

**Exhibit 20**  
**(part 1)**  
**to the Declaration of Colin Wicker**

**JA718**

CQ CONGRESSIONAL TRANSCRIPTS  
Congressional Hearings  
June 7, 2012 - Final

## House Judiciary Committee Holds Hearing on Oversight of the Justice Department

### LIST OF PANEL MEMBERS AND WITNESSES

SMITH:

The Judiciary Committee will come to order. Without objection the chairman's authorized to declare recess of the committee at any time. I'll recognize myself and then the ranking member for an opening statement.

Welcome, Attorney General Holder to today's oversight hearing of the Department of Justice. Regrettably the Obama administration has shown a disregard for the Constitution and rule of law in effort to impose their agenda on the American people. And there are many examples.

Efforts to block congressional inquiries about the administration's actions undermine the balance of power on which our nation is founded. The Department of Justice still has not provided enough information about Operation Fast and Furious so that the American public and Congress can judge who in the department bears responsibility for the decisions that led to Agent Brian Terry's death. The Justice Department refuses to comply with congressional subpoenas that may shed light on why this program was authorized, and who had knowledge of the inappropriate tactics.

The Department of Justice also has failed to provide relevant information that would have revealed the extent of Justice Kagan's involvement in the development of the Affordable Care Act when she was solicitor general. If she did give counsel on the health care bill, which was her job, then she should recuse herself, rather than evaluating the law as a member of the Supreme Court. The Justice Department has refused to let us interview her former assistants.

Neglecting to enforce or defend the laws enacted by Congress is another violation of the administration's constitutional obligation to the American people. Under this president the Justice Department has engaged in a pattern of selective enforcement of the law in order to advance its own partisan agenda. For instance, the Obama administration has sought to prevent state and local authorities from enforcing immigration laws.

At the same time, the Justice Department has refused to bring cases against sanctuary cities that violate federal law by prohibiting their officials from communicating with the Department of Homeland Security about illegal immigrants they encounter. Such sanctuary cities directly challenge the federal government's authority to enforce immigration laws. The administration's unwillingness to uphold immigration laws has led to injuries an even death.

The administration refuses to defend the Defense of Marriage Act, a law enacted by Congress and signed by then President Bill Clinton. This was a significant piece of legislation that was approved by a vote of 342-67 in the House, and 85-14 in the Senate. Regardless of how one feels about the substance of the bill, the Department of Justice has an obligation to defend the laws of the land.

Efforts by the administration to override election laws enacted by states also raise constitutional concern. Instead of acting to prevent voter fraud, the Department of Justice has challenged common sense voter ID laws that require voters to identify themselves before they are allowed to vote.

The Department of Justice recently moved to block implementation of voter ID laws enacted by legislatures in Texas and South Carolina. The Texas proposal was based on a similar law passed by the Indiana legislature, which was upheld by the Supreme Court in 2008. The Justice Department's challenge to the law ignores Supreme Court precedent that affirms a state's right to enact laws to protect the integrity of its elections.

The Department of Justice even threatened to sue Florida for trying to remove ineligible non-citizens from its voter roll. Why would the Department of Justice not want states to remove ineligible felons, ineligible non-citizens and the dead from their voter rolls?

**JA719**

The administration's actions aren't just wrong. They are arrogant, undemocratic, and an insult to the rule of law. The administration's disregard for the Constitution and rule of law not only undermines our democracy, it threatens our national security.

The Justice Department has not taken the initiative to prosecute leaks of national security secrets. Recent leaks about a foiled bomb plot out of Yemen, and a cyber-attack against Iran are, in the words of Senate Intelligence Chairwoman Diane Feinstein, "very detrimental, very concerning and hurt our country."

For the past three and a half years this administration has engaged in a pattern of obstructionism, unaccountability and partisanship. The American people should have confidence that the Department of Justice fairly enforces laws. That confidence is lacking today. This hearing looks for how that confidence can be restored.

That concludes my opening statement. And the gentleman from Michigan, the ranking member of the Judiciary Committee is recognized for his.

CONYERS:

Thank you, Chairman Smith.

And welcome, Attorney General Holder.

The opening statement is to -- an opportunity for both of us here to set the tone for this hearing. But never in the career of Chairman Smith as the chair of this committee have I heard so many erroneous statements. And having never heard them before, I can assure him and you that I will be going over his statements and help him arrive at a more factual and impartial conclusion.

Now, having said that, we welcome you once again to the House Judiciary Committee. This, by my account, is the eighth time this Congress that the attorney general has made himself available for questioning. And this level of access is extraordinary, particularly when we compare your record to that of your immediate predecessors.

Now, with respect to the continuing investigation into Operation Fast and Furious, I want to thank you for your patience and diligence. To date the Department of Justice has provided over 7,600 pages of documents to the Congress. You made additional law enforcement sensitive materials available to us, and dozens of briefings. You've permitted us to question senior department officials in hearing and in transcribed interviews. And you yourself have appeared before this committee once every six months since the controversy became public.

I hope that the tone of today's discussion reflects the many courtesies that you and the Department of Justice have shown us in the past months. And I also want to commend you and the Department of Justice on a series of important accomplishments in the field of civil rights and voting rights, a couple of issues that I've paid special attention since I first became a member of the House Judiciary Committee.

Enforcing Section 5 of the Voting Rights Act, the department has aggressively enforced Section 5, which ensures that states with a history of discrimination can't create additional barriers to minority access to the ballot box. The department has already blocked discriminatory voter ID laws in Texas and South Carolina. And I would encourage you to look at other similar troubling laws taking effect across the country.

CONYERS:

Stopping illegal purges of the voting rolls; last week the voting section wrote to the state of Florida demanding that they cease and desist from purging voters from the rolls. The practice was not submitted to the department under Section 5, and would not have been approved if it had been.

Protecting the rights of members of the armed service in terms of their voting, the department has secured court orders and consent decrees in 14 jurisdictions to better enforce the Military and Overseas Voter Empowerment Act, MOVE.

Restoring the integrity of the civil rights division, after the Office of the Inspector General and the Office of Professional Responsibility completed their review of illegal partisan and hiring -- partisan hiring practices under another administration, their final report included recommendations for improved transparent hiring process at the civil rights division itself.

And under the leadership of Assistant Attorney General Tom Perez, the division has fully adopted each of those recommendations and is now predominantly staffed by a attorneys with actual

**JA720**

experience in the field of civil rights law.

Enforcing the Fair Housing Act and the Equal Credit Opportunity Act, the department's \$335 million settlement with Countrywide Financial last December compensated families who were charged higher fees and interest rates because of their race or national origin.

This enforcement action makes clear the department will not hesitate to hold financial institutions accountable for lending discrimination.

There are of course areas, which we hope the department will improve but today, four years after the worst economic upheaval since the Great Depression, we are still looking to hold some of those Wall Street barons accountable.

And according to one -- well, let me conclude. My time has ended and I thank the chairman. And yet, what we want to do here today is have a thorough and fair discussion.

And I'm going to ask that the -- our colleagues on this committee conduct themselves in a manner that is worthy of the attorney general's present appearance here.

I thank the chair. I yield back the balance of my time.

SMITH:

Thank you, Mr. Conyers.

Our only witness today is United States Attorney General Eric H. Holder, Jr.

On February 3, 2009 Attorney General Holder was sworn in as the 82nd attorney general of the United States. Attorney General Holder has enjoyed a long career in both the public and private sectors.

First joining the Department of Justice through the Attorney General's Honors Program in 1976, he became one of the department's first attorneys to serve in the newly formed public integrity section.

He went on to serve as a judge of the superior court of the District of Columbia and the U.S. attorney for the District of Columbia.

In 1997 Mr. Holder was named by President Clinton to be the deputy attorney general. Prior to becoming attorney general, Mr. Holder was a litigation partner at Covington & Burling, LLP, in Washington, D.C.

Mr. Holder, a native of New York City, is a graduate of Columbia University and Columbia Law School.

Mr. Holder, we appreciate your presence today, look forward to your testimony and please begin.

HOLDER:

Well, good morning, Chairman Smith, Ranking Member Conyers, and distinguished members of this committee.

I appreciate the chance to discuss some of the key accomplishments that have distinguished the department's work throughout this administration and to outline our plans to build upon this particular record of achievement.

In particular I'm proud of the work that's been done by the department's 116,000 employees as well as our government and law enforcement partners worldwide to help fulfill the promises that I made before this very same committee about three years ago.

Shortly after I became attorney general, I pledged to strengthen the department's efforts to protect the American people from terrorism and other national security threats, to ensure that every decision and every investigation and every prosecution would be guided by the facts and by the law and by nothing else.

I also reaffirmed my commitment to move aggressively to prevent and to combat violent crime and financial fraud, to seek justice for victims, to protect the most vulnerable among us, to safeguard the environment and to uphold the civil rights of all of our citizens.

**JA721**

In each of these areas the department has made tremendous and I think in many cases historic progress. Nowhere is this more evident than in our national security efforts.

In the last three years the department has secured convictions against scores of dangerous terrorists that we've identified and we have stopped multiple plots by foreign terrorist groups as well as homegrown extremists.

And we have strengthened essential surveillance and intelligence gathering capabilities in a manner that is consistent with the rule of law and our most treasured values.

Just last month we secured our seventh conviction in our Article III civilian courts in one of the most serious terrorism cases -- cases that our nation has faced since 9/11, an Al Qaida sponsored plot to conduct coordinated suicide bomb attacks in the New York City subway system.

And roughly two weeks ago we obtained a guilty verdict in the case of a former member of the U.S. Army who intended to bomb U.S. soldiers in a restaurant in Killeen, Texas.

On the same day another Texas man was sentenced to 20 years in prison for attempting to become a part of Al Qaida in the Arabian Peninsula.

Now, in addition to our national security successes, the department has made meaningful, measurable strides in protecting Americans from violent crime.

Through innovative programs such as our Defending Childhood Initiative and a national forum on youth violence prevention, we have developed comprehensive, collaborative approaches to addressing the causes and remedying the consequences of violence among and directed towards our nation's young people.

By forging and strengthening partnerships between our United States attorneys offices and federal, state, local, tribal and international law enforcement officials, we are combating gun, gang and drug fueled violence more effectively than ever before.

Alongside key law enforcement allies and our counterparts in Mexico and other countries, we have orchestrated a series of coordinated strikes against violent drug cartels, arresting thousands of cartel members and seizing billions of dollars in assets.

We're also implementing strategic, desperately needed plans to address the shocking rates of violence that plague American Indian and Alaska native women through tribal communities.

And we are using every resource and tool at our disposal, including the power of research and scientific analysis, to protect our nation's law enforcement community, which in recent years has seen an unfortunate and totally unacceptable rise in the line of duty deaths.

Now, many of you worked to raise awareness about the tragic fact that violence against law enforcement officers is approaching the highest level that we have seen in nearly two decades.

As attorney general and as the brother of a retired police officer, I'm proud that the department has responded to this recent crisis with resolve and with robust action.

Just last week I met with the Major City (sic) Chiefs Police Association at its summer meeting to discuss the ways that we have developed and implemented a host of important programs such as the landmark Valor Initiative, which is providing our law enforcement partners with the latest in training, tools and resources.

As well as the Bulletproof Vest Partnership Program, which has helped more than 13,000 jurisdictions purchase lifesaving bullet and stab resistant equipment in order to help -- to help protect those who risk their lives to keep us safe.

Put simply, our commitment to officer safety has never been stronger and as recent achievements prove, the same can be said of our resolve to protect American consumers.

Since the start of this administration, the justice department has signaled an unwavering commitment to preventing and combating a wide range of financial and health care fraud crimes.

We have taken bold steps to address the contributing factors and consequences of the recent economic crisis. And this work is paying dividends.

Last year alone the department's consumer protection branch, working with U.S. attorneys

**JA722**

offices across the country, attained a 95 percent conviction rate, secured more than \$900 million in criminal and civil fines, restitution and penalties and obtained sentences totaling more than 130 years of confinement against more than 30 individuals.

In cooperation with our partners at the Department of Housing and Urban Development and a bipartisan group of 49 state attorneys general, we achieved a \$25 billion settlement with five of the nation's top mortgage servicers, the largest joint federal/state settlement in the history of the United States of America.

Through the efforts of the president's Financial Fraud Enforcement Taskforce, which was launched in 2009, we've obtained prison sentences up to 60 years in a variety of fraud cases including multi-million dollar Ponzi schemes and the largest hedge fund insider trading case in the history of this country.

We have established two new working groups to enhance civil and criminal enforcement of consumer fraud meant to bring federal and state authorities together in investigating and prosecuting misconduct by financial institutions and the organization, securitization and servicing of mortgages that contributed to our financial crisis.

And we've continued to make tremendous gains in our work to combat health care fraud. In fact, over the last fiscal year, in cooperation with the Department of Health and Human Services and my partner Kathleen Sebelius and by utilizing authorities provided under the False Claims Act and other essential statutes, we have recovered nearly \$4.1 billion in cases involving fraud on federal health care programs.

That is the highest amount ever recorded in a single year. And for every dollar that we have spent combating health care fraud, we have returned on average \$7.00 to the U.S. Treasury, the Medicare trust fund and others.

The department has also taken crucial steps forward in protecting the most vulnerable members of our society and ensuring the civil rights of all of our citizens.

Over the past three years our civil rights division has filed more criminal civil rights cases than ever before, including record numbers of human trafficking cases in an effort to ensure that in our work places and our military bases, in our housing and lending markets, in our schools and places of worship, in our immigrant communities and in our voting booths, the rights of all Americans are protected.

In addition, we're working to strengthen the rule of law across both the country and -- and around the world and beyond our borders, establishing the global alliances necessary to combat transnational organized crime, as outlined in the president's strategy.

This includes combating intellectual and financial property crimes, child pornography rings, organized criminal networks and criminal facilitation of terrorist activities.

**HOLDER:**

And we've partnered effectively with members of Congress to advance important changes in policy and legislation, from landmark hate crimes legislation to the reduction of the unjust and unfair crack, powder cocaine sentencing disparity.

Now, this work goes on today in our efforts to help ensure the reauthorization of the Violence Against Women Act, a critical law that has transformed our nation's response to crimes against women, and enhanced our ability to achieve justice for victims while holding offenders accountable.

It goes on in our strong support for renewal of essential authority such as those included in the Foreign Intelligence Surveillance Act Amendment of 2008. And it endures in our determination to build upon the extraordinary accomplishments that have defined the past three years to take our fight against terrorism, crime, fraud and other threats to a new level.

I'm proud of these and the department's many other achievements. And I hope to spend most of our time today discussing how we are working to build on this progress. However, I'd like to briefly address the ongoing investigations into the ATF gun trafficking operations along the southwest border.

As a result of concerns raised by ATF agents, we now know of several Arizona based investigations that occurred under this administration and the previous one where inappropriate tactics were used in an attempt to stem the flow of illegal guns across the southwest border. Although the -- although these law enforcement operations were focused on laudable goal of dismantling illegal gun trafficking networks, they were flawed, both in concept and execution.

**JA723**

Now, I share your concerns about how these operations were developed and how they were implemented. And that's why just as congressional leaders have called for answers, I asked the department's inspector general to conduct a comprehensive investigation as well. I also put in place new leadership at ATF, which has taken steps, including the implementation of a stricter oversight procedure for all significant investigations to prohibit the flawed tactics employed in these operations.

Now, many of the key enhancements implemented by the department as set out under the deputy attorney general's letter to the committee that is dated January 27th of this year. Even since the date of that letter, however, we have continued to refine the Title III process. For example, our Office of Enforcement Operations now requires that before it even accepts a request for a wiretap intercept from a United States attorney's office, a supervisor in the relevant U.S. attorney's office must personally approve that request.

I would be remiss if I did not point out that the ATF agents who testified before Congress have also asked that law enforcement be provided with the tools that it needs to effectively combat gun trafficking on the southwest border. And I want to reiterate my commitment to working with congressional leaders to meet the needs of our law enforcement partners, and to help address serious national security challenges on our borders.

Finally, I want to make clear that we welcome the recent engagement of congressional leadership in the department's continued efforts to satisfy the legitimate role of congressional oversight, while at the same time preserving the integrity and the independence of the department's ongoing criminal investigations and prosecutions.

The leadership's recent letter represented I think a promising step towards reaching a resolution as it accomplished two things. First, it narrowed the universe of documents still in dispute between the Justice Department and the House Oversight Committee. Second, it identified the specific questions that remain of concern to leadership. We are confident that the constructive discussions that have occurred since this letter can result in a mutually acceptable resolution.

With all these efforts, I'm grateful for your continued support. And I would be happy to answer any questions that you might have. Thank you.

SMITH:

Thank you, Mr. Attorney General.

Let me remind members that the attorney general is with us until 1:30 this afternoon. And in order for all 40 members of the committee to be able to make comments and ask questions we're going to need to adhere strictly to the five-minute rule. And I'll recognize myself for questions.

Mr. Attorney General, the Foreign Intelligence Surveillance Act Amendment, which helped protect our country from terrorists, expired at the end of this year. Do you support the extension of those amendments?

HOLDER:

We do support them. It is the most important legislative concern of the intelligence community. And we hope that Congress will pass that reauthorization before the expiration at the end of the year.

SMITH:

OK. Now, let me go to Operation Fast and Furious. You mentioned in your testimony. Mr. Attorney General, who was the highest level official in this administration who knew that these tactics were being used? And I'm talking about knew the tactics were used before the death of Agent Brian Terry on December 15, 2010?

HOLDER:

Well, we know that the operation began in the field offices in Arizona, both in the U.S. Attorney's Office and in the ATF office there. The inspector general is in the process of examining the...

SMITH:

To your knowledge who was the highest ranking official in the administration who knew about the tactics?

HOLDER:

At this point I can say that it started in Arizona. And I'm not at all certain who beyond that can be

JA724

said to have been involved with regard to the use -- not that there was knowledge of it, but what the use of the tactics. I don't (inaudible)...

SMITH:

No one other than ATF officials in Arizona, you're saying, knew about the tactics used in Operations Fast and Furious before December 15, 2010. Is that right?

HOLDER:

I think that in terms of knowledge of the tactics, as opposed to the operation itself. I don't think that anybody in Washington knew about those tactics until the beginning of...

SMITH:

Speaking of those tactics, when were you first -- when were you first told or became knowledgeable about U.S. officials allowing firearms to be sold to the drug cartels in Mexico? And I'd like a specific day if you can give it to us.

HOLDER:

I don't have a specific date. I got a letter from Senator Grassley at the end of January of 2011. I think I became aware of the tactics themselves probably in February of 2011, as I've indicated in the seven previous times that I've testified.

SMITH:

OK. And it wasn't until that letter from Senator Grassley that you knew about the firearms being allowed to be transferred to the drug cartels in Mexico?

HOLDER:

No. It was not in the letter. The letter directed my attention to the area that ultimately led to my understanding about the tactics. But the letter itself did not mention Operation Fast and Furious.

SMITH:

OK. So, once again, when did you learn about the tactics that were being used?

HOLDER:

As I said, the early part of 2011.

SMITH:

OK. And that was immediately after -- or several weeks after the death of Brian Terry?

HOLDER:

That happened in December 2010.

SMITH:

OK. And is that the same date that you found out that these firearms that were connected to Fast and Furious were found at the murder scene of Brian Terry? Or did you find out about that before?

HOLDER:

I don't know when I found out about -- I don't remember when I found out about that particular fact. I would guess that would also be some time in the early part of 2011.

SMITH:

OK. Why was it, do you think, that individuals who work for you who were in this administration would not have made it known to you or others outside of Arizona that firearms that were allowed to be given to drug cartels in Mexico by U.S. officials, why did it take so long for you to learn or for others to tell you it was there? Was there a cover-up going on? Or what was -- what was the explanation for you in your position not knowing more about the tactics?

HOLDER:

Well, I think the answer's found in your question. No one knew about the tactics at the time of that initial discovery. It wasn't until the tactics were discovered that people started to understand that we had a problem here. But for those tactics, Fast and Furious was a midlevel, regional investigation that from all reports was going on pretty successfully.

SMITH:

But again, you didn't find out about those tactics until say six weeks or two months after the

JA725



death of Brian Terry. Is that correct?

HOLDER:

Sometime in February. I think Agent Terry was killed on December 10th or 14th I believe of December.

SMITH:

OK. When was anyone in the White House first informed about the tactics that were used under Operation Fast and Furious?

HOLDER:

I don't know.

SMITH:

Did you yourself not inform anyone in the White House about Operation Fast and Furious?

HOLDER:

I'm sure there was contact between staff and the Justice Department probably and the appropriate people in the White House about Fast and Furious. I don't remember ever myself sharing that information.

SMITH:

How would anyone in the White House have learned about it? And who would have learned about it under the normal chain of command?

HOLDER:

I'm sorry?

SMITH:

How would the -- when -- how would the White House have learned about Operation Fast and Furious if not from you?

HOLDER:

Well, through my staff and the interactions that we have with the White House counsel (inaudible)...

SMITH:

OK. So, when did your staff inform the White House about Operation Fast and Furious?

HOLDER:

I don't know.

SMITH:

Were you ever curious about that?

HOLDER:

Well, my focus was on dealing with the problems...

SMITH:

OK. Right.

HOLDER:

... associated with Fast and Furious...

SMITH:

It seems to me that you -- it seems to me that you would want to know -- what White House officials to know what was going on in order to correct the problem.

HOLDER:

My focus was on...

SMITH:

My time...

**JA726**

HOLDER:

... those tactics and trying to solve the problem, and not awfully concerned about what the knowledge was in the White House. That was my responsibility.

SMITH:

I understand. But I still think the White House would have been informed. Thank you, Mr. Holder.

The gentleman from Michigan, Mr. Conyers, the ranking member, is recognized for his questions.

CONYERS:

Thank you, Chairman Smith.

Attorney General Holder, would you pull your mike up just a little bit closer, please?

You've made reference to the ATF's Multiple Sales Reporting program for certain types of rifles in states along the southwest border. This rule is intended to get at the real problem of gun violence on the border of Mexico. In your view has the program been effective? Have we been stopping guns and saving lives?

HOLDER:

Yes. The rule simply says that for the multiple sale of certain kinds of weapons, including AK-47s, if somebody buys more than one over the space of five days in four border states, that that information has to be reported to the ATF.

That has led to actionable leads. It is a very measured, responsible regulation that has been upheld by a court that has considered it and said that it is appropriate. And it is also totally consistent with what we do right now and have for the last 30 years with regard to the sale of multiple handguns.

CONYERS:

Yes. And by the way, I think we repealed the assault weapon ban. And that's led to a proliferation of weapons that I think we need to take another look at here in our legislature.

Let's talk about the Mortgage Fraud Task Force of the president and how it's coming along. You know the effect this has had in our economy and on foreclosures and in families from one end of the country to the other. How's your staffing and resources picture in this context?

HOLDER:

Well, I think we're doing pretty well. We have about I think 100 people or so who are presently involved in that task force. Subpoenas have been sent out. Investigations are under way. We're working I think very effectively with a number of U.S. attorneys, as well as our partners on the state side.

I think principally the attorney general from New York, Eric Schneiderman, as well as other state attorneys general. So I think the progress that we're making there is very good.

CONYERS:

Thank you. In 2009 you created a working group to review the department's profiling guidance that came out in 2003 under then Attorney General Ashcroft. In April of this year, 64 member of Congress wrote to urge you to revise that guidance. What's the status of the working group? And are there going to be changes to the guidance?

And if you can, what would some of those changes be?

HOLDER:

Well, we're in the process of looking at that earlier policy and seeing if, in light of experience, there are changes that need to be made. I had a meeting concerning this issue, I think, over the last two weeks. It would be my expectation that, to the extent that changes are to be made, that those would happen relatively soon.

We have an interagency -- well, certainly working within the Justice Department, and I suspect we'll have to have an interagency group because there are a number of agencies whose equities are implemented by the prospective change. But it is something that we continue to look at and something in which I've been personally involved over the last two to three weeks.

CONYERS:

**JA727**

And what's the -- what was the goal of the so-called profiling guidance?

HOLDER:

Well, to try to make sure that we did not hamper law enforcement but, at the same time, that we had in place rules, regulations, guidance to those in law enforcement that did not -- so that we did not engage in racial profiling, which is simply bad law enforcement.

If one looks at Al Qaida, they understand that, if we engage in profiling, they will be more successful. They look for -- and this has been reported -- people, as they call them, with clean skins, people who do not fit a particular profile. Those are the ones they are trying to send to harm this nation, and that is why profiling, certainly in a national security context, as well as, I would say, with regard to domestic law enforcement, is such a bad idea.

CONYERS:

Let me squeeze in my last question. Can you talk a little bit about the charges of selective enforcement of immigration law? I don't know if you've heard of any of those kinds of complaints, but can you respond to that for me, please?

HOLDER:

Selective immigration...

CONYERS:

Selective enforcement of immigration law.

HOLDER:

By the federal government, or...

CONYERS:

The Arizona law and the -- and other...

HOLDER:

The states?

CONYERS:

State -- at the state level.

HOLDER:

I see. Well...

CONYERS:

If I could finish this question, Mr. Chairman?

SMITH:

Please. Answer the question.

HOLDER:

We have filed suit against immigration laws that have been passed by a variety of states. The Supreme Court has obviously heard argument in connection with the Arizona law. The concern that we have is that this is a -- this is inherently a federal responsibility and that, if we allow these state laws to proliferate, we'll have a patchwork of laws that will make ultimate enforcement of our immigration laws impossible.

Having said that, I understand the frustration that many states feel. And I think it points out the need for a comprehensive solution to this problem.

CONYERS:

Thank you very much.

SMITH:

Thank you, Mr. Conyers.

The gentleman from Wisconsin, Mr. Sensenbrenner, is recognized for his questions.

SENSENBRENNER:

**JA728**

Thank you very much, Mr. Chairman.

Mr. Attorney General, I do want to echo Mr. Conyers' commendation of you for coming before us on a very regular basis. I know it takes a lot of your time to prepare. I also know that you don't know what's going to get thrown at you, and sometimes there will be curveballs and beanballs. I hope mine is a curveball.

I want to talk a little bit about the Florida voter registration case. And it appeared in the New York Times yesterday. There was an article there about the state defending its search for ineligible voters, and Secretary of State Ken Detzner of Florida has sent a letter to Mr. Herren of the Voting Section of the Civil Rights Division, talking about the problem.

And the problem is simply this. And that is, Florida is trying to purge its voter registration rolls of noncitizens, including illegal immigrants, people who are clearly not eligible to vote. And the Department of Homeland Security has had a nine-month delay in giving the national voter registration laws to the state. Now Mr. Herren appears to be taking the position that Florida can't do anything after the federal government has delayed giving Florida the information that it needs to do.

What can be done to solve this problem?

HOLDER:

Well, the problem with the Florida effort is that it runs counter to the national Voter Registration Act, which says you can't do this within 90 days of an election. You can successful do that which is Florida is trying to do, as has been done and has been approved by the Justice Department in North Carolina and Georgia. They did it via the right way.

You -- the database that I think is -- Florida is requesting is not necessarily the answer to these problems. That database, as I understand, which is a DHS database, does not contain on its rolls or within that database people who were born in the United States. That database will therefore be flawed and could result in the exclusion of people from voting who are native-born Americans.

SENSENBRENNER:

Well, the state of Florida has attempted to obtain this database for nine months so that it can do its thing prior to the 90-day shutoff in the national voter registration law.

And I have a copy of the letter from Secretary of State Detzner that talks about the due process protections, such as a notification by certified mail return received, 30 days to respond, hearing if requested if the mail notice is returned as undeliverable, that the names and addresses appear in a newspaper of general circulation, and an additional 30 days -- at the conclusion of the notice and hearing process, the registrar is supposed to make a final determination based upon the preponderance of evidence and allow for an appeal for any determination of ineligibility to a state circuit court.

Now, you know, this is probably due process times three or four or maybe even five times. And, you know, I'd like to know what rights to noncitizens and particularly illegal immigrants, you know, have to the protection of the Voting Rights Act and the national Voter Registration Act?

HOLDER:

They have no rights. And I stand with any state official, federal official, who wants to make sure that our voting system is -- is done in an appropriate way and that people who are not allowed to vote in fact do not vote. But as a result of the way in which Florida has carried this out, I saw a report that a -- an election official in southern Florida indicated that about 450 people on the list that -- I believe it was a woman -- that she got were indicated to be people who were not eligible to vote who in fact were eligible to vote. And I think that points out the problem in the process that...

(CROSSTALK)

HOLDER:

... is engaged in.

SENSENBRENNER:

Well, you know, with all due respect, Mr. Attorney General, there is a problem. And any ineligible voter or fraudulent voter who has a ballot placed in the same ballot box as hundreds of legitimate voters ends up diluting the votes of the legitimate voters. And the federal law is very clear on that.

JA729

And, you know, here the Department of Homeland Security hasn't given Florida the means to start the process out. And with all of these protections that I have just -- just listed. And it seems to me that, if your job is to uphold the law, you know the law sets out a process to give the states time to do this, but we have another agency of the government that you're supposed to be advising as attorney general that has prevented the state of Florida from doing this.

HOLDER:

Well, I would say I respectfully disagree. And I'd point to, as I said, other states that have -- I don't know all of the ways in which they did it, but who successfully have implemented a policy that I would agree with. I don't think we should have people who don't have the ability, who don't have the right to vote casting votes in our nation. North Carolina, Georgia did it...

SENSENBRENNER:

Well, please help Florida to do it because apparently there's been a roadblock here in Washington. And my time is up.

SMITH:

Thank you, Mr. Sensenbrenner.

The gentleman from New York, Mr. Nadler, is recognized.

NADLER:

Thank you, Mr. Chairman.

Mr. Attorney General, we have made several requests to you to allow us to review the Office of Legal Counsel memo that reportedly provides the legal justification for the lethal targeting of U.S. citizens who are terror suspects. The department has sought to (inaudible) cases seeking judicial review of lethal targeting by arguing, among other things, that the appropriate check on executive branch conduct here is the Congress and that information is being shared with Congress to make that check a meaningful one.

Yet we have yet to get any response to our requests. Will you commit to providing that memo to us and to providing a briefing?

HOLDER:

Well, we certainly want to provide information to the extent that we can with regard to the process that we use in selecting targets. I gave a speech at Northwestern University. Mr. Brennan gave a speech here. I believe...

NADLER:

Excuse me. Will you commit to providing a copy of the briefing -- a copy of the -- of the legal memo from OLC?

HOLDER:

We will certainly look at that request and try to determine whether...

NADLER:

And a briefing to the members of this committee?

HOLDER:

And we'll certainly consider the possibility of a briefing.

NADLER:

The possibility? You won't commit to giving a briefing to this committee?

HOLDER:

I think that we are probably going to be in a position to provide a briefing, but I would like to hear from the involved people in the intelligence community, as well as people at OLC, about how we might structure such...

NADLER:

And you'll you get back to us on that within, let's say, a month?

HOLDER:

We can do that.

JA730

NADLER:

Thank you.

When running for president and talking about medical marijuana being legally used around the country in certain jurisdictions, President Obama said the following, quote, "I'm not going to be using Justice Department resources to try to circumvent state laws on this issue," close quote.

Apparently, the department has not followed the president's admonition. Since 2009 DOJ has conducted around 200 raids on medical marijuana dispensaries and growers and brought more than 60 indictments. It's my understanding that the department has a more aggressive record on prosecuting these cases in this administration than under the previous administration.

The president clearly did not want to prioritize prosecutions involving medical marijuana, and while I understand selling and possessing marijuana remains against federal law, the citizens of 17 states and the District of Columbia believe its medical use should be legal.

Given these facts, why has DOJ focused so extensively on investigating and punishing those who legally grow and sell marijuana legally under local law, contrary to apparently what the -- contrary to the apparent intent of what the president said on the subject?

HOLDER:

This is inconsistent with these little things called the facts. The Justice Department indicated in a memo that went out by the deputy -- then deputy attorney general that we were not going to use the limited resources that we have to go after people who are acting in conformity with state law, people who had serious illnesses, people who were acting, as I said, consistent with state law.

But one has to deal with the reality that there are certain people who took advantage of these state laws and a different policy that this administration announced than the previous administration had, and have come up with ways in which they are taking advantage of these state laws and going beyond that which the states have authorized.

Those are the only cases that...

NADLER:

So you're saying that the -- you're not targeting people who are growing and distributing marijuana only for medical purposes in -- in -- in -- in -- in -- in following the applicable state law?

HOLDER:

Yes. We limit our enforcement efforts to those individuals, organizations that are acting out of conformity...

NADLER:

With state laws.

