

**OVERSIGHT OF THE  
FEDERAL BUREAU OF INVESTIGATION**

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**HEARING**  
BEFORE THE  
**COMMITTEE ON THE JUDICIARY**  
**UNITED STATES SENATE**  
ONE HUNDRED THIRTEENTH CONGRESS

SECOND SESSION

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MAY 21, 2014  
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# OVERSIGHT OF THE FEDERAL BUREAU OF INVESTIGATION

WEDNESDAY, MAY 21, 2014

UNITED STATES SENATE,  
COMMITTEE ON THE JUDICIARY,  
*Washington, DC.*

The Committee met, pursuant to notice, at 10:03 a.m., in Room SD-226, Dirksen Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Leahy, Schumer, Durbin, Whitehouse, Klobuchar, Coons, Blumenthal, Grassley, Hatch, Sessions, Graham, Cornyn, Lee, Cruz, and Flake.

## OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Chairman LEAHY. Good morning, everybody. Today the Judiciary Committee welcomes James Comey for his first appearance before this panel as Director of the Federal Bureau of Investigation.

Director Comey, it is good to have you here. You have had a very busy time since your confirmation last year. And I remember you said last year at your confirmation hearing that your wife told you she did not think you were going to be chosen for this job. But now you are 8 months into the job, and I hope both you and she are happy with the choice.

One of the challenges I have long observed is the FBI's need to balance its focus on counterterrorism with its commitment to long-standing law enforcement functions—the kind of law enforcement functions most of us grew up knowing. And, Director Comey, I urge you to make sure that the investigations and prosecutions are targeted and fair, and that respect for civil rights and civil liberties is upheld.

A critical tool in successful and fair prosecutions is forensic evidence. Now, we see on reruns of “Law and Order” that the DNA is automatically there and that solves the case. Well, as you know from your own experience in law enforcement, DNA analysis is not widely available, and its application does not solve the crime within the 60 minutes allotted to a television program.

There are two bipartisan bills, the Justice for All Reauthorization Act and the Criminal Justice and Forensic Science Reform Act, that would help prosecutors identify and prosecute the guilty.

While advanced technology presents the FBI with new opportunities to bring criminals to justice, it can also raise significant civil liberties challenges. Drones, for example, offer new capabilities as

a domestic investigative tool, but they also raise some serious privacy concerns. And Vermonters remind me every day, especially on weekends like this past one when I was home, of my responsibility to ensure that we protect our national security and our civil liberties. I think, Director, from having known you for years, you believe in both—protecting our national security and our civil liberties.

You are no stranger to this struggle. It was before this very Committee, in 2007, that you described a hospital bedside confrontation with senior White House officials who were urging an ailing Attorney General John Ashcroft to reauthorize an NSA surveillance program that the Justice Department had concluded was illegal. As Deputy Attorney General, you showed independence by standing firm against this attempt to circumvent the law.

Right now Congress is still dealing with the surveillance programs begun during the last administration, including a bulk collection program that acquires Americans' phone records on an unprecedented scale. I am glad the House of Representatives is poised to act on a revised version of the USA FREEDOM Act. But I remain concerned that some important reforms in that Act were removed, and I hope you will work with me as the Senate takes up this important issue and also as we look at ways to address the critical cybersecurity concerns facing our Nation.

Although we face many threats from abroad, the FBI has a key role in preventing and punishing extremist violence here at home. In 2009, I was proud to offer the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act as an amendment to the defense authorization bill. The FBI's implementation of that law has involved collaboration with the Anti-Defamation League to train State and local law enforcement agencies to protect the civil rights of all Americans, and I applaud the FBI for doing that.

So I look forward to learning more about those efforts and other priorities of the Bureau during today's hearing. I thank Director Comey for joining us for his first oversight hearing. I thank the men and women who work hard every day to keep us safe.

We can talk later, but you are also about to have in your training program one of the Capitol Police whom I have gotten to know because he has been part of the President Pro Tem protective detail, an excellent person.

[The prepared statement of Chairman Leahy appears as a submission for the record.]

With that, I will yield to Senator Grassley.

**OPENING STATEMENT OF HON. CHUCK GRASSLEY,  
A U.S. SENATOR FROM THE STATE OF IOWA**

Senator GRASSLEY. Welcome to your first oversight hearing, and I know you have been in office 10 months, and obviously a lot of things I talk about precede your takeover, and my hope is that you can help us get to the bottom of some of these things.

But, first of all, I thank you and your organization for helping us and protecting the American people from so many different threats.

Unfortunately, I must start, as I often do when the FBI Director is before this body, by pointing out that it was only on Monday that we received answers to our questions for the record from our last FBI oversight hearing 11 months ago. In addition, the answers we received are marked current as of August 26, 2013, so that means they have been laying around the big black hole of the Justice Department after the FBI forwarded them, I presume for approval. And I do not know why it takes so long when the FBI had gotten them there on August 26th that we just now received them.

I told the Attorney General in January when he appeared for oversight without having responses to the previous year's hearing questions that that is not acceptable.

In addition, when we met before Director Comey's confirmation, I provided the Director, the new Director, with a binder of all the letters and questions for the record still pending with his predecessor. The FBI has a pretty dismal record of responding to questions.

I wish I could say that all of those unanswered issues have been fully dealt with, but they have not. However, I would like to commend Director Comey for recently beginning to make an effort to improve the FBI's level of communication with my office and, for that matter, I hope all offices that contact you. Ignoring my questions does not make them go away. They need to be answered fully and completely, and in good faith.

Now, as we turn to FBI priorities, counterterrorism rightfully remains at the top. Since the September 11 attacks, the wall between intelligence and criminal cases has come down, and I think it is fair to say our country is safer as a result. Does more need to be done? I am not prepared to discuss that, but I assume that there can be improvement.

I am glad Congress is now in the process of considering reforms to some of the national security legal authorities, even as the President keeps changing his view about what is needed to keep us safe. However, Director Comey pointed out in the press a few months ago that some of these reforms would actually make it harder for the FBI to do terrorism investigations than even bank fraud investigations. I hope we will have the opportunity to discuss that topic today. At least those types of reforms seem unwise.

Of course, the threats to our Nation are broader than just terrorism. Cybercrime of all types is on the rise, as last week's events illustrate. I applaud the FBI's efforts to hold the Chinese Government accountable for stealing the trade secrets of U.S. companies and, consequently, American jobs.

I also congratulate the FBI on its work to hold the developers of Blackshades accountable for unleashing a computer program that can steal users' passwords and files, as well as activate their webcams, all without that person's knowledge. Crimes are increasingly high-tech, and the tools available to the FBI to combat them must be as high-tech as well. In many cases, these tools have at least the potential for misuse that could jeopardize the privacy of innocent Americans.

I hope to discuss the Department of Justice Inspector General's recommendation that the FBI develop special privacy guidelines concerning drones. I would also like to inquire about a proposal by

the Department of Justice that would make it easier for the FBI to hack into computers for investigative purposes.

Despite the FBI's external successes, I find its internal lack of cooperation with the Inspector General troubling. According to the Inspector General, the FBI has significantly delayed his office's work by refusing to turn over grand jury and wiretap information when he deems it necessary for one of his reviews. As you know, the Inspector General Act—it is very clear—authorizes the Inspector General to access these records.

However, the Inspector General informed me just last week, and I quote, "All of the Department's components provided ... full access to the material sought, with the notable exception of the FBI." According to the IG, "the FBI's position with respect to production of grand jury material ... is a change from its longstanding practice."

As a fact, from 2001 through 2009, the FBI routinely provided this information to the Inspector General. So I would like to know why the FBI has been stonewalling the IG and what changed after 2009 to cutoff the flow of information from the FBI.

In addition, I have questions about the status of the Justice Department's report on the FBI's whistleblower and anti-retaliation procedures. Nineteen months ago, President Obama issued a Presidential Directive related to the FBI's whistleblower procedures. It directed that the Attorney General produce a report within 6 months on how well the FBI follows its own whistleblower and anti-retaliation procedures. That report was also to examine the effectiveness of the procedures themselves and whether they could be improved.

The AG's report is now more than a year overdue, which, once again, I have to say is unacceptable. The FBI is in dire need of an update to these provisions. For years, I have asked the Bureau about specific whistleblowers who came to my office, going back to Fred Whitehurst in the 1990s. Time and again, I have heard from whistleblowers that the FBI procedures are an ineffective protection against retaliation.

When the Attorney General's report did not come out at the 6-month mark, I also asked the Government Accountability Office to look at this same issue. The FBI needs to cooperate with the GAO on its review.

Finally, as Director Comey points out in his testimony, the FBI is actively investigating wrongdoing and getting results every day. That is why it is so perplexing to hear nothing at all from the FBI concerning its investigation into the targeting of Tea Party groups by the Internal Revenue Service.

It has been just about a year since that investigation was opened. I hope we will have the time today to talk about the status of that investigation.

Thank you very much, Director Comey, for coming, and thank you, Mr. Chairman, for the hearing.

[The prepared statement of Senator Grassley appears as a submission for the record.]

Chairman LEAHY. Thank you.

Director Comey was sworn in as the seventh Director of the FBI on September 4, 2013. He has also served as Deputy Attorney Gen-



eral at the Department of Justice, as U.S. Attorney for the Southern District of New York.

Director Comey, I am delighted to have you here.  
Please go ahead, sir.

**STATEMENT OF HON. JAMES B. COMEY, JR., DIRECTOR,  
FEDERAL BUREAU OF INVESTIGATION, U.S. DEPARTMENT  
OF JUSTICE, WASHINGTON, DC**

Director COMEY. Thank you, Mr. Chairman, Senator Grassley, Senators. Let me start by thanking you for your support of the people of the FBI. When I became Director, one of the great stresses on the organization was the impact of sequestration, and especially the vacancies that was leaving around the country. And thanks to you, we now have the resources to rehire to fill those positions to be the national security and law enforcement organization that we need to be.

Mr. Chairman, as you noted, national security remains our top priority, counterterrorism and counterintelligence, for reasons that make good sense. I want to start, though, today by offering just a few thoughts about cyber because it has been much in the news, and it is something that touches everything the FBI is responsible for.

I try to explain to folks that cyber is not a thing, it is a vector; that is, because we as Americans have connected our entire lives to the Internet—it is where our children play, it is where our banking is, it is where our health care is, it is where our critical infrastructure is, it is where our Nation's secrets are, and soon it will be where your refrigerator is and where things you wear are and your car is. Because we have connected our whole lives there, the people who would do us harm in all aspects of our lives, that is where they come—for our children, for our secrets, for our money, for our identities, for our infrastructure. And so it cuts across every responsibility the FBI has.

I was in Indiana recently, and someone was reminding me of the great vector change of the last century that changed the FBI, and it was the combination of asphalt and the automobile that introduced a new kind of crime to this country where criminals could travel very quickly great distances and do a lot of bad things in the same day. So it was very important to have a national resource to respond to that. I was reminded of it while the Hoosiers were talking to me about John Dillinger, and I said in response that John Dillinger could not do a thousand robberies in the same day in all 50 States in his pajamas halfway around the world.

That is the challenge we now face with the Internet. It is a challenge that we in the FBI are trying very hard to respond to, to attract, retain, and train great people, to give them the technology they need, to build the relationships with the private sector that are vital to us respond to this threat, and to help our partners in State and local law enforcement get the training and equipment they need to respond because it touches all their responsibilities.

You saw this week two of the products of that work that both illustrate the hard work being done and the scope of the challenge we face with the indictment of the five Chinese hackers and the

charging of people all over the world in collaboration with 18 different law enforcement organizations. The challenge we face through cyber is that it blows away normal concepts of time and space and venue and requires us to shrink the world just the way the bad guys have. Both of these cases illustrate our commitment to reach around the world to make clear to people that we are not going to put up with this; that although this cyber neighborhood has become dangerous, we are going to treat these burglaries for what they are, we are going to treat them as seriously as we would someone kicking in your door to steal your stuff, to steal your ideas, to steal your identity. So we are working very, very hard to make sure that is a priority and that we work across the Government to respond to that.

I will mention just briefly counterterrorism is something that I know this Committee knows very well. I continue to focus a great deal of attention on al Qaeda and especially the offspring of al Qaeda. Its progeny throughout the Middle East and Africa are virulent and bent on doing great harm to Americans abroad and here at home.

I am particularly concerned about the confluence of that virulence among the progeny of al Qaeda and Syria, an opportunity that is attracting droves of jihadis to come to Syria to learn new things, build new relationships, and then most dangerously of all, at some point to flow out of Syria. There will be a terrorist diaspora out of Syria, and those of us—and I know everyone on this Committee remembers well the diaspora that we faced out of Afghanistan after the jihadi involvement with the Soviets there in the 1980s, a diaspora that you can connect directly to 9/11. We in law enforcement, national security, and the intelligence community are determined not to allow lines to be drawn between an outflow from Syria and future 9/11s.

And, of course, one of the big changes that I have encountered coming back to Government after nearly a decade away is the emergence of the homegrown violent extremists in the United States, those people who can be inspired by al Qaeda to kill innocents without having to be directed because the Internet, again, offers them access to poisonous information both to inspire them and to tell them how to carry out the attacks they wish to carry out.

In this forum I cannot say much about counterintelligence. It remains a huge part of our work, largely in the shadows. You saw a reflection of it, though, in the work we did to produce the indictments this week. Our counterintelligence mission remains at the forefront of our work, again, because we face nation states that are determined to steal our information and because they are able to do it through the vector that I mentioned.

And, of course, as I said, we are a national security and law enforcement organization, a combination that makes very good sense to me. And so on the criminal side we are working public corruption and white-collar crime and protecting kids and fighting gangs and violence all over this country and all over the world to great effect.

The last thing I will say is I worry a bit in the wake of recent disclosures and conversation over the last year about Government surveillance, that it is hard for me sometimes to find the space and

time to talk about what I do and why I do it. I believe people should be suspicious of Government power. I am. I think this country was founded by people who were worried about Government power, and so they divided it among three branches.

I think people should ask me: "What are you doing and why?" And I hope I can find the space and time to talk about it, to explain why I need the ability to execute lawful court orders to intercept communications, why, for example, I need the ability to track a bad guy through the cell phone, cell tower locations, because it helps me save children, rescue kidnap victims, and a number of other things.

There is an angel in those details involving the courts and Congress and tremendous amounts of oversight and responsible use of authorities. It is hard for us sometimes in the current wind storm to find that space and time, but I am determined to do that.

And let me close, again, just by thanking you. The magic of the FBI is its people. We do not have a lot of stuff. We do not have aircraft carriers, planes, satellites. We have got amazing folks working national security and criminal work all over this world 24 hours a day. That is the great joy of my work, to be able to see them and touch the work that they do. And I know you feel the same way, and we are very grateful for the support. And I look forward to answering your questions.

[The prepared statement of Director Comey appears as a submission for the record.]

Chairman LEAHY. Thank you very much. And listening to you, I was struck by a number of things that I would like to ask you that I can only ask when we are briefed on in classified sessions. And it may make sense not so much as a hearing, but it is just a general briefing, to find a time when you and those Senators on both sides of the aisle that are interested could meet in a secure room and go over some of these issues. Would you be open to that?

Director COMEY. I certainly would.

Chairman LEAHY. Thank you.

Now, you also talked about cybersecurity, which is something that has worried me and others considerably. There is no question your example of a Dillinger today could be sitting offshore, in fact, and steal huge amounts of money.

Earlier this week the Department of Justice indicted five Chinese military operatives for stealing trade secrets from American companies. Several of us were at the White House last night and discussed that, among other things. But the landmark case highlights the increasing threat that American businesses face from trade secret theft. We have seen the articles in the paper of everything from our steel companies to our high-tech companies.

We are trying to figure out a way to improve our trade secret laws. Last week the Subcommittee on Crime and Terrorism held a hearing in which the FBI testified. Several of our Members, from both sides of the aisle, are working on a legislative proposal. Can you elaborate a little bit on your efforts to curb trade secret thefts? And tell us, the tools that you now have, are they adequate?

Director COMEY. Thank you, Mr. Chairman. Yes, I agree very much with what you said. We face an enormous challenge, which was illustrated well on Monday by the indictment of the five Chi-

nese hackers, with a nation state engaging in theft. Why build it when you can steal it? And as I have learned both from my life in the private sector and from talking to the private sector in my time on this job, there are two kinds of big companies in the United States: those who have been hacked by the Chinese and those who do not yet know they have been hacked by the Chinese. So it is a problem that we are responding to with a lot of energy, working with a lot of partners across the Government.

I think in terms of statutory tools, as far as I can tell, I have the authorities that I need. The challenge of these cases is they are very resource intensive; they require expertise and technology and training, which is why I stress that I am focusing on those things.

Chairman LEAHY. The Committee discussed at length the National Security Agency's use of Section 215. We actually had hearings on that, when we considered the USA PATRIOT Act. So putting aside NSA's use of Section 215, the national security letters that you can use are based on the same relevance standard in Section 215, but they do not require judicial approval.

I would hope that national security letters are not being engaged in bulk collection. Can you confirm that the FBI does not use national security letters for bulk collections?

Director COMEY. Yes, sir, I can confirm that. We use them for the basic building block records of our most important investigations, counterintelligence and counterterrorism, but they are not used to collect records in bulk.

Chairman LEAHY. Do you have any intention of changing that and using them for bulk collections?

Director COMEY. None.

Chairman LEAHY. Thank you.

I understand you are planning to move the FBI's Directorate of Intelligence out of the National Security Branch and give intelligence and analysis to the Bureau as a whole, not just national security investigators. The only question I raise, these intelligence investigations, as you know, are often broader in scope. They may rely on expansive data collection. And so I am concerned about whether there are privacy and civil liberty questions if you use the intelligence-based approach to all investigations. Traditional domestic crime fighting may not benefit from such a shift. You acknowledge the agency's focus on national security has meant that some newer agents have not developed the basic criminal investigation skills necessary for more traditional crime solving.

So two steps. One, are you addressing civil liberties concerns in the process of this reorganization? And are you ensuring that this emphasis will not come at the expense of training agents to fulfill basic law enforcement?

Director COMEY. Yes, I can assure you of that on both counts. To start with the second piece first, I intend, now that I am able to hire new agents again, to ask—to direct that all new agents do criminal work at the beginning of their careers so they develop both the tools and techniques of law enforcement and also the mind-set. One of the great gifts of the FBI is that at our core is a respect for the rule of law and the Fourth Amendment and the Fifth Amendment and the Sixth Amendment. And there is nothing

like criminal work to drive that into the fiber of an agent, so I intend to continue that.

And absolutely, with respect to what I intend to do on the intelligence side, what I intend to do simply is just to make sure that we are using intelligence, whether it is criminal intelligence collected through interviewing informants or national security intelligence, in the appropriate way, with due regard, in fact, careful regard for civil liberties and the protections that we are so passionate about. To me, it is really about trying to make sure that my criminal investigators and my cyber investigators are being thoughtful and taking advantage of the same smart people and my intelligence analysts to be thoughtful about the work they do and to see what they might be missing in that work.

Chairman LEAHY. One last question, and I realize I have gone over time, but I mentioned this to Senator Grassley. Since 9/11, Federal prosecutors have successfully convicted more than 500 terrorism suspects in Article III courts. This week, Abu Hamza al-Masri was convicted in New York on terrorism charges. That is 500. We have had a small handful in our military commission system at Guantanamo, and that has been mired in all kinds of controversy.

The concern that came to my attention last month that military commission defense lawyers that are defending somebody at Guantanamo alleged that FBI agents interviewed a defense security officer who was part of the legal team representing one of the September 11th defendants and asked them questions about the defense team. I have a very serious concern, whether it is there or anywhere else, that the FBI would try to recruit somebody on a defense team.

Do you have anything you can tell me about this?

Director COMEY. It is a matter that I am aware of. I do not mean to hurt the feelings of my friends in the press, but their reporting is not always accurate. But—

Chairman LEAHY. No. Really?

Director COMEY. But because it is a pending matter, I cannot comment on it other than to assure you that we are being careful to make sure that the Commission, the judge in charge of the Commission is fully aware of the circumstances.

Chairman LEAHY. Okay. Well, let me suggest this: As this goes on, keep in touch with me, because—you were a prosecutor, I was a prosecutor. You know that if the prosecutor or any aspect of the prosecution team tried to infiltrate a defense team, that crosses a barrier that never should be crossed.

Director COMEY. The issue is one that I have dealt with throughout my career and take it as seriously as you do. Unfortunately, I cannot comment on the matter in particular.

Chairman LEAHY. Thank you.

Chuck.

Senator GRASSLEY. The first issue I am going to bring up probably goes back a long time before you were Director, but it happens that just last month I was approached by several female whistleblowers from the FBI. Each previously worked as a supervisor in FBI offices where the rest of her colleagues were male. These women allege that they suffered gender discrimination after obtain-

ing these positions and that they were retaliated against when they tried to report these abuses through the EEO process or other means.

One whistleblower claims that she was disciplined for allegedly being “emotionally unstable” and “unable to work with others” because she pointed out that her men’s size 40 hazardous material suit did not fit her.

Another whistleblower claims that she was denied a job for which she was ranked first out of six candidates because her male supervisors claimed that she was “emotionally fragile” following a divorce.

I am referring these whistleblowers to the Inspector General and asking him to determine whether these cases might be part of a pattern that the FBI needs to address.

So a very general question that I do not expect a long answer to: Will you make sure that the FBI fully cooperates with any IG review and that there is no further retaliation as a result of these allegations?

Director COMEY. Yes, absolutely. I am not familiar with the allegations, but yes is the answer.

Senator GRASSLEY. My next question, I want to ask you about terrorism and FISA, and I ask it because you are someone with a history of rigorous questioning of the constitutionality of the Government’s counterterrorism programs. So, Director Comey, in the debate over the reform of FISA, some are calling for changes to Section 702. This is the FISA provision that targets the electronic communications of foreigners outside the United States.

How valuable is Section 702 to the FBI’s counterterrorism mission? And do you have any concerns about whether it is legal and constitutional?

Director COMEY. It is extraordinarily valuable—and in this setting I cannot go beyond that—extraordinarily valuable to keeping the American people safe. And, second, I do not have concerns about its legality or constitutionality.

Senator GRASSLEY. My next question gets back to something I brought up in my testimony about the Inspector Generals Act that entitles that person to access to all Department records. That would be governmentwide. And then particularly relating to your Department, the PATRIOT Act requires the IG to review these records to ensure that the Department is not violating civil liberties of those being detained.

So leading up to my question, last November the Inspector General testified at a Senate hearing that the Department of Justice impeded his access to grand jury and wiretap information. In March I requested documents concerning this dispute. Last week the Inspector General provided documents showing that the FBI resisted providing records even though six other components within the DOJ have provided access to records when requested.

And, Mr. Chairman, I would like to have these IG things put in the record, if I could.

Chairman LEAHY. Without objection.

[The information referred to appears as a submission for the record.]

Senator GRASSLEY. It seems clear, Mr. Comey, from these documents that the FBI's refusal to cooperate started around 2010, obviously before you became Director. We do feel very strongly that from 2001 through 2009 the FBI provided the IG with routine access to these records. So I have three questions.

Obviously, this predates your time, but do you know what prompted this policy change back in 2010?

Director COMEY. I do not. In fact, I am not even aware that there was a policy change at this point.

Senator GRASSLEY. Okay. Second question: According to the Inspector General's office, the FBI's refusal to cooperate delayed his office's access to key information about Operation Fast and Furious for about 14 months. So, just generally, do you think that kind of delay is consistent with the IG's legal right to have access to records?

Director COMEY. I do not know the particular, but on its face it strikes me as far too long. I meet on a regular basis with the Inspector General because I think what he does is very, very important for all of us. And I am not aware of that particular issue. I remember him raising an issue with me about that we were cumbersome in our approval process for producing records, and I have asked the new General Counsel to make that much faster. But I do not know enough to comment on the particular.

Senator GRASSLEY. Okay. Well, the bottom line here is I am hoping that you could commit that the FBI will stop stonewalling the Inspector General. And, again, I know you have only been there 10 months. You do not know why it was changed, if it was changed. I think it was changed. And we just need this kind of cooperation both from the standpoint of the general IG statute as well as the protection of people's rights under the PATRIOT Act.

Director COMEY. Yes, I can commit we are not going to do any stonewalling while I am Director. I can commit to you I will find out more about this so that I can follow up on that.

Senator GRASSLEY. Thank you.

I have about 2 minutes left because the Chairman always gives me equal time. I understand that the Department of Justice is seeking to change the rules of criminal procedure to make it easier for the FBI to break into computers for evidence, especially in cases where the computer's physical location is unknown. I think that that is extraordinary power that I am not sure many Americans understand, and it creates concerns. I am at this point not saying it is wrong, but it ought to raise concerns.

So could you explain what this change would mean for the FBI, why it is necessary, and what safeguards are in place to make sure that the FBI is not unlawfully intruding in computers of innocent Americans?

Director COMEY. Yes, Senator, thank you. I will do my best. The most important thing for folks to realize is that the proposed change to this rule of Federal criminal procedure has nothing to do with changing the standard the FBI must meet before it can get a court order, a warrant to be able to search a computer. It still requires us to make a showing under oath to establish probable cause to believe that that device contains the evidence of a crime. Nothing changes that bedrock protection, and nothing will. This is

about which judge you have to go to. Given the nature of the challenge we face, as I said, that kind of does away with traditional notions of space and time, this is about trying to respond to the Internet threat by allowing judges in one jurisdiction to pass on that and to issue a warrant if the computer may not be in that jurisdiction at the time, may be in an adjoining jurisdiction.

So it is simply about what is, frankly, an arcane question of venue and not about the substantive protection that is so important to the American people.

Senator GRASSLEY. My time is up, but I would like to ask—I am going to submit a question on the EB-5 program and the FBI's investigation of it and also on a report on the need for drone privacy guidelines. And I would appreciate it if maybe you could put these questions ahead of the others that the Department has not answered yet.

Director COMEY. Okay.

[The questions of Senator Grassley appears as a submission for the record.]

Senator GRASSLEY. I yield.

Senator WHITEHOUSE [presiding]. Mr. Comey, welcome. Thank you very much for being here, and congratulations on a banner day for the FBI and the Department of Justice yesterday, between the Credit Suisse plea for facilitating tax cheating, the strong conviction of Abu Hamza in a Federal civilian court in New York City, and for the indictment of the Chinese Army officials, the PLA officials, on the cyber charges, particularly in light of the Blackshades takedown as well. Not every day is a great day in that line of work. Yesterday was a great day for you, for Attorney General Holder, for the Federal Bureau of Investigation, and for the Department of Justice. So congratulations to you, and congratulations particularly on the indictment of the Chinese military officials.

As you know, I have repeatedly pestered and hectorated Department of Justice and FBI witnesses about why the score was zero in terms of indictments on this issue while the administration was telling us that we were on the losing end of the biggest transfer of wealth through illicit means in history. And you have just put some very good points up on the board. There is predictable squawking from the Chinese that everybody spies on everybody and why should this be different. Could you explain why this is different?

Director COMEY. Yes, I have heard some of that same commentary, and I push back on the notion that this can somehow be dressed up as a national security matter. This is stealing, this is theft. This is not about one nation state trying to understand the actions of another nation state. This is about enterprise that does not have something, rather than building it, stealing it from somebody who devoted millions and millions of dollars to building it, and that employs lots and lots of people in this country to make those things. So rather than design it yourself or invent it yourself, it is being stolen. So to me, it is burglary. It is no different than if someone kicked in Alcoa's front door and marched out with file cabinets. It is the same thing.

Senator WHITEHOUSE. Thank you.



The other question I have been pursuing is how well organized we are for this cyber effort, which, as you have said, is a new vector of danger for the American public, and that we need to be adaptive in responding to.

You mentioned John Dillinger and the highway system provoking a change in the way we had to go at traditional crime, particularly the bank robberies that were the specialties of the gangsters of that era. It required more than just new attitudes. It actually required new structures. And you are now the head of one of those new structures, the Federal Bureau of Investigation that was stood up because highway patrols were being left at the State borders as Dillinger shot over the border and into another State.

Similarly, when aviation came to the world as a new science and as a new industry, the military had to change its structure. What began as a subset of the Signal Corps of the United States Army ultimately grew into the United States Air Force, an institution we are very proud of.

As I look at the Department of Justice and the FBI and I see CCIPS and CHIP, I see the National Security Division and Criminal, I see counterintelligence and criminal and cyber all working in this area, I appreciate the assurances that we have recently received—let me see if I can quote them here—that, “To better manage its ability to address cyber threats, DOJ has integrated its activities, responsibilities, and functions focused on countering cyber threats into a cohesive effort that fuses DOJ’s legal authorities, tools, and assets into coordinated action.” That a little bit begs the question of whether we are structured right, and there is a group called the Department of Justice Cyber Advisory Council that the FBI serves on. I am interested in the question of how we should structure ourselves looking forward to this continued vector being a continued danger, whether that is a topic that is being analyzed and discussed by that Department of Justice Cyber Advisory Council.

Director COMEY. I do not think I can speak to the Council because I cannot remember, sitting here, the details of it. I know it is being discussed an awful lot throughout the Government, and especially by me, because I am trying to figure out, given that it touches everything I am responsible for, from protecting kids to protecting infrastructure and our secrets, am I deployed and organized in the right way? And the answer is I think so, but it is one that I do not know enough about to give you a high-confidence answer right now.

Senator WHITEHOUSE. And conceivably even a high-confidence answer right now would not be the right answer 5 years from now or 10 years from now.

Director COMEY. That is right. The most important thing we can do is the kind of thing we are trying to do at the National Cyber Task Force, which is to get everybody who is touching this threat together at a table to share information and to make sure we are reacting in the right way to the different dimensions of this threat coming through the cyber vector.

Senator WHITEHOUSE. Thank you.

Next is Senator Cornyn.

Senator CORNYN. Director Comey, thank you for your service to the country, and thank you for your commitment to cooperate with this Committee and Congress as part of our responsibilities to conduct oversight. And that has not always been the case with the administration, but I appreciate the approach that you bring to it.

In your opening statement, you mentioned al Qaeda-inspired terrorism, and I know you are familiar, if not specifically, generally with the facts of the 2009 attack at Fort Hood, Texas, when Major Nidal Hasan shot and killed 13 people, injured a couple dozen-plus more. Do you agree with the intelligence community's assessment that Hasan was inspired by al Qaeda to conduct that attack?

Director COMEY. Yes, sir, based on everything I have read. Again, I was not in office at the time, but I have read about it since, and I do.

Senator CORNYN. I appreciate that straightforward answer. It seems almost obvious, but for some reason people want to call it "workplace violence" or other things that just strike me as flat wrong and misleading and a little bit of Orwellian talk.

Let me turn to the VA. I know we have all been shocked with the unfolding of revelations starting with, I guess, the Phoenix VA hospital with its secret waiting list that Senator Flake and Senator McCain have spoken out about their shock and dismay and concern.

There is a story today in the newspaper that says that the number of veterans' facilities being investigated for problems has more than doubled now to 26. In other words, each day that goes by, it seems like there is another revelation: allegations of destroying evidence, perhaps these secret waiting lists, people dying because they have not received the treatment that they are entitled to.

I know you agree with me that, to live up to our commitment to our Nation's veterans, we have got to do everything we can to get to the bottom of this and solve the systemic and perhaps cultural problems underlying the crisis. But to start with, we have got to get to the facts and get to the serious allegations and reports that have been made.

The VA's Acting Inspector General testified last week that his office was cooperating with Federal prosecutors in Arizona and the Public Integrity Section of the Justice Department to determine if any of this conduct warrants criminal prosecution. However, the gravity and growing scope of these allegations demands the expertise of your agency, of the FBI, obviously has to be part of that.

So let me just ask you—I would like to ask you three questions, and they are all related. So you can respond to each of them.

Are you willing to support the VA Inspector General's investigation? What assets does the FBI have that can be brought to bear in a matter of this nature? And some whistleblowers have come forward to report that evidence is being destroyed at VA facilities in spite of a request from Congress and an order by the VA to preserve that evidence. What can the FBI do to make sure that the evidence is not destroyed and that it is preserved for an appropriate investigation and perhaps further proceedings?

Director COMEY. Thank you, Senator. As of this morning, the FBI has not been asked to assist in any part of that investigation. Obviously, if we were asked, either by the VA or the Justice Depart-

ment, to assist, what we bring to bear are great people with experience in document-intensive, complex investigations. And as a former prosecutor and as Director of the FBI, I am always focused on making sure that evidence is preserved so there can be a fair evaluation of it. So destruction of evidence is something in a host of cases we take very seriously. But this particular matter we have not yet been asked to be involved with.

Senator CORNYN. And who would that request come from? From the Attorney General or from the VA or from the President?

Director COMEY. In my experience, it would typically come from, in this case, the VA IG to my special agent in charge in Phoenix, would be the usual route, could come from prosecutors at the Department of Justice asking us to help. And, obviously, if we are asked, we will do everything we can to assist.

Senator CORNYN. Well, I am sure you would agree with me we do not want to get too snarled up in the red tape and bureaucracy. The point is if you are asked by an appropriate authority, you will respond.

Director COMEY. Of course.

Senator CORNYN. Thank you very much.

Thank you, Mr. Chairman.

Senator COONS [presiding]. Thank you, Senator Cornyn.

Director Comey, thank you so much for your testimony today and welcome to your first oversight hearing with the Judiciary Committee.

Upon your review of FBI operations after taking the helm in September, I would be interested in your findings regarding the partnership between the FBI and State and local law enforcement. As the Co-Chair of the Law Enforcement Caucus with Senator Blunt, I have focused some of our conversation and efforts on the vital and valuable partnership between the FBI and between Federal law enforcement more broadly and State and local, and you both in prepared testimony and in your work I think have highlighted those valuable areas.

I would be interested in what you think are the most critical resources and programs that help advance that partnership and what you think we can do to better support that partnership with State and local law enforcement here in Congress.

Director COMEY. Great. Thank you, Senator. Yes, I agree very much the partnership we have with State and local law enforcement is vital to everything the FBI does and the country. There is nothing we do alone. That is one of the ways in which law enforcement has gotten so much better over my career. So from terrorism to protecting children to cyber, the task forces we have with State and locals are essential, and I have been making it my business in my 9 months on this job to travel the country and in I guess now about 30 different cities to speak to State and local law enforcement and say thank you, because we form these task forces and they give us their stars. Most people who do not know State and local law enforcement would think it might be like the expansion draft in football. You would cover your stars and send us people who are less than stars? No. They send us their stars. And so the partnership is vital across my responsibilities.

One thing I am hearing about consistently is a crying need for digital literacy training, cyber training for State and local law enforcement. It used to be you would execute a search warrant and actually find paper in a drug case or an assault case. Now you find a thumb drive, an iPad, and some device. They need help in becoming better cyber investigators.

So one of the things I am working on a lot is to try to get with the Secret Service, who does a terrific job on training, to see if we together can push training out to State and local law enforcement to help the 17,000 departments around the country whose folks are calling them for assistance and it needs digital literacy to respond.

Senator COONS. Well, thank you. And, Director, as you work your way around the country, if the 30 cities grow to 40 or 50 and Wilmington, Delaware, ever finds its way on to your list, I would be grateful. Federal law enforcement is playing an important role in helping us stand up an effective State and local response to what has been a dramatic increase in violent crime in my home community.

I also want to applaud your focus on intellectual property theft and on trade secret theft, both in your spoken and written testimony. I want to applaud the Bureau for securing five indictments against Chinese actors that stole trade secrets from four companies and a union, and I do think it is important. This is the first pure cyber trade secret case brought by the Department. The scope of the threat is enormous, hundreds of billions of dollars lost a year. I would be interested in hearing from you how many agents are assigned to investigate trade secret theft and what you view as the challenges the FBI is facing in working effectively with other countries in prosecuting IP theft. And before you get to your answer, I simply want to thank Senator Hatch for his real leadership in co-sponsoring with me the Defend Trade Secrets Act, which we welcome cosponsors to from this Committee.

So if you would, Director, the number of agents and the challenges you are facing in working internationally to enforce trade secret theft.

Director COMEY. Yes, thank you, Senator. I think the number of agents that we have specifically designated as intellectual property/trade secret-focused is something between 50 and 100. I cannot remember the exact number here. But the number actually working this threat is much larger than this because it touches my counter-intelligence responsibilities and the entire Cyber Division. So I have addressing this problem hundreds of people.

The challenge we face is that the world is as small as a pinhead when you are facing a cyber challenge. Shanghai is next door to Wilmington on the Internet because the photon travels at the speed of light. So we need to get better at understanding that threat here in the United States, working well with each other, and building the relationships with foreign partners to get that done. Because the bad guys have shrunk the world, we have got to shrink the world, which is why I am looking to see if I can even expand the FBI's footprint internationally to put more cyber agents abroad to build those relationships, because the bad guys do not recognize the borders.

Senator COONS. I think that is a great idea, and I look forward to working with you in close partnership. And I am grateful for the partnership of Senator Hatch, and I think that together, if we are able to pass our bill and if we are able to strengthen your resources, we can do a stronger job of defending America's innovation.

Senator Hatch.

Senator WHITEHOUSE. Senator Sessions was next.

Senator COONS. I am sorry. Senator Sessions was next. Forgive me.

Senator SESSIONS. Thank you.

Mr. Comey, you are a very talented and knowledgeable leader of the FBI, and we have to expect a lot of you. You know this business, and you know how to do it. And I think the complex cases that have been discussed today, you do deserve—you and the Bureau deserve credit for. The FBI is the greatest law enforcement agency I guess there is, certainly one of the best in the whole world. And I have known and respected agents for many, many years.

But you are a national leader, and I am concerned about a few things, and I want you to get a little perspective here. I was very disappointed at a Wall Street Journal article May 20th in which you seem to make light of marijuana use by those who would like to work for the FBI. You say, "I have to hire a great workforce to compete with those cybercriminals, and some of those kids want to smoke weed on the way to the interview." You say you have got to loosen up your no-tolerance policy, which is just a 3-year—have not used marijuana in 3 years.

Do you understand that that could be interpreted as one more example of leadership in America dismissing the seriousness of marijuana use and that could undermine our ability to convince young people not to go down a dangerous path?

Director COMEY. Very much, Senator. I am determined not to lose my sense of humor, but, unfortunately, there I was trying to be both serious and funny. I was asked a question by a guy who said, "I have a great candidate for the FBI. His problem is he smoked marijuana within the last 5 years." And I said, "I am not going to discuss a particular case but apply." And then I waxed philosophic and funny to say, look, one of our challenges that we face is getting a good workforce at the same time when young people's attitudes about marijuana and our States' attitudes about marijuana are leading more and more of them to try it.

I am absolutely dead set against using marijuana. I do not want young people to use marijuana. It is against the law. We have a 3-year ban on marijuana. I did not say that I am going to change that ban. I said I have to grapple with the change in my workforce. How do I reconcile my need—

Senator SESSIONS. Well, I think that is—I appreciate that. I think you should understand your words can have ramifications out there. The American Medical Association just last October said, "Heavy cannabis use in adolescents causes persistent impairments in neurocognitive performance and IQ, and use is associated with increased rates of anxiety, mood, and psychotic thought disorders." That is the AMA, and I think—and I am very concerned that the

leak that was used against the Administrator of DEA who expressed some concerns about some of the policies emanating around the country and in the White House on drug enforcement was used to attack her and the DEA and even indicated they could close DEA or move it under your leadership into the FBI. That article said that.

Did you have anything to do with that?

Director COMEY. No.

Senator SESSIONS. Well, thank you. Some high official, according to the article, probably in the Department of Justice, attempted to attack her and discipline her, in my opinion, having watched these things for years.

With regard to Senator Grassley's written question—and I have joined with him in a number of questions—about the D'Souza campaign contribution case, I see there was a conviction. He pled guilty to the account, I think, that it appeared from the beginning he probably violated. And he gave money to a campaign above the limits by moving money through other persons. I do not think he really ever fully denied that. Neither did his lawyer.

But my question is—we would like some specific answers about that case, because looking at the data that we have seen from 2004 through 2006, not a single charge was made under that statute. And from 2007 to 2013, only 24 were charged under that statute, which roughly is about three a year over the last 7 years. And this was—I have never seen his movie, but this was an individual known to challenge the President. There seemed to be no corrupt financial dealings involved in this contribution, and I want to know more about how he turned out to be the one that got charged.

Did you personally review that indictment before it was—review the referral of that case for indictment before it occurred?

Director COMEY. No.

Senator SESSIONS. Well, that was a pretty prominent public defendant. Wouldn't you normally know if your FBI is working on a case and going to bring that kind of indictment?

Director COMEY. No. I mean, not necessarily.

Senator SESSIONS. Well, the Department—you are in the Department of Justice. You know the guidelines say you have to ask Washington's approval or even at the local level involving someone of high profile, don't you?

Director COMEY. I cannot remember exactly, but it is not about profile. It is about members of the media, elected officials, that sort of thing. My understanding is this fellow is—

Senator SESSIONS. Well, I think it is high profile, too, if you read the Department of Justice thing.

I also just will wrap up and say I am not of the belief that prosecution of fraud has increased, as you have indicated, by 65 percent of corporate cases. Bank embezzlements in 2009—

Chairman LEAHY [presiding]. Senator, we can have another round if you would like.

Senator SESSIONS. Thank you.

Chairman LEAHY. Senator Blumenthal.

Senator SESSIONS. I will raise that. And I apologize, Mr. Chairman. You are right. You are right. I am over time.

Chairman LEAHY. It is okay, but we have some Senators who have to go to other hearings.

Senator SESSIONS. Fair enough.

Chairman LEAHY. Senator Blumenthal.

Senator BLUMENTHAL. Thank you, Mr. Chairman, and my apologies, Senator Sessions.

Thank you for being here, and thank you for your service to our Nation. Thank you also to your family and most particularly your wife for her service to our State of Connecticut. I do not know whether you or your family are still residents of Connecticut, but hopefully at least for a couple more months you will be, and thank you for the great work that you have done so far in your current position.

You have one of the best jobs in the Nation not only because of its mission but because of the great people who work for you. And I want to thank them through you for all they do to keep our Nation safe.

Focusing on the subject that was raised by Senator Cornyn, I have been dismayed and outraged by some of the revelations about the secret records, destruction of records, false statements. These are allegations now, but they may have caused injuries or deaths among our veterans in Phoenix and in more than 20 locations around the country.

I know that you have not yet been asked, but would you agree with me that the alleged criminality that has been raised so far—I stress “alleged”—would provide a predicate for FBI investigation?

Director COMEY. Senator, I do not know more about it beyond what I have read in the newspaper, so it is hard to say just based on newspaper accounts. It looks to be a significant matter, but, again, we have not been asked even to take a look at it, so I cannot say at this point.

Senator BLUMENTHAL. Would you agree with me that if there are credible and reliable indications of false statements to Federal officials, destruction of Federal records, obstruction of Federal investigation—all of them have been alleged, and they are publicly reported—that there would be sufficient predicate for an FBI investigation?

Director COMEY. Yes.

Senator BLUMENTHAL. I know that you have not been asked. Would your involvement depend on your being asked by either Department of Justice attorneys or by the Inspector General?

Director COMEY. Yes. In nearly every circumstance, if another agency or another IG is already looking at something, we will not jump on it without being asked to be involved by either the prosecutors or that agency.

Senator BLUMENTHAL. My view, for what it is worth, is that only the FBI has the resources, expertise, and authority to do the kind of prompt and effective investigation that is absolutely vital to restore and sustain the trust and confidence of the American public and our Nation’s veterans, our Nation’s heroes in the integrity of the Veterans Administration. So I will be making that view known to the Attorney General of the United States, already have informally and indirectly, and hope that you will be involved as Director

of the FBI and that you will devote your personal attention to this matter.

Director COMEY. Thank you, Senator.

Senator BLUMENTHAL. Let me turn to another matter that I know is close to the heart of the administration, the President, and the Attorney General, which is gun violence in our country. The FBI is responsible for enforcing laws to try to make our Nation safer from gun violence. Would it be helpful to the FBI and investigation and prosecutorial duties to have a specific prohibition against illegal trafficking such as I and others have proposed?

Director COMEY. Illegal in trafficking in drugs—I mean guns?

Senator BLUMENTHAL. Of guns that are stolen or otherwise illegally possessed.

Director COMEY. I do not think I know—my reaction is a criminal prohibition on gun trafficking would be useful, but sitting here today, I am trying to remember. I think I have done cases involving straw purchasing and illegal transport and trafficking in guns under 922 series. So I guess I cannot answer it specifically sitting here.

Senator BLUMENTHAL. Enhanced penalties might be helpful to—

Director COMEY. Oh, I see. Yes.

Senator BLUMENTHAL. And I am sorry for the imprecise question. Let me just close, and my time is limited. I apologize. The National Instant Criminal Background Check System as well as the Uniform Crime Reporting System are both critically important sources of information, and I hope that they could be developed to provide more reliable and accurate data about gun violence that is involved in the commission of other crimes. Right now they are hampered by a lack of participation by local agencies as well as the breakdown of data within those systems. And I hope that perhaps the FBI can do more to make them more useful as sources of data on gun violence.

Director COMEY. Thank you, sir.

Senator BLUMENTHAL. Thank you.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you.

Senator Hatch.

Senator HATCH. Well, thank you, Mr. Chairman.

Mr. Comey, I am a big fan of yours and I always have been. You are a good man who has the ability and the capacity to be able to do what needs to be done in this area. But it is an overwhelming job, and we do not always provide you with the facilities and the capacity to be able to do it as well as I know you can do it. So let us know what we can to help you more in this work, because it is really important. And there is no bigger supporter than I of your organization.

Your prepared testimony or statement identifies human trafficking as a priority issue. Now, trafficking victims often end up as prostitutes or part of the pornography trade, including child pornography. Last month the Supreme Court held that the current statute requiring restitution to victims is not suited for the kind of child pornography crimes that we see today.



So 2 weeks ago, I introduced a bill to amend the restitution statute so that it works for child pornography victims. Seven other Members of this Committee on both sides of the aisle are among the cosponsors, and I hope more will join us. I hope that investigators, prosecutors, and judges will better understand the unique nature of the crime and the way it harms these young victims especially.

With the Internet, that harm really literally never ends, and you have made a pretty good case here today of how complicated it is because of the Internet in so many areas of anti-crime.

Do you see the connection between crimes such as trafficking in child pornography?

Director COMEY. Yes, sir, very much.

Senator HATCH. Okay. The computer hacking collective called “Anonymous” is best known for denial-of-service attacks on Government, religious, and corporate websites. The collective announced last month a renewed effort to obtain and release personal identifying information of law enforcement officers. Now, since much of this information is legally accessible, targets of such hackers cannot prevent their personal information from being obtained by members of the public. However, the malicious actors can use such information to craft highly sophisticated computer attacks online and again through social media.

How is the FBI addressing these types of cyber actors? You have approached it a little bit here today. I would just like to hear more.

Director COMEY. We see that kind of behavior. The trick for the bad guy is to get you—an email is like a knock on your door. The trick is for them to get you to open the door, and so they are trying to use false information about their identity, something they know about you to get you to click on a link and open the door and let them in. And so we see it in hactivist behavior, we see it in the Chinese cyber actors, we see it in criminals of all kinds are using that same effort to hijack an identity so that innocent people open the door and let them in. So it touches everything we do.

Senator HATCH. I am sure you a following the current debate about sentencing reform, especially the push to lower sentences for drug offenders. Now, this was one of the issues addressed last month by DEA Administrator Michele Leonhart in a hearing before this Committee. And based on her personal background and law enforcement experience and her current leadership at the DEA, she said that mandatory minimum sentences “have been very important to our investigations.”

Then we received a letter last week opposing the Smarter Sentencing Act. Signatories included two former U.S. Attorneys General, two former U.S. Deputy Attorneys General, two Directors of the Office of National Drug Control Policy, three former DEA Administrators, and 21 former U.S. Attorneys. Now, the list includes officials from both Republicans and Democrats and from both Republican and Democrat administrations.

Now, Mr. Chairman, I ask that that letter be placed in the record at this point.

Chairman LEAHY. Without objection.

[The letter appears as a submission for the record.]

Chairman LEAHY. And I would also place in the record a rebuttal of criticisms about the Smarter Sentencing Act.

Senator HATCH. Fine.

[The information referred to appears as a submission for the record.]

Senator HATCH. The letter states, "We fear that lowering the minimums will make it harder for prosecutors to build cases against the leaders of narcotics organizations and gangs."

Now, you also served as Deputy Attorney General and U.S. Attorney. Do you agree with Administrator Leonhart and these former DOJ officials, or do you take another position?

Director COMEY. Similar to Michele, throughout my career as a prosecutor, mandatory minimums were an important tool both to incapacitate bad actors and, maybe as importantly, to develop information and create incentives to cooperate. And so I have used them extensively. They were a valuable tool.

Senator HATCH. My time is up, Mr. Chairman.

Chairman LEAHY. Do you have any concern about the fact—and this is somewhat related—that if you are a lawyer, stockbroker, whatever, well respected, Wall Street or anywhere else, that Friday afternoons, regular routine where somebody comes in with their \$200 worth of powder cocaine, and if you are caught, you are going to get a slap on the wrist—you are going to be told, "My goodness gracious, terrible somebody so prominent as you doing that, we are going to give you a week doing some kind of public service, helping clean up the local park," or something? And if you are a kid, a minority in the inner city and you buy \$200 worth of crack cocaine, you are going to get a mandatory minimum, you are going to go to prison, you are never going to get a job when you come out? Do you see any problem with that?

Director COMEY. It concerns me both because throughout my career I have been concerned about disparate treatment of people and people's perception that the criminal justice system is not fair. So I think it is important that both be taken very seriously.

Chairman LEAHY. Thank you.

Senator Graham.

Senator GRAHAM. Thank you, Mr. Chairman.

Thank you for coming today. I really appreciate the leadership you are providing to the FBI at a very difficult time.

Are you familiar with the case of, I think, Abu Gaith, bin Laden's son-in-law?

Director COMEY. Abu Gaith, yes.

Senator GRAHAM. How long was he interrogated before he was read his Miranda rights?

Director COMEY. I do not know, sitting here, Senator.

Senator GRAHAM. Can you just get back with me on that?

Director COMEY. Yes.

Senator GRAHAM. Is it the policy of the Obama administration, as far as you know, to—do we have enemy combatant interrogations available to us as a Nation under the Law of War?

Director COMEY. Do we as a matter of law?

Senator GRAHAM. Well, as a matter of policy. I think as a matter of law, someone like him could be held as an enemy combatant. Do you agree with that?

Director COMEY. I do.

Senator GRAHAM. Did we choose to hold him as an enemy combatant?

Director COMEY. No.

Senator GRAHAM. Do you believe that one good way to prevent—to defend the Nation is intelligence gathering from high-value targets like this gentleman?

Director COMEY. Very much.

Senator GRAHAM. So I would just suggest to Attorney General Holder that we, in my view are abandoning enemy combatant interrogations under the Law of War which would allow you to gather intelligence because we are at war, and I hope we will reconsider that policy.

Sequestration, very briefly, if we do not change sequestration, what will it do to the FBI?

Director COMEY. It will return us to where we were when I became Director, to being unable to fill vacancies, unable to train, unable to spend money on gas to go interview people. So it is a big problem for us.

Senator GRAHAM. It would really reduce your capabilities at a time when we need them the most. Would you agree with that?

Director COMEY. Yes, I would.

Senator GRAHAM. You mentioned Syria as a potential al Qaeda presence in Syria. Do you agree with Director Clapper that it represents a direct threat to the homeland, the al Qaeda safe haven in Syria?

Director COMEY. Yes.

Senator GRAHAM. Okay. Do we have a plan to deal with that as a Nation?

Director COMEY. Yes.

Senator GRAHAM. Is that classified?

Director COMEY. Yes.

Senator GRAHAM. Okay. I would like for you to brief me about that, because I think one of the likely next attacks is going to come from somebody who is trained in Syria.

Chairman LEAHY. Excuse me, and on my time. The Senator was not here earlier when Mr. Comey agreed to set up a time for a briefing, classified briefing.

Senator GRAHAM. Thank you. I think that will be very helpful to the Committee.

On Benghazi, how close are we to catching someone who attacked our consulate in Benghazi?

Director COMEY. I am not in a position to say.

Senator GRAHAM. Okay.

Director COMEY. I know the answer, but I am not in a position to say.

Senator GRAHAM. Fair enough. Abu Khattala is widely known to be one of the ring leaders, and I do not know if you can say if he has been charged or not. But this person who we believe to be one of the ring leaders of the attack has been interviewed on CNN, Times of London, and Reuters in the Benghazi area. If the press can have access to this person, why can't we capture him?

Director COMEY. I am limited in what I can say about the matter, and as you said, I cannot—

Senator GRAHAM. Fair enough.

Director COMEY. Comment on the charges. Sometimes the media, international media, can get access to people easier than law enforcement or the military can.

Senator GRAHAM. Would someone like Sufian bin Qumu, a former GITMO detainee, who we believe is one of the respected members or maybe the founder of Ansar al-Sharia, would he be an enemy combatant in our eyes? Would Mr. Khattala fall into the category of enemy combatant?

Director COMEY. I do not think I can say at this point.

Senator GRAHAM. You can get back with me. Do you know if it is the policy of the United States to read them their Miranda rights if they are captured, or could we hold them as enemy combatants? If you could just get back with me on that and whether or not, if we found them, could we use a drone to take them out? I would like for you to comment on that at a more appropriate time.

Do you believe that based on certain actions a U.S. citizen could become an enemy combatant under the Law of War?

Director COMEY. I do not think I am expert enough to answer that, sitting here.

Senator GRAHAM. Okay. Fair enough. If you could get back with me about that. My view is that they can. In every other war you have had Americans side with the enemy, and they have been treated as enemy—

Director COMEY. The reason for my hesitation is when I was Deputy Attorney General, I know there were at least one or two who were held under that authority. But I do not know the current state of the law on that.

Senator GRAHAM. That is good. That is fine. If you could just get back with me. I think these are big policy issues.

[The information referred to appears as a submission for the record.]

Senator GRAHAM. Do you agree that homegrown terrorism is one of the things that keep you up at night?

Director COMEY. Yes.

Senator GRAHAM. And that the enemy is actively trying to penetrate our backyard, recruiting American citizens?

Director COMEY. Yes.

Senator GRAHAM. And an American citizen could be a very valuable asset to al Qaeda. Is that correct?

Director COMEY. Extremely.

Senator GRAHAM. Yes, and they are up to—they are trying to recruit people in our backyard, just like every enemy has.

Very quickly, is General Petraeus still under investigation regarding classified information?

Director COMEY. That is something else I cannot comment on.

Senator GRAHAM. Okay. Thank you very much for your service, and I really appreciate what you are trying to do for the FBI at a very difficult time. All your agents out there who are fighting on multiple fronts, you do represent, in my view, the front lines of defense, so thank you.

Director COMEY. Thank you.

Chairman LEAHY. Thank you very much.

Senator Klobuchar.

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

Good to see you again, Director Comey. I still think of you as my law school classmate, but I will try to suspend belief, and I am very glad you are the Director and am pleased with the work you are doing.

I know that you brought up human trafficking in your testimony. I was actually over chairing a hearing on retirement at the Joint Economic Committee, but I wanted to come over to ask you specifically about this. It is a horrendous crime that gets overlooked. It has been overlooked for too long, and I think we are finding some startling statistics in our own country where we have learned that 83 percent of the victims actually are from our own country. Of course, we still see women being trafficked in from other places, and predominantly Mexico, where I actually was a few weeks ago leading a trip with Senator Heitkamp and Cindy McCain, who has been very focused on this issue. And we met with your counterparts, with the Federal police, as well as the attorney general of Mexico, and others. And I know they are starting to engage in this issue and have passed some legislation and have worked with our law enforcement on some significant prosecutions in Atlanta and in New York.

And I wanted to know what the FBI is focused on with this issue. I know there are some prosecutions that have been brought federally. You should know that Senator Cornyn and I are leading a bill, a version of which passed the House yesterday, along with four other sex-trafficking bills through the House after getting through their Committee there. And the bill that we have focuses on younger victims. Many of the victims—I think average age is 13—are under 18, and what the bill that I drafted does is create incentives for States to create safe harbors in their State law so they are not prosecuting the young victims. Instead, they are giving them help, but then also by doing that, getting them to testify against the johns and the pimps, which I think for too long we have been neglecting that part of the equation.

And I wondered if you would comment on this issue when we are seeing prosecutions in places like the North Dakota oil patch, which I know is Federal prosecution, and other places, what you see as trends and what you think is how we should best deal with it. Thank you.

Director COMEY. Thank you, Senator. As you said, this is a scourge that has many, many dimensions to it involving children, people trafficked within the United States, people trafficked by drug-trafficking organizations, Americans traveling overseas with so-called sex tourism. And so we are attacking it through our Civil Rights Program, through Violent Crimes Against Children Program. We are in about 100 task forces and working groups around the country to try and send the messages you just talked about, especially that being a pimp or exploiter of these—of young people or women in sex trafficking is a very, very serious offense, and we have got to bang these people hard. It is not just some social nuisance type offense. We have got to treat the victims for what they are, which is victims, and get them help and elicit their help in trying to prosecute the pimps and the exploiters.

And so it touches across a wide spectrum of our work in all 56 field offices, and it is something we take very seriously.

Senator KLOBUCHAR. Thank you very much. I also wanted to thank you—I know you have been of help in some cases in Minnesota, and also of help in a major drug bust that we had in our State involving heroin. We have a new U.S. Attorney now that Todd Jones is head of our ATF, and he has taken this on, working with law enforcement, primarily DEA but also local law enforcement and, of course, the FBI. I wanted to thank you for that and just ask you, knowing that DEA is primarily responsible for this, but what you see in terms of the heroin increases, another subject we talked a lot about in Mexico and the correlation with prescription drug abuse and those kinds of cases as well.

Director COMEY. Thank you, Senator. I hear about it everywhere I go. I have been to 27 of our field offices, and I am going to visit the rest before the end of the year, and I will be in Minneapolis in just a few weeks.

Everywhere I go, State and local law enforcement raise this question with me, and I have seen analysis from the intelligence community and DEA that the country is awash in highly pure, cheap heroin that is crowding out the traditional pill abuse, in some places methamphetamine, with deadly consequences. Overdoses are up explosively around the country.

So as you said, it is a DEA lead from the Federal level, but I have told all of my SACs across the country, “Ask what you can do. Taxpayers pay our salaries. If we have resources or technology or something we can contribute to this fight, let us contribute to it.”

Senator KLOBUCHAR. Well, I appreciate that. And, again, with U.S. Attorney Luger and the coordinated work that when on on the Federal side, it was quite an impressive day, and a number of drug busts, and I think it sends a clear message where our State is on this issue. And we appreciate the help that you gave.

The last thing that I wanted to mention is just that I am going to the floor, I hope today, to continue pursuing my effort with Senator Graham and Senator Hoeven and Senator Schumer to get a Federal metal theft bill passed. I think I have raised this with you in the past, but we are again seeing metal theft spreading throughout our country because of the price of copper and other precious metals. Veterans’ graves, the stars on veterans’ graves, as we approach Memorial Day, electric companies broken into many, many times. We have seen houses explode because people go in and steal the pipe. And all this bill does—I assume most scrap metal dealers are honest people that are doing good work, but all this bill does is take what many States have done and says that you have to write a check if you are going to get scrap metal for over a hundred bucks, and that way it is easier for law enforcement on either the local or Federal basis to track down who these people are and so we do not have a situation like we have now where they are stealing metal in Minnesota, because we have stricter laws, and then bringing it somewhere else to sell it.

And we have not seen a decrease in the number of thefts, and we believe part of this is that this is a Federal and a national issue. And I just wanted to again raise it to your attention and to

continue to have you watch over these cases. I think at some point we are going to have some major break into Federal infrastructure, and then maybe everyone will look back and wonder why they were listening to the scrap metal dealers instead of every law enforcement group in our country and every single business that deals, from beer wholesalers and distribution—because the kegs are being stolen—to veterans groups, to the electric companies who are getting broken into all the time.

