are found.

QUESTIONS FROM REPRESENTATIVE AMODEI

State Criminal Alien Assistance Program (SCAAP) Questions:

32. I, along with Chairman Smith and several of my other House colleagues, sent a letter to your attention on June 13, 2012, regarding changes you have recently made to the SCAAP reimbursement policy for localities housing "unknown" criminal aliens in their jails.

A. What possessed the Department to, in May 2012, unilaterally change the terms under which SCAAP reimbursement is provided to local law enforcement? Did you not think that you needed to confer with Congress, the body that authorizes and appropriates the funds for this program, before doing so?

Response:

All programs within the Office of Justice Programs (OJP) are reviewed each year in order to determine what changes can be made to improve their efficiency and effectiveness. In this time of limited fiscal resources, the Department believes that it would be appropriate to consider removing reimbursement for the "unknown" aliens from the SCAAP funding formula in order to increase reimbursements for "known" criminal aliens. SCAAP reimbursements for offenders of unknown immigration status raise a serious accountability issue because such reimbursements are likely to divert funding from the program's true purpose. The Department's Office of the Inspector General and some members of Congress have questioned the practice of reimbursing states for "unknown" offenders for this reason. Additionally, it is good governance to take all possible steps to concentrate SCAAP funding on those jurisdictions with the greatest demonstrated need (in terms of the number of verified criminal aliens they are responsible for holding).

The change to the SCAAP reimbursement process was outlined in the FY 2012 President's Budget submission. The change was noted also in the FY 2011 SCAAP guidelines and an email notification was sent to SCAAP grantees as well as several constituent groups in May of 2011. These notifications were designed to give grantees ample time to work on increasing the number of verified aliens. The email and the program guidelines provided examples of programs within the Department of Homeland Security (DHS) that can assist jurisdictions to increase their verifications. The Department of Justice is making every effort to encourage collaboration with DHS at the state and local level. For example, DHS provided the following tools that can assist jurisdictions with identifying criminal aliens.

- Secure Communities Program: This program leverages an existing information sharing capability between DHS and DOJ to quickly and accurately identify aliens who are arrested for a crime and booked into local law enforcement custody. With this capability, the fingerprints of everyone arrested and booked are not only checked against Federal Bureau of Investigation (FBI) criminal history records, but they are also checked against DHS immigration records. If fingerprints match DHS records, the Bureau of Immigration and Customs Enforcement (ICE) determines if immigration enforcement action is required, considering the immigration status of

the alien, the severity of the crime and the alien's criminal history. More information can be found at: www.ice.gov/secure_communities/.

- The Law Enforcement Support Center (LESC): LESC is a single national point of contact that provides timely customs information and immigration status and identity information and real-time assistance to local, state and federal law enforcement agencies on aliens suspected, arrested or convicted of criminal activity. More information can be found at www.ice.gov/LESC/.

B. When can we expect you to rescind this reimbursement policy change? If you refuse to do so, what is your statutory/legal basis for refusal?

Response:

Because the reimbursement policy change has not been implemented, there is nothing to rescind. Based on input from the field, OJP's Bureau of Justice Assistance is analyzing FY2012 data to determine the collective impact of this change. As a result, OJP has not implemented the policy change to not pay for "unknown" criminal aliens.

C. Why do you believe it is appropriate to find cost-savings for the Department on the backs of local communities by refusing to reimburse them for criminal, illegal aliens you and the Department of Homeland Security have failed to track and to remove? How could you achieve savings in other areas of the Department instead, allowing SCAAP funds to be disbursed as Congress intended and authorized?

Response:

The reimbursement policy change would allow OJP to concentrate funding on jurisdictions with a verified need for assistance in incarcerating criminal aliens, consistent with the purpose that Congress set for this program. OJP realizes that this change may result in some changes to SCAAP reimbursement levels at a difficult time for many state and local jurisdictions, but should not abandon its responsibility to ensure that SCAAP funding is used as Congress intended.

D. Do you recognize that local communities may have to release these criminals, who have repeatedly shown no respect for the rule of law, if they cannot find a way to pay for them to stay in their jails? Do you think this is appropriate? What solution would you propose to avoid this outcome?

Response:

OJP does not regulate state and local prisons and jails; any decisions regarding the release of prisoners is based on state and local law and made by state and local authorities. SCAAP reimbursements are only a small part of the funding that supports state prisons and local jails. While SCAAP is one funding stream that state and local criminal justice and corrections agencies can use to cover some of their costs, due to declining funding levels for SCAAP,

reimbursements under the program reflect a portion of the costs that each grantee is eligible to claim.

OJP will continue to work with state and local jurisdictions and DHS to facilitate the smoothest possible SCAAP application process and encourages SCAAP applicants to submit the strongest possible application. It is essential that SCAAP applicants work closely with DHS to facilitate verification of the immigration status of as many offenders as possible.

Tribal Law Enforcement Questions:

33. **As you may know, this Committee just reauthorized the Violence Against Women Act. Domestic violence, rape, and sexual assault on tribal lands are epidemic. Members of tribes in my district have expressed frustration that federal investigators and prosecutors are not, in their opinion, doing enough to pursue these and other violent crimes on tribal lands. FBI Director Mueller mentioned in his testimony before the Committee earlier this year that the FBI is aggressively investigating such crimes, particularly sexual assault and child sexual assault.**

    A. **Could you tell me about the initiatives (both investigative and prosecutorial) you have launched to combat various kinds of violent crime on tribal lands and the successes you have had to date? Are there any specific steps you're taking to deal with the problem of domestic violence on tribal land involving non-Indian-on-Indian violence? What is the standard protocol and timeline for handling those kinds of cases?**

Response:

Since 2009, the Department of Justice has added 28 new Assistant U.S. Attorney positions dedicated to prosecuting crime in Indian Country in nearly two dozen judicial districts. Every U.S. Attorney with Indian Country jurisdiction has appointed at least one tribal liaison to serve as the U.S. Attorney's Office primary point of contact with tribes in the district. In addition, the FBI added 9 positions, including 6 agents to work on Indian Country investigations. In Fiscal Year 2010, the FBI's Office for Victim Assistance added 12 Victim Specialist positions to provide victim assistance in Indian Country. The victim specialists have an invaluable role in Indian Country investigations, particularly in cases of domestic violence and child abuse, providing essential services and support.