HOLDER:

... with state laws, or in the case of instances in Colorado where distribution centers were placed within close proximity to schools.

NADLER:

OK. In September -- on September 23, 2009, you issued a memo setting forth policies and procedures governing the executive branch's invocation of the state secrets privilege. That policy requires your personal approval for the department to defend assertion of the privilege in litigation. In how many cases since September of 2009 have you approved personal invocation of the privilege?

HOLDER:

I'd have to look at that. There have not been many. I think one, two, three. Something along those lines. I'm not sure. Now, those numbers get skewed a little bit because in the second circuit in order to get -- use the SIFA (ph)-statute, the Second Circuit has a rule that says we have to invoke the state secrets privilege. But that I don't think is the same...

NADLER:

I have a number of other more specific questions on this that I'm going to submit to you, but I see I'm coming to the -- to my end of time. So I have one further question on this. You do not indicate in this policy whether or not the administration will agree to judicial review of the basis for invoking the privilege.

**JA731**

The prior administration took the position that information could not even be disclosed in camera to an article three judge, thus ensuring that there was no judicial review of whether the privilege was being properly invoked.

What is your position as to judicial review of the information that the government seeks to withhold in two respects? One, can a judge review the allegedly privileged information, and two, can the judge disagree with the executive branch's decision as to whether the privilege is properly invoked?

HOLDER:

Well, I think that we have shared information with article three judges, but at -- the way in which the privilege is set out, it is I think at the end of the day for the executive branch to make that determination. But we have put in place a process that requires multiple levels of review...

NADLER:

Within the executive branch. But you're saying you do not agree that ultimately a decision should be subject to judicial approval or disapproval, as to invocation of the privilege

HOLDER:

Well, ultimately a judge I think could probably override our assertion of the privilege, and then we'd have to decide whether or not we want to dismiss the case. But our hope is that through the process that we go through we only invoke the privilege where it's absolutely necessary. And I think if we look at the statistics, we'll probably see that we have invoked the privilege far fewer times than our predecessors.

NADLER:

Well, I hope you will share those statistics with us. Thank you.

SMITH:

Thank you, Mr. Nádler. The gentleman from California, Mr. Gallegly is recognized.

GALLEGLY:

Thank you very much, Mr. Chairman. Good to see you again, Attorney General Holder. In your last visit here we asked about a few issues that we'd like to get a response from. In fact, I'm disappointed that to date your office has been unable to provide answers to what I consider some very simple questions that we asked in that meeting having to do with prosecutions of worksite enforcement cases.

I'm especially interested in the number of DOJ worksite enforcement prosecutions for each of the last four years, the number of prosecutions of illegal workers who have been using fraudulent documents. When can I realistically expect to get a response on that?

HOLDER:

I was under the impression that we had responded to all of the questions that were put to me either during the hearing or as, I guess we call it, Q4s (ph) that had been submitted to us. If that's the case, I'll make sure that...

GALLEGLY:

I have not received them. In fact, we'll be happy to reiterate with -- with specificity what those were. But it's pretty straightforward.

HOLDER:

We'll get you those numbers, but I apologize if they've not -- if you've not gotten them.

GALLEGLY:

OK. We'll work with your office. You know, we all know that many illegal immigrants are using fraudulent Social Security numbers or individual taxpayer numbers to take jobs from American citizens. I don't think there's any question about that in anyone's mind.

They also receive taxpayer benefits such as child tax credits, earned income tax credits. There have been reports that some illegal immigrants are claiming tax credits for children not even living in the United States.

What specific -- and I want to emphasize the word specific -- steps are being used by DOJ to stop this fraud, recover taxpayer money, deport the illegal immigrants who have committed the criminal fraud?

JA732

HOLDER:

Well, you know, we work with our partners at DHS to come up with a number of ways in which we try to make sure that people through worksite enforcement, through reaching out to employers, to making clear what the policies are, what the law is.

We use a variety of techniques to try to make sure that the kinds of people you're talking about are not in fact getting benefits to which they are not entitled. It is something that we have worked pretty effectively with with DHS.

GALLEGLY:

Would -- would this group of individuals that I'm speaking about, those that have clearly committed fraud, are these folks on a priority list for deportation, or are they among those that have been given an exemption or a review to get a temporary green card?

HOLDER:

No. I mean, I think that we look -- we have certainly prioritized those people for deportation. And we have tried to place at the head of that list people who potentially pose criminal problems for those of us in the United States or in the immigrant community people who have been engaged in violent acts. Those are the ones who we are emphasizing, but it doesn't mean that those further down the list are not also people who we're trying to deport if that's...

GALLEGLY:

Well, we know -- and I'm glad to hear that acts of violence by criminal aliens are at the top of the list -- but the fraud issue to me is also an offense that should be very close to the top of the list when they're stealing the taxpayer's dollars that could otherwise be used to help your department, for instance.

Now the -- also back in December, we talked about DOJ addressing the issue of Medicare fraud. And we know by many accounts, there's as much as \$60 billion a year that is being used as -- as -- as -- being stolen from our Medicare program fraudulently.

What steps is DOJ taking to increase prosecutions on Medicare and -- and also on Medicaid fraud?

HOLDER:

We're working with our partners at DHS. Kathleen Sebelius and I, the secretary at DH -- at HHS -- have been going around the country and expanding what we call these HEAT strike force teams to increase the federal presence and our investigative capacity in those cities where we have identified these -- these problems.

And what we have seen is that we have received in the settlements, in the prosecutions that we have brought, record amounts of money brought back into the federal government. And as I indicated in my opening statement, for every dollar that we spend in enforcement, we bring back \$7 to the -- to the federal government. And it's something that I think should be funded at as high a level as we possibly can, our enforcement efforts.

GALLEGLY:

One closing question. Could you provide information to the committee on what specific enforcement is taking place in this area in California, specifically southern California, and more specifically, in and around the area of Los Angeles and areas like Glendale, California?

HOLDER:

Yeah. We can do that. I can certainly make clear to you what we are doing generally with regard to all the cities that we have targeted, but I can also share with you what we are doing in California, and in the area of California that you're talking about.

GALLEGLY:

Thank you, Mr. Chairman. I yield back.

SMITH:

Thank you, Mr. Gallegly. The gentleman from California, Mr. Berman, is recognized.

BERMAN:

Well thank you very much, Mr. Chairman. And welcome, Attorney General. I want to start by commending you and the department for your diligent work defending U.S. taxpayers against fraud by government contractors.

**JA733**



Every year I watch the total amount recovered for taxpayers under the False Claims Act increase, and I'm grateful for the work that the department and whistleblowers do together to protect our tax dollars. I think we're now up to something just over \$30 billion.

And a lot of my colleagues today are focusing on their beefs with you today. I want to talk about this subject because here I think the Justice Department and you are doing this right. And it seems the law is quite effective and I'd like to make sure it stays that way.

Earlier this year, you invited me to take part in a commemoration of the 25th anniversary of the False Claims Act. And although I wasn't able to participate in the panel discussion that followed the main event, I am told that one of the issues discussed on that panel was whether or not we should change how relators are compensated for their efforts and recovering on behalf of the taxpayer.

In October of last year, the United States Chamber of Commerce put out a report suggesting that a hard cap of \$15 million would be adequate to compensate any relator. Their logic seemed to be that that amount would cover most people's future earnings if their efforts as a whistleblower kept them from working again.

The report also suggests that such a cap would not detour whistleblowers from pursuing qui tam cases because in their study of 26 cases, the whistleblowers responded to a question about why they were willing to bring suit and most of them said that they did it because it was the right thing to do.

I believe that, but I also know for a fact that the whistleblowers put themselves at tremendous risk when they make the decision to file suit and try to recover on behalf of the government and the American taxpayer.

These cases are expensive to pursue. They can last for years. They require commitment, and I don't know if a general good feeling about "doing right" is what will make someone remain committed to the cause for the long haul.

BERMAN:

Right now relators can be awarded a percentage between 15 and 30 percent depending upon certain factors, such as whether or not the government joined the relators as plain-tos. In my mind, and I think the history of the act bears this out, this percentage share encourages a relator to pursue a case until they can recover an amount equal to the entire impact of their fraud, as opposed to settling when the case goes too long, perhaps because they know there is a hard cap and they can only recover so much money.

Though the Chamber argues that a hard cap would save the government money, I have to wonder how many cases it would deter or at least reduce the recovery for the taxpayers.

In today's world where some of these cases recover billions of dollars, if a hard cap deterred even one such case it would be a very costly endeavor for taxpayers.

When we consider the False Claims Act amendments in 1986 and in revisions since, proposals to enforce a hard cap have not been well received.

Of course, there are reasons that defendants fighting qui tam suits would want to limit damages but I'm more focused on what works best for the taxpayer. I believe what we have now is working well.

I sent you a letter on this subject last -- earlier this month but I wonder if you could share some thoughts with me now about whether the department remains committed to relators being awarded a percent share or if you support a shift to a hard cap?

HOLDER:

Well, I have to say that I'm not totally familiar with the proposal that you're -- that you have described.

But I can say that the act as it is presently constructed is working extremely, extremely well. And you're right, we asked you to come to the justice department to celebrate the success that we've had over the past 25 years with regard to an act that you were instrumental in passing.

Over the past 25 years we've had nearly 8,000 qui tam cases that have been filed that have yielded more than \$21 billion in recoveries, \$21 billion in recoveries for the United States, \$3.4 billion in awards to relators.

JA734

In fiscal year 2011 alone the department recovered more than \$2.78 billion in qui tam cases. Relators received about \$530 million as their statutory shares.

The statute that is -- as it is presently constructed works and works quite well. I would be reluctant to fool around with a formula that for the past 25 years has shown to be an effective tool at getting at fraud and incentivizing people to stay involved in the process and working with government as partners.

You know, again, I will look at it. But I have to tell you that on the basis of my examination of the rule as it -- as the -- the regulation as it exists, the statute as it exists, I'd be extremely reluctant to tamper with it.

SMITH:

Thank you, Mr. Berman.

The gentleman from Virginia, Mr. Goodlatte, is recognized.

GOODLATTE:

Thank you, Mr. Chairman.

General Holder, both the criminal division head Lanny Breuer and his deputy, Jason Weinstein, had knowledge that the ATF let a bunch of guns walk and some were recovered in Mexico, all related to the Fast and Furious scandal.

In a prior operation when they reviewed the February 4, 2011 letter that falsely denied the ATF knowingly allowed the sale of assault weapons to a straw purchaser who transported them to Mexico, do you think it is a serious offense for an individual to mislead the Congress?

HOLDER:

Well, first with regard to the question, I -- I think you've got it a little off there.

The two individuals you talk about, Mr. Weinstein, Mr. Breuer, did not know about the -- the tactics used in Fast and Furious until the beginning of last year. The...

GOODLATTE:

But they did acknowledge that, quote, "ATF let a bunch of guns walk..."

HOLDER:

And that was in connection...

GOODLATTE:

... and, quote, "some were recovered in Mexico," end quote.

HOLDER:

That was in connection, I believe, with Operation Wide Receiver that occurred...

GOODLATTE:

Correct.

HOLDER:

... occurred in the...

GOODLATTE:

Correct.

HOLDER:

... prior administration.

GOODLATTE:

Correct. But they did not acknowledge that in their communication with the Congress.

So my question to you is do you think it's a serious offense for an individual to mislead the Congress about what they know about what's going on in your department?

HOLDER:

**JA735**

Well, to the contrary, they did acknowledge to Congress that they did have that information about Wide Receiver and said that it was a mistake on their part not to share it with the leadership of the department, that prior knowledge.

Also indicated that it was a mistake on their part not to use that prior knowledge when they were looking at Fast and Furious to try to understand that they should have been more sensitive to what was going on in -- with -- with regard to Fast and Furious.

GOODLATTE:

What consequences have they faced as a result of that?

HOLDER:

Well, they are certainly -- they have apologized. They have been...

GOODLATTE:

Apology's a good thing but it's not a consequence for gross mismanagement of an operation that cost the life of one border security guard.

Why haven't these two most senior political attorneys in the criminal division faced any consequences at all for their participation in this lack of being forthcoming to the Congress and to others and for not putting a halt to the subsequent activities that took place?

HOLDER:

Well, again, I think your -- your premises are wrong.

They have not -- they have been forthcoming to Congress. They have testified or been interviewed in a way that I think is consistent with the facts.

They've been very forthright about the...

GOODLATTE:

But what about the underlying decision of allowing this to go forward?

HOLDER:

And that's the other part of, I think, your premise that is not right. They were not in charge of, they did not have operational control of Operation Fast and Furious.

GOODLATTE:

But when they knew about it, what did they do about it?

HOLDER:

Well, that happens about the same time everybody in Washington finally hears about these tactics.

They were assured by the people in Arizona that the gun walking in fact did not occur. That is the information that they got.

If you look at the materials that we submitted to Congress, the deliberative materials that we submitted to Congress around the February 4th letter, you will see that neither Mr. Breuer nor Mr. Weinstein had information about the use of -- they were in fact assured that gun walking tactics were not employed with regard to Operation Fast and Furious.

GOODLATTE:

Now, with regard to the prosecution of Senator Ted Stevens in Alaska, in that case Senator Stevens was falsely prosecuted.

His reputation was ruined. He was not reelected to the United States Senate. And it was determined that the U.S. prosecutors were engaged in outright fabricating of some evidence, deliberately withholding information that revealed the senator's innocence.

And ultimately they were held in contempt of court and the charges against Senator Stevens were dismissed.

But what consequences have they faced? To my knowledge the only consequences for engaging in the outright fabrication of evidence and deliberately withholding exculpatory evidence that would have revealed the senator's innocence was that one of them was

JA736

suspended without pay for 40 days and the other for 15 days.

Why were not these individuals fired?

HOLDER:

Well...

GOODLATTE:

Some would say they should have been disbarred for that activity. That's not the purview of the justice department but certainly no longer having them on the payroll of the justice department would be a good step in the right direction, wouldn't it?

HOLDER:

Well, again, there are a number of premises there that are inconsistent with the facts.

This is a case was brought by the prior administration. It was not dismissed by the court.

I dismissed the case. This attorney general dismissed that case after I had concerns about the way in which we had failed to turn over information that the defense had a -- a right to.

The OPR report looked at the -- looked at the matter and made a determination that they did not do so intentionally.

It's -- it's inconsistent or it's at tension with the report that was done by Mr. Schuelke and the recommendation made by those people charged with the responsibilities that those penalties should be imposed, I guess 40 days and 15 days.

This is not something that the attorney general and the deputy attorney general is involved in, the determinations as to how those cases -- what punishment should be made where findings of fact is done by people who are career within the department.

The same thing happened with regard to the determination concerning Mr. Yoo and the -- the creation of those policy memos involving interrogation techniques.

Whether or not the attorney general agrees or disagrees with what the career people do, traditionally in the department is that that is something for career people charged with that responsibility to ultimately determine.

SMITH:

Thank...

GOODLATTE:

Mr. Chairman -- Mr. Chairman, I would ask that a letter dated February 4, 2011, signed by Robert Weiss, assistant attorney general, which I think rebuts the statements made by the attorney general with regard to what was known and what was not known about Operation Wide Receiver and Operation Fast and Furious be made a part of the record.

SMITH:

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

The gentleman from Virginia, Mr. Scott, is recognized.

SCOTT:

Thank you. Thank you, Mr. Chairman.

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

Mr. Holder, you've been criticized for not turning over information upon request to the -- to one of the committees. Did some of those requests involve information pertaining to confidential informants and wiretaps under seal, court ordered seal, and information related to ongoing investigations?

HOLDER:

Yes, that is true. But we have turned over a very significant amount of information.

Now, we have collected data from 240 custodians. We have processed millions of electronic

**JA737**

records. We have turned over 7,600 pages on 46 separate productions. We have...

SCOTT:

Well, could -- could you tell us what's wrong with handing over information involving confidential informants, wiretap information under court seal and information related to ongoing investigations?

HOLDER:

We are by law prohibited from discussing or turning over the contents of wiretap related material.

There is a criminal provision that has a five-year penalty that prevents us from doing that. With -- and there's also a very practical reason, there are concerns that one would have about people who are involved in these matters.

You might put victims' safety at risk. You might put at risk the success of a prosecution.

Those are all the reasons why there are very tight restrictions on the provision of material connected to wiretaps.

SCOTT:

Thank you.

(UNKNOWN)

Mr. -- could -- would the gentleman yield?

SCOTT:

I have very little time.

(UNKNOWN)

I'll be very brief.

SCOTT:

Go ahead.

(UNKNOWN)

We did not request any wiretaps under seal. I -- since I'm the person who signed the subpoenas.

SCOTT:

Thank you.

Reclaiming my time, Mr. Attorney General, Section 5 is there to prevent discriminatory election practices from going into effect. If you didn't have Section 5, discriminatory voting changes could go into effect until the victims of discrimination raise enough money to get into court to get an injunction.

Those who benefit from the discrimination would get to legislate until the law's overturned and when overturned, they would get to run as -- with all the advantages of incumbency as a result of their discrimination.

And so there's an incentive to keep discriminating. But under Section 5 the burden is on -- on covered states to demonstrate that an election change does not have a discriminatory effect and purpose.

SCOTT:

Section 5 covered states were not selected randomly. They were covered the old-fashioned way. They earned it with a history of discrimination.

Now, how is the Department of Justice using Section 5 to prevent discriminatory voting practices and specifically what are you doing in Florida to prohibit purging of voters, according to press reports that include decorated war veterans clearly eligible to vote?

HOLDER:

Well I think first just a bit of an overview and I'll take just a second. You have to understand that over the course of the time in which I have been attorney general, we have looked at about 1,800 requests for pre-clearance under Section 5. We have opposed 11. Eleven. 1,800 requests, we have opposed 11. Now included among those is what Florida has been trying to do with

JA738

regard to the Section 5 covered counties.

That one of which -- one of those changes which a federal judge has already said is -- is inappropriate. Section 5 was reauthorized by a near unanimous Congress, signed by President Bush. Findings made by this Congress was that the need for Section 5 continues. Reauthorized I believe until 2031. It is the position of this Department of Justice and certainly this attorney general, that we will vigorously defend and vigorously use Section 5. The need for it is still there.

SCOTT:

Thank you. The first bill this president signed was the Lily Ledbetter Act prohibiting -- dealing with discrimination in employment. One of the things that -- talking about discrimination in employment in 1965, President Johnson signed an executive order prohibiting all discrimination in employment with federal contracts. I understand this administration still allows discrimination in federal contracts based on religion. If it's a so-called faith based group.

My question is, do -- do they need permission or certification to qualify for the right to discriminate? Or do they just get the right to discriminate based on the fact that they're faith based organizations using federal money?

HOLDER:

Well, I think we're committed to ensuring that we partner with faith based organizations in a way that's consistent with our laws, our values and the department will continue to evaluate legal questions that arise with respect to these programs and try to ensure that we -- make sure that we ensure that we fully comply with all of the applicable laws.

SCOTT:

Does that mean they can discriminate...

ISSA:

The gentleman's time has expired.

SCOTT:

I think it was a yes or no answer?

ISSA:

OK. Mr. Attorney General, go on and if you would, answer the question?

HOLDER:

As I said, we try to do this -- we look at these policies and try to make sure that they do -- they act in a way that's consistent with law.

ISSA:

Thank you Mr. Scott. The gentleman from California, Mr. Lungren is recognized?

LUNGREN:

Thank you very much Mr. Chairman. Mr. Attorney General I just wanted to follow up on what my friend from Virginia, Mr. Goodlatte had to say with respect to the Stevens case. I realized that you reassigned people after that. I realize it was an investigation and indictment that came before you were attorney general. That's not the point. The point is that if you have no real consequences now, you're going to have no real changes in the future. That was conduct that was stated by the judge to be outrageous.

He held a hearing as to whether a new trial ought to be called before he had made a ruling. You did come forward with a motion to dismiss, recognizing the problems. Internally the investigations showed widespread misconduct among the whole team and yet I am unaware of anybody that was fired and Senator Stevens lost his election, but more importantly he lost his reputation. And I happen to think that in the absence of serious action taken against employees of either the Department of Justice prosecutorial corps, or the FBI, that frankly the message is not seriously perceived.

So, I would just like to state that for the record. And now, Mr. Attorney General, if I were lucky enough to be invited down to meet you or see you at your office at the Justice Department, wouldn't I have to show a government issued photo ID to get in to see you?

HOLDER:

You might.

**JA739**

LUNGREN:

If I were to go to the federal courthouse here in D.C., either as a party or as a -- an attorney, wouldn't I have to show a government issued photo I.D.?

HOLDER:

That's not been my experience. Her in D.C., I don't -- you know.

LUNGREN:

Some federal courts are you aware that that's required? In some federal courts in this land?

HOLDER:

I -- I don't know.

LUNGREN:

You're aware that if I have to come here from California to exercise my constitutional right of travel and as an ordinary citizen petition the government for a redress of my grievances, I have to show a government issued photo ID, do I not?

HOLDER:

That one, yes. To get on a plane, you've got to have a photo ID.

LUNGREN:

OK. And that does involve the constitutional right of travel among the states, correct?

HOLDER:

Yup. The Supreme Court has said that the right to travel is of a constitutional dimension.

LUNGREN:

So, is your Justice Department investigating the discriminatory effect of those laws with respect to someone's constitutional right to travel? Or constitutional right to visit you? I mean the constitution doesn't say petition the government for a redress of grievances only goes to some people. I mean if I've got a complaint with the Justice Department and want to come to the Justice Department, are you inhibiting me, effecting my constitutional right by requiring me to show a government issued photo ID?

HOLDER:

Well let's get to the bottom line here. That...

(CROSSTALK)

LUNGREN:

Well, no. This -- my -- my question is...

(CROSSTALK)

HOLDER:

Alright, well I'll give you an answer. The answer...

(CROSSTALK)

LUNGREN:

Well that's all I'm asking.

HOLDER:

The answer is that with regard to the limiting things that you have discussed that might not have an impact on your constitutional right, but that some of the laws that we have challenged do have an impact on a person's ability to exercise that most fundamental of constitutional rights and that is the right to vote.

LUNGREN:

There's a fundamental right to petition the government to redress my grievances. Don't you think that is as important as quote, unquote "the right to vote?"

HOLDER:

**JA740**

I would agree with President Johnson with what he said after the '65 Voting Rights Act was passed. That the voting rights -- that voting is the most important right that we have as American citizens. It -- what is distinguishes this country and makes it exceptional as compared to other nations around...

LUNGREN:

OK. I also happen to think that it's important that we have the opportunity to petition the government to redress the grievances. I think that is as fundamental, a...

(CROSSTALK)

HOLDER:

With a vote, I can change the government. I have that ability...

(CROSSTALK)

LUNGREN:

Well you can sue me in court. You can threaten to sue me in court. And as a proud individual American citizen, I supposed I have a right to at least talk to you about whether you're going to bring me before the court and bring the majesty of the government against me. And I would think that that is as important a right. Now...

(CROSSTALK)

HOLDER:

Well I certainly have that ability to talk to you. But if I disagree with you, at the end of the day I have the ability to cast a ballot.

LUNGREN:

I can't even come in and talk to you unless I show a -- a government issued photo ID is my point. Now...

(CROSSTALK)

HOLDER:

No -- not -- that's not true in the government. That's not true of the Justice Department. If you were to show up at the Justice Department, somebody could vouch for you and you could come into the department and we could have a very...

(CROSSTALK)

LUNGREN:

Is that right?

(CROSSTALK)

HOLDER:

...I'm sure conversation.

LUNGREN:

OK. I haven't tried that with TSA. That doesn't work very, very well in terms of being able to get on an airplane to fly back here to knock on your door to get to see you.

HOLDER:

Well there are terrorists who try to bring down planes as we have seen over the course of the last, I guess 12 years.

LUNGREN:

And there are people who cheat about voting when they don't have a right to vote.

HOLDER:

We do not see that to the proportions that people have said in an attempt to try to justify these photo ID laws. All of the, I think empirical and neutral evidence shows that the questions of vote fraud do not exist to the extent...

**JA741**



(CROSSTALK)

LUNGREN:

So this...

(CROSSTALK)

HOLDER:

...that people say that it does exist. And...

(CROSSTALK)

LUNGREN:

So the Supreme Court was wrong in its decision 2007 when it said that states have a legitimate interest in requiring photo IDs for voters, even absence evidence of widespread fraud in order to inspire confidence in the electoral system? You disagree with the court on that?

HOLDER:

You know what's interesting there? And please -- please...

(CROSSTALK)

ISSA (?):

If you will answer the question? Then we'll move on.

HOLDER:

Sure, the Supreme Court -- the -- the Crawford case is fundamentally different from that which we're talking about now. That was not a Section 5 case. Indiana is not covered by Section 5 of the -- of the Voting Rights Act. I would just if -- with all due respect, Attorney General Mukasey talked about the Crawford decision, the Indiana decision and it tells how it's different. He says that the court acknowledged the undeniable fact that voter ID laws can burden some citizens right to vote.

It is important for states to implement and administer such laws in a way that minimizes that possibility. He then said, "We will not hesitate to use the tools available to us, including the Voting Rights Act if these laws, important though they may be, are used improperly to deny the right to vote." That is Michael Mukasey talking about the Indiana Crawford decision. Michael Mukasey, not Eric Holder, Michael Mukasey.

ISSA:

Thanks Mr. Lungren. The gentleman from North Carolina, Mr. Watt is recognized?

WATT:

Thank you Mr. Chairman. I -- let me start by just expressing my disappointment that some of my colleagues are spending so much time advancing the notion that we should be disqualifying people from exercising the most basic right that they have in our democracy, the right to vote. And that -- and -- and that this is -- the Judiciary Committee in which these -- these arguments are being advanced is just disappointing to me.

Second I want to applaud the Justice Department for some work that they're doing in my congressional district in particular, some very high level cases fighting drug trafficking, protecting against child predators. A bunch of money we spent on the COPS Program and the most vigorous supporters of the COPS Program are the most conservative sheriffs in my congressional district because they have been able to access funding to -- to beef up their law enforcement capacity.

WATT:

So, I -- I -- I won't go back to the voting rights part of this because I think I'll get too emotional about that. Let me deal with the thing that's under my subcommittee's jurisdiction, the one that I'm the ranking member on. And that's -- we've made some efforts to try to do something about piracy. We -- we were not successful legislatively, but the problem has not gone away. A recent article in the USA Today notes the proliferation of dangerous counterfeit products that pose safety concerns for the American public. Many of these products including counterfeit pharmaceuticals are available online and come from foreign sources.

In January of this year, the Department of Justice issued indictments against Megaupload, a foreign based website that was charged with illegally infringing the copyrights of American

JA742

**Exhibit 20**  
**(part 2)**

**to the Declaration of Colin Wicker**

**JA743**

businesses.

And now I note that some group has -- what's it called -- Anonymous unleashed a series of cyber attacks in the aftermath of the indictments against Megaupload. So now there's a connection between piracy on the one hand and cybersecurity on the other hand.

Can you just talk to us about the -- the real threats that we have in that area, both on the piracy side of this issue and on the cybersecurity and their connections, just a little bit, so we'll have some background that at least informs the American people how serious the problem is?

HOLDER:

I mean, the piracy issue is of -- has a number of dimensions to it. It is an economic issue; it is a jobs issue. When the theft of our intellectual property or the methods that we use to produce things is stolen by other organizations or by other countries, it has a direct impact on our economy.

There is also a safety factor. Health -- health items, medicines that are produced in a way that are inconsistent with the great standards we have in the United States, then sold back to the United States or sold in other countries can put people at risk.

The whole question of various parts that can be used in airplanes, other things, that are not done in a way consistent with the way in which our intellectual property standards are done can have a negative impact on safety in that way.

So the piracy question is one that has economic consequences as well as safety consequences. If one looks at the whole cyber issues, again, these are national security issues. The ability of foreign countries or organizations to have an impact on our infrastructure, to use cyber tools to ferret out secret information from the United States all put our nation at risk and is worthy of the attention of, I think, this committee, this Congress and the executive branch. And I would hope that we would be able to work together to come up with a way in which we can craft tools to deal with what is truly a 21st Century problem.

WATT:

I thank you. And I -- at the risk of going -- not going over time like some of my colleagues have, I'll just stop there. Because any other question I could ask would -- would be well over into the next person's time. So I'll yield back, Mr. Chairman.

SMITH:

Thank you, Mr. Watt.

The gentleman from California, Mr. Issa, is recognized.

ISSA:

Thank you, Mr. Chairman.

Attorney General, December 14, 2010, Brian Terry was gunned down and we began knowing more about Fast and Furious shortly thereafter. But you have said -- people representing you have said repeatedly you didn't know about it before then.

I've sent you a number of letters. Senator Grassley sent you a number of letters. You mentioned in your opening statement the speaker's letter. The speaker did not limit the scope of the subpoenas you're under an obligation to respond to. He simply asked you for response to two key areas. He did not revoke any subpoenas. However, you implied that we were working together, when, in fact, since May 18, nothing -- nothing has come from your department, not one shred of paper.

I want to ask you, first of all today, have you and your attorneys produced internally the materials responsive to the subpoenas?

HOLDER:

We believe that we have responded to the subpoenas...

ISSA:

No, Mr. Attorney General, you're not a good witness. A good witness answers the question asked. So let's go back again.

Have you and your attorneys produced internally the materials responsive?

**JA744**

In other words, have you taken the time to look up our subpoena and find out what material you have responsive to it, or have you simply invented a privilege that doesn't exist?

HOLDER:

You say, internally, have we...

ISSA:

Internally, have you pooled all that information?

HOLDER:

We've looked at 240 custodians. We have processed millions of electronic and viewed over 140,000 documents and produced to you about 7,600.

ISSA:

So 140,000 documents. How many documents are responsive but you are withholding at this time?

HOLDER:

Well, we produced 7,600.

ISSA:

Look, I don't want to hear about the 7,600.

(UNKNOWN)

Mr. Chairman, I would beg to allow...

ISSA:

The lady is out of order. Would the lady please...

(UNKNOWN)

Mr. Chairman, parliamentary inquiry...

ISSA:

This is my time.

(UNKNOWN)

Excuse me, Mr. Chairman. I would beg to allow the attorney general to be able to finish his answer.

SMITH:

the attorney general will be allowed to answer the question.

(UNKNOWN)

I thank the chairman.

SMITH:

And the attorney general will have more time to do that if we don't have interruptions.

ISSA:

And I would like my time reclaimed that was...

SMITH:

And the gentleman will be given an additional -- time...

CONYERS:

Mr. Chairman, I suggest we take back the time that Mr. Lungren used, the two minutes over his time that he used and -- and...

ISSA:

You want to give me an additional two minutes? I'm fine with that.

CONYERS:

No, I'm going to give you the 45 seconds I yielded back...

**JA745**

(LAUGHTER)

But if we're going to apply a rule on one side of this aisle...

SMITH:

Let's get back to regular order.

CONYERS:

... then we ought to apply the rule consistently. That's the point I'm trying to make.

SMITH:

The gentleman from California has the time, and the attorney general will be allowed to answer the question.

ISSA:

Isn't it true, Mr. Attorney General, that you have not produced a log of materials withheld, even though our investigators have asked for it?

HOLDER:

I know that -- I'm not sure about that. I know that the...

ISSA:

OK, I'm sure you didn't, so let's move on.

March 15, 2010, before Brian Terry was gunned down; April 19, 2010, before Brian Terry was gunned down; May 7, 2010, before Brian Terry was gunned down; May 17, 2010, before Brian Terry was gunned down; June 2, 2010, before Brian Terry was gunned down; July 2, the real date of our independence, 2010, obviously earlier, before Brian Terry was gunned down -- these wiretap applications which we did not subpoena but which were given to us by a furious group of whistleblowers that are tired of your stonewalling indicate that a number of key individuals in our administration in fact were responsible for information contained in here that clearly shows that the tactics of Fast and Furious were known. They were known and are contained in these wiretaps.

I understand you have read these wiretaps since we brought them to your attention. Is that correct?

HOLDER:

I have read them, and I disagree with the conclusion you've just reached.

ISSA:

So let me go through a very simple line of questioning, if I may, Mr. Attorney General. James Cole, deputy attorney general, has written that "the department has a greater obligation than just checking the legal sufficiency and approving wiretap application." He thinks that applications also have to comply with DOJ policy. Is that correct?

HOLDER:

Applications have to agree with DOJ policy?

ISSA:

That's what he said?

HOLDER:

Sure.

ISSA:

OK. During a transcribed interview, Deputy Assistant Attorney General Jason Weinstein testified that senior officials approving the wiretap applications do not read the wiretap applications. Is this practice acceptable to you?