That is my last speech on this for now, but I am sure you will hear about it again. Thank you very much.

Director COMEY. Thank you, Senator.

Chairman LEAHY. Senator Lee.

Senator LEE. Thank you, Mr. Chairman, and thank you, Mr. Comey, for being here and for your service on behalf of our country. What you do is very important and affects a lot of Americans, and I believe there is a lot that you do that protects a lot of Americans from harm.

I want to talk to you for a minute about the Electronic Communications Privacy Act. This is a law that, as you know, was enacted in 1986. There are some interesting ramifications that this law has. It is something of an anachronism in our legal system in the sense that it allows the Government to access the contents of email once a particular email has ripened to the age of 180 days old.

Now, this was in 1986. I think I was in ninth grade at the time it was enacted. I do not think I had ever even heard the word “email.” I do not think most Americans had. It was a transitory form of communication. It was not a means by which anyone stored information at the time. People primarily communicated through it and then deleted the email, or if they wanted to keep it, they would print it off. A paper record perhaps would be—would have certainly been treated differently, but the electronic remnant of the email itself would be subject to subpoena by the Government and could be obtained, the content of it could be obtained without a warrant once it ripened to the age of 180 days old.

I do not think too many people raised or even had or even imagined too many concerns with it at the time, partly because most people had never even heard of email. There was no such thing as cloud computing, at least nothing like what we know now.

But nowadays, of course, people communicate a lot of information by email. They transmit a lot of information into the cloud, and we live in a different world in which I think there is a reasonable expectation of privacy and one in which most Americans would not draw a real distinction between their expectation of privacy in their papers, houses, effects, and persons on the one hand, and their email on the other. Most people would probably consider their emails to be part of their papers or part of their effects.

So to that end, recognizing this anachronism in the law, recognizing the potential for abuse, my friend Chairman Leahy and I have introduced legislation, the ECPA Amendments Act, S. 607, that would get rid of this anachronism in the law and that would require the Government to obtain a warrant before it wants to go after someone’s email, would not allow them to access it by means of a subpoena simply because it was 180 days old.

There is a report that was released just a few weeks ago by the White House calling for updates to ECPA, and it recognized the increasing role of technology in our private communications. And it suggested that, “email, text messages, and the cloud should receive commensurate protections.”

So I would like to ask you, What is the FBI’s current policy and practice regarding the use of subpoenas to go after the contents of email and cloud storage?

Director COMEY. Thank you, Senator. We do not do it, is my understanding. We treat it as I believe it is, which is information which people have a reasonable expectation of privacy, and so we obtain a warrant without regard to its age. That is our policy. The statute may be outdated, but I think we are doing it in the right way.

Senator LEE. Okay. So to your knowledge, there are no circumstances in which the FBI would choose to take the subpoena route even though they could read ECPA to allow that?

Director COMEY. I think that is right. I think our procedures require by policy we obtain a probable cause-based warrant from a judge to get that content of an email, no matter how old it is, from the storage facility. If I am wrong, I will—I do not sit here knowing I am wrong, and I will correct it, but I am pretty sure that is our policy.

Senator LEE. Okay. Would you see any distinction between how you would treat email and how you would treat something on the cloud or text messages or anything like that?

Director COMEY. No.

Senator LEE. So you are not aware of any reason why—you are not aware of any instance in which the FBI uses subpoenas to go after data on the cloud?

Director COMEY. I am not aware of any. I think we treat it like the content—whether it is in email form or text form or cloud form, the stored content of a communication is something we treat through a warrant if we have the basis to get it.

Senator LEE. Okay. I see that my time has expired. I have got more questions that I would like to ask you about, and perhaps we will communicate those in writing. I would like to echo, among other things, the concern raised by Senator Sessions regarding the Dinesh D’Souza case. Anytime something like this, something that is ordinarily not prosecuted as a primary offense, happens to be brought against a very vocal critic of the current administration, obviously that raises eyebrows, and a lot of us have questions about whether the appropriate levels of approval were requested from Washington and to what degree Washington was involved in that decision.

Chairman LEAHY. Thank you.

Senator LEE. Thank you very much, Director Comey, and thank you, Mr. Chairman.

Director COMEY. Thank you, Senator.

Chairman LEAHY. Senator Durbin.

Senator DURBIN. Thank you, Mr. Chairman. Director Comey, thanks for coming. I am sorry I came a little late. We had a hearing in my Defense Subcommittee at the same time.

I understand Senator Hatch raised the issue of sentencing.



Director COMEY. Yes.

Senator DURBIN. And I would like to ask for a couple observations or comments from you on this subject. Senator Lee and I have cosponsored a bipartisan bill called "The Smarter Sentencing Act." It is in response to the fact that over the last 30 years we have seen a 500-percent increase in Federal incarceration, an 1,100-percent increase in cost. We are now estimating our Federal prisons are 40 percent overcrowded. We, unfortunately, as we pay more for incarceration, have fewer dollars for law enforcement, prevention, treatment of drug addiction. We, sadly, have the highest rate of incarceration of any country on Earth. And what we are trying to address is the question of making the individual decision.

The bill that Senator Lee and I have introduced, which has passed out of this Committee, does not eliminate mandatory minimums. In fact, for all crimes it maintains the top level in terms of mandatory minimum. For a specified category of crimes—drug offenses not involving violence, guns, or gangs—we reduce the low end of the mandatory minimum to give discretion to the judge. We think that this is a way to address a body of offenses which are not a serious violent threat to America, but need to be dealt with in a much more specific and personal way.

Again, it is within the discretion of the judge to impose the sentence, and neither Senator Lee nor any of us who cosponsor this want to in any way lessen our concern about drugs in our society. But we want to try to do this, as we say in the bill, with a smart approach.

What is your response to that kind of approach?

Director COMEY. Thank you, Senator. And I did not mean by my answer to Senator Hatch to be criticizing any particular piece of legislation. He asked me whether mandatory minimums had been a valuable tool in my career, and the answer is yes. I do not have a particular view on what the exact mandatory should be and what the incentives that will flow from that will be.

What you are saying makes sense to me in principle. I think it is always important to look at our justice system and say, "Can we be smarter about the way we approach things without watering down the deterrent effect that is the benefit of the work we do?"

Senator DURBIN. One of the aspects of the bill addresses an issue which I plead congressional guilt when it comes to, and that was the decision to increase the Sentencing Guidelines on crack cocaine over powder cocaine 100:1. At the time we did it, it was a full-scale congressional panic over the arrival of this new, cheap, on-the-street, addictive narcotic that destroyed lives and babies that mothers were carrying. And we said, "Hit it, and hit it hard." And we did, with 100:1 disparity between powder cocaine and crack cocaine. Whether it should be 100:1—which I do not think it should—or 1:1—which I happen to endorse—we have reached a congressional compromise at 18:1. Our bill addresses the 8,800 people still serving prison sentences under the old 100:1 Sentencing Guidelines for crack cocaine, but it does not treat them as a class. It only allows each individual to petition for reconsideration of their sentencing.

I had a man in my office yesterday. At the age of 17, in Rockford, Illinois, he was convicted of drug conspiracy and sentenced to a life

sentence plus 10 years. He served over 20 years in the Federal prison system, average cost \$29,000 a year, before he sentence was commuted by President Obama. It is an example of a serious mistake made by a teenager, paid for with a major part of his life.

What is your thought about those still serving under the 100:1 guideline?

Director COMEY. I do not think I have thought about it carefully enough to offer you a good answer, again, because drug enforcement is not a big focus of the job I am in now. As I said, I think as prosecutors and as investigators, it is always important we look back and try to see are there ways to do the things we have done better and smarter. But that is really all I have at this point.

Senator DURBIN. Last question. Your predecessor and I worked for years on something that came as a shock to me. On 9/11, the Federal Bureau of Investigation computer system, as it was, was totally inadequate, did not have access to the Internet, did not have ways to reference and search, and had no capacity to transmit documents or photographs online. When the suspects from 9/11 were identified, photographs of those suspects were sent to the FBI offices in overnight mail, could not be sent by the computer system. Your predecessor labored long and hard to bring that computer system into the 20th century, let alone 21st century. Where are you today?

Director COMEY. Thank you, Senator. One of the many gifts I inherited from Bob Mueller is the investment in that kind of thing, that technology. We are dramatically better. I worked on the 9/11 investigation as an Assistant U.S. Attorney in Virginia, so I know what you are talking about, so thank you for the support of that.

We have made great progress. We are not good enough yet. And the bad guys are investing in technology. We have got to keep up with them. So I have got to attract great people, and I have got to equip them and train them on the best stuff. We have made great strides, but the legacy of neglecting it for so long is we are not as good as we need to be yet.

Senator DURBIN. Thanks, Director. Thanks, Mr. Chairman.

Chairman LEAHY. I remember that time very well. In fact, I made an offer to the FBI, instead of having to ship these things, my 12-year-old neighbor could email them, and that would be helpful. And I am glad there have been improvements since then.

Senator Cruz.

Senator CRUZ. Thank you, Mr. Chairman.

Mr. Comey, welcome. Thank you for your service. I want to talk to you about the IRS targeting of American citizens and what I view as a persistent stonewalling from the administration on this matter.

It has been 372 days, just over a year, since President Obama and Attorney General Holder both publicly stated that they were outraged at the IRS' improper targeting of conservative groups and individuals. Indeed, President Obama said at the time he was angry and the American people have a right to be angry. Well, if he was telling the truth that the American people had a right to be angry 372 days ago, the stonewalling and lack of action that has occurred for over a year gives the American people a right to be even more than angry.

One year ago tomorrow, Lois Lerner, the senior official who led this targeting, pleaded the Fifth in front of the House of Representatives. And yet, despite the passage of time, very little has happened.

Nearly a year ago, when you were before this Committee for your confirmation, I asked you about this investigation, and you stated at the time it was “a very high priority” for the FBI. I would like to ask you, to date, how many victims or alleged victims of improper targeting have been interviewed by the FBI?

Director COMEY. Thank you, Senator. Because it is a pending investigation—and my description of it 10 months ago remains accurate and a great deal of work has been done by the FBI, but because it is pending I cannot talk about the particulars of the interviews we have done.

Senator CRUZ. Have you interviewed more or less than ten alleged victims?

Director COMEY. I cannot say, sir.

Senator CRUZ. Well, you could say. That has been the consistent answer of the administration. I can tell you the victims of the targeting keep telling us they have not been interviewed. And the answer—the pattern we see, when the President of the United States stands up and says, “The American people have a right to be angry,” one, we have a reason to expect that an investigation will be thorough and there will be some accountability. The answer for over a year from the FBI and Justice has been, “It is a pending investigation, and we will tell you nothing about it.”

Let me ask you a second question. In over a year has a single person been indicted?

Director COMEY. I guess I could answer that because it would be public. There have been no indictments.

Senator CRUZ. There have been no indictments.

Now, you also pledged, sitting in that chair, to personally lead vigorously this investigation, personally, regardless of the political consequences. Look, I understand you have a difficult job. There is a reason your job has a 10-year tenure: to give your position meaningful independence from the pressures of politics. Can you tell this Committee, to date, how many White House employees the FBI has interviewed in this investigation?

Director COMEY. And for the reasons I said, I cannot tell you who has been interviewed at all.

Senator CRUZ. So the American people have no right to know what is happening other than nothing has happened.

Chairman LEAHY. Let us be fair. That is not what he answered. He answered very appropriately, in the same way that similarly appropriate answers have been given during Republican administrations, and we accepted them.

Senator CRUZ. Mr. Chairman, you are welcome to accept them, and I would note that this IRS targeting correspondence has come out, came in significant request—in significant regard at the written behest of Democratic Members of this body. So I understand that there is not an interest among some Members of this body in learning what happened.

Chairman LEAHY. Again, you are not responding to what I said at all. I am just saying that what Mr. Comey has said was an ap-

appropriate answer based on the reason he did it. It has nothing to do with how we feel. I do not like the targeting of anybody, but what Mr. Comey said was a correct and appropriate answer.

Senator CRUZ. I would note for the record that when I introduced an amendment before this Committee to make it a criminal offense to willfully target American citizens based on their political views, the Chairman and every Democratic Member of this Committee voted against it.

Mr. Comey, the Attorney General has appointed to lead this investigation a major Obama donor who has given President Obama and Democrats over \$6,000. Do you see any actual or apparent conflict of interest in that?

Director COMEY. I do not—I do not think that is something else I can comment on.

Senator CRUZ. Do you think it would have been appropriate to trust John Mitchell to investigate Richard Nixon?

Director COMEY. I think that is an impossible one for me to answer at this point.

Senator CRUZ. Well, it is an easy question to answer. It would not have been. And the Attorney General has repeatedly been called on to appoint a special counsel with meaningful independence, and I would encourage you to join that call, because the integrity of the Department and the FBI matters, and it matters beyond the political urgencies of the moment.

Let me ask one final question. Both you and the Attorney General have repeatedly told this Committee that the investigation is a vigorous investigation, despite the fact that no one has been indicted, despite the fact that many of the victims have not been interviewed.

Four days after Attorney General Holder sat in that seat and told this Committee it was a vigorous investigation, the President of the United States went on national television and told the American people, categorically, there was “not a smidgeon of corruption in the IRS.” Now, the President’s statement and the Attorney General’s statement 4 days earlier that there was an ongoing vigorous investigation are facially inconsistent. I would ask you as the head of the FBI, which of those statements was true and which of those statements was false?

Director COMEY. One thing I can assure you is that the FBI does not care about anybody’s characterizations of a matter. We care only about the facts, and we are passionate about the facts and our independence.

Senator CRUZ. But, Mr. Comey, you have been a lawyer long enough to know when an answer is nonresponsive.

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

Director COMEY. Yes, sir.

Senator CRUZ. And you have not answered the question that I asked.

Chairman LEAHY. The Senator’s time has expired, and I appreciate the Director being here. I understand we have votes on the floor in a few minutes, and if others have questions for the record, they can be submitted.

Thank you very much, Mr. Comey. As I told you when you accepted this job, I appreciate the fact of your sterling record in both

Republican and Democratic administrations. I appreciate the fact that you are willing to step forward in this position. Also, as one of those who pushed for the bill that made the term of the Director of the FBI a nonpartisan one, exceeding that of the President who might appoint him, I think it was a good move for law enforcement.

We stand in recess. Thank you.

Director COMEY. Thank you, sir.

[Whereupon, at 11:47 a.m., the Committee was adjourned.]

[Additional material submitted for the record follows.]



# **A P P E N D I X**

## **ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD**

Witness List

Hearing before the  
Senate Committee on the Judiciary

On

“Oversight of the Federal Bureau of Investigation”

Wednesday, May 21, 2014  
Dirksen Senate Office Building, Room 226  
10:00 a.m.

The Honorable James B. Comey, Jr.  
Director  
Federal Bureau of Investigation  
United States Department of Justice  
Washington, DC



# Department of Justice

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STATEMENT

OF

JAMES B. COMEY, JR.  
DIRECTOR  
FEDERAL BUREAU OF INVESTIGATION

BEFORE THE

COMMITTEE ON THE JUDICIARY  
UNITED STATES SENATE

FOR A HEARING ENTITLED

"OVERSIGHT OF THE FEDERAL BUREAU OF INVESTIGATION"

PRESENTED ON

MAY 21, 2014



**Statement of James B. Comey**  
**Director, Federal Bureau of Investigation**  
**Before the United States Senate**  
**Committee on the Judiciary**  
**May 21, 2014**

Good morning Chairman Leahy, Ranking Member Grassley, and members of the Committee. I look forward to discussing the FBI's programs and priorities for the coming year.

On behalf of the men and women of the FBI, let me begin by thanking you for your ongoing support of the Bureau. We pledge to be the best possible stewards of the authorities and the funding you have provided for us and to use it to maximum effect to carry out our mission.

Today's FBI is a threat-focused, intelligence-driven organization. Each employee of the FBI understands that to mitigate the key threats facing our nation, we must constantly strive to be more efficient and more effective. Just as our adversaries continue to evolve, so, too, must the FBI. We live in a time of acute and persistent terrorist and criminal threats to our national security, our economy, and our communities. These diverse threats facing our nation and our neighborhoods underscore the complexity and breadth of the FBI's mission.

We remain focused on defending the United States against terrorism, foreign intelligence, and cyber threats; upholding and enforcing the criminal laws of the United States; protecting privacy, civil rights and civil liberties; and providing leadership and criminal justice services to federal, state, municipal, and international agencies and partners. Our continued ability to carry out this demanding mission reflects the support and oversight provided by this committee.

**National Security**

The FBI is the lead domestic intelligence and law enforcement agency in the United States. Our complementary intelligence and law enforcement capabilities make up the key components of the Bureau's national security mission. They also illustrate the unique authorities and mission we have in the U.S. Intelligence Community. We collect intelligence to understand and identify the threats to the nation. And when the time comes for action to prevent an attack, we disrupt threats using our law enforcement powers through our Joint Terrorism Task Forces (JTTFs).

Much of the FBI's success can be credited to the longstanding relationships we enjoy with our intelligence, law enforcement, public, and private sector partners. With thousands of private and public business alliances and more than 4,100 JTTF members, including more than 1,500 interagency personnel from more than 600 Federal, state, territorial, and tribal partner agencies, the FBI's partnerships are essential to achieving our mission and ensuring a coordinated approach toward national security threats.

### *Counterterrorism*

As the lead agency responsible for countering terrorist threats to the United States and its interests overseas, the FBI integrates intelligence and operations to detect and disrupt terrorists and their organizations.

Counterterrorism remains our top priority and that isn't likely to change. Overseas, the terrorist threat is complex and ever changing. We are seeing more groups and individuals engaged in terrorism, a wider array of targets, greater cooperation among terrorist groups, and continued evolution in tactics and communication.

Al Qaeda core isn't the dominant force it once was, but it remains intent on causing death and destruction. Groups with ties to Al Qaeda continue to present a top threat to our friends and partners, and in some cases to the United States and our interests abroad. We also have citizens traveling overseas—especially to Syria—and radicalizing there, and then coming home. And they are traveling from all over the United States to all parts of the world.

As the Boston bombings illustrate, we face a continuing threat from homegrown violent extremists. This threat is of particular concern. These individuals are self-radicalizing. They do not share a typical profile; their experiences and motives are often distinct. They are willing to act alone, which makes them difficult to identify and stop. This is not just a D.C., New York, or Los Angeles phenomenon; it is agnostic as to place.

We also face domestic terrorism from individuals and groups who are motivated by political, racial, religious, or social ideology—ideology fueled by bigotry and prejudice—as we saw in Overland Park, Kansas.

We in the FBI have a strong working knowledge of these groups and their general membership. Here, too, it's the lone offenders that trouble us. They stand on the periphery. We may not know of them because their actions do not predicate an investigation. Most of the time, domestic extremists are careful to keep their actions within the bounds of constitutionally protected activity. And for the FBI, protecting those civil liberties—such as freedom of speech—is of paramount importance, no matter how hateful that speech might be. We only get involved when words cross the line into illegal activity.

### *Counterintelligence*

We still confront traditional espionage – spies posing as diplomats or ordinary citizens. But espionage also has evolved. Spies today are often students, researchers, or businesspeople operating front companies. And they seek not only state secrets, but trade secrets, research and development, intellectual property, and insider information from the federal government, U.S. corporations, and American universities. Foreign intelligence services continue to grow more creative and more sophisticated in their methods to steal innovative technology, critical research and development data, and intellectual property, which erodes America's leading edge in business and poses a significant threat to national security.

We remain focused on the growing scope of the insider threat – that is, when trusted employees and contractors use their legitimate access to information to steal secrets for the benefit of another company or country. This threat has been exacerbated in recent years as businesses have become more global and increasingly exposed to foreign intelligence organizations.

To combat this threat, the FBI's Counterintelligence Division educates academic and business partners about how to protect themselves against economic espionage. We also work with the defense industry, academic institutions, and the general public to address the increased targeting of unclassified trade secrets across all American industries and sectors. Together with our intelligence and law enforcement partners, we must continue to protect our trade secrets and our state secrets, and prevent the loss of sensitive American technology.

#### ***Weapons of Mass Destruction***

As weapons of mass destruction (WMD) threats continue to evolve, the FBI uses its statutory authorities to lead all investigations concerning violations of WMD-related statutes, preparation, assessment, and responses to WMD threats and incidents within the United States. The FBI provides timely and relevant intelligence analyses of current and emerging WMD threats to inform decision makers, support investigations, and formulate effective countermeasures and tripwires to prevent attacks.

To ensure an effective national approach to preventing and responding to WMD threats, the FBI created the Weapons of Mass Destruction Directorate integrating the necessary counterterrorism, intelligence, counterintelligence, and scientific and technological components into one organizational structure. Using this integrated approach, the Directorate leads WMD policy development, planning, and response to ensure its efforts result in a comprehensive response capability that fuses investigative and technical information with intelligence to effectively resolve WMD threats.

To enable the prevention or disruption of WMD threats or attacks, FBI headquarters personnel, 56 field WMD coordinators, and two WMD assistant legal attachés oversee implementation of national and international initiatives and countermeasures. The FBI conducts outreach and liaison efforts with critical infrastructure partners, the private sector, academia, industry, and the scientific community to implement tripwires that prevent any actor – terrorist, criminal, insider threat, or lone offender – from successfully acquiring chemical, biological, radiological, or nuclear material or dissemination equipment. Through these efforts, the WMD Directorate supports the broader work of the U.S. government as a leading partner and active contributor to policy decisions.

The Counterproliferation Center (CPC) combines the operational activities of the Counterintelligence Division, the subject matter expertise of the WMDD, and the analytical capabilities of both components to identify and disrupt proliferation activities. Since its inception in July 2011, the CPC has overseen the arrest of approximately 65 individuals, including several considered by the U.S. Intelligence Community to be major proliferators. Along with these

arrests, the CPC has increased its operational tempo to collect valuable intelligence on proliferation networks.

### ***Intelligence***

The FBI's efforts to advance its intelligence capabilities have focused on streamlining and optimizing the organization's intelligence components while simultaneously positioning the Bureau to carry out its responsibilities as the lead domestic intelligence agency.

One way the FBI is enhancing our partnerships and our ability to address threats is through the Domestic Director of National Intelligence (DNI) Representative Program. Through this program, FBI senior-level field executives in 12 geographic locations are serving as DNI representatives throughout the United States. The Domestic DNI Representatives are working with Intelligence Community partners within their regions to understand the threat picture and develop a more coordinated and integrated Intelligence Community enterprise. A more unified and effective Intelligence Community will enhance the nation's ability to share information with our law enforcement and private sector partners, and will prevent and minimize threats to our national security.

In addition, we expanded the fusion cell model, which further integrates our intelligence and operational elements through teams of analysts embedded with agents in the operational divisions. These fusion cells examine the national and international picture and provide intelligence on current and emerging threats across programs, making connections that are not always visible at the field level. Providing standard criteria, these cells inform the Threat Review and Prioritization (TRP) process and develop National Threat Priorities for the field. The fusion cells assess the FBI's ability to collect intelligence to identify gaps, inform operational strategies, and mitigate threats to drive FBI operations. As a result, the fusion cells and TRP provide the field with clear guidance and a consistent process to identify priority threats, while ensuring FBI Headquarters has an effective way to manage and evaluate the most significant threats facing the country.

This strategic, national-level perspective ensures the FBI is developing a complete picture of the threat environment and directing our resources at priority targets to stay ahead of our adversaries. This integration provides a cross-programmatic view of current threats and enables a nimble approach to identifying and addressing emerging threats.

### ***Cyber***

We face sophisticated cyber threats from state-sponsored hackers, hackers for hire, organized cyber syndicates, and terrorists. They seek our state secrets, our trade secrets, our technology, and our ideas – things of incredible value to all of us. They may seek to strike our critical infrastructure and our economy. The threat is so dire that cyber security has topped the Director of National Intelligence list of global threats for the second consecutive year.

Given the scope of the cyber threat, agencies across the federal government are making cyber security a top priority. Within the FBI, we are targeting high-level intrusions – the biggest

and most dangerous botnets, state-sponsored hackers, and global cyber syndicates. We want to predict and prevent attacks, rather than reacting after the fact.

FBI agents, analysts, and computer scientists are using technical capabilities and traditional investigative techniques – such as sources and wires, surveillance, and forensics – to fight cyber crime. We are working side-by-side with our federal, state, and local partners on Cyber Task Forces in each of our 56 field offices and through the National Cyber Investigative Joint Task Force (NCIJTF). Through our 24-hour cyber command center, CyWatch, we combine the resources of the FBI and NCIJTF, allowing us to provide connectivity to federal cyber centers, government agencies, FBI field offices and legal attachés, and the private sector in the event of a cyber intrusion.

We also work with the private sector through partnerships such as the Domestic Security Alliance Council, InfraGard, and the National Cyber Forensics and Training Alliance. And we are training our state and local counterparts to triage local cyber matters, so that we can focus on national security issues.

Our legal attaché offices overseas work to coordinate cyber investigations and address jurisdictional hurdles and differences in the law from country to country. We are supporting partners at Interpol and The Hague as they work to establish international cyber crime centers. We continue to assess other locations to ensure that our cyber personnel are in the most appropriate locations across the globe.

Cyber threats to critical infrastructure require a layered approach to cybersecurity, including partnerships with private sector owners and operators, and with Federal partners including the Department of Homeland Security (DHS). We have been successful in a joint campaign to combat a campaign of cyber intrusions targeting natural gas pipeline sector companies, in which the FBI and DHS's Industrial Control Systems -CERT Cyber Emergency Response Team deployed onsite assistance to some of the organizations targeted, and provided 14 briefings in major cities throughout the United States to over 750 personnel involved in the protection of energy assets and critical infrastructure.

We have also successfully worked with DHS in to empower the US banking system to better defend against cyber attacks. As powerful distributed denial of service (DDoS) incidents impacting leading U.S. banking institutions in 2012 have persisted through 2014, the FBI has worked with DHS' US-CERT United States Computer Emergency Readiness Team to identify 600,000 DDoS-related IP addresses and contextual information, to better equip banks to defend themselves.

We know that to be successful in the fight against cyber crime, we must continue to recruit, develop, and retain a highly skilled workforce. To that end, we have developed a number of creative staffing programs and collaborative private industry partnerships to ensure that over the long term we remain focused on our most vital resource – our people.

## **Criminal**

We face many criminal threats, from complex white collar fraud in the financial, health care, and housing sectors to transnational and regional organized criminal enterprises to violent crime and public corruption. Criminal organizations – domestic and international – and individual criminal activity represent a significant threat to our security and safety in communities across the nation.

### ***Public Corruption***

Public corruption is the FBI's top criminal priority. The threat – which involves the corruption of local, state, and federally elected, appointed, or contracted officials – strikes at the heart of government, eroding public confidence and undermining the strength of our democracy. It impacts how well U.S. borders are secured and neighborhoods are protected, how verdicts are handed down in court, and how well public infrastructure such as schools and roads are built. The FBI is uniquely situated to address this threat, with our ability to conduct undercover operations, perform electronic surveillance, and run complex cases. However, partnerships are critical and we work closely with federal, state and local authorities in pursuing these cases. One key focus is border corruption. The federal government protects 7,000 miles of U.S. land border and 95,000 miles of shoreline. Every day, more than a million visitors enter the country through one of 327 official ports of entry along the Mexican and Canadian borders, as well as through seaports and international airports. Any corruption at the border enables a wide range of illegal activities, potentially placing the entire nation at risk by letting drugs, guns, money, and weapons of mass destruction slip into the country, along with criminals, terrorists, and spies. Another focus concerns election crime. Although individual states have primary responsibility for conducting fair and impartial elections, the FBI becomes involved when paramount federal interests are affected or electoral abuse occurs.

### ***Civil Rights***

The FBI remains dedicated to protecting the cherished freedoms of all Americans. That includes aggressively investigating and working to prevent hate crime, “color of law” abuses by public officials, human trafficking and involuntary servitude, and freedom of access to clinic entrances violations—the four top priorities of our civil rights program. We also support the work and cases of our local and state partners as needed.

Crimes of hatred and prejudice—from lynchings to cross burnings to vandalism of synagogues—are a sad fact of American history. When members of a family are attacked because of the color of their skin, it's not just the family that feels violated, but every resident of that neighborhood. When a teenager is murdered because he is gay, the entire community feels a sense of helplessness and despair. And when innocent people are shot at random because of their religious beliefs—real or perceived—our nation is left at a loss. Stories like this are heartbreaking. They leave each one of us with a pain in our chest. Hate crime has decreased in neighborhoods across the country, but the national numbers remain sobering.

We need to do a better job of tracking and reporting hate crime to fully understand what is happening in our communities and how to stop it. There are jurisdictions that fail to report hate crime statistics. Other jurisdictions claim there were no hate crimes in their community—a fact that would be welcome if true. We must continue to impress upon our state and local counterparts in every jurisdiction the need to track and report hate crime and to do so accurately. It is not something we can ignore or sweep under the rug.

### *Financial Fraud Crimes*

We have witnessed an increase in financial fraud in recent years, including mortgage fraud, health care fraud, and securities fraud.

The FBI and its partners continue to pinpoint the most egregious offenders of mortgage fraud. With the economy and housing market still recovering in many areas, we have seen an increase in schemes aimed both at distressed homeowners and at lenders. Our agents and analysts are using intelligence, surveillance, computer analysis, and undercover operations to identify emerging trends and to find the key players behind large-scale mortgage fraud. We also work closely with the Department of Housing and Urban Development, Postal Inspectors, the IRS, the FDIC, and the Secret Service, as well as with state and local law enforcement offices.

Health care spending currently makes up about 18 percent of our nation's total economy. These large sums present an attractive target for criminals – so much so that we lose tens of billions of dollars each year to health care fraud. Health care fraud is not a victimless crime. Every person who pays for health care benefits, every business that pays higher insurance costs to cover their employees, every taxpayer who funds Medicare, is a victim. Schemes can cause actual patient harm, including subjecting patients to unnecessary treatment, providing substandard services and supplies, and by passing potentially life-threatening diseases due to the lack of proper precautions. As health care spending continues to rise, the FBI will use every tool we have to ensure our health care dollars are used to care for the sick – not to line the pockets of criminals.

Our investigations of corporate and securities fraud have also increased substantially in recent years. As financial crimes become more sophisticated, so must the FBI. The FBI continues to use techniques such as undercover operations and Title III intercepts to address these criminal threats. These techniques are widely known for their successful use against organized crime, and they remain a vital tool to gain concrete evidence against individuals conducting crimes of this nature on a national level.

Finally, the FBI recognizes the need for increased cooperation with our regulatory counterparts. Currently, we have embedded agents and analysts at the Securities and Exchange Commission and the Commodity Futures Trading Commission, which allows the FBI to work hand-in-hand with U.S. regulators to mitigate the corporate and securities fraud threat. Furthermore, these relationships enable the FBI to identify fraud trends more quickly, and to work with our operational and intelligence counterparts in the field to begin criminal investigations when deemed appropriate.

### ***Violent Crime***

Violent crimes and gang activities exact a high toll on individuals and communities. Today's gangs are sophisticated and well organized; many use violence to control neighborhoods and boost their illegal money-making activities, which include robbery, drug and gun trafficking, fraud, extortion, and prostitution rings. Gangs do not limit their illegal activities to single jurisdictions or communities. The FBI is able to work across such lines, which is vital to the fight against violent crime in big cities and small towns across the nation. Every day, FBI Special Agents work in partnership with state and local officers and deputies on joint task forces and individual investigations.

FBI joint task forces – Violent Crime Safe Streets, Violent Gang Safe Streets, and Safe Trails Task Forces – focus on identifying and targeting major groups operating as criminal enterprises. Much of the Bureau's criminal intelligence is derived from our state, local, and tribal law enforcement partners, who know their communities inside and out. Joint task forces benefit from FBI surveillance assets and our sources track these gangs to identify emerging trends. Through these multi-subject and multi-jurisdictional investigations, the FBI concentrates its efforts on high-level groups engaged in patterns of racketeering. This investigative model enables us to target senior gang leadership and to develop enterprise-based prosecutions.

### ***Transnational Organized Crime***

More than a decade ago, the image of organized crime was of hierarchical organizations, or families, that exerted influence over criminal activities in neighborhoods, cities, or states. But organized crime has changed dramatically. Today, international criminal enterprises run multinational, multi-billion-dollar schemes from start to finish. These criminal enterprises are flat, fluid networks with global reach. While still engaged in many of the "traditional" organized crime activities of loan-sharking, extortion, and murder, new criminal enterprises are targeting stock market fraud and manipulation, cyber-facilitated bank fraud and embezzlement, identity theft, trafficking of women and children, and other illegal activities. Preventing and combating transnational organized crime demands a concentrated effort by the FBI and federal, state, local, and international partners. The Bureau continues to share intelligence about criminal groups with our partners, and to combine resources and expertise to gain a full understanding of each group.

### ***Crimes Against Children***

The FBI remains vigilant in its efforts to eradicate predators from our communities and to keep our children safe. Ready response teams are stationed across the country to quickly respond to abductions. Investigators bring to this issue the full array of forensic tools such as DNA, trace evidence, impression evidence, and digital forensics. Through improved communications, law enforcement also has the ability to quickly share information with partners throughout the world, and our outreach programs play an integral role in prevention.

The FBI also has several programs in place to educate both parents and children about the dangers posed by predators and to recover missing and endangered children should they be



taken. Through our Child Abduction Rapid Deployment teams, Innocence Lost National Initiative, Innocent Images National Initiative, Office of Victim Assistance, and numerous community outreach programs, the FBI and its partners are working to keep our children safe from harm.

The FBI established the Child Sex Tourism Initiative to employ proactive strategies to identify U.S. citizens who travel overseas to engage in illicit sexual conduct with children. These strategies also include a multi-disciplinary approach through partnerships with foreign law enforcement and non-governmental organizations to provide child victims with available support services. Similarly, the FBI's Innocence Lost National Initiative serves as the model for the partnership between federal, state and local law enforcement in addressing child prostitution. Since its inception, more than 3,100 children have been located and recovered. The investigations and subsequent 1,450 convictions have resulted in lengthy sentences, including twelve life terms.

### ***Indian Country***

The FBI continues to maintain primary federal law enforcement authority to investigate felony crimes on more than 200 Indian reservations nationwide. More than 100 Special Agents from 20 different field offices investigate these cases. In addition, the FBI has 14 Safe Trails Task Forces that investigate violent crime, drug offenses, and gangs in Indian Country and we continue to address the emerging threat from fraud and other white-collar crimes committed against tribal gaming facilities.

Sexual assault and child sexual assault are two of the FBI's investigative priorities in Indian Country. Statistics indicate that American Indians and Alaska Natives suffer violent crime at greater rates than other Americans. Approximately 75 percent of all FBI Indian Country investigations concern homicide, crimes against children, or felony assaults.

The FBI continues to work with tribes through the Tribal Law and Order Act of 2010 to help tribal governments better address the unique public safety challenges and disproportionately high rates of violence and victimization in many tribal communities. The act encourages the hiring of additional law enforcement officers for Native American lands, enhances tribal authority to prosecute and punish criminals, and provides the Bureau of Indian Affairs and tribal police officers with greater access to law enforcement databases.

### **Science & Technology**

#### ***Laboratory Services***

The FBI Laboratory ("the Lab") is one of the largest and most comprehensive forensic laboratories in the world. Operating out of a state-of-the-art facility in Quantico, Virginia, laboratory personnel travel the world on assignment, using science and technology to protect the nation and support law enforcement, intelligence, military, and forensic science partners. The Lab's many services include providing expert testimony, mapping crime scenes and conducting forensic exams of physical and hazardous evidence. Lab personnel possess expertise in many

areas of forensics supporting law enforcement and intelligence purposes, including explosives, trace evidence, documents, chemistry, cryptography, DNA, facial reconstruction, fingerprints, firearms, and WMD.

One example of the Lab's key services and programs is the Combined DNA Index System (CODIS), which blends forensic science and computer technology into a highly effective tool for linking crimes. It enables federal, state, and local forensic labs to exchange and compare DNA profiles electronically, thereby connecting violent crimes and known offenders. Using the National DNA Index System of CODIS, the National Missing Persons DNA Database helps identify missing and unidentified individuals.

The Terrorist Explosives Device Analytical Center (TEDAC) is another example. TEDAC was formally established in 2004 to serve as the single interagency organization to receive, fully analyze, and exploit all priority terrorist Improvised Explosive Devices (IEDs). TEDAC coordinates the efforts of the entire government, including law enforcement, intelligence, and military entities, to gather and share intelligence about IEDs. These efforts help disarm and disrupt IEDs, link them to their makers, and prevent future attacks. Although originally focused on devices from Iraq and Afghanistan, TEDAC now receives and analyzes devices from all over the world.

Additionally, FBI Evidence Response Teams (ERTs) are active in all 56 field offices and include more than 1,200 members. The FBI supports and enables evidence collection capabilities of field ERTs and law enforcement partners by providing forensic training, resources, and expertise. The FBI also has forward-deployed evidence response capabilities to respond to terrorist attacks and criminal incidents involving hazardous materials (chemical, biological, nuclear, and radiological) in concert with local officials and FBI WMD experts.

### ***Operational Technology***

Terrorists and criminals are increasingly adept at exploiting cutting-edge technologies to carry out or to mask their crimes. To counter current and emerging threats, the FBI actively deploys a wide range of technology-based tools, capabilities, and training that enable and enhance intelligence, national security, and law enforcement operations. In addition to developing state-of-the-art tools and techniques, the FBI also focuses on recruiting and hiring individuals who possess specialized skills and experience. These dedicated employees serve as technically trained agents, engineers, computer scientists, digital forensic examiners, electronics technicians, and other specialists. Collectively, these specialists enable lawful electronic surveillance, provide secure communications, decipher encrypted messages, reverse engineer malware, forensically examine digital evidence such as images and audio recordings, and much more.

By way of example, the National Domestic Communications Assistance Center (NDCAC) is designed to leverage and share the law enforcement community's collective technical knowledge, solutions, and resources to address the challenges posed by advancing communications services and technologies. The NDCAC also works on behalf of federal, state,

local, and tribal law enforcement agencies to strengthen law enforcement's relationships with the communications industry.

The FBI has also established 16 Regional Computer Forensic Laboratories (RCFLs) across the nation. RCFLs serve as one-stop, full-service forensics laboratories and training centers. All RCFL personnel in each of the 16 facilities across the country must earn FBI certification as digital forensics examiners and follow standardized evidence handling and operating procedures. RCFLs are staffed by federal, state, and local law enforcement personnel who examine digital evidence in support of all types of investigations – cases involving everything from child pornography and terrorism to violent crime and economic espionage.

#### ***Criminal Justice Information Services***

The FBI Criminal Justice Information Services (CJIS) Division, located in Clarksburg, West Virginia, provides federal, state, and local enforcement and other authorized users with timely access to criminal justice information through a number of programs, including the National Crime Information Center, the National Instant Criminal Background Checks System and the Uniform Crime Reporting program which is intended to generate a reliable set of crime statistics for use in law enforcement administration, operation, and management.

In addition, CJIS manages the Integrated Automated Fingerprint Identification System (IAFIS), which provides timely and accurate identification services by identifying individuals through name, date-of-birth, fingerprint image comparisons, or other descriptors, and provides criminal history records on individuals for law enforcement and civil purposes. IAFIS is designed to process criminal fingerprint submissions in two hours or less and civil submissions in 24 hours or less. In FY 2013, approximately 62.7 million fingerprint background checks were processed. The Next Generation Identification program advances the FBI's biometric identification and investigation services, providing new biometric functionality such as facial recognition, improved latent searches, and immediate responses related to the Repository for Individuals of Special Concern, a fingerprint index of wanted persons, sexual offender registry subjects, known or appropriately suspected terrorists, and other persons of special interest.

CJIS also manages the Law Enforcement National Data Exchange (N-DEX), a criminal justice information sharing network that allows law enforcement agencies to share law enforcement records from more than 4,500 agencies with nearly 140,000 criminal justice users. The N-DEX network contains more than 225 million searchable records (incident reports, arrest reports, booking data, etc.). It is projected that by the end of FY 2014, N-DEX information sharing will be available to law enforcement agencies representing almost 60 percent of the U.S. population.

#### **Critical Incident Response Group**

The Critical Incident Response Group (CIRG) is a "one stop shop" for responding rapidly to crisis situations worldwide. Its professionals are on call around the clock, ready to support FBI operations and federal, state, local, and international law enforcement partners in managing critical incidents and major investigations.

The National Center for the Analysis of Violent Crime (NCAVC) provides operational support to FBI agents and law enforcement personnel on complex and time-sensitive cases. The Behavioral Threat Assessment Center (BTAC) assesses the potential threat of violence posed by persons of concern and as reflected in threatening communications. Issues traditionally addressed by the BTAC include school and workplace attacks, threats against Members of Congress and public figures, and threatening communications.

The Violent Criminal Apprehension Program (ViCAP) is the national repository for violent crime cases – specifically those involving homicides, sexual assaults, missing persons, and unidentified human remains – helping to draw links between seemingly unconnected crimes. In 2008, the FBI launched the ViCAP Web National Crime Database, which is available to law enforcement agencies through the secure LEO website. Investigators can search ViCAP Web for nationwide cases similar to theirs and communicate with other U.S. law enforcement agencies to coordinate investigations based on these linkages. More than 5,000 federal, state, and local law enforcement agencies have contributed to the 85,000-case ViCAP national violent crime database.

#### *Active Shooter Training*

In the aftermath of the tragedy at Sandy Hook elementary school, the President announced the Now Is the Time initiative focused on protecting children and communities by reducing gun violence. A critical component of this initiative focuses on schools, institutions of higher education, and houses of worship. The FBI was assigned to lead law enforcement training to ensure coordination among agencies. To that end, we have trained more than 9,600 senior state, local, tribal, and campus law enforcement executives at conferences hosted by FBI field offices, and trained more than 6,300 first responders through tabletop exercises designed around facts similar to recent school shootings. To date, the FBI has provided our Advanced Law Enforcement Rapid Response Training course, an active shooter training program, to more than 1,400 officers from 613 agencies.

#### *Tactical Operations & Crisis Response*

CIRG has a range of tactical resources and programs that support and provide oversight to the FBI and its partners. For example, each FBI field office has a SWAT team that is equipped with a wide array of specialized weaponry and is trained to engage in hazardous operations such as barricaded subjects, high-risk arrest/search warrants, patrolling through adverse terrain, and – in some field offices – maritime interdictions. These teams include crisis negotiators who routinely respond to prison sieges, hostage takings, and kidnappings nationwide and provide assistance to state and local police negotiators. CIRG also manages the FBI Hostage Rescue Team – the U.S. government’s non-military, full-time counterterrorist tactical team – which provides enhanced manpower, training, and resources to confront the most complex threats.

The Hazardous Devices School at Redstone Arsenal in Huntsville, Alabama, is the nation’s only facility for training and certifying public safety bomb technicians to render safe hazardous devices. Managed by the FBI, the school has trained more than 20,000 state and local

first responders since it opened in 1971. A natural extension of this school can be found in the FBI's own 249 Special Agent bomb technicians, who provide training to local and state bomb squads and serve as the workforce for the FBI's explosives-related operations worldwide.

#### **Victim Assistance**

Through the Office for Victim Assistance (OVA), the FBI ensures that victims of crimes investigated by the FBI are afforded the opportunity to receive the services and notifications required by federal law and the Attorney General Guidelines on Victim and Witness Assistance. Among its many services, OVA provides on-scene help to crime victims, assesses and triages their needs, and helps victims identify and secure counseling, housing, medical attention, and legal and immigration assistance. When other resources are not available, OVA administers special Victims of Crime Act funds to meet victims' emergency needs, including reunification travel, crime scene cleanup, replacement clothing, and shipment of victims' remains.

Special services are provided to child victims. The Child Pornography Victim Assistance Program coordinates support and notification services for child victims of pornography and their guardians. The Forensic Child Interviewing Program ensures that investigative interviews of child victims and witnesses of federal crimes are tailored to the child's stage of development and minimize any additional trauma. Additionally, a detailed protocol was recently developed for providing support to families of abducted children and assisting with post-recovery reunification and follow-up services. OVA is partnering with the Criminal Investigative Division's Violent Crimes Against Children Section and other agencies and organizations to improve the response to and services for minor victims of sex trafficking.

The Terrorism and Special Jurisdiction Program provides emergency assistance to injured victims and families of American victims killed in terrorist attacks and serves as a permanent point of contact for terrorism victims. Victim Assistance Rapid Deployment Teams provide immediate, on-scene assistance to victims of domestic terrorism and mass violence, often at the request of local law enforcement agencies. These highly trained and experienced teams have responded to numerous mass casualty crimes since 2006, most recently to tragedies at Sandy Hook Elementary School, the Washington Navy Yard, and at the Boston Marathon.

#### **Information Technology**

The FBI's Information and Technology Branch (ITB) provides enterprise-wide IT products and services to more than 36,000 FBI employees, contractors, and task force members, including managing more than 114,000 workstations and 46 mission-critical systems.

The target of the ITB's current modernization efforts is to create the future FBI Information Environment. Technology provides a distinct advantage, allowing FBI users access to their critical data when, where, and how they need it. The FBI Information Environment will support development of new mission and business functionality within a defined and controlled IT framework. These modernization efforts will move the FBI toward an agile, responsive, and efficient services-based operating model, emphasizing reuse of enterprise services both to increase cost savings and to enhance the reliability of IT infrastructure and applications.

**International Offices**

One of the fundamental challenges of the 21<sup>st</sup> Century is stopping overseas threats from compromising the security of the United States. For this reason, the FBI maintains more than 80 offices overseas that cover more than 200 countries and territories. Though our successes have been many, the increase in crimes with an overseas nexus shows we must do more.

The FBI operates worldwide and continuously looks for opportunities in the Middle East, Africa, Eurasia, the Americas, and Asia to target emerging terrorist, cyber, and criminal threats. Staff have strong cross-programmatic skills and work side-by-side with sister agencies, host governments, and corporate partners to take on threats. By targeting terrorists and criminals on their home turf – before their plots take shape – the FBI can stop those who wish to harm the United States before they have the capability to do so.

**Training**

With the support of Congress, we have re-opened the FBI Academy for training of new agents and intelligence analysts. In FY 2014, the FBI plans to graduate approximately seven new groups totaling more than 300 new agent trainees by the end of the fiscal year and approximately 140 new intelligence analysts in three sessions of the Intelligence Basics Course.

The National Academy provides law enforcement executives and investigators from state and local law enforcement agencies worldwide with advanced leadership training. The National Academy has continued to train more executives, adding to its total of more than 47,000 graduates to date.

The FBI provides leadership, intelligence, and law enforcement assistance to its international training partners through a variety of programs designed to establish and strengthen cooperation and liaison between the FBI and its overseas counterparts. Courses offered include organized crime cases, anti-gang strategies, terrorist crime scene investigations, and street survival techniques. The FBI also participates in the Department of State's International Law Enforcement Academy (ILEA) program, providing instruction on specialized law enforcement techniques as well as leadership training at academies in Budapest, Hungary; Bangkok, Thailand; Gaborone, Botswana; and San Salvador, El Salvador; as well as the Regional Training Center in Lima, Peru. The FBI has supported the Director position in the Budapest academy since its establishment in 1996.

The curriculums of these academies incorporate tenets and techniques developed at the FBI National Academy. To date, more than 50,000 students from 85 countries have received ILEA training, and the FBI has been a prominent contributor to the program.

Other key training programs include Leadership in Counterterrorism, which has trained more than 400 upper-level counterterrorism executives from state or national police agencies and chiefs or deputy chiefs of local agencies to date; the Domestic Security Executive Academy, which has trained more than 340 federal executives and Fortune 1,000 corporate security

executives; the Law Enforcement Executive Development Seminar (LEEDS), a two-week program designed for chief executive officers of the nation's mid-sized law enforcement agencies; and the National Executive Institute (NEI), a two-week executive training program that provides strategic leadership education and partnership opportunities for executives from the highest levels of the FBI and the largest U.S. and international law enforcement agencies.

#### **Leadership Development**

We created the Leadership Development Program (LDP) to help prepare FBI employees to lead before taking formal leadership positions, by providing relevant tools, courses, and developmental experiences needed for success. These efforts are fostering a Bureau-wide cultural shift toward promoting long-term individual development to better operate in quickly developing transitions and crises.

Since 2009, LDP has built a variety of integrated programs, including onboarding for both new employees and specific positions such as executives and senior managers, in-depth courses for both current and new supervisors and program managers, and a developmental program to prepare aspiring leaders before they are promoted. LDP's various programs were created by employees, for employees, and are designed to build upon one another over the course of an employee's career. They were originally benchmarked against successful models from our military, law enforcement, and intelligence partners, as well as private companies; as LDP has grown, other government agencies now reach out to benchmark against the FBI.

#### **Conclusion**

Responding to this complex and ever-changing threat environment is not new to the FBI. Chairman Leahy, Ranking Member Grassley and members of the Committee, I would like to close by thanking you for this opportunity to discuss the FBI's priorities. We are grateful for the leadership that you have provided to the FBI. We would not be in the position we are today without your support. Your commitment in our workforce, our technology, and our infrastructure make a difference every day at FBI offices in the United States and around the world, and we thank you for that support. I look forward to answering any questions you may have.

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**Statement Of Senator Patrick Leahy (D-Vt.),  
Chairman, Senate Judiciary Committee  
Hearing On Oversight Of The Federal Bureau Of Investigation  
May 21, 2014**

Today, the Judiciary Committee welcomes James Comey for his first appearance before this panel as Director of the Federal Bureau of Investigation. Director Comey, I remember from your confirmation hearing last year that your wife told you she did not think you would be chosen for this position. But here you are, eight months into the job. We look forward to hearing about the challenges you have discovered at the Bureau.

One of the challenges I have long observed is the FBI's need to balance its increased focus on counterterrorism while upholding its commitment to longstanding law enforcement functions. Director Comey, as you lead the Bureau into a new era, I urge you to make sure that investigations and prosecutions are targeted and fair, and that respect for civil rights and civil liberties is upheld.

A critical tool in successful and fair prosecutions is forensic evidence. Despite what you see on reruns of "Law and Order," DNA analysis is not widely available and its application often does not solve a crime in 60 minutes or less. I support law enforcement efforts to make better use of this powerful evidence, and to that end I have long pushed two bipartisan bills, the Justice for All Reauthorization Act and the Criminal Justice and Forensic Science Reform Act. These measures will help prosecutors identify and prosecute the guilty. As a nation, we are safer when our justice system gets it right.

While advanced technology presents the FBI with new opportunities to bring criminals to justice, it also can raise significant civil liberties challenges. Drones, for example, offer new capabilities as a domestic investigative tool, but also present serious privacy concerns. We must always fiercely guard the right of the American people to be free from unwarranted government intrusion. Vermonters remind me every day of my responsibility to ensure that we protect our national security and our civil liberties.

Director Comey is no stranger to this struggle. It was before this very committee, in 2007, that you described a dramatic hospital bedside confrontation with senior White House officials who were trying to get an ailing Attorney General John Ashcroft to reauthorize an NSA surveillance program – a program that the Justice Department had concluded was illegal. As Deputy Attorney General, you showed courage and independence by standing firm against this attempt to circumvent the rule of law.

Right now, Congress is still dealing with the surveillance programs begun during the last administration, including a bulk collection program that acquires Americans' phone records on an unprecedented scale. I am glad the House is poised to act on a revised version of the USA



FREEDOM Act. However, I remain concerned that some important reforms were removed. I hope that you will work with me as the Senate takes up this important issue.

Another area where we must work together is cyber security. I look forward to hearing more about the announcement earlier this week that the U.S. government has indicted five Chinese military hackers for computer hacking and economic espionage. The FBI also has participated in a major international effort to arrest individuals involved in cyber-stalking software called Blackshades. Cyber threats are among the most serious our nation faces, and place our critical infrastructure and privacy at risk.

Although we face many threats from abroad, the FBI has a key role in preventing and punishing extremist violence here at home. Federal hate crimes laws allow the Bureau to bring its considerable resources to cases like the anti-Semitic shooting last month outside a Jewish community center in Overland Park, Kansas. In 2009, I was proud to offer the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act as an amendment to the defense authorization bill. The FBI's implementation of that law has involved collaboration with the Anti-Defamation League to train state and local law enforcement agencies to protect the civil rights of all Americans.

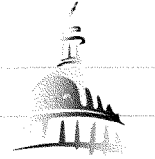
I look forward to learning more about those efforts and other priorities of the Bureau during today's hearing. I thank Director Comey for coming to the Committee for his first oversight hearing. And I thank the men and women of the FBI who work hard every day to keep us safe.

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*U.S. Senator Chuck Grassley • Iowa*

*Ranking Member • Senate Judiciary Committee*

<http://grassley.senate.gov>



Statement of Ranking Member Grassley of Iowa  
U.S. Senate Committee on the Judiciary  
Hearing on Oversight of the FBI  
Wednesday, May 21, 2014

Mr. Chairman, thank you for holding today's oversight hearing. I welcome Director Comey for his first hearing as Director of the Federal Bureau of Investigation (FBI). There are many issues to discuss about the FBI's important work protecting the United States from many different threats.

Unfortunately, I must start by pointing out that it was only on Monday that we received answers to our questions for the record from our last FBI oversight hearing eleven months ago. In addition, the answers we received are marked current as of August 26, 2013 – almost nine months ago. I understand that this is because the FBI completed its answers in August and submitted them to the Justice Department. Then they apparently disappeared into a black hole.

As I told the Attorney General in January when he appeared for an oversight hearing without having responded to the previous year's hearing questions, this is simply not acceptable.

When we met before Director Comey's confirmation, I provided him with a binder of all the letters and questions for the record still pending with his predecessor. The FBI has a pretty dismal record of responding to my questions.

I wish I could say that all of those unanswered issues have been fully dealt with, but they have not. However, I would like to commend Director Comey for recently beginning to make an effort to improve the FBI's level of communication with my office.

Ignoring my questions does not make them go away. They need to be answered fully and completely, and in good faith.

Turning to the FBI's priorities, counterterrorism rightfully remains at the top. Since the September 11 attacks, the wall between intelligence and criminal cases has come down, and our country is safer as a result.

I'm glad Congress is now in the process of considering reforms to some of the national security legal authorities, even as the President keeps changing his view about what is needed to keep us safe. However, Director Comey pointed out in the press a few months ago that some of these reforms would actually make it harder for the FBI to do terrorism investigations than bank fraud investigations. I hope we'll have the opportunity to discuss this topic more today. At least those types of reforms seem unwise.

Of course, the threats to our Nation are broader than just terrorism. Cybercrime of all types is on the rise, as this week's events illustrate. I applaud the FBI's efforts to hold the Chinese government accountable for stealing the trade secrets of U.S. companies and as a result, American jobs as well.

I also congratulate the FBI on its work to hold the developers of Blackshades accountable for unleashing a computer program that can steal users' passwords and files, as well as activate their webcams, all without their knowledge. Crimes are increasingly high-tech, and the tools available to the FBI to combat them must be as well. But in many cases, these tools have at least the potential for misuse that could jeopardize the privacy of innocent Americans.

I'd like to discuss the Department of Justice Inspector General's recommendation that the FBI develop special privacy guidelines concerning its use of drones. I'd also like to inquire about a proposal by the Department of Justice that would make it easier for the FBI to hack into computers for investigative purposes.

Despite the FBI's external successes, I find its internal lack of cooperation with its Inspector General troubling. According to the Inspector General, the FBI has significantly delayed his office's work by refusing to turn over grand jury and wiretap information when he deems it necessary for one of his reviews. The Inspector General Act authorizes the Inspector General to access these records.

However, the Inspector General informed me last week that, "All of the Department's components provided . . . full access to the material sought, with the notable exception of the FBI." According to the Inspector General, "the FBI's position with respect to production of grand jury material . . . is a change from its longstanding practice."

From 2001 through 2009, the FBI routinely provided this information to the Inspector General. So, I'd like to know why the FBI has been stonewalling the Inspector General, and what changed after 2009 to cut off the flow of information from the FBI.

In addition, I have questions about the status of the Justice Department's report on the FBI's whistleblower and anti-retaliation procedures. Nineteen months ago, President Obama issued a Presidential Directive related to the FBI's whistleblower procedures. It directed that the Attorney General produce a report within six months on how well the FBI follows its own whistleblower and anti-retaliation procedures. That report was also to examine the effectiveness of the procedures themselves and whether they could be improved.

The Attorney General's report is now more than a year overdue, which is simply unacceptable. The FBI is in dire need of an update to these provisions. For years, I have asked the Bureau about specific whistleblowers who came to my office, going back to Fred Whitehurst in the 1990s. Time and time again, I have heard from whistleblowers that the FBI procedures are an ineffective protection against retaliation.

When the Attorney General's report didn't come out at the six-month mark, I also asked the Government Accountability Office to look at this same issue. The FBI needs to cooperate with GAO on its review.

Finally, as Director Comey points out in his testimony, the FBI is actively investigating wrongdoing and getting results every day. That is why it is so perplexing to hear nothing at all from the FBI concerning its investigation into the targeting of Tea Party groups by the Internal Revenue Service.

It's been just about a year since the investigation was opened. I hope we'll have the time today to talk about the status of that investigation.

I'm also concerned about how the FBI handled the Boston Marathon bombing. The bombing reminded America that it is not immune from major terrorist attacks. There is still much to be learned from events prior to and following the incident.

The FBI has been given vast powers under Title 18 and Title 28 of the U.S. Code. However, a report issued by the Inspector Generals of the Intelligence Committee in April 2014 found that many of these investigative powers were not even used in a counter-terrorism assessment of one of the alleged bombers, Tamerlan Tsarnaev.

The report notes that the FBI did not visit Tamerlan Tsarnaev's mosque and failed to interview several people with intimate knowledge of him, including his wife or former girlfriend. The report states the FBI did not search all available databases for information on Tsarnaev, including several telephone databases and databases with information collected under the Foreign Intelligence Surveillance Act. Especially in light of all the controversy over bulk collection, it is curious that the FBI didn't even use all the tools available to it.

If the FBI and its agents choose, for whatever reason, not to use all available tools we have provided to root out terrorists, then we risk future attacks. Following the bombing, while the FBI made great efforts to keep us informed of their investigative actions to identify and capture the bombers, there were questions my staff asked that remain unanswered. Simple questions like: when were the brothers identified as suspects on surveillance video? Who made the identifications?

Leaving these questions hanging in the wind creates a perception that the FBI is hiding something. While I don't believe this to be the case, I also don't understand why Director Comey, who promised transparency in his confirmation hearing only a year ago, would allow this to occur.

Over two and a half years ago, Director Mueller promised us a report on the FBI's handling of Boston mobster Mark Rossetti. At the time, the FBI admitted that it broke its own rules by hiding Mr. Rossetti's status as an informant from the Massachusetts State Police.

This is especially significant given that the FBI also hid information from the State Police regarding Whitey Bulger. Given the Bulger case and Mr. Rossetti's own history, this delay is unacceptable.

I also still have questions about the FBI's investigation of conservative commentator Dinesh D'Souza. When Mr. D'Souza was arrested, prosecutors asserted that the case was the result of "a routine review by the FBI of campaign filings with the FEC." This raised questions for many observers, including liberal legal scholar Alan Dershowitz. Senators Sessions, Cruz, Lee, and I wrote the FBI on February 19, 2014, asking whether these "routine reviews" existed.

The FBI refused to answer the questions raised on the grounds that Mr. D'Souza might use the defense that he was being selectively prosecuted. Yesterday, Mr. D'Souza pled guilty. Now that it's clear that Mr. D'Souza will not use this defense, the FBI should be transparent and answer

the questions we asked over three months ago. If the facts would rebut the perception expressed by Mr. Dershowitz and others who were skeptical about this case, then there is no reason the FBI should resist talking about those facts.

I look forward to discussing these and a variety of other issues, time permitting. Thank you.