In January 2010, the Deputy Attorney General (DAG) issued a memorandum to all U.S. Attorneys with Indian Country responsibility affirming that "addressing violence against women and children in Indian Country is a Department of Justice priority." The memorandum further instructed that "reports of sexual assault or domestic violence in Indian Country should be investigated wherever credible evidence of violations of federal law exists, and prosecuted when the *Principles of Federal Prosecution* are met." The DAG memorandum also reiterates that where federal jurisdiction exists, the responsibility to investigate and prosecute violence against women in Indian Country also extends to misdemeanor assaults committed by non-Indian offenders against Native American women on federally recognized reservations. There is no standard timeline for handling domestic violence and sexual assault crimes; however, federal

prosecutors have been instructed that due care must be exercised to recognize ongoing risks to victims in sexual assault and domestic violence cases and to expeditiously make charging decisions in high-risk cases to minimize or eliminate those risks.

In July 2010, the Executive Office for U.S. Attorneys (EOUSA) launched the National Indian Country Training Initiative (NICTI) to ensure that Department prosecutors, as well as state and tribal criminal justice personnel, receive the training and support needed to address the particular challenges relevant to Indian Country prosecutions. The training effort is led by the Department's National Indian Country Training Coordinator. In 2011, the NICTI delivered training in 14 states and at the National Advocacy Center in Columbia, S.C. to approximately 2,500 federal, state, and tribal stakeholders on a host of criminal justice issues. A significant portion of this training focused on the investigation and prosecution of domestic violence and sexual assault crimes.

In 2011, the Attorney General launched a Violence Against Women Federal and Tribal Prosecution Task Force composed of federal and tribal prosecutors. The Task Force was created to facilitate dialogue and coordinate efforts between the Department and tribal governments regarding the prosecution of violent crimes against women in Indian Country, and to develop best-practices recommendations for both federal and tribal prosecutors. The Task Force continues its work toward publishing a resource manual for prosecutors responding to cases of intimate-partner violence in Indian Country.

In addition, the Department has initiated a creative program to increase the number of tribal SAUSAs focused on domestic violence and sexual assault. The Justice Department's Office on Violence Against Women (OVW) announced in June 2012 that four tribes in Nebraska, New Mexico, Montana, and North Dakota and South Dakota were awarded cooperative agreements to cross-designate tribal prosecutors to pursue violence-against-women cases in both tribal and federal courts. The goal of the tribal Special Assistant U.S. Attorney (SAUSA) pilot project is to train eligible tribal prosecutors in federal law, procedure, and investigative techniques to increase the likelihood that every viable criminal offense is prosecuted in tribal court, federal court, or both. The pilot project enables tribal prosecutors to bring violence-against-women cases in federal court and to serve as co-counsel with federal prosecutors on felony investigations and prosecutions of offenses arising out of their respective tribal communities. Through this special initiative, OVW will support salary, travel, and training costs of the tribal SAUSAs, who will work in collaboration with the U.S. Attorneys' Offices in the Districts of Nebraska, New Mexico, Montana, North Dakota, and South Dakota. These prosecutors will maintain an active violence-against-women crimes caseload, in tribal and/or federal court, while also helping to promote higher quality investigations, improved training, and better intergovernmental communication. Additionally, the Criminal Section of the Department of Justice's Civil Rights Division has taken the lead in prosecuting both hate crimes and abuses of police power against Native Americans, both on tribal land and in urban areas.

B. When you have declined to pursue or to prosecute criminal cases on tribal lands, is there a trend in your reason(s) for doing so? If so, what is that trend(s)?

Response:

Ensuring justice for all Americans is the fundamental goal of the Department of Justice and, specifically, improving public safety and the fair administration of justice in Indian Country remains a top priority for the Department. Overall, a substantial majority of FBI Indian Country investigations are referred for prosecution, and the U.S. Attorneys' Offices prosecute most of the Indian Country cases they open.

The most common reason that some FBI Indian Country investigations are closed administratively without referral for prosecution is that the investigation concludes that no federal crime occurred. For example, the FBI has the primary responsibility for all deaths occurring in Indian Country. However, a death investigation will be closed administratively when it is ultimately determined that the death occurred from natural causes.

The most common reasons for declinations by federal prosecutors include insufficient evidence or a referral of the case to another prosecuting authority, like the tribal prosecutor.

C. How many prosecutors have you assigned to handle tribal criminal prosecutions? How many law enforcement agents have you assigned to handle tribal criminal investigations? What additional resources do you need?

Response:

Typically, tribal criminal prosecutions are handled by prosecutors hired by their respective tribe, applying tribal law. Federal prosecutors, as a general matter, prosecute federal criminal matters. The two main federal statutes governing federal criminal jurisdiction in Indian Country are 18 U.S.C. 1152 and 1153. Section 1153, known as the Major Crimes Act, gives the federal government jurisdiction to prosecute certain enumerated offenses, such as murder, manslaughter, rape, aggravated assault, and child sexual abuse, when they are committed by Indians in Indian Country. Section 1152, known as the General Crimes Act, gives the federal government exclusive jurisdiction to prosecute all crimes committed by non-Indians against Indian victims in Indian Country. Section 1152 also grants the federal government jurisdiction to prosecute minor crimes by Indians against non-Indians, although that jurisdiction is shared with tribes, and provides that the federal government may not prosecute an Indian who has been punished by the local tribe. On a number of reservations, the federal criminal responsibilities under Sections 1152 and 1153 have been ceded to the states under "Public Law 280" or other federal laws. It should be noted that matters and cases from Public Law 280 jurisdictions do not generally appear in federal Indian Country crime reports because federal authority to prosecute in those jurisdictions has been transferred to the state.