HOLDER:

They read summaries of the applications. That is a process that has been used by this administration and by all previous administrations. It is the way in which the Office of...

**JA746**

(CROSSTALK)

ISSA:

And are you aware that -- are you aware that...

(CROSSTALK)

ISSA:

Are federal judges, to your knowledge...

HOLDER:

Can I answer my question, the question you asked?

ISSA:

No, you've given me a sufficient answer considering the amount of questions I have and the amount of time I have. Are you -- you're OK with that practice? You've already answered that.

So would you agree that senior officials are responsible for documents they sign? I would assume the answer is yes, so now let me ask you the question.

Jason Weinstein -- is he responsible for what is in these wiretaps?

HOLDER:

Is he responsible...

ISSA:

He's a responsible officer under statute. Is he responsible for them even if he only read a summary?

HOLDER:

He did not create those affidavits. He did not create that material. He would have been a person, as a deputy assistant attorney general, who would review...

ISSA:

So when Congress writes a statute requiring certain individuals be responsible, such as Jason Weinstein, Lanny Breuer and yourself...

CONYERS:

Regular order, Mr. Chairman?

ISSA:

I'm in the middle of a question.

SMITH:

The attorney general will be allowed to answer this question.

CONYERS:

He hasn't -- hasn't asked the question.

ISSA:

I'm halfway through it, if you'll quit interrupting.

If in fact the statute says they're responsible and if in fact they're not read, then in fact...

CONYERS:

Regular order, Mr. Chairman?

ISSA:

... how are the American people to understand...

CONYERS:

Regular order, Mr. Chairman?

**JA747**

ISSA:

... who is responsible for what is contained in these documents...

SMITH:

The attorney general will be allowed to answer this question.

(CROSSTALK)

ISSA:

... being in fact -- does anyone of order reading, including the ATF director, former Director Melson, anyone reading these, according to him, would be sick to their stomach because they would be immediately aware...

CONYERS:

Does he have a question, Mr. Chairman?

ISSA:

So who is responsible, Mr. Attorney General?

HOLDER:

All right. You've really conflated a bunch of things here. The responsibility...

ISSA:

You've delivered so little...

CONYERS:

Regular order now, Mr. Chairman. Will he be allowed to answer the question now?

SMITH:

The attorney general will be allowed to answer the question, but I'd appreciate no more interruptions so the A.G. can answer the question.

HOLDER:

The responsibility about what you speak is in fact the responsibility of a deputy assistant general looking at those summaries to make sure that there is a basis to go into court and to ask that court that -- to grant the wiretap based on a determination that a responsible official makes that probable cause exists to believe that a wire facility was used in the commission of a crime.

They do not look at the affidavits to see if in fact -- to review all that is engaged, all that is involved in the operation. I have read those now. I have read those. I have read those. I have read them from Wide Receiver as well. And I can say that what has happened in connection with Fast and Furious was done in the same way as wiretap applications were done under the previous administration in Wide Receiver. I've looked at the summaries, and they acted in a way that's consistent with the practice and the responsibility that they have as defined by the statute.

SMITH:

Thank you, Mr. Issa. The gentlewoman from California, Ms. Lofgren, is recognized.

CONYERS:

Mr. Chairman, before

SMITH:

Does the ranking member wish to speak out of order?

CONYERS:

If I may, please?

SMITH:

The gentleman is recognized.

CONYERS:

I think that the previous questioning was the first note of hostility and interruption of the witness that I think has been uncharacteristic of what we've been doing here so far today. And I'd like to ask the chair to admonish all the witnesses from here on out to please try to -- all the members

JA748

from here on out to please allow the witness to finish his -- his answers.

ISSA:

Would the gentleman yield?

CONYERS:

Of course.

ISSA:

You know, I appreciate that there was hostility between the attorney general and myself. I would hope that the -- I would hope that the ranking member would understand...

(CROSSTALK)

ISSA:

... that in fact most of it was produced by the fact that I have a great many questions and a relatively little period of time in which to get answers and that, for a year and a half, my committee, through subpoenas and interrogatories, has been attempting to get answers for which this witness has basically said he asserts a privilege without...

(CROSSTALK)

CONYERS:

Parliamentary inquiry, Mr. Chairman?

SMITH:

The gentleman from Michigan has the time.

CONYERS:

Parliamentary inquiry, if the gentleman would yield?

HOLDER:

Can I just make...

CONYERS:

What -- what -- I -- I'd like to yield to the attorney general at this point, please.

HOLDER:

Well, I -- with all due respect to Chairman Issa, he says there's hostility between us. I don't feel that, you know. I understand he's asking questions. I'm trying to respond as best I can.

I'm not feeling hostile at all. I'm pretty calm. I'm OK so, you know...

SMITH:

Let me assure the gentleman from Michigan that the attorney general will be allowed to answer future questions.

And the gentlewoman from California, Ms. Lofgren, is recognized for her questions.

LOFGREN:

Thank you, Mr. Chairman.

And, Mr. Attorney General, thank you for being here with us.

When you were last before us in December I asked you about a case involving the seizure of a domain name called the jazzOne.com for alleged copyright infringement.

In December you said you were unfamiliar with the case but that you would certainly look into it and get back to me. Since that hearing not only have I not heard from you but new details have surfaced and therefore I'd like to revisit the issue.

To refresh everyone's memory, the JazzOne is a blog. It -- it's a blog dedicated to discussion of hip-hop music. And in November of 2010 the domain name of the site was seized as part ICE's Operation in Our Sites and on an application by prosecutors in your department.

**JA749**



After the government seized the domain name, the owners filed a request for the government to return it to them. And under the law the government had 90 days to initiate a full forfeiture proceeding against the domain or else return the property.

However, in this case that deadline passed with no action. When the website's lawyer inquired with the department's lawyers, he was told the government had filed an extension, but under seal.

The website was given no notice and they were never given an opportunity to appear in court and -- and to respond. And I have talked to the representative of the website and he assures that he's made diligent efforts to try and actually appear and make his case.

The -- when he asked for proof that the extension existed, your department's lawyers basically said they'd have to trust them. Now, this happened two more times.

Finally in December of last year, more than a year after the original seizure, the government decided that it didn't in fact have probable cause to seize -- support the seizure and returned the domain.

Now, we now have unsealed court records and we know that ICE and your department were actually waiting for the Recording Industry Association of America, which made an initial allegation of the infringement to provide detail, apparently proof.

And I've reviewed the affidavit, which I'd ask unanimous consent to put into the record, that in September of -- of 2011, 10 months after the seizure, the ICE agent was still waiting for information from RIAA to give probable cause.

Now, here's the concern I have. Blogs are entitled to First Amendment protection. And I think it's the law that you have to have probable cause before you seize things.

You can't seize things, have secret proceedings in the federal court and then a year later come up with probable cause.

So here -- here's my question for you. It looks to me -- and I'd say another issue as to websites, I mean this isn't like a car that's stolen and is gonna disappear or a bag of cocaine, it's a website so the evidence can be completely preserved even without seizure.

So I think the issue of seizure does need to be visited with us. But I want to know what the department's posture is if an ICE agent is behaving recklessly in an investigation, as it seems to be in this case.

Don't the prosecutors in your department have an obligation to reject faulty affidavits? Do you think that the -- the ex parte process that was included here is proper and consistent with the First and Fifth Amendments to say -- seize a domain name that has First Amendment protection for a year without any opportunity for the owner to be heard?

HOLDER:

The -- as with all domains that are seized or were seized I guess in Operation in Our Sites, I believe that the seizure that you reference was conducted pursuant to lawful -- a lawful court order.

And the procedures that the department followed in that case, including the ex parte procedures you mentioned, were consistent with the statutes that authorize the seizure and forfeiture and also consistent with due process protections that those statutes provide.

LOFGREN:

So -- so you're suggesting that the representation, which turned out to be false under the initial affidavits, which I again would ask to be made a part of the record, were -- those false affidavits were sufficient to have ex parte communications and sealed -- and -- and secret proceedings from the federal court to suppress this speech for over a year?

HOLDER:

No, I mean, clearly if -- if material was submitted that was false in an underlying affidavit...

LOFGREN:

Or at least misleading (inaudible)...

HOLDER:

**JA750**

That would not be an appropriate basis for action on behalf of the -- the government.

The seizure of and forfeiture of properties is a really powerful tool that the government has and it has to be used judiciously.

And to the extent that there are problems along the lines that you have described, that would be of great concern. We would not -- we should not be in court trying to do the kinds of things that I have described here, domain name seizures, if the underlying material is not consistent with the facts.

That's something we shouldn't be doing.

LOFGREN:

Well, I -- as I say, in -- last December you were gonna get back to me and I know you have many things to do but I would appreciate, I'll ask again if I could get a -- a report on this specific case.

And certainly as my colleague, Mr. Watt, has -- has mentioned there are important enforcement issues that need to go on. I do not disagree with that.

But we also have to be very careful about the First Amendment and the Fifth Amendment. And I hope that you do not disagree with that.

SMITH:

Thank you, Ms. -- thank you, Ms. Lofgren.

And without objection, the document that the gentlewoman referred to will be made a part of the record.

JACKSON LEE:

Mr. Chairman, I have a parliamentary inquiry, please.

SMITH:

The gentlewoman will state her parliamentary inquiry.

JACKSON LEE:

I -- I appreciate it very much, Mr. Chairman.

And the gentleman from California, in his statement about his own subpoena, mentioned today that he did not request wiretaps under seal. And in Mr. Issa's contempt citation the wiretap applications document the extensive involvement of the criminal division...

SMITH:

Would the gentlewoman state her parliamentary inquiry?

JACKSON LEE:

... in the Fast and Furious. Yes, I will.

My question did anyone review with the justice department, before this hearing...

SMITH:

That is not a parliamentary inquiry.

JACKSON LEE:

... whether the use of this leaked information will harm the department's ability to bring justice to those...

SMITH:

Ms. Jackson Lee...

JACKSON LEE:

... who violated our laws.

SMITH:

That is not a parliamentary inquiry.

**JA751**

JACKSON LEE:

It refers to the questioning of Mr. Issa. Mr. Issa (inaudible) in this hearing...

SMITH:

The gentlewoman...

JACKSON LEE:

If not, how do we know that the use of the information during this hearing, if asked, is consistent...

(CROSSTALK)

SMITH:

We're going to have to deduct this from your time if you continue. That is not a parliamentary inquiry.

JACKSON LEE:

I believe it is, Mr. Chairman, but I hope that we have reviewed this information.

SMITH:

The gentleman from Virginia, Mr. Forbes, is recognized for his questions.

FORBES:

Thank you, Mr. Chairman.

And, General, thank you for being here today and I -- I think despite all the rhetoric, we know that this committee is not asking you to break the law regarding what you say or information you provide the Congress.

It's just, as you know, it doesn't matter if you appear at Congress seven times or 70 times, if when you're asked you say I don't know to the questions that are most pertinent.

Or it doesn't matter if you supply 7,000 pages or documents or 700,000 pages, if they're not the proper paper -- proper papers to answer key questions.

So I want to begin where you began and that was the standard that you said that you have in the department, which is that every action is guided by law and facts and nothing else. I -- I think I stated that correctly.

Is that fair?

HOLDER:

Well, certainly when we're at our best that's -- that's what happens.

FORBES:

We -- we know that every cabinet secretary doesn't adhere to that standard.

In fact, we -- we have in a paper today the fact that several cabinet members were required to come to a meeting at the Democratic National Committee Headquarters.

Where the campaign manager, the top strategist for the campaign, the executive director of the Democratic National Committee was there telling them the actions that they should take and -- in four items, to hold the -- to help the president win reelection, regarding the campaign structure, the importance of the electoral college and the importance of staying on message.

The question I want to ask you this morning is I know that you're familiar with David Axelrod, who's the -- Obama's top campaign strategy (sic).

And to the best of your knowledge, has Mr. Axelrod or anybody on his behalf or anybody on behalf of the campaign had any discussions with you or members of the justice department regarding actions that you should or should not take, messaging that you should or should not make or hiring decisions that you should or should not support?

HOLDER:

Absolutely not.

**JA752**

I mean, they're -- one of the things that I -- I -- I like a great deal about my interaction with people in the White House is that, and I think they take their lead from the president, is that they have respected what I would almost -- I could -- I'd call a wall that has to exist between the justice department and the political operation that goes on in the White House.

I've not had any of that kind of interaction.

FORBES:

So there've been some publications out, and of course we never know whether these publications are accurate or not, but at least in one book that claims that you and Mr. Axelrod had some type of confrontation when he was trying to get you to hire someone.

And you're saying that's not accurate at all. You've never had any kind of meetings with him regarding any hiring decisions at the Department of Justice.

HOLDER:

No. We talked about not a hiring decision. We talked about ways in which we might improve the ability of the justice department to respond to political attacks that were coming my way.

David Axelrod and I are good friends. He's a close friend of mine. We have a great relationship.

He's a person I respect a great deal. We've worked together on the campaign, while he was at -- at the White House. But he's never done anything that I would consider inappropriate.

FORBES:

But -- but then what you're saying is you have had contact with Mr. Axelrod, campaign strategist, about how you should handle attacks coming to you as attorney general, correct?

HOLDER:

Yeah, I mean, there's a political dimension to the job that I have as attorney general.

I mean, the reality is that I don't sit up in an ivory tower and just do -- do law enforcement. I am the subject of attacks. I'm a person who is seen by some as pretty controversial.

And there are times, or at least there was that time when I was looking for some help in that regard.

FORBES:

So -- so you have had those discussions.

Did he ever try to encourage you to hire or put any particular person at the Department of Justice?

HOLDER:

No.

FORBES:

With Fast and Furious, there've been a lot of discussions about it and we know that's a big item not just for us but the ambassador to Mexico has said that that operation, which took place under your watch, has poisoned the Mexican people and really put a strain on strides in two successive administrations in the United States.

He's been concerned that the investigation hasn't been completed. Have you ever had any consultation with the White House or anyone with the campaign or with Mr. Axelrod about messaging related to Fast and Furious?

HOLDER:

About messaging with regard to Fast and Furious?

FORBES:

Yes. Comments that were made how you were going to message it, any of that.

HOLDER:

Well, we have certainly talked about the way in which we could deal with the interaction between the Justice Department and Congress about ways in which I would - we would...

**JA753**

FORBES:

But nothing about press messaging at all?

HOLDER:

Well, I mean, in terms of trying to get a - a message out that was consistent with the facts and make sure that it was done in an appropriate way, I've had conversations like that in the White House council...

FORBES:

OK. Just two other quick questions. I know that you filed actions against Arizona, South Carolina, Utah and Alabama, all Republican governors. My time is up. Would you give us a list of any similar actions of the similar profile you filed against any Democratic governor - states with Democratic governors?

And also, the final thing is if you will let us know if you had any relationship or meetings with the White House and members of the campaign about any of the messaging or any of these actions that took place on that.

And Mr. Chairman, my time has expired, and...

SMITH:

Thank you...

HOLDER:

One thing. With regard to the question of the governors, I'm not sure that there has been a photo ID attempt made by a state run by a Democratic governor.

FORBES:

No, no. I wasn't asking about photo IDs. I think if you look at these states, they were regarding I think immigration policies. But any action that you've taken against a governor - a Democratic governor of a similar high profile with an investigation...

HOLDER:

I think with regard to the immigration laws, as I understand it, and I'll check, but I don't think that there has been a similar immigration attempt made by states run by Democratic governors, which would be the reason why we have not opposed them. But I'll check and we'll share that information with you.

FORBES:

And also, Mr. Attorney General, when you check, if you'd make sure you let us know the contacts you had with Mr. Axelrod regarding any messaging or anything that come regarding those actions. Thank you.

SMITH:

OK. Thank you, Mr. Forbes. The gentlewoman from Texas, Ms. Jackson Lee, is recognized for questions.

JACKSON LEE:

I thank the chairman. I thank the ranking member, and I certainly thank the attorney general for his service. I just wanted to add what I don't think, very quickly, was in the introduction of the attorney general. And my series of questions, Mr. General, without any disrespect, will be bullet like, not toward you, but questioning so that I get a series of questions in.

But I did note that you were a deputy attorney general under the Bush administration. You continued to serve, I think, through the time that you were appointed under President Obama. Is that correct? Did you remain during that time?

HOLDER:

Little known fact. I was George Bush's first attorney general.

JACKSON LEE:

I think that should be made clear for the record because you've had a continuous public service commitment. You were in the private sector for a moment, but between a judgeship and the superior court that I understand you were appointed by President Ronald Reagan at that time. Is that correct, Mr. Attorney General?

**JA754**

HOLDER:

That's correct.

JACKSON LEE:

Let me thank you again for your service and ask a series of questions. I will be giving to you today, June 7, a letter to ask for the investigation of the state of Texas for its purging of 1.5 million voters. And I encourage and hope that there will be a speedy review in as much as that we're in a process of election - a November 2012 election.

And I do want to just ask a question on this issue of voting. And my good friend from California wanted to establish certain rights, egress, ingress, but the protection of access under the First Amendment. And I want to just focus, if you wanted to petition your government and use no government ID, most could either take their vehicle, hitch a ride, but they would not be totally prohibited from exercising that constitutional right.

And you made a point about fundamental right, but if you are denied the right to vote, there is no alternative, is there not? There's no other way. Maybe you could get a bull horn in the middle of the street, but there's no way you could impact the choice of those who will govern. Could you just be very quick on that answer, please?

HOLDER:

I think that's right. If you want to directly impact governmental policy who were setting those policies, that is directly tied to the ability to vote, to cast a ballot.

JACKSON LEE:

So do you think - believe it is a legitimate duty, action of the Division on Civil Rights, of the Department of Justice operating under existing current law to assess issues of purging or the impact of the voter ID law?

HOLDER:

Absolutely. We applied the law that had been passed by this Congress as early as 1965, reauthorized as recently as six years ago overwhelmingly by Congress.

JACKSON LEE:

Are you going outside the bounds of the law when you in essence review Florida or Texas or Ohio or Indiana, the case proceeding, the Indiana case, are you outside the boundaries as you can assess?

HOLDER:

All we're doing is applying the law that exists and has existed for over 40 years now.

JACKSON LEE:

With respect to the Affordable Care decision which is pending, but I just want a simple question. Do you feel that there was adequate review and the decision ultimately rested with the Supreme Court, which I think has done a - a decent and fair job on recusals with respect to Justice Kagan, could you have done anything more than what was appropriately done by the Justice Department?

HOLDER:

With regard to the recusal issue?

JACKSON LEE:

Yes.

HOLDER:

I don't think that we should have done any more. The question of recusal I think is something best brought up by the litigants in the case. They had that opportunity. I don't know if they raised it or not, but I think the Justice Department has done all it can, certainly responding to foyer requests. And all information that I think appropriately can be shared has been shared.

JACKSON LEE:

I appreciate. We are certainly saddened by the loss of life that was resulted by the Fast and Furious. I think you have said that often. Are you aware of the report produced by Ranking Member Elijah Cummings?

HOLDER:

**JA755**

Yes.

JACKSON LEE:

And were you aware that in the - do you believe that under this report that his staff and the Ranking Member Cummings of the Oversight Committee extensively reviewed either the 7,600 or at least the world of information that was given?

HOLDER:

Yeah. I think they did a good job of reviewing the information. They produced a good report that contains a number of reforms that we have tried to implement.

JACKSON LEE:

Quickly, the statement says that they found no politically motivated operation, that Fast and Furious was not conceived and directed by high-level Obama administration political appointees at the Department of Justice. Would you concede that they would have the basis to say that?

HOLDER:

I think if one looks at the documents what - that statement is manifestly true.

JACKSON LEE:

Can I ask you as well to investigate? And are you concerned or have you seen the impact of single race-based juries in a number of cases? This has been an issue in a number of areas, particularly in the South, in cases that are particularly sensitive.

I'm going to ask you to investigate the Chad Holley case, which is a beating incident that occurred in Houston, Texas, and the series of trials that are coming forward, but in particular one case was tried by a single-race jury, and of course resulted in the acquittal.

Would you please take this as an official request for the Justice Department to investigate the beating and the resulting trial that was a single-race jury in the case of Chad Holley?

HOLDER:

The Supreme Court has recognized that the selection process that - a deliberate attempt at creating a jury of a single race under the Batsin (ph) case is not appropriate. I'm familiar with the - the Holley case. Not intimately with, but I am familiar with the Holley case, and that is something that we are in the process of determining what course of action we should take.

SMITH:

Mr. Attorney General, a number of members today have made requests from you of information. When can they expect those requests to be responded to? Within two weeks or so?

HOLDER:

We will do the best that we can as quickly as we can. I'm a little - I'm a little surprised that we have not responded at least to some of the things that have been raised in connection with last time I was here. But we'll try to do a better job than that.

JACKSON LEE:

I thank the chairman. Thank you, Mr. General.

SMITH:

Thank you, Ms. Jackson Lee. The gentleman from Iowa, Mr. King, is recognized.

KING:

Thank you, Mr. Chairman. Thank you, Attorney General, for being here to testify today. I just am picking up on the chairman's remarks. I point out that I had a series of questions that I asked December 8 here. And although we haven't pressed relentlessly for those responses, I haven't seen them. And so I'm going to be submitting a new request from December 8, and then additionally here for this today I believe.

But I think, first of all, there's one piece left on the Fast and Furious I'd just ask you, is that - that - can you tell me when you first started to doubt that the original letter was inaccurate? Can you tell me what piece of information caused you to do that?

HOLDER:

Yeah. I mean, I think my first doubts happened just before - or just about the same time that I asked the inspector general to conduct a report. As I listened to media reports and things I was

**JA756**

getting from Senator Grassley, I had some - that's when I think my doubts first began about the accuracy of the February 4 letter.

KING:

Was there a piece of information though in particular in those media reports that caused you to doubt, or just the information itself? You thought you had to look into it?

HOLDER:

I'm not sure I can remember anything specific, but I do remember that the reports were inconsistent with what I was hearing from people within the department, and also inconsistent with what Senator Grassley was telling me in a letter I think that he sent to me like on February 9, or something like that.

KING:

Yeah. I've got a February 4 letter denying ATF ever walked guns. That was 2011. I don't have the date of Senator Grassley's letter, but that letter was formally withdrawn on December 2, 2011. That's consistent with your testimony though, I recognize. And I thank you.

And then I take us back to this - to this - the Pigford issue and the discrimination issues that we discussed the last time, General Holder. And now - we discussed Pigford then and I - and I posed the question that in the farm bill of 2008, consistent with I believe your testimony and also a statement made personally to me by Secretary Vilsack, that - that the farm bill authorized the negotiations and the agreement that ultimately lays out in the terms of \$1.25 billion to be distributed to black farmers who have claims of discrimination.

And the authorization within the farm bill is \$100 million, and that's to cap that for all of the settlements that are there. And now I see that not only is it not capped at \$100 million, it's been expanded to \$1.25 billion, and we have three other cases out here since that period of time.

Garcia v. Vilsack, Keepseagle v. Vilsack, Love v. Vilsack. And when I total them up, it's \$1.33 billion in this order, Garcia. \$760 million, Keepseagle. \$1.33 billion, Love. Coincidence, I suppose. \$1.25 billion, Pigford, for a total of altogether of \$4.93 billion in - poised to - either having been distributed or poised to be distributed under these discrimination cases, a lot of it, \$3.58 billion, coming out of the judgment fund.

And can you tell me how much is in the judgment fund, and is - is - I'm going to ask you to produce a report of the funds that come in and the funds that are distributed out of the judgment fund. I think this Congress needs an oversight if we're dealing with numbers that are approaching \$5 billion.

HOLDER:

What I can say is that the settlements that were reached, we set pools of money that can be tapped if people can prove that in fact they were discriminated against. There is certainly an unfortunate history of discrimination that I think everybody acknowledges exists between the Department of Agriculture and dealing with farmers of a variety of ethnicities and genders. And the attempts at structuring these settlement was to deal with -- to redress those -- to redress those wrongs.

KING:

But \$5 billion in round figures, \$4.93 billion? That is a big chunk of money to be distributing without congressional oversight. And do you have any resistance to Congress taking a look at that data? The contingency fees? And the distributional amounts? And -- and the sources of that money? And the amounts?

HOLDER:

No, I mean I think that's a legitimate oversight to talk about the way in which the cases were settled. How...

(CROSSTALK)

KING:

OK.

(CROSSTALK)

HOLDER:

...it impacts the judgment fund.

**JA757**



KING:

And then I'll follow up with a more specific question -- I wanted to also ask you about your reaction when you saw the video of the young man who claimed your ballot here some months ago. And your action -- reaction towards requirement for a photo ID after you saw that video?

HOLDER:

You know, I mean it's an attempt show something I suppose. But I think what I drew from that -- the video was that that guy was very careful not to say he was Eric Holder. Not to actually get a ballot. He didn't do the kinds of things that would have subjected him to criminal...

(CROSSTALK)

KING:

Yeah and I -- I'm not worried about that. But, he could have obtained your ballot with ease. It was offered to him. And so I just suggest this, that it -- it may not be impossible, but I think it's been determined here today in the questioning of Mr. Lungren that -- that visiting a federal building, even your building, it may not be impossible, but difficult without a picture ID. And if you -- if it's difficult or impossible to visit a government building without a photo ID then how can we allow someone to help choose our government without a photo ID?

(CROSSTALK)

HOLDER:

Well you see I think the question is -- if you look at for instance South Carolina. They had in place measures that protected the integrity of the ballot before they went to the photo ID. And I don't per se say that photo IDs are necessarily bad. The question is now the structure is put in place? How they are distributed. Whether or not it has a disproportionate impact on people of a certain race or ethnicity? A certain age group?

KING:

Why would it?

SMITH:

The gentleman's time has expired. Thank you Mr. King. The gentlewoman from California, Ms. Waters is...

(CROSSTALK)

WATERS:

Thank you very much. I would like to welcome you Mr. Attorney General. I have a number of questions that I wanted to ask you, but my attention has been diverted to the line of questioning from Congressman Goodlatte. It -- it's well known that you dismissed the charges -- Stevens -- that were placed against Senator Stevens following your investigation that indicated that certain exculpatory evidence had been withheld. Now was there just one thing? Or were there several things that were done that you disagreed with that caused you to dismiss?

HOLDER:

The thing that was the main motivator for my decision to dismiss the case was, I thought the pretty solid evidence we had uncovered that Brady material, exculpatory material had not been shared with the defense. And I think that was the -- that was the basis, the main motivation for my decide -- deciding to dismiss the case.

WATERS:

And it seems that -- I think his name is pronounced Mr. Schuelke - S-C-H-U-E-L-K-E?

HOLDER:

Hank Schuelke.

WATERS:

Agreed with you basically. But the punishment now does not seem to match the crime. Prosecutorial misconduct. And a lot of people are wondering, how does the Office of Professional Responsibility literally dispute the seriousness of the withholding of exculpatory evidence? How do you account for that?

HOLDER:

Yeah I don't -- I wouldn't agree that they don't take it seriously. I mean they -- Schuelke -- Mr.

**JA758**

Schuelke who I know and respect. He's a good lawyer, came up with a report and said that he thought that the material was -- was -- was withheld intentionally. The OPR report, which is like about 700 pages long says yes the information was withheld, but said it was done recklessly, not intentionally. And it was on that basis that the OPR recommendation was made as to what the appropriate sanction was.

Mr. Schuelke never made a recommendation as to what he thought the appropriate sanctions should be because I think as Judge Sullivan said, there was not an order that he could actually point to so that he could find contempt or something like that. So I think that's the difference between the Schuelke report and the OPR report. The state of mind of the person who was engaged, who did not turn over the information.

WATERS:

So, in your opinion, do you believe that the recommendations for punishment by the Office of Professional Responsibility, are those recommendations basically in line with the unintentional withholding? Or perhaps it could have been stronger? What do you -- what do you think?

HOLDER:

Well I -- I think it's appropriate for the attorney general not to comment on these determinations because it is something that is not my responsibility to do. We put that in the hands of the career people. We have a great OPR -- great Office of Professional Responsibility. We have a -- a structure in place so that people outside of OPR look at the findings of OPR and then make a determination as to what the appropriate sanctions should be. And the people who are political in nature are really insulated from that -- that process.

WATERS:

So, I -- I suppose what we can conclude is that you dismissed. You felt that the withholding of the information was serious enough to dismiss?

HOLDER:

Yes.

WATERS:

And that whether -- was -- and I asked I think was there leaking of information? Was there sharing of information with others that should not have been shared with? In addition to the withholding of information?

HOLDER:

No. I -- I don't know. I -- I - as I remember it, the concern that I had was with the non-providing of information that the defense was entitled to. That was the concern that I had.

WATERS:

And so clearly you addressed that concern. But again after having addressed it, the Office of Professional Responsibility had the responsibility to determine what the punishment should be and you have no hand in that? Is that right?

HOLDER:

That's correct.

WATERS:

OK, well I just wanted to get on the record that -- that the withholding of the -- the evidence was a serious matter. And that you made a decision based on that.

HOLDER:

Well, I would agree with you. Whatever -- whether you agree with Mr. Schuelke or you are with OPR. Whether it was intentional or reckless, negligent, it was serious and I think necessitated the dismissal of the case. Which is why -- what I did.

WATERS:

Thank you very much. I yield back the balance of my time.

SMITH:

All right. Thank you Ms. Waters. Does the gentleman from Virginia, Mr. Scott, have a unanimous consent request?

SCOTT:

**JA759**

Yes and thank you Mr. Chairman. Mr. Chairman I ask unanimous consent to enter into the record letters from the National Organization from Black Law Enforcement Executives, City of Philadelphia Police Department, Boston Police Department and Association of Prosecuting Attorneys on behalf of the attorney general. And also a copy of the draft contempt citation we were questioning what -- what had been asked for -- draft contempt citation offered by the Committee on Oversight and Government Reform.

Which says in part, that wiretap applications document extensive involvement of the Criminal Division in Fast and Furious, yet the Department of Justice has failed to produce them in response to the committee's subpoena. So that we know exactly what was asked.

(CROSSTALK)

SMITH:

OK. Without objection those documents will be made a part of the record and the gentleman from Arizona, Mr. Franks is recognized for questions?

FRANKS:

Well thank you Mr. Chairman. Thank you general. Mr. Holder, on April 27, 2011, members of this committee asked you to give us information surrounding the decision by Justice to forgo prosecution of the unindicted co conspirators in the Holy Land Foundation case. This is the largest terrorism finance case of course in U.S. history. You -- you refused to comply with this request and you've still not produced or -- you've still not prosecuted despite there being what many consider to be, a mountain of evidence against the Jihadist groups.

At least one of which now says that it's working inside your agency to advise on the purge of counterterrorism training materials. And we're told that this mountain of evidence, which outlines the Jihadist network within the United States amounts to 80 bankers boxes full of documents. This evidence was turned over to the court and much of it was given to the Jihadist defense lawyers. Now members of this committee and other committees would like to review this evidence.

Whether it has to be on a classified basis or not. Would you commit today to give us and provide us with those documents, which comprised the government's case in the Holy Land Foundation trial?

HOLDER:

I -- I -- I don't -- that's hard for me to answer that question. I don't know...

(CROSSTALK)

FRANKS:

It's not -- it's not hard to answer. It's -- it's will you or will you not?

HOLDER:

I don't know what the nature of the evidence is? I don't know if it's Grand Jury material. I don't know if the wiretap information -- there are a variety of things that I have to look at. I can certainly take your request and we can check to see what the nature of the evidence is and make a determination about whether it's appropriate for that material to be reviewed. I -- I just don't know.

FRANKS:

All right. Well we -- we made the request on April 27 of last year and so far it hasn't happened. So I -- I would like to make the request. And would -- would you give us your best efforts basis that -- your good faith effort that you will give that information to us if -- if you can do so?

HOLDER:

I'll certainly make a good faith effort to look at the request that you have made and see whether or not it can be complied with.

FRANKS:

All right well I -- I guess would have hoped that you would also give us some explanation as to why the request has been ignored thus far? Let me shift gears on you here. It's been reported that multiple agencies including the FBI are now purging counterism (sic) training materials of information outside groups might find offensive. Including a discussion of things as fundamental as, that quote, "Al-Qaeda is a group that endorses violent ideology that should be examined." Unquote. That's one example.

JA760

For the new guidelines, FBI agents may no longer discuss this in their training sessions because it offends some people. It's been purged. And this strikes many as the sacrificing of vital national security, the muzzling of our national security apparatus on the altar of political correctness. And -- and it -- this concern I think general seems warranted given that the bipartisan Senate report on the Fort Hood massacre, to quote again, the worst terrorist attack on U.S. soil since 9/11 found that, quote "Political correctness inhibited officials from taking actions that could have stopped the attack."