QUESTIONS SUBMITTED TO HON. JAMES B. COMEY, JR., BY SENATOR LEAHY

**QUESTIONS FOR THE RECORD – Chairman Leahy**  
**5/21/14 FBI Oversight Hearing**

**FBI Use of Drones**

1. At a Judiciary Committee oversight hearing last June, Director Mueller revealed that the FBI has used drones within the United States in a limited number of instances to conduct surveillance. At that time, the Bureau was in the initial stages of developing policies and procedures to govern the use of drones, including privacy protections.

**Q: Has the FBI finalized and implemented these guidelines? Specifically, what measures are being taken to ensure that Americans' privacy rights are not being violated?**

**Q: What are the approved uses of drones by the FBI? Would a search warrant or other judicial order be required to operate a drone within the United States?**

2. In addition to the privacy implications of integrating drones into the national airspace, I also have serious concerns about the impact on public safety. Over the past year, news reports have highlighted several instances of drones nearly colliding with commercial airliners. I understand that the FBI has initiated an investigation into a March incident involving a drone that came dangerously close to a plane as it attempted to land in Florida.

**Q: What role does the FBI play in investigating these types of cases and how is the FBI planning to handle the proliferation of drone technology?**

**Private Prisons**

According to recent press reports, the FBI launched a criminal investigation into the private prison company Corrections Corporation of America related to violence and understaffing at Idaho's largest federal prison. The issue of safety in federally contracted private prison facilities has long been of interest to this committee.

**Q: Does the Bureau's inquiry extend to other facilities owned by the Corrections Corporation of America?**

**Q: Will you commit to sharing your findings with this committee and working with my staff on this issue?**

**FBI Shooting of Ibragim Todashev**

Earlier this month, the *Boston Globe* reported that the FBI agent involved in the Todashev shooting had a disturbing disciplinary record as a police officer prior to joining the Bureau. According to reports, over the course of four years with the Oakland Police Department

in California, the officer was the subject of two police brutality lawsuits and four internal affairs investigations, and pleaded the Fifth at a police corruption trial.

**Q: Was the FBI aware of this officer's troubled history when he was hired, and are changes needed to the background investigation process for prospective agents?**

**Recording Custodial Interrogations**

I understand that the Justice Department recently approved important new guidance establishing a presumption that DOJ agencies will record all custodial interrogations. This is a critical protection that ensures accountability and helps establish the admissibility of evidence at trial. It will improve every aspect of our justice system.

**Q: Can you tell me more about this new guidance and how it will be implemented across the Bureau?**

**IP theft**

Intellectual property theft remains a serious threat to American creators, innovators, and consumers. The FBI has long played a central role in protecting these critical economic and cultural resources.

**Q: Please explain the FBI's current efforts to combat intellectual property theft, and any ways in which Congress could further assist you in those efforts.**

**IPEC and Funding**

The PRO-IP Act, which created the position of the Intellectual Property Enforcement Coordinator, authorized additional resources for law enforcement for use in addressing theft of intellectual property. In the past I have worked to secure funding for state and local IP enforcement efforts, and additional funds for U.S. Attorneys and FBI agents focused in this area. I have requested increased funding for these programs, and created the IPEC position, because I believe that strong enforcement that deters theft is important to our economic growth.

**Q: What is your view on the relationship between resources for enforcement and the ability to combat IP theft – and what is your view on the relationship between combating IP theft and the American economy?**



**ICANN/Cybersquatting**

The Internet Corporation for Assigned Names and Numbers (ICANN) is undertaking a significant expansion in the number of so-called “top-level domains” that are available to compete with extensions such as “.com”. Companies may now apply for top-level domains that contain their brand name, and new operators have applied for extensions such as “.shop” and “.music”. This change creates opportunities for business expansion and innovation, but it also increases the risk of consumer confusion about which domain names are legitimate. I have long urged ICANN to be cautious in approving who will administer sensitive domain names like “.bank” and “.pharma”. I have also expressed concern about the increased risk of cyber-squatting and consumer fraud.

**Q: Can more be done to address the risk of cyber-squatting and consumer fraud online, and is this an area that law enforcement is working to address?**

**TRAFFICKING**

A recent FBI report found that in FY 2012 the FBI had 306 pending human trafficking investigations with suspected adult and foreign child victims, a decrease from 337 in FY 2011 and an increase of investigations increased involving child sex trafficking from 352 to 440.

**Q:**

- 1. Could you provide more recent statistics?**
- 2. If more recent statistics continue the trend in a decline in investigations of foreign nationals, to what does the FBI attribute this decline?**
- 3. Were there fewer victims or were there fewer resources to investigate this type of trafficking?**
- 4. To what does the FBI attribute the increase in child sex trafficking cases?**
- 5. Were there more victims or greater resources to pursue more investigations?**
- 6. How many child labor trafficking cases has the FBI investigated in the past few years?**
- 7. How many cases of forced labor has the FBI investigated in the past few years?**
- 8. In cases of child labor or forced labor, can you provide any demographic information about the victims, any details about the circumstances, geographic trends, information about perpetrators, or any other identifiable trends?**

**Crisis Intervention Teams**

I understand that the FBI is investigating a number of police shootings in New Mexico, several of which have involved force against mentally ill individuals. There is a confirmed criminal investigation of the Albuquerque police and their behavior that led to the fatal shooting of a camper in March of this year, a man who had a well-documented history of mental illness.

I'm pleased that the FBI has developed Crisis Intervention Teams (CIT) specifically to train agents on the signs of mental illness and how to ensure they know how to diffuse such confrontations.

**Q: Can you talk about the CIT training, and how the FBI plans to expand this training at the state and local level?**

**Questions for the Record from Senator Dianne Feinstein**  
**For James B. Comey, Jr., Director, Federal Bureau of Investigation**  
**Senate Committee on the Judiciary**  
**May 21, 2014**

**Human Trafficking**

The kidnapping of 276 young girls in Nigeria by Boko Haram has shone a spotlight on the problem of international human trafficking. An article in this week's TIME Magazine demonstrates that these 276 girls are only the "tip of the iceberg."

The TIME article cites the following statistics. I am astounded by the number of trafficking victims.

- 21-30 million people are in some sort of involuntary servitude — the highest number in history.
- Victims from 136 different countries have been found in 118 other countries.
- China, India, and Pakistan have the most slaves, but Mauritania and Haiti have a higher prevalence of slavery.
- Sex trafficking represents from 22 to 58% of trafficking, depending on the publication.
- The profit margin on each woman trafficked is approximately 70%.
- From 2007 to 2010, 16% of the countries studied by the U.N.'s Office on Drugs and Crime did not record a single conviction for any kind of trafficking.

I would like to ask you the following questions about the FBI's efforts to combat human trafficking:

- **What challenges do you face in seeking to investigate international trafficking rings, where jurisdictional issues often arise?**

- **Both the FBI and the Department of Homeland Security have jurisdiction over human trafficking cases. How does each agency ensure that it is not duplicating the other agency's work?**
- **For domestic cases, what are the "triggers" for asserting the FBI's jurisdiction over a case, instead of deferring to state or local authorities?**

I understand that most of the Department of Justice's enforcement efforts are centered on those who sell sex ("pimps"), rather than on the buyers of sex ("johns"). To eliminate human trafficking, I believe we need to investigate and prosecute both the sellers and buyers of sex.

- **What efforts are you making to prosecute johns?**
- **What additional federal authorities would help you prosecute traffickers, including johns, and help reduce demand for these services?**
- **Is there anything preventing you from seizing cash, property, and other assets from pimps and johns that you successfully prosecute?**
- **What steps does the FBI take to identify victims of human trafficking that it comes across in its investigations, especially victims who are reluctant to cooperate with law enforcement?**

The "2013 Trafficking in Persons Report" published by the State Department stated that, in FY 2012, the FBI had 306 pending human trafficking investigations with suspected adult and foreign child victims, a decrease from 337 in FY 2011. That same report found that, in 2012, the FBI initiated 440 investigations involving the sex trafficking of children, an increase from 352 in 2011.

- **To what do you attribute the decline in investigations of adult and foreign child victims? Were there fewer victims or were there fewer resources to investigate this type of trafficking?**
- **To what does the FBI attribute the increase in child sex trafficking investigations? Were there more victims or greater resources to pursue more investigations?**
- **Overall, do you have sufficient funding to investigate human trafficking? If you had more funding, could you perform more investigations?**

### **Unaccompanied Alien Children**

In 2008, Congress passed an amendment I authored to the Violence Against Women Reauthorization Act of 2013 to allow prosecution of those who sexually abuse an unaccompanied alien child in federal custody, regardless of which federal agency has authority over the minor. Unfortunately, I recently learned of several allegations of serious sexual abuse of children in the custody of the Office of Refugee Resettlement (ORR). These children were allegedly abused by the very staff charged with their protection and care, which deeply concerns me.

I understand that, in most instances, ORR is required to report the child abuse to state or local authorities. In some instances, however, ORR is required to make its report to the FBI and the FBI determines whether to pursue the case.

- **Can you tell me the number of incidents reported to the FBI, and the number of cases that the FBI chose to pursue?**
- **What factors do you take into consideration to determine which cases the FBI should pursue?**

### **Money Laundering – Zetas Horse Case**

Last year, the FBI concluded a major money laundering investigation that uncovered a scheme in which the violent Mexican drug trafficking organization Los Zetas laundered at least \$22 million through an Oklahoma-based horse racing operation. As a result, the brother of Zetas leader Miguel Trevino Morales was sentenced to 20 years in prison and a number of others also face lengthy prison sentences.

However, all too often the money launderers that fund violent drug traffickers escape justice. This includes the financial institutions that launder drug money. In 2012, HSBC entered into a Deferred Prosecution Agreement and paid \$1.92 billion in fines for handling at least \$881 million in Mexican drug proceeds. Yet none of the individuals responsible faced criminal sanctions.

Drug traffickers are ultimately fueled by greed. Attacking their profits and those who launder them is critical to combat these organizations. I believe that criminal charges are a valuable tool to do so.

- **Do you agree that criminal sanctions help bring money launderers to justice and deter financial institutions from laundering drug proceeds?**

- **What more can be done to investigate and prosecute the money launderers who enable violent drug traffickers to operate? Are there additional legal tools you feel are necessary to do so?**

### **NICS Reporting**

As you know, the FBI's National Instant Criminal Background Check System (NICS) contains the databases of all persons who are prohibited from possessing a gun. Our constituents rely on these databases to keep gun out of the hands of convicted felons, the mentally ill, drug abusers, and other categories of dangerous people.

However, the system is missing millions of records because state and federal agencies have been slow to report records to NICS. While states have made progress, I understand that, as of May 31, 2013, nine states have provided fewer than 100 records.

Many of the missing records are mental health or domestic violence records. But some of them are criminal records — USA Today published a front-page article on April 23<sup>rd</sup> describing an investigation it conducted that concluded that, in five states alone, law enforcement agencies failed to provide information to the FBI about at least 2.5 million outstanding arrest warrants.

- **Could you explain how missing records prevent NICS from keeping guns out of the hands of criminals, domestic abusers, and people that a court has declared are a danger to themselves or others?**
- **Why are some states not providing these records to the NICS databases?**
- **What steps is the FBI taking to encourage and help states to submit qualifying records to the NICS databases?**

Domestic violence records pose a particular challenge. Under federal law, convicted domestic abusers and abusers subject to a permanent restraining order cannot access a gun. Although domestic abuse records are frequently submitted to the NICS databases, it is difficult to identify them as prohibiting. Consequently, a person who has been convicted of domestic abuse or is subject to a permanent restraining order can often pass a background check even though he is prohibited from buying a gun.

- **What steps is the FBI taking to ensure that state and local governments appropriately designate the records they submit to the NICS databases?**

- **Does the Department of Justice audit the quality of records submitted to NICS to ensure that domestic abuse records that are prohibiting are properly designated?**

**Crime Victims' Rights Act**

I understand that the FBI takes the position that rights afforded to victims under the Crime Victims' Rights Act apply even before formal charges have been filed, and that those rights apply during the investigative stage of a criminal case.

- **Could you describe how the FBI provides rights to victims during the investigative stage?**
- **Has providing rights to victims during the investigative stage impeded investigations?**

**OIG Report on FBI's Administration of Crime Victims Fund Monies**

The Department of Justice's Office of Inspector General issued a report in September 2013 that found significant problems with the FBI's administration of Crime Victims Fund (CVF) monies. In sum, the Inspector General found that the FBI did not have adequate internal controls over Crime Victim Fund monies. Among other findings, the IG found that:

- Approximately \$527,000 in Crime Victim Fund monies were left idle at the FBI for two years instead of being used for victim services.
- The FBI did not accurately request reimbursement for \$631,000 it spent on Victim Specialists in Fiscal Year 2009.

I understand that the FBI's Office of Victim Assistance's new director has implemented a new tracking system.

- **Could you give me an update on the FBI's efforts to implement internal control procedures over Crime Victim Fund monies that it administers?**

**Questions for Director Comey from Senator Franken**

1. I held a hearing on the FBI's Next Generation Identification facial recognition pilot program in 2012. And as the FBI explained to me at that hearing, this is a facial recognition system that would allow federal, state and local law enforcement to take a photo of a suspected unidentified criminal and run it against a database of known, identified criminals from mugshots.

The FBI testified that, quote "the only photos that will go into the database are criminal mugshot photos," and that, quote "the system that we are deploying... absolutely will be limited to the mugshot photos and the criminal history database." In other words, there would be no chance that an innocent citizen will be suspected of a crime just because he or she looks like a criminal, because there would be only known criminals in the database.

Yet documents released last month through a Freedom of Information Act request show that as of 2010, the FBI had asked the contractors building that database to make sure that it could hold up to 4.3 million civil, non-criminal photos by fiscal year 2015.

Does the FBI's facial recognition database include photos of non-criminals? If so, what non-criminals are included in the database? If not, does the FBI have plans to include non-criminal photos in the database in the future?

2. At my 2012 hearing, I said that the FBI's facial recognition program could be a powerful tool to catch serious criminals; but I also said that this program raised serious civil liberties concerns. For example, the FBI had prepared internal presentations showing how facial recognition technology could have been used to identify people attending peaceful political rallies.

Will the FBI issue a rule prohibiting or discouraging jurisdictions from using facial recognition technology in a way that could stifle free speech?

3. The last privacy assessment for the FBI's facial recognition program was conducted in 2008. That was six years ago, when the facial recognition system really wasn't up and running yet. It now has at least 12 million photos in it. At my 2012 hearing, the FBI witness said that the Bureau was in the process of updating that assessment. But two years later, no privacy assessment has been issued.

When will the FBI release an updated privacy assessment for its facial recognition program?



QUESTIONS SUBMITTED TO HON. JAMES B. COMEY, JR., BY SENATOR BLUMENTHAL

**Senator Blumenthal  
Questions for the Record**

Human trafficking is one of the most pressing human rights concerns of our era and I appreciate the hard work that the men and women of the FBI have put into combatting it. The issue is very important to me. In 2012, Senator Portman and I started the Senate Caucus to End Human Trafficking and several of my colleagues here on the Judiciary Committee are a part of that caucus. You referred to human trafficking three times in your testimony: when you discussed the FBI's civil rights programs, when you discussed the transnational organized crime program, and when you discussed the Innocence Lost National Initiative. My understanding is that human trafficking cases can also fall under the FBI's cyber program. I'm concerned that such diffusion of responsibility can make it difficult to develop strong and consistent investigative strategies. I'm further concerned that this can lead to an inconsistent relationship with partner non-governmental organizations on these cases.

- 1. What steps can be taken to strengthen the FBI's approach to human trafficking investigations?**
- 2. Do you think that consolidation of the bureau's anti-human trafficking efforts into a single unit could enhance the bureau's capabilities to confront this threat?**

- 3. Many criminal networks involved in human trafficking are complex. Is the FBI using complex criminal enterprise investigative techniques to go after these networks?**
- 4. Would you be able to provide this committee with statistics on the number of times wire intercepts and undercover operations have been used against human trafficking networks?**
- 5. De-confliction and intelligence sharing between local, state, and federal agencies has been essential to our country's counter-narcotics strategy. Are there lessons to be learned there that can inform our efforts to combat human trafficking?**

The FBI has a long tradition of being on the cutting edge of law enforcement techniques. The FBI's Uniform Crime Reporting system, while novel when it was first introduced in 1930, fails to capture sufficient detail on crime in America to inform modern policing strategies. The FBI's National Incident Based Reporting System, introduced in 1988, is a much needed replacement to the Uniform Crime Reporting system. NIBRS captures time of day and location details, injuries, weapon involvement, relationships between victims and offenders, and all offenses involved within a given incident, among many other critical data points. This tool is not only essential to law enforcement; it has great capacity to inform

Congressional efforts to address crime. Unfortunately, as of 2007, only 25% of the U.S. population was covered by agencies utilizing this sophisticated crime reporting program, limiting its usefulness.

- 1. Can you tell me what percentage of the population is currently covered by agencies participating in the National Incident Based Reporting System?**
- 2. What steps is the FBI taking to complete the rollout of the National Incident Based Reporting System?**
- 3. Could a local law enforcement agency's access to the N-DEX database be dependent upon their participation in the National Incident Based Reporting System?**

I am very concerned with ensuring successful enforcement of the Brady bill. We recently celebrated the 20 year anniversary of background checks on firearms sales by licensed dealers and the statistics have shown them to be very successful at preventing guns from getting into the hands of criminals. But the success has been limited by two things: loopholes that allow for private gun sales without background checks, even when those sales are between strangers and facilitated through websites or gun shows, and incomplete records in the FBI's National Instant Criminal Background Checks System. I fully understand that the success of

the system is dependent upon comprehensive criminal records, mental health adjudications, and restraining order information being furnished by states, and that the FBI cannot simply go out and add these records without states providing them.

- 1. Last year, funds were set aside to add relevant records to the NICS system. How has the NICS system developed over the past year with that influx of money? With additional resources, could we make the NICS system even more effective?**
- 2. Does the FBI have an estimate of the number of records that should be in NICS but are not?**
- 3. Could states benefit from more guidance on which records should be submitted to NICS?**

**Senate Committee on the Judiciary**  
**“Oversight of the Federal Bureau of Investigation”**

**May 21, 2014**

**Questions for the Record from Ranking Member Charles E. Grassley**

**James B. Comey, Jr.**

**1. Inspector General Right of Access**

At a Senate hearing on November 19, 2013, Inspector General Michael Horowitz testified that the Department is impeding his access to grand jury information and material witness warrants to which he is entitled under the Inspector General Act of 1978. Section 6(a)(1) of that Act authorizes the Inspector General “to have access to all records, reports, audits, reviews, documents, papers, recommendations, or other material available to the applicable establishment which relate to programs and operations with respect to which that Inspector General has responsibilities under this Act.”

In addition, Section 1001 of the Patriot Act requires the Inspector General to review whether the Department violated the civil liberties and civil rights of individuals detained as material witnesses in national security investigations following 9/11. The Inspector General has stated that access to grand jury information and material witness warrants is necessary to fulfill his duties under the Patriot Act.

So, in March and April 2014, I wrote a letter to the Department and the Inspector General requesting documents about this dispute. On May 13, the Department and the Inspector General produced documents that showed that the Department sought – and obtained in a timely manner – grand jury information concerning material witnesses from the Department of Justice National Security Division and three U.S. Attorney’s Offices (Southern District of New York, Northern District of Illinois, and the Eastern District of Virginia). In addition to these four entities, the U.S. Marshals Service and the Federal Bureau of Prisons apparently provided full and timely access to the records the Inspector General requested under the IG Act and the Patriot Act.

Significantly, however, the Inspector General noted that “All of the Department’s components provided us with full access to the material we sought, with the notable exception of the FBI.” Specifically, when the Inspector General requested files from the FBI relating to material witnesses in August 2010, the FBI allegedly responded in October 2010 by informing the Inspector General that the grand jury secrecy rules prohibit the FBI from providing the grand jury material to the Inspector General.

The Inspector General alleges that the FBI previously provided routine access to these records from 2001 through 2009, but abruptly reversed its policy in 2010.

**Questions**

- a. From 2001 – when the Office of the Inspector General (OIG) assumed primary oversight responsibility for the FBI – through 2009, did the FBI ever refuse to produce grand jury material to the OIG? Why or why not? If so, please describe each instance in detail.
- b. From 2001 through 2009, did the FBI ever delay the OIG’s access to grand jury material by asserting the right to conduct a page-by-page preproduction review of all case files and e-mails requested by the OIG? Why or why not? If so, please describe each instance in detail.
- c. The OIG asserts that the FBI’s page-by-page preproduction review of all materials requested by the OIG allows the FBI to make unilateral determinations about what documents requested by the OIG are relevant to OIG reviews. The Inspector General Act of 1978 reserves that judgment to the OIG and authorizes the OIG to have independent access to FBI materials. Does the FBI believe that the grand jury secrecy rules override, or conflict with, the Inspector General Act in any way? If so, please explain.
- d. From 2001 to the present, when the OIG has obtained grand jury material from the FBI, has OIG ever violated the legal prohibitions on disclosure of such information? Specifically, has the OIG ever failed to remove or redact from its public reports sensitive or classified information, or information that would identify the subjects or direction of a grand jury investigation?
- e. In October 2010, did the FBI’s Office of the General Counsel inform the OIG that the FBI believed grand jury secrecy rules prohibited the FBI from providing grand jury material to the OIG? If not, then why did the FBI’s practice of providing grand jury information to the OIG change?
- f. Did the FBI ever assert this position prior to October 2010? If so, please provide documentation. If not, please explain why the FBI adopted this new policy in October 2010.
- g. If the FBI still adheres to the October 2010 interpretation, what is the FBI’s view on the legality of all the grand jury material which was allegedly provided to the OIG on a routine basis from 2001 through 2009?
- h. According to the OIG, from February 2010 and September 2010, the Department of Justice National Security Division and three U.S. Attorney’s Offices referenced above provided the OIG with grand jury information concerning material witnesses pursuant to Fed. R. Crim. P. 6(e)(3)(D). How does the FBI reconcile its October 2010 interpretation of the grand jury secrecy rules with the position adopted by the National Security Division and the three U.S. Attorney’s Offices referenced above?
- i. How long did it take for the FBI to provide the OIG with grand jury materials as part of the OIG’s review of the FBI’s use of “exigent letters?”

- j. How long did it take for the FBI to provide the OIG with grand jury materials and material witness warrant information as part of the OIG's review of Operation Fast and Furious?
- k. How long did it take for the FBI to provide the OIG with grand jury materials and material witness warrant information as part of the OIG's civil liberties and civil rights oversight responsibilities under the Patriot Act?

## **2. FBI Report Regarding Mark Rossetti**

Over two and one half years ago I wrote the FBI concerning its use of Boston mobster Mark Rossetti as an informant. The FBI promised to produce a report on Mr. Rossetti's use as an informant but claimed that production of the report would be postponed until all ongoing cases were concluded. On December 13, 2013, your staff wrote in an e-mail that all cases involving Mr. Rossetti and his associates were finished and you had access to the documents you needed. Given that all ongoing cases were concluded over five months ago, when will this report be ready?

## **3. 9/11 Commission**

Earlier this month, the Justice Department made public four heavily censored documents in response to a Freedom of Information Act lawsuit in Florida. The documents confirmed that by 2002, the Bureau had found "many connections" between 9/11 terrorists and Esam Ghazzawi, a Florida businessman with ties to the Saudi Royal family. Esam Ghazzawi's family reportedly fled their home in Sarasota, Florida on August 27, 2001 – just two weeks before the 9/11 attacks. This information was allegedly not disclosed to the 9/11 Commission or to congressional investigators. In fact, according to the FBI records chief, the FBI was aware of these four documents linking the Ghazzawi family to 9/11 terrorists, but never turned over the documents to the 9/11 Commission or to Congress.

### **Questions**

- a. What is the FBI's explanation as to why these documents were never provided to Congress?
- b. Do you think Freedom of Information Act requesters should receive more access to FBI documents than Congressional investigators or the 9/11 Commission?

A similar issue came up earlier this year when it was revealed that the FBI concealed important information from the 9/11 Commission regarding its counterterrorist activities. Specifically, the newly uncovered information reveals that the FBI had a human source in direct contact with Osama bin Laden as early as 1993. Allegedly, this source learned directly from Osama bin Laden that he was looking to finance terrorist attacks in the United States. This revelation raises a lot of

questions as to why the 9/11 Commission was never told about the human source and what else, if anything, the FBI is withholding.

**Question**

- c. Was this information provided to the 9/11 Commission?

**4. Boston Marathon Bombing – Unanswered questions**

On Monday, April 15, 2013, two bomb blasts rocked the Boston Marathon finish line and initiated a five day investigation and manhunt coordinated by the FBI. The FBI released unnamed photographic images of the suspects on Thursday, April 18, 2013 at 5:20 PM. Following the release of the photos, the individuals allegedly murdered MIT Police Officer Sean Collier, engaged police in a firefight, and triggered a door to door manhunt in Watertown, Massachusetts. Tamerlan and Dzhokhar Tsarnaev were identified by name following Tamerlan's death after the firefight with police. Since that time, on multiple occasions, my staff has asked a series of unclassified questions which have never been answered.

**Questions**

- a. At what time and date were the images of Dzhokhar Tsarnaev and/or Tamerlan Tsarnaev discovered on video or photograph for the *first time* as being at least one or both of the individuals reasonably believed to be involved in the bombings even if they could not be identified by name?
- b. Who made that determination and for what agency did that individual work?
- c. Following this initial determination, what investigative steps did the FBI take *or* attempt to take *prior* to releasing the photos to the public?
- d. Did the FBI notify anyone in the Cambridge Police Department of the FBI surveillance in Cambridge, MA prior to its initiation?
  - i. If so, whom?
  - ii. If not, why not?

**5. Boston Marathon Bombing – Source Development**

The Inspector General of the Intelligence Committee (ICIG) issued a report on April 10, 2014 regarding the FBI's incomplete assessment of Boston Bomber, Tamerlan Tsarnaev in 2011. The report noted that the FBI did not interview several people with intimate knowledge of Tamerlan including his wife or former girlfriend, visit his mosque, or interview his associates. The report states the FBI did not search all available databases, such as several FBI systems, telephone databases, or databases with information collected under the Foreign Intelligence Surveillance



Act (FISA). I understand these judgment calls are all within “the legal framework governing its ability to gather intelligence and conduct investigations.” It is impossible to know what would have changed with further investigation but it would be concerning to find out that the reason for such an incomplete assessment was part of an attempt to recruit Tamerlan Tsarnaev at that time or to leave the option available in the future.

### **Questions**

- a. Did the FBI and the agent conducting the assessment limit their exposure in the public life of Tamerlan Tsarnaev with the intent to recruit him at that time or to allow for that option in the future?
  - i. If not, what was the reason the case agent for conducting such a limited assessment?
  - ii. How have the case agent or supervisor been held accountable for conducting an incomplete assessment? If they have not been held accountable, then why not?
- b. Is limiting the FBI’s exposure in the public life of a potential source part of any training or method related to the identification, recruitment, or management of confidential sources and informants?
- c. Provide all FBI guidelines and training materials for the identification, recruitment, and management of confidential sources and informants.

### **6. Boston Marathon Bombing – Source Development**

On May 22, 2013, Ibragim Todashev was shot and killed in the course of an interview led by the Federal Bureau of Investigation (FBI). The interview occurred during an investigation into the Boston Marathon bombing and a possible connection to a triple murder that occurred years earlier in Waltham, Massachusetts. The Department of Justice (DOJ) Civil Rights Division determined that the evidence did not reveal a violation of federal criminal rights statutes or warrant any further federal criminal investigation. However, I still have questions about events prior to the FBI’s interview with Todashev.

Reports obtained from the Orange County Sheriff’s Department indicate that the FBI also conducted physical surveillance on Todashev. According to those reports, on May 4, 2013, Todashev was involved in a physical altercation over a parking spot at the Premium Outlet Mall. According to one deputy who responded to the scene of the crime, “I approached the location where the incident occurred and saw a male laying on the ground. I could see a considerable amount of blood on the ground and the subject appeared unconscious. Believing I was dealing with a felony crime, I immediately located the vehicle...” Following Todashev’s arrest, according to another deputy, “Once on his feet the suspect commented that the vehicles behind us are FBI agents that have been following him. I noticed 3 (three) vehicles with dark tint...I noticed one vehicle was driven by a male, had a computer stand and appeared to be talking on a

radio.” The use of surveillance was confirmed in the sworn statement of the FBI agent involved in the May 22<sup>nd</sup> shooting. According to the agent, “FBI Agents surveilling Todashev witnessed this event and relayed the details directly to me.”

According to Florida law, federal law enforcement officers have the authority to make a warrantless arrest of any person who has committed a felony involving violence in their presence while the officer is engaged in the exercise of their law enforcement duties. The possibility that employees of the top law enforcement organization in this country witnessed a violent felony and, although they had the authority to intervene, opted to maintain surveillance while someone was beat unconscious is concerning.

### **Questions**

- a. Did the FBI conduct physical surveillance of Ibragim Todashev on May 4, 2013? If so, how many federal agents participated?
- b. Was the FBI conducting physical surveillance of Ibragim Todashev in the area of the Premium Outlet Mall, Orlando, Florida on May 4, 2013?
- c. When did the FBI become aware of the circumstances of the May 4, 2013 arrest?
- d. When did the FBI obtain a copy of the May 4, 2013 arrest report documenting the incident?
- e. Do any FBI policies or instructions address an agent’s obligations when witnessing a felony? If so, please provide a copy.
- f. Do any FBI policies or instructions address an agent’s obligations when witnessing a felony in a state where federal law enforcement officers are afforded peace officer status (e.g. Florida)? If so, please provide a copy.
- g. Do any FBI policies or instructions address the issues of providing assistance to local law enforcement officers who are executing a felony arrest? If so, please provide a copy.
- h. Did any FBI employees witness the physical altercation in which Ibragim Todashev was involved on May 4, 2013?
- i. Did any FBI agents attempt to physically intervene in the altercation involving Ibragim Todashev at the Premium Outlet Mall?
- j. Did any FBI employees witness the felony stop and arrest by Orange County Sheriff’s Department Officers of Ibragim Todashev on May 4, 2013?
- k. Did any FBI employee attempt to assist the Orange County Sheriff’s Department in the felony stop and arrest of Ibragim Todashev on May 4, 2013?

1. Please provide all surveillance reports of Ibragim Todashev from May 4, 2014.

#### 7. Presidential Policy Directive 19

In October 2012, President Obama tasked Attorney General Holder with providing him with a report on the FBI whistleblower procedures within six months. That was nineteen months ago, and the Attorney General still hasn't completed his report. The Bureau has an abysmal record when it comes to whistleblower retaliation.

#### Questions

- a. When did the Justice Department first contact FBI headquarters about Section E of PPD 19?
- b. Section E requires the Attorney General to prepare his report "in consultation with . . . Federal Bureau of Investigation employees . . ." What involvement has the FBI had in the Attorney General's review so far?
- c. What cooperation has the FBI given GAO in its review so far?
- d. What revisions to 28 CFR Part 27 do you believe could increase the regulation's effectiveness in protecting whistleblowers?
- e. Whistleblowers are only protected under 28 CFR Part 27 if they come forward to one of 9 high-ranking entities. From FY 2013-FY 2014, how many FBI whistleblower complaints have failed to qualify each year as protected disclosures because the complainant is unaware that they must make their disclosure to one of these 9 entities?
- f. Would the FBI support providing whistleblower protections if a whistleblower went to any supervisor in the whistleblower's chain of command rather than exclusively offering protection to those who report to the top officials designated in DOJ's regulations?
- g. Does FBI have concerns about the duration of FBI whistleblower retaliation cases and, if so, what could FBI do to help resolve these cases more quickly?
- h. Given the length of many FBI whistleblower retaliation cases, to what extent has FBI taken action to address the alleged reprisal by, for example, putting personnel actions on hold before these cases were resolved?
- i. What percentage of whistleblower retaliation cases does the FBI settle?
  - a. How does the FBI's cost of defending these cases compare to how much it would cost the FBI to accommodate the whistleblowers through settlement?
  - b. What, if any, regulatory, statutory, or other barriers inhibit FBI from settling these cases?

- j. In those cases where OARM orders corrective action, what steps does the FBI take to ensure that this corrective action is implemented?
- k. How does FBI ensure that when OARM finds retaliation has occurred, the wrongdoers or responsible officials are adequately disciplined given that OARM has no jurisdiction over the retaliators?
- l. From FY 2003-FY 2013, please list all the retaliatory actions that OARM has found to have occurred and the disciplinary action the FBI took in each of these cases.

#### **8. FBI Insider Threat and Whistleblower Training**

Last summer, McClatchy reported on President Obama's National Insider Threat Program. McClatchy alleged that some agencies were using the program to target whistleblowers. According to McClatchy, several agencies used behavioral profiling techniques and asked federal employees to spy on their coworkers—even employees who do not deal with classified information.

When I asked the FBI for its own insider threat training, FBI legislative affairs staff provided me with a link to information assurance training developed by the Defense Information Security Agency that the FBI requires all of its employees to complete. This link includes an insider threat section. However, it fails to make the distinction between insider threats and whistleblowers. There is a big difference between leaking and blowing the whistle. Teaching that difference should be part of any training related to insider threats.

#### **Questions**

- a. Is the Defense Information Security Agency training the only training the FBI requires its employees to complete on insider threat-related issues? If not, what other training is required? When are FBI employees first required to complete this other training, and how regularly are they required to re-complete it? What repercussions are there for employees who fail to complete this training, either initially or as regularly required subsequently?
- b. When are FBI employees first required to complete the Defense Information Security Agency training? How regularly are FBI employees required to re-complete this training?
- c. What repercussions are there for employees who fail to complete the Defense Information Security Agency training, either initially or as regularly required subsequently?
- d. What training do FBI employees receive on the FBI's process for making a protected disclosure (28 CFR § 27.1) and the protections afforded whistleblowers (28 CFR § 27.2)?
- e. When are FBI employees first required to complete this whistleblower training? How regularly are FBI employees required to re-complete this training?

- f. What repercussions are there for employees who fail to complete this whistleblower training, either initially or as regularly required subsequently?
- g. Will you issue guidance to clarify to FBI personnel in your training that the Insider Threat program should not be used to target legitimate whistleblowers? If not, why not?

#### **9. National Insider Threat Program**

The minimum standards for each agency to follow came from the interagency Insider Threat Task Force, established by Executive Order 13587 on October 7, 2011. The Task Force, co-chaired by the Attorney General and the Director of National Intelligence, was jointly staffed by the Office of the National Counterintelligence Executive (ONCIX) and personnel from FBI's Counterintelligence Division.

One year later, on November 21, 2012, that Task Force issued the National Insider Threat Policy and an accompanying document, Minimum Standards for Executive Branch Insider Threat Programs. The two documents were released together throughout the Executive Branch via a Presidential Memorandum. Those standards did not do enough to distinguish actual insider threats from legitimate whistleblowers.

It is my understanding that the FBI's Insider Threat Program has continued to produce training materials with ONCIX. According to an October 28, 2013 letter I received from the FBI, the Bureau and ONCIX spent \$38,341.41 producing a video titled Game of Pawns and \$72,598.29 producing a video titled Betrayed. The FBI received some attention for releasing Game of Pawns in its entirety online on April 14, 2014, although the video had apparently been developed some time before. Again, neither of the videos nor the extra features accompanying them made any effort to distinguish between insider threats and legitimate whistleblowers.

#### **Questions**

- a. Did the Insider Threat Task Force consider the distinction between whistleblowers and insider threats when formulating the Insider Threat Policy and Minimum Standards?
- b. Will the Insider Threat Task Force amend the Insider Threat Policy and Minimum Standards to make it clear that the Insider Threat programs should not be used to target legitimate whistleblowers?
- c. When was Game of Pawns first developed?
- d. Why was the decision made to release Game of Pawns publicly in April 2014?
- e. What projects are currently being worked on by the FBI's Insider Threat Program staff?

**10. DOJ's Use of Drones**

Last September, the Department of Justice's Inspector General released a report on the Department's use of drones. According to the report, officials with the Federal Bureau of Investigation (FBI) said that there was no need to develop specialized privacy controls to guide the Department's use of drones. But the Inspector General recommended otherwise, noting that the use of drones raises unique concerns about privacy and the collection of evidence.

**Questions**

- a. Do you agree that special privacy controls for drones are not necessary? Why or why not?
- b. If you think these controls are necessary, have you taken any steps to implement the IG's recommendation?

**11. USCIS's EB-5 Program**

Recently the Bureau informed my staff that there are around 14 ongoing investigations in the FBI's Economic Crimes Unit related to the Department of Homeland Security's EB-5 immigrant investor program. As I understand it, these include investigations surrounding securities fraud, Ponzi schemes, and embezzlement by regional centers, attorneys, and third-party promoters. These 14 don't even include those related to national security concerns, such as the concerns that were raised about FBI field offices being constructed with EB-5 money.

According a recent New York Times article, "If Congress approves, [Comey] plans to move the bureau's head of intelligence out of the national security division and create a new intelligence branch . . . in an effort to more quickly identify trends and perpetrators."

**Question**

- a. How would this change help identify vulnerabilities in the EB-5 visa program from a systemic perspective?

**12. Deficient Accounting of Funds Distributed from the Crime Victim's Fund**

In a September 2013 audit report, the Department of Justice Office of the Inspector General found that the FBI had mismanaged funding from the Crime Victim's Fund. This created a risk of mismanagement of the funds, and in one instance resulted in over half a million dollars sitting idle for two years instead of being used to actually help victims.

**Questions**

- a. What has the FBI done to fix its mismanagement of these victim funds?

- b. Has the FBI gone back and identified any unspent funds from Fiscal Year 2010 and 2011, as the Inspector General recommended?

### **13. Lone Wolf Terrorists**

The threat of lone wolf terrorists, or homegrown extremists, continues to be a difficult problem. As you pointed out in your testimony, "As the Boston bombings illustrate, we face a continuing threat from homegrown violent extremists. This threat is of particular concern. These individuals are self-radicalizing. They do not share a typical profile; their experiences and motives are often distinct. They are willing to act alone, which makes them difficult to identify and stop. This is not just a D.C., New York, or Los Angeles phenomenon; it is agnostic as to place."

#### **Question**

- a. Are there additional tools that Congress can provide that you believe would help the FBI address the issue of homegrown extremists?

### **14. Stingray Technology**

According to numerous media reports, the FBI makes use of stingrays, devices that trick nearby cell phones into connecting to it, for investigative purposes. Such a device may well help solve crimes, or track fugitives or abducted children. But there are privacy concerns with the use of such technology, which reportedly could be used to obtain large amounts of information, including geolocation data, from cellphones, even those cellphones that are in the vicinity but not related to an investigation.

#### **Questions**

- a. Please describe the legal standard and process, if any, the FBI adheres to before employing stingray technology. For example, does the FBI obtain a warrant or other judicial order before employing them? Does the legal standard and process change across jurisdictions or is it uniform across the United States?
- b. What if any internal FBI policies or procedures are in place to ensure the privacy of innocent bystanders whose cellphones may come into range of a stingray device?

### **15. Next Generation Identification Program**

I am also concerned about the potential effect on privacy of the FBI's Next Generation Identification program (NGI), a replacement under development for the Integrated Automated Fingerprint Identification System (IAFIS). NGI will reportedly include a database of millions of photographs that will be searchable using facial recognition technology.

**Questions**

- a. A privacy impact assessment was completed for this program in June 2008, about six years ago. Given the rapid advances in technology, does the FBI plan to update this assessment as it moves forward with this program? If so, when?
- b. What if any internal policies and procedures will the FBI have in place to limit the types of photographs and other information that can be placed into the system (for example, will non-criminal photographs from background checks, state driver's licenses, passports, or social media websites be included); the individuals who may access the system; and the purposes for which results of searches of the system may be used?

**16. Firearms Policies**

In November, I contacted you regarding firearm accountability and retention within the FBI. While the FBI responded to a number of the questions included in my inquiry, some remain. Please respond to the following.

**Questions**

- a. How many rounds of ammunition have been stolen, lost, and/or unaccounted for during the past five years? For each status, please break down the rounds by caliber.
- b. How often does the FBI conduct an inventory of all agency firearms, including serial number verification? Who makes this verification?
- c. In your response, you referenced a comprehensive property inventory that occurred in the Spring of 2013. Did this inventory include serial number verification? If not, when was the last inventory conducted in which serial numbers were verified by at least Supervisory Special Agents, if not more senior members of management? How many firearms were unaccounted for at that time?
- d. How many firearms are currently unaccounted for? What steps are being taken to recover these firearms?



## QUESTIONS SUBMITTED TO HON. JAMES B. COMEY, JR., BY SENATOR FLAKE

**Written Questions of Senator Jeff Flake**  
 U.S. Senate Committee on the Judiciary  
*Oversight of the Federal Bureau of Investigation*  
 May 28, 2014

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1. On May 19<sup>th</sup>, the Department of Justice announced indictments against five Chinese military hackers for foreign theft of trade secrets or economic espionage, among other crimes. The DOJ announcement quoted you as saying: "For too long, the Chinese government has blatantly sought to use cyber espionage to obtain economic advantage for its state-owned industries. . . . The indictment announced today is an important step. But there are many more victims, and there is much more to be done. With our unique criminal and national security authorities, we will continue to use all legal tools at our disposal to counter cyber espionage from all sources."
  - a. Given your statement, would you agree with other executive branch reports that the threat of economic espionage coordinated by foreign governments to U.S. businesses is a "growing and persistent threat"?
  
2. I have introduced the Future of American Innovation and Research Act or "FAIR Act," which provides companies with a legal remedy when their trade secrets are stolen from abroad.
 

On May 13<sup>th</sup>, the Assistant Director of the FBI Counterintelligence Division, Randall Coleman, testified that, "[p]rotecting the nation's economy from this threat is not something the FBI can accomplish on its own. . . . companies need to be proactive . . . ." Companies must be proactive because, since the Economic Espionage Act was enacted in 1996, almost 20 years ago, there have only been 10 convictions under Section 1831, which targets theft of trade secrets to benefit foreign entities or governments.

  - a. Since the FBI cannot investigate and DOJ cannot prosecute every theft of trade secrets, given their limited resources, wouldn't a broad federal civil cause of action help companies be proactive in combating the theft of their trade secrets?
  
3. A 2013 Administration report on trade secret theft describes how the threats are evolving, stating: "Over the next several years, the proliferation of portable devices that connect to the Internet and other networks will continue to create new opportunities for malicious actors to conduct espionage. The trend in both commercial and government organizations toward the pooling of information processing and storage will present even greater challenges to preserving the security and integrity of sensitive information."
  - a. Doesn't the increasing use of portable devices that connect to the internet and cloud-based storage expand the opportunities for foreign actors operating abroad to steal trade secrets?
  
4. Has the FBI noticed an increase in international economic espionage over the past several years? And, are there any other trends in international economic espionage that we should take into consideration when considering potential legislation?
  
5. In a recently released DOJ Office of Inspector General report on the FBI Terrorist Watchlist nomination practices, the OIG "found that the improvements implemented by the FBI as a result of [their] previous audits have helped ensure that the watchlist is more complete, accurate, and current." However, the report found the "FBI's time requirements for the submission of watchlist actions could be strengthened." Under the FBI's guidelines, up to 17 business days could elapse between the date a case agent receives supervisory approval to open a terrorism case and the date the subject is nominated to the

watchlist.” The OIG recommended that the FBI further review its policies and processes to determine the most effective and efficient methods, including technological improvements, and to ensure that subjects are reliably nominated to the watchlist as expeditiously as possible.

- a. What efforts are you taking to implement this recommendation by the Office of Inspector General?
6. In a September 2013 audit report, the OIG found that as a result of poor accounting practices the FBI had mismanaged funding from the Crime Victim’s Fund (CVF). The report concluded that the FBI did not have adequate internal controls over Crime Victim’s Fund funding and “found that the system implemented by the FBI to track and document CVF expenditures was insufficient and unreliable.” The audit resulted in three recommendations to the FBI to improve the effectiveness of its internal control over CVF funds. These recommendations include (1) conducting analysis for FYs 2010 and 2011 to identify and remedy unspent CVF funds, unbilled CVF expenses, and improperly transferred CVF funds; (2) implementing internal controls to ensure the FBI is in compliance with all rules, regulations, and guidelines related to the administration of CVF funds; and (3) enhancing coordination efforts within the FBI and with the OVC to ensure CVF funds are properly accounted for and accurately reported.
    - a. What progress have you made in implementing these recommendations so that these deficiencies are corrected?
  7. On May 20<sup>th</sup>, the House Oversight and Government Reform Committee subpoenaed the Justice Department for documents related to its involvement in efforts to scrutinize and potentially prosecute tax-exempt groups. Given the series of events which have called into question the quality of the FBI’s investigation with the Department of Justice and the recent bipartisan vote of “no confidence” by the House of Representatives, in which the appointment of a special prosecutor was overwhelmingly approved, I urge the agency to cooperate fully with the House and Senate investigations.
    - a. Will you commit to cooperate fully with these investigations?
    - b. Will you turn over any and all documents related to the investigation that are requested by the House and Senate investigative committees?
  8. According to the U.S. Attorney’s Manual, federal prosecutors may give notice to a person formerly identified as a target of an investigation once that person’s target status has ended. When you were U.S. Attorney, did you place any limits on your Assistant U.S. Attorneys’ ability to provide timely notice of declination after a decision was made not to pursue a case?
    - a. What do you believe is the best practice when determining whether to inform targets they are no longer under investigation?
  9. Given your experience, do you see any reason why the U.S. Attorney manual cannot be changed to allow for presumptive notice of declinations to targets who have already been given notice of their status, assuming the notice does not otherwise compromise another investigation or create risks to any individual or business?



**U.S. Department of Justice**  
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

July 2, 2015

The Honorable Charles E. Grassley  
Chairman  
Committee on the Judiciary  
United States Senate  
Washington, DC 20510

Dear Mr. Chairman:

Please find enclosed responses to questions arising from the appearance of FBI Director James Comey before the Committee on May 21, 2014, at a hearing entitled "Oversight of the Federal Bureau of Investigation."

Thank you for the opportunity to present our views. Please do not hesitate to contact this office if we be of additional assistance to you. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

A handwritten signature in black ink, appearing to read "Peter J. Kadzik".

Peter J. Kadzik  
Assistant Attorney General

Enclosure

cc: The Honorable Patrick J. Leahy  
Ranking Minority Member

**Responses of the Federal Bureau of Investigation  
to Questions for the Record  
Arising from the May 21, 2014, Hearing Before the  
Senate Committee on the Judiciary  
Regarding "Oversight of the FBI"**

**Questions Posed by Chairman Leahy**

**FBI Use of Drones**

**1. At a Judiciary Committee oversight hearing last June, Director Mueller revealed that the FBI has used drones within the United States in a limited number of instances to conduct surveillance. At that time, the Bureau was in the initial stages of developing policies and procedures to govern the use of drones, including privacy protections.**

**a. Has the FBI finalized and implemented these guidelines? Specifically, what measures are being taken to ensure that Americans' privacy rights are not being violated?**

**Response:**

We appreciate the Committee's interest in unmanned aircraft systems (UAS), which have been used by the FBI in very limited circumstances when there is a specific, operational need. Since 2006, the FBI has deployed UAS in only 13 cases to support missions related to kidnappings, search and rescue operations, drug interdictions, and fugitive investigations. The investigative use of the FBI's aviation resources generally, including both manned and unmanned aircraft, is governed by our Domestic Investigations and Operations Guide (DIOG). While the DIOG does not expressly address unmanned aircraft, the procedural aspects of our use of unmanned aerial systems are included in an aviation policy guide that is not available for public dissemination. In August 2013, the Department of Justice (DOJ) Office of the Deputy Attorney General directed DOJ's Office of Legal Policy to convene a working group composed of a broad range of DOJ entities, including the Chief Privacy and Civil Liberties Officer and the Office of Privacy and Civil Liberties, to identify and address any policy or legal issues pertaining to the domestic use of unmanned aircraft systems (UAS) for surveillance purposes. This working group will make recommendations to DOJ leadership on DOJ policies or guidance specific to UAS, and the FBI is pleased to assist in the development of any such policies or guidance.

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*These responses are current as of 8/29/14*

**b. What are the approved uses of drones by the FBI? Would a search warrant or other judicial order be required to operate a drone within the United States?**

**Response:**

As we briefed Senate Judiciary Committee staff on July 12, 2013, and advised in response to the Questions for the Record arising from the June 19, 2013 Oversight hearing, the FBI uses UAS in limited circumstances when there is a specific, operational need. UAS have been used for surveillance to support missions related to kidnappings, search and rescue operations, drug interdictions, and fugitive investigations. For example, in 2013 in Alabama, the FBI used UAS surveillance to support the successful rescue of the 5-year-old child who was being held hostage in an underground bunker by Jimmy Lee Dykes. None of the UAS used by the FBI are armed with either lethal or non-lethal weapons, and the FBI has no plans to use weapons with UAS. The FBI does not use UAS to conduct "bulk" surveillance or to conduct general surveillance not related to a specific, properly authorized investigation or assessment.

The FBI's use of UAS is guided by all applicable Constitutional, statutory, and regulatory provisions, including: the Fourth Amendment of the United States Constitution; the Privacy Act; Federal Aviation Administration (FAA) rules and regulations; the Attorney General Guidelines for Domestic FBI Operations; the FBI's Domestic Investigations and Operations Guide (DIOG); the FBI's 2011 Bureau Aviation Regulations Manual; and other applicable policies. For example, the FBI must obtain a Certificate of Waiver or Authorization (COA) from the FAA before using UAS. As the UAS operator, the FBI must comply with the FAA guidance listed in the COA when operating in the national airspace (this includes significant limits on the location and altitude at which the FBI operates the UAS). The FBI must also comply with the limits applicable to public aircraft.

Prior to deployment, every request to use UAS for surveillance must also be approved by the FBI's aviation unit and the relevant FBI Field Office. In addition, requests to use UAS for surveillance are reviewed by FBI legal counsel when there is a belief that an individual may have a reasonable expectation of privacy under the Fourth Amendment. This review is designed to ensure that the proposed use of UAS is consistent with the Fourth Amendment and that the required privacy and civil liberties analysis is conducted prior to UAS deployment. The FBI will not use UAS to acquire information in circumstances in which individuals have a reasonable expectation of privacy except, as is true in non-UAS circumstances, when a warrant has been obtained or an exception to the Fourth Amendment warrant requirement applies.

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*These responses are current as of 8/29/14*

**2. In addition to the privacy implications of integrating drones into the national airspace, I also have serious concerns about the impact on public safety. Over the past year, news reports have highlighted several instances of drones nearly colliding with commercial airliners. I understand that the FBI has initiated an investigation into a March incident involving a drone that came dangerously close to a plane as it attempted to land in Florida.**

**What role does the FBI play in investigating these types of cases and how is the FBI planning to handle the proliferation of drone technology?**

**Response:**

Although the use of UAS is subject to regulation by the FAA, the FBI would work closely with the FAA and the National Transportation Safety Board (NTSB) to investigate any collision between a drone and a commercial airliner to determine if the collision was a criminal act or an act of terrorism. If the collision were determined to be accidental, jurisdiction would fall to the FAA. To facilitate coordination and cooperation among law enforcement entities, the FAA provides guidance regarding the role of law enforcement agencies in deterring, detecting, and investigating unauthorized and/or unsafe UAS operations.

**Private Prisons**

**3. According to recent press reports, the FBI launched a criminal investigation into the private prison company Corrections Corporation of America related to violence and understaffing at Idaho's largest federal prison. The issue of safety in federally contracted private prison facilities has long been of interest to this committee.**

**a. Does the Bureau's inquiry extend to other facilities owned by the Corrections Corporation of America?**

**b. Will you commit to sharing your findings with this committee and working with my staff on this issue?**

**Response to subparts a and b:**

Under longstanding DOJ policy, the FBI generally does not confirm the existence of ongoing investigations or disclose nonpublic information about them. In addition to protecting the privacy interests of those affected, the policy serves to avoid disclosures that could provide subjects with information that might result in the destruction of evidence, witness tampering, or other activity that would impede an FBI investigation.

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**FBI Shooting of Ibragim Todashev**

**4. Earlier this month, the *Boston Globe* reported that the FBI agent involved in the Todashev shooting had a disturbing disciplinary record as a police officer prior to joining the Bureau. According to reports, over the course of four years with the Oakland Police Department in California, the officer was the subject of two police brutality lawsuits and four internal affairs investigations, and pleaded the Fifth at a police corruption trial.**

**Was the FBI aware of this officer's troubled history when he was hired, and are changes needed to the background investigation process for prospective agents?**

**Response:**

FBI policy requires that background investigations of candidates for Special Agent positions include checks of the Internal Affairs or equivalent offices for all law enforcement employers, including a review of any allegations of police misconduct, whether substantiated or unsubstantiated. The FBI also conducts local arrest and criminal/civil court record checks in each area where a candidate has resided, attended school, or been employed during the scope of the background investigation.

In this case, the background investigation included checks of both court records and the records of the Oakland Police Department's Internal Affairs Division, as required. The FBI continuously reviews its hiring and background investigation procedures and makes adjustments as warranted.

**Recording Custodial Interrogations**

**5. I understand that the Justice Department recently approved important new guidance establishing a presumption that DOJ agencies will record all custodial interrogations. This is a critical protection that ensures accountability and helps establish the admissibility of evidence at trial. It will improve every aspect of our justice system.**

**Can you tell me more about this new guidance and how it will be implemented across the Bureau?**

**Response:**

The May 12, 2014, policy issued by the Deputy Attorney General establishes recording of custodial interviews as the regular practice of DOJ's investigative agencies, including the FBI, subject only to limited exceptions. Video recording is strongly preferred under

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the policy, permitting the reproduction in subsequent court proceedings of the complete interview, including both visual and audio aspects. As you indicate, the new policy will further the interests of justice in many ways. The benefits include creating an objective record of custodial interviews, providing incontrovertible evidence of what was said and done, and foreclosing disputes and misrepresentations regarding agents' conduct and arrestees' statements. The FBI has conducted joint training with other DOJ components affected by this policy to address implementation issues and to provide guidance to agents and prosecutors.

We expect that recordings of interviews will provide strong evidence that supports the cases our agents work so hard to build.

### **IP Theft**

**6. Intellectual property theft remains a serious threat to American creators, innovators, and consumers. The FBI has long played a central role in protecting these critical economic and cultural resources.**

**Please explain the FBI's current efforts to combat intellectual property theft, and any ways in which Congress could further assist you in those efforts.**

### **Response:**

The FBI's strategic objective with respect to the criminal enforcement of intellectual property rights (IPR) is to disrupt and dismantle efforts by international and domestic criminal organizations and individuals to manufacture or traffic in counterfeit and pirated goods and to steal, distribute, or otherwise profit from the theft of intellectual property. Our investigative focus is on complex and high impact cases critical to ensuring national security and to protecting public health and safety. As a consequence, our highest investigative priorities are cases involving thefts of trade secrets, distribution of counterfeit goods that pose an immediate threat to health and safety, and violations of copyright and trademark laws that have a national security, organized crime, or significant economic nexus.

The FBI participates in the National IPR Coordination Center, which is a centralized, multi-agency organization the mission of which is to coordinate, manage, and promote the U.S. Government's efforts to enforce federal IPR laws. This coordinated approach enables each agency to bring its unique investigative resources, capabilities, and authorities to address a particular threat or actor, allowing government resources to be used in the most effective and efficient manner.

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In addition to investigating existing cases, the FBI places a great deal of emphasis on proactive initiatives to counter current and emerging threats, through which we coordinate investigative strategies with private industry as well as domestic and foreign law enforcement partners. Among other efforts, the FBI has initiated projects designed to address health and safety threats in part through increased public awareness of the harm and illegality of IPR violations.

The FBI has also taken a lead role in executing the U.S. strategy to reduce the theft of trade secrets. In collaboration with state, local, federal, and foreign law enforcement authorities, the FBI has employed the resources provided by legislation such as the Prioritizing Resources and Organization for Intellectual Property Act (PRO-IP Act) to initiate, advance, and support cutting edge and significant IPR investigations, outreach, and training projects. The FBI believes the protection of our nation's intellectual property is becoming ever more important as our economy is increasingly driven by the information technology sector and we are committed to finding new ways to enforce the laws designed to protect this intellectual property.

In Fiscal Year 2014, the FBI initiated approximately 70 new investigations and made approximately 70 arrests, and DOJ obtained more than 50 convictions, related to intellectual property rights violations. Pursuant to one of the investigations, four Atlanta-area individuals were charged for their roles in piracy groups engaged in the illegal distribution of more than two million copies of copyrighted Android mobile device applications (apps) without permission from the copyright owners or app developers. Pursuant to another investigation, which concerned the safety threat posed when automobile diagnostic system software is unlocked and installed on counterfeit diagnostic devices, suspects were charged with copyright infringement, among other charges. In a third case, a former engineer was convicted of stealing designs for pre-fillable syringes and pen injectors for use in a competing business in India.

#### **IPEC and Funding**

**7. The PRO-IP Act, which created the position of the Intellectual Property Enforcement Coordinator, authorized additional resources for law enforcement for use in addressing theft of intellectual property. In the past I have worked to secure funding for state and local IP enforcement efforts, and additional funds for U.S. Attorneys and FBI agents focused in this area. I have requested increased funding for these programs, and created the IPEC position, because I believe that strong enforcement that deters theft is important to our economic growth.**

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**What is your view on the relationship between resources for enforcement and the ability to combat IP theft – and what is your view on the relationship between combating IP theft and the American economy?**

**Response:**

Funds received in support of the FBI's IPR programs have had a significant impact on the FBI's ability to combat the threats posed by IPR crimes. With this funding, the FBI has trained Special Agents regarding the special challenges of IPR enforcement and has established formal and informal relationships with domestic and international enforcement agents and rights holders. This has enabled investigators in the field and personnel at the National IPR Coordination Center to address complex international and domestic IPR matters efficiently and effectively. The FBI will continue to employ the resources provided through the PRO-IP Act to initiate, advance, and support cutting edge and significant IPR investigations, programs, and training.

The threat to U.S. intellectual property interests is immense and growing in size, scope, and complexity. This threat, which hides in the shadows of the legitimate economy, suppressing U.S. job growth and eroding U.S. economic potential, parallels the increasing sophistication of Internet-based fraud and computer network intrusions. The challenges related to combating the threat to intellectual property are ever-changing, as IPR-related criminal activity constantly evolves and adapts to enforcement efforts. The increase in global Internet use and the explosion of global supply chains create an increasingly international venue for IPR crime. The digital nature of commerce and trade has brought about a quiet revolution in criminal activity. Criminal elements have followed industry's lead, increasing their focus on the digital realm to facilitate a booming, multi-billion-dollar underground economy that depends on IPR crime. The FBI recognizes these challenges and will continue to use its expertise and resources to address these crimes.

**ICANN/Cybersquatting**

**8. The Internet Corporation for Assigned Names and Numbers (ICANN) is undertaking a significant expansion in the number of so-called "top-level domains" that are available to compete with extensions such as ".com". Companies may now apply for top-level domains that contain their brand name, and new operators have applied for extensions such as ".shop" and ".music". This change creates opportunities for business expansion and innovation, but it also increases the risk of consumer confusion about which domain names are legitimate. I have long urged ICANN to be cautious in approving who will administer sensitive domain names like ".bank" and ".pharma". I have also expressed concern about the increased risk of cyber-squatting and consumer fraud.**

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**Can more be done to address the risk of cyber-squatting and consumer fraud online, and is this an area that law enforcement is working to address?**

**Response:**

The FBI continues to have concerns regarding the introduction of hundreds, and possibly thousands, of new generic top-level domains (gTLDs). Over the last six years, the U.S. Government (USG) has actively and continuously engaged with its counterparts, through the Governmental Advisory Committee (GAC) of the Internet Corporation for Assigned Names and Numbers (ICANN), to inform the development and implementation of the new gTLD program through the provision of consensus policy advice to the ICANN Board. Following ICANN's publication of the more than 1,900 new gTLD applications in 2012, the USG, through a broad interagency process that included experts in copyright and law enforcement, reviewed the applications and proposed additional safeguards applicable to all new gTLDs to address intellectual property, consumer protection, and law enforcement concerns. These safeguards are designed to reduce abuse, verify the WHOIS data, provide transparency, address complaints, and ensure consequences for lack of compliance.