There are 48 federal judicial districts with Indian Country responsibility. Although the exact number of federal prosecutors handling Indian Country cases at any given time is fluid, the Department's prioritization of Indian Country crime and increase in federal resources over the past three years has resulted in a notable increase in Indian Country cases prosecuted in federal courts. Case loads have dramatically increased due, at least in part, to the prioritization of public safety in Indian Country and the dedication of federal resources to that effort. Currently, there

are about 115 FBI special agents dedicated full-time, and 42 FBI Victim Specialists working in support of Indian Country investigative matters. Fifteen FBI Safe Trails Task Forces (STTFs) are engaged in this effort and are critical in combining limited Federal and tribal resources to target crimes involving violence, drugs, gangs, and gaming violations. The FBI, however, is not the only law enforcement agency investigating crimes in Indian Country. The Bureau of Indian Affairs, other federal law enforcement agencies (e.g., DEA), and tribal law enforcement also conduct investigations of crimes and allegations arising from Indian Country.

In addition, the Tribal Law and Order Act of 2010 authorized the cross-designation of qualified tribal prosecutors as Special Assistant United States Attorneys (SAUSAs). A number of USAOs currently have tribal SAUSAs.

D. How does the referral process work between tribes and federal law enforcement?

Response:

A referral is simply the mechanism by which a tribal law enforcement agency seeks the involvement or advice of a federal agency. A referral may take many forms, ranging from a formal, written presentation by a law enforcement agency to an informal phone call. In addition, how and when a law enforcement agency decides to refer a matter to another agency depends on many factors, including the nature of the cases, the stage of the investigation, and the relationship between the agencies.

i. Can this process be strengthened, in your opinion? If so, how?

Response:

The Department continues to work on strengthening the justice system and law enforcement presence in Indian Country. The Department has engaged in dozens of consultations with tribes on issues important to public safety, justice, and law enforcement, including violence against American Indian and Alaska Native women and implementation of the Tribal Law and Order Act. The overarching goal of the Department is to create substantial, lasting improvements in all of Indian Country, and to undertake reforms to institutionalize our federal commitment. In this regard, the Department continues its work to strengthen relationships with federally recognized tribes, improve the coordination of training and information sharing, enhance tribal capacity, and provide effective federal law enforcement and prosecution efforts in Indian Country.

For example, U.S. Attorneys' Offices are engaging in an unprecedented level of collaboration with tribal law enforcement, consulting at least annually on crime-fighting strategies in each federal judicial district, joining in federal/tribal task forces, sharing case and grant information, training investigators, and cross-deputizing tribal police and prosecutors to enforce federal law and to allow those deputized individuals to bring cases directly to federal court.

E. What is being done to enforce the Indian Arts and Crafts Act of 2010, to provide trademark protection to Indian artwork against counterfeiters?

Response:

Under the Indian Arts and Crafts Act of 2010, the Indian Arts and Crafts Board may refer potential violations for investigation to all federal law enforcement officers — including those from Department of the Interior bureaus, and can work with federal law enforcement officers who uncover violations of the Act in the course of their regular duties. On March 1, 2012, the Indian Arts and Crafts Board signed a Memorandum of Agreement for investigative services with the Department of the Interior's U.S. Fish and Wildlife Service. Since that time, the Indian Arts and Crafts Board has officially referred 12 cases to the U.S. Fish and Wildlife Service Office of Law Enforcement to determine if further investigation is warranted.

Department Conference Policy:

34. **In April 2008, the Department of Justice's Financial Management Division issued a policy requiring special approval for all requests to hold "a predominately internal event in a non-federal facility" at, among other places, locations "known for gambling," "considered a tourist attraction or common vacation location," or "any resort facility or resort location."[6] Reno, Nevada and Lake Tahoe, Nevada were both specifically listed as examples of locations requiring special approval.**

It is my understanding that the Department has continued this policy in the current Administration.

I have been informed that because of this policy, some well-respected judicial training institutions, including the National Judicial College and the National Council for Juvenile and Family Court Judges, both located in Reno, Nevada, have had difficulty obtaining approval to host essential training events in their own backyard. This policy leads to needless extra cost to the taxpayer and to these institutions, as they must scramble to secure, to travel to, and to host an event at a remote location not on the Department's list.

A. **Could you confirm that this special approval policy for certain conference locations is still in effect in your Department? If so, has it been reformed in any way?**

Response:

The Department recently issued DOJ Policy Statement 1400.01 "Planning, Approving, Attending and Reporting Conferences," which replaced the previous policy issued in April 2008. The new DOJ Policy Statement 1400.01 implements the requirements of Office of Management and Budget Memorandum M-12-12, "Promoting Efficient Spending to Support Agency Operations." The Department does not prohibit official travel to, or holding a conference or meeting in, any

[6] *See* U.S. DEPARTMENT OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, AUDIT DIVISION, AUDIT OF DEPARTMENT OF JUSTICE CONFERENCE PLANNING AND FOOD AND BEVERAGE COSTS, AUDIT REPORT 11-43, at App. III, pg. 87 (Sept. 2011, revised Oct. 2011), http://www.justice.gov/oig/reports/plus/a1143.pdf.

city or location. Section II.C of DOJ Policy Statement 1400.01 provides guidance on selecting locations. The specific language in Section II.C related to "resort locations" is as follows:

> Conference planners must exercise special care when considering holding a conference in any location that may give rise to appearance issues, such as a resort location. Conference planners must ensure that the choice to hold a conference in such a location is made only when there is a determination that it is the most cost-effective option, such as when the majority of conference attendees are stationed at or near the location.