Now, members of multiple committees are now investigating. Has anyone inside your agency coordinated with any other federal agency such as DOD or DHS or the Department of State, to carry out this review of counterterrorism training materials?

HOLDER:

Well, let me say first off that the decisions that were made by the FBI with regard to the -- what use would be made of certain materials is not based on political correctness or whether or not something is offensive. The search was for materials that were simply incorrect. That stated -- had assertions about particular things that were simply wrong. And we didn't think that was appropriate to be included in the training materials.

Bob Mueller has taken the -- this very seriously. But I can tell you, I mean if anybody you can include Bob Mueller, he is not making the determinations on the basis of what is either offensive or politically correct. That is not the driver in this attempt to make sure that our training materials are accurate.

FRANKS:

So, has anyone inside your agency coordinated this effort such as it is? Whatever it might be, with the DOD or DHS or the State Department?

HOLDER:

Well, I'm not sure that we necessarily have to. We obviously interact with our partners all the time in a variety of ways. The deputy attorney general issued some guiding principles to all DOJ component heads and U.S. attorneys to make sure that this training material -- these training materials were accurate. We interact with our partners all the time, and it is on that basis among other things that we have an ability to decide what materials are accurate.

FRANKS:

Well, it's one of two things. Either your position is that no one in your agency has spoken with or met with other agencies or the White House in carrying out this purge of vital counterterrorism materials. Or they have. And if they have, who directed these agencies in general to purge these materials? And what outside groups advising the department on the issue?

HOLDER:

This is an internal process being done by members of the FBI, members of the Justice Department who are steeped in this...

FRANKS:

Can you tell us what outside groups are advising you on this process?

HOLDER:

I -- this is something that's being run primarily out of the FBI. I mean, to the extent that there are outsiders who are involved in this war we are trying to interact with we can perhaps try to get you those names.

FRANKS:

Would you? I'll leave it right there. If you'll just respectfully, officially ask you to give us the list of who the outside groups are that are working with you on this process. Because one of them is a jihadist group that says they are working with you on it. And I just want to make that...

HOLDER:

I don't believe that's accurate. But I will relay the request to the FBI.

FRANKS:

All right.

Thank you, Mr. Chairman.

SMITH:

**JA761**

Thank you, Mr. Franks.

The gentleman from Illinois, Mr. Quigley's recognized for questions.

QUIGLEY:

Thank you so much, Mr. Chairman.

Sir, it is, as you know, very hard to minimize or diminish the tragedy that is Fast and Furious. Horribly ill-conceived program that led to the loss of life of an agent endangered others. And as you agree, there must be a continued thorough, independent investigation and justice must be done. Corrections must be made, and I believe have been made.

But with the greatest respect I would say today that I believe that the effort here has become politically motivated in an attempt to embarrass the administration. And that diminishes the process. The operative phrase that comes to mind since bad witness has been used, is pay no attention to the man behind the curtain.

Mr. Attorney General, welcome to Oz. Pay no attention to the fact that this process began under a previous administration. Pay no attention that the agencies lack sufficient resources. Pay no attention that the head of the ATF hasn't been allowed to be appointed.

Pay no attention that the laws are inadequate to protect agents and citizens on both sides of the border. Even more specifically, but in Arizona any citizen may purchase an unlimited number of AK-47s and transfer them within the state in private sales. That the Special Agent Peter Forcelli of the Phoenix field division testified at a previous hearing that as it relates to straw purchasers and punishments, he used the expression "some people view this as no more than -- no more consequential than doing 65 in a 55."

And that as it relates to the Gun Show Loophole, we recognize the fact and others would ask you to pay no attention. You can buy any type of gun you want without any background check. You could be adjudicated as dangerously mentally ill. You could be a felon. You could be on your third order of protection. You could be on a terrorist watch list. And you can buy what you want.

In terms of resources, the Washington Post said in 2010 the ATF has the same number of agents it had in 1970, while the FBI's grown by 50 percent and DEA by 233 percent. I'm glad those agencies got the growth they need because they make us safer. But ATF does as well.

And finally, pay no attention to the fact that Special Agent Peter Forcelli of the ATF said "I have less than 100 agents assigned to the entire state of Arizona. That's 114,000 square miles. Do we have the resources? No, we don't." We desperately need them.

So, Mr. Attorney General, life is unfortunately even after tragedies about moving on. And I ask you in a perfect world, what are the situations and resources that you and other agencies have to combat the threats that are still going on; the fact that people are still dying from gun violence in the border area?

HOLDER:

Yes. It is an issue that we have to confront. Recent studies have shown that of the 94,000 guns that were seized in Mexico, 64,000 of those guns can be traced back to the United States. I think there are a number of steps that Congress could take and help us in connection with this fight.

We need a comprehensive firearms trafficking statute. We need tougher sentences for straw purchasers so you don't have that 65-55 mile an hour thought. We need to get ATF the resources that it needs. In fiscal year '11 Congress cut our request for 14 project gunrunner teams in half. It decreases our capacity to do these kinds of things.

And I think that Congress should not attempt to block the long gun reporting requirement that has recently been upheld by a federal court that would require somebody buying multiple AK-47s over a five- day period to have that information simply shared with the ATF. That is a valuable intelligence tool and has helped us, while it's been in place in only four Border States, to develop leads and to deal with the situations that you have described.

QUIGLEY:

And if I might switch gears briefly. I come from Illinois. I come from Chicago. It's important to recognize the gentleman stepping down from the attorney general's position in Chicago has left an extraordinary legacy. I want to commend his efforts. And I give you the opportunity to do the same if you will.

**JA762**

HOLDER:

I have known Pat Fitzgerald since he was a line lawyer in the southern district of New York and working on really consequential, important terrorism cases. I have admired his work then. He has been an outstanding U.S. attorney in two administrations.

He is a true patriot. He has been a great U.S. attorney. He has focused on public corruption matters as well as national security matters. He has in fact been a model U.S. attorney and somebody who's going to be sorely missed by us in the Justice Department.

QUIGLEY:

Thank you, sir.

I yield back.

SMITH:

Thank you, Mr. Quigley.

The gentlewoman from Texas, Ms. Jackson Lee is recognized for unanimous consent request.

JACKSON LEE:

Mr. Chairman, thank you for your courtesies. Unanimous consent to submit into the record a report of the Minority Staff Oversight indemnity reform dealing with Fast and Furious; I ask unanimous consent a statement on the draft contempt citation of the Oversight Committee, a letter regarding the purging of voters, and a letter regarding race-based juries. I ask unanimous consent to submit it into the record.

(UNKNOWN)

Reserving the right to object.

SMITH:

The gentleman reserves the right to object, and can be heard on his objection.

(UNKNOWN)

I have no objections to the latter material. But in the case of the former material, I would ask unanimous consent that if we're going to enter one side of any document from another committee if you want it into the record, that corresponding documents be allowed to be paired in so as to give a complete report.

SMITH:

OK. Without objection the documents mentioned by the gentlewoman from...

JACKSON LEE:

And I have no (inaudible)...

SMITH:

... Texas will be made part of the record. And the documents referred to by the gentleman from California will be made a part of the record.

We'll now go to the gentleman from Texas, Mr. Gohmert, for his questions.

GOHMERT:

Thank you, Mr. Chairman.

So you know where I'm coming from, Mr. Attorney General, I've been a prosecutor. I've been a district judge handling felonies including death penalty cases. I've been a chief justice of a court of appeals. As a -- I've been appointed to defend cases I didn't want to defend. But I did my very best job, and did it well.

I've had people come before me who were friends that I've sent to prison because that was consistent with justice of what I would've done to someone in their situation who was not a friend. I have sentenced the children of friends with a courtroom full of my supporters who were all beginning me not to. But I knew if I was going to be consistent in justice I had to do that.

I've sent people to prison because it was the fair and just thing when considering all of the facts and considering what had been done in the past. And then I've gone in my office after sentencing and wept because of the personal anguish of those that I cared deeply about. But I

**JA763**

knew that I did the right thing. And history has borne me out.

So, when I hear an attorney general of the United States come before us and say somewhat cavalierly there is a political aspect to this office, it offends me beyond belief. Your job is justice, Mr. Attorney General. It's justice across the board. And that is what's been so troublesome around here.

When we made a request a year ago here for the documents that your department has produced to people who were convicted of supporting terrorism; they're terrorists. And we wanted the documents you gave to the terrorists. We're a year later and we still don't have them. Why in the world would your department be more considerate of the terrorists than of the people who are members of Congress who can vote to just completely defund your department? It makes no sense.

So, I will ask again. And there is no room for a response that, well it's an ongoing investigation, well some of these may be classified. I'm asking for the documents your department produced to the terrorist supporters convicted in the Holy Land Foundation trial. Can we get those documents, just the ones that you gave to the terrorist defendants?

HOLDER:

Well, certainly you can have access to those things that are on the public record that were used in the trial.

I was also a judge. I sat in this Washington, D.C....

GOHMERT:

So, is that a yes or a no that we will get those documents?

HOLDER:

As I said, I was also a judge, and understand the anguish that you go through.

And just may clear up one thing with regard to the political aspect of this job. I have to advance or try to advance legislation that I think is appropriate for the department. That is a political job. I push policy initiatives for the department. That is a political component. I fight defunding requests that people kind of cavalierly throw around about the budget of this department. That is, from my perspective, a political component to this job.

GOHMERT:

Sir, it is not cavalierly. When a department has parts of it that are not doing their job and in fact may be giving more aid and comfort to people who are part of organizations who want to bring about an end to our way of life. Then that concerns me that perhaps that is an area that should be defunded.

And when you've been here before and we've talked about Fast and Furious and you were asked who actually authorized Fast and Furious, you had said we may not ever know who authorized Fast and Furious. Are you any closer right now as you sit here to knowing who authorized Fast and Furious?

HOLDER:

I suspect that we are closer, given the fact that the inspector general is charged with the responsibility of investigating this matter at my request, has been in the field and been interviewing people. And my guess would be that we are closer to that. I expect that report will be out relatively soon.

GOHMERT:

Did you not ever go back to your office and say when you found out about Fast and Furious I demand to know who authorized this? Are things so fast and loose in your office that somebody can authorize the sale to international criminals of American guns that are bringing about the death of even American agents, and nobody has to do that in writing?

SMITH:

The gentleman's time's expired. But you can answer the question.

HOLDER:

Well, let's look at what I did do. I asked the inspector general to conduct an investigation. I put an end to the policy that led to the Fast and Furious debacle. I made personnel changes at ATF and in the U.S. Attorney's Office. We made changes in the procedures there.

JA764

And that's in stark contrast to what happened to my predecessor Attorney General Mukasey when he was briefed about the transmission of guns to Mexico, and as far as I can tell did far less than what I did.

GOHMERT:

Sir, that was a different...

HOLDER:

If you want to look at what I did...

GOHMERT:

... aspect.

HOLDER:

If you want to look at what I did, those are simply the facts.

SMITH:

Gentleman's time...

GOHMERT:

My question, though, Mr. Chairman, was did you go back and say I demand to know who authorized this Fast and Furious program. That was the question.

HOLDER:

That's...

GOHMERT:

Pretty simple.

HOLDER:

That's consistent with me telling the inspector general, find out what happened here. So, the answer to your question's yes.

SMITH:

The gentleman's time's expired.

The gentleman from Georgia, Mr. Johnson, is recognized for five minutes.

JOHNSON:

Thank you, Mr. Chairman.

On May 12th the House passed its Commerce Justice Science appropriations bill. And this is a part of the Ryan budget. And it tries its best to eviscerate and neuter the ability of the Justice Department to protect Americans as it is supposed to do. You can't operate without money.

And the bill in its attempt to neuter the department cuts funding for financial and mortgage fraud enforcement. It prohibits funding for enforcing the requirement that licensed firearms dealers report multiple sales of rifles to the same person. It prohibits funding to bring actions against states for their voter identification laws, among other things.

The bill -- the bill would cut funding for the general administration line on the DOJ's budget request from \$81 million to \$45 million. Or excuse me. Yes, \$29 million less than requested. The DOJ program for recessions and asset forfeitures has been cut.

The number of U.S. attorneys you'll have 1,000 unfilled positions. And you've already lost -- that's attorneys. You've already lost 850 staff since the hiring freeze that was instituted in January of 2011 has gone since -- since that went into effect. And this bill could result in an additional 411 positions lost.

The Antitrust Division is cut \$5.2 million. You could lose up to 70 positions in that unit. You've already lost 77 positions in that unit. That's the unit that keeps consumer prices low and gets at collusion and -- and bid rigging and other activities that cost money to consumers; cost consumers money.

The U.S. Trustee Program, which you administer, which is so important in bankruptcy, which are

**JA765**



on the rise. You've seen a 5 percent reduction, 50 positions may be suspended. Law enforcement, wireless communications for the department has been cut. The ability to hire people in foreign language, skilled in foreign languages has been cut. These things hurt the department's ability to be effective.

I want to get to that part about the voter identification laws. You were answering a question that was posed to you by Mr. -- from Iowa, Mr. King. But you were cut off by the bell and you were not given a chance to complete your -- your statement on that. Can you complete it now, please?

HOLDER:

I'll be honest with you. I don't remember where I was.

JOHNSON:

Well, it had to do with the South Carolina challenge of your department to their voter ID laws.

HOLDER:

All I can say is that with regard to the South Carolina law, we looked at the evidence that was provided to us by South Carolina, did not feel that the evidence about voter fraud was substantial enough to overcome the disproportionate impact that the changes in their voting procedures had on minorities, older people, young people. It was on that basis and under Section 5 of the Voting Rights Act that we decided to file -- to not clear (ph). That was -- I tried to do.

JOHNSON:

So, basically you were stating or you stated that the reason that South Carolina gave for making it tougher to vote through voter ID requirements. The reason that they did that, which is to get at the voter fraud, did not hold any water. In other words, there was an insufficient evidence of voter fraud, and so therefore there must've been some other intention behind their legislation to make it more difficult to vote there. Would you agree with me on that?

HOLDER:

Well, the initial material we got from them did not have any statistical proof. We got a submission from them later on that indicated there were perhaps 900 people who had -- I think who were dead who were on voter rolls or something along those lines. That was undisputed by another South Carolina official. This is all a matter that is now before the court and will be ultimately decided by the court here in Washington, D.C.

JOHNSON:

And then as I stated earlier, the House Commerce Justice Science bill...

SMITH:

The gentleman's time is expired.

JOHNSON:

... prohibits funding to bring actions against states for their voter identification laws.

And I'll yield back the balance of my time. But I would like to make a unanimous consent request.

SMITH:

Without objection. What document does the gentleman wish to enter into the record?

JOHNSON:

There are 10 letters of support for Attorney General Holder praising his leadership from the National Fraternal Order of Police; from Patricia Maisch, a Tucson shooting survivor; a letter from the Leadership Conference to the Chairman Issa; a letter from Commissioner Ramsey to Chairman Issa; a letter from the National Action Network to Chairman Issa; a letter from the Leadership Conference to Speaker Boehner; a letter from the National Women's Law Center to Speaker Boehner; a letter from the National Women's Law Center to Chairman Issa; a tri-caucus letter from Representative Gonzales, Representative Cleaver and Representative...

SMITH:

Without objection all of those letters be...

JOHNSON:

Last but not least...

**JA766**

SMITH:

... made a...

JOHNSON:

... letter from the National Organization of Black Law Enforcement...

SMITH:

Did you get these letters from the Attorney General himself? No, I'm teasing. Without objection all those letters will be made a part of the record.

JOHNSON:

Thank you. And I yield back.

SMITH:

Gentleman from Texas, Mr. Poe is recognized for questions.

POE:

Thank you, Mr. Chairman.

Thank you for being here, Attorney General. I want to thank your office for the cooperation they've had on the specific issue of human trafficking, the new scourge that's happening in the United States.

A recent Pew study has come out and said that there are approximately 2 million ineligible voters in the United States. Of that 2 million, 1.8 million are dead people. I would assume you would agree that voter rolls when verified that the folks on the rolls are dead, they should be purged in some manner. Would you agree with that or not?

HOLDER:

Absolutely. I think the purging should occur. It just ought to be done consistent with federal law.

POE:

The -- your office, how many -- how many specific cases have you prosecuted or your office has prosecuted on voter fraud since you've been attorney general?

HOLDER:

I don't know what the number is. I know that I prosecuted them myself when I was in the public integrity (inaudible). I don't...

POE:

Just when you've been attorney general.

HOLDER:

I don't know what the number is.

POE:

Would the number be zero?

HOLDER:

No. I think that we have had vote fraud cases that I know that we've either settled through pleas. I'm not sure we've had trials, but I know that we've had cases where people have committed offenses where they've made straw donations and other ways in which voter fraud was carried out. I know we've done those cases. I don't know what the numbers are.

POE:

OK. So that I know the exact number because the information I've been given it's zero. So, if you would provide me the actual number. I don't need the cases, just the number of cases that your office has prosecuted under Section 8 of the -- of the law. And let me know, and let the chairman know the exact number. Because like I said, my information is there are none.

HOLDER:

Well I mean our efforts to fight voter fraud though go beyond just Section 8 of the NVRA. They -- there's a whole range of other statutes that we use...

**JA767**

(CROSSTALK)

POE:

I understand.

HOLDER:

...in those cases.

POE:

I would like to know specifically Section 8, prosecutions under your term as attorney general?

(CROSSTALK)

HOLDER:

You can wrap that into the larger...

(CROSSTALK)

POE:

I know there are other cases.

(CROSSTALK)

HOLDER:

...you want to wrap...

(CROSSTALK)

POE:

I'm not asking for the other ones. Just to be specific, I'm asking for the Section 8 prosecutions by your office.

HOLDER:

I mean but actually just to be fair. To get a sense of what it is we're doing. As I said, we'll give you that information, but as I said I will give you a sense of...

(CROSSTALK)

POE:

You can give me more information if you wish. That's fine. Just so it's Section 8s included in that. That would be great.

HOLDER:

Sure.

POE:

The Mexican ambassador to the United States recently has made some comments about Fast and Furious that Mexico was unaware of -- quote, "Mexico was never apprised how the operation would be designed and implemented." Talked about the fact that Fast and Furious has hurt the relationship between the United States and Mexico. I'm not surprised that he would say something like this. We constantly talk, as we should about the Americans that were killed in Fast and Furious. But there were apparently according to the Mexican news reports, hundreds of Mexican nationals killed because of Fast and Furious.

The last time you were here, you answered a question and you said, "More people will probably die because of Fast and Furious." Do you know how many people in Mexico have been killed as a result of the United States helping to facilitate straw purchases of automatic weapons going down to Mexico? Do you know how many?

HOLDER:

I -- I don't know. But I -- I -- I would think that there have been some and I know that given the 64,000 guns that have gone to -- from the United States to Mexico that Mexican citizens, Mexican law enforcement officers have lost their lives as a result of guns that started in the United States, but ended up in Mexico.

POE:

How many of the guns have been recovered of the total number in Fast and Furious? And we get different numbers. I've heard 1,200. I heard 2,000. How many guns have been recovered in Mexico that were the result of guns involved in the Fast and Furious operation?

HOLDER:

I don't know that number.

POE:

Any guess at all? Do you know how many -- that -- that was the purpose, was it not of Fast and Furious? To sort of keep up with the firearms when they go to Mexico? And see where they were used in a crime scene? And then who the bad guys were? Wasn't that sort of the purpose?

HOLDER:

Yeah...

(CROSSTALK)

POE:

Failed purpose?

HOLDER:

That was the stated purpose as it was in Wide Receiver and the other previous attempts at dealing with the flow of guns from the United States to Mexico, none of which were ultimately successful and all of which allowed guns to be inappropriately put into the stream of commerce.

POE:

How many guns have been recovered on Fast and Furious?

HOLDER:

I've heard different numbers on that as well. Anywhere from 800 to 1,200. I'm -- I just don't know. I think we started off with a number of about 2,000 that were put into -- into -- inappropriately put into the stream of commerce and then the number that has recovered as -- I've heard 800 to 1,200, but I don't know.

POE:

What would our -- what would America's reaction be if the roles were completely reversed? That if our neighbors in Mexico or Canada, they -- they smuggled -- facilitated the smuggling of automatic weapons into our country where Americans were killed? Mexican nationals killed? What would be our reaction to that?

(CROSSTALK)

HOLDER:

Probably...

(CROSSTALK)

POE:

As the head lawyer in the country?

HOLDER:

Probably similar to what the ambassador has said. Though I do have to say that we have a good -- we -- we have a -- we -- we maintain a good relationship with Mexico that operates on a whole bunch of levels. Certainly law enforcement is the one that I'm most familiar with. I have a good relationship with the attorney general in Mexico. We talk all the time. And we have -- we continue to work together on a variety of law enforcement projects.

And it's not been deterred by the -- the regrettable Fast and the Furious episode. But I can understand the Mexican ambassador's comments.

POE:

And what are we doing to wrap the operational -- oh I'm sorry Mr. Chairman I didn't realize.

(CROSSTALK)

JA769

SMITH:

The gentleman's time...

(CROSSTALK)

POE:

You know if we're from the south, we should get more than five minutes, I think.

(CROSSTALK)

SMITH:

Thanks.

(CROSSTALK)

SMITH:

Why doesn't the gentleman from Texas ask the question that he'd like the attorney general to respond to in writing?

POE:

Then I ask unanimous consent to submit -- you mean ask the question or submit the question in writing?

SMITH:

I was going to suggest you ask the question you were planning to ask and we'll get the response later on?

POE:

I will submit the -- numerous questions to the attorney general. You can submit back, if you would to the -- to the chairman. Thank you.

SMITH:

All right. Without objection. Thank you Mr. Poe. The gentleman from Tennessee, Mr. Cohen is recognized?

COHEN:

Thank you Mr. Chairman and I'll talk fast even though I'm from the south. Mr. -- Mr. Attorney General, we appreciate your coming before us. In October 2008, the Department of Justice approved the merger between Delta and Northwest Airlines. The Department of Justice issued a statement, you may not remember this. Quote, "The proposed merger between Delta and Northwest is likely to produce substantial and credible efficiencies that will benefit U.S. consumers and is not likely to substantially lessen competition." Unquote.

Unfortunately, that forecast has in many people's mind, in Memphis in particular, proved to be grossly inaccurate. Many of the promises made by Delta in front of this committee have been broken. As anybody in Memphis can attest, the prices of flying out of this quote, unquote, "fortress hub" is much, much, much higher than it is flying out of other cities. And you can fly to cities through Memphis at cheaper prices than you can from Memphis to X. If you go from another city through Memphis to the city, it's cheaper than Memphis to.

This has caused the city the loss of conventions. The loss of businesses who said, we left Memphis because the price of flying out was too great, so we moved to Atlanta. Convention moved to Kansas City. Another group moved to Kansas City. The people of Memphis are very upset about this and that we have unreasonably high airfares. Memphis is not alone. Cincinnati lost their hub and -- and service has been cut in Minneapolis as well. Now that the merger is in place, what type of enforcement mechanisms does your Department of Justice have to ensure competition, or to try to get competition? And break up what is in essence, a monopoly?

HOLDER:

Well I think that we have been appropriately aggressive in our antitrust (sic) enforcement efforts. There are a number of cases that we have brought. Everything from e-books to the way in which telecommunications industry has tried to -- has tried to consolidate and in those cases where we have not brought suit, we have extracted from the parties who have sought to -- to join promises or concrete divestitures of -- of assets so that we would maximize the chances that the consumer would benefit.

**JA770**

I think we have focused appropriately on what the impact will be on consumers and I think that the...

(CROSSTALK)

COHEN:

But in the airline industry, have we done anything? Because the airline industry has gotten to be basically three major carriers. They've divided up the middle cities and the middle cities are hostages. They are company towns. And the people in the cities have to pay whatever they're charged. Can we do anything about that?

HOLDER:

Well, I mean there's a certain amount of consolidation that has happened in the industry that I think is necessary for the survival of those companies. But, for instance you look at what Delta and U.S. Air tried to do in a transaction involving LaGuardia Airport and National Airport here in Washington, D.C., we approved what they wanted to do in New York. And we have reserved decision on what they wanted to do here in Washington to see what the impact of the -- these consolidated...

COHEN:

If I could interrupt you because our timing is limited. Washington, Los Angeles, New York, the big cities have had competition. It's the middle American cities that are getting the brunt of this. Memphis is one of them. What can you do about Memphis, Cincinnati, St. Louis, Pittsburgh?

HOLDER:

Well I mean what we can always do is to examine what the impact of these mergers has been. And if we find anti-competitive operations in a particular city...

(CROSSTALK)

COHEN:

Then can I ask you to look into Memphis and the situation there? Frontier Airlines came in. Delta came in, undercut them. Frontier left. U.S. Air now is running Memphis, Washington. Delta is going to undercut them. Southwest is not looking to come in. We talked to Southwest, they said if we come in, we're going to be undercut. That's monopoly.

HOLDER:

Yeah. I mean the -- there cannot be -- I -- I can't comment on the particulars yet because I'm not aware of them, but to the extent that one entity tries to undercut another inappropriately by lowering its prices and driving that competitor out of the market -- only to drive that competitor out of the market. And then raises its prices once the competitor is gone, that's inappropriate under our antitrust laws. And that's the kind of thing that would have an impact on consumers. And that we would aggressively pursue.

COHEN:

Well that -- let me ask you to look at the situation in Memphis, that's number one. Number two, in Memphis too and I think I've written you about this, grocery store business. Kroger's come in and had taken over the market. They bought out Schnucks. Then Schnucks took Kroger's place -- shops in Southern Illinois. Schnucks has got a -- a -- an area of influence in Southern Illinois they didn't have because they swapped stores with Kroger. Prices have gone up, there's not competition there.

It's happening all over America. Business is finding ways to work with each other to create monopolistic practices and take advantage of consumers. And consumers are left off. It's what's happening. Income inequality, purchasing ability inequality, the middle-class, the consumer, they've got nowhere to go. The only hope and change they've got is with your and our -- this administration. Otherwise big business is cutting them out. So I'd appreciate your looking into these monopolistic practices and looking after the consumer, which I know you want to.

HOLDER:

Our focus is on the protection of consumers. And I think as I said that we've been -- aggressively put people to head that division who share that attitude. As I said, I think they have done a good job.

COHEN:

Thank you. And I yield back the proverbial remainder of my time when I have none.

SMITH:

JA771

The gentleman's time has expired. The chair recognizes the gentleman from Utah, Mr. Chaffetz?

CHAFFETZ:

Thank you.

SMITH:

Five minutes.

CHAFFETZ:

Thank you. Thank you Mr. Attorney General for being here. I'd like to -- to focus my comments on -- on Fast and Furious. You -- you stated in previous testimony here today that you had read the six wiretap applications. I too have read those wiretap applications. I come to a -- a conclusion that is totally different than your conclusions. And that is but I think, a sliver of the information that we're looking at where a reasonable person would only come to the conclusion that the senior most people within the Department of Justice did indeed know that guns were walking.

That those tactics were being used. And I guess my question for you, Mr. Attorney General, those -- those things are sealed. Those -- those wiretap applications. Nobody wants to impede in an ongoing investigation or hamper a prosecution opportunities (sic.) My question for you today is, would you be willing to make yourself personally available to myself and Mr. Gowdy and in the essence of fairness, Mr. Bobby Scott and Mike Quigley, to come talk to you? Sit down and I want you to show me how you don't come to that conclusion?

And I'd like to show you why I think there's a preponderance of evidence that would lead one to believe that, yes indeed the Department of Justice did know about this. Is that fair? Could you make yourself available?

HOLDER:

Well.

JACKSON LEE:

Chairman, a parliamentary inquiry...

(CROSSTALK)

CHAFFETZ:

Mr. Chairman, please?

(CROSSTALK)

SMITH:

(Inaudible) continue to inquire.

CHAFFETZ:

Mr. Chairman.

JACKSON LEE:

I -- I know the attorney general is about to answer.

SMITH:

Just...

(CROSSTALK)

JACKSON LEE:

...but the -- is it appropriate -- is it appropriate for members to refer to sealed documents in this Judiciary Committee room and suggest that the attorney general makes a personal visit to members on what is sealed and should not be provided during a criminal investigation?

CHAFFETZ:

I simply asked if -- again, I don't -- please, Mr. Chairman, this should not count toward my time. I'm simply asking -- there's a dispute here. This has been going -- this has gone on for a year and a half. Most members on this side asked about Fast and Furious. We're trying to resolve this, get to the end of it. It's hard to do in five minutes. I'm just asking for personal time to show

JA772

you what we've seen and for you to share with us what you've seen.

JACKSON LEE:

But, Mr. Chairman, I again refer -- these are sealed documents. What I'm trying to understand, is the gentleman wanting the chair -- excuse me -- the attorney general to speak to sealed documents that have been leaked and then discuss it with members while there is a pending criminal investigation?

Is this the appropriate approach...

SMITH:

The gentleman will suspend.

JACKSON LEE:

... for the Judiciary Committee?

SMITH:

The gentleman will suspend. The contents of the sealed documents may not be discussed.

The gentleman may have his time back, and will receive...

JACKSON LEE:

Thank you, Mr. Chairman.

SMITH:

... the remaining time that has been allotted to the gentlelady from Texas.

CHAFFETZ:

Is that a reasonable request?

Will you sit down with us and talk about this?

HOLDER:

Well, I don't think that, under the federal law, I have an ability to talk about, as the statute says, the contents of the wiretap...

CHAFFETZ:

Would you be willing to sit with us and talk about all the other pieces of evidence that we see that aren't sealed?

HOLDER:

Well, I have sat down with you on eight separate occasions...

CHAFFETZ:

I'm asking for more time to sit with you, more than just five minutes, and go through this in some depth. Give us two hours, two members from the Democrats, two on the Republican side, and go through this?

HOLDER:

You know, with all due respect, I give you four hours at a crack on eight separate occasions. I'm not sure there's an awful lot more I have to say.

But here's one point I would say. You and I have both read materials that senior people in the Justice Department, as they went through those -- that approval process -- did not read. As we know...

CHAFFETZ:

Let me go on, please. If you're -- so the answer's no?

HOLDER:

No, but...

CHAFFETZ:

Well, you're eating up my time, and I only have about three and a half minutes left. I'd like more

**JA773**



time. That's what I'm asking for, and you're saying no. So...

HOLDER:

No, but...

CHAFFETZ:

Please, let me -- let me -- let me share with you why I think this is imperative. Sunday, October 17, 11:07 p.m. Jason Weinstein sent an e-mail to James Trusty, "Do you think we should try to have Lanny participate in a press when Fast and Furious and Laura's Tucson case are unsealed? It's a tricky case, given the number of guns that have walked, but it is a significant set of prosecutions."

James Trusty sends back to Jason Weinstein, "It's not going to be any big surprise that a bunch of U.S. guns are being used in Mexico, so how I'm not sure how much grief we'd get for guns walking. It may be more like, finally, there are going to be people who -- they're going after the people who sent guns down there."

Now, you claim with passion that nobody at the senior levels of the Department of Justice prior to the death of Brian Terry knew that guns were talking, and I've got an e-mail from Jason Weinstein using the term "guns walking."

HOLDER:

I think we went through this exercise before. That refers to Wide Receiver, not Fast and Furious.

CHAFFETZ:

That's not what the February 4th letter that was sent to the United States Congress. It says that the ATF never uses those tactics -- never.

HOLDER:

We said.

CHAFFETZ:

That's not true.

HOLDER:

And we said that that letter was inaccurate. It was ultimately withdrawn. But the e-mail that you just read -- now, this is important. That e-mail referred to Wide Receiver. It did not refer to Fast and Furious. That has to be noted for the record.

CHAFFETZ:

It's -- no, it doesn't. It says "Fast and Furious." "Do you think we should try to have Lanny participate in a press when Fast and Furious and Laura's Tucson case are unsealed?"

It's specific to Fast and Furious. That is not true, Mr. Attorney General.

I'm happy to share it with you.

May I ask unanimous consent to give you some extra time to review it?

HOLDER:

That's fine. The Laura Tucson case refers to Wide Receiver.

CHAFFETZ:

It says "Fast and Furious." We'll let the media have it, and we'll play it out there.

HOLDER:

Laura was not involved....

CHAFFETZ:

Have you....

HOLDER:

Laura Duffy was not involved -- Laura was not involved in Fast and Furious.

CHAFFETZ:

**JA774**

The e-mail says "Fast and Furious." You say it doesn't. I've got it in black and white.

Did you personally read...

HOLDER:

I have superior knowledge.

CHAFFETZ:

Did you personally read Speaker Boehner's letter sent to you on May 18, 2012?

HOLDER:

Yes, I got that.

CHAFFETZ:

Did you read it?