The ICANN GAC has further developed, and provided to the ICANN Board, a set of "Safeguards for New gTLDs" that address several broad categories of new gTLD strings such as consumer protection and regulated markets. These safeguards are intended to add another measure of consumer protection for strings related to such areas as children, health and fitness, finance, professional services, and intellectual property. These safeguards have been incorporated into the contracts between ICANN and the gTLD registries. We believe these safeguards will help address concerns regarding cybersquatting, defensive registrations, and brand/reputational harms.

**Trafficking**

**9. A recent FBI report found that in FY 2012 the FBI had 306 pending human trafficking investigations with suspected adult and foreign child victims, a decrease from 337 in FY 2011 and an increase of investigations increased involving child sex trafficking from 352 to 440.**

**a. Could you provide more recent statistics?**

**Response:**

The numbers provided in the 2013 Trafficking in Persons (TIP) Report were not correctly characterized. The 306 investigations referenced in the TIP report are the investigations

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*These responses are current as of 8/29/14*

that were opened during FY 2012 (new investigations). In FY 2012, the FBI had 459 pending investigations regarding the suspected human trafficking of adult and foreign child victims, an increase from 342 in FY 2011. This number increased to 473 pending investigations in FY 2013, and was approximately 525 pending investigations, including approximately 460 cases associated with the commercial sexual exploitation of children, as of June 2014.

**b. If more recent statistics continue the trend in a decline in investigations of foreign nationals, to what does the FBI attribute this decline?**

**c. Were there fewer victims or were there fewer resources to investigate this type of trafficking?**

**Response to subparts b and c:**

It is not unexpected to have increases or decreases from year to year; single-year changes do not reflect a trend. However, as noted above, the number of these investigations actually increased from 2011 to 2012. Over the past 5-year period, the number of pending investigations regarding the trafficking of adult and foreign child victims has increased from approximately 280 in 2009 to approximately 525 at present.

**d. To what does the FBI attribute the increase in child sex trafficking cases?**

**e. Were there more victims or greater resources to pursue more investigations?**

**Response to subparts d and e:**

The FBI's law enforcement efforts with respect to child sex trafficking have increased in recent years as a result of a variety of factors. Most importantly, the FBI has experienced a significant increase in the number of Special Agents assigned to these investigations, and the availability of greater Agent resources allows us to open more investigations. Also of critical importance, we have benefited from partnership agreements with numerous local, state, and federal agencies in support of the Innocence Lost national initiative and from the creation of several new task forces.

The FBI task forces addressing child exploitation seek out and develop strong partnerships with nongovernmental organizations (NGOs) that work with vulnerable populations. NGOs, which are critical liaison and operational partners in human trafficking matters, provide information concerning potential human trafficking situations, offer invaluable victim services during ongoing investigations, and enhance victims' trust by serving as a vital bridge between victims and law enforcement.

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personnel. The FBI learns from the NGOs, which have expertise in their communities, and it provides training to these NGOs, helping them understand the law enforcement approach to combating this growing crime problem. For example, since 2003 the FBI has partnered with the National Center for Missing and Exploited Children to host training on protecting victims of child prostitution. To date, more than 1,300 law enforcement officers and prosecutors have attended this training, which focuses on the comprehensive identification, intervention, and investigation of the commercial sexual exploitation of children.

**f. How many child labor trafficking cases has the FBI investigated in the past few years?**

**Response:**

The FBI conducted approximately 20 child labor trafficking investigations from 2009 to 2012.

**g. How many cases of forced labor has the FBI investigated in the past few years?**

**Response:**

Including the 20 child labor trafficking investigations noted above, the FBI conducted approximately 100 labor trafficking investigations from 2009 to 2012.

**h. In cases of child labor or forced labor, can you provide any demographic information about the victims, any details about the circumstances, geographic trends, information about perpetrators, or any other identifiable trends?**

**Response:**

The following statistics refer to labor trafficking cases (or cases that had both labor and sex trafficking) opened and closed from 2009-2012:

<u>Number of Victims</u>	<u>Gender</u>	<u>Place of Birth/Ethnicity</u>
30% 1 victim	74% female	25% USA
38% 2-5 victims	12% male*	23% Hispanic
13% 6-10 victims	11% both	19% Asia/South Pacific
7% 11-20 victims	3% unknown	19% Unknown
12% Unknown	14% Other	

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\*The rate of male victimization is far greater in labor trafficking cases than in sex trafficking cases.

<u>Recruited Inside or Outside the U.S.</u>		<u>Was the Victim Smuggled into the U.S.</u>	
38%	Already in U.S. when recruited	18%	Yes
41%	Outside of U.S. when recruited	51%	No
21%	Unknown	31%	Unknown

<u>Time Trafficked</u>	<u>Victim Lived on Premises</u>	<u>Withheld ID/Travel Docs</u>
22% 0-3 months	44% Yes	25% Yes
10% 4-6 months	37% No	37% No
6% 7-9 months	19% Unknown	38% Unknown
7% 10-12 months		
9% 13-18 months		
3% 19-24 months		
12% 2-5 years		
6% Greater than 5 years		
25% Unknown		

Work Done While Trafficked

35%	Domestic worker/maid/janitor
33%	Bar/restaurant/night club/stripper
6%	Massage parlor
4%	Agriculture
3%	Construction
19%	Other – fishing, garment industry, nail salon, street vendor, landscaping, carnival/circus

Means of Recruitment

22%	Word of mouth
11%	Friend/acquaintance
8%	Kidnapping
7%	Job placement company
6%	Family
4%	Romantic relationship
2%	Online
8%	Other
32%	Unknown

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Gang/Criminal Enterprise Involvement

5% Yes  
 51% No  
 44% Unknown

Type of Force, Fraud, or Coercion Used (Ranked in Order of Most Common)\*

1. Physical abuse
2. Mental/Emotional abuse
3. Non-physical abuse (immigration-related threats; threats to family members; withholding travel documents)
4. Sexual abuse
5. Personal threats

\*These are listed in order of the most common, as opposed to the greatest percentage, because frequently more than one type of coercion is used on a victim.

Geography: The FBI has conducted labor trafficking investigations in 26 different states and the District of Columbia. The top ten geographic regions accounting for the most labor trafficking investigations are: Southern California, Northern California, Mid-Florida, West Texas, Colorado, District of Columbia, Southern Florida, Western North Carolina, New Jersey, and Maryland.

Crisis Intervention Teams

**10. I understand that the FBI is investigating a number of police shootings in New Mexico, several of which have involved force against mentally ill individuals. There is a confirmed criminal investigation of the Albuquerque police and their behavior that led to the fatal shooting of a camper in March of this year, a man who had a well-documented history of mental illness. I'm pleased that the FBI has developed Crisis Intervention Teams (CIT) specifically to train agents on the signs of mental illness and how to ensure they know how to diffuse such confrontations.**

**Can you talk about the CIT training, and how the FBI plans to expand this training at the state and local level?**

Response:


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The FBI does not have Crisis Intervention Teams (CITs) and has not developed training in this area. CITs are generally entities within local police departments, because it is the local police who have the most direct and frequent contact with residents. These teams are trained by the local police department to respond to incidents involving those with serious mental illness. For example, a CIT might be called upon to address a circumstance involving a person with a behavioral or emotional disorder that has resulted in a serious functional impairment involving criminal conduct.

**Questions Posed by Senator Feinstein**

**Human Trafficking**

11. The kidnapping of 276 young girls in Nigeria by Boko Haram has shone a spotlight on the problem of international human trafficking. An article in this week's TIME Magazine demonstrates that these 276 girls are only the "tip of the iceberg." The TIME article cites the following statistics. I am astounded by the number of trafficking victims.

- 21-30 million people are in some sort of involuntary servitude — the highest number in history.
- Victims from 136 different countries have been found in 118 other countries.
- China, India, and Pakistan have the most slaves, but Mauritania and Haiti have a higher prevalence of slavery.
- Sex trafficking represents from 22 to 58% of trafficking, depending on the publication.
- The profit margin on each woman trafficked is approximately 70%.
- From 2007 to 2010, 16% of the countries studied by the U.N.'s Office on Drugs and Crime did not record a single conviction for any kind of trafficking.

I would like to ask you the following questions about the FBI's efforts to combat human trafficking:

- a. What challenges do you face in seeking to investigate international trafficking rings, where jurisdictional issues often arise?

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**Response:**

In cases in which there is an appropriate U.S. nexus, the FBI can investigate human trafficking that occurs entirely on foreign soil. That said, there are still limits on the FBI's investigative authorities in foreign countries. FBI agents in a country from which investigative assistance might be sought will work with appropriate counterparts and, if needed, pursue assistance under the terms of an applicable bilateral or multilateral treaty. In the absence of an applicable treaty, the FBI may seek investigative assistance through letters of request or letters rogatory. The procedural requirements for making treaty requests, letter requests, and letters rogatory may make it challenging for the FBI to conduct the interviews, gather the evidence, and secure the witnesses necessary for prosecution in the United States. In addition, victim services can be severely limited depending upon the support offered by the foreign country and any NGOs in that country.

**b. Both the FBI and the Department of Homeland Security have jurisdiction over human trafficking cases. How does each agency ensure that it is not duplicating the other agency's work?**

**Response:**

The FBI and the Department of Homeland Security (DHS) de-conflict and coordinate their efforts through participation in more than 150 task forces and working groups throughout the country. In addition, both agencies participate in six Anti-trafficking Coordination Teams (ACTeams) along with various DOJ elements (including appropriate U.S. Attorneys' Offices), the Department of Labor (DOL) Office of the Inspector General (OIG), and DOL Wage and Hour Division personnel. Each agency also has representation on the ACTeams at the headquarters level, through which training and ACTeam initiatives are coordinated.

**c. For domestic cases, what are the "triggers" for asserting the FBI's jurisdiction over a case, instead of deferring to state or local authorities?**

**Response:**

Other than the question of whether the allegation indicates criminal activity as defined by federal criminal statutes, there are no specific "triggers" for asserting FBI investigative jurisdiction. This is primarily because the FBI's activities in this area are typically through its participation in more than 150 task forces and working groups, which include federal, state, and local law enforcement agencies, and decisions as to whether to pursue the cases federally are often made in this context.

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**12. I understand that most of the Department of Justice's enforcement efforts are centered on those who sell sex ("pimps"), rather than on the buyers of sex ("johns"). To eliminate human trafficking, I believe we need to investigate and prosecute both the sellers and buyers of sex.**

**a. What efforts are you making to prosecute johns?**

**Response:**

The FBI takes a victim-centered approach to its human trafficking investigations, prioritizing the rescue of the victims. Consequently, the FBI's investigations of human trafficking often employ investigative methods designed to maximize the possibility of encountering and rescuing those working in the commercial sex industry against their will.

The FBI leads approximately 70 Child Exploitation Task Forces (CETFs) in which we partner with nearly 400 federal, state, and local law enforcement agencies. Through the CETFs, cases involving the commercial sexual exploitation of children are prosecuted through both state and federal courts. While the work of the CETFs does focus on the recovery of the children who are forced into acts of prostitution, the CETFs work to identify those who force these children into this situation as well as the adults who engage in sexual acts with the children. In addition to the federal crime of engaging in commercial sex with a minor, it is also a violation of federal criminal law (18 U.S.C. § 1591) to knowingly engage in commercial sex through force, fraud, or coercion. The FBI investigates these federal violations, as well as cases involving the purchase of sex trafficking victims. For example, on June 3, 2014, the Denver CETF worked with local law enforcement partners to arrest nine individuals for engaging in sex with a 17-year-old female who was being commercially sexually exploited. In addition to the nine felony arrests, 21 other males were charged with misdemeanors for patronizing an adult victim, identified as a 20-year-old female. In total, this case resulted in the arrest of two individuals responsible for forcing the victims into acts of prostitution and 30 individuals who engaged in sexual acts with the victims.

**b. What additional federal authorities would help you prosecute traffickers, including johns, and help reduce demand for these services?**

**Response:**

The FBI recognizes the numerous options available through existing law. FBI agents and Task Force Officers (TFOs) regularly work with the appropriate United States Attorneys'

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*These responses are current as of 8/29/14*

Offices and state prosecutors to develop sound investigative and prosecutive strategies. Through this process, the FBI, TFOs, and prosecutors evaluate the merits of each case under relevant federal, state, and local laws to identify the best means of addressing those who facilitate or patronize the commercial exploitation of children. This government response may include both prosecution and, in appropriate cases, the seizure of property through asset forfeiture procedures.

**c. Is there anything preventing you from seizing cash, property, and other assets from pimps and johns that you successfully prosecute?**

**Response:**

Federal law generally does allow for asset forfeiture in human trafficking cases. In appropriate circumstances, the FBI seizes all assets that are forfeitable under applicable laws.

**d. What steps does the FBI take to identify victims of human trafficking that it comes across in its investigations, especially victims who are reluctant to cooperate with law enforcement?**

**Response:**

The FBI takes a victim-centered approach in human trafficking cases. All efforts are taken to ensure victims are identified and that appropriate services are rendered. Due to the expected distrust of law enforcement authorities, the FBI's investigators and more than 130 victim specialists are trained to take the time necessary to overcome any trust barriers.

The FBI's victim specialists do not gather evidence for the investigative team. Instead, they are focused solely on assessing the victim's immediate and long-term needs. The FBI uses a multi-disciplinary team, incorporating law enforcement, judicial, social services, and NGO representatives in this process. This strategy is critical to earning the trust of the victims, and this trust is essential to the victims' willingness to accept the resources being offered.

**13. The "2013 Trafficking in Persons Report" published by the State Department stated that, in FY 2012, the FBI had 306 pending human trafficking investigations with suspected adult and foreign child victims, a decrease from 337 in FY 2011. That same report found that, in 2012, the FBI initiated 440 investigations involving the sex trafficking of children, an increase from 352 in 2011.**

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*These responses are current as of 8/29/14 .*

a. To what do you attribute the decline in investigations of adult and foreign child victims? Were there fewer victims or were there fewer resources to investigate this type of trafficking?

b. To what does the FBI attribute the increase in child sex trafficking investigations? Were there more victims or greater resources to pursue more investigations?

c. Overall, do you have sufficient funding to investigate human trafficking? If you had more funding, could you perform more investigations?

**Response to subparts a through c:**

Please see the response to Question 9, above.

**Unaccompanied Alien Children**

14. In 2008, Congress passed an amendment I authored to the Violence Against Women Reauthorization Act of 2013 to allow prosecution of those who sexually abuse an unaccompanied alien child in federal custody, regardless of which federal agency has authority over the minor. Unfortunately, I recently learned of several allegations of serious sexual abuse of children in the custody of the Office of Refugee Resettlement (ORR). These children were allegedly abused by the very staff charged with their protection and care, which deeply concerns me.

I understand that, in most instances, ORR is required to report the child abuse to state or local authorities. In some instances, however, ORR is required to make its report to the FBI and the FBI determines whether to pursue the case.

a. Can you tell me the number of incidents reported to the FBI, and the number of cases that the FBI chose to pursue?

**Response:**

As of August 29, 2014 the FBI had received two Significant Incident Reports from the Office of Refugee Resettlement (ORR) alleging sexual abuse of a child by an adult. As noted below in response to question 14b, the Department of Health and Human Services (HHS) and DOJ work together to determine how best to address such abuse.

b. What factors do you take into consideration to determine which cases the FBI should pursue?

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*These responses are current as of 8/29/14*

**Response:**

HHS and DOJ have been discussing how to most effectively address alleged sexual abuse of an unaccompanied child (UAC) in a facility operated by, or under contract with, HHS's ORR. State licensing and other mandatory reporting laws obligate facilities that provide housing and care for UACs to report allegations of abuse to the ORR and local authorities. DOJ and HHS are working to finalize a protocol by which allegations of serious sexual abuse of a minor by an ORR employee would be reported to the FBI in addition to the reports already made to state authorities. DOJ would review these allegations to determine whether Federal investigation and prosecution are appropriate. Because many of these cases are more appropriately handled at the state or local level, DOJ and HHS would assist state and local law enforcement officials and prosecutors in coordinating with the Federal government to obtain Federal witnesses and assistance.

**Money Laundering – Zetas Horse Case**

**15. Last year, the FBI concluded a major money laundering investigation that uncovered a scheme in which the violent Mexican drug trafficking organization Los Zetas laundered at least \$22 million through an Oklahoma-based horse racing operation. As a result, the brother of Zetas leader Miguel Trevino Morales was sentenced to 20 years in prison and a number of others also face lengthy prison sentences.**

**However, all too often the money launderers that fund violent drug traffickers escape justice. This includes the financial institutions that launder drug money. In 2012, HSBC entered into a Deferred Prosecution Agreement and paid \$1.92 billion in fines for handling at least \$881 million in Mexican drug proceeds. Yet none of the individuals responsible faced criminal sanctions.**

**Drug traffickers are ultimately fueled by greed. Attacking their profits and those who launder them is critical to combat these organizations. I believe that criminal charges are a valuable tool to do so.**

**a. Do you agree that criminal sanctions help bring money launderers to justice and deter financial institutions from laundering drug proceeds?**

**Response:**

Criminal sanctions are among the tools we use to respond to and deter money laundering by financial institutions. Like other tools, criminal sanctions offer advantages and disadvantages. For example, although imprisonment may serve as a highly effective

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deterrent, it is often far more difficult to identify the individual responsible for money laundering than to identify the responsible financial institution, and there is currently no vehicle for imprisoning financial institutions. In addition, the burden of proof is greater in the criminal context than in a civil proceeding. Consequently, if monetary sanctions are sought, this is more efficiently accomplished through civil proceedings.

That said, civil penalties also present limitations. Although significant, the \$1.92 billion fine against HSBC represented only a small portion of the bank's 2012 profit of \$13.5 billion. Even such a seemingly small penalty may, though, change behavior, as evidenced by the fact that HSBC has bolstered its internal anti-money laundering team.

In addition to criminal sanctions, the United States Government can also use designations by the Department of the Treasury's Office of Foreign Assets Control to prohibit foreign individuals or entities from potentially laundering illicit proceeds through the U.S. financial system. This encourages businesses that make large sums of money in the United States to closely examine suspicious activity and to keep their activity transparent so they are not excluded from doing business in the United States.

**b. What more can be done to investigate and prosecute the money launderers who enable violent drug traffickers to operate? Are there additional legal tools you feel are necessary to do so?**

**Response:**

The FBI believes several aspects of our effort to investigate and combat Transnational Criminal Organizations' (TCOs) money laundering activities could benefit from increased attention. For example, we believe additional education regarding the ways in which TCOs operate and their methods of laundering illicit proceeds would allow those in the financial sector to avoid unintentional complicity. Increased publicity regarding the fines levied against financial institutions would also aid our efforts because these fines not only affect a financial institution's bottom line, they also impact the institution's reputation, which has a lasting effect. In addition, FBI investigations benefit from the information derived from the Suspicious Activity Reports (SARs) required by the Bank Secrecy Act, but the sheer volume of SARs presents challenges. Dedicated experts to analyze this vast amount of information would allow us to use this information more efficiently. We are exploring how we can add the necessary expertise.

**NICS Reporting**

**16. As you know, the FBI's National Instant Criminal Background Check System (NICS) contains the databases of all persons who are prohibited from possessing a gun. Our**

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constituents rely on these databases to keep gun out of the hands of convicted felons, the mentally ill, drug abusers, and other categories of dangerous people.

However, the system is missing millions of records because state and federal agencies have been slow to report records to NICS. While states have made progress, I understand that, as of May 31, 2013, nine states have provided fewer than 100 records.

Many of the missing records are mental health or domestic violence records. But some of them are criminal records — USA Today published a front-page article on April 23<sup>rd</sup> describing an investigation it conducted that concluded that, in five states alone, law enforcement agencies failed to provide information to the FBI about at least 2.5 million outstanding arrest warrants.

a. Could you explain how missing records prevent NICS from keeping guns out of the hands of criminals, domestic abusers, and people that a court has declared are a danger to themselves or others?

**Response:**

While the National Instant Criminal Background Check System (NICS) is a critical tool in keeping firearms out of the hands of prohibited persons, its effectiveness depends on the quality of the information entered into the FBI databases upon which it relies. Federal, state, tribal, and other entities submit relevant information to the FBI record systems that are checked by the NICS to identify felony convictions, prohibiting mental health adjudications and commitments, domestic violence protection orders, and misdemeanor crimes of domestic violence (MCDV).

The NICS searches three databases maintained by the FBI: the National Crime Information Center (NCIC); the Interstate Identification Index (III); and the NICS Index (the NICS Index contains records of individuals who are prohibited from acquiring firearms based on information not typically located in the III or the NCIC, such as disqualifying mental health information). Additionally, a fourth search may be conducted on persons who have indicated their country of citizenship as other than the United States on the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) Form 4473; this search is of the applicable databases of DHS's U.S. Immigration and Customs Enforcement.

If states and others do not submit information to one of the databases searched by the NICS, then potential disqualifiers may not be detected and persons who are prohibited from purchasing or possessing a firearm may be improperly permitted to obtain a firearm.

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**b. Why are some states not providing these records to the NICS databases?****Response:**

The applicable law, which is the NICS Improvement Amendments Act of 2007 (NIAA), does not require states to submit information to the NICS. Instead, it relies on a series of financial incentives – both rewards and penalties – to encourage states to submit information to the NICS. States that do not meet the NIAA’s record completeness goals are not eligible for grant incentives (such as the waiver of the 10% matching requirement under the National Criminal History Improvement Program) and may be subject to grant penalties.

Primarily through the FBI’s communications with its state contacts and through DOJ’s Bureau of Justice Statistics, DOJ assists states in their efforts to identify relevant information and make it available to the NICS. Numerous state agencies have, however, alerted the Department to challenges they face in these efforts. For example, for certain categories of NICS-relevant information (such as information pertaining to mental health adjudications), state privacy laws may restrict the sharing of information in a way that renders it unavailable to the NICS. In addition, many states lack adequate infrastructure to allow for the effective and efficient sharing of information between local, county, and state agencies. Some states lack the human resources needed to collect, analyze, code, and organize records relevant to the NICS. Many states do not have a centralized file or database where these records are maintained, or records are in a legacy system that is no longer available for making inquiries, or information is contained in paper files that are not stored in a manner that allows for practical searching or conversion to a searchable digital format. Many states are subject to budgetary constraints that limit their ability to address these challenges. Each of the above factors may have affected the progress made by states in providing relevant records to the NICS.

**c. What steps is the FBI taking to encourage and help states to submit qualifying records to the NICS databases?****Response:**

DOJ engages in extensive outreach to assist a wide variety of agencies, including state agencies, by providing resources regarding the requirements of the NIAA (including training conferences, written guidance, and available web sites), assisting them in determining whether they create information relevant to the NICS, helping them to submit information to the NICS electronically, working to overcome information-sharing barriers, and helping those agencies that adjudicate mental health to address the requirements surrounding mental health disabilities programs. In addition, appropriate

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DOJ elements engage in monthly teleconferences with the Bureau of Justice Statistics and the ATF to discuss NIAA matters.

In addition to this broad program, if it appears that a given agency creates qualified records but does not submit them, more targeted efforts will be employed with that agency. For example, DOJ might offer training opportunities, meetings, seminars, literature, and teleconferences and engage in written correspondence, telephone contact, and e-mail to help the agency understand the importance of providing input. DOJ will also help the agency overcome obstacles such as technical impediments, misunderstandings regarding submission criteria or reporting practices, and legal issues related to the sharing of information. When states encounter impediments to information sharing in their own state statutes, the NICS Section has also provided examples of legislation passed by other states to permit the sharing of certain types of information with the NICS, such as mental health information.

**17. Domestic violence records pose a particular challenge. Under federal law, convicted domestic abusers and abusers subject to a permanent restraining order cannot access a gun. Although domestic abuse records are frequently submitted to the NICS databases, it is difficult to identify them as prohibiting. Consequently, a person who has been convicted of domestic abuse or is subject to a permanent restraining order can often pass a background check even though he is prohibited from buying a gun.**

**a. What steps is the FBI taking to ensure that state and local governments appropriately designate the records they submit to the NICS databases?**

**Response:**

Ensuring the completeness of NICS records is an ongoing FBI goal. The FBI has shared informational letters, e-mails, legal opinions, legislative updates, relief program criteria, bench cards, and other training materials to assist states in understanding federal and state prohibitions. As a result of training conferences, regional meetings, state task force efforts, teleconferences, and the FBI's daily customer service efforts, many states have enjoyed successful NICS Index participation.

The FBI conducts triennial audits of the federal, state, tribal, and other agencies and of the state points of contact that have access to or contribute information to the NICS. These audits are conducted to ensure the agency is upholding the integrity of the NICS, to ascertain the agency's level of understanding and adherence to state and federal guidelines, and to verify that the information submitted to the NICS is accurate, valid, and complete.

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**b. Does the Department of Justice audit the quality of records submitted to NICS to ensure that domestic abuse records that are prohibiting are properly designated?**

**Response:**

The FBI conducts triennial audits of the records of federal, state, tribal, and other agencies and of the state points of contact that have access to or contribute information to the NICS. Among other things, these audits are conducted to verify that the information submitted to the NICS, including information regarding domestic abuse records, is accurate, valid, and complete.

**Crime Victims' Rights Act**

**18. I understand that the FBI takes the position that rights afforded to victims under the Crime Victims' Rights Act apply even before formal charges have been filed, and that those rights apply during the investigative stage of a criminal case.**

**a. Could you describe how the FBI provides rights to victims during the investigative stage?**

**Response:**

As explained in the Attorney General Guidelines for Victim and Witness Assistance (Guidelines), "Federal victims' services and rights laws are the foundation for the AG Guidelines. The core statutes are the Victims' Rights and Restitution Act (VRRRA), 42 U.S.C. § 10607 (2006) (containing mandatory services), and the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771 (2006 & Supp. III 2009) (containing court enforceable rights), but additional rights and requirements exist in other statutes and rules of criminal procedure." (Guidelines at Section I.B.1.) The Guidelines provide that a "strong presumption exists in favor of providing . . . assistance and services to victims of crime. Federal statutes define mandatory services and court-enforceable rights for federal crime victims that establish a minimum baseline for the Department's obligation to crime victims. Department personnel are encouraged to provide additional assistance to crime victims where appropriate and within available resources, as situations warrant. (Guidelines at Section II.A.) The FBI makes every effort to identify victims and ensure that victim information is provided to U.S. Attorneys' Offices directly or through the Victim Notification System in order to facilitate the protection of victims' rights under both the CVRA and the VRRRA. This includes the FBI's efforts to ensure that victims receive case updates before this information is obtained by the media and the general public. The FBI's victim assistance strategy is to provide crisis support to victims and their families, to collaborate with investigative and operational teams to synchronize and

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enhance our response to victims, to coordinate with other agencies and community-based services to facilitate access to a wide range of services, and to provide continuity and stability for victims and their families throughout the investigation. This assistance includes the provision of on-scene crisis response services, transportation to critical appointments, financial assistance to meet exigent needs, and specialized services for child victims and victims of terrorism and mass violence.

**b. Has providing rights to victims during the investigative stage impeded investigations?**

**Response:**

No. To the contrary, ensuring that victims have the assistance, information, and support they need, and to which they are entitled, generally enhances investigations because victims who feel more secure and comfortable are better able to cope and cooperate. Admittedly, in some circumstances we are unable to disclose nonpublic information regarding a pending investigation because this might result in the destruction of evidence, witness tampering, or other activity that would impede the investigation. Notwithstanding these challenges, or the challenges inherent in the protection of victims' rights on a large scale or related to complex crimes involving many victims, the FBI believes this effort is worthwhile and we are committed to identifying cost-effective means of meeting these challenges.

**OIG Report on FBI's Administration of Crime Victims Fund Monies**

**19. The Department of Justice's Office of Inspector General issued a report in September 2013 that found significant problems with the FBI's administration of Crime Victims Fund (CVF) monies. In sum, the Inspector General found that the FBI did not have adequate internal controls over Crime Victim Fund monies. Among other findings, the IG found that:**

- **Approximately \$527,000 in Crime Victim Fund monies were left idle at the FBI for two years instead of being used for victim services.**
- **The FBI did not accurately request reimbursement for \$631,000 it spent on Victim Specialists in Fiscal Year 2009.**

**I understand that the FBI's Office of Victim Assistance's new director has implemented a new tracking system.**

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**Could you give me an update on the FBI's efforts to implement internal control procedures over Crime Victim Fund monies that it administers?**

**Response:**

The FBI conducted an analysis and reconciliation of the Crime Victims Fund (CVF) for fiscal years 2010 and 2011 and provided the results to DOJ's OIG. In October 2013, the FBI implemented a new financial management system, called the Unified Financial Management System (UFMS). This system is configured in accordance with DOJ's internal control and tracking requirements, pursuant to which OVA CVF reimbursable funds are budgeted, billed, and tracked.

Among other improvements:

- The controls established in UFMS prevent CVF reimbursable authority from being realigned to other FBI activities.
- Supporting documents, including CVF invoices, receipts, and records of asset purchases, are scanned into and maintained in the appropriate management system.
- Every CVF expenditure or transfer of funds is identified by CVF reimbursable agreement number, program, and sub-program to enhance the accuracy of billing and data reporting.
- OVA budget staff review billing records to ensure that OVA and UFMS records are consistent and to identify the end-of-year unspent funds that must be transferred back to the FBI OVA account.

In addition to these improvements, the FBI is updating its procedures to ensure that unused "no-year" CVF money is tracked and rolled into the new fiscal year's CVF budget accounts. Unobligated balances available for rollover are rolled over and tracked in UFMS, allowing visibility for both OVA and the FBI's Finance Division. The FBI and DOJ have agreed that the FBI will use a specific template for reporting CVF expenses to DOJ in order to enhance the efficiency of our coordination.

**Questions Posed by Senator Franken**

**20. I held a hearing on the FBI's Next Generation Identification facial recognition pilot program in 2012. And as the FBI explained to me at that hearing, this is a facial recognition system that would allow federal, state and local law enforcement to take a**

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photo of a suspected unidentified criminal and run it against a database of known, identified criminals from mugshots.

The FBI testified that, quote “the only photos that will go into the database are criminal mugshot photos,” and that, quote “the system that we are deploying... absolutely will be limited to the mugshot photos and the criminal history database.” In other words, there would be no chance that an innocent citizen will be suspected of a crime just because he or she looks like a criminal, because there would be only known criminals in the database.

Yet documents released last month through a Freedom of Information Act request show that as of 2010, the FBI had asked the contractors building that database to make sure that it could hold up to 4.3 million civil, non-criminal photos by fiscal year 2015.

**Does the FBI’s facial recognition database include photos of non-criminals? If so, what non-criminals are included in the database? If not, does the FBI have plans to include non-criminal photos in the database in the future?**

**Response:**

Pursuant to federal law (28 U.S.C. § 534), the FBI, as a component of DOJ, acquires, collects, classifies, and maintains identification, criminal identification, crime, and other records. The FBI exchanges this information with authorized officials and organizations when such disclosure serves law enforcement or other legislatively recognized interests. Included in this information are photos collected for criminal justice purposes, such as mugshots, and photos collected for noncriminal justice purposes, such as employment suitability checks, permits, identity verification, and licensing.

The FBI’s databases are designed so that a facial recognition search run in a criminal investigation will not return photographs that are in the FBI’s files only for noncriminal justice purposes (such as for security clearances, military service, and immigration benefits). Consequently, a photo that is in the system only for noncriminal justice purposes will not be returned in response to a criminal investigation facial recognition search request. Over time, the FBI intends to add photos to files that have not historically included them. For example, the FBI has also long collected and retained civil fingerprints and associated biometric identifiers and biographical data for such noncriminal justice reasons as employment suitability checks, identity verification, and licensing. These files often include text-based descriptors, such as descriptions of a person’s race, gender, and age. The addition of photos to these files would, therefore, provide a different form of physical description that might prevent identity errors resulting from the availability of only text-based descriptions. While the addition of

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photos would constitute an expansion of the type of personal information retained, it would not expand the purposes for which the information is being collected or used. These photos would be retrieved only incidentally pursuant to the authorized retrieval of the underlying record using the individual's name or other personal identifier.

**21. At my 2012 hearing, I said that the FBI's facial recognition program could be a powerful tool to catch serious criminals; but I also said that this program raised serious civil liberties concerns. For example, the FBI had prepared internal presentations showing how facial recognition technology could have been used to identify people attending peaceful political rallies.**

**Will the FBI issue a rule prohibiting or discouraging jurisdictions from using facial recognition technology in a way that could stifle free speech?**

**Response:**

The FBI appreciates the concern regarding the possible use of facial recognition technology in a way that protects free speech. We have expressly addressed this issue in the Policy and Implementation Guide for the Interstate Photo System (IPS), which is a collection of both criminal justice and noncriminal justice photos received with transactions that include fingerprints from both hands (called tenprint transactions). This Guide provides as follows:

It is the responsibility of the user agency to develop appropriate usage policies for the IPS component, in accordance with the applicable laws and policies of the governmental jurisdiction to which the user agency is subject, including ensuring compliance with the CJIS Security Policy and CJIS User Agreement. All appropriate use policies must protect the constitutional rights of all persons and should expressly prohibit collection of photos in violation of an individual's 1st and 4th amendment rights.

There are mechanisms in place to prevent both unauthorized access and access for improper purposes. The IPS is not available to users unless there has been an application for, and assignment of, an Originating Agency Identifier (ORI) unique to each using entity. Each state and federal CJIS Systems Officer must apply, in writing, to the CJIS Division for the assignment of an ORI. The CJIS Division evaluates these requests to ensure the agency or entity meets the criteria for ORI assignment and maintains an index of ORIs. Full-access ORIs are provided to criminal justice agencies and other agencies as directed by federal legislation, while limited-access ORIs are provided to noncriminal justice agencies requiring access to FBI-maintained records for official purposes. Each using entity may only access the types of information authorized, and for the purposes

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authorized, for its ORI. Access is strictly controlled and audited by the FBI's CJIS Division. In the event of noncompliance, the offending agency will be required to modify the noncompliant process. In addition, if warranted, formal sanctions will be initiated and may include termination of services.

**22. The last privacy assessment for the FBI's facial recognition program was conducted in 2008. That was six years ago, when the facial recognition system really wasn't up and running yet. It now has at least 12 million photos in it. At my 2012 hearing, the FBI witness said that the Bureau was in the process of updating that assessment. But two years later, no privacy assessment has been issued.**

**When will the FBI release an updated privacy assessment for its facial recognition program?**

**Response:**

The E-Government Act of 2002 mandates that executive agencies complete Privacy Impact Assessments (PIAs) for new technology systems that contain personally identifiable information or when existing systems are substantially modified. As the FBI has replaced the Integrated Automated Fingerprint Identification System (IAFIS) with Next Generation Identification (NGI), we have written PIAs for each increment of NGI and we continue to work with DOJ's Office of Privacy and Civil Liberties to publish these PIAs. IPS is being delivered in the system's final increment and the associated PIA, which includes significant data submitted by our state and local partners, will be published once it has been coordinated with DOJ. In the interim, we have drafted a Privacy Threshold Analysis (PTA) to assess NGI's face recognition and other photo services. By policy, the FBI chooses to complete PTAs prior to PIAs to ensure that privacy documentation is in place while systems are being developed.

**Questions Posed by Senator Blumenthal**

**23. Human trafficking is one of the most pressing human rights concerns of our era and I appreciate the hard work that the men and women of the FBI have put into combatting it. The issue is very important to me. In 2012, Senator Portman and I started the Senate Caucus to End Human Trafficking and several of my colleagues here on the Judiciary Committee are a part of that caucus. You referred to human trafficking three times in your testimony: when you discussed the FBI's civil rights programs, when you discussed the transnational organized crime program, and when you discussed the Innocence Lost National Initiative. My understanding is that human trafficking cases can also fall under the FBI's cyber program. I'm concerned that such diffusion of responsibility can make it**

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difficult to develop strong and consistent investigative strategies. I'm further concerned that this can lead to an inconsistent relationship with partner non-governmental organizations on these cases.

a. What steps can be taken to strengthen the FBI's approach to human trafficking investigations?

b. Do you think that consolidation of the bureau's anti-human trafficking efforts into a single unit could enhance the bureau's capabilities to confront this threat?

**Response to subparts a and b:**

As the question indicates, human trafficking involves civil rights concerns, is often the product of transnational organized crime, is often perpetrated through the use of computers, and is addressed by the FBI, in part, through its Innocence Lost initiative. Rather than indicating that responsibility for these investigations is diffused, though, this should make clear that the FBI appreciates the dimensions of this complex problem and is using resources from the applicable areas to address it. For example, the Innocence Lost initiative, which is part of the FBI's Violent Crimes Against Children program, has focused resources from DOJ's Child Exploitation and Obscenity Section, the National Center for Missing and Exploited Children, and almost 70 dedicated task forces and working groups on the growing problem of domestic sex trafficking of children in the United States. These groups have worked together to rescue more than 3,400 children and to convict nearly 1,500 people who exploit children through prostitution.

These results are possible because the programs with the greatest expertise regarding child exploitation are focused on these cases. Other international and national programs, including FBI programs, focus their particular expertise on other aspects of human trafficking, such as on the transnational organized crime component or on the civil rights that are implicated. For example, the FBI has a strong civil rights program that works to address the domestic trafficking of adults as well as the exploitation of foreign adults and children. By focusing the people and groups who have particular expertise on related aspects of human trafficking, we are able to develop an enforcement plan that is specific to a particular trafficking victim. This allows us to achieve better results than if we required one group of people to acquire expertise in diverse investigative methodologies and approaches. For example, FBI teams composed of personnel from both our Violent Crimes Against Children program and our Civil Rights program worked with our state and local partners to target those who were trafficking children during the 2014 Super Bowl. These teams recovered 18 children and 3 adult women as a result of this effort.

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**c. Many criminal networks involved in human trafficking are complex. Is the FBI using complex criminal enterprise investigative techniques to go after these networks?**

**Response:**

The FBI appreciates that many human trafficking networks are complex and responds by using myriad sophisticated investigative techniques to combat this crime. These techniques include undercover operations, wire intercepts, human intelligence, surveillance, and other sensitive techniques. We tailor our approach to the needs of each investigation, using the techniques that are most likely to produce successful results under the particular circumstances involved. For example, in January 2014, the FBI's San Diego division collaborated with the San Diego Police Department and the United States Attorney's Office in an investigation that led to the indictment of 24 alleged gang members and associates in a racketeering conspiracy that involved the cross-country sex trafficking of underage girls and women in addition to other serious crimes. The criminal organization was formed as a result of cooperation between several gangs, with gang members taking on various responsibilities within the criminal enterprise. The primary business of this organization was sex trafficking in 46 cities across 23 states. The gang members who were ultimately indicted were arrested in California, Arizona, and New Jersey.

**d. Would you be able to provide this committee with statistics on the number of times wire intercepts and undercover operations have been used against human trafficking networks?**

**Response:**

We are not able to provide the number of times a particular investigative technique has been used in human trafficking investigations because human trafficking often occurs along with other offenses and it is impossible to attribute a given technique to only one of those offenses. For example, in the above response, the 24 gang members were charged with a racketeering conspiracy related to human trafficking, murder, kidnapping, robbery, and drug-related crimes. Typically, any investigative techniques that are used in a case are related to all of the crimes that are known to us at the time and for which the technique is authorized, so they would not be linked to just human trafficking, or murder, or any of the other individual crimes involved. It is clearly the case, however, that the FBI uses both wire intercepts and undercover operations, along with other investigative techniques, in our efforts to combat human trafficking to the extent these techniques are authorized in a given case.

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**e. De-confliction and intelligence sharing between local, state, and federal agencies has been essential to our country's counter-narcotics strategy. Are there lessons to be learned there that can inform our efforts to combat human trafficking?**

**Response:**

As with all crimes, we believe information sharing is a key component of our efforts to combat human trafficking. This information sharing is accomplished in large part through the many task forces in which we participate. Through these task forces, the FBI learns of local intelligence that assists us in developing a more complete picture of a given criminal enterprise, and the FBI is able to offer national-level context and links to activities in other jurisdictions of which local task force members may be unaware.

Among the databases and other information available to task force members is the intelligence generated by the approximately 70 CETFs, which are discussed in more detail in response to Question 12, above. This task force collaboration has helped to identify children recovered on the street and to connect activities that were not previously known to be associated. The FBI also shares human trafficking investigative data with the Organized Crime Drug Enforcement Task Forces (OCDETF) Fusion Center, where 16 federal and international law enforcement agencies have immediate access to ongoing FBI investigations. In addition, the FBI partners with the Human Smuggling and Trafficking Center (HSTC) as appropriate, recently providing four years of human trafficking case data for the HSTC's use in creating its national human trafficking threat assessment. The FBI also works with the HSTC, Department of State, and DHS to develop and provide training related to human trafficking for embassy personnel overseas.

**24. The FBI has a long tradition of being on the cutting edge of law enforcement techniques. The FBI's Uniform Crime Reporting system, while novel when it was first introduced in 1930, fails to capture sufficient detail on crime in America to inform modern policing strategies. The FBI's National Incident Based Reporting System, introduced in 1988, is a much needed replacement to the Uniform Crime Reporting system. NIBRS captures time of day and location details, injuries, weapon involvement, relationships between victims and offenders, and all offenses involved within a given incident, among many other critical data points. This tool is not only essential to law enforcement; it has great capacity to inform Congressional efforts to address crime. Unfortunately, as of 2007, only 25% of the U.S. population was covered by agencies utilizing this sophisticated crime reporting program, limiting its usefulness.**

**a. Can you tell me what percentage of the population is currently covered by agencies participating in the National Incident Based Reporting System?**

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**Response:**

The percentage of the population currently covered by National Incident-Based Reporting System (NIBRS) participants is 30 percent. Although over 6,300 law enforcement agencies report NIBRS data, these agencies typically do not represent the most populous areas within their states.

**b. What steps is the FBI taking to complete the rollout of the National Incident Based Reporting System?**

**Response:**

The FBI has partnered with DOJ's Bureau of Justice Statistics to develop the National Crime Statistics Exchange. The Exchange will help 400 law enforcement agencies, selected by a national sampling expert, transition from the traditional Summary Reporting System to the NIBRS. The goal of this partnership is to increase the number of NIBRS participants at the local, state, and tribal levels in order to produce a nationally representative estimate.

**c. Could a local law enforcement agency's access to the N-DEX database be dependent upon their participation in the National Incident Based Reporting System?**

**Response:**

The FBI does not believe that either NIBRS or the National Data Exchange (N-DEX) would benefit from using N-DEX access as an incentive to encourage participation in NIBRS. Denying a local agency an important information resource such as N-DEX could have negative short-term investigative impact on that agency. It could also have long-term adverse impact on the FBI, which is using a "no strings attached" strategy to encourage increased use of this relatively new service. We do, though, recognize that NIBRS participation rates could benefit from greater integration with other FBI information sharing initiatives, and we are pursuing other long-term solutions.

**25. I am very concerned with ensuring successful enforcement of the Brady bill. We recently celebrated the 20 year anniversary of background checks on firearms sales by licensed dealers and the statistics have shown them to be very successful at preventing guns from getting into the hands of criminals. But the success has been limited by two things: loopholes that allow for private gun sales without background checks, even when those sales are between strangers and facilitated through websites or gun shows, and incomplete records in the FBI's National Instant Criminal Background Checks System. I fully**

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**understand that the success of the system is dependent upon comprehensive criminal records, mental health adjudications, and restraining order information being furnished by states, and that the FBI cannot simply go out and add these records without states providing them.**

**a. Last year, funds were set aside to add relevant records to the NICS system. How has the NICS system developed over the past year with that influx of money? With additional resources, could we make the NICS system even more effective?**

**Response:**

DOJ is the recipient of funding to provide relevant records to the CJIS systems, one of which is the NICS. The Department uses these funds primarily to offer grants to assist states in developing methods of submitting relevant records to the NICS Index, the III, and the NCIC. Funding for further education regarding the purpose of the NICS and the value of providing relevant records would be beneficial. It is of utmost importance that states provide their criminal history record dispositions, and this effort would benefit from funding for further education, promotion, and state grants to assist the states in updating their data processing methods.

Separate from the funds DOJ receives to improve the provision of records to the NICS, the FBI's NICS Section uses its budget to provide to federal, state, local, and tribal authorities information and training regarding the NICS program. For example, the NICS Section provides guidance regarding the legal and operational determinations these authorities must make, presents information regarding the NICS program at conferences, provides resource materials on the Internet, and engages with this community through a variety of other means.

**b. Does the FBI have an estimate of the number of records that should be in NICS but are not?**

**Response:**

The FBI has no way of estimating the number of records that should be in the NICS but are not. DOJ's Bureau of Justice Statistics published a study entitled, *Survey of State Criminal History Information Systems, 2012*, which provides some statistics addressing the amount of information maintained in state systems as compared to the federal level. Although these statistics demonstrate that relevant state records may be missing from the federal system, the FBI cannot determine which of these records might contain information that would be prohibit a weapon purchase as a result of a NICS background checks.

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c. Could states benefit from more guidance on which records should be submitted to NICS?

**Response:**

Yes, greater education regarding the records that should be submitted to the NICS would be beneficial. Because the FBI believes strongly in the value of additional guidance, the FBI's NICS Section works, as noted above, to provide to federal, state, local, and tribal authorities information and training regarding the NICS program. For example, the NICS Section provides guidance regarding the legal and operational determinations these authorities must make, presents information regarding the NICS program at conferences, provides resource materials on the Internet, and engages with this community through a variety of other means.

**Questions Posed by Senator Grassley**

**Inspector General Right of Access**

26. At a Senate hearing on November 19, 2013, Inspector General Michael Horowitz testified that the Department is impeding his access to grand jury information and material witness warrants to which he is entitled under the Inspector General Act of 1978. Section 6(a)(1) of that Act authorizes the Inspector General "to have access to all records, reports, audits, reviews, documents, papers, recommendations, or other material available to the applicable establishment which relate to programs and operations with respect to which that Inspector General has responsibilities under this Act."

In addition, Section 1001 of the Patriot Act requires the Inspector General to review whether the Department violated the civil liberties and civil rights of individuals detained as material witnesses in national security investigations following 9/11. The Inspector General has stated that access to grand jury information and material witness warrants is necessary to fulfill his duties under the Patriot Act.

So, in March and April 2014, I wrote a letter to the Department and the Inspector General requesting documents about this dispute. On May 13, the Department and the Inspector General produced documents that showed that the Department sought – and obtained in a timely manner – grand jury information concerning material witnesses from the Department of Justice National Security Division and three U.S. Attorney's Offices (Southern District of New York, Northern District of Illinois, and the Eastern District of

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Virginia). In addition to these four entities, the U.S. Marshals Service and the Federal Bureau of Prisons apparently provided full and timely access to the records the Inspector General requested under the IG Act and the Patriot Act.

Significantly, however, the Inspector General noted that “All of the Department’s components provided us with full access to the material we sought, with the notable exception of the FBI.” Specifically, when the Inspector General requested files from the FBI relating to material witnesses in August 2010, the FBI allegedly responded in October 2010 by informing the Inspector General that the grand jury secrecy rules prohibit the FBI from providing the grand jury material to the Inspector General.

The Inspector General alleges that the FBI previously provided routine access to these records from 2001 through 2009, but abruptly reversed its policy in 2010.

a. From 2001 – when the Office of the Inspector General (OIG) assumed primary oversight responsibility for the FBI – through 2009, did the FBI ever refuse to produce grand jury material to the OIG? Why or why not? If so, please describe each instance in detail.

b. From 2001 through 2009, did the FBI ever delay the OIG’s access to grand jury material by asserting the right to conduct a page-by-page preproduction review of all case files and e-mails requested by the OIG? Why or why not? If so, please describe each instance in detail.

c. The OIG asserts that the FBI’s page-by-page preproduction review of all materials requested by the OIG allows the FBI to make unilateral determinations about what documents requested by the OIG are relevant to OIG reviews. The Inspector General Act of 1978 reserves that judgment to the OIG and authorizes the OIG to have independent access to FBI materials. Does the FBI believe that the grand jury secrecy rules override, or conflict with, the Inspector General Act in any way? If so, please explain.

d. From 2001 to the present, when the OIG has obtained grand jury material from the FBI, has OIG ever violated the legal prohibitions on disclosure of such information? Specifically, has the OIG ever failed to remove or redact from its public reports sensitive or classified information, or information that would identify the subjects or direction of a grand jury investigation?

e. In October 2010, did the FBI’s Office of the General Counsel inform the OIG that the FBI believed grand jury secrecy rules prohibited the FBI from providing grand jury material to the OIG? If not, then why did the FBI’s practice of providing grand jury information to the OIG change?

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f. Did the FBI ever assert this position prior to October 2010? If so, please provide documentation. If not, please explain why the FBI adopted this new policy in October 2010.

g. If the FBI still adheres to the October 2010 interpretation, what is the FBI's view on the legality of all the grand jury material which was allegedly provided to the OIG on a routine basis from 2001 through 2009?

h. According to the OIG, from February 2010 and September 2010, the Department of Justice National Security Division and three U.S. Attorney's Offices referenced above provided the OIG with grand jury information concerning material witnesses pursuant to Fed. R. Crim. P. 6(e)(3)(D). How does the FBI reconcile its October 2010 interpretation of the grand jury secrecy rules with the position adopted by the National Security Division and the three U.S. Attorney's Offices referenced above?

i. How long did it take for the FBI to provide the OIG with grand jury materials as part of the OIG's review of the FBI's use of "exigent letters?"

j. How long did it take for the FBI to provide the OIG with grand jury materials and material witness warrant information as part of the OIG's review of Operation Fast and Furious?

k. How long did it take for the FBI to provide the OIG with grand jury materials and material witness warrant information as part of the OIG's civil liberties and civil rights oversight responsibilities under the Patriot Act?

**Response to subparts a through k:**

DOJ has asked the Office of Legal Counsel (OLC) to opine on the issues raised by the OIG. It is the FBI's understanding that OLC is considering the interaction between the general provisions of the Inspector General Act of 1978, which afford broad access to information, and certain provisions of federal law that restrict access to grand jury information and other records. The FBI looks forward to the formal OLC opinion and expects that the opinion will clarify the circumstances under which the FBI is legally permitted to provide the OIG with such information.

**FBI Report Regarding Mark Rossetti**

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*These responses are current as of 8/29/14*

27. Over two and one half years ago I wrote the FBI concerning its use of Boston mobster Mark Rossetti as an informant. The FBI promised to produce a report on Mr. Rossetti's use as an informant but claimed that production of the report would be postponed until all ongoing cases were concluded. On December 13, 2013, your staff wrote in an e-mail that all cases involving Mr. Rossetti and his associates were finished and you had access to the documents you needed. Given that all ongoing cases were concluded over five months ago, when will this report be ready?

**Response:**

This report has been completed but, because it contains information regarding sensitive sources and methods, it is not appropriate for public dissemination. The FBI made a redacted version of the report available to both House and Senate staff in late July 2014 and we continue to work with both houses to ensure that interested Members are able to review this report.

**9/11 Commission**

28. Earlier this month, the Justice Department made public four heavily censored documents in response to a Freedom of Information Act lawsuit in Florida. The documents confirmed that by 2002, the Bureau had found "many connections" between 9/11 terrorists and Esam Ghazzawi, a Florida businessman with ties to the Saudi Royal family. Esam Ghazzawi's family reportedly fled their home in Sarasota, Florida on August 27, 2001 – just two weeks before the 9/11 attacks. This information was allegedly not disclosed to the 9/11 Commission or to congressional investigators. In fact, according to the FBI records chief, the FBI was aware of these four documents linking the Ghazzawi family to 9/11 terrorists, but never turned over the documents to the 9/11 Commission or to Congress.

a. What is the FBI's explanation as to why these documents were never provided to Congress?

b. Do you think Freedom of Information Act requesters should receive more access to FBI documents than Congressional investigators or the 9/11 Commission?

**Response to subparts a and b:**

During the course of the Joint Congressional Inquiry into the attacks of 9/11/01, Congressional investigators were granted access to virtually all investigation documents, with the exception of material protected by Rule 6(e) of the Federal Rules of Criminal Procedure. The records concerning the Sarasota matter are not protected by Rule 6(e) and were therefore available to congressional investigators. During the 8-month period

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of the inquiry, the Joint Inquiry staff reviewed tens of thousands of documents in the FBI's possession and the FBI formally produced records to staff investigators upon request. In total, the FBI produced more than 24,000 pages of records through this process. The records of the Joint Congressional Inquiry were subsequently transferred to the 9/11 Commission. As a result of their review of FBI records, Congressional investigators focused on several aspects of the 9/11 investigation originating in Florida, but the FBI is unable to ascertain whether these investigators reviewed records concerning the Sarasota family. The FBI also has not identified any specific requests made by the investigators concerning the Sarasota family.

In the aftermath of the 9/11 attacks, the FBI received a large number of calls from the public reporting suspicious activity, including calls regarding the alleged abrupt departure of residents of Sarasota, Florida, shortly before the 9/11 attacks. An early FBI investigative document notes connections between one of these residents and a local flight school, which is the flight school at which two of the 9/11 hijackers received training. The FBI document also indicates connections between other local residents and this flight school. The FBI followed up on this matter and ultimately determined that there was no credible evidence of any contact, including physical visits, telephone, e-mail, or financial contact, between the hijackers and the family. Members of the family were subsequently located and interviewed and, contrary to suggestions in media reports, the FBI did not develop any evidence that connected the family members to any of the 9/11 hijackers or to the 9/11 plot.

**29. A similar issue came up earlier this year when it was revealed that the FBI concealed important information from the 9/11 Commission regarding its counterterrorist activities. Specifically, the newly uncovered information reveals that the FBI had a human source in direct contact with Osama bin Laden as early as 1993. Allegedly, this source learned directly from Osama bin Laden that he was looking to finance terrorist attacks in the United States. This revelation raises a lot of questions as to why the 9/11 Commission was never told about the human source and what else, if anything, the FBI is withholding. Was this information provided to the 9/11 Commission?**

**Response:**

We are aware that in February 2014 a Washington newspaper reported that a confidential FBI source had direct contact with Usama bin Laden in 1993 and that bin Laden was looking to finance terrorist attacks in the United States. Although the FBI's counterterrorism program did include important sources in 1993, the FBI had no sources with direct access to bin Laden. The person who was alleged to have had this direct contact was in frequent contact with Abdel-Rahman (Abdel-Rahman was known as the "Blind Sheik" and later convicted on terrorist charges related to the 1993 bombing of the

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*These responses are current as of 8/29/14*

World Trade Center), but he did not communicate with bin Laden. In any event, this source did not have any communications with the FBI after 1994 and could not have provided a window into the 9/11 attacks because the planning for this event did not begin until late 1998 or early 1999.

**Boston Marathon Bombing – Unanswered Questions**

**30. On Monday, April 15, 2013, two bomb blasts rocked the Boston Marathon finish line and initiated a five day investigation and manhunt coordinated by the FBI. The FBI released unnamed photographic images of the suspects on Thursday, April 18, 2013 at 5:20 PM. Following the release of the photos, the individuals allegedly murdered MIT Police Officer Sean Collier, engaged police in a firefight, and triggered a door to door manhunt in Watertown, Massachusetts. Tamerlan and Dzhokhar Tsarnaev were identified by name following Tamerlan's death after the firefight with police. Since that time, on multiple occasions, my staff has asked a series of unclassified questions which have never been answered.**

**a. At what time and date were the images of Dzhokhar Tsarnaev and/or Tamerlan Tsarnaev discovered on video or photograph for the first time as being at least one or both of the individuals reasonably believed to be involved in the bombings even if they could not be identified by name?**

**b. Who made that determination and for what agency did that individual work?**

**Response to subparts a and b:**

At some point on Tuesday (April 16, 2013), an FBI professional staff employee assigned to review digital surveillance footage discovered an individual in a white hat (White Hat) who was reasonably believed to be involved in the bombing. Late Tuesday night (April 16, 2013) or early Wednesday morning (April 17, 2013), review of additional surveillance footage showed that White Hat appeared to be walking with an individual in a black hat (Black Hat). Only after the Watertown, Massachusetts, shootout did we identify White Hat as Dzhokhar Tsarnaev and Black Hat as Tamerlan Tsarnaev.

**c. Following this initial determination, what investigative steps did the FBI take or attempt to take prior to releasing the photos to the public?**

**Response:**

After the bombing, and throughout the investigative process, the FBI followed all logical leads and engaged in the same investigative steps that form the basis for all such

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*These responses are current as of 8/29/14*

investigations. These steps included physical searches for parts of the explosive devices and other evidence, review of the many photographs and videos of the event, and interviews of those who might be able to identify the perpetrators. Our identification efforts did not cease until after the Watertown shootout, when the identities of Dzhokhar and Tamerlan Tsarnaev were established.

**d. Did the FBI notify anyone in the Cambridge Police Department of the FBI surveillance in Cambridge, MA prior to its initiation? If so, whom? If not, why not?**

**Response:**

As noted above, the FBI did not know the identities of the Tsarnaev brothers until after the shootout in Watertown, Massachusetts. We did not conduct surveillance of the brothers before this identification. Tamerlan was killed during this shootout and the search for Dzhokhar began at that point. Consequently, we also conducted no surveillance of the brothers after the shootout.

**Boston Marathon Bombing – Source Development**

31. The Inspector General of the Intelligence Committee (ICIG) issued a report on April 10, 2014 regarding the FBI's incomplete assessment of Boston Bomber, Tamerlan Tsarnaev in 2011. The report noted that the FBI did not interview several people with intimate knowledge of Tamerlan including his wife or former girlfriend, visit his mosque, or interview his associates. The report states the FBI did not search all available databases, such as several FBI systems, telephone databases, or databases with information collected under the Foreign Intelligence Surveillance Act (FISA). I understand these judgment calls are all within "the legal framework governing its ability to gather intelligence and conduct investigations." It is impossible to know what would have changed with further investigation but it would be concerning to find out that the reason for such an incomplete assessment was part of an attempt to recruit Tamerlan Tsarnaev at that time or to leave the option available in the future.

**a. Did the FBI and the agent conducting the assessment limit their exposure in the public life of Tamerlan Tsarnaev with the intent to recruit him at that time or to allow for that option in the future?**

**1. If not, what was the reason the case agent for conducting such a limited assessment?**

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*These responses are current as of 8/29/14*

**2. How have the case agent or supervisor been held accountable for conducting an incomplete assessment? If they have not been held accountable, then why not?**

**Response to subparts 1 and 2:**

The FBI did not limit the investigation of Tamerlan Tsarnaev. Upon opening the assessment on Tamerlan, the FBI conducted a complete and thorough assessment consistent with guidance provided by the Attorney General's Guidelines for Domestic FBI Operations (AGG-Dom) and the FBI's DIOG. The AGG-Dom and the DIOG afford FBI personnel, in exercising judgment based on their training and experience, flexibility in choosing specific investigative steps and they direct the FBI to use the least intrusive methods to conduct an adequate investigation. Consistent with this guidance, the methods the case agent chose were sufficient to conduct an assessment of Tamerlan given the information that led to the assessment. Only after the assessment failed to reveal a nexus to terrorism did the agent consider cultivating Tamerlan for information gathering purposes.

As indicated in their April 2014 report, the Inspectors General of the Intelligence Community "concluded that the FBI made investigative judgments based on information known at the time and that were within the legal framework governing its ability to gather intelligence and conduct investigations." That report also includes the DOJ OIG conclusion that the FBI decision to open the investigation of Tamerlan at the assessment level "was an application of the least intrusive method principle within their investigative discretion" and that it cannot be known whether additional interviews and database searches would have yielded additional relevant information.