B. If this policy is still in effect, would you consider making an exception to the policy for those institutions that are headquartered in special-approval locations and that desire to hold essential meetings or conferences in their home city?

Response:

The Department believes that the new DOJ Policy Statement 1400.01 addresses these concerns.

QUESTIONS FROM REPRESENTATIVE JERROLD NADLER

35. **You issued a memo on September 23, 2009 setting forth policies and procedures governing the executive branch's invocation of the state secrets privilege (the "state secrets memo"). That policy requires your personal approval for the Department to defend assertion of the privilege in litigation.**

A. **In how many cases (since September 2009) have you approved invocation of the privilege?**

Response:

Some matters involving classified or sensitive information may need to be litigated under seal, and thus it should be noted that it may not be possible or appropriate for the Department to indicate the precise number or names of matters in which the Attorney General has approved the Department's defense of an invocation of the privilege. With that understanding, since the September 2009 policy was issued, the Attorney General has approved the Department's defense of an assertion of the state secrets privilege under that policy in the following six cases:

Shubert, et al. v. Obama et al. (07-cv-00693) (N.D. Cal.)

Al-Aualqi v. Obama, et al. (10-cv-1469) (D.D.C.)

Fazaga et al. v. Federal Bureau of Investigation et al. (SA11-cv-00301) (C.D. Cal.)

Roule v. Petraeus, (10-cv-4632) (N.D. Cal.)

Jewel, et al. v. Obama, et al. (3:08-cv-04373) (N.D. Cal.)

Ibrahim v. Department of Homeland Security, et al. (3:06-cv-0545) (N.D. Cal.)

B. **Where you have approved the privilege, have you ever referred allegations of wrongdoing raised in the case to an Inspector General of any agency or department for investigation (as is contemplated by the policy)?**

Response:

Please see response to question 35(B)(iii), below.

i. **If so, how many cases?**

Response:

Please see response to question 35(B)(iii), below.

ii. **What have been the results of those IG referrals and have you shared those with Congress? Will you share them with this Committee?**

Response:

Please see response to question 35(B)(iii), below.

iii. Where you have not referred it to an Inspector General, what evidence have you required to conclude that the allegations of wrongdoing are not credible?

Response:

Under the September 2009 policy, the Department of Justice will not defend an invocation of the state secrets privilege in order to (i) conceal violations of the law, inefficiency, or administrative error; (ii) prevent embarrassment to a person, organization, or agency of the United States Government; (iii) restrain competition; or (iv) prevent or delay the release of information which would not reasonably be expected to cause significant harm to national security. If the Attorney General concludes that it would be proper to defend invocation of the privilege in a particular case, but the case raises credible allegations of government wrongdoing, the Department will refer those allegations to the Inspector General of the appropriate department or agency for further investigation, and will provide prompt notice of the referral to the head of the appropriate department or agency.

The Department's policy is not to disclose referrals made to Inspectors General regarding possible misconduct of employees of other agencies or referrals to the Department's Office of Professional Responsibility. Consistent with that policy, we could not provide the number of cases, if any, that may have been referred to an IG pursuant to the Department's policy on the state secrets privilege. However, to the extent IG investigations are undertaken, the Government typically has released public versions of final IG reports.

C. In how many cases/instances have you disapproved of invocation of the privilege?

Response:

In a circumstance in which the Attorney General were to not approve the Department's defense of a state secrets privilege assertion, deliberations within the Executive Branch on such a matter should remain confidential because there may be various reasons why, in the context of ongoing litigation, the Department might decline to pursue a privilege assertion (for example, to pursue alternative grounds for dismissal or settlement of a case).

36. The state secrets memo indicates that the Department will provide "periodic reports" to "appropriate oversight committees" with respect to all cases in which the privilege is invoked.

A. How many periodic reports have been filed and with which committees?

Response:

The Department submitted its first periodic report on April 29, 2011, to the House and Senate Judiciary and Intelligence Committees. This is the only report submitted to date. We expect a second report to be submitted in the near future.

B. Please provide copies of all such reports to the House Judiciary Committee. To the extent you object to doing so, please provide the basis for that objecting, including an explanation of why these reports, which involve the invocation of an evidentiary privilege in Article III courts, do not fall within the Judiciary Committee's oversight jurisdiction.

Response:

The April 2011 report was provided to the Committee.

37. You do not indicate in the state secrets memo whether this Administration will agree to judicial review of the basis for invoking the privilege. The prior Administration took the position that information could not even be disclosed in camera to an Article III judge, thus ensuring that there was no judicial review of whether the privilege had been properly invoked.

What is your position as to judicial review of the information that the government seeks to withhold in two key respects:

A. Can a judge review the allegedly privileged information?

Response:

As set forth by the Supreme Court, the law governing the state secrets privilege does not require that the Executive Branch submit classified information subject to the privilege to the district court with a state secrets privilege assertion. *See Reynolds v. United States*, 353 U.S. 1, 10 (1953) ("It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers."); *see also id.* at 8 (courts must decide a state secrets privilege "without forcing a disclosure of the very thing the privilege is designed to protect"). In some instances, the privilege can properly be asserted by describing the privileged information in unclassified terms alone.

However, as the Department's April 2011 report indicates, the Executive Branch has committed to continue its practice of supporting any invocation of the privilege with detailed evidentiary submissions that provide a firm foundation for the court to evaluate whether the Government has demonstrated a risk of significant harm to national security. The Department recognizes that courts have an essential and independent role to play in reviewing the Executive Branch's assertion of the privilege and will continue to assist courts in carrying out their role.