HOLDER:

Yes.

CHAFFETZ:

Have you personally responded to the speaker?

HOLDER:

The deputy attorney general responded.

CHAFFETZ:

So you delegated that to James Cole?

HOLDER:

I didn't delegate it to him, but it was appropriate for him to respond.

CHAFFETZ:

So you didn't think it was appropriate for you to respond?

HOLDER:

No, but what I've indicated in my opening statement -- and I'm certainly willing to indicate right now -- is that I am willing to personally engage with the four people who signed that letter and try to come to an accommodation so that we can get you the information that you need consistent with what I think is our need to protect ongoing investigations.

I want to be as flexible as we can, and you said, get to the end...

CHAFFETZ:

I have a hard time buying that, when you won't sit down with a guy like me and...

SMITH:

The gentleman's time is expired.

CHAFFETZ:

... go over these details.

SMITH:

The gentleman's time is expired.

SMITH:

The chair recognizes the gentleman from Puerto Rico, Mr. Pierluisi.

PIERLUISI:

Welcome back, Attorney General. And I -- I realize been it's a long hearing, and as you say, the eighth occasion on which you appeared before us. As I have stated before, the first thing I'll say is that I have to commend your demeanor, your patience, your decorum, in appearing before us, I mean, subjecting yourself sometimes to process that I do not believe is fair. If anything, this committee should always try to afford due process. And I am sad to say that sometimes here you

**JA775**

were interrupted in a way that is not deserving to the position you're holding.

So I, for one, I thank you.

Now, as you probably expected, I want to complain a little bit. The familiar subject of my questioning is the federal government's response to drug-related violence in Puerto Rico and the neighboring U.S. Virgin Islands.

The murder-rape in Puerto Rico and the USVI is nearly six times the national average and nearly three times higher than any state. Most of these homicides are linked to the cross-border trade in illegal drugs which is primarily a federal responsibility to combat.

During your previous testimony, you stated that "Drug-related violence in our nation's Caribbean territories is a national security issue we have to confront."

You also stated that Puerto Ricans are American citizens who deserve the protection of their government. I know you and your team have been working to address this problem. You and the heads of DOJ's component agencies have always made yourselves available to talk to me despite your busy schedules, and I appreciate that.

And there have been some major success stories in recent months, including yesterday's federal-state operation, which resulted in the arrests of dozens of our airline workers in Puerto Rico who were smuggling drugs on flights to the mainland U.S. Your men and women in Puerto Rico are doing terrific and courageous work. I hope you know that I recognize and respect that.

But it's clear to me and to any reasonable observer that far more needs to be done. The CJS appropriations bill, which we approved recently this year, explicitly stated, "The committee is aware that efforts by federal law enforcement to reduce drug trafficking and associated violence in the Southwest border region has affected trafficking routes and crime rates in the Caribbean. The committee expects the attorney general to address these trends by allocating necessary resources to areas substantially affected by drug-related violence and reporting back to the committee."

~~I wrote this very same week to the president asking him to direct ONDCP to prepare and publish a Caribbean border counternarcotics strategy which would outline a federal plan of action to address drug trafficking and related violence in Puerto Rico and the V.I.~~

ONDCP already does this for the Southwest border and the northern border. So the first question I have is do you see any reason why ONDCP should not do the same for the Caribbean border?

HOLDER:

I think that's actually a fair point, and it's consistent with what I testified to, I think, before your remarks that -- my remarks that you referenced before. When one looks at the Caribbean, Puerto Rico in particular, I think we need to have a strategy. We have a task force on Puerto Rico that the associate attorney general is one of the co-chairs of. I think that, to the extent that it is not explicit, that we should develop such a plan.

PIERLUISI:

Thank you. And my second question -- and, Mr. Chairman, you know, I would -- I would like to be able to make my question and then get an answer even if my time expires. Quite a few of my fellow members have had that courtesy. I hope you can extend it to me as well.

SMITH:

The gentleman just ask the question.

PIERLUISI:

OK.

The second question is, can you explain the concrete steps that DOJ has taken to strengthen its presence in Puerto Rico?

Wouldn't it be appropriate for DOJ to increase the resources it devotes to the island even if it is only a temporary surge, just as the federal government did when there was a spike in violence on the U.S. side of the Southwest border?

I know we're living in an environment of constrained resources, but I'm talking about prioritizing the limited resources you have and making sure they're being allocated to these areas where

**JA776**

they're needed the most?

By the way -- and I have the stats -- D.A. has increased its manpower, but the FBI and ATF have not in recent years. Shouldn't you be acting with more of a sense of urgency in this area?

Please tell me why I should feel better about this than I do?

SMITH:

If the attorney general would be brief?

HOLDER:

OK. We are -- our law enforcement components have really developed recruitment and retention incentives for agents who are willing to -- who are stationed in Puerto Rico. Retention is a really -- it's a unique problem that we have in Puerto Rico, but I think the issue that you raise about surges is something that we are starting to embrace, because we have seen -- although we've seen historic drops in the crime rate, we have seen hot spots, for lack of a better term, around the country.

And what we are now doing is developing a capacity to surge agents and resources, money at times, to help local law enforcement into those hot spots. We have done it in a couple of cities in the United States mainland. We plan on looking at other places that we will. And I think Puerto Rico, given the -- the homicide rate and the violent crime rate that is -- far outstrips the national norm, I think Puerto Rico would certainly be a candidate for such a surge.

PIERLUISI:

Thank you so much.

SMITH:

The gentleman's time is expired. The chair recognizes the gentleman from South Carolina, Mr. Gowdy for five minutes.

GOWDY:

Thank you, Mr. Chairman. I thank you for your great service to the great State of Texas and as a judge.

Mr. Attorney General, I want to ask you about a comment attributed to you and, then, a statement issued by the Department of Justice. In a "New York Times" interview in December of 2011, you said there was a desire to "get at" you because you "consistently take progressive stands."

Shortly after that interview, the department issued a statement wherein it said your critics, and I'll quote, "Your critics rightly view you as a progressive force."

The common theme in both of those statements is an apparent belief that you are targeted because you are, to use your term, progressive. So I want to be really clear with you, Mr. Attorney General. I'm not a critic of yours because you consider yourself to be progressive.

I'm a critic because I don't think the Attorney General for the United States of America should have any political ideology whatsoever. You are the Attorney General for the entire country regardless of your political ideology or anyone else's political ideology.

You're the Attorney General for everyone. You're a former judge, you're a former U.S. Attorney, you're currently the chief law enforcement official for the United States. I don't know what attracted you to the criminal justice system. I haven't had an opportunity to ask you.

I can tell you that what attracted me to it was the notion of working solely for a woman who is blindfolded and carries nothing with her except a set of scales and a sword. No political ideology, no agenda, just a set of scales and a sword.

And it's important to me that she doesn't care about anyone's station in life and she doesn't care about their political ideology and she doesn't care whether they're black, white, brown, progressive, conservative. It's just about the equal application of the law.

And further in that interview with the "New York Times," you singled out my colleague from South Carolina, Senator Graham, as someone who had good faith in his criticisms towards you.

So my question -- and, then, you suggested that others are motivated by something more nefarious, bad faith, a desire to get at you, a desire to do damage to the president.

**JA777**

So my question to you is this, do you think it's possible to be motivated by good faith and still ask who the senior-most level officials within main justice were who knew about the tactic of gun-walking prior to Brian Terry's death? Is it possible for me to ask that question and be motivated by good faith?

HOLDER:

Sure. I would say that, you know, let's ask do you think John Ashcroft was a conservative?

GOWDY:

I don't know Mr. Ashcroft. I tell you who I do know, Mr. Attorney General, I know the United States Attorney for the District of South Carolina. He was appointed by President Obama. He is every bit of progressive as you say you are, if not more so.

And not only have I not been a critic of his, I have been one of his biggest fans because you cannot tell what his political ideology is from the way he discharges his job. So I don't know John Ashcroft. I don't know you. I know Bill Nettles. I know the United States Attorney.

And, oh, you can shake your head when I say that, but the truth is you're the one who said you were being targeted because you're a progressive.

And my point to you is, I would be asking the exact same questions about Fast and Furious whether you were John Ashcroft, whether you were Dan Lungren, whether you were Bob Goodlatte. I don't care about the political ideology of the U.S. Attorney or the Attorney General.

HOLDER:

All I would say is this, the decisions that I have made in connection with anything that I've done in the Justice Department don't reflect my political ideology. They reflect my view of the facts, the law and what my responsibility is as Attorney General of the United States.

Now ...

GOWDY:

Well, then, why did your department say that? Why did your department in December say that you were a target because you consistently take progressive stands? Do you think that's why I'm asking you about Fast and Furious because of your political ideology?

HOLDER:

I have -- I will accept that your question to me is one that is based in good faith. I'm not going to say -- I'm not going to ignore reality and say that all of the attacks that have been directed at me have been those that are nonpolitical in nature or that have come in good faith ...

GOWDY:

Can I be motivated by good faith?

HOLDER:

(inaudible) reality.

GOWDY:

Can I be motivated by good faith and still believe that you ought to have to show an ID to vote in South Carolina just like you do to have to enter the Federal Courthouse?

HOLDER:

Absolutely. We can have a disagreement, you can operate in good faith and ask that question as I can disagree with you in good faith and not have a political motivation behind my position.

GOWDY:

Well, Mr. Attorney General, you have a difficult job, but if you think that you are being singled out because of political ideology or race or any other characteristic or factor when it comes to Fast and Furious, you are sorely mistaken. I would be asking the exact same questions regardless of what party was in party.

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

SMITH:

The gentleman's time is expired. Chair recognizes gentlewoman from California, Ms. Chu, for

**JA778**

five minutes.

CHU:

Thank you, Mr. Chair.

Attorney General Holder, before I begin my questions, I'd like to take a moment to commend you for the progress that the department has made on various issues, for instance on intellectual property rights. You have made that a priority.

It's very, very important for our economy and I congratulate the Department of Justice on the ground-breaking case earlier this year, where you charged seven individuals and two corporations for running an international organized criminal enterprise that was responsible for causing more than half a billion dollar in harm to copyright owners.

And I also want to thank the department for seeking to protect every American's right to vote. During 2011, the Civil Rights Division handled 27 new voting rights cases and with 176 bills introduced in Congress that are aimed at suppressing American's right to vote, you're doing incredibly important work.

I also want to applaud you for changing the material that the FBI had been using in their counter-terrorism materials that had many inflammatory statements about Islam and offensive stereotypes about Muslims. And, in fact, the FBI has conducted the review of this counter-terrorism training material that indicated factually incorrect information.

And earlier, Congress member Franks said that these were statements that had to do with political correctness, but actually I wanted to name some of the statements that were made in these training materials that were incorrect and, in fact, offensive.

For instance, this one that was in the FBI manual, "Never attempt to shake hands with an Asian" or how about "Never stare at an Asian." I most personally take offense at that I must tell you. And how about this, "The Arabic is swayed more by ideas than by fact." Or how about, "Traditional Muslim attire and growing facial hair is in indication of extremism."

I think those are statements that had to be removed from those manuals and my question has to do with the fact that a generation of FBI agents and joint terrorism task force members have been trained with these biased materials.

What is the department doing to make sure that those that have been trained with those materials don't hold these kinds of stereotypes?

HOLDER:

We have certainly removed those materials so that the training does not continue and as people are updated in their training, we make clear to them that that material was inappropriately shared with them before.

There are ongoing things that happen in the field offices to make sure that people don't rely on the kinds of things that you have just read into the record in their enforcement efforts so it's an ongoing thing.

We understand that there have been certain agents who have been exposed to this and we understand it is our responsibility to make sure that that information was incorrect not politically incorrect, but it was factually incorrect, that we make sure that they operate only on the basis of factually correct information.

CHU:

I truly appreciate that and, actually, I also wanted to talk about another issue and that's the NYPD and the Muslim community. In August 2011, the Associated Press published an investigative article that described intelligence-gathering by the NYPD of the Muslim community in New York.

So 34 members of Congress and over 115 community and civil rights groups have requested that the Department of Justice open an investigation on this issue? Has the Department of Justice begun a formal investigation into this issue?

HOLDER:

Well, we are aware of the allegations. We have received, as you indicate, several requests to investigate the NYPD and we are in the process of reviewing these requests. We are very far along in what I will call this preliminary stage and I expect to be getting something, a formal recommendation fairly soon.

JA779

CHU:

I would appreciate it that because we want to make sure that innocent Americans aren't spied upon simply for eating at a restaurant or simply practicing their faith and it is offensive to many.

I always remember the fact that we had 120,000 Japanese-Americans that were taken off to concentration camps based on allegations of spying and, yet, in the end, not a single case of espionage was ever proven. So we want to make sure that the rights of innocent Americans is protected.

HOLDER:

Yes, that is our objective as well.

CHU:

Thank you. I yield back.

SMITH:

Thank you, Ms. Chu.

The gentlewoman from Florida, Ms. Adams, is recognized for questions.

ADAMS:

Thank you, Mr. Chairman.

Hello, Attorney General. Good to see you again.

HOLDER:

Good morning -- good afternoon.

ADAMS:

Earlier when you were asked about when you became aware of the tactics of Fast and Furious, I believe you said it was the early part of 2011?

HOLDER:

Right.

ADAMS:

And how long after Agent Terry's death were you made aware of the fact that one of those guns that walked was actually used to kill your agent?

HOLDER:

I think roughly about the same time. I'm not sure we've actually had a ballistic match in the regard, but I think I was made aware of the fact that guns found on the scene were from Fast and Furious and I think that was about roughly the same time, sometime in February. I'm not sure exactly when.

ADAMS:

Would you consider that -- because I'm going to go back to your opening statement. You said, during your opening statement, about how you and your agency are working closely with all the agencies and that all the issues that apply to whether it's the National Security League, Homeland Security and all that; you're working very closely.

Yet, you have an agent murdered, there's guns on the scene that come back to Fast and Furious and it takes one, two months before you're made aware of the fact that this has happened?

HOLDER:

Well, you're talking about my personal knowledge.

ADAMS:

Yes.

HOLDER:

There were other people ...

**JA780**

ADAMS:

You are the Attorney General, are you not?

HOLDER:

I will stipulate to that.

ADAMS:

You are our chief law enforcement officer ...

HOLDER:

But ...

ADAMS:

You have a dead agent.

HOLDER:

No, but I'm saying that there were people in the Justice Department who were aware of the fact that those guns found on the scene were from Operation Fast and Furious. I personally did not become aware of that until February, but there were people in the department working with our DHS allies and people in local law enforcement and the FBI who were aware of that fact. Yes, I thought you were directing the question at just me, as opposed to somebody else.

ADAMS:

Well, you know, I heard -- I've listened all day long, and I listened the other day when you were here, also. And every time when questions are posed about Fast and Furious, we always get a different timeline or somewhat similar or we've had a letter called back for inaccuracies months after it was delivered to us.

So now we have -- you sit here and you tell us today, in your opening statement, how well your agencies are working together, yet you have an agent who is murdered, and it takes a couple of months before you're made aware, as the attorney general, that the weapons that were left and allowed to gun walk were used during the homicide.

So I -- I go onto -- if we have all of this going on, and I keep hearing you go back to, well, in the previous administration, we did this, or they did that. You know, I don't really care what happened in the previous administrations. What I care about is the fact that, when I worked with agents in the previous administration as a law enforcement official, I knew that when they went to get a wiretap, they had to produce the evidence of probable cause to their supervisor, who then had to sign off on that.

So I listened today, as you said, well, they just signed off on a summary. So are you telling me that your supervisors sign off on wiretaps based on summaries without looking at probable cause?

HOLDER:

No, that's what they do at all. They are satisfied looking at the summaries that are prepared that probable cause does, in fact, exist, but they do not review these things with an eye towards understanding the full panoply, the full scope of the underlying operation. They only make sure that when we go to court, there is a sufficient basis for us to say that probable cause exists, that with regard to the telephone number that we want to get the wire on, that we can say that that particular phone was involved in the commission of a crime, not the full extent of what Operation Fast and Furious was all about.

ADAMS:

So, you know, you -- you covered a lot of different areas today. I am still waiting for an answer as to how so many thousands of guns walked. I've never been involved in an undercover operation that would allow such a thing to happen, and it's amazing to me that our own attorney general's office is the one who allowed it to happen.

But then you go in to say that you have...

HOLDER:

I did not allow that to happen. And, in fact, as soon as I found out about it...

ADAMS:

It was your agency.

**JA781**



HOLDER:

... I...

ADAMS:

You have control over that agency, do you not?

HOLDER:

As soon as I heard about it, I instructed that that policy, that practice had to stop. I was the first attorney general to do that, and I did that.

ADAMS:

After the death of one of our agents. You also talk about how your agency is working deliberately on -- and there was some information to ask about immigration. And then you said, well, you know, we just need a comprehensive solution for immigration issues. Wouldn't that solution be that you and your agency actually enforce the laws on the books that we have today?

HOLDER:

We do enforce the laws. We are more effective than any...

(CROSSTALK)

ADAMS:

Well, I will just let you know that when I ask about with criminal aliens that are released back into...

CONYERS:

Regular order.

(CROSSTALK)

ADAMS:

... because what we have is criminal aliens being released back into our communities because their home countries will not take them back, and I ask, well, do we ever file 243(d) paperwork? And I was told, no, none during this administration have been attempted. So I have concerns when I ask you about our immigration laws being enforced.

The other thing, before I go, is I want to tell you this...

SMITH:

The gentlewoman's time has expired.

ADAMS:

I'll yield back.

SMITH:

Thank you, Ms. Adams.

The gentlewoman from California, Ms. Sanchez, is recognized.

I'm sorry. The gentleman from Florida, Mr. Deutch, is recognized.

DEUTCH:

I knew it wasn't intentional. Thank you, Mr. Chairman.

General Holder, thank you for joining us here today. As we're all aware, General Holder, a statewide purge of suspected ineligible voters is underway in Florida. Now, all voters benefit from voter roll maintenance efforts conducted with oversight, with accuracy, and with enough time to rectify mistakes. Unfortunately, the purge underway in Florida is nothing of the sort.

A list of 182,000 suspected non-citizens has been compiled by Governor Scott's administration. This list is so riddled with mistakes that Governor Scott's own secretary of state Kurt Browning objected to the list, yet the risk was not reason enough for Governor Scott to stop. Cross-checking driver's license data with state voter files was guaranteed to result in mistakes, guaranteed. Many legal immigrants who have become citizens are still classified as non-citizens

**JA782**

in the motor vehicle records.

But it doesn't explain how a World War II veteran and Bronze Star-winner from Davie, Florida, was listed. And it doesn't explain how a Fort Lauderdale small-business owner was listed. It doesn't explain the staggering rate of inaccuracy in just the initial stage of the purge. If the rate of inaccuracy in the initial 2,600 holds up for the remaining 180,000, then nearly 40,000 American citizens' voting rights are at risk.

And let me be clear about one issue: Everyone here agrees we don't want non-citizens on the rolls. I don't. General Holder, you don't. The issue is that this purge will remove thousands of legitimate voters. Why is there zero concern for these voters?

Mr. Sensenbrenner earlier called this a model of due process. In fact, the letters going to voters say that they will be removed if they fail to respond within 30 days. The governor believes that a failure to respond to a letter within 30 days is reason enough to lose your right to vote, even if you're a U.S. citizen.

Maybe you moved. Maybe you don't read your mail. Maybe it got lost, or maybe, General Holder, you're a different elderly veteran of World War II who received the letter the week that his wife died and threw it out because he didn't have time to deal with the preposterous assertion that he is not a United States citizen. That happened, Mr. Attorney General.

Now, General Holder, I applauded you last Friday for requesting that Florida suspend this error-ridden, unaccountable, and illegal voter purge. The DOJ rightly pointed out that federal voter laws prohibit voter purges within 90 days of an election, thanks to a law passed two decades ago, because the closer you get to an election, the less time you have to correct mistakes, mistakes like disenfranchising voters.

Now, I'm aware the governor responded to you late last night, in a letter that showcases his administration's willingness to make up the law as they go along. And I know, Mr. Attorney General, your department will respond in detail in the coming days and will do everything necessary to compel Florida to comply with the law to prevent thousands of Floridians from being disenfranchised.

But finally, I want to give you a chance to respond to a letter sent to you yesterday by a colleague of mine. The letter reads that your department's interference in this purge proves that you are, quote, "more concerned with protecting the re-election prospects of the president than with upholding justice and enforcing the rule of law," that you are actually working to keep non-citizens who have committed a felony on our state's voter rolls.

General Holder, with 16 cases of voter fraud found in Florida of over 8 million votes cast in 2008, the assertion that voter fraud is an actual electoral strategy is preposterous and offensive, and it's condescending, because voter fraud would be a totally ineffective way to rig an election. It's rare because it's a felony that risks prison time and huge fines, and it's a totally illogical way to try to swing an election.

You know what is an effective way to sway elections? Scrubbing thousands of legitimate voters off the rolls, eradicating voter registration drives, reducing early voting, and disenfranchising millions of seniors and impoverished Americans who lack government IDs. That's the tactic that Governor Scott -- Governor Scott and his ilk are using not just in Florida, but around the country.

But maybe I'm wrong, General Holder. Can you just answer quickly, is my Republican colleague right, Mr. Attorney General? Have I missed some grand conspiracy here?

HOLDER:

I'm not -- I haven't seen the letter, but that is not what motivated our action or will continue to motivate the actions that we may have to take. I've not seen the response from the governor or the secretary of state in Florida, but I am -- I will assure you that we will make sure that the federal law is enforced and that voter purges happen in a way that is consistent with the law.

I share your view that we do not want to have people inappropriately voting, that we don't want to have voter rolls that contain people who should not have the right to vote. At the same time, we should engage in a process that does not put off the rolls people who have served their country as veterans, people who want to exercise that most fundamental of American rights, and so the notion that this is somehow a political ploy is inconsistent. One only has to look at the law, which is clear, 90 days. It is very, very clear, 90 days.

DEUTCH:

And, in fact, General Holder, then, it's -- it is possible that as the highest law enforcement officer

**JA783**

of the land, that you actually have real concerns about American citizens being disenfranchised and that the United States Department of Justice, the U.S. Department of Justice actually cares about protecting the constitutional rights -- the constitutional rights of American citizens that are now being threatened by this illegal voter purge in Florida. Isn't that correct?

HOLDER:

That's right. At base, we have to enforce the law, a law that was designed by this Congress or its predecessor to protect the rights of American citizens. That's what our action is all about, to protect the rights of American citizens.

DEUTCH:

Thank you. I yield back.

SMITH:

The gentleman yields back his time.

The gentleman from Arizona, Mr. Quayle, is recognized.

QUAYLE:

Thank you, Mr. Chairman.

And -- and thank you for being here, Mr. Attorney General. I want to get back to how the wiretap application is approved and the process that it is. You said that basically whoever it was just reads the summary, determines whether there's probable cause, and if there is probable cause, then they send it off to get approval by the courts. Is that -- is that basically what you're saying the process is?

HOLDER:

Yeah, line lawyers in the Office of Enforcement Operations look at the affidavits, prepare a summary that's then reviewed by a deputy assistant attorney general, and then it goes to the courts.

QUAYLE:

So the deputy assistant is only looking for probable cause. Is that what you're stating?

HOLDER:

Right, to make sure there's a probable cause basis.

QUAYLE:

How is that true? Because under extensive requirements for federal eavesdropping law, the Justice Department officials have a duty, a duty to evaluate the law enforcement tactics that have been used in the investigation, why they aren't going to actually make it so that we can have a further investigation, and why you need to have wiretapping put into place.

We have Title 18 USC Section 25181(c) says that the application needs a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if they tried or to be dangerous.

Now, we put these sorts of safe measures in place, because wiretaps are extraordinarily intrusive. And so probable cause being the only basis for putting the application is just blatantly - is just false, I mean, unless you were -- your Justice Department was not living up to what is actually statutorily required for an application.

HOLDER:

What you're saying is absolutely right, that, in fact, there is that requirement. And if you look at the affidavits in the summaries, you will see that there is a statement by the person who does the affidavit and the person who prepares the summary that, in fact, other methods have been tried and have proven to be unsuccessful.

QUAYLE:

So you're saying that they're -- they did know about -- see, this is where I'm trying to get at is did the deputy U.S. attorney who actually signed off on these wiretap applications, did they actually go through and understand what the tactics that were being used?

Since then they would actually know at the time of reviewing those. Because you said that all they were looking at was the summaries and looking for probable cause when actually they would have to be looking for the tactics, why they failed and why you needed to have

**JA784**

eavesdropping going forward. So, that would mean that they would probably have that information a lot earlier than when you said earlier.

HOLDER:

I was looking at the tactics that we use in order to try to surveil (ph) people. All right. That's what you're looking for in terms of these tactics. Doesn't mean that you're looking at every tactic that was used...

QUAYLE:

It's part of the whole operation, though.

HOLDER:

The investigation...

QUAYLE:

But the investigation for the operation of what they're trying to accomplish you're using various tactics. It's not just for surveilling (ph). It's for the whole operation.

HOLDER:

And what I'm...

QUAYLE:

And so the tactics actually are a part of the application. Why they failed, why you need eavesdropping. So, your deputy -- deputy attorney actually knew about the tactics even though you've been saying all along that you didn't because you only had the summary and you're only looking for probable cause.

HOLDER:

I've looked at these affidavits. I've looked at these summaries. There's nothing in those affidavits as I've reviewed them that indicates that gun walking was allowed. That's the bottom line. And so I didn't see anything in there that would put on notice a person who was reviewing either at the line level or at the deputy assistant attorney general level. You would have knowledge of the fact that these inappropriate tactics were being used.

QUAYLE:

Are you saying in the summaries or in the whole affidavit?

HOLDER:

In the affidavit as well as...

QUAYLE:

In whole. So, there were no -- there were no comments about the tactics of gun walking within the whole affidavit. Or are you talking about the summaries? Because there's a clear distinction between the two and if you're saying they're only relying on the summaries and not the whole affidavit.

But then you would have to go to actually then would it be an untrue affidavit Go Gate (ph) wiretaps that they didn't include the gun walking? So, I mean is that lying to the court in the tactics that were being used during the operation?

HOLDER:

I mean, we have to speak hypothetically here OK because we can't talk about the...

QUAYLE:

I understand that. But hypothetically so -- I mean, I'm just trying to get down to what the process was. Because it seems to be a little misleading from what you have said and what Mr. Brewer said in the past that it was only for legal sufficiency or probable cause in this instance from your perspective. When in actuality the statutes that govern this, especially with federal eavesdropping, are much more strict and require much more proof that federal eavesdropping and wiretapping is necessary to actually go through with it and get the court order to do it.

HOLDER:

They do not -- these statutes do not require the degree of specificity that you are implying. They do not require you to go and describe all of the things that you have done during the course of an investigation with the degree of specificity that you are implying. That is not accurate.

**JA785**

QUAYLE:

What degree of specificity do you think that I'm implying here? I mean, you have to go through what the procedures are, what the tactics were. I mean, I'm not trying to say that you need to put down every serial number of the certain shoe that somebody was wearing while somebody was surveilling (ph) somebody. But the basic gun walking is a pretty big piece of the tactical operation in Operation Fast and Furious.

HOLDER:

Well, again, I can't get into the contents of the Fast and Furious wiretaps. I'm prohibited from doing that under federal law. But I can tell you that the notion that you are pushing, and you're pushing incorrectly. It does not require that degree of specificity, granularity to appropriately put together an affidavit and a summary that can go to a...

QUAYLE:

But it provides more than probable cause, which is what you were saying earlier, and it provides more than legal proficiency, which is what Mr. Brewer was saying earlier.

HOLDER:

Let him ask the question.

SMITH:

Gentleman's time...

QUAYLE:

My time's expired. Thank you.

SMITH:

... has expired.

The gentlewoman from California, Ms. Sanchez, is recognized.

SANCHEZ:

Thank you, Mr. Chairman.

And General Holder, thank you so much for joining us here today. I know that it's an important responsibility of your office to submit to this committee's oversight. And I know that you would agree that this is an important role for our committee to play. But it can't be easy.

I feel your pain to sit in front of us for such a lengthy period of time and answer questions about the many different areas under your purview. So, I'm going to apologize, I come towards the end, if some of my colleagues have already bent your ear on this topic. But I'd be remiss if I didn't bring up the recent changes in the Department of Justice policies regarding the reimbursement to local governments under the State Criminal Alien Assistance Program, or known more commonly as SCAAP.

As I'm sure you're aware SCAAP permits states and localities to seek reimbursements for the cost of detaining deportable immigrants charged with a felony or two or more misdemeanors. Deportation is a federal responsibility and SCAAP is a program which acknowledges that our overburdened local law enforcement facilities shouldn't have to bear those costs without some kind of reimbursement or recompense from the federal government since it is the federal government's responsibility.

Shortly after I was first sworn in as a member of Congress some 10 years ago local police officials came to me and explained how a change in the SCAAP funding rules was having a very profound effect on their budgets. And the 2003 SCAAP reinterpretation in which states only receive reimbursement if a criminal alien is convicted of a felony or two misdemeanors, and the arrest and the conviction occur in the same fiscal year, which is an odd and interesting requirement, has had tremendous repercussions throughout the law enforcement community, particularly in my state of California.

In California SAAP reimbursement payments have declined from \$220 million in fiscal year 2002, prior to the Department of Justice reinterpretation; down to \$112 million in fiscal year 2009. And for 10 years now in Congress I've been working with colleagues on both sides of the aisle for a bipartisan issue to try to help Justice recognize the need to return to the original congressional intent of this legislation.

The police departments and sheriffs' departments in my state are already having to do more in

**JA786**

terms of deterring crime and protecting constituents with less. And this reinterpretation of the SCAAP reimbursement really hinders their ability to do that.

They're trying under very difficult budget circumstances to do an incredible -- and they're doing an incredible job. But I -- you know they keep asking me, what is the federal government going to do about SCAAP reimbursement? And I'd love to be able to tell them that the funds that they desperately need are going to be coming. But last month I was just made to find that your department further reduced the reimbursements under the SCAAP program, which has the effect of only further increasing the pressures on local law enforcement and making their jobs that much harder.

This change is not only going to -- would not only reimburse state and local law enforcement if they're holding a known inmate already in ICE's database. And I just want to bring your attention to a letter that I have from the California State Sheriff's Association.

And Mr. Chairman, with your permission I'd like to enter it into the record.

SMITH:

Without objection.

SANCHEZ:

It suggests that if your department had made this change in 2010 it would've reduced payments to California sheriffs by an additional \$10 million. And that's already on top of the 50 percent cut from 2003 to 2009. And I just want to quote a section of this letter since I think that the California State Sheriff's Association summarizes this issue very accurately.

They state, and I'm quoting, "the federal government must uphold its responsibility to the facilities that hold criminal aliens, and not allow changes that would weaken the funding provided for SCAAP."

I hope that you'll give this issue more thought, and much more thought to the impact that this change is going to have on law enforcement communities across the nation, not just to mention southern California. And I hope that you'll reconsider rescinding -- reconsider this decision and consider rescinding it.

I just wanted to make you aware of that issue. I will be following up with your office. And I hope that we can work together to try to ensure that local law enforcement entities will be properly reimbursed for the great job that they do in trying to protect the public safety.

And I guess I'll allow you just a brief comment and then yield back to the chairman.

SMITH:

OK. Thank you, Ms. Sanchez.

The gentleman from Arkansas, Mr. Griffin, is recognized.

GRIFFIN:

Thank you, Mr. Chairman.

Thank you, Mr. Attorney General, for being here today. I want to ask you if you're familiar with the Olmsted case that deals with disability law. Are you -- you prepared to speak about that today?

HOLDER:

Well, I mean I'm not an expert on it, but...

GRIFFIN:

OK. Let me ask you a few questions about it.

In my state we have a number of homes, institutions for the developmentally disabled. And around the country there have been a number of lawsuits against some of these homes, alleging violations of civil rights.

And in some instances these lawsuits are filed with the view that the Olmstead case contemplates a -- a structure where the institutions sort of are phased out and that individuals with -- who are disabled, intellectually disabled, developmentally disabled, with those individuals are moved into more community based care. My state has -- has been, and Arkansas has been

**JA787**

the object of some of these lawsuits.

First of all, I wanted to ask you, do you believe that the Olmstead case requires a movement away from institutional care for the developmentally disabled? Or do you believe that these institutions can exist within the Olmstead framework?

HOLDER:

As I said, I am not an expert on Olmstead. I am familiar with the -- what the decision talks about and you know unnecessary institutionalization, how that clashes with the ADA. You're asking a question that I think is just beyond my...