**b. Is limiting the FBI's exposure in the public life of a potential source part of any training or method related to the identification, recruitment, or management of confidential sources and informants?**

**Response:**

The FBI's guidance regarding the use and recruitment of confidential sources is provided in response to subpart c, below.

**c. Provide all FBI guidelines and training materials for the identification, recruitment, and management of confidential sources and informants.**

**Response:**

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*These responses are current as of 8/29/14*

Following is the portion of the FBI's DIOG regarding the use and recruitment of confidential human sources. In order to provide our response in this unrestricted format, we have redacted the portions that would require us to restrict access to this content.

The FBI would be pleased to brief the Committee regarding this DIOG provision, including the redacted portions, if it would help the Committee understand this important area.

**18.5.5 (U) INVESTIGATIVE METHOD: CHS USE AND RECRUITMENT**

(U) See AGG-Dom, Part II.A.4.c.

**18.5.5.1 (U) SCOPE**

(U//FOUO) The FBI may use and recruit human sources in Assessments and Predicated Investigations in conformity with the AGG-Dom, Attorney General Guidelines Regarding the Use of FBI Confidential Human Sources (AGG-CHS), the FBI [redaction], and the FBI [redaction]. In this context, "use" means obtaining information from, tasking, or otherwise operating such sources. See AGG-Dom, Part VII.V.

(U//FOUO) *Note:* If the originator of information reported to the FBI characterizes an individual, group, or activity in a certain way, and that characterization should be documented for completeness of the FBI record, the FBI record (i.e., 302, EC, LHM) should reflect that another party, and not the FBI, is the originator of the characterization.

**18.5.5.2 (U) APPLICATION**

(U//FOUO) This investigative method may be used in Assessments, Predicated Investigations, foreign intelligence collection investigations, and for assistance to other agencies when it is not otherwise prohibited by AGG-Dom, Part III.B.2.

(U) When collecting positive foreign intelligence, the FBI must operate openly and consensually with an USPER, to the extent practicable.

(U//FOUO) A CHS can be "used" in support of an Assessment and a Predicated Investigation or for the purpose of validating, vetting or determining the suitability of another CHS as part of an Assessment.

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**18.5.5.3 (U) APPROVALS**

(U//FOUO) All investigative methods should be evaluated to ensure compliance with the admonition that the FBI should use the least intrusive method if reasonable based upon the circumstances of the investigation. That requirement should be particularly observed during an Assessment when using a CHS because the use of a CHS during an assessment may be more intrusive than many other investigative methods. Use of a CHS in an Assessment should take place only after considering whether there are effective, less intrusive means available to obtain the desired information. The CHS must comply with all constitutional, statutory, and regulatory restrictions and limitations. In addition:

A) (U//FOUO) CHS use and direction must be limited in focus and scope to what is necessary to accomplish the authorized purpose and objective of the Assessment or Predicated Investigation. [Redaction.]

B) (U//FOUO) During an Assessment, [redaction] (see the Special Rule for Religious Services and the Special Rule for Other Sensitive Organizations below) only to the extent that such information is necessary to achieve the specific objective of the Assessment. If such contact reveals information or facts about an individual, group or organization that meets the requirements to open a Predicated Investigation, a Predicated Investigation may be opened, as appropriate.

C) (U//FOUO) **Special Rule for Religious Services** – regardless of whether it is open to the general public:

1) (U//FOUO) **In Assessments:** [Redaction.] An FBI employee attending a religious service overtly must have SSA approval. Higher approvals may be required under certain circumstances, such as attendance that rises to the level of UDP (see DIOG Section 16). [Redaction.]

2) (U//FOUO) **In Predicated Investigations:** [Redaction.] An FBI employee attending a religious service overtly must have SSA approval. Higher approvals may be required under certain circumstances, such as attendance that rises to the level of UDP (see DIOG Section 16) [redaction] (see DIOG Section 18.6.13).

D) (U//FOUO) **Special Rule for Other Sensitive Organizations:**

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1) (U//FOUO) *In Assessments*: [Redaction.]

2) (U//FOUO) *In Predicated Investigations*: [Redaction.]

E) (U//FOUO) **Public Information**: [Redaction] (which must be approved in accordance with DIOG Section 16), [redaction].

F) (U//FOUO) **Non-Public Information**: [Redaction.]

G) (U//FOUO) [Redaction.] This principle does not, however, eliminate the legal concept of a consent search or the doctrine of misplaced confidence. [Redaction.]

H) (U//FOUO) If there is any conflict between the [redaction] or any other PG and the DIOG, the DIOG controls. OGC, OIC and CPO should be immediately notified of any such conflict.

#### 18.5.5.4 (U) USE/DISSEMINATION

(U//FOUO) The use or dissemination of information obtained by this method must comply with the AGG-Dom, DIOG Section 14, and the [redaction].

**32. On May 22, 2013, Ibragim Todashev was shot and killed in the course of an interview led by the Federal Bureau of Investigation (FBI). The interview occurred during an investigation into the Boston Marathon bombing and a possible connection to a triple murder that occurred years earlier in Waltham, Massachusetts. The Department of Justice (DOJ) Civil Rights Division determined that the evidence did not reveal a violation of federal criminal rights statutes or warrant any further federal criminal investigation. However, I still have questions about events prior to the FBI's interview with Todashev.**

Reports obtained from the Orange County Sheriff's Department indicate that the FBI also conducted physical surveillance on Todashev. According to those reports, on May 4, 2013, Todashev was involved in a physical altercation over a parking spot at the Premium Outlet Mall. According to one deputy who responded to the scene of the crime, "I approached the location where the incident occurred and saw a male laying on the ground. I could see a considerable amount of blood on the ground and the subject appeared unconscious. Believing I was dealing with a felony crime, I immediately located the vehicle..." Following Todashev's arrest, according to another deputy, "Once on his feet the suspect commented that the vehicles behind us are FBI agents that have been following him. I noticed 3 (three) vehicles with dark tint...I noticed one vehicle was driven

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by a male, had a computer stand and appeared to be talking on a radio.” The use of surveillance was confirmed in the sworn statement of the FBI agent involved in the May 22nd shooting. According to the agent, “FBI Agents surveilling Todashev witnessed this event and relayed the details directly to me.”

According to Florida law, federal law enforcement officers have the authority to make a warrantless arrest of any person who has committed a felony involving violence in their presence while the officer is engaged in the exercise of their law enforcement duties. The possibility that employees of the top law enforcement organization in this country witnessed a violent felony and, although they had the authority to intervene, opted to maintain surveillance while someone was beat unconscious is concerning.

a. Did the FBI conduct physical surveillance of Ibragim Todashev on May 4, 2013? If so, how many federal agents participated?

b. Was the FBI conducting physical surveillance of Ibragim Todashev in the area of the Premium Outlet Mall, Orlando, Florida on May 4, 2013?

c. When did the FBI become aware of the circumstances of the May 4, 2013 arrest?

d. When did the FBI obtain a copy of the May 4, 2013 arrest report documenting the incident?

e. Do any FBI policies or instructions address an agent’s obligations when witnessing a felony? If so, please provide a copy.

f. Do any FBI policies or instructions address an agent’s obligations when witnessing a felony in a state where federal law enforcement officers are afforded peace officer status (e.g. Florida)? If so, please provide a copy.

g. Do any FBI policies or instructions address the issues of providing assistance to local law enforcement officers who are executing a felony arrest? If so, please provide a copy.

h. Did any FBI employees witness the physical altercation in which Ibragim Todashev was involved on May 4, 2013?

i. Did any FBI agents attempt to physically intervene in the altercation involving Ibragim Todashev at the Premium Outlet Mall?

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**j. Did any FBI employees witness the felony stop and arrest by Orange County Sheriff's Department Officers of Ibragim Todashev on May 4, 2013?**

**k. Did any FBI employee attempt to assist the Orange County Sheriff's Department in the felony stop and arrest of Ibragim Todashev on May 4, 2013?**

**l. Please provide all surveillance reports of Ibragim Todashev from May 4, 2014.**

**Response to subparts a through l:**

On May 4, 2013, an FBI Mobile Surveillance Team (MST) was conducting surveillance of Ibragim Todashev. When Todashev reached the Orlando Premium Outlet mall, the MST witnessed his altercation with two unidentified individuals in the mall's parking lot. This MST witness was approximately 50 yards away and observed armed security guards from the mall's security detail responding to the incident. The MST member, who was armed and dressed in plain clothes, was concerned about the potential of a police-on-police incident. The MST member also did not assess the altercation as constituting a felony assault, as it was later classified by the Orlando Sheriff's Office. When Todashev fled the vicinity of the assault, the MST member followed Todashev for approximately a quarter of a mile before Todashev was stopped by an Orlando Sheriff's Deputy and arrested.

FBI policies and instructions addressing an agent's obligations when witnessing a federal crime are articulated in Section 19.3.1 of the FBI's DIOG, and an agent's obligations when witnessing a non-federal crime are contained in Section 19.3.3, as follows:

***19.3.1 (U) FEDERAL CRIMES***

(U) Whenever possible, SAC [Special Agent in Charge] and USAO [United States Attorney's Office] authority must be obtained before making a warrantless arrest. Agents are authorized to make warrantless arrests for any federal crime (felony or misdemeanor) committed in their presence. Agents also have authority to make warrantless felony arrests for a crime not committed in the presence of the Agent if there is probable cause to believe the person to be arrested committed a federal felony. A warrantless arrest must only be made when sound judgment indicates obtaining a warrant would unduly burden the investigation or substantially increase the potential for danger or escape. (See Non-Federal Crimes below.)

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**19.3.3 (U) NON-FEDERAL CRIMES**

(U) There is no federal statutory authority for Agents to intervene in non-federal (state) crimes. FBI policy permits certain types of non-federal arrests in exigent circumstances.

(U) As a general rule, an Agent should only make an arrest for a state crime if a serious offense (felony or violent misdemeanor) has been committed in his or her presence and immediate action by the Agent is necessary to prevent escape, serious bodily injury, or destruction of property.

(U) Agents are also authorized to arrest a person who is the subject of an FBI Predicated Investigation when a state or local arrest warrant for that person is outstanding, and the person is encountered during the investigation and would likely escape if not arrested. Similarly, an Agent working with state or local law enforcement officers who request assistance to apprehend a nonfederal fugitive who has been encountered during the course of a federal investigation is authorized to provide the requested assistance when intervention is otherwise permitted for a state crime as described in the preceding paragraph.

(U) In some states, there is legislative authority for an Agent to intervene in certain types of state crimes as a peace officer rather than as a private citizen. Deputization as a state peace officer allows a federal Agent to make arrests for state offenses with the authority and immunities of a law enforcement officer of the state or one of its subdivisions. Of greater significance is whether intervention by an Agent in a particular nonfederal crime falls within the scope of employment. Agents who intervene in serious nonfederal crimes committed in their presence or who arrest a state fugitive under the circumstances previously described will normally be considered to be acting within the scope of their employment. While the determination to provide legal representation depends on the facts and circumstances of each circumstance, the DOJ, as a general rule, will provide legal representation to Agents who act in accordance with this policy.

(U) It is important to note that the DOJ has indicated that efforts to enforce minor infractions of the law, such as shoplifting or traffic

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violations, are not generally considered to be within the scope of employment. Civil actions against federal personnel concerning acts which fall outside the scope of employment will not be removed to federal courts, and employees in such circumstances will not be eligible for legal representation provided for by the DOJ. An Agent's status with respect to civil liability in such circumstances will depend on a particular state's law, which may require an employee to defend himself/herself as an ordinary citizen.

**Presidential Policy Directive 19**

**33. In October 2012, President Obama tasked Attorney General Holder with providing him with a report on the FBI whistleblower procedures within six months. That was nineteen months ago, and the Attorney General still hasn't completed his report. The Bureau has an abysmal record when it comes to whistleblower retaliation.**

**a. When did the Justice Department first contact FBI headquarters about Section E of PPD 19?**

**Response:**

The FBI was contacted about Section E of Presidential Policy Directive (PPD) 19 shortly after PPD 19 was issued in October 2012.

**b. Section E requires the Attorney General to prepare his report "in consultation with . . . Federal Bureau of Investigation employees . . ." What involvement has the FBI had in the Attorney General's review so far?**

**Response:**

DOJ convened a working group on this matter in late 2012 and the working group held a number of meetings over a period of months. FBI representatives, who obtained input from FBI employees, have participated in the group's proceedings, attended the meetings, and contributed to the preparation of the Attorney General's report.

**c. What cooperation has the FBI given GAO in its review so far?**

**Response:**

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The FBI has cooperated fully with the Government Accountability Office (GAO) review and has met with the GAO team undertaking the review. To date, GAO's inquiry has focused primarily on DOJ's Office of Attorney Recruitment and Management (OARM). The FBI will provide further assistance if we are asked to do so.

**d. What revisions to 28 CFR Part 27 do you believe could increase the regulation's effectiveness in protecting whistleblowers?**

**Response:**

We believe the process reflected in 28 CFR Part 27 will be made more effective by the availability of the FBI Whistleblower Mediation Program, which was established by DOJ in April 2014 and will be included in 28 C.F.R. Part 27 following notice and comment. The FBI also welcomes procedural changes that will expedite OARM's review, including the use of acknowledgment/show cause orders.

**e. Whistleblowers are only protected under 28 CFR Part 27 if they come forward to one of 9 high-ranking entities. From FY 2013-FY 2014, how many FBI whistleblower complaints have failed to qualify each year as protected disclosures because the complainant is unaware that they must make their disclosure to one of these 9 entities?**

**Response:**

The FBI does not track the number of occasions on which an individual claims that a disclosure should enjoy whistleblower protections but, because the disclosure was not made to an authorized party, the claim is denied. We have, though, been advised by OARM that, during the designated period, OARM dismissed two cases based upon the complainant's failure to allege that he or she made a disclosure to a designated recipient under 28 C.F.R. § 27.1(a).

**f. Would the FBI support providing whistleblower protections if a whistleblower went to any supervisor in the whistleblower's chain of command rather than exclusively offering protection to those who report to the top officials designated in DOJ's regulations?**

**Response:**

Currently, in addition to specified DOJ and FBI Headquarters officials, FBI employees may make protected disclosures to the highest-ranking official in any FBI field office. The Attorney General's report recommends expanding those to whom protected disclosures may be made to include the second-highest ranking tier of field office officials.

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**g. Does FBI have concerns about the duration of FBI whistleblower retaliation cases and, if so, what could FBI do to help resolve these cases more quickly?**

**Response:**

Yes. As noted above, we believe the adoption of voluntary mediation procedures will be helpful in resolving these cases more quickly. Another constructive step would be the devotion of additional resources to the DOJ component that adjudicates these matters (DOJ's OARM), a step that we understand the Department has already taken.

**h. Given the length of many FBI whistleblower retaliation cases, to what extent has FBI taken action to address the alleged reprisal by, for example, putting personnel actions on hold before these cases were resolved?**

**Response:**

Although, as discussed above, we support efforts to resolve these cases more quickly, we do not believe it is appropriate to disrupt the personnel management system by putting personnel actions on hold while these cases are resolved. This is particularly true in light of the relatively small number of cases that ultimately result in OARM findings of retaliation.

**i. What percentage of whistleblower retaliation cases does the FBI settle?**

**Response:**

Although the FBI does not track the precise number of whistleblower retaliation cases that are settled, overall the FBI has settled only a small fraction of these cases. This proportion may increase with the adoption of voluntary mediation procedures.

**1. How does the FBI's cost of defending these cases compare to how much it would cost the FBI to accommodate the whistleblowers through settlement?**

**Response:**

We do not have data regarding the cost of defending these cases. Even in the absence of dollar figures, though, we anticipate that the introduction of voluntary mediation procedures could reduce the relative costs associated with resolving these cases and speed up the process for all concerned.

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**2. What, if any, regulatory, statutory, or other barriers inhibit FBI from settling these cases?**

**Response:**

Although there are no particular barriers to engaging in settlements, we are limited as to the terms of individual settlements, which must conform to applicable law. For example, we cannot, by way of settlement, provide for a back pay award that fails to comply with the requirements and limitations of the Back Pay Act.

**j. In those cases where OARM orders corrective action, what steps does the FBI take to ensure that this corrective action is implemented?**

**Response:**

The FBI's practice is to promptly and conscientiously implement final OARM corrective action orders. For example, corrective actions related to back pay are typically initiated within one month of a final order.

**k. How does FBI ensure that when OARM finds retaliation has occurred, the wrongdoers or responsible officials are adequately disciplined given that OARM has no jurisdiction over the retaliators?**

**Response:**

As required by law (5 U.S.C. § 2303), the FBI follows procedures published at 28 C.F.R. Part 27 to process, evaluate, and respond to allegations of retaliation against FBI employees. These procedures, which address both investigating reprisal allegations and ordering corrective action, assign to OARM the responsibility for directing corrective action in appropriate cases. As noted above, the FBI's practice is to promptly and conscientiously implement final OARM corrective action orders.

**i. From FY 2003-FY 2013, please list all the retaliatory actions that OARM has found to have occurred and the disciplinary action the FBI took in each of these cases.**

**Response:**

We are aware of only four finally adjudicated cases in which OARM has found reprisal and ordered corrective relief. In two of those cases, the FBI employees determined by OARM to have engaged in improper retaliation had retired from the FBI by the time of

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OARM's decision. In the other two cases, the FBI's internal processes led to an ultimate conclusion that no disciplinary action was warranted under the circumstances.

**FBI Insider Threat and Whistleblower Training**

**34. Last summer, McClatchy reported on President Obama's National Insider Threat Program. McClatchy alleged that some agencies were using the program to target whistleblowers. According to McClatchy, several agencies used behavioral profiling techniques and asked federal employees to spy on their coworkers—even employees who do not deal with classified information.**

When I asked the FBI for its own insider threat training, FBI legislative affairs staff provided me with a link to information assurance training developed by the Defense Information Security Agency that the FBI requires all of its employees to complete. This link includes an insider threat section. However, it fails to make the distinction between insider threats and whistleblowers. There is a big difference between leaking and blowing the whistle. Teaching that difference should be part of any training related to insider threats.

**a. Is the Defense Information Security Agency training the only training the FBI requires its employees to complete on insider threat-related issues? If not, what other training is required? When are FBI employees first required to complete this other training, and how regularly are they required to re-complete it? What repercussions are there for employees who fail to complete this training, either initially or as regularly required subsequently?**

**b. When are FBI employees first required to complete the Defense Information Security Agency training? How regularly are FBI employees required to re-complete this training?**

**c. What repercussions are there for employees who fail to complete the Defense Information Security Agency training, either initially or as regularly required subsequently?**

**Response to subparts a through c:**

The question states, and the FBI agrees, "There is a big difference between leaking and blowing the whistle." We do not believe that FBI employees have any confusion when distinguishing between the actions of a malicious insider intent on doing harm to the organization and the actions of an employee who is reporting potential fraud, waste,

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*These responses are current as of 8/29/14*

abuse, or other information protected by whistleblower statutes to individuals authorized to receive this information.

The Defense Information Security Agency training is the only training all FBI employees are required to take that concerns insider threat. This training assists employees in protecting FBI information from inappropriate and inadvertent disclosure to unauthorized personnel; it does not direct employees to disregard the separately required training they receive regarding disclosures of information concerning violations of law, gross mismanagement or waste of funds, abuse of authority, and other appropriate matters to authorized individuals. "Information security" training is taken annually by all FBI employees, contractors, and members of our Joint Terrorism Task Forces, and new employees are required to complete information security training within the first week at their assigned office. FBI policy provides that failure to complete this training will result in denial of access to FBI information systems and that FBI personnel who do not comply with this requirement are subject to administrative, disciplinary, security, or other adverse action.

**d. What training do FBI employees receive on the FBI's process for making a protected disclosure (28 CFR § 27.1) and the protections afforded whistleblowers (28 CFR § 27.2)?**

**e. When are FBI employees first required to complete this whistleblower training? How regularly are FBI employees required to re-complete this training?**

**Response to subparts d and e:**

FBI employees receive training regarding whistleblower protections through a variety of means. The most widely taken training is required biennially and discusses what qualifies as a protected whistleblower disclosure, to whom such disclosures may be made, the protections afforded those who make these disclosures, and related issues. This training is often referred to as NO FEAR Act training. The FBI also provides training regarding whistleblower protections at "Onboarding New Employees" (ONE) briefings that are provided to all new employees and during annual All Employee conferences. In addition, whistleblower training is often provided during supervisor retreats that are held periodically and during training directed by the Equal Employment Opportunity Commission, the Merit Systems Protection Board, and others. Information regarding whistleblower protections is also available on the websites of both the FBI's Office of Equal Employment Opportunity Affairs and Office of the General Counsel; these websites identify those to whom protected disclosures may be made, provide filing instructions, and address frequently asked questions.

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*These responses are current as of 8/29/14*



**f. What repercussions are there for employees who fail to complete this whistleblower training, either initially or as regularly required subsequently?**

**Response:**

New employees must attend ONE training before they report to their duty stations, and the required biennial NO FEAR Act training discussed above is taken on the FBI's Intranet system and tracked through the FBI's web-based Virtual Academy. Other training regarding whistleblower protections, including the training provided during All Employee conferences, is typically tracked either through the FBI's Virtual Academy or by the employee's supervisor.

Division Heads receive reports of those who have not attended mandatory training or taken advantage of make-up sessions. FBI personnel who do not comply with mandatory training requirements are subject to administrative, disciplinary, or other adverse action.

**g. Will you issue guidance to clarify to FBI personnel in your training that the Insider Threat program should not be used to target legitimate whistleblowers? If not, why not?**

**Response:**

As noted above, we do not believe that FBI employees have any confusion when distinguishing between the actions of a malicious insider intent on doing harm to the organization and the actions of an employee who is reporting potential fraud, waste, abuse, or other information protected by whistleblower statutes, to individuals authorized to receive this information.

**National Insider Threat Program**

**35. The minimum standards for each agency to follow came from the interagency Insider Threat Task Force, established by Executive Order 13587 on October 7, 2011. The Task Force, co-chaired by the Attorney General and the Director of National Intelligence, was jointly staffed by the Office of the National Counterintelligence Executive (ONCIX) and personnel from FBI's Counterintelligence Division.**

**One year later, on November 21, 2012, that Task Force issued the National Insider Threat Policy and an accompanying document, Minimum Standards for Executive Branch Insider Threat Programs. The two documents were released together throughout the Executive Branch via a Presidential Memorandum. Those standards did not do enough to distinguish actual insider threats from legitimate whistleblowers.**

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*These responses are current as of 8/29/14*

It is my understanding that the FBI's Insider Threat Program has continued to produce training materials with ONCIX. According to an October 28, 2013 letter I received from the FBI, the Bureau and ONCIX spent \$38,341.41 producing a video titled Game of Pawns and \$72,598.29 producing a video titled Betrayed. The FBI received some attention for releasing Game of Pawns in its entirety online on April 14, 2014, although the video had apparently been developed some time before. Again, neither of the videos nor the extra features accompanying them made any effort to distinguish between insider threats and legitimate whistleblowers.

**a. Did the Insider Threat Task Force consider the distinction between whistleblowers and insider threats when formulating the Insider Threat Policy and Minimum Standards?**

**b. Will the Insider Threat Task Force amend the Insider Threat Policy and Minimum Standards to make it clear that the Insider Threat programs should not be used to target legitimate whistleblowers?**

**Response to subparts a and b:**

As discussed in response to Question 34, above, we do not believe that FBI employees have any confusion when distinguishing between the actions of a malicious insider intent on doing harm to the organization and the actions of an employee intent on reporting potential fraud, waste, abuse, or other information protected by whistleblower statutes to individuals authorized to receive this information.

The "National Insider Threat Policy and Minimum Standards for Executive Branch Insider Threat Programs" was transmitted by the White House to Executive Branch agencies in 2012. The Minimum Standards provide direction and guidance to agencies that are developing insider threat programs to deter, detect, and mitigate actions by employees who may represent a threat to national security. Although we cannot speak for the Insider Threat Task Force, we note that the Minimum Standards require that agencies' threat programs be developed and implemented in consultation with each agency's Office of the General Counsel and civil liberties and privacy officials so that all insider threat program activities are conducted in accordance with applicable laws, whistleblower protections, and civil liberties and privacy policies.

**c. When was Game of Pawns first developed?**

**Response:**

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*These responses are current as of 8/29/14*

The Game of Pawns video was finalized in December 2012.

**d. Why was the decision made to release Game of Pawns publicly in April 2014?**

**Response:**

Recent FBI investigations have indicated that hostile intelligence services target U.S. students studying abroad for both intelligence-gathering and recruitment purposes. U.S. students have demonstrated susceptibility to this targeting because they have limited awareness of this threat. The FBI included the public release of Game of Pawns as part of a proactive public outreach initiative to help U.S. students traveling overseas develop a greater awareness of this targeting threat.

**e. What projects are currently being worked on by the FBI's Insider Threat Program staff?**

**Response:**

The FBI recently created an Insider Threat Center (InTC) to coordinate the FBI's program for deterring, detecting, and mitigating insider threats, including the safeguarding of classified information from exploitation, compromise, or other unauthorized disclosure. The InTC identifies and prioritizes risks to the FBI's critical assets and formulates strategies to mitigate those risks. In addition, the InTC administers the FBI's Insider Threat Risk Board, which develops mitigation plans for personnel who pose a potential insider threat risk.

**DOJ's Use of Drones**

**36. Last September, the Department of Justice's Inspector General released a report on the Department's use of drones. According to the report, officials with the Federal Bureau of Investigation (FBI) said that there was no need to develop specialized privacy controls to guide the Department's use of drones. But the Inspector General recommended otherwise, noting that the use of drones raises unique concerns about privacy and the collection of evidence.**

**a. Do you agree that special privacy controls for drones are not necessary? Why or why not?**

**b. If you think these controls are necessary, have you taken any steps to implement the IG's recommendation?**

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*These responses are current as of 8/29/14*

**Response to subparts a and b:**

The OIG report explains that its recommendation regarding the development of specialized privacy controls is not based on current usage but, instead, that it “may be merited” because future UAS technologies may create “circumstances unanticipated by existing policies.” In making this recommendation, the IG report notes that the FBI complies with existing privacy requirements, has adequate policy controls over UAS activity, and adheres to Fourth Amendment requirements applicable to aerial surveillance activities that have been articulated by the courts.

Following publication of the OIG report, Attorney General Holder advised that DOJ would accept the OIG’s recommendation and implement a Department-wide policy on the use of UAS, including specific privacy controls. Based on this commitment, DOJ has convened a working group, which includes the FBI and DOJ’s Chief Privacy and Civil Liberties Officer and Office of Privacy and Civil Liberties, to identify and address policy and legal issues pertaining to the domestic use of UAS.

**USCIS’s EB-5 Program**

**37. Recently the Bureau informed my staff that there are around 14 ongoing investigations in the FBI’s Economic Crimes Unit related to the Department of Homeland Security’s EB-5 immigrant investor program. As I understand it, these include investigations surrounding securities fraud, Ponzi schemes, and embezzlement by regional centers, attorneys, and third-party promoters. These 14 don’t even include those related to national security concerns, such as the concerns that were raised about FBI field offices being constructed with EB-5 money.**

**According a recent New York Times article, “If Congress approves, [Comey] plans to move the bureau’s head of intelligence out of the national security division and create a new intelligence branch . . . in an effort to more quickly identify trends and perpetrators.”**

**How would this change help identify vulnerabilities in the EB-5 visa program from a systemic perspective?**

**Response:**

Please see the enclosed letter to Senator Grassley dated July 24, 2014.

**Deficient Accounting of Funds Distributed from the Crime Victim’s Fund**


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*These responses are current as of 8/29/14*

**38. In a September 2013 audit report, the Department of Justice Office of the Inspector General found that the FBI had mismanaged funding from the Crime Victim's Fund. This created a risk of mismanagement of the funds, and in one instance resulted in over half a million dollars sitting idle for two years instead of being used to actually help victims.**

**a. What has the FBI done to fix its mismanagement of these victim funds?**

**Response:**

Please see the response to Question 19, above.

**b. Has the FBI gone back and identified any unspent funds from Fiscal Year 2010 and 2011, as the Inspector General recommended?**

**Response:**

Yes. Corrected records were provided to DOJ's OIG, among others. DOJ has emphasized that the FBI can only estimate the amount of funding needed for the current fiscal year. That estimate, including any amount rolled over from the previous year, must be provided to DOJ's Office for Victims of Crime (OVC) before final reconciliation of the prior fiscal year's expenses and obligations. As a result, the final rollover amount is very likely to be an amended one. The UFMS, which is discussed in response to Question 19, above, should help us determine the rollover amount more quickly at the end of a fiscal year. The final rollover amount will be provided to DOJ's OVC as soon as it is available.

**Lone Wolf Terrorists**

**39. The threat of lone wolf terrorists, or homegrown extremists, continues to be a difficult problem. As you pointed out in your testimony, "As the Boston bombings illustrate, we face a continuing threat from homegrown violent extremists. This threat is of particular concern. These individuals are self-radicalizing. They do not share a typical profile; their experiences and motives are often distinct. They are willing to act alone, which makes them difficult to identify and stop. This is not just a D.C., New York, or Los Angeles phenomenon; it is agnostic as to place."**

**Are there additional tools that Congress can provide that you believe would help the FBI address the issue of homegrown extremists?**

**Response:**

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*These responses are current as of 8/29/14*

The FBI appreciates the support we receive from this Committee. We would be pleased to work through DOJ and the Administration to identify tools that will assist our efforts to address the threat posed by homegrown extremists.

**Stingray Technology**

**40. According to numerous media reports, the FBI makes use of stingrays, devices that trick nearby cell phones into connecting to it, for investigative purposes. Such a device may well help solve crimes, or track fugitives or abducted children. But there are privacy concerns with the use of such technology, which reportedly could be used to obtain large amounts of information, including geolocation data, from cellphones, even those cellphones that are in the vicinity but not related to an investigation.**

**a. Please describe the legal standard and process, if any, the FBI adheres to before employing stingray technology. For example, does the FBI obtain a warrant or other judicial order before employing them? Does the legal standard and process change across jurisdictions or is it uniform across the United States?**

**Response:**

The FBI generally deploys cell site simulator equipment pursuant to a search warrant based upon probable cause. FBI policy does allow the deployment of such equipment in certain other limited circumstances, including (1) when exigent circumstances present a risk of serious bodily injury or death to an individual or an imminent threat to national security; and (2) when the totality of the circumstances reasonably indicates that the person using the targeted device does not have a reasonable expectation of privacy in the place where he or she is at the time of deployment (for example, where the person is observed in a public space). However, when relying on those narrow exceptions to the warrant requirement, FBI policy still requires compliance with the Pen Register Act (18 U.S.C. §§3121-27) or the state law equivalent. Additionally, consistent with DOJ guidance, when using pen register authority, agents generally obtain an order for historical cell site records under 18 U.S.C. § 2703(d).

As a result of laws passed by some individual states and conflicting court opinions at both the federal and state levels, the legal standard for operating cell site simulator equipment is not uniform throughout the United States. Even among the federal district courts, several magistrates have held that, while a pen register order is required, an order based upon probable cause is not; other magistrates have held that a probable cause-based warrant is required. No federal appellate court has definitively ruled on this question to date, and there is a similar split of opinions among the state courts.

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*These responses are current as of 8/29/14*

**b. What if any internal FBI policies or procedures are in place to ensure the privacy of innocent bystanders whose cellphones may come into range of a stingray device?**

**Response:**

Multiple policies and procedures operate to provide privacy and civil liberties protections related to FBI investigations. Most broadly, these protections are provided by the Constitution, Privacy Act, AGG-Dom, and DIOG. For example, the AGG-Dom provide that “[t]he activities authorized by these Guidelines must be conducted in a manner consistent with all applicable laws, regulations, and policies, including those protecting privacy and civil liberties.” (AGG-Dom, Introduction at section C.) As an additional layer of protection, for non-targeted cellular devices that may be within range of FBI equipment, FBI policy requires that all data stored in the equipment be purged at the conclusion of a location mission. In addition, court orders often include a requirement to purge information for non-targeted devices when the mission is completed.

**Next Generation Identification Program**

**41. I am also concerned about the potential effect on privacy of the FBI's Next Generation Identification program (NGI), a replacement under development for the Integrated Automated Fingerprint Identification System (IAFIS). NGI will reportedly include a database of millions of photographs that will be searchable using facial recognition technology.**

**a. A privacy impact assessment was completed for this program in June 2008, about six years ago. Given the rapid advances in technology, does the FBI plan to update this assessment as it moves forward with this program? If so, when?**

**Response:**

As discussed in response to Question 22, above, the FBI is replacing IAFIS with the NGI system. During this process, the FBI has worked with DOJ to publish PIAs and the related SORNs for each increment of NGI. NGI's face recognition service and IPS are being delivered in the system's final increment. In such cases, the FBI often completes a PTA prior to the PIA to assess the applicability of privacy compliance requirements, including the need for a PIA, and to ensure privacy considerations are documented while the system is being developed. Consistent with this practice, the FBI's CJIS Division has drafted a PTA to assess NGI's face recognition and other photo services. The PIA and related SORN will be completed, with the benefit of significant data submitted by our state and local partners, when NGI's facial recognition service and IPS are delivered and NGI becomes fully operational.

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*These responses are current as of 8/29/14*

The primary guidance issued by the FBI's Criminal Justice Information Services (CJIS) Division to its users of facial recognition is the IPS Policy and Implementation Guide, which states:

It is the responsibility of the user agency to develop appropriate usage policies for the IPS component, in accordance with the applicable laws and policies of the governmental jurisdiction to which the user agency is subject, including ensuring compliance with the CJIS Security Policy and CJIS User Agreement. All appropriate use policies must protect the constitutional rights of all persons and should expressly prohibit collection of photos in violation of an individual's 1st and 4th amendment rights.

**b. What if any internal policies and procedures will the FBI have in place to limit the types of photographs and other information that can be placed into the system (for example, will non-criminal photographs from background checks, state driver's licenses, passports, or social media websites be included); the individuals who may access the system; and the purposes for which results of searches of the system may be used?**

**Response:**

The IPS will be a collection of both criminal justice and noncriminal justice photos received with transactions that include fingerprints from both hands (called tenprint transactions). As explained further in response to Question 21, above, the IPS is available only to users who have been assigned ORIs. Full-access ORIs are provided to criminal justice agencies and other agencies as directed by federal legislation, while limited-access ORIs are provided to noncriminal justice agencies requiring access to FBI-maintained records for official purposes. Each using entity may only access the types of information authorized, and for the purposes authorized, for its ORI. Although the IPS will include both criminal justice and noncriminal justice photos, as discussed in response to Question 20, above, a photo in the IPS that is associated with an identity that is in NGI only for noncriminal justice purposes will not be returned in response to a criminal investigation facial recognition search request. Access is strictly controlled and audited by the FBI's CJIS Division.

**Firearms Policies**

**42. In November, I contacted you regarding firearm accountability and retention within the FBI. While the FBI responded to a number of the questions included in my inquiry, some remain. Please respond to the following.**

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*These responses are current as of 8/29/14*



**a. How many rounds of ammunition have been stolen, lost, and/or unaccounted for during the past five years? For each status, please break down the rounds by caliber.**

**Response:**

As the question notes, this question was posed in a November 2013 letter to the FBI Director, to which we responded in a letter dated March 4, 2014. This information was included in the Law Enforcement Sensitive attachment to that letter.

**b. How often does the FBI conduct an inventory of all agency firearms, including serial number verification? Who makes this verification?**

**Response:**

The FBI conducts an annual inventory of all FBI firearms, verifying each by serial number. This verification is conducted by FBI firearms instructors, supervisors, and inventory management specialists.

**c. In your response, you referenced a comprehensive property inventory that occurred in the Spring of 2013. Did this inventory include serial number verification? If not, when was the last inventory conducted in which serial numbers were verified by at least Supervisory Special Agents, if not more senior members of management? How many firearms were unaccounted for at that time?**

**Response:**

Each annual firearms inventory, including the inventory conducted in 2013, is accomplished using serial number verification.

The number of firearms unaccounted for is provided in the Law Enforcement Sensitive attachment to our March 4, 2014 letter.

**d. How many firearms are currently unaccounted for? What steps are being taken to recover these firearms?**

**Response:**

The number of firearms currently unaccounted for is provided in the Law Enforcement Sensitive attachment to our March 4, 2014 letter.

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*These responses are current as of 8/29/14*

When FBI firearms are lost or stolen, they are entered into the NCIC data base. That data entry enables any law enforcement officer in the United States who recovers an FBI weapon to verify it as a Bureau weapon and facilitate its return.

**Questions Posed by Senator Flake**

**43. On May 19<sup>th</sup>, the Department of Justice announced indictments against five Chinese military hackers for foreign theft of trade secrets or economic espionage, among other crimes. The DOJ announcement quoted you as saying: “For too long, the Chinese government has blatantly sought to use cyber espionage to obtain economic advantage for its state-owned industries. . . . The indictment announced today is an important step. But there are many more victims, and there is much more to be done. With our unique criminal and national security authorities, we will continue to use all legal tools at our disposal to counter cyber espionage from all sources.”**

**Given your statement, would you agree with other executive branch reports that the threat of economic espionage coordinated by foreign governments to U.S. businesses is a “growing and persistent threat”?**

**Response:**

Economic espionage against U.S. businesses, especially when coordinated by a foreign government, is a major concern for both the national security and the economic welfare of our nation. This activity undermines the ability of U.S. businesses to operate effectively and efficiently in a global environment, adversely affecting their capacity to negotiate fair contracts, protect sensitive information such as trade secrets and proprietary processes, and expand into new markets. This threat has persisted for many years and is expanding as the global economy becomes more interconnected.

**44. I have introduced the Future of American Innovation and Research Act or “FAIR Act,” which provides companies with a legal remedy when their trade secrets are stolen from abroad.**

**On May 13<sup>th</sup>, the Assistant Director of the FBI Counterintelligence Division, Randall Coleman, testified that, “[p]rotecting the nation’s economy from this threat is not something the FBI can accomplish on its own. . . . companies need to be proactive . . . .” Companies must be proactive because, since the Economic Espionage Act was enacted in 1996, almost 20 years ago, there have only been 10 convictions under Section 1831, which targets theft of trade secrets to benefit foreign entities or governments.**

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*These responses are current as of 8/29/14*

**Since the FBI cannot investigate and DOJ cannot prosecute every theft of trade secrets, given their limited resources, wouldn't a broad federal civil cause of action help companies be proactive in combating the theft of their trade secrets?**

**Response:**

Although the FBI cannot speak to what types of legal vehicles or remedies would best assist commercial enterprises in dealing with the theft of their trade secrets, we generally provide our views of proposed legislation to DOJ pursuant to DOJ's role in assisting in the development of the Administration's position. We would be pleased to do so here.

**45. A 2013 Administration report on trade secret theft describes how the threats are evolving, stating: "Over the next several years, the proliferation of portable devices that connect to the Internet and other networks will continue to create new opportunities for malicious actors to conduct espionage. The trend in both commercial and government organizations toward the pooling of information processing and storage will present even greater challenges to preserving the security and integrity of sensitive information."**

**Doesn't the increasing use of portable devices that connect to the internet and cloud-based storage expand the opportunities for foreign actors operating abroad to steal trade secrets?**

**Response:**

As the 2013 report indicates, the increase in the number of devices connected to the Internet and other networks presents an enhanced security challenge because of the increased amount of information that is placed at risk of compromise. Cloud-based storage presents a particular challenge because, as data is distributed over a wider area or a greater number of devices, the security requirements become increasingly complex.

According to a 2014 Internet security threat report prepared by Symantec, an American technology firm, the largest percentage of malware is designed to track users in various ways. This malware may collect users' text messages and phone call logs, track their GPS, record their phone calls, and collect pictures and videos from their phones. The second most common type of malware is designed to steal device information, configuration data, banking credentials, and other information stored on or accessed by the device. The FBI believes criminals and foreign intelligence services will continue to exploit cloud computing networks to facilitate network intrusions for data theft and as potential launch points for other cyber exploitations and attacks, both of which can be used to steal trade secrets.

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*These responses are current as of 8/29/14*

**46. Has the FBI noticed an increase in international economic espionage over the past several years? And, are there any other trends in international economic espionage that we should take into consideration when considering potential legislation?**

**Response:**

The number of economic espionage cases initiated between fiscal years 2009 and 2013 has tripled. The FBI's ability to investigate economic espionage cases is affected by the difficulty of accomplishing service of process on overseas companies. Such service is governed to a large extent by treaties and the laws of foreign countries.

**47. In a recently released DOJ Office of Inspector General report on the FBI Terrorist Watchlist nomination practices, the OIG "found that the improvements implemented by the FBI as a result of [their] previous audits have helped ensure that the watchlist is more complete, accurate, and current." However, the report found the "FBI's time requirements for the submission of watchlist actions could be strengthened." Under the FBI's guidelines, up to 17 business days could elapse between the date a case agent receives supervisory approval to open a terrorism case and the date the subject is nominated to the watchlist." The OIG recommended that the FBI further review its policies and processes to determine the most effective and efficient methods, including technological improvements, and to ensure that subjects are reliably nominated to the watchlist as expeditiously as possible.**

**What efforts are you taking to implement this recommendation by the Office of Inspector General?**

**Response:**

As recommended in the report by DOJ's OIG, the FBI has re-assessed its standards for the timeliness of watchlist nomination submissions by field divisions. The FBI's assessment indicates that, in most cases, watchlist nominations are submitted within 5 days of the opening of a terrorism case.

**48. In a September 2013 audit report, the OIG found that as a result of poor accounting practices the FBI had mismanaged funding from the Crime Victim's Fund (CVF). The report concluded that the FBI did not have adequate internal controls over Crime Victim's Fund funding and "found that the system implemented by the FBI to track and document CVF expenditures was insufficient and unreliable." The audit resulted in three recommendations to the FBI to improve the effectiveness of its internal control over CVF funds. These recommendations include (1) conducting analysis for FYs 2010 and 2011 to identify and remedy unspent CVF funds, unbilled CVF expenses, and improperly transferred CVF funds; (2) implementing internal controls to ensure the FBI is in**

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*These responses are current as of 8/29/14*

**compliance with all rules, regulations, and guidelines related to the administration of CVF funds; and (3) enhancing coordination efforts within the FBI and with the OVC to ensure CVF funds are properly accounted for and accurately reported.**

**What progress have you made in implementing these recommendations so that these deficiencies are corrected?**

**Response:**

As indicated in response to Question 19, above, the FBI conducted an analysis and reconciliation of the CVF for fiscal years 2010 and 2011 and provided the results to DOJ's OIG. In October 2013, the FBI implemented a new financial management system, called the Unified Financial Management System (UFMS). This system is configured in accordance with DOJ's internal control and tracking requirements, pursuant to which OVA CVF reimbursable funds are budgeted, billed, and tracked.

Among other improvements:

- The controls established in UFMS prevent CVF reimbursable authority from being realigned to other FBI activities.
- Supporting documents, including CVF invoices, receipts, and records of asset purchases, are scanned into and maintained in the appropriate management system.
- Every CVF expenditure or transfer of funds is identified by CVF reimbursable agreement number, program, and sub-program to enhance the accuracy of billing and data reporting.
- OVA budget staff review billing records to ensure that OVA and UFMS records are consistent and to identify the end-of-year unspent funds that must be transferred back to the FBI OVA account.

In addition to these improvements, the FBI is updating its procedures to ensure that unused "no-year" CVF money is tracked and rolled into the new fiscal year's CVF budget accounts. Unobligated balances available for rollover are tracked in UFMS, allowing visibility for both OVA and the FBI's Finance Division. The FBI and DOJ have agreed that the FBI will use a specific template for reporting CVF expenses to DOJ in order to enhance the efficiency of our coordination.

**49. On May 20<sup>th</sup>, the House Oversight and Government Reform Committee subpoenaed the Justice Department for documents related to its involvement in efforts to scrutinize and potentially prosecute tax-exempt groups. Given the series of events which have called into**

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*These responses are current as of 8/29/14*

question the quality of the FBI's investigation with the Department of Justice and the recent bipartisan vote of "no confidence" by the House of Representatives, in which the appointment of a special prosecutor was overwhelmingly approved, I urge the agency to cooperate fully with the House and Senate investigations.

a. Will you commit to cooperate fully with these investigations?

b. Will you turn over any and all documents related to the investigation that are requested by the House and Senate investigative committees?

**Response to subparts a and b:**

Consistent with the constitutional roles of the Congress and the Executive Branch and with longstanding DOJ policy, the FBI will provide appropriate assistance in these investigations.

50. According to the U.S. Attorney's Manual, federal prosecutors may give notice to a person formerly identified as a target of an investigation once that person's target status has ended.

a. When you were U.S. Attorney, did you place any limits on your Assistant U.S. Attorneys' ability to provide timely notice of declination after a decision was made not to pursue a case?

**Response:**

The United States Attorneys' Manual (USAM) affords the United States Attorney "the discretion to notify an individual, who has been the target of a grand jury investigation, that the individual is no longer considered to be a target by the United States Attorney's Office." (USAM § 9-11.155.) The USAM identifies some of the circumstances in which such notification may be appropriate, and it also makes clear that a United States Attorney may decline to issue the notification "if the notification would adversely affect the integrity of the investigation or the grand jury process, or for other appropriate reasons." United States Attorneys are responsible for exercising their discretion consistent with the USAM guidance to ensure that notice of declination is provided in appropriate cases.

b. What do you believe is the best practice when determining whether to inform targets they are no longer under investigation?

**Response:**

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*These responses are current as of 8/29/14*

In accordance with the USAM, a decision to inform a subject that he/she is no longer the target of a grand jury investigation is at the discretion of the United States Attorney. The United States Attorney will consider the facts and circumstances of the particular case, the need to maintain the integrity of the investigation and the grand jury process, and other appropriate factors.

**51. Given your experience, do you see any reason why the U.S. Attorney manual cannot be changed to allow for presumptive notice of declinations to targets who have already been given notice of their status, assuming the notice does not otherwise compromise another investigation or create risks to any individual or business?**

**Response:**

The USAM affords the appropriate level of discretion to United States Attorneys, who are authorized to make determinations regarding notice of declinations in the manner that will maintain investigative integrity while serving the public interest.

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*These responses are current as of 8/29/14*

**ENCLOSURE**

**QUESTION 37**

**7/24/14 LETTER**

**FROM FBI OFFICE OF CONGRESSIONAL AFFAIRS  
TO SENATOR CHARLES E. GRASSLEY**



**U.S. Department of Justice**

Federal Bureau of Investigation

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*Washington, D.C. 20535*

July 24, 2014

Honorable Charles E. Grassley  
Ranking Member  
Committee on the Judiciary  
United States Senate  
Washington, DC 20535

Dear Senator Grassley:

This is in response to your letter dated May 29, 2014 following Director Comey's appearance before the Senate Judiciary Committee. Your letter seeks information concerning the FBI's ability to identify vulnerabilities in the EB-5 visa program and whether the use of Unmanned Aerial Systems (UAS) should trigger specialized privacy controls.

In support of your continued interest in the potential vulnerabilities in the EB-5 visa program, we have provided briefings for your staff outlining potential vulnerabilities to the program from both criminal and counterintelligence perspectives. In addition, we have provided copies of unclassified finished intelligence products and access to classified finished intelligence products that highlight these issues and are shared with our national security and law enforcement partners. Recently, the FBI's Directorate of Intelligence and Criminal Investigative Division disseminated an Intelligence Bulletin summarizing current source reporting and US Government assessments of efforts to exploit the program. A copy of this most recent finished intelligence product will be made available to you through Senate Security. The creation of an Executive Assistant Director for Intelligence will, among other things, continue to promote the use of lawfully collected intelligence in all aspects of the FBI's mission, including the identification of potential fraud vulnerabilities. The FBI will continue to assess this issue, disseminate additional products when appropriate, and work with our partners on appropriate mitigation.

Your letter also asked whether specialized privacy controls were necessary in the context of UAS. In response to the recommendations in the OIG Report referenced in your letter, the Department of Justice (DOJ) convened a working group comprised of DOJ components using or with an interest in using UAS. The FBI is participating in the working group, whose purpose of the working group is to determine whether UAS capabilities are sufficiently distinct from those of manned aircraft that they require specific DOJ-level policy to address privacy and legal concerns. While the working group considers this issue, the FBI only conducts UAS surveillance consistent with Department and FBI rules and regulations for conducting aerial surveillance in our investigations. Specifically, the FBI's use of UAS for surveillance is governed by: the Fourth Amendment of the United States Constitution and Federal laws and policies including the Privacy Act; Federal Aviation Administration rules and regulations; the

Honorable Charles E. Grassley

Attorney General Guidelines for Domestic FBI Operations; the FBI's Domestic Investigations and Operations Guide and the FBI's 2011 Bureau Aviation Regulations Manual, which has specific policies for the use of UAS for aerial surveillance.

We appreciate your continued support for the FBI and its mission. Please contact my office if you have questions concerning this or other matters.

Sincerely,



Stephen D. Kelly  
Assistant Director  
Office of Congressional Affairs

1 - Honorable Patrick J. Leahy  
Chairman  
Committee on the Judiciary  
United States Senate  
Washington, DC 20535



November 25, 2013

Senator Richard Durbin 711 Hart Senate Office Bldg. Washington, DC 20510	Senator Mike Lee 316 Hart Senate Office Bldg. Washington, DC 20510	Senator Patrick Leahy 437 Russell Senate Office Bldg. Washington, DC 20510
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Dear Senators Durbin, Lee and Leahy:

The Association of Prosecuting Attorneys (APA) is a private non-profit whose mission is to support and enhance the effectiveness of prosecutors in their efforts to create safer communities. We are the only national organization to include and support all prosecutors, including both appointed and elected prosecutors, as well as their deputies and assistants, whether they work as city attorneys, city prosecutors, district attorneys, state's attorneys, attorneys general or U.S. attorneys.

On behalf of APA, I offer our support of your efforts in Congress to pass the Smarter Sentencing Act of 2013 (S.1410, H.R.3382), as this legislation improves public safety, helps redirect resources from federal incarceration of lower-level drug offenders to our most important law enforcement priorities, and promotes fairness of sentences for drug offenders who were sentenced prior to the enactment of the Fair Sentencing Act. As prosecutors, we are well aware of the need for proportionate sentencing and believe that adjustments should be made to the federal drug mandatory minimums that are evidence-based, take into consideration data from the Sentencing Commission, and are intended to reduce recidivism.

The bill reduces, but does not eliminate, certain mandatory minimums for non-violent drug offenses. However, it keeps in place a floor of significant custody time for swift, certain punishment. Prosecutors and judges should be allowed some reasonable discretion in cases involving non-violent drug offenses, and that discretion is provided by this bill. These reductions will allow courts to make appropriate, individualized assessments in non-violent drug cases, maintain some uniformity in sentencing for drug-related offenses, and continue to sentence the most serious offenders with appropriately long sentences. The bill also modestly expands the existing federal safety valve consistent with public safety.

The bill promotes fairness and justice in sentencing by allowing inmates serving sentences imposed before the Fair Sentencing Act to seek sentence reductions consistent with current law. It is unjust not to address those serving sentences Congress already determined to be unfair and racially disparate. Prosecutors will review each and every petition for a sentence reduction and oppose reductions where necessary before judges who can deny any petition consistent with public safety. Lastly, the bill requires the Attorney General to report on how the reduced expenditures on federal corrections and cost savings resulting from this Act will be used to help reduce overcrowding, increase investment in law enforcement and crime prevention, and reduce recidivism. This is important to study, as spending on federal incarceration has increased by more than 1100 percent in the last 30 years. Almost 50 percent of the federal prison population consists of offenders with commitments for drug or drug-related offenses.

This continued rise in prison population at the federal level is inconsistent with trends at the state level, which have plateaued or declined in recent years. This funding pressure has caused a shift from some of our most important law enforcement functions including prosecutors, investigators, state/local criminal justice assistance as well as crime prevention efforts. For example, since 2011 alone, DOJ has lost hundreds of positions in U.S. Attorney's Offices, the Drug Enforcement Administration and the U.S. Marshals Service. In addition, local assistance programs like Byrne JAG have been reduced over 40 percent. These local assistance funds are critical for the improvement of the administration of justice in this country.

We have made huge strides in terms of public safety and violent crime. With nearly a third of the Department of Justice budget now going to federal incarceration and detention, we are threatening our ability to provide sufficient law enforcement resources and keep our communities safe.

We are available to answer any questions you may have, and we thank you for your attention to this real and pressing law enforcement concern. This measure, when enacted into law, will help reduce overcrowding in the Federal Bureau of Prisons, help increase proper investment in law enforcement and crime prevention, and help reduce criminal recidivism, thereby increasing the effectiveness of Federal criminal justice spending.

Respectfully submitted,



David LaBahn  
President and CEO

December 9, 2013

VIA ELECTRONIC MAIL

The Honorable Richard J. "Dick" Durbin  
United States Senate  
711 Hart Senate Office Building  
Washington, DC 20510-1304

The Honorable Michael S. "Mike" Lee  
United States Senate  
316 Hart Senate Office Building  
Washington, DC 20510-4404

RE: The Smarter Sentencing Act

Dear Senators Durbin and Lee:

As former judges, prosecutors and law enforcement officials, we write to express our support for the reforms to federal sentencing contained in the Smarter Sentencing Act (S.1410, H.R.3382). Your bill represents an important step in promoting public safety and addressing the consequences of federal mandatory minimum sentences on the explosive growth in incarceration costs and the fairness of sentences for nonviolent drug offenders.

Law enforcement has made great progress in curbing violent crime. At the federal level, we need to address the parts of our sentencing policies that are not working. Over the past three decades, what we spend on federal incarceration has increased by more than 1100 percent. Despite this massive investment, federal prisons are nearly 40 percent over capacity, with the ratio of prisoners to prison guards rising. As a nation, we are expending enormous amounts of money and still failing to keep pace with the growing prison population, with drug offenders comprising nearly half of this population.

In addition to being fiscally imprudent, maintaining the status quo in federal sentencing policy threatens public safety. Overcrowding threatens the safety of prison guards and inmates in federal prisons. Perhaps most important, spending on incarceration in this economy has started to jeopardize funding for some of our most important priorities, like crime prevention, law enforcement, and reducing recidivism. This includes possible reductions in the number of federal investigators and prosecutors. The Bureau of Prisons currently accounts for about 25 percent of the Department of Justice's budget and this is projected to increase. With more resources going to incarcerate nonviolent offenders, and fewer resources spent to investigate and prosecute violent crimes and support state and local law enforcement efforts, public safety will be at risk. Law enforcement will continue to maximize its resources to keep our communities safe. But Congress created our sentencing scheme and needs to act to help solve these problems.

The Smarter Sentencing Act reflects these concerns and embodies measured, bipartisan reforms. Its modest expansion of the current "safety valve," coupled with the reduction of some mandatory minimums for non-violent drug offenses—while maintaining statutory maximums—allows courts to make individualized assessments in nonviolent drug cases. This maintains consistency in sentencing for drug-related offenses, but allows for discretion to give less lengthy sentences, where appropriate. This approach is a step toward controlling the growth of incarceration costs, while maintaining public safety

and helping to ensure that prison sentences are appropriate for each offender. The bill does not repeal any mandatory minimums or affect the sentences for any violent offenses, but helps focus limited resources on the most serious offenders.

The bill also promotes fairness and consistency by acknowledging the numerous federal prisoners who are serving sentences imposed prior to the Fair Sentencing Act of 2010's reduction of the crack/powder cocaine sentencing disparity. The Smarter Sentencing Act would allow certain inmates sentenced under the old regime to petition courts and prosecutors for a review of their sentences and possible sentence reductions under current law. This not only addresses what is now widely recognized as an unjust disparity in sentences, but estimates also show that it could save more than \$1 billion in incarceration costs.

We appreciate your leadership in seeking bipartisan solutions to address the widely acknowledged problems with over-incarceration, to which mandatory minimum sentences have contributed. We are pleased to extend our help as you work with your colleagues in both the Senate and House to pursue reform in federal sentencing.

*Signatories as of December 9, 2013:*

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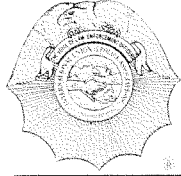
**Sharon Zealey**  
Former United States Attorney, Southern District of Ohio

**Sheldon T. Zenner**

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**David M. Zlotnick**

Former Assistant United States Attorney, District of Columbia



**INTERNATIONAL UNION  
OF POLICE ASSOCIATIONS  
AFL-CIO**  
*THE ONLY UNION FOR LAW ENFORCEMENT OFFICERS*

SAM A. CABRAL  
*International President*  
JOHN E. O'KEEFE  
*International Secretary-Treasurer*

December 9, 2013

The Honorable Richard J. Durbin  
United States Senate  
Washington, D.C. 20510

The Honorable Michael S. Lee  
United States Senate  
Washington, D.C. 20510

Re: The Smarter Sentencing Act, S.-1410, H.R.3382

Dear Senators Durbin and Lee:

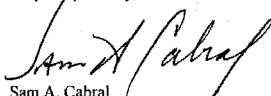
On behalf of the International Union of Police Associations, AFL-CIO (I.U.P.A.), I am proud to endorse the Smarter Sentencing Act. We believe that this critical legislation is needed to address the exploding federal prison population, containing a large number of non-violent drug offenders, and to restore the funding necessary for local law enforcement hiring, training and equipment.

As you know, the I.U.P.A. represents more than 100,000 rank and file, active duty, law enforcement and emergency medical personnel across this great nation, as well as in Puerto Rico and the Virgin Islands. Collectively, these men and women are largely responsible for the dramatic decrease in violent crime that this nation has realized. Many of our locals have increased public safety through augmentation of personnel and equipment through federal grants from the Justice Department. These necessary federal funds are rapidly declining as more resources are diverted towards the cost of federal incarceration. The Bureau of Prisons currently accounts for more than 25% of the Department of Justice's budget. If the situation is not soon addressed through measures like the Smarter Sentencing Act, this situation will worsen exponentially, leading to the erosion of the public safety accomplishments of our officers. With the law enforcement community continually doing more with less, we have long since passed the point where we are forced to critically determine how we can best spend the finite resources allocated to public safety.

Drug offenders currently account for nearly half of the federal prison population. Our prisons are critically over-crowded, jeopardizing the safety of the corrections personnel assigned to administer them. This legislation is a thoughtful, modest, and we believe, safe approach to address this growing concern. The legislation focuses on non-violent drug offenses, does not reduce maximum penalties, and helps ensure that resources will be focused on the most serious public safety risks. Additionally, it will restore vital funding to local law enforcement and help them keep our communities safe.

We applaud the introduction of this reasonable and bipartisan legislation, and look forward to working with you and your staff members to move this bill forward.

Very Respectfully,

  
Sam A. Cabral  
International President



JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE  
OF THE UNITED STATES  
*Presiding*

HONORABLE JOHN D. BATES  
*Secretary*

December 19, 2013

Honorable Patrick J. Leahy  
Chairman  
Committee on the Judiciary  
United States Senate  
Washington, DC 20510

Dear Mr. Chairman:

On behalf of the Judicial Conference of the United States, I am writing to share the views of the Judicial Branch on legislation that is before the Judiciary Committee, specifically S. 619, the "Justice Safety Valve Act of 2013"; S. 1410, the "Smarter Sentencing Act of 2013"; S. 1675, the "Recidivism Reduction and Public Safety Act of 2013"; and S. 1783, the "Federal Prison Reform Act of 2013." This letter supplements the views expressed in a September 17, 2013, letter to you from Judge Robert Holmes Bell, then-Chair of the Judicial Conference's Criminal Law Committee, which was submitted in connection with the Judiciary Committee's September 18 hearing entitled "Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences."

The Conference strongly supports the reforms to mandatory minimum sentencing proposed in S. 619 and S. 1410. These bills would help ameliorate the fiscal and social costs of mandatory minimum sentences. A copy of Judge Bell's letter, which thoroughly discusses this issue, is enclosed.