Accordingly, it is the Executive Branch's normal practice to provide reviewing courts with declarations, solely for *in camera, ex parte review,* that describe the privileged information in classified terms so that the courts may rule based on a robust understanding of the information at issue and why disclosure would harm national security.

We do not believe your description of the position taken by the prior Administration is accurate. As the Department's 2011 report indicates, all privilege assertions pending when this Administration took office in 2009 were reviewed by a Task Force appointed by the Attorney General, and the Task Force concluded that, in each of the cases reviewed, the risk to national security was sufficiently significant, and the evidentiary submission made to the court to support the privilege was sufficiently strong, that invocation of the privilege was warranted and should be maintained. In addition, in each pending case evaluated by the Task Force, the Government had provided reviewing courts with lengthy, well documented classified submissions setting forth the information that the litigation threatened to expose, the national security interests at stake, and other relevant information. These factual submissions uniformly provided the court with an ample basis for understanding why the evidence in question could not be made public and why the claims and defenses at issue could not be litigated without causing significant harm to national security.

B. Can a judge disagree with the executive branch's decision as to whether the privilege is properly invoked?

Response:

Yes. *Reynolds* provides that "[t]he court itself must determine whether the circumstances are appropriate for the claim of privilege." *See* 345 U.S. at 8.

38. We have made several requests to you to allow us to review the Office of Legal Counsel memo that reportedly provides the legal justification for the lethal targeting of U.S. citizens who are terror suspects. Your Department has sought dismissal of cases seeking judicial review of lethal targeting by arguing, among other things, that the appropriate check on executive branch conduct here is the Congress and that information is being shared with Congress to make that check a meaningful one. Yet we have yet to get any response to our requests.

A. Will you commit to providing the memo?

Response:

As a general matter, the Department of Justice does not disclose confidential legal advice that it has provided. Nonetheless, the Administration has undertaken significant steps to accommodate the interests of the appropriate committees of Congress in the general subject of your question. The Department has provided Members of the Judiciary Committee with, and released publicly, a draft white paper that sets forth a legal framework for considering the circumstances in which the U.S. government could conduct a lethal operation directed against a U.S. citizen who is a senior operational leader of Al-Qa'ida or an associated force. In addition, the Attorney General made a public address at Northwestern University School of Law in March 2012 explaining that

framework, and several other administration officials have also made public remarks to help explain the legal framework that would apply in this area. As the Attorney General indicated in his address, in keeping with the law and our constitutional system of checks and balances, the Executive Branch regularly informs the appropriate members of Congress about our counterterrorism activities, including the applicable legal framework, and would of course follow the same practice where lethal force is used against U.S. citizens. As a general matter, the department or agency that engages in any particular counterterrorism activity is in the best position to explain the legal basis for that activity to its appropriate oversight committee. Consistent with that, it is our understanding that those departments and agencies involved in our nation's counterterrorism efforts regularly keep their appropriate oversight committees informed regarding those activities, including the legal basis for them.

Without confirming or addressing any particular program or operation, the President's recent decision to provide members of the Intelligence and Judiciary Committees with access to classified OLC advice related to the subject of the draft white paper was an extraordinary accommodation in the context of ongoing activities by the Executive Branch. The decision to share the advice on a limited basis was designed to accommodate the interest of those committees in the underlying subject matter of the advice while at the same time seeking to protect the sensitive and deliberative information contained in the documents.

B. Will you also commit to briefing interested Committee members?

Response:

See response to Question 38A, above.

QUESTIONS FROM REPRESENTATIVE NADLER AND REPRESENTATIVE COHEN

Medical Marijuana Prosecutions

39. In response to a question asked of you regarding the investigation and prosecution of persons by the Department of Justice (DOJ) for actions relating to medical marijuana, you said that DOJ limits its "enforcement efforts to those individuals [or] organizations that are acting out of conformity with State laws, or, in the case of instances in Colorado, where distribution centers were placed within close proximity to schools."

A. For each enforcement action DOJ has taken against persons or entities engaged in cultivating or selling medical marijuana in any jurisdiction in which medical marijuana is legal during your service as Attorney General, please provide information about the case, including the specific federal, state and/or local laws, regulations, and/or policies that allegedly were being violated. Please explain why in each enforcement action DOJ acted in the place of or instead of the applicable state and/or local law enforcement entity.

Response:

The U.S. Attorneys are the chief federal law enforcement officers in their districts, responsible for federal criminal prosecutions and civil cases involving the United States Government. The Controlled Substances Act (CSA) prohibits the manufacture, distribution, possession, and use of marijuana. Distributing marijuana for purported medical purposes is not a recognized exception to the Controlled Substances Act. *See United States v. Oakland Cannabis Buyers Cooperative*, 532 U.S. 483, 499 (2001). The Department of Justice has issued guidance regarding the enforcement of CSA in jurisdictions where marijuana cultivation and distribution is allowed for medical use. This guidance is in the form of memoranda by Deputy Attorney General James Cole on June 29, 2011 (the *Cole* memo) and by then-Deputy Attorney General David Ogden on October 19, 2009 (the *Ogden* memo). The *Cole* and *Ogden* memos reiterate that, while the Department generally does not focus its limited resources on seriously ill individuals who use marijuana consistent with applicable state law that purports to authorize its use for medical purposes, the Department has the authority to enforce the CSA against individuals and organizations that participate in the unlawful manufacturing and distribution of marijuana, regardless of whether such activities are permitted under state law.