GRIFFIN:

OK. Could I -- could I get something in writing on that? And let me -- let me continue a little bit.

My concern is that those who are implementing, and I understand it's many levels below you. My concerns that some in the Civil Rights Division and the Special Litigation section at DOJ are pursuing -- and to be fair, some of this litigation began in the last administration. So, this is -- this is an ongoing problem.

But my concern is that there are some who read the Olmstead case as if not requiring a move away from institutional care, at least somehow endorsing the move that those at DOJ have -- some at DOJ have advocated for. And my reading of -- well I think anyone's reading of -- of the case, the -- the actual case demonstrates that that's not what the case contemplated. The case was made -- made it clear that -- that segregation of those with disabilities will not be tolerated. But that institutions could be a part of the solution there.

And in fact the opinion, the plurality opinion said, and I want to quote this to you, quote "Each disabled person is entitled to treatment in the most integrated setting possible for that person recognizing on a case by case basis that that setting may be an institution." And so that is -- if you could get me some answers on that, that would be very important to me. You know, the -- the lawsuit that was filed in Arkansas was eventually dismissed for lack of evidence by -- lack of evidence presented by the Department of Justice.

And unfortunately it cost the State of Arkansas and the development center that was involved, \$4.3 million to litigate that. And -- and in the end, it was dismissed for no evidence. And if -- I won't go into the details here, but I'll just -- just tell you in a small state like ours, and an institution like this, \$4.3 million was a significant sum of money and in fact had to be -- timber had to be sold. Mineral rights had to be sold, et cetera to help fund this litigation. Which was then dismissed because DOJ had no evidence or did not have sufficient evidence.

So, if -- if you could get me just your views on that, I would very much appreciate it. And I thank you for being here today and listening.

HOLDER:

Yeah I'd be glad to do that. I think the -- the underlying material that you have shared with regard to the disposition of those two cases, is accurate. And so what I will endeavor to do is to respond to the questions that you have -- you have put to me and I apologize for not being able to answer based on that correct, factual assertions you've made.

GRIFFIN:

Thank you, Sir.

ISSA:

Thank you Mr. Griffin. The gentleman from Florida, Mr. Ross is recommended -- recognized?

ROSS:

Thank you Mr. Chairman. Mr. Attorney General, thank you for being here. I guess the -- the benefit of having me question you is I may be the last one. Thank you for your patience today. I want to ask you a couple of questions. The House Committee on Oversight did receive six wiretap applications that it reviewed. In that -- that committee's contention is that those applications contained detailed information about Fast and Furious and gun walking.

Now it's my understanding you have reviewed those applications since your testimony. It's my understanding that -- that you take issue as to what these applications actually detail as to whether Fast and Furious existed? Or whether there was any gun walking?

HOLDER:

Yeah. I mean, you know, what I would do again if I can't talk about the contents, I would align

**JA788**

myself with the letter that...

ROSS:

Is that James Cole's letter? Or...

(CROSSTALK)

HOLDER:

The letter that Congressman Cummings...

(CROSSTALK)

ROSS:

OK.

HOLDER:

...sent out, I guess a couple of days or so ago as he went through his analysis of that same material. I think his -- his perspective is -- is the correct one as opposed to what Chairman Issa...

(CROSSTALK)

ROSS:

Yeah and -- and since then -- and my understanding that there was a letter January 27 of this year to Chairman Issa that -- from general -- attorney general -- Deputy Attorney General James Cole that indicated that the changes have been made. Two of those changes included, the Department of Justice has changed its way of response, congressional inquiries and has also changed the internal process for wiretap reviews. In fact they -- your office has tripled the number of attorneys now reviewing wiretaps, is that correct?

HOLDER:

That's correct.

ROSS:

Is that an indication that what was done before was done inadequately and inappropriately?

HOLDER:

Well, it was actually in response to office visits that I was making where people were saying it was taking too long for them to make requests in the field and to get them processed in Washington and get the approvals back into the...

(CROSSTALK)

ROSS:

So it had nothing to do with another level of review to make sure that -- as to the accuracy of the content?

HOLDER:

No -- one of the changes actually does when we now require somebody in the field, a supervisor to look at the affidavit from the application that gets sent to Washington. We now require that supervisor to look at that. That was not a requirement before. And that is to try to make sure that we have better accuracy.

ROSS:

And -- and -- and as I understand it, according to a -- on Tuesday you have a spokeswoman, Tracy Schmalzer who issued a statement that says, "The review process for wiretap applications is limited and -- and specific assessment of whether a legal basis exists to support a surveillance request. The review process is not an approval of an operation." I -- I'm sure you agree with that. So the -- the sufficiency of it then has nothing to do with what may be alleged in there.

For example, hypothetically if there was a human trafficking operation going on and the wiretap was being requested for that, at what point do you just not look at the legal sufficiency of whether they -- requirements are met for the wiretap? At what point do you do something to stop the actual operation that's being asserted in there?

HOLDER:

Well I mean when you get these affidavits, they are pretty broad ranging. They describe in -- in

**JA789**



pretty good detail what's going on in an operation. But they don't go into all of the -- as I was explaining to Mr. Quayle, they don't go into the nitty-gritty of everything that is going on in connection with an investigation. If for instance and affidavit did contain -- and we'll talk totally hypothetically here.

ROSS:

Right.

HOLDER:

If an affidavit did contain some indication that trafficking was going on. That young girls were being -- were being tortured or something or that guns were being walked.

ROSS:

Right. What -- what -- what I'm getting at is we know have in place a process in reviewing the wiretap applications that would prevent another Fast and Furious. Is that correct?

HOLDER:

I -- I think we do with regard to that supervisory level. This is always assuming that the people who are working on the affidavits are sharing all the information. But it's not -- but -- but you shouldn't have that on the basis of just wiretaps. I mean given the policy pronouncements that I've made and the changes that I've made, I think that is the primary reason why we should not have a repeat of Fast and Furious.

ROSS:

And -- and -- and believe me, I would love to spend more time on -- on that issue. I'm sure you - you've -- you've had enough entertainment on that one. But what I would like to address with you is something that's near and dear to my state of Florida. Is it your opinion that you feel that deceased people should vote?

HOLDER:

Obviously, no.

ROSS:

And illegal aliens should not vote either?

HOLDER:

No, but veterans should be able to.

ROSS:

I couldn't agree more as long as they're, you know, eligible to vote. But, when my state in the furtherance of its obligation to make sure that we have a -- a -- an adequate and sanctified voting process, nine months ago requests from the Department of Homeland Security, the citizen database and yet receives not only a no, but no response. And then today, when they're trying to do what's necessary to make sure that the sanctity of the voting process is preserved and appropriate, the Department of Justice stonewalls and says, sorry you're within 90 days and therefore the Voting Rights Act applies and you can't do it.

So what is my -- what is my state supposed to do when DHS and DOJ does not cooperate with them in the furtherance of their obligations?

HOLDER:

Well, I can't speak to what DHS did, but I will say this about that DHS database, it does not contain people who were born in the United States so it is not going to be a cure all, even if...

(CROSSTALK)

ROSS:

But why would they refuse to give it? And now they have to go to the motor vehicle roles to find out -- to do their job? I mean they had better tools with that database than what they have now with their own internal tools.

HOLDER:

Well, I mean I don't know why they didn't. But I can say that the database itself would not be adequate for the kind of purging that is sought by the state of Florida.

(CROSSTALK)

**JA790**

HOLDER:

If it had been...

(CROSSTALK)

ROSS:

And -- and there's no reason they should not have -- DHS should not have -- they should have released it to the department...

(CROSSTALK)

HOLDER:

I don't know what the basis was for that determination by -- by DHS. I do know that, and I am concerned about the numbers of people who I've heard have been inappropriately purged from the voter roles who are citizens. Who have voted in the past and for whatever reason got -- got those letters.

(CROSSTALK)

ROSS:

Thank you. I yield back.

SMITH:

Thank you, Mr. Ross.

Mr. Attorney General, thank you for your testimony today...

JACKSON LEE:

Mr. Chairman, I have one unanimous consent, please?

SMITH:

The gentleman from Texas, Ms. Jackson Lee, is recognized for a unanimous consent request.

JACKSON LEE:

I thank you. It's a clarification regarding an e-mail sent by Mr. Jason Weinstein. This is his testimony regarding an e-mail referred to by the gentleman from Utah. The e-mail referred to the Wide Receiver, and the testimony that I'm submitting indicates this statement. "When I say it is a tricky case, given the number of guns that have walked, I am talking exclusively about Wide Receiver." I ask unanimous consent to submit this testimony into the record.

SMITH:

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

Mr. Attorney General, thank you again for your testimony. Without objection, all members will have five legislative days to submit additional written questions to the attorney general. And we hope he will be timely in his response.

This hearing is adjourned.

HOLDER:

Thank you.

CQ Transcriptions, June 7, 2012

#### List of Panel Members and Witnesses

##### PANEL MEMBERS:

REP. LAMAR SMITH, R-TEXAS CHAIRMAN

REP. F. JAMES SENSENBRENNER JR., R-WIS.

REP. HOWARD COBLE, R-N.C.

**JA791**

REP. ELTON GALLEGLY, R-CALIF.  
REP. ROBERT W. GOODLATTE, R-VA.  
REP. DAN LUNGREN, R-CALIF.  
REP. DARRELL ISSA, R-CALIF.  
REP. J. RANDY FORBES, R-VA.  
REP. STEVE KING, R-IOWA  
REP. TRENT FRANKS, R-ARIZ.  
REP. LOUIE GOHMERT, R-TEXAS  
REP. JIM JORDAN, R-OHIO  
REP. TED POE, R-TEXAS  
REP. JASON CHAFFETZ, R-UTAH  
REP. DENNIS A. ROSS, R-FLA.  
REP. STEVE CHABOT, R-OHIO  
REP. MIKE PENCE, R-IND.  
REP. TIM GRIFFIN, R-ARK.  
REP. TOM MARINO, R-PA.  
REP. TREY GOWDY, R-S.C.  
REP. SANDY ADAMS, R-FLA.  
REP. BEN QUAYLE, R-ARIZ.  
REP. MARK AMODEI, R-NEV.  
REP. JOHN CONYERS JR., D-MICH. RANKING MEMBER  
REP. HOWARD L. BERMAN, D-CALIF.  
REP. JERROLD NADLER, D-N.Y.  
REP. ROBERT C. SCOTT, D-VA.  
REP. MELVIN WATT, D-N.C.  
REP. ZOE LOFGREN, D-CALIF.  
REP. SHEILA JACKSON LEE, D-TEXAS  
REP. MAXINE WATERS, D-CALIF.  
REP. STEVE COHEN, D-TENN.  
REP. HANK JOHNSON, D-GA.  
RES. CMMSR. PEDRO R. PIERLUISI, D-P.R.  
REP. MIKE QUIGLEY, D-ILL.  
REP. JUDY CHU, D-CALIF.

**JA792**

REP. TED DEUTCH, D-FLA.

REP. LINDA T. SANCHEZ, D-CALIF.

REP. JARED POLIS, D-COLO.

WITNESSES:

ATTORNEY GENERAL ERIC H. HOLDER JR.

Source: **CQ Transcriptions**

*All materials herein are protected by United States copyright law and may not be reproduced, distributed, transmitted, displayed, published or broadcast without the prior written permission of CQ Transcriptions. You may not alter or remove any trademark, copyright or other notice from copies of the content.*

© 2012 CQ Roll Call All Rights Reserved.

**JA793**

**Exhibit 21**  
**to the Declaration of Colin Wicker**

**JA794**

## 4 Ways to Avoid Running Out of Money During Retirement

If you have a \$500,000 portfolio, download the guide by *Forbes* columnist Ken Fisher's firm. Even if you have something else in place, this must-read guide includes research and analysis you can use right now. Don't miss it!

[Click Here to Download Your Guide!](#)

FISHER INVESTMENTS™

Dow Jones Reprints: This copy is for your personal, non-commercial use only. To order presentation-ready copies for distribution to your colleagues, clients or customers, use the Order Reprints tool at the bottom of any article or visit [www.djreprints.com](http://www.djreprints.com)

[See a sample reprint in PDF format.](#)

[Order a reprint of this article now](#)

**THE WALL STREET JOURNAL.**

WSJ.com

WORLD NEWS | March 26, 2010

# U.S. Seeks Cleric Backing Jihad

*Preacher Radicalized Activists With Writings, Officials Say*

By KEITH JOHNSON

WASHINGTON—One of the U.S.'s prime terrorism suspects doesn't carry a rifle or explosives. But U.S.-born cleric Anwar al Awlaki's prominence as an apologist for jihad—especially in the English-speaking world—has put him squarely in the cross hairs of the antiterror effort.

Mr. Awlaki, born in New Mexico in 1971 to Yemeni parents and believed to be hiding in Yemen, is the most prominent of a handful of native-English-speaking preachers, whose calls for jihad, or holy war, are helping radicalize a new generation through the Internet, counterterrorism investigators say.



Associated Press

U.S.-born cleric Anwar al Awlaki exchanged emails with the shooter behind last year's fatal rampage at Fort Hood in Killeen, Texas.

He exchanged dozens of emails with Fort Hood shooter Maj. Nidal Hasan in the months before the November killing spree at a U.S. Army base. He calls Umar Farouk Abdulmutallab, the underwear bomber who allegedly tried to blow up a Detroit-bound airliner on Christmas Day, "my student." His writings helped to radicalize several Canadians, at least one of whom went to fight for al Qaeda in Somalia.

"He's clearly someone that we're looking for," said Leon Panetta, director of the Central Intelligence Agency, in an interview last week. "There isn't any question that he's one of the individuals that we're focusing on."

Mr. Panetta cited Mr. Awlaki's role in inspiring past attacks as well as his efforts to "inspire additional attacks on the United

States."

In a statement disseminated widely on pro-Jihadi Web sites last week, Mr. Awlaki ratcheted up his calls for jihad against the West, especially the U.S., and said that thanks in part to the spread of his ideas, "Jihad is becoming as American as apple pie and as British as afternoon tea."

Mr. Awlaki's importance as an instigator of jihad has increased at the same time that al Qaeda has become more decentralized. Recent terrorist acts against the U.S. have been attempted or carried out by individuals with little or no formal connection to al Qaeda's core, some of whom may have become radicalized by reading English-language versions of violent treatises, such as Mr. Awlaki's "Constants on the Path of Jihad."

U.S. officials aren't making that distinction. "He's considered al Qaeda," a senior intelligence official said, adding that the U.S. government doesn't let terrorist suspects "self-define."

**JA795**

Shortly after the Sept. 11, 2001, attacks on the U.S., a presidential covert action finding signed by George W. Bush authorized the capturing or killing of al Qaeda operatives, including Americans. At the time, Congress authorized the president to use all necessary force against groups or persons linked to the 9/11 strikes.



Getty Images

Lt. Col. Charles Keller and his family at a vigil for victims of the attack.

An order to kill an American, however, "has to meet legal thresholds," the official said. He declined to be more specific.

Mr. Awlaki burst into the spotlight after the Fort Hood shootings, when it emerged that he had counseled Maj. Hasan by email about the immorality of a Muslim serving in the U.S. Army.

But Mr. Awlaki's links to radical Islam go further back, according to the 9/11 Commission Report. In the late 1990s, while living in California, he was investigated by the Federal Bureau of Investigation for ties to the Palestinian group Hamas. After 9/11, he was questioned by the FBI about his relationship with two of the hijackers, whom he met while serving as imam

at a mosque in northern Virginia.

Mr. Awlaki fled the U.S. for Europe, and eventually settled in Yemen, where he was detained by authorities in 2006 and questioned by the FBI. He was later released.

"The combination of perfect English, having the proper religious credentials, and being a jihadi theorist makes him a very significant figure, both in terms of radicalizing people and perhaps even in an operational context," said Daveed Gartenstein-Ross, director of the Center for Terrorism Research at the Foundation for the Defense of Democracies in Washington.

In late December, Yemeni forces bombed a rural hideout where Mr. Awlaki and other terrorism targets were believed to be hiding. Mr. Awlaki was initially thought killed, but he promptly resurfaced on the Internet, through recorded statements and interviews with Arab media.

—Siobhan Gorman  
contributed to this article.

**Write to Keith Johnson at [keith.johnson@wsj.com](mailto:keith.johnson@wsj.com)**

Copyright 2012 Dow Jones & Company, Inc. All Rights Reserved

This copy is for your personal, non-commercial use only. Distribution and use of this material are governed by our Subscriber Agreement and by copyright law. For non-personal use or to order multiple copies, please contact Dow Jones Reprints at 1-800-843-0008 or visit [www.djreprints.com](http://www.djreprints.com)

## You Might Like

On Board the USS George Washington  
Korean General's Departure Seen as a Purge  
Egypt's High Court Blocks Parliament  
Pentagon Bulks Up Defenses in the Gulf  
It May Be Sane, but It's Not Fun

## From Around the Web

Content from Sponsors What's this?

Britain's Intelligence Chief Warns Iran  
Closing on Bomb, Predicts Israeli Attack  
(Newsmax.com)

Job loss at 55 is bad news (Bankrate.com)

Paying Off Your Mortgage Early: Should You  
Do It? (Can Do Finance)

What Is a Corpsman in the Marines? (eHow)

U-turn over fighter plane

**JA796**

**Exhibit 22**  
**to the Declaration of Colin Wicker**

**JA797**





U.S. Department of Defense  
Office of the Assistant Secretary of Defense (Public Affairs)

## News Transcript

On the Web:

<http://www.defense.gov/Transcripts/Transcript.aspx?TranscriptID=4890>

Media contact: +1 (703) 697-5131/697-5132

Public contact:

<http://www.defense.gov/landing/comment.aspx>

or +1 (703) 571-3343

Presenter: Secretary of Defense Leon E. Panetta and Canadian Minister of National Defense Peter MacKay

September 30, 2011

### Remarks by Secretary Panetta and Canadian Minister MacKay

SECRETARY LEON PANETTA: Well, let me -- let me welcome Minister MacKay to the Pentagon. This is our first meeting together. I've had the opportunity to meet him before, but this is the first time we've had a chance to sit down and talk about our relationship and the areas where we cooperate.

Canada and the United States are neighbors, but we are also friends and allies, and we are partners. And that's true in a number of areas. And we've had a chance to talk about some of the areas where we have developed a real strong partnership.

In Afghanistan, the Canadians are doing tremendous work, providing trainers -- training. They have a presence in Kandahar. Canada is one of the NATO countries that suffered the most in terms of those who lost their lives. And we pay tremendous respect to Canada for the sacrifice that they've made, but for the -- for the continuing strong partnership that they give us in Afghanistan.

Secondly, in Libya, we work very closely with them and NATO in that effort. And that represents -- I think both the minister and I would agree that that represents a really effective use of our NATO partnership in that kind of conflict.

The third area that we are looking at is how can we improve our bilateral partnership and presence in the hemisphere and try to work with other countries in this hemisphere to try to promote better security, issues like drug trafficking, issues that relate to security, issues that relate to our ability to respond to disasters. If we can develop better capabilities and partnerships throughout the hemisphere, that's something that I think both of us consider to be a real step forward in our relationship.

And the last area is obviously we both face budget constraints. And as we address those budget constraints, I think we also recognize that the more we can partner in capabilities, the more we can work together, it can ensure that as we constrain our budgets, we continue to protect our countries and provide the best defense possible for our people.

So thank you, Mr. Minister, for coming. We've had a great discussion, and I look forward to a continuing partnership with you and with Canada.

And I also have a chance to go up to Halifax at a conference that he will sponsor. This is his home area. And as a former politician, you can understand how important it is to be able to go to his hometown and be able to be with him there in Halifax. I look forward to that and look forward to continuing to work with you.

MINISTER PETER MACKAY: Well, let me begin by expressing my gratitude to Defense Secretary Panetta for the invitation and the opportunity to speak about these important issues and to emphasize, again, the enduring and special relationship that Canada and the United States share not just at the defense level, but really across the board, whether it be trade, whether it be our economies, whether it be our mutual desire to help in other parts of the world, including in our hemisphere.

But most importantly for all of us is the defense of continental North America. And whether it's the institutions of NORAD, our Permanent Joint Board on Defense and other security cooperation efforts, Canada and the United States, in my view, have the best relationship on the planet that really sets the gold standard for other countries around the world.

Of course, our relationship through NATO has also been one of the foundations of the defense partnership that the defense secretary spoke about. And in Afghanistan, in Libya today, Canadian and U.S. forces are shoulder to shoulder and in lockstep in the efforts to bring about peace and security in those two troubled nations, with great success, I might add. And the training piece that will enable in particular Afghans to take over those responsibilities and to assume that important security element for their own country, their own population is what we strive to achieve.

I'm very, very grateful for the incredible sacrifices that have been made by Americans in pursuit of those objectives. And as Secretary Panetta has mentioned, there is, in my view, opportunity for further growth in the relationship. To work towards greater cooperation here at home and abroad is a shared objective.

**JA798**

These are times where we are looking at defense budgets, and that calls for even greater effort to find efficiencies and to find ways

where we can mutually reinforce and support one another on a number of important projects and initiatives.

So these discussions are beneficial and ongoing, and I look forward to hosting Secretary Panetta in Canada very soon and an opportunity to again reinforce what has been just an outstanding example of how two nations share their national and international responsibilities.

So thank you very much for being here.

SEC. PANETTA: Thank you.

STAFF: Our first question will be from Barbara Starr of CNN.

Q: Mr. Secretary, what can you tell the American people about the role of the U.S. military in tracking and killing Anwar al-Awlaki? Were there U.S. military boots on the ground? And any information you can give us about the specifics of the attack.

SEC. PANETTA: Well, this has been a bad year for terrorists. You know, we -- we just have seen a major blow -- another major blow to al-Qaida, someone who was truly an operational arm of al-Qaida in this node of Yemen. And, you know, we had always had tremendous concern that after getting bin Laden, that someone like Awlaki was a primary target because of his continuing efforts to plan attacks against the United States.

As we know, he was involved in the Detroit bombing, he was involved in the cargo bombing efforts. He continued to try to inspire people to terrorize this country and to attack this country. And so this country is much safer as a result of the loss of Awlaki.

As far as the operational elements here, I'm not going to speak to those except to say that we've been working with the Yemenis over a long period of time to be able to target Awlaki, and I want to congratulate them on their efforts, their intelligence assistance, their operational assistance to get this job done.

STAFF: (Off mic.)...NBC

Q: Minister MacKay, did you -- was there any discussion today about the F-35 unit price at all -- (off mic) -- there needs to be more information released on that?

MIN. MACKAY: We did speak briefly about the F-35 program of which Canada is a full participant. It's still our intention, as you know, to purchase 65 of these aircraft, which are the conventional take-off aircraft. But I want to be very clear. There are three different variants. Canada is buying one variant, which is the conventional aircraft, which, from my own experience in visiting Lockheed Martin and speaking with their officials, is on time and on budget. We are purchasing those aircraft pushed out to about 2016 -- between 2016 and 2022 to replace our entire fleet of F-18s.

Now the program itself I know has received a lot of scrutiny here in the United States and in Canada, and the reality is this is the best and only fifth-generation aircraft available to Canada.

And by being part of a larger group of nations, we hope to share in the industrial benefits of that aircraft. But most importantly, we know the importance to North American security of being interoperable, through NORAD, through the United States Air Force and our own Royal Canadian Air Force.

Having that ability to communicate and ability to defend North America is of critical importance and it helps us in international missions, as well, as we are seeing currently in Libya. We are flying aircraft and working very much with the United States Air Force on refueling, on patrol, as well as for strike missions.

I would take the opportunity just to congratulate the defense secretary on a very successful recent outcome of that ongoing mission. And it is becoming clear that it is an occupational hazard to be in a leadership position in a terrorist organization. And so with the elimination of Osama bin Laden, today's news, this is good news not only for the United States and North America; this is making the world a safer place.

STAFF: (Off mic) -- Wall Street Journal.

Q: Mr. Secretary, the attack in Yemen, why now? Is this part of the Saleh government trying to hold on by stepping up its cooperation?

And after the bin Laden raid, you talked about the cooperation between the CIA and the military. Is this part of a further proof of that cooperation, this strike today? Is this a sign of closer cooperation between the agency and this department?

SEC. PANETTA: Well, there's no question that in the last few years the intelligence community and the military community have really come together as partners in going after terrorism. The president of the United States has made very clear that our primary mission is to disrupt, dismantle and defeat al-Qaida. And that has been the target of all of these efforts.

**JA799**

And what happened to bin Laden, what's happened to the top leadership in al-Qaida and what happened today with Awlaki is the

result of a lot of efforts coming together. In this instance, the Yemenis themselves have long cooperated with the United States in this effort. It goes back, frankly, to before some of the turmoil we've seen there, that the relationship in sharing intelligence and going after this target was something that involved a tremendous amount of cooperation between the United States and the Yemenis, and today it paid off.

.STAFF: Final question from Lee-Anne Goodman, Canadian Press.

Q: (Off mic) – Did you take the Challenger here today?

MIN. MACKAY: Certainly didn't.

Q: Why not?

MIN. MACKAY: Pardon me?

Q: Why not?

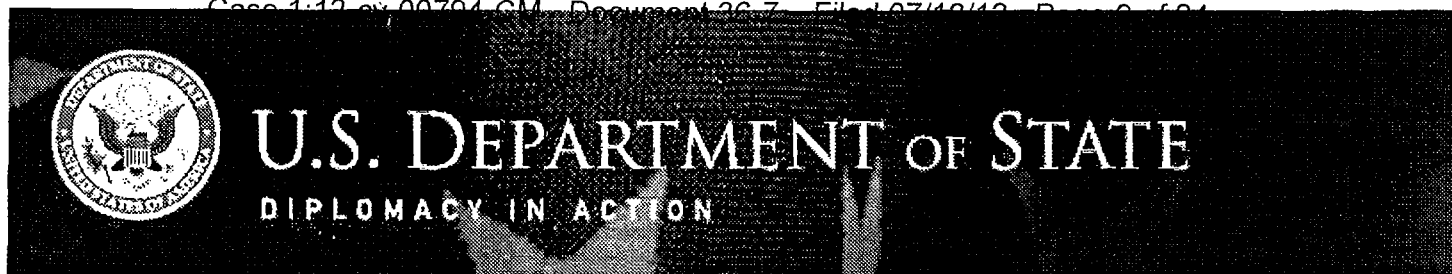
MIN. MACKAY: Because there's commercial flights available.

It's wonderful to be a reliable, robust security partner with the United States of America. And more than anything else, we want to signal through not just words but actions that our interests are common and that our goals are similar. And we -- we are very, very grateful for the level of cooperation, certainly in the security community and the defense community, that we enjoy. So again, thank you very much.

SEC. PANETTA: Thank you. Thanks very much.

**Exhibit 23**  
**to the Declaration of Colin Wicker**

**JA801**



Home » Bureaus/Offices Reporting Directly to the Secretary » Office of the Legal Adviser » Remarks, Fact Sheets, and Other Releases » Remarks » 1  
International Law

## The Obama Administration and International Law

### Speech

**Harold Hongju Koh**

Legal Adviser, U.S. Department of State

**Annual Meeting of the American Society of International Law**

**Washington, DC**

**March 25, 2010**

---

Thank you, Dean Areen, for that very generous introduction, and very special thanks to my good friends President Lucy Reed and Executive Director Betsy Andersen for the extraordinary work you do with the American Society of International Law. It has been such a great joy in my new position to be able to collaborate with the Society on so many issues.

It is such a pleasure to be back here at the ASIL. I am embarrassed to confess that I have been a member of ASIL for more than 30 years, since my first year of law school, and coming to the annual meeting has always been a highlight of my year. As a young lawyer just out of law school I would come to the American Society meeting and stand in the hotel lobby gaping at all the famous international lawyers walking by: for international lawyers, that is as close as we get to watching the Hollywood stars stroll the red carpet at the Oscars! And last year at this time, when this meeting was held, I was still in the middle of my confirmation process. So under the arcane rules of that process, I was allowed to come here to be seen, but not heard. So it is a pleasure finally to be able to address all of you and to give you my perspective on the Obama Administration's approach to international law.

Let me start by bringing you special greetings from someone you already know.

As you saw, my client, Secretary Clinton very much wanted to be here in person, but as you see in the headlines, this week she has been called away to Mexico, to meeting visiting Pakistani dignitaries, to testify on Capitol Hill, and many other duties. As you can tell, she is very proud of the strong historical relationship between the American Society and the State Department, and she is determined to keep it strong. As the Secretary mentioned, I and another long time member of the Society, your former President Anne Marie Slaughter of the Policy Planning Staff join her every morning at her 8:45 am senior staff meeting, so the spirit of the American Society is very much in the room (and the smell of the Society as well, as I am usually there at that hour clutching my ASIL coffee mug!)

Since this is my first chance to address you as Legal Adviser, I thought I would speak to three issues. First, the nature of my job as Legal Adviser. Second, to discuss the strategic vision of international law that we in the Obama Administration are attempting to implement. Third and finally, to discuss particular issues that we have grappled with in our first year in a number of high-profile areas: the International Criminal Court, the Human Rights Council, and what I call The Law of 9/11: detentions, use of force, and prosecutions.

**JA802**

First, my job. I have now been the Legal Adviser of the State Department for about nine months. This is a position I first heard of about 40 years ago, and it has struck me throughout my career as the most fascinating legal job in the U.S. Government. Now that I've actually been in the job for awhile, I have become even more convinced that that is true, for four reasons.

First, I have absolutely extraordinary colleagues at the Legal Adviser's Office, which we call "L," which is surely the greatest international law firm in the world. Its numbers include many current lawyers and alumni who are sitting here in the audience, and it is a training ground for America's international lawyers [To prove that point, could I have a show of hands of how many of you in the audience have worked in L sometime during your careers?] Our 175 lawyers are spread over 24 offices, including four extraordinary career deputies and a Counselor of International Law, nearly all of whom are members of this Society and many of whom you will find speaking on the various panels throughout this Annual Meeting program.

Second, I have extraordinary clients and you just saw one, Secretary Hillary Clinton, who is a remarkably able lawyer. Of course, another client of mine, the President, is also an outstanding lawyer, as are both Deputy Secretaries, the Department's Counselor, the Deputy Chief of Staff, and a host of Under Secretaries and Assistant Secretaries.

Third, each day we tackle extraordinarily fascinating legal questions. When I was a professor, I would spend a lot of time trying to think up exam questions. For those of you who are professors, this job literally presents you with a new exam question every single day. For example, I had never really thought about the question: "can you attach a panda?" Or the question, can Mu'ammar al-Qadhafi erect a tent in Englewood, New Jersey, notwithstanding a contrary local ordinance? To be honest, I had never really thought about those questions. But rest assured, in the future, many Yale law students will.

Fourth and finally, my position allows me to play extraordinary and varied roles. Some government lawyers have the privilege for example, of giving regular advice to a particularly prominent client or pleading particular cases before a particular court. But the Legal Adviser must shift back and forth constantly between four rich and varied roles: which I call counselor, conscience, defender of U.S. interests, and spokesperson for international law.

As **Counselor**, I mean obviously, that the Legal Adviser must play all the traditional functions of an agency general counsel, but with a twist. Like every in-house counsel's office, we do buildings and acquisitions, but those buildings may well be in Afghanistan or Beijing. We review government contracts, but they may require contracting activities in Iraq or Pakistan. We review employment decisions, but with respect to employees with diplomatic and consular immunities or special visa problems.

But in addition to being counselors, we also serve as a **conscience** for the U.S. Government with regard to international law. The Legal Adviser, along with many others in policy as well as legal positions, offers opinions on both the wisdom and morality of proposed international actions. For it is the unique role of the Legal Adviser's Office to coordinate and render authoritative legal advice for the State Department on international legal issues, or as Dick Bilder once put it, to "speak law to power." In this role, the Legal Adviser must serve not only as a source of black letter advice to his clients, but more fundamentally, as a source of good judgment. That means that one of the most important roles of the Legal Adviser is to advise the Secretary when a policy option being proposed is "lawful but awful." As Herman Pfleger, one former Legal Adviser, put it: "You should never say no to your client when the law and your conscience say yes; but you should never, ever say yes when your law and conscience say no." And because my job is simply to provide the President and the Secretary of State with the very best legal advice that I can give them, I have felt little conflict with my past roles as a law professor, dean and human rights lawyer, because as my old professor, former legal adviser Abram Chayes, once put it: "There's nothing wrong with a lawyer holding the United States to its own best standards and principles."