A number of the provisions contained in these bills would impose additional costs upon the Federal Judiciary. It is critical that Congress provide adequate resources when it imposes additional burdens on the Judicial Branch. Court staffing already is at 1997 levels, and budget allotments to the courts are at 2007 levels. S. 1675 would impose new workload requirements on the Federal Judiciary by, *inter alia*, mandating new recidivism reporting requirements on the probation system; establishing demonstration and pilot projects in the courts; and mandating new requirements for presentence reports. S. 1783 also would impose new workload requirements on the courts. For example, under S. 1783 judges would be required to consider recommendations from the Bureau of Prisons on whether inmates should serve the remainder of their sentences on



Honorable Patrick J. Leahy  
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home confinement.<sup>1</sup> If home confinement is authorized, probation officers would be required to supervise the inmates using technology that allows them to “continuously monitor the locational status” of the offenders. The bill caps the cost of providing these services at \$16 per day per inmate – but the current daily cost of supervision (i.e., an officer’s time) and continuous location monitoring (e.g., active GPS monitoring) is roughly \$18 per day per offender, and the bill makes no accommodation for inflationary growth.<sup>2</sup>

S. 1410 also would impose costs on the Judiciary, including supervision by probation officers of offenders released from custody. In addition to new requirements on judges and probation officers, the workload of Federal Defenders and CJA panel attorneys also would increase under S. 1410, S. 1675, or S. 1783, especially with regard to sentencing preparation and other representational requirements. Congress must provide adequate resources for the Judiciary to meet these new workload requirements. The same holds true for any legislation that would impose new workload requirements on the Federal Judiciary.

Several reforms proposed by these bills are consonant with Conference policy. For 60 years, the Judicial Conference has consistently and vigorously opposed mandatory minimums and has supported measures for their repeal or to ameliorate their effects.<sup>3</sup> In his letter, Judge Bell reiterated the Conference’s longstanding opposition to mandatory minimum sentences and its strong support for legislation such as the “Justice Safety Valve Act of 2013” that would help avoid the costs associated with mandatory minimum sentences. Although the “Smarter Sentencing Act of 2013” would implement a more modest expansion of the safety valve by extending eligibility to defendants whose criminal history categories were not higher than category two, it is consistent with the Conference’s view that a safety valve “is needed to ameliorate some of the harshest results of mandatory minimums.” The Conference continues to

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<sup>1</sup> This provision would also require a judge to approve or deny a recommendation within 60 days of submission. If no decision is made within that time, the recommendation is deemed approved. The Judicial Conference has concerns over statutory time limits beyond those already established that would require a judge to prioritize certain cases; these concerns are heightened by the prospect of a prisoner being released by default.

<sup>2</sup> The potential additional workload that could result from these changes to federal supervision could be very significant, and so the Attorney General should be required to collaborate with the Director of the Administrative Office of the United States Courts when developing guidelines for supervision by probation officers under S. 1783 (including to determine appropriate lengths of home confinement for particular categories of offenders). Additionally, S. 1783 currently refers to the “Assistant Director of the Office of Probation and Pretrial Services.” As of October 1, 2013, the Probation and Pretrial Services Office is led by a Chief. We recommend, however, that the bill instead refer to the “Director of the Administrative Office of the United States Courts” throughout.

<sup>3</sup> See JCUS-SEP 53, p. 29; JCUS-SEP 61, pp. 98-99; JCUS-MAR 62, pp. 20-21; JCUS-MAR 65, p. 20; JCUS-SEP 67, pp. 79-80; JCUS-OCT 71, p. 40; JCUS-APR 76, p. 10; JCUS-SEP 81, p. 90; JCUS-MAR 90, p. 16; JCUS-SEP 90, p. 62; JCUS-SEP 91, pp. 45,56; JCUS-MAR 93, p.13; JCUS-SEP 93, p. 46; JCUS-SEP 95, p. 47; JCUS-MAR 09, pp. 16-17.

Honorable Patrick J. Leahy  
Page 3

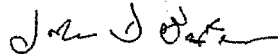
pursue its overriding goal of persuading Congress to reduce or repeal mandatory minimum sentences (which S. 1410 also does for certain drug crimes).<sup>4</sup>

Section 3 of the "Smarter Sentencing Act of 2013" would make the "Fair Sentencing Act of 2010" (Public Law No. 111-220) – which reduced the disparity between sentences for crack and powder cocaine offenses – applicable to inmates who had been sentenced prior to August 3, 2010. This proposal is consistent with the Conference's strategy to restore fairness to the sentences for defendants convicted of crack cocaine offenses. Noting concern that the disparity between the sentences for powder and crack cocaine offenses could have a corrosive effect on public confidence in the courts, the Judicial Conference agreed to oppose that disparity and to support the reduction of the difference.<sup>5</sup>

The Conference supports Congress's efforts to review and ameliorate the deleterious and unwanted consequences spawned by mandatory minimum sentencing provisions. Far from benign, these unintended consequences waste valuable taxpayer dollars, create tremendous injustice in sentencing, undermine guideline sentencing, and ultimately could foster disrespect for the criminal justice system. We hope that Congress will act swiftly to reform federal mandatory minimum sentencing.

If we may be of further assistance to you in this or any other matter, please do not hesitate to contact the Office of Legislative Affairs, Administrative Office of the United States Courts, at 202-502-1700.

Sincerely,



John D. Bates  
Secretary

Enclosure

cc: Democratic Members of the Senate Committee on the Judiciary

Identical letter sent to: Honorable Charles E. Grassley

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<sup>4</sup> JCUS-SEP 91, p. 56.

<sup>5</sup> JCUS-SEP 06, p. 18.



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**Honorable Robert Holmes Bell, Chair**

September 17, 2013

Honorable Patrick J. Leahy  
Chairman  
Committee on the Judiciary  
United States Senate  
Washington, DC 20510

Dear Mr. Chairman:

As Chair of the Criminal Law Committee of the Judicial Conference of the United States, I am pleased that the Senate Judiciary Committee plans to convene a hearing on September 18, 2013, entitled "Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences." For 60 years, the Judicial Conference has consistently and vigorously opposed mandatory minimums and has supported measures for their repeal or to ameliorate their effects.<sup>1</sup> In anticipation of this upcoming hearing, I am writing to reiterate the Conference's long-standing opposition to mandatory minimum sentences and to express our strong support for legislation such as the "Justice Safety Valve Act of 2013" that would help avoid the fiscal and social costs associated with mandatory minimum sentences.

<sup>1</sup> JCUS-SEP 53, p. 29; JCUS-SEP 61, pp. 98-99; JCUS-MAR 62, pp. 20-21; JCUS-MAR 65, p. 20; JCUS-SEP 67, pp. 79-80; JCUS-OCT 71, p. 40; JCUS-APR 76, p. 10; JCUS-SEP 81, p. 90; JCUS-MAR 90, p. 16; JCUS-SEP 90, p. 62; JCUS-SEP 91, pp. 45,56; JCUS-MAR 93, p. 13; JCUS-SEP 93, p. 46; JCUS-SEP 95, p. 47; JCUS-MAR 09, pp. 16-17.

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The Conference has had considerable company in its opposition to mandatory minimum sentences. As Judge William W. Wilkins testified, “It is important to note this developing consensus because we occasionally hear the comment that criticisms of mandatory minimums should be dismissed as coming from judges who are unhappy about limits on their discretion . . . . [T]he spectrum of viewpoints represented by those who have concerns about mandatory minimums is far broader than the federal judiciary. It includes representatives of virtually all sectors in the criminal justice system.”<sup>2</sup>

Judges routinely perform tasks in which the individual judge has no or very little discretion. “In fact, much of a judge’s daily activity is consumed with executing ‘mandatory’ tasks, using a decision-making process that is ‘mandated’ by some other entity. Thus, a judge must adjudicate a civil case, according to the prescribed standards, whether or not the judge agrees with the policy judgment made by Congress that gave rise to the cause of action or to the recognized defenses. A judge must instruct a jury as to what the applicable statute and precedent require, regardless of the judge’s possible disagreement with some of these instructions. Myriad other examples abound.”<sup>3</sup> But the Judicial Conference does not advocate for the repeal of these legislatively mandated tasks.

This belies the claim that judges are motivated by a parochial desire to increase their own power in sentencing. Rather, the Conference’s opposition to mandatory minimums derives from a recognition, gained through years of experience, that they are wasteful of taxpayer dollars, produce unjust results, are incompatible with the concept of guideline sentencing, and could undermine confidence in the judicial system.

Part I of this letter describes some of the well-known objections to mandatory minimums. In part II, we discuss the Conference’s support of interim legislative measures to reduce the effects of statutory minimums. There is a range of ways to address their unjust and unintended effects, from outright repeal to taking incremental steps. The Judicial Conference is supportive of Congress’s efforts to make a thoughtful and thorough assessment of this continuing problem.

<sup>2</sup> See, e.g., *Federal Mandatory Minimum Sentencing: Hearing Before the Subcomm. on Crime and Criminal Justice of the H. Comm. on the Judiciary*, 103rd Cong. 66 (July 28, 1993) [hereinafter *1993 Hearing*] (statement of Judge William W. Wilkins, Jr., Chairman, United States Sentencing Commission).

<sup>3</sup> *Mandatory Minimums and Unintended Consequences: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. 39 (July 14, 2009) [hereinafter *2009 Hearing*] (statement of Chief Judge Julie E. Carnes, Chair, Committee on Criminal Law, Judicial Conference of the United States).

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## I. The Failure of Mandatory Minimum Sentences

Though mandatory minimums have been criticized on numerous grounds,<sup>4</sup> there are three objections that we wish to highlight. First, statutory minimums cost taxpayers excessively in the form of unnecessary prison and supervised release costs. Second, they are inherently rigid and often lead to inconsistent and disproportionately severe sentences. Finally, they impair the efforts of the Sentencing Commission to fashion Guidelines in accordance with the principles of the Sentencing Reform Act, including the careful calibration of sentences proportionate to severity of the offense and the research-based development of a rational and coherent set of punishments.

### A. Mandatory Minimum Sentences Unnecessarily Increase the Cost of Prison and Community Supervision

Mandatory minimums have a significant impact on correctional costs. As the Sentencing Commission stated in its 2011 report to Congress, a proliferation of mandatory minimum penalties has occurred over the past 20 years. Between 1991 and 2011, the number of mandatory minimum penalties doubled, from 98 to 195.<sup>5</sup> There are approximately 195,000 more inmates incarcerated in federal prisons today than there were in 1980, a nearly 790 percent increase in the federal prison population.<sup>6</sup> This growth “is the result of several changes to the federal criminal justice system, including expanding the use of mandatory minimum penalties; the federal government taking jurisdiction in more criminal cases; and eliminating parole for federal inmates.”<sup>7</sup>

Longer prison sentences also mean longer terms of supervised release. Legislation ameliorating the effects of mandatory minimums can save taxpayer dollars, not only through a reduction in the prison population, but by lowering supervised release caseloads. It has been suggested that “persons who serve the longer terms of imprisonment that have resulted from mandatory minimum sentences and the sentencing guidelines may present greater problems in

<sup>4</sup> See, e.g., U.S. Sentencing Commission, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (October 2011), at 90-103, available at: [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Congressional\\_Testimony\\_and\\_Reports/Mandatory\\_Minimum\\_Penalties/20111031\\_RtC\\_PDF/Chapter\\_05.pdf](http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/20111031_RtC_PDF/Chapter_05.pdf). (reviewing policy views against mandatory minimum penalties, including that they are applied inconsistently; they transfer discretion from judges to prosecutors; they are ineffective as a deterrent or as a law enforcement tool to induce pleas and cooperation; they are indicative of the “overfederalization” of criminal justice policy and as upsetting the proper allocation of responsibility between the states and federal government; and they unfairly impact racial minorities and the economically disadvantaged).

<sup>5</sup> U.S. Sentencing Commission, *Report to the Congress*, *supra* note 4, at 71.

<sup>6</sup> Congressional Research Service, *The Federal Prison Population Buildup: Overview, Policy Changes, Issues, and Options* (January 2013), at 51, available at: <http://www.fas.org/sgp/crs/misc/R42937.pdf>.

<sup>7</sup> *Id.* See also U.S. Sentencing Commission, *Report to the Congress*, *supra* note 4, at 63 (“Statutes carrying mandatory minimum penalties have increased in number, apply to more offense conduct, require longer terms, and are used more often than they were 20 years ago. These changes have occurred amid other systemic changes to the federal criminal justice system . . . that also have had an impact on the size of the federal prison population. Those include expanded federalization of criminal law, increased size and changes in the composition of the federal criminal docket, high rates of imposition of sentences of imprisonment, and increasing average sentence lengths. [T]he changes to mandatory minimum penalties and these co-occurring systemic changes have combined to increase the federal prison population significantly.”).

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supervision simply by virtue of the longer periods of incarceration.”<sup>8</sup> In a 2010 report, the Sentencing Commission noted that the average term of supervised release for an offender subject to a mandatory minimum was 52 months, which compared to 35 months for an offender who was not subject to a mandatory minimum—a difference of 17 months.<sup>9</sup> Based on fiscal year 2012 cost data, the cost of supervising an offender for one month is approximately \$279.<sup>10</sup> Should the prison population be reduced due to legislation reducing the impact of mandatory minimums, the federal probation and pretrial services system could also play a role in reducing system-wide costs through the effective and efficient supervision of offenders in the community.<sup>11</sup>

### B. Mandatory Minimum Sentences Cause Disproportionality in Sentencing

Mandatory minimum statutes are structurally flawed and often result in disproportionately severe sentences. As past chairs of the Judicial Conference’s Criminal Law Committee have testified, there is an inherent difficulty in crafting a statutory minimum that can truly apply to every case. Unlike the Sentencing Guidelines, applied by judges on a case-by-case basis, allowing a consideration of multiple factors that relate to the culpability and dangerousness of the offender, mandatory minimum statutes typically identify one aggravating factor, and then pin the prescribed enhanced sentence to it. Such an approach means that any offender who is convicted of the particular statute, but whose conduct has been extenuated in ways not taken into account, will necessarily be given a sentence that is excessive. This reduces proportionality and creates unwarranted uniformity in treatment of disparate offenders. In short, as two former Criminal Law Committee chairs have put it, mandatory minimum penalties “mean one-size-fits-all injustice”<sup>12</sup> and are “blunt and inflexible tool[s].”<sup>13</sup>

<sup>8</sup> See David Adair, *Revocation of Supervised Release - A Judicial Function*, 6 FEDERAL SENTENCING REPORTER 190, 191 (1994).

<sup>9</sup> U.S. Sentencing Commission, *Federal Offenders Sentenced to Supervised Release* (July 2010), at 51-52, available at: [http://www.ussc.gov/Research/Research\\_Publications/Supervised\\_Release/20100722\\_Supervised\\_Release.pdf](http://www.ussc.gov/Research/Research_Publications/Supervised_Release/20100722_Supervised_Release.pdf).

<sup>10</sup> Memorandum from Matthew G. Rowland, Assistant Director, Office of Probation and Pretrial Services, Administrative Office of the U.S. Courts (hereinafter “AO”), “Costs of Incarceration and Supervision,” (May 17, 2013) (on file with the AO).

<sup>11</sup> 1993 Hearing, *supra* note 2, at 110 (statement of Judge Vincent L. Broderick) (“There are a variety of alternative sanctions that can be safely managed in the community, ranging from low security residential correctional alternatives and home detention with electronic monitoring, to community supervision of offenders who are required to provide restitution, to submit urine tests for the detection of drug use, to perform compensatory service, and to pay fines. I have had the great privilege, these past three years, of exercising judicial supervision over the Federal Pretrial Services Officers and Probation Officers. They constitute an extremely talented and dedicated body of men and women who can effectively control convicted criminals outside of penal facilities.”).

<sup>12</sup> *Mandatory Minimum Sentencing Laws - The Issues: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. 46 (June 26, 2007) [hereinafter 2007 Hearing] (statement of Judge Paul Cassell, Chair, Committee on Criminal Law, Judicial Conference of the United States) (“Mandatory minimum sentences mean one-size-fits-all injustice. Each offender who comes before a federal judge for sentencing deserves to have their individual facts and circumstances considered in determining a just sentence. Yet mandatory minimum sentences require judges to put blinders on to the unique facts and circumstances of particular cases.”).

<sup>13</sup> 2009 Hearing, *supra* note 3, at 42 (statement of Chief Judge Julie E. Carnes). See also 1993 Hearing, *supra* note 2, at 67 (statement of Judge William W. Wilkins, Jr.) (“[Mandatory minimums] treat similarly offenders who can be quite different with respect to the seriousness of their conduct or their danger to society. This happens because mandatory minimums generally take account of only one or two out of an array of potentially important

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Mandatory minimum sentences typically are adopted to express opprobrium for a certain crime or in reaction to a particular case where the sentence seemed too lenient. And in some cases, of course, the mandatory penalty will seem appropriate and reasonable. When that happens, judges are not concerned that the sentence was also called for by a mandatory sentencing provision because the sentence is fair. Unfortunately, however, given the severity of many of the mandatory sentences that are most frequently utilized in our system, judges are often required to impose a mandatory sentence in which the minimum term seems greatly disproportionate to the particular crime the judge has just examined and terribly cruel to the human being standing before the judge for sentencing.

This is frequently the case with drug distribution cases, where the only considerations are the type and amount of drugs.<sup>14</sup> Former Criminal Law Committee Chair Judge Vincent Broderick testified two decades ago that mandatory minimums for drug distribution offenses are often unfair and result in sentences disproportionate to the level of culpability because they are based on the amount of drugs involved,<sup>15</sup> they are based on the weight of drugs regardless of purity,<sup>16</sup> they apply conspiracy principles to drug sentences,<sup>17</sup> and the most culpable offenders are able to avoid mandatory minimums by cooperating with prosecutors because they have more knowledge of the drug conspiracy than lower-level offenders.<sup>18</sup>

offense or offender-related facts.”); U.S. Sentencing Commission, *Report to the Congress*, *supra* note 4, at 346 (“For . . . a sentence to be reasonable in every case, the factors triggering the mandatory minimum penalty must *always* warrant the prescribed mandatory minimum penalty, regardless of the individualized circumstances of the offense or the offender. This cannot necessarily be said for all cases subject to certain mandatory minimum penalties.”) (emphasis in original).

<sup>14</sup> In its recent report to Congress, the Sentencing Commission reported, based on fiscal year 2010 data, that over three-quarters (77.4%) of convictions of an offense carrying a mandatory minimum penalty were for drug trafficking offenses. U.S. Sentencing Commission, *Report to the Congress*, *supra* note 4, at 146.

<sup>15</sup> *1993 Hearing*, *supra* note 2, at 106 (statement of Judge Vincent L. Broderick) (“Use of the amounts of drugs by weight in setting mandatory minimum sentences raises issues of fairness because the amount of drugs in the offense is more often than not totally unrelated to the role of the offender in the drug enterprise. Individuals operating at the top levels of drug enterprises routinely insulate themselves from possession of the drugs and participation in the smuggling or transfer functions of the business. It is the participants at the lower levels – those that transport, sell, or possess the drugs – that are caught with large quantities. These individuals make up the endless supply of low paid mules, runners, and street traders, many of them aliens.”).

<sup>16</sup> *Id.* (“The weight of inert substances used to dilute the drugs or the weight of a carrier medium (the paper or sugar cube that contains LSD or the weight of a suitcase in which drugs have been ingeniously imbedded in the construction materials of the suitcase) is added to the total weight of the drug to determine whether a mandatory sentence applies. A defendant in possession of a quantity of pure heroin may face a lighter sentence than another defendant in possession of a smaller quantity of heroin of substantially less purity, but more weight because of the diluting substance. Since the relation of the carrier medium to the drug increases as the drug is diluted in movement to the retail level, the unfairness of imposing automatic sentences based on amount without regard to role in the offense is compounded by failure to take purity into account.”).

<sup>17</sup> *Id.* (“Another significant factor of unwarranted unfairness in mandatory minimum sentencing is the application of conspiracy principles to quantity-driven drug crimes . . . [A]ccomplices with minor roles may be held accountable for the foreseeable acts of other conspirators in furtherance of the conspiracy. A low-level conspirator is subject to the same penalty as the kingpin . . . despite the fact that [he or she] ha[s] little knowledge of the nature [or amount of the drugs involved].”).

<sup>18</sup> *Id.* 107 (“Who is in a position to give such ‘substantial assistance’? Not the mule who knows nothing more about the distribution scheme than his own role, and not the street-level distributor. The highly culpable defendant managing or operating a drug trafficking enterprise has more information with which to bargain. Low-level offenders, peripherally involved with less responsibility and knowledge, do not have much information to offer . . . There are few federal judges engaged in criminal sentencing who have not had the disheartening experience

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In her congressional testimony four years ago, Chief Judge Julie Carnes (my predecessor as Chair of the Criminal Law Committee) provided a specific example of how disproportionately severe sentences may result from the mandatory minimum structure governing drug-related offenses.<sup>19</sup> Title 21 U.S.C. § 841(b)(1)(A) provides that, when a defendant has been convicted of a drug distribution offense involving a quantity of drugs that would trigger a mandatory minimum sentence of 10 years imprisonment—e.g., 5 kilograms of cocaine—the defendant’s 10-year mandatory sentence shall be doubled to a 20-year sentence if he has been previously convicted of a drug distribution-type offense. Now, if the defendant is a drug kingpin running a long-standing, well-organized, and extensive drug operation who has been previously convicted of another serious drug offense, a 20-year sentence may be just. The amount of drugs may be a valid indicator of market share, and thus culpability, for leaders of drug manufacturing, importing, or distributing organizations. But, kingpins are, by definition, few in number, and they are not the drug defendant that judges see most frequently in federal court.

Instead of a drug kingpin, assume that the defendant is a low-level participant who is one of several individuals hired to provide the manual labor used to offload a large drug shipment arriving in a boat. The quantity of drugs in the boat will easily qualify for a 10-year mandatory sentence. This is so even though in cases of employees of these organizations or others on the periphery of the crime, the amount of drugs with which they are involved is often merely fortuitous. A courier, unloader, or watchman may receive a fixed fee for his work, and not be fully aware of the type or amount of drugs involved. A low-level member of a conspiracy may have little awareness and no control over the actions of other members. Further, assume that the low-level defendant has one prior conviction for distributing a small quantity of marijuana, for which he served no time in prison. Finally, assume that since his one marijuana conviction, he has led a law-abiding life until he lost his job and made the poor decision to offload this drug shipment in order to help support his wife and children. This defendant will now be subject to a 20-year mandatory minimum sentence. It is difficult to defend the proportionality of this type of sentence, which is not unusual in the federal criminal justice system.<sup>20</sup>

### C. Mandatory Minimum Sentences are Incompatible with the Sentencing Reform Act

Mandatory minimum statutes are incompatible with guideline sentencing and impair the efforts of the Sentencing Commission to fashion Sentencing Guidelines in accordance with the principles of the Sentencing Reform Act. In 1984, Congress passed the Sentencing Reform Act after years of consideration and debate. The Act created the Sentencing Commission and charged it with the responsibility to create a comprehensive system of guideline sentencing.

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of seeing major players in crimes before them immunize themselves from the mandatory minimum sentences by blowing the whistle on their minions, while the low-level offenders find themselves sentenced to the mandatory minimum prison term so skillfully avoided by the kingpins.”)

<sup>19</sup> 2009 Hearing, *supra* note 3, at 43 (statement of Chief Judge Julie E. Carnes).

<sup>20</sup> See, e.g., *United States v. Lettich*, No. 11-CR-00609(JG), 2013 WL 753445, at \*2 (E.D.N.Y. Feb. 28, 2013) (“[M]any low-level drug trafficking defendants are receiving the harsh mandatory minimum sentences that Congress explicitly created only for the leaders and managers of drug operations.”).



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But mandatory minimum sentences have severely hampered the Commission in its task of establishing fair, certain, rational, and proportional Guidelines. They deny the Commission the opportunity to bring to bear the expertise of its members and staff upon the development of sentencing policy. Since the Commission has embodied within its Guidelines the mandatory minimum sentences,<sup>21</sup> the Guidelines have been skewed out of shape and upward by the inclusion of sentence ranges which have not been empirically constructed.<sup>22</sup> Consideration of mandatory minimums in setting Guidelines' base offense levels normally eliminates any relevance of the aggravating and mitigating factors that the Commission has determined should be considered in the establishment of the sentencing range for certain offenses and offenders.

As the Commission explained in its 1991 report to Congress on mandatory minimums, the simultaneous existence of mandatory sentences and Sentencing Guidelines skews the "finely calibrated . . . smooth continuum" of the Guidelines, and prevents the Commission from maintaining system-wide proportionality in the sentencing ranges for all federal crimes.<sup>23</sup> The Commission concluded that the two systems are "structurally and functionally at odds."<sup>24</sup> Similarly, in 1993, Chief Justice William Rehnquist stated that "one of the best arguments against any more mandatory minimums, and perhaps against some of those that we already have, is that they frustrate the careful calibration of sentences, from one end of the spectrum to the other, which the Sentencing Guidelines were intended to accomplish."<sup>25</sup> Likewise, Senator Orrin Hatch has expressed grave doubts about the ability to reconcile the federal sentencing guidelines and mandatory minimum sentences.<sup>26</sup>

<sup>21</sup> The Sentencing Commission has taken the position that minimum sentences mandated by statute require the Sentencing Guidelines faithfully to reflect that mandate. The Commission has accordingly reflected those mandatory minimums at or near the lowest point of the Sentencing Guideline ranges. The Criminal Law Committee has expressed its concerns to the Commission about the subversion of the Sentencing Guideline scheme caused by mandatory minimum sentences. The Committee believes that setting the Sentencing Guidelines' base offense levels irrespective of mandatory minimum penalties is the best approach to harmonizing what are essentially two competing approaches to criminal sentencing. See, e.g., Letter from Judge Sim Lake, Chair, Committee on Criminal Law, Judicial Conference of the United States, to members of the U.S. Sentencing Commission (Mar. 8, 2004) (on file with the AO); Letter from Judge Paul Cassell, Chair, Committee on Criminal Law, Judicial Conference of the United States, to Judge Ricardo Hinojosa, Chair, U.S. Sentencing Commission (Mar. 16, 2007) (on file with the AO); see also *U.S. v. Leitch*, *supra* note 20, at \*2 ("[T]he Commission can fix this problem by delinking the Guidelines ranges from the mandatory minimum sentences and crafting lower ranges based on empirical data, expertise, and more than 25 years of application experience demonstrating that the current ranges are not the 'heartlands' the Commission hoped they would become.")

<sup>22</sup> 1993 Hearing, *supra* note 2, at 108 (statement of Judge Vincent L. Broderick) ("This superimposition of mandatory minimum sentences within the Guidelines structure has skewed the Guidelines upward . . . As a consequence, offenders committing crimes not subject to mandatory minimums serve sentences that are more severe than they would be were there no mandatory minimums. Thus mandatory minimum penalties have hindered the development of proportionality in the Guidelines, and are unfair not only with respect to offenders who are subject to them, but with respect to others as well.")

<sup>23</sup> U.S. Sentencing Commission, *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (August 1991), available at: [http://www.uscc.gov/Legislative\\_and\\_Public\\_Affairs/Congressional\\_Testimony\\_and\\_Reports/Mandatory\\_Minimum\\_Penalties/199108\\_RtC\\_Mandatory\\_Minimum.htm](http://www.uscc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/199108_RtC_Mandatory_Minimum.htm)

<sup>24</sup> *Id.*

<sup>25</sup> Chief Justice William H. Rehnquist, *Luncheon Address* (June 18, 1993), in U.S. Sentencing Commission, *Proceedings of the Inaugural Symposium on Crime and Punishment in the United States* 286 (1993).

<sup>26</sup> Hon. Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185, 194 (1993).

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## II. Solutions to Ameliorate the Effects of Mandatory Minimum Statutes

Today, the Conference endorsed seeking legislation “such as the ‘Justice Safety Valve Act of 2013,’ . . . that is designed to restore judges’ sentencing discretion and avoid the costs associated with mandatory minimum sentences.”<sup>27</sup> Though it favors the repeal of all mandatory minimum penalties, the Conference also supports steps that reduce the negative effects of these statutory provisions.

The Judicial Conference historically has supported legislative measures short of outright repeal of mandatory minimum statutes. In 1991, for instance, it approved a proposed statutory amendment that would provide district judges with authority to impose a sentence below a mandatory minimum when a defendant has limited involvement in an offense.<sup>28</sup> The Conference noted that “[w]hile the judiciary’s overriding goal is to persuade Congress to repeal mandatory minimum sentences, for the short term, a safety valve of some sort is needed to ameliorate some of the harshest results of mandatory minimums.”<sup>29</sup> In 1993, the Conference considered the Controlled Substances Minimum Penalty–Sentencing Guideline Reconciliation Act of 1993, legislation presented by the Chairman of the Sentencing Commission that attempted to reconcile mandatory minimum sentences with the Sentencing Guidelines.<sup>30</sup> The Criminal Law Committee believed that, although the proposed legislation would not have solved all of the problems associated with mandatory minimum sentences, it addressed the essential incompatibility of mandatory minimums and Sentencing Guidelines and represented a promising approach.<sup>31</sup> On recommendation of the Committee, the Conference endorsed the concept.<sup>32</sup>

## Conclusion

The Conference supports Congress’s efforts to review and ameliorate the deleterious and unwanted consequences spawned by mandatory minimum sentencing provisions. The good intentions of their proponents notwithstanding,<sup>33</sup> mandatory minimum sentencing statutes have created what the late Chief Justice Rehnquist aptly identified as “unintended consequences.”<sup>34</sup> Far from benign, these unintended consequences waste valuable taxpayer dollars, create tremendous

<sup>27</sup> JCUS-SEP 13, p. \_\_\_\_.

<sup>28</sup> JCUS-SEP 91, p. 56. The proposed legislation for drug offenses would have required the Commission to use mandatory minimum penalties only in establishing base offense levels, and would otherwise permit the guidelines through downward adjustments or departures to provide for sentences below the mandatory minimum penalties. See *1993 Hearing*, *supra* note 2, at 70 (statement of Judge William W. Wilkins, Jr.).

<sup>29</sup> JCUS-SEP 91, p. 56.

<sup>30</sup> JCUS-SEP 93, p. 46.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *2009 Hearing*, *supra* note 3, at 37 (statement of Chief Judge Julie E. Carnes) (“I start by attributing no ill will or bad purpose to any Congressional member who has promoted or supported particular mandatory minimum sentences. To the contrary, many of these statutes were enacted out of a sincere belief that certain types of criminal activity were undermining the order and safety that any civilized society must maintain and out of a desire to create an effective weapon that could be wielded against those who refuse to comply with these laws.”).

<sup>34</sup> Chief Justice William H. Rehnquist, *Luncheon Address*, *supra* note 25 (suggesting that federal mandatory minimum sentencing statutes are “perhaps a good example of the law of unintended consequences”).

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injustice in the sentencing, undermine guideline sentencing, and ultimately could foster disrespect for the criminal justice system. We hope that Congress will act swiftly to reform federal mandatory minimum sentencing.

If we may be of further assistance to you in this or any other matter, please do not hesitate to contact the Office of Legislative Affairs, Administrative Office of the United States Courts, at 202-502-1700.

Sincerely,



Robert Thomas Bell

Identical letter sent to: Honorable Charles E. Grassley

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November 26, 2013

Senator Patrick Leahy, Chairman  
Senate Committee on the Judiciary  
224 Dirksen Senate Office Building  
Washington, D.C. 20510

Senator Chuck Grassley, Ranking Member  
Senate Committee on the Judiciary  
152 Dirksen Senate Office Building  
Washington, D.C. 20510

Dear Senators Leahy and Grassley,

The United States Sentencing Commission is pleased that the Senate Judiciary Committee plans to take up legislation next month on important sentencing issues, including federal mandatory minimum penalties. We want to draw your attention to the written statement submitted for the Committee's September 18 hearing on "Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences." That statement (attached) made several recommendations relevant to the legislation before the Committee and drew heavily upon the research and conclusions from the Commission's 2011 report on Mandatory Minimum Penalties in the Federal Criminal Justice System.

As set out in that statement, the Commission is concerned about rising federal prison costs and about federal prison populations far exceeding prison capacity. We believe that modifying certain severe mandatory minimum penalties is an important step toward addressing that problem and improving the fairness of federal sentences.

Specifically, the Commission unanimously recommends that Congress consider the following statutory changes:

- Congress should reduce the current statutory mandatory minimum penalties for drug trafficking.
- The provisions of the Fair Sentencing Act of 2010, which Congress passed to reduce the disparity in treatment of crack and powder cocaine, should be made retroactive.

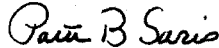
- Congress should consider expanding the so-called “safety valve,” allowing sentences below mandatory minimum penalties for non-violent low-level drug offenders, to offenders with slightly greater criminal histories than currently permitted.
- The safety valve provision, and potentially other measures providing relief from current mandatory minimum penalties, should be applied more broadly to extend beyond drug offenders to other low-level non-violent offenders in appropriate cases.

The Commission is also pleased that the Judiciary Committee is considering clarifying the calculation of good time credit for federal inmates to specify that inmates are eligible for 54 days of good time credit per year of sentence imposed. We support Congress addressing this longstanding issue.

As set out in more detail in the attached statement, the Commission reached these conclusions based on its analysis which indicates that mandatory minimum penalties in general have contributed to the overall federal prison population, that certain severe mandatory minimum sentences can lead to disparate charging decisions by prosecutors, and that, in the drug context, statutory mandatory minimum penalties often apply more broadly than to just the high-level drug offenders that it appears Congress intended to target. The Commission’s recommendations are also informed by recidivism data showing that crack cocaine offenders released early after modest sentence reductions did not demonstrate an increased propensity to reoffend after a two-year study period.

The Commission stands ready to assist the Judiciary Committee as it prepares to consider these vitally important federal sentencing issues. We are happy to provide any data, analysis, or other assistance that would be useful to the Committee. Please don’t hesitate to reach out to me or my staff if we can be helpful in any way.

Sincerely,



Patti B. Saris  
Chair

cc: Senate Judiciary Committee Members

**Statement of Judge Patti B. Saris**  
**Chair, United States Sentencing Commission**  
**For the Hearing on**  
**“Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences”**  
**Before the Committee on the Judiciary**  
**United States Senate**

**September 18, 2013**

Chairman Leahy, Ranking Member Grassley, and distinguished members of the Committee, thank you for providing me with the opportunity to submit this statement on behalf of the United States Sentencing Commission about mandatory minimum sentences in the federal criminal justice system.

We are particularly pleased that the Judiciary Committee is addressing this vital issue that has been a key focus for the Commission for several years. The bipartisan seven-member Commission<sup>1</sup> unanimously agrees that mandatory minimum sentences in their current form have led to unintended results, caused unwarranted disparity in sentencing, and contributed to the current crisis in the federal prison population and budget. We unanimously agree that statutory changes to address these problems are appropriate.

In our 2011 report to Congress entitled *Mandatory Minimum Penalties in the Federal Criminal Justice System*,<sup>2</sup> the Commission set out in detail its findings that existing mandatory minimum penalties are unevenly applied, leading to unintended consequences. We set out a series of recommendations for modifying the laws governing mandatory minimum penalties that would make sentencing laws more uniform and fair and help them operate as Congress intended. It is gratifying that members of this Committee, including Senators Leahy, Durbin, and Lee, and other Republican and Democratic members of the Senate and House have proposed legislation corresponding to many of these key recommendations.

Since 2011, circumstances have made the need to address the problems caused by the current mandatory minimum penalties still more urgent. Even as state prison populations have begun to decline slightly due to reforms in many states, the federal prison population has continued to grow, increasing by almost four percent in the last two years alone and by about a third in the past decade.<sup>3</sup> The size of the Federal Bureau of Prisons' (BOP) population exceeds the BOP's capacity by 38 to 53 percent on average.<sup>4</sup> Meanwhile, the nation's budget crisis has become more acute. The overall Department of Justice budget has decreased, meaning that as

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<sup>1</sup> By statute, no more than four members of the Commission may be of the same political party. 28 U.S.C. § 991(a).

<sup>2</sup> U.S. Sentencing Comm'n, *Mandatory Minimum Penalties in the Federal Criminal Justice System* (October 2011) (Mandatory Minimum Report), [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Congressional\\_Testimony\\_and\\_Reports/Mandatory\\_Minimum\\_Penalties/20111031\\_RtC\\_Mandatory\\_Minimum.cfm](http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/20111031_RtC_Mandatory_Minimum.cfm).

<sup>3</sup> E. Ann Carson & Daniela Golinelli, U.S. Dep't of Justice, Bureau of Justice Statistics, *Prisoners in 2012 – Advance Counts 2* (July 2013), <http://www.bjs.gov/content/pub/pdf/p12ac.pdf>.

<sup>4</sup> U.S. Dep't of Justice, *Federal Prison System FY 2013 Congressional Budget 1* (2013) <http://www.justice.gov/jmd/2013justification/pdf/fy13-bop-bf-justification.pdf>.

more resources are needed for prisons, fewer are available for other components of the criminal justice system that promote public safety. Federal prisons and detention now cost more than \$8 billion a year and account for close to one third of the overall Department of Justice budget.<sup>5</sup> For these reasons, the Commission feels even more strongly now than in 2011 that congressional action is necessary and has also identified reducing costs of incarceration as a Commission priority for this year.<sup>6</sup>

I will set out the Commission's findings as to why changes in the law are necessary and our recommendations for the changes the Commission believes Congress should consider. The Commission found that certain severe mandatory minimum sentences lead to disparate decisions by prosecutors and to vastly different results for similarly situated offenders. The Commission further found that, in the drug context, statutory mandatory minimum penalties often applied to lower-level offenders, rather than just to the high-level drug offenders that it appears Congress intended to target. The Commission's analysis revealed that mandatory minimum penalties have contributed significantly to the overall federal prison population. Finally, the Commission's analysis of recidivism data following the early release of offenders convicted of crack cocaine offenses after sentencing reductions showed that reducing these drug sentences did not lead to an increased propensity to reoffend.

Based on this analysis, the Commission unanimously recommends that Congress consider a number of statutory changes. The Commission recommends that Congress reduce the current statutory mandatory minimum penalties for drug trafficking. We recommend that the provisions of the Fair Sentencing Act of 2010,<sup>7</sup> which Congress passed to reduce the disparity in treatment of crack and powder cocaine, be made retroactive. We further recommend that Congress consider expanding the so-called "safety valve," allowing sentences below mandatory minimum penalties for non-violent low-level drug offenders, to offenders with slightly greater criminal histories than currently permitted. Finally, the Commission recommends that the safety valve provision, and potentially other measures providing relief from current mandatory minimum penalties, be applied more broadly to extend beyond drug offenders to other low-level non-violent offenders in appropriate cases.

Republican and Democratic members of this Committee and others in Congress have proposed legislation to reform certain mandatory minimum penalty provisions. The Commission strongly supports these efforts to reform this important area of the law. While there is a spectrum of views among the members of the Commission regarding whether Congress should exercise its power to direct sentencing power by enacting mandatory minimum penalties in general, the Commission unanimously believes that a strong and effective system of sentencing

<sup>5</sup> U.S. Dep't of Justice, *FY 2014 Budget Request at a Glance* 3 (2013) (U.S. Dep't of Justice FY 2014 Budget Request), [www.justice.gov/jmd/2014summary/pdf/fy14-bud-sum.pdf#bs](http://www.justice.gov/jmd/2014summary/pdf/fy14-bud-sum.pdf#bs); see also Letter from Jonathan Wroblewski, U.S. Dep't of Justice, to Hon. Patti Saris, U.S. Sentencing Comm'n, 8 (July 11, 2013) ([http://www.ussc.gov/Meetings\\_and\\_Rulemaking/Public\\_Comment/20130801/Public\\_Comment\\_DOJ\\_Proposed\\_Priorities.pdf](http://www.ussc.gov/Meetings_and_Rulemaking/Public_Comment/20130801/Public_Comment_DOJ_Proposed_Priorities.pdf)).

<sup>6</sup> See U.S. Sentencing Comm'n, *Notice of Final Priorities*, 78 Fed. Reg. 51,820, 51,821 (Aug. 21, 2013) (Notice of Final Priorities).

<sup>7</sup> Pub. L. No. 111-220, 124 Stat. 2373 (2010).

guidelines best serves the purposes that motivated Congress in passing the Sentencing Reform Act of 1984.

#### **I. The Commission's Findings on Mandatory Minimum Sentences**

Congress created the United States Sentencing Commission as an independent agency to guide federal sentencing policy and practices as set forth in the SRA.<sup>8</sup> Congress specifically charged the Commission not only with establishing the federal sentencing guidelines and working to ensure that they function as effectively and fairly as possible, but also with assessing whether sentencing, penal, and correctional practices are fulfilling the purposes they were intended to advance.<sup>9</sup>

In section 4713 of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009, a provision that originated with members of this Committee, Congress directed the Commission to evaluate the effect of mandatory minimum penalties on federal sentencing.<sup>10</sup> In response to that directive, and based on its own statutory authority, the Commission reviewed legislation, analyzed sentencing data, studied scholarship, and conducted hearings. The Commission published the Mandatory Minimum Report in October 2011 and has continued to perform relevant sentencing data analysis since the report was published. That comprehensive process has led the Commission to several important conclusions about the effect of current mandatory minimum penalty statutes.

##### **A. Severe Mandatory Minimum Penalties Are Applied Inconsistently**

The Commission determined that some mandatory minimum provisions apply too broadly, are set too high, or both, for some offenders who could be prosecuted under them. These mandatory minimum penalties are triggered by a limited number of aggravating factors, without regard to the possibility that mitigating circumstances surrounding the offense or the offender may justify a lower penalty.<sup>11</sup> This broad application can lead to a perception by those making charging decisions that some offenders to whom mandatory minimums could apply do not merit them. As a result, certain mandatory minimum penalties are applied inconsistently from district to district and even within districts, as shown by the Commission's data analyses and our interviews of prosecutors and defense attorneys. Mandatory minimum penalties, and the existing provisions granting relief from them in certain cases, also impact demographic groups differently, with Black and Hispanic offenders constituting the large majority of offenders subject to mandatory minimum penalties and Black offenders being eligible for relief from those penalties far less often than other groups.

Interviews with prosecutors and defense attorneys in thirteen districts across the country revealed widely divergent practices with respect to charging certain offenses that triggered

<sup>8</sup> See 28 U.S.C. § 991(b); 18 U.S.C. § 3553(a)(2).

<sup>9</sup> 28 U.S.C. § 991.

<sup>10</sup> Div. E of the Nat'l Def. Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, 123 Stat. 2190, 2843 (2009)

<sup>11</sup> Mandatory Minimum Report, *supra* note 2, at 345-46.



significant mandatory minimum penalties. These differences were particularly acute with respect to practices regarding filing notice under section 851 of title 21 of the United States Code for drug offenders with prior felony drug convictions, which generally doubles the applicable mandatory minimum sentence. In some districts, the filing was routine. In others, it was more selectively filed, and in one district, it was almost never filed at all.<sup>12</sup> Our analysis of the data bore out these differences. For example, in six districts, more than 75 percent of eligible defendants received the increased mandatory minimum penalty for a prior conviction, while in eight other districts, none of the eligible drug offenders received the enhanced penalty.<sup>13</sup>

Similarly, the Commission's interviews revealed vastly different policies in different districts in the charging of cases under section 924(c) of title 18 of the United States Code for the use or possession of a firearm during a crime of violence or drug trafficking felony. In that statute, different factors trigger successively larger mandatory minimum sentences ranging from five years to life, including successive 25-year sentences for second or subsequent convictions. The Commission found that districts had different policies as to whether and when they would bring charges under this provision and whether and when they would bring multiple charges under the section, which would trigger far steeper mandatory minimum penalties.<sup>14</sup> The data bears out these geographic variations in how these mandatory minimum penalties are applied. In fiscal year 2012, just 13 districts accounted for 45.8 percent of all cases involving a conviction under section 924(c) even though those districts reported only 27.5 percent of all federal criminal cases that year. In contrast, 35 districts reported 10 or fewer cases with a conviction under that statute.

When similarly situated offenders receive sentences that differ by years or decades, the criminal justice system is not achieving the principles of fairness and parity that underlie the SRA. Yet the Commission has found severe, broadly applicable mandatory minimum penalties to have that effect.

The current mandatory minimum sentencing scheme also affects different demographic groups in different ways. Hispanic offenders constituted 41.1 percent of offenders convicted of an offense carrying a mandatory minimum penalty in 2012; Black offenders constituted 28.4 percent, and White offenders were 28.1 percent.<sup>15</sup> The rate with which these groups of offenders qualified for relief from mandatory minimum penalties varied greatly. Black offenders qualified for relief under the safety valve in 11.6 percent of cases in which a mandatory minimum penalty applied, compared to White offenders in 29.0 percent of cases, and Hispanic offenders in 42.9 percent.<sup>16</sup> Because of this, although Black offenders in 2012 made up 26.3 percent of drug offenders convicted of an offense carrying a mandatory minimum penalty, they accounted for 35.2 percent of the drug offenders still subject to that mandatory minimum at sentencing.

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<sup>12</sup> *Id.* at 111-13.

<sup>13</sup> *Id.* at 255.

<sup>14</sup> *Id.* at 113-14.

<sup>15</sup> *Id.* at xxviii.

<sup>16</sup> Offenders were most often disqualified from safety valve relief because of their criminal history or because of involvement of a dangerous weapon in connection with the offense. See Mandatory Minimum Report, *supra* note 2, at xxviii.

### **B. Mandatory Minimum Drug Penalties Apply to Many Lower-Level Offenders**

In establishing mandatory minimum penalties for drug trafficking, it appears that Congress intended to target “major” and “serious” drug traffickers.<sup>17</sup> Yet the Commission’s research has found that those penalties sweep more broadly than Congress may have intended. Mandatory minimum penalties are tied only to the quantity of drugs involved, but the Commission’s research has found that the quantity involved in an offense is often not as good a proxy for the function played by the offender as Congress may have believed. A courier may be carrying a large quantity of drugs, but may be a lower-level member of a drug organization.

Mandatory minimum penalties currently apply in large numbers to every function in a drug organization, from couriers and mules who transport drugs often at the lowest levels of a drug organization all the way up to high-level suppliers and importers who bring large quantities of drugs into the United States.<sup>18</sup> For instance, in the cases the Commission reviewed, 23 percent of all drug offenders were couriers, and nearly half of these were charged with offenses carrying mandatory minimum sentences. The category of drug offenders most often subject to mandatory minimum penalties at the time of sentencing – that is, those who did not obtain any relief from those penalties – were street level dealers, who were many steps down from high-level suppliers and leaders of drug organizations.<sup>19</sup> While Congress appears to have intended to impose these mandatory penalties on “major” or “serious” drug traffickers, in practice the penalties have swept more broadly.

### **C. Mandatory Minimum Penalties Have Contributed to Rising Prison Populations**

The federal prison population has increased dramatically over the past two decades, and offenses carrying mandatory minimum sentences have played a significant role in that increase. The number of inmates housed by the BOP on December 31, 1991 was 71,608.<sup>20</sup> By December 31, 2012, that number had more than tripled to 217,815 inmates.<sup>21</sup>

<sup>17</sup> See U.S. Sentencing Comm’n, *Report to Congress: Cocaine and Federal Sentencing Policy* 6 (2002), [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Congressional\\_Testimony\\_and\\_Reports/Drug\\_Topics/200205\\_RtC\\_Cocaine\\_Sentencing\\_Policy/index.htm](http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/200205_RtC_Cocaine_Sentencing_Policy/index.htm); see also 132 Cong. Rec. 27,193-94 (Sept. 30, 1986) (statement of Sen. Byrd) (“For the kingpins ... the minimum term is 10 years. ... [F]or the middle-level dealers ... a minimum term of 5 years.”); 132 Cong. Rec. 22,993 (Sept. 11, 1986) (statement of Rep. LaFalce) (“[S]eparate penalties are established for the biggest traffickers, with another set of penalties for other serious drug pushers.”).

<sup>18</sup> To provide a more complete profile of federal drug offenders for the Mandatory Minimum Report, the Commission undertook a special analysis project in 2010. Using a 15% sample of drug cases reported to the Commission in fiscal year 2009, the Commission assessed the functions performed by drug offenders as part of the offense. Offender function was determined by a review of the offense conduct section of the presentence report. The Commission assigned each offender to one of 21 separate function categories based on his or her most serious conduct as described in the Presentence Report and not rejected by the court on the Statement of Reasons form. For more information on the Commission’s analysis, please see Mandatory Minimum Report, *supra* note 2, at 165-66.

<sup>19</sup> *Id.* at 166-70.

<sup>20</sup> Allen J. Beck & Darrell K. Gilliard, *Prisoners in 1994*, Bureau of Justice Statistics Bulletin 1 (1995).

<sup>21</sup> Carson & Golinelli, *supra* note 3, at 2.

Offenses carrying mandatory minimum penalties were a significant driver of this population increase.<sup>22</sup> The number of offenders in custody of the BOP who were convicted of violating a statute carrying a mandatory minimum penalty increased from 40,104 offenders in 1995 to 111,545 in 2010, an increase of 178.1 percent.<sup>23</sup> Similarly, the number of offenders in federal custody who were subject to a mandatory minimum penalty at sentencing – who had not received relief from that mandatory sentence – increased from 29,603 in 1995 to 75,579 in 2010, a 155.3 percent increase.<sup>24</sup>

These increases in prison population have led not only to a dramatically higher federal prison budget, which has increased more than six fold from \$1.36 billion for fiscal year 1991<sup>25</sup> to \$8.23 billion this year,<sup>26</sup> but also to significant overcrowding, which the BOP reports causes particular concern at high-security facilities and which courts have found causes security risks and makes prison programs less effective.<sup>27</sup> Changing the laws governing mandatory minimum penalties would be an important step toward addressing the crisis in the federal prison population and prison costs.

#### **D. Recent Reductions in the Sentences of Some Drug Offenders Have Not Increased Offenders' Propensity to Reoffend**

The Commission recognizes that one of the most important goals of sentencing is ensuring that sentences reflect the need to protect public safety.<sup>28</sup> The Commission believes based on its research that some reduction in the sentences imposed on drug offenders would not lead to increased recidivism and crime.

In 2007, the Commission reduced by two levels the base offense level in the sentencing guidelines for each quantity level of crack cocaine and made the changes retroactive. The average decrease in sentences among those crack cocaine offenders receiving retroactive application of the 2007 amendment was 26 months, which corresponds to a 17 percent reduction in the total sentence.<sup>29</sup> In order to determine whether drug offenders serving reduced sentences

<sup>22</sup> An increase in the number of prosecutions brought and individuals convicted overall, including for offenses without mandatory minimum penalties, has also contributed to the increasing federal prison population. See Mandatory Minimum Report, *supra* note 2, at 81-82.

<sup>23</sup> *Id.* at 81.

<sup>24</sup> *Id.*

<sup>25</sup> Pub. L. No. 101-515, 104 Stat. 2101, 2114 (1990).

<sup>26</sup> U.S. Dep't of Justice FY 2014 Budget Request, *supra* note 5.

<sup>27</sup> Mandatory Minimum Report, *supra* note 2, at 83 (quoting Testimony of Harley Lappin, Director, Fed. Bureau of Prisons, to U.S. Sentencing Comm'n (Mar. 17, 2011)); *Brown v. Plata*, 563 U.S. \_\_\_, 131 S.Ct. 1910, 1923 (2011) (finding the "exceptional" overcrowding in the California prison system was the "primary cause of the violation of a Federal right" and affirming a decision requiring the prison system to reduce the population to 137.5% of its capacity).

<sup>28</sup> 18 U.S.C. § 3553(a)(2)(B) and (C).

<sup>29</sup> U.S. Sentencing Comm'n, *Guidelines Manual*, App. C, Amendments 706 and 711 (effective November 1, 2007). These changes predated the statutory changes to crack sentencing levels in the Fair Sentencing Act. See Fair Sentencing Act, Pub. L. No. 111-220, 124 Stat. 2373 (2010).

posed any increased public safety risk, the Commission undertook a study in 2011 of the recidivism rates of the offenders affected by this change. The Commission studied the recidivism rate of offenders whose sentences were reduced pursuant to retroactive application of this guideline amendment and compared that rate with the recidivism rate of offenders who would have qualified for such a reduction, but were released after serving their full sentence before the 2007 changes went into effect.<sup>30</sup> The analysis showed no statistically significant difference between the two groups.<sup>31</sup>

Of the 848 offenders studied who were released in 2008 pursuant to the retroactive application of the 2007 sentencing amendment, 30.4 percent recidivated within two years. Of the 484 offenders studied who were released in the year before the new amendment went into effect after serving their full sentences, 32.6 percent recidivated within two years. The difference is not statistically significant.<sup>32</sup>

The Commission's study examined offenders released pursuant to retroactive application of a change in the sentencing guidelines, not a change in mandatory minimum penalties. Still, the Commission's 2011 study found that federal drug offenders released somewhat earlier than their original sentence were no more likely to recidivate than if they had served their full sentences. That result suggests that modest reductions in mandatory minimum penalties likely would not have a significant impact on public safety.

## **II. The Commission's Recommendations for Statutory Changes**

Based on the Commission's research and analysis in preparing our 2011 report and in the years since, we support several statutory changes that will help to reduce disparities, help federal sentencing work more effectively as intended, and control the expanding federal prison population and budget.

### **A. Reduce Mandatory Minimum Penalties for Drug Offenses**

In the Mandatory Minimum Report, the Commission recommended that, should Congress use mandatory minimum penalties, those penalties not be excessively severe. The Commission focused in detail on the severity and scope of mandatory minimum drug trafficking penalties. The Commission now recommends that Congress consider reducing the mandatory minimum penalties governing drug trafficking offenses.

Reducing mandatory minimum penalties would mean fewer instances of the severe mandatory sentences that led to the disparities in application documented in the Commission's

<sup>30</sup> U.S. Sentencing Comm'n, *Recidivism Among Offenders with Sentence Modifications Made Pursuant to Retroactive Application of 2007 Crack Cocaine Amendment* (May 31, 2011), at [http://www.ussc.gov/Research\\_and\\_Statistics/Research\\_Projects/Miscellaneous/20110527\\_Recidivism\\_2007\\_Crack\\_Cocaine\\_Amendment.pdf](http://www.ussc.gov/Research_and_Statistics/Research_Projects/Miscellaneous/20110527_Recidivism_2007_Crack_Cocaine_Amendment.pdf).

<sup>31</sup> *Id.* at 2.

<sup>32</sup> *Id.* at 4-7.

report. It would also reduce the likelihood that low-level drug offenders would be convicted of offenses with severe mandatory sentences that were intended for higher-level offenders.

Reducing mandatory minimum penalties for drug trafficking offenses would reduce the prison population substantially. For example, under one scenario, a reduction in drug trafficking mandatory minimum penalties from ten and five years to five and two years, respectively, would lead to savings for those offenders sentenced in the first fiscal year after the change of 45,312 bed years over time.<sup>33</sup> That bed savings would translate to very significant cost savings,<sup>34</sup> with corresponding savings over time for each subsequent year of reduced sentences, unless offense conduct or charging practices change over time.

A reduction in the length of these mandatory minimum penalties would help address concerns that certain demographic groups have been too greatly affected by mandatory minimum penalties for drug trafficking. These changes would lead to reduced minimum penalties for all offenders currently subject to mandatory minimum penalties for drug trafficking. As noted above, currently available forms of relief from mandatory minimum penalties affected different demographic groups differently, particularly in the case of Black offenders, who qualify for the “safety valve” much less frequently than other offenders.

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<sup>33</sup> The following broad assumptions, some or all of which might not in fact apply should the law change, were made in performing this analysis:

(a) The sentences for all offenders subject to an offense carrying a 10-year mandatory minimum penalty at the time of sentencing would be lowered by half (as a reduction from a 10-year mandatory minimum to a 5-year minimum is a 50% reduction). For those offenders who were convicted of an offense carrying a 10-year mandatory minimum penalty but who would receive relief from the penalty by the date of sentencing, the Commission’s rough estimate was that their sentence would be reduced by 25% to reflect the fact that the court already had the discretion to sentence them without regard to any mandatory minimum penalty;

(b) The sentences for all offenders convicted of an offense carrying a 5-year mandatory minimum penalty would be lowered by 60 percent (as a reduction from a 5-year mandatory minimum to a 2-year minimum is a 60% reduction). For offenders who were convicted of an offense carrying a 5-year mandatory minimum penalty but who would receive relief from the penalty by the date of sentencing, the Commission’s rough estimate was that their sentence would be reduced by 30% to reflect the fact that the court already had the discretion to sentence them without regard to any mandatory minimum penalty;

(c) The analysis did not include any estimate of a change in sentence for offenders for whom a mandatory minimum penalty did not apply (e.g., drug trafficking offenders with drug quantities below the mandatory minimum thresholds);

(d) For offenders who were also convicted of additional (i.e., non-drug) mandatory minimum penalties, those penalties were left in place.

See *id.* at 3-7.

<sup>34</sup> The Bureau of Prisons estimated the average annual cost per inmate to be \$26,359. Bureau of Prisons, *Federal Prison System Per Capita Costs* (2012), [http://www.bop.gov/foia/fy12\\_per\\_capita\\_costs.pdf](http://www.bop.gov/foia/fy12_per_capita_costs.pdf). This cost estimate does not take into account potential increased costs for the United States Parole Commission, the United States Probation Office, and other aspects of the criminal justice system should certain offenders be released earlier.

### B. Make the Fair Sentencing Act Statutorily Retroactive

The Fair Sentencing Act of 2010 (FSA),<sup>35</sup> in an effort to reduce the disparities in sentencing between offenses involving crack cocaine and offenses involving powder cocaine, eliminated the mandatory minimum sentence for simple possession of crack cocaine and increased the quantities of crack cocaine required to trigger the five- and ten-year mandatory minimum penalties for trafficking offenses from five to 28 grams and from 50 to 280 grams, respectively.<sup>36</sup> The law did not make those statutory changes retroactive. The Commission recommends that Congress make the reductions in mandatory minimum penalties in the FSA fully retroactive.

In 2011, the Commission amended the sentencing guidelines in accordance with the statutory changes in the FSA and made these guideline changes retroactive. In making this decision,<sup>37</sup> the Commission considered the underlying purposes behind the statute, including Congress's decision to act "consistent with the Commission's long-held position that the then-existing statutory penalty structure for crack cocaine 'significantly undermines the various congressional objectives set forth in the Sentencing Reform Act and elsewhere'"<sup>38</sup> and Congress's statement in the text of the FSA that its purpose was to "restore fairness to Federal cocaine sentencing" and provide "cocaine sentencing disparity reduction."<sup>39</sup> The Commission also concluded, based on testimony, comment, and the experience of implementing the 2007 crack cocaine guideline amendment retroactively, that although a large number of cases would be affected, the administrative burden caused by retroactivity would be manageable.<sup>40</sup> To date, 11,937 offenders have petitioned for sentence reduction based on retroactive application of guideline amendment implementing the FSA, and courts have granted relief in 7,317 of those cases.<sup>41</sup> The average sentence reduction in these cases has been 29 months, which corresponds to a 19.9 percent decrease from the original sentence.<sup>42</sup>

The same rationales that prompted the Commission to make the guideline changes implementing the FSA retroactive justify making the FSA's statutory changes retroactive. Just as restoring fairness and reducing disparities are principles that govern our consideration of sentencing policy going forward, they should also govern our evaluation of sentencing decisions

<sup>35</sup> Fair Sentencing Act, Pub. L. No. 111-220, 124 Stat. 2373 (2010) (FSA).

<sup>36</sup> FSA § 2.

<sup>37</sup> The Commission, in deciding whether to make amendments retroactive, considers factors including "the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively." USSG §1B1.10, comment. (backg'd).

<sup>38</sup> U.S. Sentencing Comm'n, *Notice of Final Action Regarding Amendment on Retroactivity*, Effective November 1, 2011, 76 Fed. Reg. 41,332, 41,333 (Jul. 13, 2011) (Notice of Final Action Regarding Retroactivity).