With respect to specific enforcement actions, in the *Ogden* and *Cole* memos the Department of Justice has provided U.S. Attorneys with guidance about deploying resources to enforce the CSA as part of the exercise of the broad discretion that U.S. Attorneys are given to address federal criminal matters within your districts. Through this enforcement guidance, the Department seeks to have its U.S. Attorneys focus their limited prosecutorial resources on conduct that significantly impacts and damages their communities. Specifically, the guidance advised that prosecution of significant traffickers in illegal drugs, including marijuana, remains a core priority but, as noted above, that it likely was not an efficient use of resources to focus enforcement efforts on seriously ill individuals and their individual caregivers. The following

U.S Attorneys' Offices have engaged in criminal and civil enforcement actions in jurisdictions that have under consideration, or have implemented, legislation that would sanction and regulate the commercial cultivation and distribution of marijuana for purported medical use: the four districts in California, the District of Colorado, the District of Montana, the Eastern District of Washington, the District of Nevada, the District of Oregon, and the District of Rhode Island. The enforcement actions undertaken in these districts are a matter of public record.

A. Besides the instances you mentioned in your answer in Colorado, have any DOJ personnel cited any federal law or section of the federal code, such as 21 U.S.C. 860 (known as the *Drug-Free School Zones Act*) as a reason in communications with any persons or entities engaged in cultivating or selling medical marijuana in any jurisdiction in which medical marijuana is legal during your service as Attorney General that the business should or must close or otherwise cease doing business?

i. If the answer is yes, please detail each instance. How do such actions comport with your statement that enforcement actions only have occurred when persons or entities were acting out of conformity with state law? Why does DOJ believe 21 U.S.C. 860 is relevant to the authority of a medical marijuana business to operate when that provision only provides for enhanced penalties for violations of federal drug laws occurring too close to schools or other places children are likely to be?

Response:

Congress has emphasized the importance of a "Drug Free" zone around schools, and has enacted heightened penalties for drug trafficking within 1,000 feet of schools to protect children and young people. 21 U.S.C. § 860. The rationale behind the passage of 21 U.S.C., Section 860 in 1984, as amended in 1988, is directly applicable to the circumstance of marijuana distribution centers operating within close proximity to schools. The Controlled Substances Act of 1970 (CSA) had already created penalties for those who distributed or manufactured a controlled substance. However, Congress clearly believed that enhanced penalties should apply to those who violated the CSA within close proximity to children.

In conformity with this Congressional judgment, a number of USAO's have focused their prosecutorial resources on purported medical marijuana dispensaries near schools. For example, the U.S. Attorney for the Northern District of California has communicated that the USAO in her district will target for enforcement those dispensaries located within 1,000 feet of a school. The U.S. Attorneys in Colorado and the Western District of Washington have similarly referenced 21 U.S.C. § 860 in the communications from the USAO to the owners of marijuana dispensaries. Other U.S. Attorneys have also communicated this position through public court filings or announcements.

B. With respect to actions you mentioned in your answer in Colorado, taking enforcement actions against medical marijuana entities allegedly too close in proximity to schools, why in each action did DOJ decide to enforce federal

law when Colorado and the relevant localities, which had legalized medical marijuana, had chosen to allow these entities to operate legally?

Response:

As stated above, Congress has emphasized the importance of a "Drug Free" zone around schools, and has enacted heightened penalties for drug trafficking within 1,000 feet of schools to protect children and young people. 21 U.S.C. § 860. In addition, the *Ogden* memo's list of aggravating factors justifying the use of federal law enforcement resources includes the distribution of marijuana to minors. Third, in Colorado, evidence has mounted that the easy availability of marijuana due to the proliferation of dispensaries has resulted in concrete harm to children, teens and young adults. And while the Department's actions in Colorado have taken place regardless of whether the particular dispensaries were in compliance with state law, Colorado's state law now prohibits the issuance of new licenses to dispensaries that are to be located on private land within 1,000 feet of a "school, an alcohol or drug treatment facility, or the principal campus of a college, university, or seminary, or a residential child care facility." CRS § 12-43.3-308(1)(d).

C. **For each future enforcement action by DOJ against persons or entities engaged in cultivating or selling medical marijuana in any jurisdiction in which medical marijuana is legal during your service as Attorney General, will you commit to making it clear to the public and Members of Congress both which specific federal, state and/or local laws, regulations and/or policies are allegedly being violated and why DOJ took action in the place of or instead of the applicable state and/or local law enforcement entity? Why or why not?**

Response:

As set out in the *Ogden* and *Cole* memos, the Department of Justice has publicly explained the factors it applies in determining whether to bring actions against marijuana traffickers. In any case brought, the legal filings themselves must, as a matter of law, set forth the federal laws alleged to have been violated. In some instances, those filings may also note violations of state or local law, but as the *Ogden* and *Cole* memos make clear, such violations are not required as a matter of law or policy for the Department to bring federal charges, whether civil or criminal.

QUESTIONS FROM REPRESENTATIVE SCOTT

Faith Based Initiative Questions

40. First I'd like to thank you for your responses to my questions for the record submitted after your last appearance before this Committee on December 8, 2011. We just received those responses earlier this month.

With regard to my questions about the Faith-Based Initiative, I want to thank the Department for finally admitting in no uncertain terms that notwithstanding federal statute explicitly prohibiting discrimination based on religion, this Administration does in fact permit discrimination based on religion with federal funds. So once again, now in the 21st century, an employer using government money can tell a job applicant – the most qualified job applicant – we don't hire your kind, even for a job paid for with taxpayer dollars.

On that note, I do have some follow up questions and clarifications about the process by which this discrimination is permitted.