A third role the Legal Adviser plays is **defender** of the United States interests in the many international fora in which the U.S. appears-- the International Court of Justice, where I had the honor recently of appearing for the United States in the *Kosovo* case; the UN Compensation Commission; the Iran-US Claims Tribunal; NAFTA tribunals (where I was privileged to argue recently before a Chapter XI tribunal in the *Grand River* case) -- and we also appear regularly in US domestic litigation, usually as of counsel to the Department of Justice in a case such as the Supreme Court's current case of *Samantar v. Yousuf*, on which this Society held a panel this morning.

A fourth and final role for the Legal Adviser, and the reason I'm here tonight, is to act as a **spokesperson** for the US Government about why international law matters. Many people don't understand why obeying our international commitments is both right and smart, and that is a message that this Administration, and I as Legal Adviser, are committed to spreading.

## II. The Strategic Vision

That brings me to my second topic: what strategic vision of international law are we trying to implement? How does obeying international law advance U.S foreign policy interests and strengthen America's position of global leadership? Or to put it another way, with respect to international law, is this Administration really committed to what our President has famously called "change we can believe in"? Some, including a number of the panelists who have addressed this conference, have argued that there is really more continuity than change from the last administration to this one.

To them I would answer that, of course, in foreign policy, from administration to administration, there will always be more continuity than change; you simply cannot turn the ship of state 360 degrees from administration to administration every four to eight years, nor should you. But, I would argue--and these are the core of my remarks today-- to say that is to understate the most important difference between this administration and the last: and that is with respect to its **approach and attitude toward international law**. The difference in that approach to international law I would argue is captured in **an Emerging "Obama-Clinton Doctrine,"** which is based on four commitments: to: 1. *Principled Engagement*; 2. *Diplomacy as a Critical Element of Smart Power*; 3. *Strategic Multilateralism*; and 4. the notion that *Living Our Values Makes us Stronger and Safer, by Following Rules of Domestic and International Law; and Following Universal Standards, Not Double Standards*.

As articulated by the President and Secretary Clinton, I believe the Obama/Clinton doctrine reflects these four core commitments. First, a **Commitment to Principled Engagement**: A powerful belief in the interdependence of the global community is a major theme for our President, whose father came from a Kenyan family and who as a child spent several years in Indonesia.

Second, a commitment to what Secretary Clinton calls "**smart power**"--a blend of principle and pragmatism" that makes "intelligent use of all means at our disposal," including promotion of democracy, development, technology, and human rights and international law to place diplomacy at the vanguard of our foreign policy.

Third, a commitment to what some have called **Strategic Multilateralism**: the notion acknowledged by President Obama at Cairo, that the challenges of the twenty-first century "can't be met by any one leader or any one nation" and must therefore be addressed by open dialogue and partnership by the United States with peoples and nations across traditional regional divides, "based on mutual interest and mutual respect" as well as acknowledgment of "the rights and responsibilities of [all] nations."

And fourth and finally, a commitment to **living our values by respecting the rule of law**, As I said, both the President and Secretary Clinton are outstanding lawyers, and they understand that by imposing constraints on government action, law legitimates and gives credibility to governmental action. As the President emphasized forcefully in his National Archives speech and elsewhere, the American political system was founded on a vision of common humanity, universal rights and rule of law. Fidelity to [these] values" makes us stronger and safer. This also means **following universal standards, not double standards**. In his Nobel lecture at Oslo, President Obama affirmed that "[a]dhering to standards,

Case 1:12-cv-00794-CM Document 36-7 Filed 07/18/12 Page 12 of 24  
international standards, strengthens those who do, and isolates those who don't." And in her December speech on a 21<sup>st</sup> Century human rights agenda, and again two weeks ago in introducing our annual human rights reports, Secretary Clinton reiterated that "a commitment to human rights starts with universal standards and with holding everyone accountable to those standards, including ourselves."

Now in implementing this ambitious vision—this Obama-Clinton doctrine based on principled international engagement, smart power, strategic multilateralism, and the view that global leadership flows to those who live their values and obey the law and global standards—I am reminded of two stories.

The first, told by a former teammate is about the late Mickey Mantle of the American baseball team, the New York Yankees, who, having been told that he would not play the next day, went out and got terrifically drunk (as he was wont to do). The next day, he arrived at the ballpark, somewhat impaired, but in the late innings was unexpectedly called upon to pinch-hit. After staggering out to the field, he swung wildly at the first two pitches and missed by a mile. But on the third pitch, he hit a tremendous home run. And when he returned to the dugout, he squinted out at the wildly cheering crowd and confided to his teammates, "[t]hose people don't know how hard that really was."<sup>[1]</sup>

In much the same way, I learned that the making of U.S. foreign policy is infinitely harder than it looks from the ivory tower. Why? Because, as lawyers, we are accustomed to the relatively orderly world of law and litigation, which is based on a knowable and identifiable structure and sequence of events. The workload comes with courtroom deadlines, page limits and scheduled arguments. But if conducting litigation is like climbing a ladder, making foreign policy is much more like driving the roundabout near the Coliseum in Rome.

In this maze of bureaucratic politics, you are only one lawyer, and there is only so much that any one person can do. Collective government decision-making creates enormous coordination problems. We in the Legal Adviser's Office are not the only lawyers in government: On any given issue, my office needs to reach consensus decisions with all of the other interested State Department bureaus, but our Department as a whole then needs to coordinate its positions not just with other government law offices, which include: our lawyer clients (POTUS/SecState/DepSecState); White House Lawyers (WHCounsel/NSC Legal Counsel/USTR General Counsel); DOD Lawyers (OGC, Jt Staff, CoComs, Services, JAGs); DOJ Lawyers (OLC, OSG, Litigating Divisions-Civ., Crim, OIL, NSD); IC Lawyers (DNI, CIA); DHS Lawyers, not to mention lawyers in the Senate and House.

To make matters even more complex, we participate in a complicated web of legal processes within processes: the policy process, the clearance process, the interagency process, the legislative process; and once a U.S. position is developed, an *intergovernmental* lawyering process. So unlike academics, who are accustomed to being individualists, in government you are necessarily part of a team. One obvious corollary to this is that as one government lawyer, your views and the views of your client are not the only views that matter. As Walter Dellinger observed when he worked at OLC:

"[U]nlike an academic lawyer, an executive branch attorney may have an obligation to work within a tradition of reasoned, executive branch precedent, memorialized in formal written opinions. Lawyers in the executive branch have thought and written for decades about the President's legal authority... When lawyers who are now [in my office] begin to research an issue, they are not expected to turn to what I might have written or said in a floor discussion at a law professors' convention. They are expected to look to the previous opinions of the Attorneys General and of heads of this office to develop and refine the executive branch's legal positions."<sup>[2]</sup>

Now to say that is not to say that one administration cannot or should not reverse a previous administration's legal positions. But what it does mean, as I noted at my confirmation hearings, is that government lawyers should begin with a presumption of *stare decisis*--that an existing interpretation of the Executive Branch should stand-- unless after careful review, a considered reexamination of the text, structure, legislative or negotiating history, purpose and practice under the treaty or statute firmly convinces us that a change to the prior interpretation is warranted.



So that is what I mean when I say it's harder than it looks. And as those listening who have served in government know, it is a lot harder to get from a good idea to the implementation of that idea than those outside the government can imagine.

That brings me to my second, shorter story: about two Irishmen walking down the road near Galway. One of them asks the other, "So how do you get to Dublin?" And the other answers, "I wouldn't start from here."

In the same way, given the choice, no one would have started with what we inherited: the worst recession since the Depression, with conflicts in Iraq, Afghanistan, against al-Qaeda. Add to this mix a difficult and divided political environment, which makes it very difficult to get 60 Senate votes for cloture, much less the 67 you would need for treaty ratification, and such thorny carryover issues as resuming international engagement, closing Guantanamo, not to mention tackling an array of new challenges brought to us by the 21<sup>st</sup> century: climate change, attendant shifts in the polar environment; cyber crime, aggression and terrorism, food security, and global health just to name a few. Just to round things out, throw in a 7.0 earthquake in Haiti, another earthquake in Chile, four feet of snow in Washington, and you might well say to yourselves, to coin a phrase, "I wouldn't start from here."

But that having been said, how have we played the hand we have been dealt? What legal challenges do we face? There are really five fields of law that have occupied most of my time: what I call the law of international justice and dispute resolution, the law of 9/11, the law of international agreements, the law of the State Department, and the law of globalization. Tonight I want to focus on the first two of these areas: the law of international justice and dispute resolution and the law of 9/11. For they best illustrate how we have tried to implement the four themes I have outlined: principled engagement; multilateralism, smart power, and living our values.

### **III. Current Legal Challenges**

#### **A. International Justice and Dispute Resolution**

By international justice and dispute resolution, I refer to the U.S.'s renewed relationship to international tribunals and other international bodies. Let me address two of them: the International Criminal Court and the U.N. Human Rights Council. As President Obama recognized, "a new era of engagement has begun and renewed respect for international law and institutions is critical if we are to resume American leadership in a new global century."

##### **1. The International Criminal Court**

With respect to the U.S. relationship to the ICC, let me report on my recent participation in the Resumed 8th Session of ICC Assembly of States Parties in New York, from which I have just returned. Last November, Ambassador-at-Large for War Crimes Stephen Rapp and I led an interagency delegation that resumed engagement with the Court by attending a meeting of the ICC Assembly of States Parties (ASP). This was the first time that the United States had attended such a meeting, and this week's New York meeting continued that November session. As you know, the United States is not party to the Rome Statute, but we have attended these meetings as an observer. Our goal in November was to listen and learn, and by listening to gain a better understanding of the issues being considered by the ASP and of the workings of the International Criminal Court.

Significantly, although during the last decade the U.S. was largely absent from the ICC, our historic commitment to the cause of international justice has remained strong. As you all know, we have not been silent in the face of war crimes and crimes against humanity. As one of the vigorous supporters of the work of the ad hoc tribunals regarding the former Yugoslavia, Rwanda, Cambodia, Sierra Leone, and Lebanon, the United States has worked for decades, and we will continue to work, with other States to ensure accountability on behalf of victims of such crimes. But as some of those ad hoc war crimes tribunals enter their final years, the eyes of the world are increasingly turned toward the ICC. At the end of May, the United States will attend the ASP's Review Conference in Kampala, Uganda. There are two key items on the agenda: stock-taking and aggression.

In the current situation where the Court has open investigations and prosecutions in relation to four situations, but has not yet concluded any trials, the stock-taking exercise is designed to address ways to strengthen the Court, and includes issues such as state cooperation; complementarity; effect on victims; peace and justice; and universality of membership. Even as a non-State party, the United States believes that it can be a valuable partner and ally in the cause of advancing international justice. The Obama Administration has been actively looking at ways that the U.S. can, consistent with U.S. law, assist the ICC in fulfilling its historic charge of providing justice to those who have endured crimes of epic savagery and scope. And as Ambassador Rapp announced in New York, we would like to meet with the Prosecutor at the ICC to examine whether there are specific ways that the United States might be able to support the particular prosecutions that already underway in the Democratic Republic of Congo, Sudan, Central African Republic, and Uganda.

But as for the second agenda item, the definition of the crime of aggression, the United States has a number of serious concerns and questions. The crime of aggression, which is a *jus ad bellum* crime based on acts committed by the state, fundamentally differs from the other three crimes under the Court's jurisdiction—genocide, war crimes, and crimes against humanity—which are *jus in bello* crimes directed against particular individuals. In particular, we are concerned that adopting a definition of aggression at this point in the court's history could divert the ICC from its core mission, and potentially politicize and weaken this young institution. Among the States Parties we found strongly held, yet divergent, views on many fundamental and unresolved questions.

First, there are questions raised by the terms of the definition itself, including the degree to which it may depart from customary international law of both the "crime of aggression" and the state "act of aggression." This encompasses questions like what does it mean when the current draft definition requires that an act of aggression must be a "manifest" — as opposed to an "egregious" violation of the U.N. Charter?

A second question of who decides. The United States believes that investigation or prosecution of the crime of aggression should not take place absent a determination by the U.N. Security Council that aggression has occurred. The U.N. Charter confers on the Security Council the responsibility for determining when aggression has taken place. We are concerned by the confusion that might arise if more than one institution were legally empowered to make such a determination in the same case, especially since these bodies, under the current proposal, would be applying different definitions of aggression.

Third, there are questions about how such a crime would potentially affect the Court at this point in its development. For example, how would the still-maturing Court be affected if its prosecutor were mandated to investigate and prosecute this crime, which by its very nature, even if perfectly defined, would inevitably be seen as political—both by those who are charged, as well as by those who believe aggressors have been wrongly left uncharged? To what extent would the availability of such a charge place burdens on the prosecutor in every case, both those in which he chooses to charge aggression and those in which he does not? If you think of the Court as a wobbly bicycle that is finally starting to move forward, is this frankly more weight than the bicycle can bear?

Fourth, would adopting the crime of aggression at this time advance or hinder the key goals of the stock-taking exercise: promoting complementarity, cooperation, and universality? With respect to complementarity, how would this principle apply to a crime of aggression? Do we want national courts to pass judgment on public acts of foreign states that are elements of the crime of aggression? Would adding at this time a crime that would run against heads of state and senior leaders enhance or obstruct the prospects for state cooperation with the Court? And will moving to adopt this highly politicized crime at a time when there is genuine disagreement on such issues enhance the prospects for universal adherence to the Rome Statute?

**JA807**

All of these questions go to our ultimate concern: has a genuine consensus yet emerged to finalize a definition of the crime of aggression? What outcome in Kampala will truly strengthen the Court at this critical moment in its history? What we heard at the Resumed Session in New York is that no clear consensus has yet emerged on many of these questions.

Because this is such a momentous decision for this institution, which would bring about such an organic change in the Court's work, that we believe that we should leave no stone unturned in search of genuine consensus. And we look forward to discussing these important issues with as many States Parties and Non States Parties as possible between now and what we hope will be a successful Review Conference in Kampala.

## 2. Human Rights Council

In addition to reengaging with the ICC, the United States has also reengaged the U.N. Human Rights Council in Geneva. Along with my long time friend and colleague, Assistant Secretary of State for Democracy, Human Rights and Labor Michael Posner, who has my old job, and Assistant Secretary of State for International Organizations Esther Brimmer, I had the privilege of leading the first U.S. delegation to return to the Human Rights Council this past September.

You know the history: In March 2006, the U.N. General Assembly voted overwhelmingly to replace the flawed Human Rights Commission with this new body: the Human Rights Council. The last Administration participated actively in the negotiations in New York to reform the Commission, but ultimately voted against adoption of the UNGA resolution that created the HRC, and decided not to run for a seat.

The UNGA resolution that created the HRC made a number of important changes from the commission process: it created the Universal Periodic Review process, a mandatory process of self-examination and peer review that requires each U.N. member state to defend its own record before the HRC every four years. The Obama Administration would like our report to serve as a model for the world. Accordingly, we are preparing our first UPR report, which will be presented this November, with outreach sessions in an unprecedented interagency listening tour being conducted in about ten locations around the United States to hear about human rights concerns from civil society, community leaders, and tribal governments. Second, the HRC and its various subsidiary bodies and mechanisms meet far more frequently throughout the year than did the Commission, a pace that exhausts delegations. Third, the election criteria were revised. So while HRC membership still includes a number of authoritarian regimes that do not respect human rights, the election requirement of a majority of UNGA votes in often competitive elections has led to certain countries being defeated for membership and others declining to run for a seat. The rule that only one-third of membership (16 members) can convene a special session, has led to a disproportionate number of special sessions dedicated to criticism of Israel, which already is the only country with a permanent agenda item dedicated to examination of its human rights practices: an unbalanced focus that we have clearly and consistently criticized.

When the Obama Administration took office, we faced two choices with respect to the Human Rights Council: we could continue to stay away, and watch the flaws continue and possibly get worse, or we could engage and fight for better outcomes on human rights issues, even if they would not be easy to achieve. With the HRC, as with the ICC and other fora, we have chosen principled engagement and strategic multilateralism. While the institution is far from perfect, it is important and deserves the long-term commitment of the United States, and the United States must deploy its stature and moral authority to improve the U.N. human rights system where possible. This is a long-term effort, but one that we are committed to seeing through to success consistent with the basic goals of the Obama-Clinton doctrine: principled engagement and universality of human rights law. Our inaugural session as an HRC member in September saw some important successes, most notably the adoption by consensus of a freedom of expression resolution, which we co-sponsored with Egypt, that brought warring regional groups together and preserved the resolution as a vehicle to express firm support for freedom of speech and expression. This resolution was a way of implementing some of the themes in President Obama's historic speech in Cairo, bridging geographic and cultural divides and dealing with global issues of discrimination and intolerance. We also joined country resolutions highlighting human rights situations in Burma, Somalia, Cambodia, and Honduras, and were able to take positions joined by other countries on several resolutions on which the United States previously would have been isolated, including ones on toxic waste and the financial crisis. The challenges in developing a body that fairly and even-handedly addresses human rights issues are significant, but we will continue to work toward that end.

At the March HRC session, which ends tomorrow, we have continued to pursue principled engagement by taking on a variety of initiatives at the HRC that seek to weaken protections on freedom of expression, in particular, the push of some Council Members to ban speech that "defames" religions, such as the Danish cartoons. At this session, we made supported a country resolution on Guinea and made significant progress in opposing the Organization of the Islamic Conference's highly problematic "defamation of religions" resolution, even while continuing to deal with underlying concerns about religious intolerance.

## B. The Law of 9/11

Let me focus the balance of my remarks on that aspect of my job that I call "The Law of 9/11." In this area, as in the other areas of our work, we believe, in the President's words, that "living our values doesn't make us weaker, it makes us safer and it makes us stronger."

We live in a time, when, as you know, the United States finds itself engaged in several armed conflicts. As the President has noted, one conflict, in Iraq, is winding down. He also reminded us that the conflict in Afghanistan is a "conflict that America did not seek, one in which we are joined by forty-three other countries...in an effort to defend ourselves and all nations from further attacks." In the conflict occurring in Afghanistan and elsewhere, we continue to fight the perpetrators of 9/11: a non-state actor, al-Qaeda (as well as the Taliban forces that harbored al-Qaeda).

Everyone here at this meeting is committed to international law. But as President Obama reminded us, "the world must remember that it was not simply international institutions -- not just treaties and declarations -- that brought stability to a post-World War II world. ...[T]he instruments of war do have a role to play in preserving the peace."

With this background, let me address a question on many of your minds: how has this Administration determined to conduct these armed conflicts and to defend our national security, consistent with its abiding commitment to international law? **Let there be no doubt: the Obama Administration is firmly committed to complying with all applicable law, including the laws of war, in all aspects of these ongoing armed conflicts.** As the President reaffirmed in his Nobel Prize Lecture, "Where force is necessary, we have a moral and strategic interest in binding ourselves to certain rules of conduct ... [E]ven as we confront a vicious adversary that abides by no rules ... the United States of America must remain a standard bearer in the conduct of war. That is what makes us different from those whom we fight. That is the source of our strength." We in the Obama Administration have worked hard since we entered office to ensure that we conduct all aspects of these armed conflicts -- in particular, detention operations, targeting, and prosecution of terrorist suspects -- in a manner consistent not just with the applicable laws of war, but also with the Constitution and laws of the United States.

Let me say a word about each: detention, targeting, and prosecution.

### 1. Detention

With respect to detention, as you know, the last Administration's detention practices were widely criticized around the world, and as a private citizen, I was among the vocal critics of those practices. This Administration and I personally have spent much of the last year seeking to revise those practices to ensure their full compliance with domestic and international law, first, by unequivocally guaranteeing *humane treatment* for all individuals in U.S. custody as a result of armed conflict and second, by *ensuring that all detained individuals are being held pursuant to lawful authorities*.

#### a. Treatment

To ensure humane treatment, on his second full day in office, the President unequivocally banned the use of torture as an instrument of U.S. policy, a commitment that he has repeatedly reaffirmed in the months since. He directed that executive officials could no longer rely upon the Justice Department OLC opinions that had permitted practices that I consider to be torture and cruel treatment -- many of which he later disclosed publicly -- and he instructed that henceforth, all interrogations of detainees must be conducted in accordance with Common Article 3 of the Geneva Conventions and with the revised Army Field Manual. An interagency review of U.S. interrogation practices later advised -- and the President

agreed – that no techniques beyond those in the Army Field Manual (and traditional noncoercive FBI techniques) are necessary to conduct effective interrogations. That Interrogation and Transfer Task Force also issued a set of recommendations to help ensure that the United States will not transfer individuals to face torture. The President also revoked Executive Order 13440, which had interpreted particular provisions of Common Article 3, and restored the meaning of those provisions to the way they have traditionally been understood in international law. The President ordered CIA “black sites” closed and directed the Secretary of Defense to conduct an immediate review – with two follow-up visits by a blue ribbon task force of former government officials – to ensure that the conditions of detention at Guantanamo fully comply with Common Article 3 of the Geneva Conventions. Last December, I visited Guantanamo, a place I had visited several times over the last two decades, and I believe that the conditions I observed are humane and meet Geneva Conventions standards.

As you all know, also on his second full day in office, the President ordered Guantanamo closed, and his commitment to doing so has not wavered, even as closing Guantanamo has proven to be an arduous and painstaking process. Since the beginning of the Administration, through the work of my colleague Ambassador Dan Fried, we have transferred approximately 57 detainees to 22 different countries, of whom 33 were resettled in countries that are not the detainees’ countries of origin. Our efforts continue on a daily basis. Just this week, five more detainees were transferred out of Guantanamo for resettlement. We are very grateful to those countries who have contributed to our efforts to close Guantanamo by resettling detainees; that list continues to grow as more and more countries see the positive changes we are making and wish to offer their support.

During the past year, we completed an exhaustive, rigorous, and collaborative interagency review of the status of the roughly 240 individuals detained at Guantanamo Bay when President Obama took office. The President’s Executive Order placed responsibility for review of each Guantanamo detainee with six entities –the Departments of Justice, State, Defense, and Homeland Security, the Office of the Director of National Intelligence (ODNI), and the Joint Chiefs of Staff – to collect and consolidate from across the government all information concerning the detainees and to ensure that diplomatic, military, intelligence, homeland security, and law enforcement viewpoints would all be fully considered in the review process. This interagency task force, on which several State Department attorneys participated, painstakingly considered each and every Guantanamo detainee’s case to assess whether the detainee could be transferred or repatriated consistently with national security, the interests of justice, and our policy not to transfer individuals to countries where they would likely face torture or persecution. The six entities ultimately reached unanimous agreement on the proper disposition of all detainees subject to review. As the President has made clear, this is not a one-time review; there will be “a thorough process of periodic review, so that *any* prolonged detention is carefully evaluated and justified.” Similarly, the Department of Defense has created new review procedures for individuals held at the detention facility in Parwan at Bagram airfield, Afghanistan, with increased representation for detainees, greater opportunities to present evidence, and more transparent proceedings. Outside organizations have begun to monitor these proceedings, and even some of the toughest critics have acknowledged the positive changes that have been made.

#### **b. Legal Authority to Detain**

Some have asked what legal basis we have for continuing to detain those held on Guantanamo and at Bagram. But as a matter of both international and domestic law, the legal framework is well-established. As a matter of international law, our detention operations rest on three legal foundations. First, we continue to fight a war of self-defense against an enemy that attacked us on September 11, 2001, and before, and that continues to undertake armed attacks against the United States. Second, in Afghanistan, we work as partners with a consenting host government. And third, the United Nations Security Council has, through a series of successive resolutions, authorized the use of “all necessary measures” by the NATO countries constituting the International Security Assistance Force (ISAF) to fulfill their mandate in Afghanistan. As a nation at war, we must comply with the laws of war, but detention of enemy belligerents to prevent them from returning to hostilities is a well-recognized feature of the conduct of armed conflict, as the drafters of Common Article 3 and Additional Protocol II recognized and as our own Supreme Court recognized in *Hamdi v. Rumsfeld*.

The federal courts have confirmed our legal authority to detain in the Guantanamo habeas cases, but the Administration is not asserting an unlimited detention authority. For example, with regard to individuals detained at Guantanamo, we explained in a March 13, 2009 habeas filing before the DC federal court --and repeatedly in habeas cases since -- that we are resting our detention authority on a domestic statute -- the 2001 Authorization for Use of Military Force (AUMF) -- as informed by the principles of the laws of war. Our detention authority in Afghanistan comes from the same source.

In explaining this approach, let me note two important differences from the legal approach of the last Administration. First, as a matter of *domestic law*, the Obama Administration has not based its claim of authority to detain those at GITMO and Bagram on the President's Article II authority as Commander-in-Chief. Instead, we have relied on legislative authority expressly granted to the President by Congress in the 2001 AUMF.

Second, unlike the last administration, as a matter of *international law*, this Administration has expressly acknowledged that international law informs the scope of our detention authority. Both in our internal decisions about specific Guantanamo detainees, and before the courts in habeas cases, we have interpreted the scope of detention authority authorized by Congress in the AUMF as *informed by the laws of war*. Those laws of war were designed primarily for traditional armed conflicts among states, not conflicts against a diffuse, difficult-to-identify terrorist enemy, therefore construing what is "necessary and appropriate" under the AUMF requires some "translation," or analogizing principles from the laws of war governing traditional *international* conflicts.

Some commentators have criticized our decision to detain certain individuals based on their membership in a non-state armed group. But as those of you who follow the Guantanamo habeas litigation know, we have defended this position based on the AUMF, as informed by the text, structure, and history of the Geneva Conventions and other sources of the laws of war. Moreover, while the various judges who have considered these arguments have taken issue with certain points, they have accepted the overall proposition that individuals who are part of an organized armed group like al-Qaeda can be subject to law of war detention for the duration of the current conflict. In sum, we have based our authority to detain not on conclusory labels, like "enemy combatant," but on whether the factual record in the particular case meets the legal standard. This includes, but is not limited to, whether an individual joined with or became part of al-Qaeda or Taliban forces or associated forces, which can be demonstrated by relevant evidence of formal or functional membership, which may include an oath of loyalty, training with al-Qaeda, or taking positions with enemy forces. Often these factors operate in combination. While we disagree with the International Committee of the Red Cross on some of the particulars, our general approach of looking at "functional" membership in an armed group has been endorsed not only by the federal courts, but also is consistent with the approach taken in the targeting context by the ICRC in its recent study on Direct Participation in Hostilities (DPH).

A final point: the Obama Administration has made clear both its goal not only of closing Guantanamo, but also of moving to shift detention responsibilities to the local governments in Iraq and Afghanistan. Last July, I visited the detention facilities in Afghanistan at Bagram, as well as Afghan detention facilities near Kabul, and I discussed the conditions at those facilities with both Afghan and U.S. military officials and representatives of the International Committee of the Red Cross. I was impressed by the efforts that the Department of Defense is making both to improve our ongoing operations and to prepare the Afghans for the day when we turn over responsibility for detention operations. This Fall, DOD created a joint task force led by a three-star admiral, Robert Harward, to bring new energy and focus to these efforts, and you can see evidence of his work in the rigorous implementation of our new detainee review procedures at Bagram, the increased transparency of these proceedings, and closer coordination with our Afghan partners in our detention operations.

In sum, with respect to both treatment and detainability, we believe that our detention practices comport with both domestic and international law.

## B. Use of Force

In the same way, in all of our operations involving the *use of force*, including those in the armed conflict with al-Qaeda, the Taliban and associated forces, the Obama Administration is committed by word and deed to conducting ourselves in accordance with all applicable law. With respect to the subject of targeting, which has been much commented upon in the

**JA811**

media and international legal circles, there are obviously limits to what I can say publicly. What I can say is that it is the considered view of this Administration—and it has certainly been my experience during my time as Legal Adviser—that U.S. targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war.

The United States agrees that it must conform its actions to all applicable law. As I have explained, as a matter of international law, the United States is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law. As a matter of domestic law, Congress authorized the use of all necessary and appropriate force through the 2001 Authorization for Use of Military Force (AUMF). These domestic and international legal authorities continue to this day.

As recent events have shown, al-Qaeda has not abandoned its intent to attack the United States, and indeed continues to attack us. Thus, in this ongoing armed conflict, the United States has the authority under international law, and the responsibility to its citizens, to use force, including lethal force, to defend itself, including by targeting persons such as high-level al-Qaeda leaders who are planning attacks. As you know, this is a conflict with an organized terrorist enemy that does not have conventional forces, but that plans and executes its attacks against us and our allies while hiding among civilian populations. That behavior simultaneously makes the application of international law more difficult and more critical for the protection of innocent civilians. Of course, whether a particular individual will be targeted in a particular location will depend upon considerations specific to each case, including those related to the imminence of the threat, the sovereignty of the other states involved, and the willingness and ability of those states to suppress the threat the target poses. In particular, this Administration has carefully reviewed the rules governing targeting operations to ensure that these operations are conducted consistently with law of war principles, including:

- First, the principle of *distinction*, which requires that attacks be limited to military objectives and that civilians or civilian objects shall not be the object of the attack; and
- Second, the principle of *proportionality*, which prohibits attacks that may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, that would be excessive in relation to the concrete and direct military advantage anticipated.

In U.S. operations against al-Qaeda and its associated forces-- including lethal operations conducted with the use of unmanned aerial vehicles-- great care is taken to adhere to these principles in both planning and execution, to ensure that only legitimate objectives are targeted and that collateral damage is kept to a minimum.

Recently, a number of legal objections have been raised against U.S. targeting practices. While today is obviously not the occasion for a detailed legal opinion responding to each of these objections, let me briefly address four:

First, some have suggested that the *very act of targeting* a particular leader of an enemy force in an armed conflict must violate the laws of war. But individuals who are part of such an armed group are belligerents and, therefore, lawful targets under international law. During World War II, for example, American aviators tracked and shot down the airplane carrying the architect of the Japanese attack on Pearl Harbor, who was also the leader of enemy forces in the Battle of Midway. This was a lawful operation then, and would be if conducted today. Indeed, targeting particular individuals serves to narrow the focus when force is employed and to avoid broader harm to civilians and civilian objects.

Second, some have challenged *the very use of advanced weapons systems*, such as unmanned aerial vehicles, for lethal operations. But the rules that govern targeting do not turn on the type of weapon system used, and there is no prohibition under the laws of war on the use of technologically advanced weapons systems in armed conflict-- such as pilotless aircraft or so-called smart bombs-- so long as they are employed in conformity with applicable laws of war. Indeed, using such advanced technologies can ensure both that the best intelligence is available for planning operations, and that civilian casualties are minimized in carrying out such operations.

Third, some have argued that the use of lethal force against specific individuals fails to provide adequate process and thus constitutes *unlawful extrajudicial killing*. But a state that is engaged in an armed conflict or in legitimate self-defense is not required to provide targets with legal process before the state may use lethal force. Our procedures and practices for identifying lawful targets are extremely robust, and advanced technologies have helped to make our targeting even more precise. In my experience, the principles of distinction and proportionality that the United States applies are not just recited at meetings. They are implemented rigorously throughout the planning and execution of lethal operations to ensure that such operations are conducted in accordance with all applicable law.

Fourth and finally, some have argued that our targeting practices violate *domestic law*, in particular, the long-standing *domestic ban on assassinations*. But under domestic law, the use of lawful weapons systems—consistent with the applicable laws of war—for precision targeting of specific high-level belligerent leaders when acting in self-defense or during an armed conflict is not unlawful, and hence does not constitute “assassination.”

In sum, let me repeat: as in the area of detention operations, this Administration is committed to ensuring that the targeting practices that I have described are lawful.

### **C. Prosecutions:**

The same goes, third and finally, for our policy of prosecutions. As the President made clear in his May 2009 National Archives speech, we have a national security interest in trying terrorists, either before Article III courts or military commissions, and in keeping the number of individuals detained under the laws of war low.

Obviously, the choice between Article III courts and military commissions must be made on a case-by-case basis, depending on the facts of each particular case. Many acts of terrorism committed in the context of an armed conflict can constitute both war crimes and violations of our Federal criminal law, and they can be prosecuted in either federal courts or military commissions. As the last Administration found, those who have violated American criminal laws can be successfully tried in federal courts, for example, Richard Reid, Zacarias Moussaoui, and a number of others.

With respect to the criminal justice system, to reiterate what Attorney General Holder recently explained, Article III prosecutions have proven to be remarkably effective in incapacitating terrorists. In 2009, there were more defendants charged with terrorism violations in federal court than in any year since 9/11. In February 2010, for example, Najibullah Zazi pleaded guilty in the Eastern District of New York to a three-count information charging him with conspiracy to use weapons of mass destruction, specifically explosives, against persons or property in the United States, conspiracy to commit murder in a foreign country, and provision of material support to al-Qaeda. We have also effectively used the criminal justice system to pursue those who have sought to commit terrorist acts overseas. On March 18, 2010, for example, David Headley pleaded guilty to a dozen terrorism charges in U.S. federal court in Chicago, admitting that he participated in planning the November 2008 terrorist attacks in Mumbai, India, as well as later planning to attack a Danish newspaper.