<sup>39</sup> See generally FSA.

<sup>40</sup> Notice of Final Action Regarding Retroactivity, *supra* note 38 at 10.

<sup>41</sup> U.S. Sentencing Comm'n, *Preliminary Crack Retroactivity Data Report Fair Sentencing Act*, Table 3 (July 2013), [http://www.ussc.gov/Research\\_and\\_Statistics/Federal\\_Sentencing\\_Statistics/FSA\\_Amendment/2013-07\\_USSC\\_Prelim\\_Crack\\_Retro\\_Data\\_Report\\_FSA.pdf](http://www.ussc.gov/Research_and_Statistics/Federal_Sentencing_Statistics/FSA_Amendment/2013-07_USSC_Prelim_Crack_Retro_Data_Report_FSA.pdf).

<sup>42</sup> *Id.* at Table 8.

already made. A large number of those currently incarcerated would be affected, and recent experiences with several sets of retroactive sentencing changes in crack cocaine cases demonstrate that the burden is manageable and that public safety would not be adversely affected.

The Commission has determined that, should the mandatory minimum penalty provisions of the FSA be made fully retroactive, 8,829 offenders would likely be eligible for a sentence reduction, with an average reduction of 53 months per offender. That would result in an estimated total savings of 37,400 bed years over a period of several years and to significant cost savings. The Commission estimates that 87.7 percent of the inmates eligible for a sentence reduction would be Black.

### C. Consider Expanding the Statutory Safety Valve

In the Mandatory Minimum Report, the Commission recommended that Congress consider “expanding the safety valve at 18 U.S.C. § 3553(f) to include certain non-violent offenders who receive two, or perhaps three, criminal history points under the federal sentencing guidelines.”<sup>43</sup> The “safety valve” statute allows sentences below the mandatory minimum in drug trafficking cases where specific factors apply, notably that the offense was non-violent and that the offender has a minimal criminal history. The Commission recommended that Congress consider allowing offenders with a slightly greater criminal history to qualify.

The Commission found that the broad sweep and severe nature of certain current mandatory minimum penalties led to results perceived to be overly severe for some offenders and therefore to widely disparate application in different districts and even within districts.<sup>44</sup> The Commission also found that in the drug context, existing mandatory minimum penalties often applied to lower level offenders than may have been intended. It would be preferable to allow more cases to be controlled by the sentencing guidelines, which take many more factors into account, particularly in those drug cases where the existing mandatory minimum penalties are too severe, too broad, or unevenly applied. Accordingly, Congress should consider allowing a broader group of offenders who still have a modest criminal history, but who otherwise meet the statutory criteria, to qualify for the safety valve, enabling them to be sentenced below the mandatory minimum penalty and in accordance with the sentencing guidelines.

In 2012, 9,445 offenders received relief under the safety valve provision in the sentencing guidelines. If the safety valve had been expanded to offenders with two criminal history points, 820 additional offenders would have qualified. Had it been expanded to offenders with three criminal history points, a total of 2,180 additional offenders would have qualified.<sup>45</sup> While this

<sup>43</sup> Mandatory Minimum Report, *supra* note 2, at xxxi.

<sup>44</sup> *Id.* at 346.

<sup>45</sup> These totals include offenders not convicted of offenses carrying a mandatory minimum sentence, but subject to safety valve relief under the sentencing guidelines because they meet the same qualifying criteria. The guidelines would need to be amended to correspond to the proposed statutory changes to realize this level of relief. These totals also represent the estimated maximum number of offenders who could qualify for the safety valve since one of the requirements, that the offender provide all information he or she has about the offense to the government, is impossible to predict. See 18 U.S.C. § 3553(f).

change would start to address some of the disparities and unintended consequences noted above, it would likely have little effect on the demographic differences observed in the application of mandatory minimum penalties to drug offenders because the demographic characteristics of the offenders who would become newly eligible for the safety valve would be similar to those of the offenders already eligible.<sup>46</sup> For reduced sentences to reach a broader demographic population, Congress would have to reduce the length of mandatory minimum drug penalties.

#### **D. Apply Safety Valve and Other Relief to a Broader Set of Offenses**

The Mandatory Minimum Report recommended that a statutory “safety valve” mechanism similar to the one available for drug offenders could be appropriately tailored for low-level, non-violent offenders convicted of other offenses carrying mandatory minimum penalties.<sup>47</sup> Such safety valve provisions should be constructed similarly to the existing safety valve for drug cases with specific factors to ensure consistent application regardless of the location of the offense, the identity of the offender, or the judge. The Commission stands ready to work with Congress on safety valve criteria that could apply in a consistent manner. The Commission has also recommended that Congress consider reducing the length of some mandatory minimum penalties outside of the drug context.<sup>48</sup>

The concerns set out above about disparities resulting from severe mandatory minimum sentences apply in contexts beyond drug offenses, as do the concerns about the effect on the prison population and costs. While drug offenders make up a significant proportion of those subject to mandatory minimum penalties, the number of offenders subject to other mandatory minimum penalties is also substantial. In 2012, 20,037 offenders were convicted of an offense carrying a mandatory minimum penalty. Of those, 4,460 were convicted of non-drug-related offenses subject to a mandatory minimum penalty, and 3,691 of these were still subject to that penalty at the time of sentencing. Statutory provisions allowing for relief when appropriate for this pool of offenders would address the same concerns the Commission has highlighted.

In the Mandatory Minimum Report, the Commission recommended several other legislative provisions to address specific problems documented with existing mandatory minimum penalties, particularly in connection with section 924(c) of title 18 of the United States Code for the use of a firearm during a crime of violence or drug trafficking felony. The Commission recommended that Congress consider amending section 924(c) so that enhanced mandatory minimum penalties for a “second or subsequent” offense apply only to prior convictions, not for multiple violations charged together. The Commission further recommended that Congress consider reducing the length of some of the penalties in that firearms statute and giving courts discretion to impose mandatory sentences concurrently for multiple violations of section 924(c), following the structure currently in place for aggravated identity theft offenses, rather than mandating that the sentences be imposed consecutively.<sup>49</sup> The

<sup>46</sup> Mandatory Minimum Report, *supra* note 2, at 356.

<sup>47</sup> See *id.* at xxx.

<sup>48</sup> See, e.g., *id.* at xxxi.

<sup>49</sup> See *id.* at 364.



Commission also recommended that Congress reassess the scope and severity of the recidivist provisions for drug offenses in sections 841 and 960 of title 21 of the United States Code, which can lead to what some perceive as over-counting for criminal history.<sup>50</sup>

### **III. The Role of the Sentencing Commission and the Guidelines**

These recommendations, all of which impact statutory mandatory minimum penalties and require statutory change, can only be effectuated by Congress. However, the Commission is dedicated to working within its authority and responsibilities to address the issues of unwarranted sentencing disparities and over-incarceration within the federal criminal justice system. First, the Commission is committed to working with Congress to implement the recommendations of the Mandatory Minimum Report. We have identified doing so as the first item in our list of priorities for the coming year.<sup>51</sup> This will entail supporting legislative initiatives and working with Congress to help members craft and pass appropriate legislative provisions that are consistent with our recommendations. We are gratified that Senators on and off this Committee have introduced legislation to reform certain mandatory minimum penalty provisions, and the Commission strongly supports these efforts to reform this important area of the law. We have also called on Congress to request prison impact analyses from the Commission as early as possible when it considers enacting or amending mandatory minimum penalties. This analysis may be very helpful for congressional consideration particularly at this time of strained federal resources.<sup>52</sup>

The Commission is also considering whether changes to the sentencing guidelines are appropriate to address similar concerns about prison populations and costs, noting an intention overall to “consider the issue of reducing costs of incarceration and overcapacity of prisons” pursuant to 28 U.S.C. § 994(g).<sup>53</sup> Specifically, the Commission has listed as its second priority for the coming year review and possible amendment of guidelines applicable to all drug offenses, possibly including amendment of the Drug Quantity Table across all drug types.<sup>54</sup> Should the Commission determine that such action is appropriate, such an amendment would have a significant impact on federal prison sentences for a large number of offenders, though as was the case with the Commission’s 2007 crack cocaine amendment, the impact would be limited by current mandatory minimum penalties.

Finally, and most fundamentally, the Commission believes that a strong and effective sentencing guidelines system best serves the purposes of the SRA. Should Congress decide to limit mandatory minimum penalties in some of the ways under discussion today, the sentencing guidelines will remain an important baseline to ensure sufficient punishment, to protect against unwarranted disparities, and to encourage fair and appropriate sentencing. The Commission will continue to work to ensure that the guidelines are amended as necessary to most appropriately

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<sup>50</sup> See *id.* at 356.

<sup>51</sup> See Notice of Final Priorities, *supra* note 6.

<sup>52</sup> See Mandatory Minimum Report, *supra* note 2, at xxx.

<sup>53</sup> See Notice of Final Priorities, *supra* note 6.

<sup>54</sup> *Id.*

effectuate the purposes of the SRA and to ensure that the guidelines can be as effective a tool as possible to ensure appropriate sentencing going forward.

#### **IV. Conclusion**

The Commission is pleased to see the Judiciary Committee and others in Congress undertaking a serious examination of current mandatory minimum penalties and considering options to make the federal criminal justice system fairer, more effective, and less costly. The bipartisan Commission strongly supports legislative provisions currently being considered that are consistent with the recommendations outlined above and stands ready to work with you and others in Congress to enact these statutory changes. We will also work closely with you as we seek to address similar concerns through modifications of the sentencing guidelines. The Commission thanks you for holding this very important hearing and looks forward working with you in the months ahead.



U.S. Department of Justice

Office of the Inspector General

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May 13, 2014

The Honorable Charles E. Grassley  
Ranking Member  
United States Senate  
135 Hart Senate Office Building  
Washington, D.C. 20510

Dear Senator Grassley:

I write in response to your correspondence dated March 28, 2014, requesting communications and documents between the Department of Justice Office of the Inspector General (OIG) and the Department of Justice (Department) regarding the OIG's attempts to gain access to certain Department records pursuant to the Inspector General Act in connection with several recent OIG reviews.

We have enclosed 12 documents with this correspondence that are responsive to your request in that they describe the substantive legal issues, and provide much of the background and history and the positions taken on these access issues by the OIG, the Department, and the Federal Bureau of Investigation (FBI). The 12 documents enclosed with this correspondence include the following:

- Summary of the OIG's Position Regarding Access to Documents and Materials Gathered by the FBI, which was created by the OIG in October 2011.
- Letter from Deputy Attorney General James M. Cole to FBI General Counsel Andrew Weissmann and OIG Acting Inspector General Cynthia Schnedar, dated November 18, 2011, regarding access to credit reports obtained pursuant to Section 1681u of the Fair Credit Reporting Act (FCRA) related to the OIG's review of the FBI's use of national security letters (NSLs).
- Letter from Attorney General Eric H. Holder to OIG Acting Inspector General Cynthia Schnedar, dated November 18, 2011, regarding access to grand jury material related to the OIG's review of the Bureau of Alcohol, Tobacco, Firearms and Explosives' (ATF) investigation known as Operation Fast and Furious.

- Letter from Deputy Attorney General James M. Cole to FBI General Counsel Andrew Weissmann and OIG Acting Inspector General Cynthia Schnedar, dated December 5, 2011, regarding access to Title III documents related to the OIG's review of the Department's use of the material witness warrant statute, 18 U.S.C § 3144.
- Memorandum from OIG Acting Inspector General Cynthia Schnedar to Deputy Attorney General James M. Cole, dated December 6, 2011, regarding access to credit reports obtained pursuant to Section 1681u of FCRA related to the OIG's review of the FBI's use of national security letters (NSLs).
- Memorandum from OIG Acting Inspector General Cynthia Schnedar to Attorney General Eric H. Holder, dated December 16, 2011, regarding access to grand jury material related to the OIG's review of ATF's investigation known as Operation Fast and Furious.
- Memorandum from OIG Acting Inspector General Cynthia Schnedar to Deputy Attorney General James M. Cole, dated December 16, 2011, regarding access to Title III documents related to the OIG's review of the Department's use of the material witness warrant statute, 18 U.S.C § 3144.
- Letter from Deputy Attorney General James M. Cole to OIG Acting Inspector General Cynthia Schnedar, dated January 4, 2012, informing the OIG that the Department asked the Office of Legal Counsel (OLC) to provide a formal opinion regarding the OIG's access to grand jury material, information obtained pursuant to Section 1681u of FCRA, and information obtained pursuant to Title III.
- Letter from Deputy Attorney General James M. Cole to OIG Acting Inspector General Cynthia Schnedar, dated March 16, 2012, regarding the OIG's request that the Department withdraw the request for an opinion from OLC.
- Letter from Deputy Attorney General James M. Cole to OIG Acting Inspector General Cynthia Schnedar, dated April 11, 2012, authorizing the Criminal Division to disclose Title III information to the OIG related to the OIG's review of the ATF investigation known as Operation Fast and Furious.

Two of the 12 documents responsive to your request are classified:

- Letter from FBI General Counsel Valerie Caproni to OIG Assistant Inspector General for Oversight and Review Carol Ochoa, dated March 4, 2011, providing the FBI's view of dissemination restrictions for documents in FBI investigative files.
- Memorandum from FBI General Counsel Andrew Weissmann and Special Assistant to the General Counsel Catherine Bruno to Inspector General Michael Horowitz, dated February 29, 2013 [sic], regarding legal restrictions on dissemination of FBI information to the OIG for OIG criminal investigations.

We are providing a redacted version of these two documents with this unclassified letter. If you would like to review these documents in classified form, the Department has requested that arrangements be made to review them in the OIG offices. We will work with your staff to make such arrangements at a convenient time.

Consistent with our usual practice when we are asked to produce documents that were created by the Department or a Department component, or that involved a communication by the OIG with the Department or a Department component, the OIG provided the above-referenced 12 documents and other documents that we believe are responsive to your request to the Department for its review. The Department has informed us that it is asserting the deliberative process privilege and/or the attorney-client privilege over the other responsive documents, and therefore they are not included in this production.

Thank you for your continued support for the work of our Office. If you have any questions, please do not hesitate to call me or my Chief of Staff, Jay Lerner, at (202) 514-3435.

Sincerely,



Michael E. Horowitz  
Inspector General

Enclosures

**Summary of the Department of Justice Office of the Inspector General's  
Position Regarding Access to Documents and Materials Gathered by the  
Federal Bureau of Investigation**

**Introduction**

In November 2009, the Office of the Inspector General (OIG) initiated a review of the Department's use of the material witness statute, 18 U.S.C. § 3144. Pursuant to our responsibilities under Section 1001 of the Patriot Act, a significant part of our review is to assess whether Department officials violated the civil rights and civil liberties of individuals detained as material witnesses in national security cases in the wake of the September 11 terrorist attacks. In addition, the review will provide an overview of the types and trends of the Department's uses of the statute over time; assess the Department's controls over the use of material witness warrants; and address issues such as the length and costs of detention, conditions of confinement, access to counsel, and the benefit to the Department's enforcement of criminal law derived from the use of the statute.

In the course of our investigation, we learned that most of the material witnesses in the investigations related to the September 11 attacks were detained for testimony before a grand jury. At our request, between February and September 2010 the Department of Justice National Security Division and three U.S. Attorneys' offices (SDNY, NDIL, EDVA) provided us with grand jury information concerning material witnesses pursuant to Fed. R. Crim. P. 6(e)(3)(D), which permits disclosure of grand jury matters involving foreign intelligence information to any federal law enforcement official to assist in the performance of that official's duties. We also sought a wide range of materials from other Department components, including the U.S. Marshals Service, the Federal Bureau of Prisons, and the Federal Bureau of Investigation (FBI). All of the Department's components provided us with full access to the material we sought, with the notable exception of the FBI.

In August 2010, we requested files from the FBI relating to the first of 13 material witnesses. In October 2010, representatives of the FBI's Office of General Counsel informed us that the FBI believed grand jury secrecy rules prohibited the FBI from providing grand jury material to the OIG. The FBI took the position that it was required to withhold from the OIG all of the grand jury material it gathered in the course of these investigations. The FBI has also asserted that, in addition to grand jury information, it can refuse the OIG access to other categories of information in this and other reviews, including Title III materials, federal taxpayer information; child victim, child witness, or federal juvenile court information; patient medical information; credit reports; FISA information; foreign government or international organization information; information subject to non-disclosure agreements, memoranda of

understanding or court order; attorney client information; and human source identity information. The information we have requested is critical to our review. Among other things, we are examining the Department's controls over the use of material witness warrants, the benefit to the Department from the use of the statute, and allegations of civil rights and civil liberties abuses in the Department's post-9/11 use of the statute in the national security context. The requested grand jury information is necessary for our assessment of these issues.

The FBI has also asserted that page-by-page preproduction review of all case files and e-mails requested by the OIG in the material witness review is necessary to ensure that grand jury and any other information the FBI asserts must legally be withheld from the OIG is redacted. These preproduction reviews have caused substantial delays to OIG reviews and have undermined the OIG's independence by giving the entity we are reviewing unilateral control over what information the OIG receives, and what it does not.

The FBI's position with respect to production of grand jury material to the OIG is a change from its longstanding practice.<sup>1</sup> It is also markedly different from the practices adopted by other components of the Department of Justice. The OIG routinely has been provided full and prompt access to grand jury and other sensitive materials in its reviews involving Department components in high profile and sensitive matters, such as our review of the President's Surveillance Program and the investigation into the removal of nine U.S. Attorneys in 2006. Those reviews would have been substantially delayed, if not thwarted, had the Department employed the FBI's new approach.

In many respects, the material witness warrant review is no different from other recent OIG reviews conducted in connection with our civil rights and civil liberties oversight responsibilities under the Patriot Act in which Department components granted the OIG access to grand jury and other sensitive material. For example, in our review of the FBI's use of "exigent letters" to obtain telephone records, at our request the Department of Justice Criminal Division and the FBI provided us grand jury materials in two then

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<sup>1</sup> Since 2001, when the OIG assumed primary oversight responsibility for the FBI, the OIG has undertaken numerous investigations which required review of the most sensitive material, including grand jury material and documents classified at the highest levels of secrecy. Through all of these reviews, the FBI never refused to produce documents and other material to the OIG, including the most sensitive human and technical source information, and it never asserted the right to make unilateral determinations about what requested documents were relevant to the OIG reviews. On the rare occasion when the FBI voiced concern based on some of the grounds now more broadly asserted in this matter, quick compromises were reached by the OIG and the FBI. Indeed, with only minor exceptions, the FBI's historical cooperation with the OIG has been exemplary, and that cooperation has enabled the OIG to conduct thorough and accurate reviews in a timely manner, consistent with its statutorily based oversight mission and its duty to assist in maintaining public confidence in the Department of Justice.

ongoing sensitive media leak investigations involving information classified at the TS/SCI level. The grand jury materials were essential to our findings that FBI personnel had improperly sought reporters' toll records in contravention of the Electronic Communications Privacy Act and Department of Justice policy.<sup>2</sup>

Similarly, in our review of the FBI's investigations pertaining to certain domestic advocacy groups, the OIG assessed allegations that the FBI had improperly targeted domestic advocacy groups for investigation based upon their exercise of First Amendment rights. In the course of this review, the FBI provided OIG investigators access to grand jury information in the investigations we examined. This information was necessary to the OIG's review as it informed our judgment about the FBI's predication for and decision to extend certain investigations. The lack of access to this information would have critically impaired our ability to reach any conclusions about the FBI's investigative decisions and, consequently, our ability to address concerns that the FBI's conduct in these criminal investigations may have violated civil rights and civil liberties.<sup>3</sup>

When the OIG has obtained grand jury material, the OIG has carefully adhered to the legal prohibitions on disclosure of such information. We routinely conduct extensive pre-publication reviews with affected components in the Department. The OIG has ensured that sensitive information – whether it be law enforcement sensitive, classified, or information that would identify the subjects or direction of a grand jury investigation – is removed or redacted from our public reports. In all of our reviews and investigations, the OIG has scrupulously protected sensitive information and has taken great pains to prevent any unauthorized disclosure of classified, grand jury, or otherwise sensitive information.

For the reasons discussed below, the OIG is entitled to access to the material the FBI is withholding. First, the Inspector General Act of 1978, as amended (Inspector General Act or the Act), provides the OIG with the authority to obtain access to all of the documents and materials we seek. Second, in the same way that attorneys performing an oversight function in the Department's Office of Professional Responsibility (OPR) are "attorneys for the government" under the legal exceptions to grand jury secrecy rules, the OIG attorneys conducting the material witness review are attorneys for the government entitled to receive grand jury material because they perform the same oversight function. Third, the OIG also qualifies for disclosure of the grand jury material requested in the material witness review under

<sup>2</sup> We described this issue in our report, *A Review of the Federal Bureau of Investigation's Use of Edgert Letters and Other Informal Requests for Telephone Records*, (January 2010).

<sup>3</sup> Our findings are described in our report, *A Review of the FBI's Investigations of Certain Domestic Advocacy Groups* (September 2010).



amendments to the grand jury secrecy rules designed to enhance sharing of information relating to terrorism investigations.

#### **L THE INSPECTOR GENERAL ACT**

The FBI's refusal to provide prompt and full access to the materials we requested on the basis of grand jury secrecy rules and other statutes and Department policies stands in direct conflict with the Inspector General Act. The Act provides the OIG with access to all documents and materials available to the Department, including the FBI. No other rule or statute should be interpreted, and no policy should be written, in a manner that impedes the Inspector General's statutory mandate to conduct independent oversight of Department programs. See, e.g., *Watt v. Alaska*, 451 U.S. 259, 267 (1981) (A court "must read [two allegedly conflicting] statutes to give effect to each if [it] can do so while preserving their sense and purpose.>").

##### **A. The Inspector General Act Grants the OIG Full and Prompt Access to any Documents and Materials Available to the DOJ, Including the FBI, that Relate to the OIG's Oversight Responsibilities**

The Inspector General Act is an explicit statement of Congress's desire to create and maintain independent and objective oversight organizations inside of certain federal agencies, including the Department of Justice, without agency interference. Crucial to the Inspectors General (IGs) independent and objective oversight is having prompt and complete access to documents and information relating to the programs they oversee. Recognizing this, the Inspector General Act authorizes IGs "to have access to all records, reports, audits, reviews, documents, papers, recommendations, or other material available to the applicable establishment which relate to programs and operations with respect to which that Inspector General has responsibilities under this Act." 5 U.S.C. App. 3 § 6(a)(1). The Act also authorizes the IGs to "request" necessary "information or assistance" from "any Federal, State, or local governmental agency or unit thereof," including the particular establishments the IGs oversee. *Id.* § 6(a)(3); *id.* § 12(5) (defining the term "Federal agency" to include the establishments overseen by the Inspectors General). Together, these two statutory provisions operate to ensure that the Inspectors General are able to access the information necessary to fulfill their oversight responsibilities.

The only explicit limitation on IGs' right of access to information contained in the Inspector General Act concerns all agencies' obligation to provide "information or assistance" to the Inspectors General. However, this limitation does not apply to IGs' absolute right of access to documents from their particular agency. This circumscribed limitation provides that all federal

agencies shall furnish information or assistance to a requesting IG "insofar as is practicable and not in contravention of any existing statutory restriction or regulation of the Federal agency from which the information is requested[.]"<sup>5</sup> U.S.C. § 6(b)(1) (emphasis added).<sup>4</sup>

Another provision of the Inspector General Act grants the Inspectors General discretion to report instances of noncooperation to the head of the relevant agency, whether that noncooperation impedes on the IGs' authority to obtain documents or "information and assistance." Under that section, when an IG believes "information or assistance" is "unreasonably refused or not provided, the Inspector General shall report the circumstances to the head of the establishment involved without delay." 5 U.S.C. App. 3 § 6(b)(2) The FBI contends this reporting provision of the Act is a further limitation on the agencies' obligation to provide documents and "information and assistance" to the Inspectors General. The FBI has argued that the provision implicitly recognizes that requests for both documents and "information and assistance" can be "reasonably refused."

The OIG believes the FBI's reliance on this reporting section as limiting an IG's right of access to documents in the custody of the agency it oversees is misplaced. This provision of the Act is entirely consistent with the right of full and prompt access to documents and materials and does not create a limitation, explicit or implicit, on the authorities provided elsewhere in the Act. By granting the Inspectors General the discretion to decide that some instances of noncooperation by an agency do not rise to the level of a reportable incident, the provision accounts for the practical reality that many instances where

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<sup>4</sup> The legislative history is silent on the reason for conditioning agencies' furnishing of "information or assistance" to all IGs on practicability or statutory restriction, but imposing no such limitation on an agency's absolute requirement to provide its documents to its own IG. However, there are possible explanations for the distinction. For example, providing access to documents and materials maintained in agency systems and files is simple, inexpensive, and an undeniable precondition to the fair, objective, and successful exercise of the IGs' oversight responsibilities. Accordingly, the Act's unconditional language authorizing IGs to have access to the documents and materials of the agency it oversees is understandable and sensible. In contrast, agencies may not always be able to fulfill requests for "information or assistance" immediately, even from their agency's IG. A request of one agency from another agency's IG may require more careful scrutiny because it would entail information being transmitted outside of the requested agency. In addition, busy agency schedules must be accommodated when fulfilling a request for an interview; subject matter experts may not be immediately available to interpret documents or may have left the agency's employment; responses to interrogatories often require revisions and approvals; and annotations, explanations, and written analyses of existing documents and materials can take significant amounts of time. Despite the OIG's historical success at reaching reasonable compromises with components of the DOJ responding to requests for "information or assistance," the OIG readily acknowledges that circumstances could arise where a component's delay, difficulty, or even refusal in responding to a request for "information or assistance" would be reasonable. These considerations are not applicable, however, to IGs' access to documents and materials of the agency it oversees, and therefore, that provision of the Act authorizes access in absolute terms.

Inspectors General are not granted access to documents or materials, or are not provided "information or assistance" in response to a request, do not merit a report to agency management.<sup>5</sup>

To summarize, the Inspector General Act provides the Inspectors General a right of full and prompt access to documents and materials in the custody of the agency they oversee, a right to request "information or assistance" from any agency that is modestly limited, and an obligation to report instances of agency noncooperation to the agency head when, in the judgment of the Inspector General, such noncooperation is unreasonable. Accordingly, the Act provides Inspectors General unconditional authority to gather documents and records in the custody of the agency they oversee, an authority necessary to obtain the basic information to conduct independent and objective reviews and investigations.

**B. The Only Limitation on the OIG's Authority to Conduct Audits and Investigations within its Jurisdiction is Section 8E of the Inspector General Act, and that Limitation Must Be Invoked by the Attorney General**

In the law creating the DOJ OIG, Congress inserted an exception to the normal authority granted to Inspectors General. In a section captioned "Special provisions concerning the Department of Justice," the IG Act provides the Attorney General the authority, under specified circumstances and using a specific procedure, to prohibit the OIG from carrying out or completing an audit or investigation, or from issuing any subpoena. See 5 U.S.C. App. 3 § 8E. This authority may only be exercised by the Attorney General, 5 U.S.C. App. 3 § 8E(a)(1)-(2), and only with respect to specific kinds of sensitive information. *Id.* § 8E(a)(1). The Attorney General must specifically determine that the prohibition on the Inspector General's exercise of authority is necessary to prevent the disclosure of certain specifically described categories of information, or to prevent the significant impairment to the national interests of the United States. *Id.* § 8E(a)(2). The Attorney General's decision must be conducted in writing, must state the reasons for the decision, and the Inspector General must report the decision to Congress within thirty days. *Id.* § 8E(a)(3). These provisions represent an acknowledgement of the fact that the Department of Justice often handles highly sensitive criminal and national security information, the premature disclosure of which could pose a threat to the national interests.

<sup>5</sup> For example, IG document requests can be very broad, particularly before IG investigators have learned the details of the program under review. In such instances, formal requests are often informally and consensually narrowed after discussions with the agency under review, and a report to the agency head is unnecessary. Similarly, an agency's failure to provide the Inspector General with access to a document is often inadvertent or such a minor inconvenience that the Inspector General could reasonably view the noncooperation as *de minimis*.

These exacting procedures confirm that the special provisions of Section 8E represent an extraordinary departure from the baseline rule that the Inspectors General shall have unconditional access to documents and materials, and broad authority to initiate and conduct independent and objective oversight investigations. These procedures also confirm that only the Attorney General, and not the FBI, has the power to prohibit the OIG's access to relevant documents and materials available to the Department.

## II. GRAND JURY SECRECY RULES

The Federal Rules of Criminal Procedure provide the general rule of secrecy applicable to grand jury information and various exceptions to that general rule. One of the exceptions allows disclosure of grand jury information to "an attorney for the government." This exception provides a basis, additional to and independent of the Inspector General Act, for disclosing the requested grand jury materials to the OIG.<sup>6</sup> The OIG's reliance on the "attorney for the government" exception to obtain access to grand jury material is supported by an Office of Legal Counsel (OLC) opinion and a federal court decision. OIG access to grand jury material under this exception is consistent with the broad authority granted to the OIG under the Inspector General Act, and it avoids an oversight gap so that Department employees cannot use grand jury secrecy rules to shield from review their adherence to Department policies, Attorney General Guidelines, and the Constitution. The "attorney for the government" exception allows for automatic disclosure of grand jury materials and is, therefore, particularly well suited to ensure that the OIG's ability to access documents and materials, and to access them promptly, is coextensive with that of the Department and the FBI.

### A. OIG Attorneys Are "Attorneys for the Government"

In an unpublished opinion issued subsequent to *United States v. Sells Engineering, Inc.*, 463 U.S. 418 (1983) (a Supreme Court opinion narrowly construing the term "attorney for the government" as used in the exception to the general rule of grand jury secrecy), the OLC determined that, even in light of the Court's decision, the Rule was broad enough to encompass Office of Professional Responsibility (OPR) attorneys exercising their oversight authority with regard to Department attorneys.

In *Sells*, Civil Division attorneys pursuing a civil fraud case sought automatic access to grand jury materials generated in a parallel criminal proceeding. The Supreme Court interpreted the exception that provides for

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<sup>6</sup> Rule 6(e)(3)(A)(i) provides: "Disclosure of a grand jury matter - other than the grand jury's deliberations or any grand juror's vote - may be made to: (i) an attorney for the government for use in performing that attorney's duty . . . ." Fed. R. Crim. P. 6(e)(3)(A)(i).

automatic disclosure of grand jury materials to "attorney[s] for the government" for use in their official duties, as limited to government attorneys working on the criminal matter to which the material pertains. *Sells*, 463 U.S. at 427. The Court held that all other disclosures must be "judicially supervised rather than automatic," *id.* at 435, because allowing disclosure other than to the prosecutors and their assistants would unacceptably undermine the effectiveness of grand jury proceedings by: (1) creating an incentive to use the grand jury's investigative powers improperly to elicit evidence for use in a civil case; (2) increasing the risk that release of grand jury material could potentially undermine full and candid witness testimony; and (3) by circumventing limits on the government's powers of discovery and investigation in cases otherwise outside the grand jury process. See *id.* at 432-33.

In its unpublished opinion, OLC concluded that the three concerns the Supreme Court expressed in *Sells* were not present when OPR attorneys conduct their oversight function of the conduct of Department attorneys in grand jury proceedings. OLC concluded that as a delegee of the Attorney General for purposes of overseeing and advising with respect to the ethical conduct of department attorneys and reporting its findings and recommendations to the Attorney General, OPR is part of the prosecution team's supervisory chain. Thus, OPR attorneys may receive automatic access to grand jury information under the supervisory component inherent in the "attorney for the government" exception.

OIG attorneys should be allowed automatic access to grand jury material in the performance of their oversight duties because OIG and OPR perform the identical functions within the scope of their respective jurisdictions. Like OPR attorneys conducting oversight of Department attorneys in their use of the grand jury to perform their litigating function, OIG attorneys are part of the supervisory chain conducting oversight of the conduct of law enforcement officials assisting the grand jury. Both the OIG and OPR are under the general supervision of the Attorney General, compare 28 C.F.R. 0.29a(a) (OIG) with 28 C.F.R. 0.39. Just like OPR, the Inspector General must "report expeditiously to the Attorney General whenever the Inspector General has reasonable grounds to believe there has been a violation of Federal criminal law." 5 U.S.C. App. 3, §§ 4(d) & 8E(b)(2). OIG attorneys make findings and recommendations to the Attorney General regarding the conduct of law enforcement officials assisting the grand jury, and the Attorney General then imposes any discipline or implements reform. Therefore, for purposes of the "attorney of the government" exception, the OIG is in the same position as OPR, both with respect to its oversight function and its relationship to the Attorney General.

More to the point, whatever formal differences exist in the relative structures of the OIG and OPR, the two offices are functionally indistinguishable for purposes of access to grand jury materials for all of their oversight purposes. The risks to the secrecy of the underlying grand jury

proceedings from disclosure to the OIG, if any, are no different from those created by automatic disclosure to OPR. OPR's oversight of the conduct of Department attorneys is an after-the-fact examination of what happened during the grand jury process, just as is OIG's oversight of law enforcement agents' conduct. OIG review of law enforcement conduct in such circumstances is not undertaken to affect the outcome of a civil proceeding related to the target of an underlying criminal investigation. Therefore, disclosure of grand jury materials to the OIG runs no risk of creating an incentive to misuse the grand jury process in order to improperly elicit evidence for use in a separate administrative or criminal misconduct proceeding against the target of the grand jury's investigation. Similarly, because our review is of law enforcement conduct and not of lay witnesses who are called to testify, the willingness of those witnesses to testify should not be implicated. OIG oversight also ensures that the Department's law enforcement officials who testify before the grand jury do so fully and candidly, and that Department employees do not ignore their legal obligations to the grand jury.

Moreover, the OIG's inherent supervisory role with regard to Department employees who assist the grand jury was recognized by a federal court overseeing proceedings relating to the death of Bureau of Prisons inmate Kenneth Michael Trentadue. The district court granted the government's motion for access to grand jury materials, finding that the OIG's investigation of alleged misconduct "is supervisory in nature with respect to the ethical conduct of Department employees." The court stated that "disclosure of grand jury materials to the OIG constitutes disclosure to 'an attorney for the government for use in the performance of such attorney's duty[.]'" *In re Matters Occurring Before the Grand Jury Impaneled July 16, 1996*, Misc. #39, W.D. Okla. (June 4, 1998).

Accordingly, there is no principled basis upon which to deny OIG attorneys the same access as OPR is allowed to review grand jury materials necessary to carry out its oversight function. Both OPR and OIG attorneys require access to grand jury materials to fulfill a supervisory function directed at maintaining the highest standards of conduct for Department employees who assist the grand jury. As such, OIG attorneys should also be able to obtain automatic access to matters that pertain to law enforcement conduct in matters related to the grand jury within the jurisdiction of the OIG.

**B. The OIG is entitled to Receive Grand Jury Materials Involving Foreign Intelligence Information**

Another exception to the general rule of grand jury secrecy allows an attorney for the government to disclose "any grand-jury matter involving foreign intelligence, counterintelligence . . . , or foreign intelligence information . . . to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official to assist the official receiving the

information in the performance of that official's duties." Fed. R. Crim. P. 6(e)(3)(D). This exception was added in 2001 as part of the USA PATRIOT Act and was designed to enable greater sharing of information among law enforcement agencies and the intelligence community to enhance the government's effort to combat terrorism.<sup>7</sup>

This exception encompasses the OIG's request for the grand jury materials at issue in its material witness warrant review. The grand jury proceedings pursuant to which the materials were collected were all investigations of international terrorist activity conducted in the wake of the terrorist attacks of September 11, 2001. All of the grand jury information gathered in them is thus necessarily "related to," "gathered . . . to protect against," or "relates to the ability of the United States to protect against," among other things, "international terrorist activities." See 50 U.S.C. § 401a and Rule 6(e)(3)(D). All of the grand jury material gathered in those investigations thus constitutes foreign intelligence, counter intelligence, or foreign intelligence information (collectively, Foreign Intelligence Information).

In addition, OIG officials qualify as law enforcement officials within the meaning of the rule by virtue of the Inspector General's authority to conduct criminal investigations, apply for search warrants, make arrests, and investigate violations of civil rights and civil liberties. See, e.g., 5 U.S.C. App. 3 § 6(e)(1); USA PATRIOT ACT, Pub. L. 107-56, § 1001, 115 Stat. 272, 391 (2001). Also, the OIG's oversight activities constitute law enforcement duties for purposes of the foreign intelligence exception because they directly affect the design and implementation of the Department's law enforcement programs.

The OIG has discussed the access issues with Department leadership and sought their assistance in resolving the dispute with the FBI. Although the Department's consideration of all these issues is ongoing, in July 2011, the Department concluded that, at a minimum, the foreign intelligence exception authorizes an "attorney for the government" to disclose grand jury information to the OIG for use in connection with OIG's law enforcement duties, such as the material witness warrant review, to the extent that the attorney for the government determines that the grand jury information in question involves foreign intelligence. Since then, an "attorney for the government" in the Department's National Security Division (a Department component under review in the Material Witness Warrant review), has been conducting a page-by-page review of the materials withheld by the FBI to determine whether they qualify as Foreign Intelligence Information under the exception before providing them to the OIG. In addition, the FBI has continued its own page-by-page review of some of the requested files to identify and redact grand jury and other categories of information, before the National Security Division attorney

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<sup>7</sup> Pub. L. 107-56, § 203(A)(1), 115 Stat. 272, 279-81 (2001).

performs yet another review for the purpose of sending the material back to the FBI for the removal of grand jury foreign intelligence information redactions.

The Department's confirmation that the foreign intelligence exception is one basis for authorizing the OIG to obtain access to grand jury information was helpful. However, the page-by-page review of the material being conducted by the FBI and National Security Division to implement that decision is unnecessary. In our view, such page-by-page review is not necessary here because all of the grand jury material we have sought to date in the material witness review was collected in investigations of international terrorist activity conducted in the wake of the terrorist attacks of September 11, 2001, and thus necessarily falls within the very broad definitions of foreign intelligence, counterintelligence, or foreign intelligence information. See 50 U.S.C. § 401a and Rule 6(e)(3)(D). Therefore, the exception allows the OIG to receive all of the grand jury information from those investigations.<sup>8</sup>

Although the Department's determination that the OIG is entitled to access to the requested grand jury information in the material witness review under the foreign intelligence exception is helpful, that decision does not resolve the access issue. First, it does not address access to grand jury material that does not involve foreign intelligence information. Second, the Department's preliminary decision under the foreign intelligence exception does not address access to grand jury material in other OIG reviews. And third, the decision has been construed by the National Security Division and the FBI to require page-by-page review of the information, thereby undermining the independence and timeliness of the OIG's review as described above. Accordingly, a full decision confirming the OIG's right of access to grand jury and other information under the Inspector General Act and the "attorney for the government" exception is still necessary to enable the OIG effectively to carry out its oversight mission.

### III. CONCLUSION

The objective and independent oversight mandated by the Inspector General Act depends on the fundamental principle that the Inspectors General should have access to the same documents and materials as the establishments they oversee. This principle explains why the Inspector General Act grants the IGs access to the documents and materials that are available to their establishments. It explains why OIG investigators are routinely granted

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<sup>8</sup> As noted above, such page-by-page reviews are also improper because they are contrary to the provisions of the Inspector General Act granting the OIG broad access to any document or material that is available to the agency overseen; undermine the independence of the Inspector General by granting a component under review unilateral authority to determine what materials the Inspector General receives, and result in unacceptable delays in the production of materials necessary for the OIG to conduct its oversight.



access to TS/SCI materials when reviewing TS/SCI programs. It explains why OIG investigators are routinely read into some of the government's most highly classified and tightly compartmented programs, such as the President's Surveillance Program and the programs involved in the Robert Hanssen matter. And it explains why any instance of unreasonable denial of access to documents or materials under the Inspector General Act must be reported to the head of the agency, and why the Attorney General's decision to preclude an OIG audit, investigation, or subpoena must be reported to Congress.

The FBI's withholding of grand jury and other information is unsupported in law and contrary to the Inspector General Act and exceptions to the general rule of grand jury secrecy. The OIG is entitled to access under the Inspector General Act. Moreover, the OIG qualifies for two exceptions to the general rule of grand jury secrecy. See *supra*; see also 5 U.S.C. App. 3 § 6; Fed. R. Crim. P. 6(e)(3)(D), 6(e)(3)(A)(i). It is true, of course, that under Section 8E of the Inspector General Act, the Attorney General could deny the OIG access to the documents at issue, as many of the documents constitute sensitive information within the scope of that Section. See 5 U.S.C. App. 3 § 8E. But the Attorney General has not done so, and until he makes the written determination required in Section 8E(a)(2) and sets out the reasons for his decision, the OIG is entitled to prompt and full access to the materials.

Denying the OIG access to the materials it is seeking would also represent an unnecessary and problematic departure from a working relationship that has proven highly successful for years. Since its inception, the OIG has routinely received highly sensitive materials, including strictly compartmented counterterrorism and counterintelligence information, classified information owned by other agencies, and grand jury information, and it has always handled this information without incident. The OIG has always conducted careful sensitivity reviews with all concerned individuals and entities, both inside and outside the Department, prior to any publication of sensitive information, and it has been entirely reasonable and cooperative in its negotiations over such publications. The OIG's access to sensitive materials has never created a security vulnerability or harmed the nation's interests; far from it, the OIG's access to sensitive information has markedly advanced the nation's interests by enabling the independent and objective oversight mandated by Congress.

Simply put, there is no reason, legal or otherwise, to depart from the time-tested approach of allowing the OIG full and prompt access to documents and using a thorough prepublication sensitivity review to safeguard against unauthorized disclosure of the information therein. Access to grand jury and other sensitive materials is essential to the OIG's work, perhaps never more so than when the OIG is overseeing such important national security matters as the Department's use of material witness warrants and the FBI's use of its Patriot Act authorities. But whatever the subject matter, the authorities and

**mandates of the Inspector General are clear, and neither grand jury secrecy rules nor any other statutory or internal policy restrictions should be read in a manner that frustrates or precludes the OIG's ability to fulfill its mission.**



Office of the Deputy Attorney General  
Washington, D.C. 20533

November 18, 2011

Andrew Weissmann  
General Counsel  
Federal Bureau of Investigation  
Washington, DC 20535

Cynthia Schneider  
Acting Inspector General  
Department of Justice  
Washington, DC 20530

Dear Mr. Weissmann and Ms. Schneider:

The Office of the Inspector General (OIG) is conducting a review regarding the effectiveness and use, including any improper or illegal use, of national security letters (NSLs) issued by the Department. In the course of this review, the FBI has identified and withheld from disclosure twelve credit reports obtained pursuant to section 1681a of the Fair Credit Reporting Act, 15 U.S.C. § 1681. As explained below, I have determined that disclosing these reports to the OIG in connection with its review is permissible under section 1681u(f) because such disclosure is necessary to my informed decision-making regarding the approval or conduct of future foreign intelligence investigations.

Section 1681a of the Fair Credit Reporting Act provides that the FBI may obtain certain limited information from credit reporting agencies if an appropriately authorized senior FBI official makes a written request certifying that the information is sought for the conduct of an authorized investigation to protect against international terrorism or clandestine intelligence activities. Upon such a request, the credit agency may provide the "names and addresses of all financial institutions . . . at which a consumer maintains or has maintained an account," 15 U.S.C. § 1681u(f), and "identifying information respecting a consumer, limited to name, address, former addresses, places of employment, or former places of employment," *id.* at § 1681u(f). The FBI is barred from disseminating this information outside of the FBI except as specified by section 1681u(f):

The [FBI] may not disseminate information obtained pursuant to this section outside of the [FBI], except to other Federal agencies as may be necessary for the approval or conduct of a foreign counterintelligence investigation, or, where the information concerns a person subject to the Uniform Code of Military Justice, to

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appropriate investigative authorities within the military department concerned as may be necessary for the conduct of a joint foreign counterintelligence investigation.

**15 U.S.C. § 1681u(3).**

After consultation with the Office of Legal Counsel, I have determined that the FBI is authorized under this provision to disclose the credit report information in question to the OIG in connection with the NEL review. Specifically, section 1681u(3) authorizes the FBI to disclose the covered information to "other Federal agencies as may be necessary for the approval or conduct of a foreign counterintelligence investigation." In my view, this includes dissemination to the Department of Justice, including to prosecutors and Department officials with a supervisory responsibility regarding the approval or conduct of a foreign counterintelligence investigation. As Deputy Attorney General, I have such a supervisory responsibility, and providing the OIG with access to the information in question in connection with its NEL review is necessary to assist me in discharging this responsibility. The OIG has informed me that this information is necessary to its completion of a thorough review regarding the effectiveness and propriety of the FBI's use of section 1681u NELs. In turn, I fully expect that the OIG's completion of, and report regarding, that review will directly assist me in making informed decisions regarding the future approval or conduct of foreign counterintelligence investigations.

I note that this decision bears only upon the propriety of disclosure for purposes of OIG's current review. Additionally, only OIG personnel and supervisors with direct responsibility for completing the NEL review and report may use the information disclosed, and may not further disseminate this information.

Thank you for your attention to this matter.

Sincerely,



James M. Cole  
Deputy Attorney General



Office of the Attorney General  
Washington, D. C. 20530

November 18, 2011

Ms. Cynthia Schneider  
Acting Inspector General  
U.S. Department of Justice  
950 Pennsylvania Ave. NW  
Washington, DC 20530

Re: Inspector General's Request for Grand Jury Material  
Obtained in Certain ATF Criminal Investigations

Dear Ms. Schneider:

The Acting Inspector General of the Department of Justice has requested that the Attorney General authorize the Federal Bureau of Investigation ("FBI") (and other Department components) to disclose to the Office of the Inspector General ("OIG") grand jury material related to its review of the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") investigations known as Operation Fast and Furious and Operation Wide Receiver, as well as the ATF investigation of alleged criminal conduct by Jean-Baptiste Kingery. As explained below, I have determined that disclosing the grand jury information in question to the OIG in connection with this review is permissible under Rule 6(e) of the Federal Rules of Criminal Procedure because I have determined that such disclosure is necessary to assist me in performing my duty to enforce federal criminal law.

Rule 6(e)(3)(A)(ii) authorizes the disclosure of grand jury information to "any government personnel . . . that an attorney for the government considers necessary to assist in performing that attorney's duty to enforce federal criminal law." As Attorney General and head of the Department of Justice, I am an "attorney for the government" under Rule 6(e)(3)(A)(ii) and the senior supervisor of the Department's programs, policies, and practices related to the enforcement of federal criminal law. My performance of my "duty to enforce federal criminal law" includes exercising this supervisory authority.

I have determined that providing the OIG with access to the grand jury information in question in connection with its review of these investigations is necessary to assist me in discharging these criminal law enforcement supervisory responsibilities. I fully expect that the Acting Inspector General's report to me upon completion of the OIG review will provide information that will directly assist me in evaluating the circumstances surrounding Operation

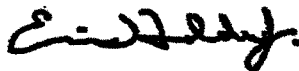
Ms. Cynthia Schneider  
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Fast and Furious and in performing my duty to supervise the Department's criminal law enforcement programs, policies, and practices. After I learned of allegations regarding the inappropriate investigative tactics employed in Operation Fast and Furious, I directed the Deputy Attorney General to refer the matter to OIG for a thorough review of the facts surrounding that investigation and for a report of OIG's findings. Subsequent to that referral, I understand that the OIG expanded its review to include Operation Wide Receiver and the Kingery investigation because they may have involved similar investigative strategy and practices.

Obtaining a complete understanding of the conduct of these investigations is necessary to my discharge of my criminal law enforcement responsibilities, and I believe that to do a thorough review of these investigations, it is necessary that the OIG have access to any relevant grand jury materials, and therefore I authorize the FBI (and other Department components) to disclose grand jury materials relating to these investigations to the OIG. In making this decision, I have determined that providing the OIG access to the grand jury material at issue will not impair the Department's conduct of these ongoing investigations and associated prosecutions.

I note that under Rule 6(e)(3)(B), a person to whom information is disclosed under Rule 6(3)(A)(ii) may use that information only to assist an attorney for the government in performing that attorney's duty to enforce federal criminal law. Thus, only OIG personnel with direct responsibility for completing the review and report that I have requested may review and use the grand jury information disclosed to them. This is the only purpose for which this review may take place. Moreover, the Inspector General should promptly provide me, in writing, a list of the names of the persons within her Office who will have access to the Rule 6(e) material in connection with this OIG review. Once I receive that information, the Department, on my behalf, will promptly inform the court that impeached the grand jury or juries of the names of all persons to whom a disclosure has been made, as Rule 6(e) requires. That notice will also certify, as required by Rule 6(e)(3)(B), that the OIG personnel working on the review have been advised of their obligation of secrecy under Rule 6(e).

Sincerely,



Eric H. Holder, Jr.  
Attorney General

**Office of the Deputy Attorney General  
Washington, D.C. 20530**

December 5, 2011

**Mr. Andrew Weissmann  
General Counsel  
Federal Bureau of Investigation  
Washington, DC 20535**

**Ms. Cynthia Schneider  
Acting Inspector General  
Department of Justice  
Washington, DC 20530**

**Dear Mr. Weissmann and Ms. Schneider:**

The Office of the Inspector General ("OIG") is conducting a review regarding the Department's use of the material witness warrant statute, 18 U.S.C. § 3144. In the course of this review, the Federal Bureau of Investigation ("FBI") has identified and withheld from disclosure certain information obtained pursuant to the Federal Wiretap Act, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 18 U.S.C. §§ 2510-2522 (hereinafter "Title III"). As explained below, I have determined that disclosing this information to the OIG in connection with its ongoing review is permissible under Title III because such disclosure is necessary to the OIG's performance of its investigative or law enforcement duties.

Section 2517 governs an investigative or law enforcement officer's disclosure and use of Title III information. It provides in relevant part:

*Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.*

18 U.S.C. § 2517(1). Section 2510(7) defines "[i]nvestigative or law enforcement officer" to mean "any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses."

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After consultation with the Office of Legal Counsel ("OLC"), I have determined that the FBI is authorized under section 2517 to disclose the information in question to the OIG in connection with its current review. OLC has previously concluded that OIG agents qualify as "investigative officers" authorized to disclose or receive Title III information. See *Whether Agents of the Department of Justice Office of Inspector General are "Investigative or Law Enforcement Officers" Within the Meaning of 18 U.S.C. § 2510(7)*, 14 Op. O.L.C. 107, 109-10 (1990). OIG agents may therefore obtain and use Title III information as "appropriate to the proper performance of the official duties" of the investigative or law enforcement officer disclosing or receiving the information. The meaning of "official duties" has been construed narrowly, as used in a parallel provision, 18 U.S.C. § 2517(2), to permit disclosure by a law enforcement official when related to the law enforcement duties of the officer. See *Intelligence Community*, 24 Op. O.L.C. 261, 263 (2007). Consistent with this interpretation, it is my view that OIG agents, as authorized investigative officers, may receive and use Title III information in conjunction with the performance of their investigative or law enforcement duties.

In this case, the OIG has informed me that the Title III information in question is necessary to its completion of a thorough review of the Department's use of the material witness warrant statute. This review is expected to address, among other things, allegations of misconduct by law enforcement agents that potentially reflect a violation of criminal law. Obtaining access to and use of Title III information relevant to the OIG's review is therefore directly related to the performance of its investigative or law enforcement duties, and disclosure is appropriate for this purpose. I note that only OIG personnel with direct responsibility for completing this review and report may use the information disclosed.

Thank you for your attention to this matter.

Sincerely,



James M. Cole -  
Deputy Attorney General





U.S. Department of Justice  
Office of the Inspector General

December 6, 2011

**MEMORANDUM FOR THE DEPUTY ATTORNEY GENERAL**

**FROM:**

CYNTHIA A. SCHNEDAR *Cynthia A. Schnedar*  
ACTING INSPECTOR GENERAL

**SUBJECT:**

Inspector General Access to Department Documents  
Obtained Pursuant to FCRA Section 1681u

Thank you for your letter dated November 18, 2011. As you noted, the Office of the Inspector General (OIG) is conducting a review of the use of national security letters by the Department of Justice (Department). In connection with that review, on October 28, 2011, the OIG requested access to certain Federal Bureau of Investigation (FBI) field office files containing national security letters and return information, including credit report information the FBI obtained pursuant to Section 1681u of the Fair Credit Reporting Act (FCRA), 15 U.S.C. Section 1681u. When the OIG's team arrived at the FBI's San Francisco office on November 14 for a field review of the requested files, the FBI informed the OIG for the first time that it was withholding from the OIG credit report information in 12 files based on the provision of the FCRA that limits dissemination of such information outside the FBI, Section 1681u(f).<sup>1</sup>

Although I appreciate the decision in your letter instructing the FBI to provide the credit report information to the OIG, I am writing to express my concerns about the basis for your decision. We were particularly troubled by two aspects of your letter.

First, you invoked the exception to the limitation on dissemination in Section 1681u(f), which authorizes the FBI to disseminate return information "to other Federal agencies as may be necessary for the approval or conduct of a

<sup>1</sup> Section 1681u(f) of the FCRA provides: "The Federal Bureau of Investigation may not disseminate information obtained pursuant to this section outside of the Federal Bureau of Investigation, except to other Federal agencies as may be necessary for the approval or conduct of a foreign counterintelligence investigation, or, where the information concerns a person subject to the Uniform Code of Military Justice, to appropriate investigative authorities within the military department concerned as may be necessary for the conduct of a joint foreign counterintelligence investigation."

foreign counterintelligence investigation." Your letter states that this exception includes dissemination to the Department, and that you have decided the material can be disclosed to the OIG because disclosure is "necessary to [the Deputy Attorney General's] informed decision-making regarding the approval or conduct of future foreign intelligence investigations." However, the Department is not an "other Federal agency" with respect to the FBI; to the contrary, the FBI is a part of the Department, as is the OIG. Moreover, the FBI has routinely provided and the Department has allowed the National Security Division (NSD) to have access to such information without first seeking a case-by-case determination from the Deputy Attorney General that such disclosure is "necessary for the approval or conduct of a foreign intelligence investigation." As we describe below, NSD regularly obtains such access for oversight as well as operational purposes.

Second, the letter states that your decision that the OIG should have access to the Section 1681u credit report information obtained by the FBI pursuant to national security letters "bears only upon the propriety of disclosure for purposes of OIG's current review." Thus, your letter appears not to envision disclosure of FCRA Section 1681u credit report information to the OIG in any of its other reviews or investigations unless the Department consents in advance to the disclosure based upon a determination that the OIG's access is necessary for the exercise of the Deputy Attorney General's supervisory responsibility in foreign intelligence investigations.

The OIG continues to maintain that under Section 6(a)(1) of the Inspector General Act (the Act), 5 U.S.C. App. 3, it is authorized to have access to all documents available to the Department and its components. The OIG believes that a process that allows the OIG access to documents only with advance permission from the Department on a case-by-case basis is contrary to this and other provisions of the Act. Moreover, such a process is contrary to the policy and practice of the Department and its components, including the FBI, since the inception of the OIG and the expansion of our jurisdiction in 2001 to include oversight over the FBI.

Significantly, the Act provides that once the Inspector General (IG) decides to initiate a review, only the Attorney General (AG) may prohibit the IG from carrying out or completing the review, and only in certain carefully circumscribed instances, in writing, and with notice to Congress. See Inspector General Act, Section 5E. In short, the Act mandates that the IG receive access to Department documents unless the AG invokes the Section 5E process to prohibit such access, not that the IG receives access only when the Department consents to it.

Moreover, the statutory limitation on the FBI's dissemination of information it receives pursuant to FCRA Section 1681u does not preclude the OIG from obtaining access to it. Section 1681u provided the FBI with now

authority to use national security letters to obtain limited credit report information and consumer identifying information in counterintelligence investigations. The limitation on dissemination contained in Section 1681u(f) was designed to ensure that information collected under this expanded authority was not improperly reported or shared with other agencies. The purpose of the limitation on dissemination was to protect privacy and civil liberties of the individuals whose credit information was obtained.<sup>3</sup> In view of the consistent congressional interest in monitoring use of this and other expanded authorities under the USA PATRIOT Act, it makes no sense to read into the dissemination limiting language of Section 1681u a statutory bar to the Department's own IG having access for purposes of oversight. Indeed, such a reading is strained, and inconsistent with the language and intent of the FCRA.

Our reading of the statute is consistent with subsequent congressional action and past practice in the Department. As you know, our current review of the Department's use of national security letters is a follow-up review to two previous congressionally mandated reviews. In the USA PATRIOT Improvement and Reauthorization Act of 2005 (Patriot Reauthorization Act), Congress directed the OIG to "perform an audit of the effectiveness and use, including any improper or illegal use, of national security letters issued by the Department of Justice." Pub. L. 109-177, Section 119 (2005). This same section of the Act defined national security letters to include requests made pursuant to Section 1681u. It also listed among specific items to be addressed in the audit the manner in which information obtained through national security letters was "collected, retained, analyzed, and disseminated by the Department, including any direct access to such information (such as access to raw data) provided to any other department, agency, or instrumentality of Federal, State, local or tribal governments or any private sector entity" (emphasis added).

Fulfilling the mandates of the Patriot Reauthorization Act clearly required the OIG to have access to the "raw data" the Department obtained through national security letters -- including Section 1681u credit report information -- yet the Patriot Reauthorization Act contained no provision granting the OIG access to Section 1681u information. This shows that in 2005, Congress believed the OIG already had access to Section 1681u information in order to

<sup>3</sup> See, e.g., House Conference Report 104-427, p. 36 (1995) ("In addition, FBI presently has authority to use the National Security Letter mechanism to obtain two types of records: financial institution records (under the Right to Financial Privacy Act, 12 U.S.C. 3414a)(3)(B) and telephone subscriber and toll billing information (under the Electronic Communications Privacy Act, 18 U.S.C. 3706). Expansion of this extraordinary authority is not taken lightly by the conferees, but the conferees have concluded that in this instance the need is genuine, the threshold for use is sufficiently rigorous, and, given the safeguards built in to the legislation, the threat to privacy is minimized.")

and its dissemination. Accordingly, Section 1681u(f) should not be read as limiting the Department of Justice Inspector General's access to such information.

The Department's past practice is also consistent with our reading of Section 1681u(f). In our prior national security letter reviews and during our first site visit in the ongoing review, the FBI provided the OIG full access to Section 1681u credit report information as well as to all other information it obtained through its use of national security letters, without suggesting that FCRA Section 1681u limited such access. Our past reviews resulted in findings that the FBI had used national security letters (including what the FBI called "exigent letters") in violation of applicable national security letters statutes, Attorney General Guidelines, and internal FBI policies. With respect to Section 1681u specifically, we found that FBI personnel did not fully understand the statutory requirements of the FCRA and had in certain cases requested or received information they were not entitled to receive pursuant to Section 1681u.

In response to our findings, the FBI and other Department components instituted corrective actions, including implementation by the NSD of oversight reviews (patterned after the OIG's reviews) that examine whether the FBI is using national security letters in accordance with applicable laws and policies. The FBI has since routinely provided the Oversight Section of NSD with access to Section 1681u credit report information in field office files on a quarterly basis, without first seeking a case-by-case determination from the Deputy Attorney General that such disclosure is "necessary for the approval or conduct of a foreign intelligence investigation." We see no need to invoke the exception to the dissemination limitations of Section 1681u(f) to allow the OIG access to this credit report information when the Oversight Section of NSD routinely obtains it without reference to the exception for the identical purpose of conducting oversight of the FBI. Indeed, especially in light of our prior national security letter and "exigent letter" reviews, it would be remarkable if the Department now - at the FBI's request - restricted the OIG's access to Section 1681u material to only those reviews to which the Department consented.

In sum, the process contemplated by the November 18 memorandum - that the OIG may obtain access to Department documents related to an OIG review only after receiving advance consent from the Department on a case-by-case basis - is directly contrary to the broad authority and access granted to the IG in the Act, is not required by the terms of Section 1681u, is contrary to the purpose of the dissemination limitations contained in the statute, as well as the intent of Congress demonstrated by its subsequent legislation, and is a disturbing break from the long standing policy and practice within the Department.