The response the Department provided to explain the self-certification process seems very different from the "case-by-case" process as explained by Joshua DuBois, Special Assistant to the President and Executive Director of the White House Office of Faith-based and Neighborhood Partnerships. He said, "On the hiring issue, . . . [w]e will work with the White House counsel and with the Department of Justice, the attorney general, to fully explore that individual case and make a recommendation to the president. At the end of the day, he will determine what he thinks the best path forward is."[7] Mr. DuBois has explained that this process was put in place because "[t]he President has said that he wants to fully understand the legal and policy intricacies of this issue before making decisions. In the case of co-religious hiring . . . , he wants to fully examine the issues on a case-by-case basis before moving forward."[8]

A. Have you heard of the process Mr. DuBois describes?

Response:

The Attorney General has not had the opportunity to discuss this process that Mr. DuBois describes.

B. Are you or other components of the Department involved in the specific review that Mr. DuBois describes?

---

[7] *See* http://www.pewforum.org/Social-Welfare/Government-Partnerships-With-Faith-Based-Organizations-Looking-Back-Moving-Forward.aspx .

[8] *See* http://www.usaid.gov/our_work/global_partnerships/fbci/dubois_092209.html.

Response:

Mr. Dubois has not contacted the Department in regard to this process.

C. If the President wants to fully examine issues and fully understand the legal and policy intricacies, is the self-certification process employed by the Department robust enough?

Response:

The self-certification process is consistent with current policies interpreting the Religious Freedom Restoration Act (RFRA). Any certification submitted to the Office of Justice Programs (OJP) in support of a grant application is subject to 18 U.S.C. § 1001 and 42 U.S.C. § 3795a. Because a false certification is subject to criminal penalties under those statutes, OJP relies on the certifications in the ordinary course of business. The penalties proscribed in those statutes provide a reasonable and sufficient predicate for OJP to rely on the RFRA certifications as prima facie evidence of what they certify; however, when credible evidence comes to the attention of OJP indicating that a certification may be false or inaccurate, OJP may look behind the certification to ascertain the truth of the facts certified.

41. The response by the Department refers to an OJP policy that allows for case-by-case review. I believe that policy is laid out in a document dated October 2007. That document states that "exemptions should be granted" if the religious organization applying for funds certifies the three statements set forth in the document, "unless the funding entity has good reason to question the certification."

A. Is such an exemption granted only for the duration of the funding agreement with the Department? Or is the exemption standing, so that if a faith-based organization is granted an exemption once it could apply for other grants without submitting a new certification?

Response:

The exemption, which is made pursuant to current policies interpreting the Religious Freedom Restoration Act, is granted only for the duration of the award.

B. I read this process as a self-certifying process and the funding agency can only deny a request to discriminate if it "has good reason to question the certification." Is that your understanding of the policy or is there an actual review?

Response:

The Department reserves the authority to revoke an exemption made pursuant to its October 2007 policy statement interpreting the Religious Freedom Restoration Act if there is sufficient reason to question the certification upon which the exemption is predicated.

C. If there is an actual review, who receives the certification and makes a determination? And on what basis is the certification reviewed and the determination made? In other words, what are the standards applied to such a review, as separate and distinct from the standards or statements of certification?

Response:

Any certification submitted to OJP in support of a grant application is subject to 18 U.S.C. § 1001 and 42 U.S.C. § 3795a. Because a false certification is subject to criminal penalties under those statutes, OJP relies on the certifications in the ordinary course of business. The penalties prescribed in those statutes provide a reasonable and sufficient predicate for OJP to rely on the RFRA certifications as prima facie evidence of what they certify; however, when credible evidence comes to the attention of OJP indicating that a certification may be false or inaccurate, OJP may look behind the certification to ascertain the truth of the facts certified.

D. If there is no such review, then why does the Administration claim a case-by-case review process? If there is no such review, then can't anyone claim the exemption with no review and no repercussions?

Response:

Please see the response to 41(C), above.

E. Please clarify whether the eight faith-based organizations that submitted certificates to OJP in FY2008 were *granted* exemptions? Was there a review before the exemptions were granted?

Response:

The organizations were granted exemptions. Please see the response to 41(C), above.

F. Have any requests for exemptions been received since FY2009? If so, please provide details about whether the exemptions were granted and any review or process completed by the Department pertaining to those requests for exemptions.

Response:

The chart below lists the six organizations that have provided the Department (specifically, the Office of Justice Programs) with certificates of exemption since FY 2009.
No certificates of exemption have been provided to the Department since November 2009.
Each of the listed awards is a congressionally directed award.

OJP Grantee	Date of award	Date on certificate	Amount of award
Detroit Rescue Mission Ministries	9/8/2008	9/25/2009	$ 469,533

Long Island Teen Challenge	9/15/2008	9/28/2009	$ 44,717
Denver Rescue Mission	9/8/2008	11/23/2009	$ 268,305
Straight Ahead Ministries	9/17/2008	4/14/2009	$ 89,435
World Impact, Inc.	9/15/2008	9/16/2009	$ 268,305
World Impact, Inc.	9/2/2008	9/16/2009	$ 67,076
World Impact, Inc.	9/18/2009	9/16/2009	$ 200,000
Indiana Teen Challenge, Inc.	9/15/2008	9/27/2009	$ 89,435
Indiana Teen Challenge, Inc.	9/16/2009	9/27/2009	$ 50,000

42. Regarding the legal authority to discriminate and its requirements and limitations:

A. What notice are job applicants required to be given that anti-discrimination laws do not apply for a particular job opening?

Response:

No notice is given because the antidiscrimination laws do apply; however, where the provisions of the Religious Freedom Restoration Act apply, they control.

B. If it is not illegal to discriminate, what if any recourse and remedy does a victim of discrimination have?

Response:

Please see the response to 42(A), above.

C. Does an entity need "certification" to discriminate? What authority does the Department have to require certification as a condition to discriminate? Why is certification necessary? Under current law, a faith based organizations using its own money may discriminate and may use its status as a faith based organization as a defense in court. Why is the process different when a faith based organization is discriminating using federal taxpayer dollars?