**I appreciate the sentiment that you expressed at our meeting about this subject on November 18 that the goal of the Department was to ensure that the OIG is able to have access, consistent with the law, to the materials it needs to conduct its oversight mission. I request that you reconsider your basis for allowing the OIG to have access to FCRA Section 1681u information. Consistent with the law for the reasons described herein, I ask that you issue a memorandum to the FBI informing it that the OIG can have access to FCRA Section 1681u information for its oversight reviews and investigations unless and until the AG finds it necessary to invoke the Section 8E process to prevent such access.**



U.S. Department of Justice

Office of the Inspector General

December 16, 2011

## MEMORANDUM FOR THE ATTORNEY GENERAL

FROM:

CYNTHIA A. SCHNEDAR   
ACTING INSPECTOR GENERAL

SUBJECT:

Inspector General Access to Grand Jury Materials

Thank you for your letter of November 18, 2011, stating that the Office of the Inspector General (OIG) is authorized to receive grand jury material in its review of the Bureau of Alcohol, Tobacco, Firearms and Explosives' (ATF) firearms trafficking investigation known as Operation Fast and Furious, and other investigations with similar objectives, methods, and strategies. Your letter stated that you have determined that disclosing the grand jury material to the OIG is permissible under Rule 6(e)(3)(A)(ii) of the Federal Rules of Criminal Procedure because you have determined that such disclosure is necessary to assist you, an attorney for the government, in performing your duty to enforce federal criminal law.

I appreciate your decision that the OIG may have access to grand jury information for the purpose of completing this review. While it remains our position that we are entitled to this information, I am writing to express my disagreement with the rationale for your decision as to why we should be allowed this access. We were particularly concerned by the following aspects of your letter.

First, your letter incorrectly stated that I requested you to authorize the Federal Bureau of Investigation (FBI) and other Department components to disclose grand jury information to the OIG for our review. We do not believe Department components must seek authorization from the Attorney General to disclose grand jury information to the OIG for our use in conducting our investigations and reviews. Thus, while we notified Department officials that we were seeking certain grand jury information in Fast and Furious, that conversation was merely to provide notification and was not a request for the Department's authorization for us to receive such materials. Indeed, prior to receiving your letter, we had already obtained grand jury information from the FBI relevant to the ATF's Operation Fast and Furious, and the U.S. Attorney's

Office for the District of Arizona had notified us that it would provide grand jury information to us for this review. This was consistent with a long-standing policy and practice within the Department and its components, including the FBI, to provide grand jury information to the OIG upon our request for use in oversight reviews, without first obtaining consent to do so from the Attorney General.<sup>1</sup>

I also am concerned that in providing authorization for the disclosure of grand jury information to the OIG, your letter appears to envision that it is necessary for the OIG to obtain authorization from the Attorney General, on a case-by-case basis, prior to obtaining access to grand jury material from the Department's components. A requirement that the OIG must first seek permission from the Attorney General to obtain material necessary for our reviews, however, undermines the OIG's independence and is inconsistent with the Inspector General Act.

As we have discussed with you and the Deputy Attorney General, the OIG believes that Section 6(a)(1) of the Inspector General Act, 5 U.S.C. App. 3, entitles us to have access to all documents available to the Department and its components. Significantly, Section 8E of the Act provides that only the Attorney General may prohibit the Inspector General from carrying out or completing a review, and may do so only in certain carefully circumscribed instances, in writing, and with notice to Congress. In short, the Act mandates that the OIG receive access to Department documents unless the Attorney General invokes the Section 8E process to prohibit such access. The Act does not limit the OIG's access to Department documents to only those circumstances when the Attorney General consents to it.

In addition, while we agree that Rule 6(e) provides authority for the OIG to obtain access to grand jury information independent from the Inspector General Act, I am troubled that your letter relied on Rule 6(e)(3)(A)(ii) to grant the OIG access to grand jury material in Operation Fast and Furious. That provision authorizes the disclosure of grand jury information to "any government personnel . . . that an attorney for the government considers necessary to assist in performing that attorney's duty to enforce federal criminal law." Your letter stated that the provision applied to the OIG's access

<sup>1</sup> As we have discussed with you, in contrast to its provision of grand jury material to the OIG in the Fast and Furious review, the FBI departed from its long-standing compliance with the practice of providing the OIG with access to grand jury and numerous other categories of materials and refused to provide such access to the OIG in connection with the OIG's ongoing review of the Department's use of the material witness warrant statute, 18 U.S.C. Section 3144. As you know, in that review, the OIG requested and eventually obtained the Department's intervention to direct the FBI to provide the OIG with what we believe the FBI is required by law to provide us. We have since received grand jury information from the FBI for use in our material witness warrant review pursuant to Federal Rule of Criminal Procedure 6(e)(3)(D).

to grand jury information in the Fast and Furious review because you referred the matter to the OIG for investigation. You reasoned that the OIG's access to grand jury information is necessary for you to exercise your supervisory authority over the Department's enforcement of federal criminal law.

Conditioning the OIG's access to grand jury information upon your determination that access is necessary for the exercise of the Attorney General's supervisory responsibilities again is inconsistent with the Inspector General Act. Moreover, it is unnecessary under Rule 6(e). Attorneys for the OIG may receive direct access to grand jury information pursuant to Rule 6(e)(3)(A)(i), which provides that disclosure of grand jury information may be made to "an attorney for the government for use in performing that attorney's duty."

The Department has routinely provided attorneys in the Office of Professional Responsibility (OPR) access to grand jury information to enable them to conduct oversight investigations of alleged misconduct by Department attorneys in the performance of their litigation functions. Such access has been allowed pursuant to Rule 6(e)(3)(A)(i), and it has not required a case-by-case determination of need for the Attorney General's exercise of supervisory authority. Indeed, an Office of Legal Counsel (OLC) opinion issued in 1984 concluded that OPR attorneys qualify for automatic access under Rule 6(e)(3)(A)(i) because they are part of the supervisory chain conducting oversight of the conduct of Department attorneys before the grand jury. See Memorandum of OLC Deputy Assistant Attorney General Robert B. Shanks, *Disclosure of Grand Jury Material to the Office of Professional Responsibility*, January 5, 1984. OIG attorneys are similarly part of the supervisory chain conducting oversight of the conduct of law enforcement officials, fulfilling a supervisory function directed at maintaining the highest standards of conduct by Department employees. OIG attorneys therefore should receive the same automatic access to grand jury information for use in oversight reviews as OPR attorneys do pursuant to Rule 6(e)(3)(A)(i).

In sum, the premise of your November 18 letter -- that the OIG may obtain access to grand jury material relevant to an OIG review only after the Attorney General or other Department official determines on a case-by-case basis that such access is necessary to assist an attorney for the government in performing your duty to enforce federal criminal law -- is contrary to the broad authority and access granted to the Inspector General in the Inspector General Act. It also breaks with the long standing policy and practice of Department components providing grand jury material to the OIG without obtaining the consent of Department leadership. Moreover, Rule 6(e)(3)(A)(i) provides authority for the OIG to obtain access to grand jury information independent from the Inspector General Act, just as OPR is allowed automatic access pursuant to that rule.



I appreciate the sentiment that the Deputy Attorney General expressed at our meeting with him about this subject on November 18 that the goal of the Department was to ensure that the OIG is able to have access, consistent with the law, to the materials it needs to conduct its oversight mission. I request that you reconsider your basis for allowing the OIG to have access to grand jury information. Consistent with the law for the reasons described herein, I ask that you make clear that the OIG can have access to grand jury information for its oversight reviews and investigations pursuant to the Inspector General Act and Rule 6(e)(3)(A)(i), unless and until the Attorney General finds it necessary to invoke the Section 8E process to prevent such access.

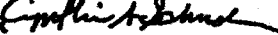


U.S. Department of Justice

Office of the Inspector General

December 16, 2011

## MEMORANDUM FOR THE DEPUTY ATTORNEY GENERAL

FROM: CYNTHIA A. SCHNEDAR   
ACTING INSPECTOR GENERAL

SUBJECT: Inspector General Access to Department Documents  
Relating to Title III Electronic Surveillance

I received your letter dated December 5, 2011, directing the Federal Bureau of Investigation (FBI) to disclose to the Office of the Inspector General (OIG) material the FBI gathered pursuant to the Federal Wiretap Act, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 18 U.S.C. §§ 2510-2522 (Title III), for our ongoing review regarding the Department's use of the material witness warrant statute, 18 U.S.C. § 3144. In your letter, you cite an opinion from the Office of Legal Counsel (OLC) issued in 1990 concluding that OIG agents qualify as "investigative officers" authorized to obtain and use Title III information as appropriate to the proper performance of their official duties. You state that you have determined that disclosing Title III information to the OIG for the material witness warrant review is permissible because it is necessary to the OIG's performances of its investigative or law enforcement duties. You also state that disclosure in this circumstance is appropriate because "the Title III information in question is necessary to [the OIG's] completion of a thorough review of the Department's use of the material witness warrant statute."

Although I appreciate your decision that the FBI is authorized to disclose the Title III material it has been withholding in response to our request for it, I do not agree with the rationale contained in your letter that it is necessary for the OIG to obtain authorization from Department leadership, on a case-by-case basis, prior to obtaining access to Title III material from the Department's components. As we have previously discussed with you, we believe a requirement that the OIG must first seek permission from the Department to obtain material necessary for its reviews undermines the OIG's independence and is contrary to the access provisions of the Inspector General Act (the Act). See 5 U.S.C. App. 3.

As I noted in my letter to you dated December 6, 2011, regarding the OIG's authority to obtain credit report information gathered pursuant to 15 U.S.C. § 1681u, the OIG believes that Section 6(a)(1) of the Act entitles us to

access to all documents available to the Department and its components, unless the Attorney General himself formally, in writing and with notice to Congress, exercises his authority pursuant to section 8E of the Act to prohibit the OIG from completing or carrying out a review in circumstances specifically enumerated in Section 8E.

Title III itself provides a basis independent of the Act for the OIG to obtain access to Title III materials. As you note, the 1990 OLC opinion interpreted 18 U.S.C. § 2517(1) to include OIG agents as investigative officers authorized under Title III to receive such information for the performance of their investigative or law enforcement duties. However, you also cite a 2000 OLC opinion regarding dissemination of Title III material as narrowly construing the term "official duties," to limit disclosure to law enforcement officials to situations when it is "related to the law enforcement duties" of the receiving officer. Because the 2000 OLC opinion arose in the context of dissemination of Title III material outside of the Department to the intelligence community, we do not believe it precludes the OIG or other officials within the Department from obtaining Title III material to conduct supervision or oversight of law enforcement.

In sum, we believe the OIG is authorized to receive Title III materials under both the Inspector General Act and Title III. Indeed the OIG has historically received such information from Department components, including the FBI, in recognition that the OIG's function includes ensuring that criminal law enforcement personnel are conducting investigations in compliance with applicable laws and policies. Moreover, it is common sense that our role of conducting oversight of law enforcement activities must encompass access to the materials and information derived from the techniques employed by law enforcement officers.

Accordingly, I ask that you reconsider the basis for allowing the OIG to have access to Title III information in our material witness warrant review. Consistent with the law as described in this memorandum, I request that you determine that the FBI and other Department components should provide the OIG access to Title III material for its oversight reviews and investigations in all such matters, unless the Attorney General invokes Section 8E of the Act to prevent such access.



**Office of the Deputy Attorney General**  
Washington, D.C. 20530

January 4, 2012

Cynthia Schneider  
Acting Inspector General  
Department of Justice  
Washington, DC 20530

Dear Ms. Schneider:

I am in receipt of your letters dated December 6 and December 16, 2011, setting forth your views regarding the Office of the Inspector General's (OIG) ability to access grand jury material under Rule 6(e) of the Federal Rules of Criminal Procedure, information obtained pursuant to Section 1681u of the Fair Credit Reporting Act, 15 U.S.C. § 1681 (FCRA), and information obtained pursuant to the Federal Wiretap Act, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 18 U.S.C. §§ 2510-2522 (Title III).

As you know, the Office of Legal Counsel (OLC), the entity within the Executive Branch responsible for providing authoritative legal advice about these types of matters, has been considering the issues raised by your requests. OLC's established practice is to refrain from reaching any final conclusions until it has solicited and received the views of all affected parties, including OIG, a process that I understand is currently underway. OLC has advised me that at this time, however, they are not persuaded that the Inspector General Act provides authority to access documents notwithstanding the restrictions on their use or dissemination contained in the statutes referenced above.

I have consulted with OLC at length about ways that, consistent with applicable law, the Department can ensure that OIG continues to have access to the materials it needs for its essential work. Within the limits of the law, the Attorney General and I have endeavored to find solutions that provide OIG with immediate access to documents necessary for its thorough and effective review of specific matters. Whenever you have raised concerns with us about a component withholding documents that you need, we have found ways to provide you access. We understand that, as you confirmed at our meeting on December 19, 2011, OIG currently has access to the information that it needs for its ongoing reviews. In the meantime, as we explained at our December meeting, where possible under existing law, we will continue to work with OLC to develop Department-wide policies that would ensure that documents are made available to OIG without the need for case-by-case determinations.

Ms. Cynthia Schneider  
January 4, 2012  
Page 2

To obtain a definitive answer to these legal questions, I have shared your letters with OLC and asked that OLC provide a formal opinion regarding the construction of Section 6(a)(1) of the Inspector General Act, 5 U.S.C. App. 3, and the OIG's access to grand jury material, information obtained pursuant to Section 1681u of FCRA, and information obtained pursuant to Title III. Please continue to work with OLC to ensure that they have the benefit of your views and perspective on these issues. If, after OLC has completed its opinion, you believe the existing statutes do not provide your office with access on terms that allow it to perform its oversight mission, legislative action may be necessary. I look forward to working with you if such action is ultimately required.

Sincerely,



James M. Cole  
Deputy Attorney General



Office of the Deputy Attorney General  
Washington, D.C. 20531

March 16, 2012

Ms. Cynthia Schneider  
Acting Inspector General  
U.S. Department of Justice  
950 Pennsylvania Ave, NW  
Washington, DC 20530

Dear Ms. Schneider:

As I explained in our recent discussions and my letter of January 4, 2012, I am committed to ensuring that the Office of the Inspector General (OIG) has access to the information it needs to perform effectively its oversight mission. Toward that end, the Attorney General and I have worked over the past several months to make certain that OIG has the materials necessary to conduct its ongoing reviews. We have also indicated that we are committed to developing Department-wide policies to make documents available to your office without the need for case-by-case determinations.

Your office responded that, although you were grateful for our efforts, you believed that the approach we proposed was inconsistent with Section 6(a)(1) of the Inspector General Act, 5 U.S.C. App. 3, and the specific statutory provisions at issue. To resolve the legal questions presented, I asked for an opinion from the Office of Legal Counsel (OLC), the entity within the Executive Branch that resolves such disputes.

Both your office and the Council of Inspectors General on Integrity and Efficiency (CIGIE) have requested that the Department withdraw the request for an opinion from OLC because OIG and CIGIE have indicated to me that they are satisfied with the terms of access currently being provided. You have also indicated that OIG has received all material responsive to its pending reviews and no longer believes there is a need to resolve the legal questions presented. From our discussions, I understand that OIG now believes that the best course is to proceed with developing Department-wide policies concerning its access to information. These policies would seek to facilitate your reviews by providing presumptive access to certain categories of information to the extent permitted by the terms of the specific statutory provisions at issue. We will work to maximize your ability to obtain information, but you understand that access to some categories of information may be legally permissible on these terms only in certain circumstances, and access to other categories of information may not be possible at all.

In light of the foregoing, I intend to inform OLC that a formal opinion is no longer needed on the legal issues that have been raised. It bears noting that OLC has already provided informal legal advice upon which the Attorney General and I have relied as a basis for ensuring

Ms. Cynthia Schneider  
Page 2

that OIG has had access to information in specific reviews. I encourage you to contact OIG to provide your legal views concerning prospective access by OIG to the type of information at issue in those reviews—specifically, grand jury material, financial information received pursuant to Section 1681u of the Fair Credit Reporting Act, 15 U.S.C. § 1681 (FCRA), and information obtained pursuant to the Federal Wiretap Act, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 18 U.S.C. §§ 2510-2522 (Title III).

Please let me know if you disagree with any of the foregoing. If I do not hear from you within a week, I will withdraw the request for an opinion from OIG.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Cole", written in a cursive style.

James M. Cole  
Deputy Attorney General



U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, DC 20530

April 11, 2012

Ms. Cynthia Schneider  
Acting Inspector General  
U.S. Department of Justice  
Washington, DC 20530

Dear Ms. Schneider:

The Office of the Inspector General ("OIG") is conducting a review of the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") investigations known as Operation Fast and Furious and Operation Wide Receiver, as well as the ATF investigation of alleged criminal conduct by Jean-Baptiste Kingery. In the course of this review, the OIG has sought pertinent information from various Department components. The Criminal Division has identified certain information obtained pursuant to the Federal Wiretap Act, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 18 U.S.C. §§ 2510-2522 (hereinafter "Title III"), as responsive to the OIG's request. The Criminal Division has advised me of the nature of this Title III information and has asked if it may disclose that information to the OIG. As explained below, I have authorized the Criminal Division to disclose this information to the OIG on my behalf, for the OIG's use in connection with its ongoing review.

Section 2517 governs an investigative or law enforcement officer's disclosure and use of Title III information. It provides in relevant part:

Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

18 U.S.C. § 2517(2). As Deputy Attorney General, I am a "law enforcement officer" as defined in 18 U.S.C. § 2510(7), and my official duties as such include supervisory responsibility for the Department's criminal law enforcement programs, policies, and practices. Pursuant to section 2517(2), I may therefore "use" Title III information by disclosing it in a manner that enables me to perform appropriately my law enforcement duties, which include these supervisory responsibilities.

After consultation with the Office of Legal Counsel, I have determined that providing the OIG with access to the Title III information in question in connection with its review of these investigations will assist the appropriate performance and discharge of my criminal law enforcement supervisory responsibilities. Indeed, I fully expect that both the OIG's investigation and its subsequent report will provide information that will directly assist me in supervising the

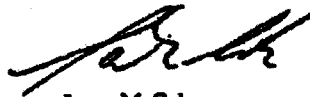


Ms. Cynthia Schneider  
Page 2

Department's criminal law enforcement programs, policies, and practices. I therefore authorize the Criminal Division and other Department components to provide the OIG with responsive Title III information for its use in connection with this review. In making this decision, and because it will not result in protected materials being disclosed outside the Department, I have determined that providing the OIG with access to this information will not impair the Department's conduct of the ongoing investigations and associated prosecutions. I note that only OIG personnel with express responsibility for completing this review and subsequent report may use the information disclosed.

Thank you for your attention to this matter.

Sincerely,



James M. Cole  
Deputy Attorney General



U.S. Department of Justice

Federal Bureau of Investigation

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Office of the General Counsel

Washington, D.C. 20535

March 4, 2011

Camel F. Ochoa  
Assistant Inspector General  
Oversight and Review Division  
Office of the Inspector General  
U.S. Department of Justice  
1425 New York Avenue, NW, Suite 13109  
Washington, DC 20530

Dear Ms. Ochoa:

You have asked for an explanation of the dissemination restrictions that exist on documents that the Federal Bureau of Investigation ("FBI") may have in its investigative files. You have raised concerns that if such dissemination restrictions are observed by the FBI in connection with requests from the Office of the Inspector General ("OIG"), OIG's oversight ability will be impaired. While we appreciate your concerns, restrictions on dissemination affect a relatively small number of documents relating to a small number of OIG audits, investigations or reviews. Nevertheless, the FBI is eager to understand the OIG's argument that the statutory limitations cited below do not apply to disseminations from the FBI to OIG. (U)

In prior discussions, the OIG has noted that section 6(a)(1) of the Inspector General Act of 1978, 5 U.S.C. app. § 6 (hereinafter "IG Act") authorizes the OIG to have access to "all records, reports, . . . documents, papers, . . . or other material available to the applicable establishment which relate to programs and operations with respect to which th[e] Inspector General has responsibilities under this Act." Section 6(a)(3) further authorizes the OIG "to request such information or assistance as may be necessary for carrying out the duties and responsibilities provided by this Act from any Federal . . . agency or unit thereof." (U)

Although Section 6(a)(1) grants broad access, section 6(b) makes clear that access is not without limit. Section 6(b)(1) provides that "[u]pon request of an Inspector General for information or assistance under subsection (a)(3), the head of any Federal agency involved shall, insofar as is practicable and not in contravention of any existing statutory restriction or regulation of the Federal Agency from which the information is requested, furnish to such Inspector General . . . such information or assistance." (Emphasis added.) Although Section 6(b)(1) applies by its terms only to requests pursuant to Section 6(a)(3), Section 6(b)(2) also recognizes that section 6(a)(1) is not absolute: "Whenever information or assistance requested under subsection (a)(1) or (a)(3) is, in the judgment of an Inspector General, unreasonably refused or not provided, the Inspector General shall report the circumstances to the head of the establishment involved without delay." (Emphasis added.) Thus, the statute implicitly

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recognizes that requests under (a)(1) can be "reasonably" refused (otherwise section 6(b)(2) would not have included subsection (a)(1) within its scope). This interpretation is supported by legislative history strongly suggesting Congress did not intend for the IG Act to supersede statutes that restrict dissemination of certain types of information. According to the Senate Report on the Legislation, "the committee intends [subsection 6(a)] to be a broad mandate permitting the inspector and auditor general the access he needs to do an effective job, subject, of course, to the provisions of other statutes, such as the Privacy Act." S. REP. NO. 95-1071, at 34 (1978). Given the legislative history and the plain language of section 6(b)(2), absent a contrary decision from the Office of Legal Counsel or a persuasive legal argument from the OIG, we believe that it is "reasonable" for the FBI not to produce materials the dissemination of which would violate an existing statutory, regulatory or other legal requirement. (U)

The dissemination restrictions discussed below do not apply to requests from the OIG that are made as part of criminal investigations that are being conducted jointly by the OIG and the FBI. (U)

#### A. Grand Jury Information (U)

The disclosure of federal grand jury material is governed by Federal Rules of Criminal Procedure 6(e) and implementing guidelines promulgated by DOJ. Rule 6(e)'s restrictions on dissemination vary depending on the nature of the investigation being conducted by the entity seeking the information and the nature of information being sought. If the OIG requests materials that contain information protected by Rule 6(e), and if the requirements described below are not met, the information may not be produced to the OIG. (U)

"Rule 6(e) does not cover all information developed during the course of a grand jury investigation, but only information that would reveal the strategy or direction of the investigation, the nature of the evidence produced before the grand jury, the views expressed by members of the grand jury, or anything else that actually occurred before the grand jury." See USA Book, Federal Grand Jury Practice, Office of Legal Education, October 2008 at § 3.6 (citing *United States v. Smith*, 123 F.3d 140, 148 (3d Cir. 1997)). Moreover, the question whether a specific document is or is not 6(e) material may depend on the quantity of Grand Jury information requested or the federal circuit in which the Grand Jury is sitting. *Id.* at §§ 3.6 through 3.10. Requests for entire investigative files -- the disclosure of which will necessarily disclose the nature of evidence that was collected by and produced to the grand jury -- may raise different legal concerns than focused requests for limited materials that have independent significance (e.g., bank records, telephone records). (U)

##### 1. Criminal Investigations (U)

Rules 6(e)(3)(A) and (B) provide that an attorney for the government may disclose Grand Jury material to any other government personnel necessary to assist in performing that attorney's duty to enforce federal criminal law and the information disclosed is to be used only for those purposes. Disclosure under Rule 6(e)(3)(A) is permitted only when necessary to assist in

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enforcing federal criminal laws. Furthermore, the rule does not permit disclosure of grand jury materials after the completion of a prosecution. (U)

This, if the OIG seeks material from the FBI on the basis of Rules 6(e)(3)(A) and (B), and if the prosecution is not complete, the Grand Jury information that is necessary to assist the OIG in enforcing federal criminal laws may be provided to the OIG. On the other hand, Rules 6(e)(3)(A) and (B) cannot be relied upon as a basis to produce documents requested as part of an audit or as part of a general oversight review. (U)

### 2. Foreign Intelligence, Counterintelligence, or Foreign Intelligence Information (U)

Our prior submission to the Office of Legal Counsel has fully explained our view of the scope of our ability to produce material in the OIG pursuant to Rule 6(e)(3)(D) and that discussion will not be repeated here. (U)

### 3. Threat Information (U)

Rule 6(e)(3)(D) also permits the disclosure of Grand Jury matters involving a threat of attack or other grave hostile acts of a foreign power or its agent, a threat of domestic or international sabotage or terrorism, or clandestine intelligence gathering activities by an intelligence service or network of a foreign power or by its agent. Such disclosure may be made to any appropriate federal official for the purpose of preventing or responding to such a threat. There is no requirement that the threat be imminent or specific. It is highly unlikely that this provision will ever be triggered when responding to an OIG request for documents. Nevertheless, if the FBI wishes to determine that providing to the OIG Grand Jury information that involves a threat may aid in preventing or responding to such a threat, the information may be disclosed. Absent such a determination, however, Rule 6(e) would preclude such a disclosure. (U)

From a legislative perspective, Rule 6(e) is only implicated in investigative files in which grand jury subpoenas were issued. Accordingly, requested documents will only be reviewed for Rule 6(e) material if grand jury subpoenas were utilized during the investigations.

### B. Title III Materials (U)

The disclosure and use of information intercepted under the authority of the Federal Wiretap Act, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Title III or T-III), is controlled by 18 U.S.C. § 2513. As with 6(e) information, the authority to disclose or not T-III material contained in FBI files depends on the nature of the investigation being conducted by the entity seeking the information and the nature of information being sought. Unless one of the exceptions below is satisfied, the T-III information may not be produced. (U)

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### 1. Foreign Intelligence, Counterintelligence, or Foreign Intelligence Information (U)

Section 2517 (b) of Title 18, United States Code, permits the disclosure of T-III derived information that is foreign intelligence or counterintelligence, or foreign intelligence information to any other federal law enforcement or national security official in so far as the official, in the performance of his or her official duty. As this grand jury learned, it is OIG's position that a piece-by-piece determination must be made that the T-III information is foreign intelligence, counterintelligence or foreign intelligence information. Such information can be shared with the OIG under this provision only when the OIG is acting in a law enforcement capacity. If either condition is not met (i.e., a particular piece of information is not foreign intelligence, counterintelligence or foreign intelligence information or the OIG is not functioning as a law enforcement official), then T-III information may not be provided. (U)

### 2. Threat Information (U)

18 U.S.C. § 2517 (d) permits the disclosure of T-III derived information to any federal government official, to the extent that such information reveals a threat of actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power, domestic or international sabotage, domestic or international terrorism, or clandestine intelligence gathering activities by an intelligence service or network of a foreign power or by an agent of a foreign power, for the purpose of preventing or responding to such a threat. In order for information to be disseminated under this provision, the individual or entity receiving the information must use it in response to the threat, and not for other purposes. As with the similar provision in Rule 6(e), it is highly unlikely that an OIG request will satisfy this provision. Nevertheless, if the provision is satisfied, such T-III information may be produced to the OIG. (U)

In terms of production logistics, the vast majority of FBI investigative files do not include Title III information because Title III surveillance was not utilized during the investigation. In addition, the FBI recently issued a policy restricting the manner in which Title III information is included in FBI files. Thus, in the majority of cases, the FBI does not anticipate that it will need to search requested documents for Title III information. (U)

### C. Federal Taxpayer Information (FTI) (U)

The dissemination of federal taxpayer information is governed by 26 U.S.C. § 6103. Section 6103 applies to taxpayer information that is obtained from the Internal Revenue Service (IRS) or from another agency that originally received the information from the IRS. The FBI can obtain § 6103 information only for one of three purposes: (1) for use in a (non-tax) criminal investigation; (2) to locate a fugitive; or (3) for use in a terrorism investigation. 26 U.S.C. § 6103(d). Information obtained for one purpose may not be used by FBI personnel or disseminated to other agencies or subdivisions of agencies for another purpose.<sup>1</sup> 26 U.S.C.

<sup>1</sup> Section 5 of IRS Publication 1975 discusses restricting access to FTI. Section 5.A states, "However, in most cases, the disclosure authority does not permit agencies or subdivisions of agencies to exchange or use"

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§ 6103 states that the tax return information obtained by the Department of Justice may only be disclosed to officers or employees who are "personally and directly engaged in, and solely for their use in, any proceeding before a Federal grand jury or Federal or state court." 26 U.S.C. § 6103(b)(5). Accordingly, PFI may not be produced to the OIG unless they are relevant to a criminal investigation being conducted by the OIG. (U)

In terms of production logistics, by long standing FBI policy, PFI must be retained in a restricted archive. Accordingly, the unclassified portions of the file will not be searched for PFI, absent a case specific indication that FBI policy was not followed in the particular case at issue. (U)

#### D. Child Victim, Child Witness or Federal Juvenile Court Information (U)

The identities of child victims or child witnesses are restricted by the Child Victim and Witnesses Information Act, 18 U.S.C. § 3509(d), which provides that DOJ employees may disclose documents that contain "the name or any other information concerning the child" only to "persons who, by reason of their participation in the proceeding, have reason to know such information." Accordingly, the names of child victims and child witness identities may not be produced to the OIG. (U)

Information derived from court records prepared for ongoing or closed juvenile delinquency proceedings in U.S. federal courts is restricted by the Juvenile Delinquency Act, 18 U.S.C. § 5038. These juvenile court records may be disclosed only in response to an inquiry from a law enforcement agency when the request for information is "related to the investigation of a crime." 18 U.S.C. § 5038(4)(3). Thus, only if the OIG is conducting a criminal investigation as to which the federal juvenile court records are relevant may such records be produced to the OIG. (U)

From a production logistics perspective, few FBI files include the names of child victims, witnesses or juvenile delinquents. When FBI investigative files are requested, the FBI will determine whether or not there is any specific reason to suspect that a requested file contains such materials. If not, the file will not be reviewed to search for such information. (U)

#### E. Patient Medical Information (U)

The FBI's ability to re-disseminate medical information that identifies an individual as the recipient of medical services or diagnoses may be restricted depending upon the type of information, how the information was obtained, and for what purpose it was obtained. Information obtained by patient consent or court order may have limitations regarding the purpose for which the information will be used. Other legal authorities, such as Executive Order 13181 and 18 U.S.C. § 3486(e), may also limit re-dissemination of the information absent

subsequent disclosure of the information." It notes that "Unless specifically authorized by [Federal Juvenile Code], agencies are not permitted to allow access to PFI to agents, representatives, or contractors." (U)

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specific approvals being obtained. Psychotherapy notes and substance abuse patient medical records in particular have very stringent confidentiality protections. See 42 U.S.C. § 290dd-2; 42 C.F.R. Chapter 1, subchapter A, Part 2; 45 CFR § 164.508(2). Thus, if the OIG requests materials that contain individually-identifiable patient medical information, the Office of General Counsel must be consulted prior to producing such materials. (U)

From a production logistics perspective, few FBI files outside of the health care fraud classification include such information. When FBI investigative files are requested, the FBI will determine whether or not there is any specific reason to suspect that a requested file contains such information. If not, the file will not be reviewed to search for such information. (U)

**F. Credit Reports (U)**

The Fair Credit Reporting Act governs the dissemination of credit reports and information from credit reports. Because the statutory scheme is quite complicated, if the OIG requests materials that include credit reports or information from credit reports, we are recommending that the Office of the General Counsel be consulted prior to production. (U)

**G. FISA Information (U)**



(S/NF)



(S/NF)



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From a production logistics perspective, FBI files outside of the national security area will not contain FISA information and many FBI national security files do not include the use of FISA surveillance authorities. Moreover, under the current SMPs, raw FISA information is unlikely to be present in FBI investigative files. When FBI investigative files are requested, the FBI will determine whether or not there is any specific reason to suspect that a requested file contains raw FISA information. If not, the file will not be reviewed to search for such information. (U)

**H. Foreign Government or International Organization Information (U)**

If a foreign government has imposed restrictions on the dissemination of information it provides to the FBI and the information has not been disseminated within DOJ, that information should not be produced to the OIG absent permission from the entity that provided the information to the FBI. (U)

From a production logistics perspective, few FBI files outside of the national security area will include such information. When FBI investigative files are requested, the FBI will determine whether or not there is any specific reason to suspect that a requested file contains information provided by a foreign government that has imposed restrictions on the dissemination of the information. If not, the file will not be reviewed to search for such information. (U)

**I. Information Subject to Non-Disclosure Agreements, Memoranda of Understanding or Court Order (U)**

A non-disclosure agreement (NDA) or Memorandum of Understanding (MOU) may, depending on its terms, impose restrictions on the FBI sharing information with entities outside the FBI, including the OIG. Because each NDA or MOU will vary in its terms, an analysis of the ability to share information will turn on the particular terms and conditions of the agreement. Thus, if the requested materials were obtained pursuant to an NDA or an MOU that, on its face, appears to restrict the disclosure of the information outside the FBI, we are recommending that OIG be consulted prior to disclosure. (U)



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A court order may, depending on its terms, impose restrictions on the FBI sharing information with entities outside the FBI, including the OIG. The FBI's ability to share information will turn on the particular terms and conditions of the order. Thus, if the requested materials are governed by a court order that appears, on its face, to restrict the disclosure of the information outside the FBI, we are recommending consultation with OGC prior to production. (U)

From a production logistics perspective, few FBI files will include such information. When FBI investigative files are requested, the FBI will determine whether or not there is any specific reason to suspect that a requested file contains such information. If not, the file will not be reviewed to search for such information. (U)

**J. Attorney-Client Information (U)**

The FBI's attorney-client information falls into the two general categories: "official capacity" and "individual capacity" information. "Individual capacity" attorney-client information is subject to the standards set forth in 28 C.F.R. §§50.15 and 50.16 and 28 U.S.C. § 512. In sum, the attorney and the employee enter into a "traditional attorney-client relationship" and the information relating to the representation is covered by attorney-client confidentiality rules. The information subject to the privilege includes communications between the attorney and the employee, as well as "confidential information about a client from any source." See *Individual Capacity Manual* at 34 (citing Model Rules of Professional Conduct 1.6 and 1.6(b), which have been adopted in some form in "most jurisdictions"). (U)

The attorney-client relationship commences with the request for representation and applies to communications made for the purpose of securing representation. *Id.* at 30. This obligation to safeguard privileged or other confidential client information remains "in perpetuity" and the information must therefore be protected not only while the case is active but also after its disposition. *Id.* at 33. In the event the OIG requests information from the FBI relating to a matter in which an FBI attorney has handled a request for individual representation or has represented an individual in his or her individual capacity, the FBI attorney handling the matter must be consulted and all attorney-client privileged information must be withheld. (U)

From a production logistics perspective, individual representation materials are included in a file classification that is separate from any underlying investigative files. Attorney client materials should, therefore, not be included in investigative files. When FBI investigative files are requested, the FBI will determine whether or not there is any specific reason to suspect that the requested materials include individual capacity attorney client material. If not, requested materials will not be reviewed to search for such information. (U)

**K. Other U.S. Government Information (U)**

There are many circumstances through which the FBI comes into possession of information that originates with another government entity (hereinafter "third party information"). In addition, certain statutes restrict the dissemination of information regarding

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employees of certain U.S. government entities (See, e.g., 50 U.S.C. § 403g). Such information should not be produced to the OIG. (U)

From a production logistics perspective, few FBI files outside of the national security area will include such information. When FBI investigative files are requested, the FBI will determine whether or not there is any specific reason to suspect that a requested file contains information provided by another government agency or the name of an employee that cannot be disclosed. If not, the file will not be reviewed to search for such information. (U)

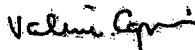
## I. Source Information (U)

If the OIG requests access to or documents from an FBI source file, the request must be approved by the relevant FBI SAC or his or her designee. See Attorney General Guidelines Regarding the Use of FBI Confidential Human Sources at I.D.4.a.ii. Moreover, the FBI Confidential Human Source Policy Manual requires that the disclosure be documented in the source's main file. See Confidential Human Source Policy Manual POL07-0004-01 (Revised September 5, 2007). (U)

The OIG may have access to source reporting that is contained in FBI investigative files without such approval. During civil litigation and in response to FOIA requests, the FBI withholds such information from disclosure if it would tend to identify the informant. Because the OIG is part of the Department, there is no reason to suspect that it will attempt to piece together disparate pieces of information in order to identify an FBI informant. Thus, if the information at issue is available generally to FBI employees who have access to ACS, it can also be produced to the OIG. (U)

As noted above, we believe these dissemination restrictions will affect only a small number of OIG document requests. Nonetheless, we are working to enhance our capacity to gather and review requested documents so that we can continue to provide the OIG with the information it needs to carry out its oversight responsibilities. Moreover, as we discussed, I am eager to understand the OIG's position regarding the applicability of the above-discussed restrictions on the dissemination of FBI information. (U)

Very truly yours,



Valeria Caproni  
General Counsel

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## MEMORANDUM

To: Michael Horowitz, Inspector General  
 From: Andrew Weissmann, General Counsel, FBI <sup>(A)</sup>  
 Catharine Bruno, Special Assistant to the General Counsel, FBI <sup>CAB</sup>  
 Re: Legal restrictions on dissemination of FBI information to the Department of  
 Justice Offices of the Inspector General (OIG) for OIG criminal investigations  
 Date: February 29, 2013

## I. (U) Background.

(U) The Memorandum is provided as a follow-up to our meeting on February 22, 2013, at which we discussed OIG access to FBI information. The FBI understands that the OIG, by virtue of its statute and mission, is generally entitled to broad access to information that is within the possession of the FBI. 5 U.S.C. App. 3-§ 6(a), Section 6(a)(1) of the Inspector General Act states that, "[E]ach Inspector General . . . is authorized -- to have access to all records, reports, audits, reviews, documents, papers, recommendations, or other material available to the applicable establishment which relate to programs and operations with respect to which that Inspector General has responsibilities under the Act. . . ." *Id.* In the fall of 2011, the OIG raised concerns to the Office of the Deputy Attorney General (ODAG) regarding the level of access to certain categories of information DOJ components were providing to OIG. Upon ODAG request, the FBI provided ODAG with a memorandum describing the categories of information that the FBI determined may be subject to legal restrictions on dissemination to the DOJ OIG. See Memorandum from F. Kelley, Acting General Counsel, FBI, to ODAG (October 3, 2011) (hereinafter "October 2011 Memorandum") (Attachment A).

(U) This memorandum specifically addresses the scope of OIG access to those previously-identified categories of FBI information when the OIG is conducting a criminal investigation. Even when the OIG is exercising its criminal investigative authority (rather than pursuing an administrative misconduct investigation, audit, inspection, or program review) some legal restrictions limit the FBI's ability to release information to the OIG. In most instances, however, the FBI can produce the restricted information to the OIG for use in its criminal cases after the FBI or the OIG have followed the appropriate process for obtaining access (for example, seeking permission from the court for information that is under seal), as described below.

(U) In this memorandum, we first address the categories of information identified in the FBI's October 2011 Memorandum where, if requested in connection with an OIG criminal case, there are no restrictions on dissemination. We then address those categories of information identified in the FBI's October 2011 Memorandum where, even when the OIG is conducting a criminal case, the restrictions on dissemination may apply.

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II (U) Categories of Information Not Subject to Restriction on Dissemination where the OIG is Pursuing a Criminal Case

A. (U) Title III Information

(U) Section 2511(i)(e) of Title 18 generally prohibits a person from disclosing what that person knows to be material collected from a wiretap ("Title III information"). Section 2517(1), however, permits the disclosure of Title III information from "one investigative or law enforcement officer . . . to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure." 18 U.S.C. § 2517(1). Section 2517(2) allows for an investigative or law enforcement officer to make use of Title III information "to the extent such use is appropriate to the proper performance of his official duties." Therefore, where the OIG is pursuing a criminal case, there is no restriction on dissemination of Title III information from the FBI to the OIG.

B. (U) Federal Juvenile Court Records

(U) The Juvenile Delinquency Act, 18 U.S.C. § 5038(a)(3) states that "Throughout and upon the completion of the juvenile delinquency proceeding, the records shall be safeguarded from disclosure to unauthorized persons. The records shall be released to the extent necessary to meet the following circumstances: . . . (3) inquiries from law enforcement agencies where the request for information is related to the investigation of a crime or a position within that agency." (Emphasis added). Thus, the OIG may have access to such information as part of its criminal investigatory function to which the records are relevant.

C. (U) Bank Secrecy Act Information

(U) Information obtained pursuant to the Bank Secrecy Act (BSA) (31 U.S.C. § 5311 et. al.) from the Financial Criminal Enforcement Network (FINCEN) is prohibited from disclosure except in compliance with applicable memoranda of understanding between the FBI and FINCEN. However, FINCEN's Office of General Counsel's Office has stated to the FBI Office of General Counsel that such information may be shared with the OIG where the OIG is conducting a criminal case. Therefore, the FBI may provide information from FINCEN that is protected by the BSA to the OIG for its criminal cases.

D. (U) Source Identifying Information

(U) The Attorney General Guidelines Regarding the Use of FBI Confidential Human Sources ("AGG-CHS") generally prohibits the disclosure of "the identity of any Confidential Human Source or information that the source has provided that would have a tendency to identify the Source," though there are exceptions, one of which is applicable. Specifically, DOJ personnel may make appropriate disclosures to "other law enforcement, intelligence, immigration, diplomatic, and military officials who need to know the identity to perform their official duties, subject to prior approval of the FBI-SAC or his or her designee." Thus, pursuant to the AGG-

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CRS, if the OIG is acting in a law enforcement capacity and demonstrates a need to know, then the FBI may produce documents which identify or provide information which tends to identify a CRS to the OIG, subject to the approval of the FBI-SAC or his designee.

III. (U) Categories of Information that May be Subject to Restriction on Dissemination where the OIG is Pursuing a Criminal Case

A. (U) Grand Jury Information

(U) Rule 6(e) of the Federal Rules of Criminal Procedure generally prohibits government officials from disclosing information about any matter occurring before grand jury. The rule, however, contains some exceptions which may apply to the OIG's access in criminal cases.

i. (U) Disclosure to assist attorney in performing duty to enforce criminal law

(U) An individual otherwise restricted from disclosing grand jury information may provide such information to "any government personnel . . . that an attorney for the government considers necessary to assist in performing that attorney's duty to enforce federal criminal law." Fed. R. Crim. P. 6(e)(3)(a)(ii). This exception does not authorize the FBI to provide the OIG with all 6(e) information from FBI records whenever the OIG requests 6(e) information during the course of a criminal investigation. Rather, the OIG must seek appropriate authorization - either from the prosecutor assigned to the case in which the 6(e) information was obtained, or from the Attorney General as part of his general supervisory authority.<sup>1</sup> Disclosure based on this exception also requires court notification. See Fed. R. Crim. P. 6(e)(3)(B).

ii. (U) Disclosure to assist attorney in performing intelligence-related duties

(U) "An attorney for the government may disclose any grand-jury matter involving foreign intelligence, counterintelligence . . . or foreign intelligence information . . . to any federal law enforcement . . . official to assist that official receiving the information in the performance of that official's duties." Fed. R. Crim. P. 6(e)(3)(D). When the OIG seeks to avail itself of this exemption, the determination that the Grand Jury matter involves foreign intelligence or counterintelligence information must still be made by an attorney for the government. Disclosure based on this exception also requires court notification. See Fed. R. Crim. P. 6(e)(3)(d)(ii).

iii. (U) Disclosure with leave of court

(U) In addition to access granted by a government attorney, Rule 6(e) allows the court that empaneled the grand jury to authorize disclosure of grand jury material. "The court may authorize disclosure . . . preliminarily to or in connection with a judicial proceeding." Fed. R. Crim. P. 6(e)(3)(B). This exemption, too, would require the OIG to obtain such specific permission before the FBI would be authorized to release the information.

<sup>1</sup>(U) This position is consistent with oral guidance OLC provided to the FBI in April 2012. See Notes of Mtg. between FBI and OLC (Apr. 11, 2012) (Attachment C).

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**B. (U) Federal Tax Information**

(U) Section 6103 of the Internal Revenue Code, 26 U.S.C. § 6103, prohibits a federal employee from disseminating federal tax return or return information (FTI) obtained directly from the Internal Revenue Service (IRS), or from another agency that originally received the information from the IRS, except in limited circumstances. One permissible circumstance is that FBI employees may share such tax information with other "officers and employees of any Federal agency who are personally and directly engaged in" an investigation directly relating to tax liability. See 26 U.S.C. § 6103(h)(2). Standing alone, the fact that the OIG is conducting a criminal investigation is not sufficient to permit the FBI to categorically provide the OIG access to such tax information. In order to obtain the information, the OIG would need to establish that the OIG employees receiving the information are personally and directly engaged in the investigation for which the records were initially and appropriately obtained. This information is also subject to strict handling controls, so it can easily be identified and is, generally speaking, already segregated from non-FTI material.

**C. (U) Individual-Capacity Attorney-Client Information**

(U) Most often FBI attorneys' attorney-client relationship and corresponding privilege runs on behalf of the organization. We understand that sharing such "official-capacity" attorney-client information with the DOJ OIG does not constitute a waiver of attorney-client privilege. Such information is therefore not restricted from dissemination to the OIG for its criminal cases (though the OIG is restricted from disclosing the information outside the Department of Justice without prior consultation).

(U) In some cases, however, such as when an individual FBI employee is sued for official actions, an FBI attorney's attorney-client relationship and corresponding privilege does extend to an individual FBI employee. Such "individual capacity" attorney-client information is subject to the standards set forth in 28 C.F.R. §§50.15 and 50.16 and 28 U.S.C. § 517. The attorney and the employee enter into a "traditional attorney-client relationship" and the information relating to the representation is covered by attorney-client confidentiality rules. See, generally, Individual Capacity Representation of Federal Employees in Civil and Criminal Proceedings: Process, Procedures, Ethical Considerations and Professional Responsibility Concerns, Constitutional & Specialized Torts Staff, Civil Division, Torts Branch (July 2010) at page 4 (hereinafter "Individual Capacity Manual"). The information subject to the privilege includes communications between the attorney and the employee, as well as "confidential information about a client from any source." See Individual Capacity Manual at 34.

(U) The scope of the protection for individual-capacity attorney-client information is broad. The attorney-client relationship commences with the request for representation and applies to communications made for the purpose of securing representation. *Id.* at 30. The obligation to safeguard privileged or other confidential client information remains "in perpetuity" and the information must therefore be protected not only while the case is active but also after its disposition. *Id.* at 35. Because these protections exist whether the OIG is conducting a criminal

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or non-criminal investigation, where the OIG requests information from the FBI relating to a matter in which an FBI attorney has handled a request for individual representation or has represented an individual in his or her individual capacity, the FBI attorney handling the matter must be consulted and all individual capacity attorney-client privileged information must be withheld.

**D. (U) Child Victim or Child Witness Information**

(U) The release of information concerning the identities of child victims or child witnesses is restricted by the *Child Victim and Witness Information Act*, 18 U.S.C. § 3509. Government employees may only disclose documents containing information about a child victim or witness as described in the statute to individuals who have a need to know such information "by reason of their participation in the proceeding" in which the documents arise, 18 U.S.C. § 3509(d)(1)(A)(ii). Therefore, release to the OIG should be limited to those who have a need to know the information in the performance of official duties related to the particular investigation or prosecution in which the child is a victim or witness. Alternatively, the relevant court may order disclosure if "disclosure is necessary to the welfare and well-being of the child." 18 U.S.C. § 3509(d)(4). Accordingly, the OIG is not entitled to access such information simply because the OIG is investigating a different criminal matter. The FBI may only provide such information to the OIG for its criminal cases where the OIG employees to whom such information would be released meet the statutory requirement for access or have obtained a court order permitting disclosure.

**E. (U) Patient Medical Information**

(U) Executive Order 13181 restricts the derivative use of protected health information obtained from the provider by all federal agencies including federal law enforcement personnel. Executive Order 13181 provides that "law enforcement may not use protected health information concerning an individual that is discovered during the course of health care oversight activities for unrelated civil, administrative, or criminal investigations of non-health care oversight matters." The Deputy Attorney General (DAG) must approve any use of such information to pursue a non-health care-oversight investigation. See EO 13181 § 3(b). The DAG may only grant such approval if disclosure is in the interest of the public and would outweigh the potential injury to the patient. *Id.* Accordingly, the FBI may provide such information to the OIG for its criminal cases after the DAG has approved the disclosure.

(U) Information obtained by patient consent, court order or subpoena, has certain limitations regarding the purpose for which the information will be used. Title 18 U.S.C. § 3486(e)(2) provides that "[h]ealth information about an individual that is disclosed under this section may not be used in, or disclosed to any person for use in, any administrative, civil, or criminal action or investigation directed against the individual who is the subject of the information unless the action or investigation arises out of and is directly related to receipt of health care or payment for health care or action involving a fraudulent claim related to health . . ." In addition, health records obtained pursuant to a court order for oversight purposes can be used against that patient upon a finding by the court of "good cause" such that the need for disclosure outweighs the potential for injury to the patient and the doctor-patient relationship. Thus, where the OIG seeks

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information for use in criminal cases that are directly related to receipt of health care or payment for health care, or action involving a fraudulent claim related to health, the FBI may provide the information. Otherwise, the OIG may obtain permission from the court to use the information in its criminal cases.

(U) As discussed at more length in our October 5, 2011 Memorandum to ODAG (Attachment A), psychotherapy notes and substance abuse patient medical records also have very stringent protections on confidentiality. *See also* 42 C.F.R. §§ 2.1, 2.13, 2.32 and 42 C.F.R. Chapter 1, subchapter A, Part 2; 45 C.F.R. 164.508(2). In some instances, however, such information may also be disclosed pursuant to a court order for OIG criminal cases. *See e.g.* 42 C.F.R. § 2.1(b)(2)(C).

(U) In sum, if the OIG requests materials for its criminal cases that contain individually identifiable patient medical information, the disclosure of such information must comport with these statutory restrictions.

F. (U) Credit Information Obtained for Counterintelligence Purposes

(U) Under the *Fair Credit Reporting Act* (FCRA), the FBI may obtain names of financial institutions with which the consumer maintains or has maintained an account or consumer identifying information for counterintelligence purposes. *See* 15 U.S.C. § 1681u(a) & (b). The FBI, however, "may not disseminate information obtained pursuant to this section outside of the Federal Bureau of Investigation, except to other Federal agencies as may be necessary for the approval or conduct of a foreign counterintelligence investigation, or, where the information concerns a person subject to the Uniform Code of Military Justice, to appropriate investigative authorities within the military department concerned as may be necessary for the conduct of a joint foreign counterintelligence investigation." 15 U.S.C. § 1681u(f). Where the Deputy Attorney General determines that OIG access in a particular case is necessary for the approval or conduct of a foreign counterintelligence investigation, the FBI may provide such access. We are aware of at least one instance where ODAG made such a determination with respect to a non-criminal OIG matter (See Ltr. From DAG Cole to Acting IG Schnedar (undated) at Attachment D). Thus, in an OIG criminal investigation the OIG may seek access to such information from ODAG if the statutorily required basis can be sustained.

G. (U) FISA Information





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i. (U) FISA-acquired electronic surveillance and physical search provisions



ii. (U) FISA-acquired tangible things of a United States Person

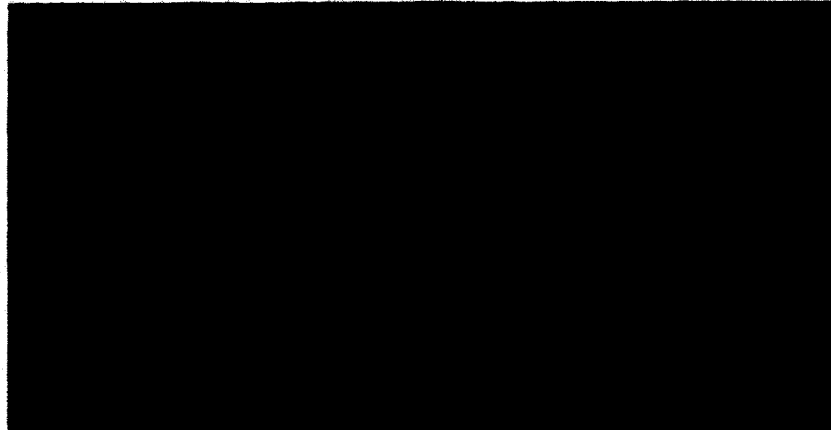


iii. (U) Intelligence Community Information



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<sup>4</sup> (U) While the order's definition of "agency" may be broad enough to encompass the entirety of the Department of Justice (DOJ), see E.O. 13526 § 6.1(b), such a reading in the context of Section 4.1(f) would mean that, whenever the FBI receives classified intelligence information from another U.S. government agency, the information would effectively be deemed to have been "made available" to every component of DOJ, to include the OIG, the Bureau of Prisons, the U.S. Marshal's Service, and the Bureau of Alcohol, Tobacco, Firearms, and Explosives, among others. Such a presumption does not comport with the ordinary expectations within the government's intelligence information-sharing environment.

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**I (U) Foreign Government or International Organization Information**

**J (U) Information Subject to Memoranda of Understanding or Non-Disclosure**

(U) The FBI often obtains information or access to databases through Memoranda of Understanding (MOU) or non-disclosure agreements (NDA) with other federal, state, or local agencies, from foreign governments, and from private parties. These MOUs or NDAs may, depending on their terms, impose restrictions on the FBI sharing information with entities outside the FBI, including the OIG. If such information was provided to the FBI in a manner that precludes dissemination to the OIG for its criminal cases, the FBI could work with the entity that provided the information to the FBI to reach agreement on providing the information to the OIG. In addition, going forward, the FBI can include in its MOUs explicit language permitting sharing with the DOJ OIG.

**K (U) Information Restricted by Court Order**

(U) The FBI occasionally comes into possession of information that is subject to a court order restricting dissemination to certain individuals or entities. The terms of the court order may not permit FBI dissemination to the OIG for a criminal investigation without prior authorization. In such a case, the FBI could request that the court grant access to the OIG for use in a criminal investigation.

**III (U) Conclusion**

(U) Even when the OIG is exercising its criminal investigative authority (rather than pursuing an administrative misconduct investigation, audit, inspection, or program review) some legal restrictions limit the FBI's ability to release information to the OIG. In most instances, however, the FBI can produce the restricted information to the OIG for use in its criminal cases after the FBI or the OIG have followed the appropriate process for obtaining access. We look forward to working with your office to put into place procedures that will provide timely and complete OIG

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access to FBI information for all OIG matters, while maintaining appropriate controls to ensure compliance with legal restrictions on dissemination for certain categories of information, as described above.

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May 12, 2014

The Honorable Harry Reid  
Majority Leader

The Honorable Mitch McConnell  
Minority Leader

United States Senate  
Washington, DC 20510

**Re: Federal Criminal Sentencing Reform**

Dear Majority Leader Reid and Minority Leader McConnell:

As former government officials who served in the war on drugs, we care deeply about our nation's system of justice. During our tenure, we labored to see that justice was well served, the guilty punished and the innocent protected. We recognize the ongoing need to continue to improve how the nation deals with crime.

Significant components of our statutory framework for sentencing lie at the heart of our nation's success in confronting crime. Collectively, these sentencing measures have helped substantially to reduce crime throughout our nation over the past thirty years. A series of laws, beginning with the Sentencing Reform Act of 1984, have dramatically lessened the financial and human toll of crime on Americans. Critical to these laws has been the role of mandatory minimum sentencing and the exercise by Congress of its Constitutional prerogative to establish the minimum of years of detention served by a federal offender. While federal judges are properly entrusted with great discretion, strong mandatory minimums are needed to insure both that there is a degree of consistency from judge to judge, and that differing judicial ideologies and temperaments do not produce excessively lenient sentences. In addition, and of central importance, prosecutors use strong mandatory minimums, along with safety-valves built into the current system, to induce cooperation from so-called "smaller fish," to build cases against kingpins and leaders of criminal organizations.

Because the Senate is now considering revisiting the subject of mandatory minimum penalties for federal drug trafficking offenses, we take this opportunity to express our personal concerns over pending legislative proposals. We are concerned specifically by proposals that would slash current mandatory minimum penalties over federal drug trafficking offenses -- by as much as fifty percent. We are deeply concerned about the impact of sentencing reductions of this magnitude on public safety. We believe the American people will be ill-served by the significant reduction of sentences for federal drug trafficking crimes that involve the sale and distribution of dangerous drugs like heroin, methamphetamines and PCP. We are aware of little public support for lowering the minimum required sentences for these extremely dangerous and sometimes lethal drugs. In addition, we fear that lowering the minimums will make it harder for prosecutors to build cases against the leaders of narcotics organizations and gangs -- leaders who often direct violent and socially destructive organizations that harm people throughout the United States.

Many of us once served on the front lines of justice. We have witnessed the focus of federal law enforcement upon drug trafficking - not drug possession offenses - and the value of mandatory minimum sentences aimed at drug trafficking offenses.

Existing law already provides escape hatches for deserving defendants facing a mandatory minimum sentence. Often, they can plea bargain their way to a lesser charge; such bargaining is overwhelmingly the way federal cases are resolved. Even if convicted under a mandatory minimum charge, however, the judge on his own can sidestep the sentence if the defendant has a minor criminal

history, has not engaged in violence, was not a big-time player, and cooperates with federal authorities. This "safety valve," as it's known, has been in the law for almost 20 years. Prosecutors correctly regard this as an essential tool in encouraging cooperation and, thus, breaking down drug conspiracies, large criminal organizations and violent gangs.

We believe our current sentencing regimen strikes the right balance between Congressional direction in the establishment of sentencing levels, due regard for appropriate judicial direction, and the preservation of public safety. We have made great gains in reducing crime. Our current sentencing framework has kept us safe and should be preserved.

Sincerely yours,

William P. Barr  
Former United States Attorney General

Michael B. Mukasey  
Former United States Attorney General

Samuel K. Skinner  
Former White House Chief of Staff and Former United States Attorney, Northern District of Illinois

William Bennett  
Former Director of the White House Office of National Drug Control Policy

John P. Walters  
Former Director of the White House Office of National Drug Control Policy

Mark Filip  
Former United States Deputy Attorney General

Paul J. McNulty  
Former United States Deputy Attorney General and Former United States Attorney, Eastern District of Virginia

George J. Terwilliger III  
Former United States Deputy Attorney General and Former United States Attorney, District of Vermont

Larry D. Thompson  
Former United States Deputy Attorney General and Former United States Attorney, Northern District of Georgia

Peter Bensinger  
Former Administrator, Drug Enforcement Administration

Jack Lawn  
Former Administrator, Drug Enforcement Administration

Karen Tandy  
Former Administrator, Drug Enforcement Administration

Greg Brower  
Former United States Attorney, District of Nevada

A. Bates Butler III  
Former United States Attorney, District of Arizona

Richard Cullen  
Former United States Attorney, Eastern District, Virginia

James R. "Russ" Dedrick, Former United States Attorney, Eastern District, Tennessee and Eastern District, North Carolina

Troy A. Eid  
Former United States Attorney, District of Colorado

Gregory J. Fouratt  
Former United States Attorney, District of New Mexico

John W. Gill, Jr.  
Former United States Attorney, Eastern District, Tennessee

John F. Hoehner  
Former United States Attorney, Northern District, Indiana

Tim Johnson  
Former United States Attorney, Southern District, Texas

Gregory G. Lockhart  
Former United States Attorney, Southern District, Ohio

Alice H. Martin  
Former United States Attorney, Northern District, Alabama

James A. McDevitt  
Former United States Attorney, Eastern District of Washington

Patrick Molloy  
Former United States Attorney, Eastern District, Kentucky

A. John Pappalardo  
Former United States Attorney, Massachusetts

Wayne A. Rich, Jr.  
Former United States Attorney, Southern District, West Virginia

Kenneth W. Sukhia  
Former United States Attorney, Northern District of Florida

Ronald Woods  
Former United States Attorney, Southern District, Texas