Response:

Please see responses to 41(C) and 42(A), above.

The Pardon Process

43. Thank you for your responses we received on June 5, to questions for the record concerning the December *Washington Post* article about potential bias in recommendations to the President about pardon applications. The story found that

white applicants were four times as likely as applicants of color to receive presidential pardons. You assured us that you were undertaking a statistical study and making changes such as instituting an office diversity policy, Spanish language materials and a frequently asked questions section for the website. "These changes," you wrote, "reflect the Department's commitment to the integrity of the executive clemency process, and to the equal and fair evaluation of all applicants." The December *Washington Post*/ProPublica series recounted disturbing evidence that appears to point to racial disparity in the granting of pardons. How will the measures you outlined in your June 5 response address this problem?

Response:

The statistical study the Department is commissioning will review the pardon recommendation process in a thorough and careful manner. It will seek to assess the full range of important criteria that are considered in evaluating the merits of pardon petitions, including those that were not accounted for in the ProPublica analysis cited by *The Washington Post*, in an effort to determine whether evidence of a racial disparity in the recommendation process exists. The additions to the Office of the Pardon Attorney (OPA) website described in the Department's June 5, 2012, response are intended to ensure that all clemency applicants understand the executive clemency process and how their petitions for relief will be evaluated by OPA staff as part of that process. On a separate but related note, the diversity policy adopted by OPA demonstrates the office's commitment to hiring and retaining a staff that reflects the diversity of our society and its broad and varied experiences.

A. **You mentioned in your responses that the *Washington Post*/ProPublica accounts alleging racial bias in pardon grants did not control for, among other things, expressions of remorse and candor. The grant outcome suggests that whites may be four times as remorseful and candid as people of color. Will your statistical study be controlling for and/or examining how expressions of remorse and candor correlated with race?**

Response:

Please see response to question 43, above. These factors, among others, will be examined as part of the aforementioned study.

B. **You mentioned that first among the things the OPA looks for in a clemency candidate is the severity of the sentence. Sentences are often excessive and unduly severe. Given this shared concern, I wonder whether you were struck, as I was, by the fact that of the thousands of applications for commutation made between 2001 and 2009, only 6 received positive recommendations from the Pardon Attorney. Even given a totality of the circumstances approach, are you concerned about the paucity of positive recommendations during the latter period continuing up to now and, if so, how would you propose to increase the number of favorable recommendations?**

Response:

As the Department indicated in its June 5, 2012, response, the standards for considering petitions for commutation of sentence include such factors as disparity or undue severity of sentence, among others. Since the development of the Department's clemency recommendations falls within the deliberative process privilege, the Attorney General is not at liberty to discuss specific clemency recommendations made by OPA. However, as a point of clarification, the number of favorable recommendations cited in your question is inaccurate and understates the number of such recommendations made by OPA between 2001 and 2009. The Attorney General expects that OPA fairly applies the well-settled standards for evaluating applications for commutation of sentence in developing the Deputy Attorney General's recommendations to the President for disposition of such clemency petitions. Indeed, the Department's Office of the Inspector General recently concluded a detailed audit of the procedures by which OPA processes executive clemency applications and concluded, among other things, that OPA employs a reasonable approach in investigating the merits of clemency applications and developing its recommendations. It should also be noted that as a general matter, commutation of sentence is considered to be an extraordinary remedy that is rarely granted, as OPA's website explains to potential applicants. This fact is demonstrated by the small number of such grants by successive Presidents over a period of more than 20 years prior to the administration of President George W. Bush. Specifically, President Carter granted 29 commutations, President Reagan granted 13 commutations during his two terms, all of which were issued between FY 1982 and FY 1985, and President George H.W. Bush granted three commutations during his administration. While President Clinton granted a total of 61 commutations before leaving office, only three were granted during the first six years of his administration (between FY 1993 and FY 1998).

44. A story published by the *Washington Post* in collaboration with the investigative journalism organization, ProPublica on May 13, 2012 contained allegations that the Pardon Attorney misled the President of the United States about support for a clemency petitioner, Clarence Aaron. Specifically, the account stated that the Pardon Attorney so misrepresented the support for Mr. Aaron that Kenneth Lee, the attorney responsible for handling the case at the White House Counsel office, said that the Pardon Attorney had "presented the views of [U.S. Attorney Deborah] Rhodes and [the sentencing judge, Charles] Butler "in the least favorable light to the applicant." The article states, "[h]ad he read the statements at the time, Lee said, he would have urged Bush to commute Aaron's sentence."

A. In light of your stated commitment to a fair evaluation and an office that operates with integrity, what steps are you taking, or plan to take, to investigate the allegations about the Office of the Pardon Attorney's handling of this case and its recommendation to the President?

Response:

The Department's Office of the Inspector General conducted an investigation of this matter and issued its report on December 18, 2012. We are also taking steps to ensure fairness in the process through the statistical study we have commenced, as described in question 43, above.

B. In light of the allegations that the President was misled by the Pardon Attorney as to the support for Clarence Aaron's commutation, what steps do you plan to take to investigate denials in what might be other deserving applications for commutation that have received negative recommendations from the Pardon Attorney?

Response:

Please see the response to question 44(A), above. It bears noting that a federal prisoner whose commutation application has been denied becomes eligible to reapply for executive clemency one year from the date on which the President denied his prior request, and is free to do so once that waiting period has expired.

C. Given that the President of the United States is the institutional client of the Pardon Attorney and given that an attorney has a professional obligation to be forthcoming and truthful in dealings with a client, will you direct an inquiry into the Pardon Attorney's actions by the Office of Professional Responsibility in addition to any other investigative actions?

Response:

Please see the response to question 44(A), above.