As the President noted in his National Archives speech, lawfully constituted military commissions are also appropriate venues for trying persons for violations of the laws of war. In 2009, with significant input from this Administration, the Military Commissions Act was amended, with important changes to address the defects in the previous Military Commissions Act of 2006, including the addition of a provision that renders inadmissible any statements taken as a result of cruel, inhuman or degrading treatment. The 2009 legislative reforms also require the government to disclose more potentially exculpatory information, restrict hearsay evidence, and generally require that statements of the accused be admitted only if they were provided voluntarily (with a carefully defined exception for battlefield statements).

### **IV. CONCLUSION**

In closing, in the last year, this Administration has pursued principled engagement with the ICC and the Human Rights Council, and has reaffirmed its commitment to international law with respect to all three aspects of the armed conflicts in which we find ourselves: detention, targeting and prosecution. While these are not all we want to achieve, neither are they



small accomplishments. As the President said in his Nobel Lecture, "I have reaffirmed America's commitment to abide by the Geneva Conventions. We lose ourselves when we compromise the very ideals that we fight to defend. And we honor ideals by upholding them not when it's easy, but when it is hard." As President Obama went on to say, even in this day and age war is sometimes justified, but "this truth", he said, "must coexist with another – that no matter how justified, war promises human tragedy. The soldier's courage and sacrifice is full of glory ... But war itself is never glorious, and we must never trumpet it as such. So part of our challenge is reconciling these two seemingly irreconcilable truths – that war is sometimes necessary, and war at some level is an expression of human folly."

Although it is not always easy, I see my job as an international lawyer in this Administration as reconciling these truths around a thoroughgoing commitment to the rule of law. That is the commitment I made to the President and the Secretary when I took this job with an oath to uphold the Constitution and laws of the United States. That is a commitment that I make to myself every day that I am a government lawyer. And that is a commitment that I make to each of you, as a lawyer deeply committed—as we all are—to the goals and aspirations of this American Society of International Law.

Thank you.

---

[1] Jim Bouton, *Ball Four: My Life and Hard Times Throwing the Knuckleball in the Big Leagues* 30 (1970).

[2] Walter Dellinger, *After the Cold War: Presidential Power and the Use of Military Force*, 50 U. Miami L. Rev. 107 (1995).

**Back to Top**

The Office of Website Management, Bureau of Public Affairs, manages this site as a portal for information from the U.S. State Department. External links to other Internet sites should not be construed as an endorsement of the views or privacy policies contained therein.

**Exhibit 24**  
**to the Declaration of Colin Wicker**

**JA815**



U.S. Department of Justice

United States Attorney  
Southern District of New York

86 Chambers Street  
New York, New York 10007

May 18, 2012

BY FACSIMILE

Hon. Colleen McMahon  
United States District Judge  
United States Courthouse  
500 Pearl Street, Room 1350  
New York, New York 10007

Re: New York Times v. Department of Justice  
11 Civ. 9336 (CM)

ACLU v. Department of Justice  
12 Civ. 794 (CM)

Dear Judge McMahon:

We write respectfully on behalf of the Department of Justice, the Department of Defense and the Central Intelligence Agency (collectively, the "Government"), the defendants in the above-referenced Freedom of Information Act ("FOIA") cases in which plaintiffs seek records pertaining to alleged targeted lethal operations directed at U.S. citizens and others affiliated with al Qaeda or other terrorist groups. Regrettably, in light of the status of the Government's ongoing deliberations regarding the national security interests implicated in this matter, we find it necessary to seek a further extension, until June 20, 2012, of the Government's deadline to file its consolidated motion for summary judgment in these related cases. In support of this request, we respectfully request leave to submit a second classified declaration by Director of National Intelligence James R. Clapper, Jr. ("Second Clapper Declaration").

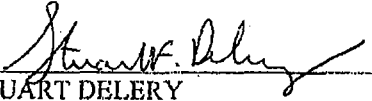
As the Court is aware from our submission seeking an extension last month, this matter implicates extraordinarily sensitive national security matters that have been, and continue to be, the subject of deliberations at the highest levels of the Executive Branch. We are mindful of the Court's desire to move this case forward expeditiously, and we sincerely regret the necessity of this request for a further enlargement of time. As explained in the Second Clapper Declaration, the Government has made significant and diligent efforts to meet the present deadline. However, as also detailed in the Second Clapper Declaration, further deliberations and consultations are required to determine the Government's position with regard to the sensitive matters at issue. Attorney General Eric H. Holder, Jr. therefore has directed us to seek this further enlargement of time to allow the conclusion of this important process.

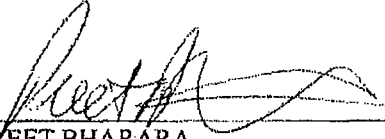
JA816

Plaintiffs previously had objected to an extension of more than one week of the Government's initial briefing deadline.

We thank the Court for its consideration of this submission. A Classified Information Security Officer will contact chambers shortly to make arrangements to make the classified declaration available to the Court.

Respectfully,

  
STUART DELERY  
Acting Assistant Attorney General  
Civil Division, U.S. Department of Justice

  
PREET BHARARA  
United States Attorney for the  
Southern District of New York

cc: Eric A.O. Ruzicka, Esq.  
Dorsey & Whitney LLP  
Suite 1500  
50 South Sixth Street  
Minneapolis, MN 55402-1498  
*Counsel for ACLU Plaintiffs*  
By Email

David McCraw, Esq.  
The New York Times Company  
620 Eighth Ave.  
New York, NY 10018  
*Counsel for New York Times Plaintiffs*  
By Email

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

AMERICAN CIVIL LIBERTIES UNION and THE  
AMERICAN CIVIL LIBERTIES UNION FOUNDATION )

Plaintiffs, )

v. )

U.S. DEPARTMENT OF JUSTICE, including its  
component the Office of Legal Counsel, )  
U.S. DEPARTMENT OF DEFENSE, including its  
component U.S. Special Operations Command, )  
and CENTRAL INTELLIGENCE AGENCY, )

Defendants. )

12 Civ. 794 (CM)

**DECLARATION OF MARK H. HERRINGTON**

Pursuant to 28 U.S.C. § 1746, I, Mark H. Herrington, hereby declare under penalty of perjury that the following is true and correct:

1. I am an Associate Deputy General Counsel in the Office of General Counsel (“OGC”) (Office of Litigation Counsel) of the United States Department of Defense (“DoD”). OGC provides legal advice to the Secretary of Defense and other leaders within the DoD. I am responsible for, among other things, overseeing Freedom of Information Act (“FOIA”) litigation involving DoD. I have held my current position since March 2007.

2. My duties include coordinating searches across DoD to ensure thoroughness, reasonableness, and consistency. By reviewing each component’s efforts and search results, I am able to determine potential inadequacies of the components’ searches. I routinely request that components conduct further searches to provide the most diligent search and production possible from DoD as a whole.

**JA818**

3. The statements in this declaration are based upon my personal knowledge and upon my review of information available to me in my official capacity.

4. I am familiar with the FOIA request, dated October 19, 2011, which plaintiffs sent to the DoD Office of Freedom of Information (OFOI) and Headquarters, United States Special Operations Command (SOCOM) seeking 1) the legal basis upon which U.S. citizens can be subjected to "targeted killings," 2) the process by which U.S. citizens can be designated for "targeted killing," 3) the legal basis "upon which the targeted killing of Anwar al-Awlaki was authorized," 4) the "factual basis for the targeted killing of al-Awlaki," 5) the factual basis for the killing of "Samir Khan," and 6) the factual basis for the killing of "Abdulrahman al-Awlaki." The request was also sent to the Department of Justice and its component Office of Legal Counsel (OLC), and the Central Intelligence Agency (CIA).

5. My involvement in the searches for and production of DoD records commenced after plaintiffs filed their complaint on February 1, 2012.

#### **PURPOSE OF DECLARATION**

6. This declaration is intended to supplement the unclassified declaration of Lieutenant General Robert R. Neller, dated June 20, 2012, which provided basic information regarding the DoD search for records responsive to Plaintiffs' request and detailed the basis for withholding the unclassified documents located in that search.

7. In Plaintiffs' Opposition to Defendants' Motion for Summary Judgment, they argue that the DoD search was insufficiently described because "the Neller Declaration does not, however, provide any information on the databases and electronic systems searched or how they were selected, does not list all the search terms used, and does not describe how the DOD determined which paper documents to search." Plaintiffs further complain that "DOD and the

two DOJ components also do not indicate whether they used any code names in searching for responsive records.”

8. Given DoD’s “No Number, No List” response with regard to classified documents located in the search for responsive records, there are limitations as to how much detail can be provided regarding that search. For instance, for the same reasons described in paragraph 26 of Lt. Gen. Neller’s declaration, if DoD were to indicate, either affirmatively or negatively, whether “code names” were used in conducting the search, such indication would itself reveal classified information about the nature and extent of DoD’s interest in the subjects of Plaintiffs’ request. That information could reveal the nature, depth, or breadth of DoD’s operational activities. Therefore, I will provide additional details regarding the DoD search, but must limit those details to avoid revealing classified information.

#### **DOD’S SEARCH FOR DOCUMENTS**

9. As stated in Lt. Gen. Neller’s declaration, I coordinated a search of the DoD offices that I determined were likely to have documents responsive to Plaintiffs’ request, based upon discussions with DoD personnel familiar with the subject matter of the request. I determined that the offices likely to have such information included the DoD Office of the General Counsel, the Joint Staff, United States Special Operations Command (SOCOM), and United States Central Command (CENTCOM).

10. I directed that each of the relevant offices search for records, and ensured they had copies of the plaintiffs’ complaint and original request and that they searched for records dated between September 11, 2001, and the date they initiated their search.

11. The multiple DoD components, and their subcomponents, conducted a thorough and reasonable search for all responsive documents, including all levels of classification, hard-

copy and electronic records, and email correspondence. In devising and conducting searches, DoD staff relies on their knowledge of what is in the relevant files, as well as consultations with identified custodians of potentially responsive records, and continually refines search parameters to ensure a search reasonably calculated to locate responsive records. In light of the direct participation in the searches by persons with familiarity with the subject matter, I have confidence that their searches would in fact turn up the records that had been requested. I will describe each search in turn.

#### **DoD Office of the General Counsel**

12. The Office of DOD GC advises the Secretary and Deputy Secretary of Defense (OSD) regarding all legal matters and services performed within, or involving, DoD, and provides legal advice to OSD organizations and, as appropriate, other DoD components. To complete its mission DOD GC is divided into multiple offices. The full list of duties and responsibilities of DOD GC offices can be viewed at <http://www.dod.mil/dodgc/index.html>.

13. After consulting other DOD GC attorneys, I determined that the offices likely to possess responsive records were the Front Office, Legal Counsel, International Affairs, and Intelligence. These four offices conducted extensive searches of paper files, emails, and electronic records for all responsive documents regardless of their classification. Electronic searches included individual computer hard drives, individual drives stored on a server, and shared drives which are accessible by multiple attorneys within each office. The searches were conducted by attorneys familiar with the subject matter of Plaintiffs' request and the electronic searches included the use of relevant search terms, such as "Citizen," "US Citizen," "U.S. Citizen," "AG Speech," "Aulaqi," "Awlaki," and "Khan". Ultimately, as attorneys familiar



with the subject matter would know best how any responsive materials would be stored, they used their discretion in conducting the search of both electronic and paper files.

#### **Office of the Chairman of the Joint Chiefs of Staff**

14. The Joint Staff conducted extensive searches of paper files, emails, and electronic records for all responsive documents regardless of their classification. Electronic searches included individual computer hard drives, individual drives stored on a server, and shared drives. The searches were conducted by personnel familiar with the subject matter and included the use of relevant search terms, including "US Citizen," "U.S. Citizen," "AG Speech," "Awlaki," "Aulaqi," and "Khan". Again, personnel familiar with the subject matter knew best how any responsive materials would be stored and used their discretion in conducting the search of both electronic and paper files.

#### **United States Special Operations Command**

15. Based upon my request, SOCOM searched relevant offices at SOCOM itself and relevant offices for the subcomponents, including Navy, Air Force, Marine Corps, Army, and Joint Special Operations Commands. The searches included physical searches of their paper records and electronic searches of emails and shared drives. The searches included all levels of classification. The searches were conducted by personnel familiar with the subject matter of Plaintiffs' request and included the use of relevant search terms, such as "US Citizen(s)," "UAV," "Target," and the names of the individuals, including the spelling "Awlaki."

#### **United States Central Command**

16. Based upon my request, USCENTCOM directed that appropriate offices search for records responsive to Plaintiffs' FOIA request using relevant search terms, including "targeted killing," "U.S. civilian killings," "AMCIT," "USPER," and "citizen," and the names

of the individuals mentioned in the request, using the spelling "Awlaki." In addition to individuals with knowledge of the subject matter conducting searches, a paralegal in the CENTCOM Staff Judge Advocate's Office searched the "P" drives, which are shared drives on a local server (both classified and unclassified); SharePoint Portals, which are shared drives on the classified internet system for the legal office; and the tasking management tool, which is used to assign taskings to other directorates.

#### **Alternate Spellings of Awlaki**

17. When searching for records pertaining to Anwar al-Awlaki, the components used either "Awlaki" or "Aulaqi," and in some instances both. While Defendants have used the spelling "Aulaki" in their motion for summary judgment, I have consulted with the relevant records custodians and "Aulaki" is not a spelling that DoD commonly uses and would be unlikely to yield any different results. To reinforce this fact, Joint Staff recently searched an electronic document repository on a classified network, and found no responsive documents using the spelling "Aulaki." As I mentioned above, in light of the direct participation in the searches by persons with familiarity with the subject matter, I have confidence that their searches would in fact turn up the records that had been requested.

I declare under penalty of perjury of the laws of the United States of America that the foregoing is true and correct to the best of my knowledge and information.

Executed this 8<sup>th</sup> day of August 2012 in Washington, D.C.



MARK H. HERRINGTON, ESQ.

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION,	)	
et al.	)	
	)	
Plaintiffs,	)	
	)	Civil No. 12-00794 (CM)
v.	)	
	)	
DEPARTMENT OF JUSTICE,	)	
et al.	)	
	)	
Defendants.	)	
	)	
	)	

SUPPLEMENTAL DECLARATION OF DOUGLAS R. HIBBARD

I, Douglas R. Hibbard, declare the following to be true and correct:

1) I am the Deputy Chief of the Initial Request (IR) Staff of the Office of Information Policy (OIP), United States Department of Justice. In this capacity, I am responsible for supervising the handling of the Freedom of Information Act (FOIA) requests processed by OIP. The IR Staff of OIP is responsible for processing FOIA requests seeking records from within OIP and from six senior leadership offices of the Department of Justice, specifically the Offices of the Attorney General, Deputy Attorney General, Associate Attorney General, Legal Policy, Legislative Affairs, and Public Affairs. The IR Staff determines whether records responsive to access requests exist and, if so, whether they can be released in accordance with the FOIA. In processing such requests, the IR Staff consults with personnel in the senior leadership offices and, when appropriate, with other components within the Department of Justice, as well as with other Executive Branch agencies. In devising and conducting searches, the IR Staff relies on its

knowledge of what is in the relevant files, as well as consultations with identified custodians of potentially responsive records, and continually refines search parameters to ensure a search reasonably calculated to locate responsive records.

2) I make the statements herein on the basis of personal knowledge, as well as on the basis of information acquired by me in the course of performing my official duties.

3) In my declaration of June 20, 2012, I described the administrative processing of plaintiffs' request, including the search for responsive records in the Offices of the Attorney General (OAG), Deputy Attorney General (ODAG), and Associate Attorney General (OASG). This declaration supplements by reference my June 20, 2012 declaration, and provides additional detail regarding the records search conducted by OIP. In particular, this declaration supplements ¶¶ 9-30 of my June 20, 2012 declaration. In light of the direct participation in the searches by OAG, ODAG, and OASG personnel with familiarity with the subject matter, as detailed in ¶ 9 of my June 20, 2012 declaration, coupled with OIP's own extensive experience in conducting records searches, I have confidence that the searches conducted for this request were reasonably calculated to locate the records that had been requested.

4) As described in ¶¶ 11, 18, and 20 of my June 20, 2012 declaration, OAG and ODAG identified a total of eleven custodians who may maintain responsive unclassified e-mails. In order to better facilitate the completion of its searches, OIP ultimately conducted the search of the unclassified e-mails of all eleven custodians through each officials' Enterprise Vault (EV Vault). As described in ¶ 12 of my June 20, 2012 declaration, the EV Vault maintains e-mails of current and former employees of the senior leadership offices of the Department.

5) One significant advantage of searching through the EV Vault is that it allows OIP to


refine its search terms so as to focus on the records being sought and limit the amount of non-responsive material located. At the time OIP was beginning its search of the EV Vaults, it had already completed its review of the unclassified paper and unclassified electronic files located in OAG, ODAG, and OASG. This review had demonstrated that the majority of the records related to Anwar al-Aulaqi maintained by OAG and ODAG (and, in fact, all of the records maintained by OASG) were not responsive to the request in that they concerned Anwar al-Aulaqi, but not the alleged use of lethal force against him. Given that knowledge, OIP conducted an initial search of the EV Vaults using the terms "al-Aulaqi," "al-Awlaki," and "al-Alwaki." These searches located a substantial amount of material, including many of the non-responsive records located in the searches of unclassified paper and unclassified electronic files. A preliminary review of a substantial sampling of these results demonstrated that the located material was not responsive to the request for reasons similar to those applicable to the unclassified paper and unclassified electronic material, i.e., the records did not pertain to the alleged use of lethal force against Anwar al-Aulaqi. As such, OIP determined that using the names alone was not sufficiently specific to identify records responsive to the request at issue. In addition, I have consulted the EV Vaults of the principal OAG and ODAG records custodians, i.e., the officials within those Offices primarily responsible for matters on this and related issues, and can confirm that "Aulaki" is not a spelling of Anwar al-Aulaqi's name that was commonly used by senior leadership office personnel.

6) Based on the knowledge detailed above, and because plaintiffs' request is explicitly focused on the legal authority for and alleged use of targeted lethal force against Anwar al-Aulaqi, Samir Khan, and Abdulrahman al-Aulaqi, OIP focused its search for records concerning

those individuals to records that included their names and the term "target."

7) Furthermore, in an effort to facilitate the processing of plaintiffs' request and based on the knowledge gained by OIP during the search for responsive records and OIP's initial review of the records located, OIP focused its review on the records of the three individuals identified in OAG and ODAG as the principal records custodians on this matter. As described in ¶¶ 12, 16, 19, 20, and 26 of my June 20, 2012 declaration, OIP reviewed the entirety of the records located for these three custodians. As these individuals had been identified as the principal records custodians for their respective Offices, the review of their records was not limited in any way. For the remaining, secondary custodians, OIP reviewed the first five hundred documents if the search revealed more than five hundred documents. As no additional responsive documents were located within these samplings, OIP determined that further review of the remaining records would not be likely to uncover responsive material.

I declare under penalty of perjury that the foregoing is true and correct.

  
Douglas Hibbard

Executed this 8 day of August 2012.



A NEW  
CENTURY  
OF SERVICE  
1912 | 2012



**DORSEY**<sup>™</sup>  
DORSEY & WHITNEY LLP

ERIC A. O. RUZICKA  
(612) 340-2959  
FAX (612) 340-8800  
ruzicka.eric@dorsey.com

September 11, 2012

**BY FACSIMILE**

The Honorable Colleen McMahon  
United States District Court  
Southern District of New York  
Room 1350  
500 Pearl Street  
New York, NY 10007

Re: American Civil Liberties Union et al. v. U.S. Department of Justice et al.  
U.S. Southern District of New York File No: 12 CIV 794 (CM)

Dear Judge McMahon:

I am writing on behalf of plaintiffs the American Civil Liberties Union and The American Civil Liberties Union Foundation (collectively, the "ACLU") to bring another official disclosure to the Court's attention. In a recent television interview with Jessica Yellin, the Chief White House Correspondent for CNN, President Obama acknowledged the existence of the targeted killing program, discussed the principles which he says guide the government's targeting decisions, and specifically discussed the legal restrictions on targeting United States citizens. The interview can be found online at: <http://edition.cnn.com/video/#/video/us/2012/09/05/president-obama-on-drone-warfare.cnn>.

President Obama specifically stated that "drones are one tool" the government uses against al-Qaeda and those who the government believes would attack Americans. The President also clearly articulated the following four criteria for when a targeted killing is authorized: (1) "a target that is authorized by our laws," (2) "a threat that is serious and not speculative," (3) "a situation in which we can't capture the individual before they move forward on some sort of operational plot against the United States," and, (4) "we are very careful about avoiding civilian casualties." The President was asked whether the standards are different when the target is an American, and responded that there is

no doubt that when an American has made the decisions to affiliate itself with al-Qaeda and target fellow Americans that there is a legal justification for us to try to stop them from carrying out plots. What is also true though is that as an American citizen they are subject to the protections of the constitutional due process.

The statements made by the President in this interview are yet another official acknowledgment of the existence of a targeted killing program that has been used against United States citizens and a purported legal basis for such killings that has been adopted by the government. In light of this acknowledgment, the positions taken by the government in this



September 11, 2012  
Page 2

litigation and in the agency responses to the ACLU's Freedom of Information Act request are not tenable. I also direct the Court to a video distributed by the President's re-election campaign that was played during the recent Democratic National Convention. The video is at <http://www.youtube.com/watch?v=1WbQe-wVK9E>. The relevant portion begins at 3:38. While this video is not independently an official acknowledgment, it further underscores the absurdity of the government's position. In front of this Court, the administration stonewalls the ACLU's Freedom of Information Act request and claims that it will endanger national security to again acknowledge the United States' role in killing Anwar al-Awlaki. However, at the same time, when it is politically advantageous, the President's campaign points to that same killing as an example of how he "persevered . . . as Commander-in-Chief."

The ACLU requests that the Court either consider the videos in question based on this letter or that it grant the ACLU permission to file a brief supplemental affidavit. Thank you for your consideration of this request.

Respectfully,

Eric A. O. Ruzicka

cc: Sarah S. Normand, Esq., United States Attorney (by Email)  
David McCraw, Esq. Counsel for New York Times Plaintiffs (by Email)

USA  
11

**JA829**



\*\*\*\*\*  
\*\*\* TX REPORT \*\*\*  
\*\*\*\*\*

TRANSMISSION OK

TX/RX NO 0361  
RECIPIENT ADDRESS 6754#700124#3#12128056326#  
DESTINATION ID  
ST. TIME 09/11 10:45  
TIME USE 00'49  
PAGES SENT 3  
RESULT OK



### FAX COVER SHEET

The information contained in this facsimile message, if a client of this firm is a named addressee, or the message is otherwise intended for a client, is presumptively legally privileged and confidential information. If you are not a named addressee, or if there is any reason to believe that you may have received this message in error, (1) do not read the message below; (2) do not distribute or copy this facsimile; and (3) please immediately call us collect at the number of the sender below.

DATE:	<b>September 11, 2012</b>	TOTAL # OF PAGES: (INCLUDING THIS COVER SHEET)	_____
TO:	<b>The Honorable Colleen McMahon</b>	FAX #:	<b>(212) 805-6326</b>
FIRM NAME:	<b>US District Court, So. District of New York</b>	PHONE #:	<b>(212) 805-6325</b>
FROM:	<b>Eric A. O. Ruzicka</b>	FAX #:	<b>(612) 340-8800</b>
PHONE #:	<b>(612) 340-2959</b>	EMAIL:	<b>ruzicka.eric@dorsey.com</b>

COMMENTS: PLEASE SEE ATTACHED.

**U.S. Department of Justice**



*United States Attorney  
Southern District of New York*

*86 Chambers Street  
New York, New York 10007*

September 14, 2012

**BY FACSIMILE**

Hon. Colleen McMahon  
United States District Judge  
United States Courthouse  
500 Pearl Street, Room 1350  
New York, New York 10007

Re: New York Times v. Department of Justice  
11 Civ. 9336 (CM)

ACLU v. Department of Justice  
12 Civ. 794 (CM)

Dear Judge McMahon:

We write respectfully on behalf of the Department of Justice, the Department of Defense and the Central Intelligence Agency (collectively, the "Government"), the defendants in the above-referenced Freedom of Information Act cases, to oppose the request in the September 11, 2012, letters of the ACLU and the New York Times (collectively, "plaintiffs") to supplement the record in these case. The cited comments of the President to CNN and the video played at the Democratic National Convention add nothing new and do not constitute an official disclosure of any classified information at issue in this case. Nor do plaintiffs make any effort to demonstrate such a disclosure under the applicable legal standards.

Plaintiffs allege that the President confirmed in his comments to CNN that "'drones are one tool' that the government uses against al-Qaeda and those who the government believes would attack Americans." But that fact is not classified, and the Government does not seek to protect it in these cases. Indeed, as explained in the Government's briefs, Assistant to the President for Homeland Security and Counterterrorism John Brennan has acknowledged that the Government uses drones as a counterterrorism tool. Further, Attorney General Eric Holder has outlined the legal parameters governing any potential use of lethal force against U.S. citizens. What these officials have never acknowledged – and what the President never addressed in the remarks that plaintiffs cite – is whether or not the CIA participates in drone strikes, and whether or not the United States conducted such a strike against Anwar al-Aulaqi or the other U.S.

**JA831**

citizens addressed by plaintiffs' FOIA requests.<sup>1</sup> Those facts remain classified and have never been officially acknowledged.

Plaintiffs' attempt to infer such a disclosure from the President's comments is flatly inconsistent with Second Circuit precedent, which makes clear that courts may not find official disclosure unless the classified fact at issue "(1) is as specific as the information previously released, (2) matches the information previously disclosed, and (3) was made public through an official and documented disclosure." *Wilson v. CIA*, 586 F.3d 171, 186 (2d Cir. 2009) (citation, quotation marks and alterations omitted); *see also Halpern v. FBI*, 181 F.3d 279, 294 (2d Cir. 1999) (2d Cir. 1999) (even information that has "entered the realm of public knowledge" remains properly classified and exempt from disclosure unless "the government has officially disclosed the specific information the requester seeks"). Plaintiffs do not even argue that this "strict test," *Wilson*, 586 F.3d at 186, is satisfied here, and it plainly is not.

With respect to the video aired at the Democratic National Convention, which is addressed only in the ACLU's letter, the ACLU concedes that the video does not constitute an official disclosure. In any event, the video simply states that al-Aulaqi "has been killed," which neither confirms nor refutes that the United States (much less the CIA) conducted the operation that resulted in al-Aulaqi's death.

Because plaintiffs cannot show that the classified facts at issue in these cases were disclosed in either the President's remarks to CNN or in the video aired at the Democratic National Convention, they add nothing to the existing record. Accordingly, plaintiffs' request to supplement their summary judgment arguments should be denied.

Respectfully,

STUART DELERY  
Acting Assistant Attorney General

PREET BHARARA  
United States Attorney

ELIZABETH SHAPIRO  
AMY POWELL  
Trial Attorneys  
Telephone: (202) 514-5302  
[Elizabeth.Shapiro@usdoj.gov](mailto:Elizabeth.Shapiro@usdoj.gov)

By: Sarah S. Normand (NMC)  
SARAH S. NORMAND  
Assistant United States Attorney  
Telephone: 212.637.2709  
Fax: 212.637.2702  
Email: [sarah.normand@usdoj.gov](mailto:sarah.normand@usdoj.gov)

---

<sup>1</sup> Contrary to the ACLU's claim, the President's remarks do not acknowledge that such strikes "ha[ve] been used against United States citizens." The President stated only that there is "no doubt that when an American has made the decision to affiliate itself with al-Qaeda and target fellow Americans, that there is a legal justification for us to try to stop them from carrying out plots," and that "as an American citizen, they are subject to the protections of the Constitution and due process." Moreover, the President prefaced his statements by emphasizing that he had to be "careful" in responding to the interviewer's questions because "[t]here are classified issues," underscoring that the President calibrated his responses to avoid revealing classified information.

cc: Eric A.O. Ruzicka, Esq.  
Dorsey & Whitney LLP  
Suite 1500  
50 South Sixth Street  
Minneapolis, MN 55402-1498  
*Counsel for ACLU Plaintiffs*  
By Email

David McCraw, Esq.  
The New York Times Company  
620 Eighth Ave.  
New York, NY 10018  
*Counsel for New York Times Plaintiffs*  
By Email



A NEW  
CENTURY  
OF SERVICE  
1912 | 2012



**DORSEY**<sup>™</sup>  
DORSEY & WHITNEY LLP

COLIN WICKER  
(612) 492-6687  
FAX (952) 516.5531  
wicker.colin@dorsey.com

November 20, 2012

**BY FACSIMILE**

The Honorable Colleen McMahon  
United States District Court  
Southern District of New York  
Room 1350  
500 Pearl Street  
New York, NY 10007

Re: *American Civil Liberties Union v. U.S. Department of Justice et al.*  
Case No. 12 Civ. 794

Dear Judge McMahon:

In a recent letter to the Court, see Letter to Court, *Am. Civil Liberties Union v. U.S. Dep't of Justice*, No. 12 Civ. 794 (S.D.N.Y. Sept. 11, 2012), plaintiffs the American Civil Liberties Union and the American Civil Liberties Union Foundation (collectively, the "ACLU") called attention to several statements President Obama made about the government's targeted killing program after the submission of the parties' briefs supporting their cross-motions for summary judgment. The ACLU now submits for the Court's further consideration four recent articles from the *Washington Post*, attached hereto, in which high-ranking administration officials acknowledge and discuss the CIA's use of armed drones to carry out targeted killings, providing even further evidence that the government's position in this case is untenable.

The articles quote and paraphrase numerous statements about the CIA's drone program by Deputy National Security Advisor John Brennan and former National Counterterrorism Center Director Michael Leiter, and attribute numerous other statements to "officials," "administration officials," "high-ranking administration officials," and "senior administration officials."

The October 24 article is particularly notable because it quotes and paraphrases Mr. Brennan as he discusses the "playbook" that contains the government's procedures and criteria for its targeted killing program. Karen DeYoung, *A CIA Veteran Transforms U.S. Counterterrorism Policy*, WASH. POST, Oct. 24, 2012. Mr. Brennan also discussed his "efforts to curtail the CIA's primary responsibility for targeted killings" and, further, the article notes that "Brennan and others described a future in which the CIA is eased out of the clandestine-killing business." The government has admitted, through Mr. Brennan's statements, that the CIA is involved in the government's targeted killing program. In light of that disclosure, the defendant agencies' continued reliance upon "Glomar" and "No Number, No List" responses is unsustainable.



The Honorable Colleen McMahon  
November 20, 2012  
Page 2

In addition to the admissions made by Mr. Brennan, the series of articles also provide various additional details, at a granularly specific level, regarding the targeted killing program, including the process set up to approve such killings and the military's increasing involvement in them. The October 23 article explains that the approval process for targeted killings has been codified and streamlined, that a database of potential targets is maintained, and that the program is being institutionalized and is expected to continue operating for at least a decade. See Greg Miller, *Plan for Hunting Terrorists Signals U.S. Intends to Keep Adding Names to Kill Lists*, WASH. POST, Oct. 23, 2012. The October 25 article discusses a military facility in Djibouti that the government has admitted is a base for remotely piloted aircraft used for "regional security missions," and that hosts drone missions. Craig Whitlock, *Remote U.S. Base at Core of Secret Operations*, WASH. POST, Oct. 25, 2012. And the October 18 article details a proposal by then-CIA Director David Petraeus to "significant[ly] expan[d] . . . the agency's fleet of armed drones." Greg Miller, *CIA Seeks to Expand Drone Fleet, Officials Say*, WASH. POST, Oct. 18, 2012.

The government has argued throughout this litigation that the CIA should not be required to satisfy its usual obligations under FOIA because even acknowledging the existence of the agency's targeted killing program—or its "interest" in targeted killings—would jeopardize national security. It is simply impossible to square that contention with the administration's ongoing campaign of selective disclosure, exemplified, most recently, by the *Washington Post* articles. If national-security officials can discuss the CIA's targeted killing and drone programs with journalists, the government should be required to respond to requests submitted under FOIA and should not be permitted to pretend that its litigation position is based on legitimate considerations of national security.

In the past and in the attached articles, the government has admitted that there is a targeted killing program, that there are various procedures and criteria that govern the program (which are now being compiled into a "playbook"), and that the CIA and DOD are involved in the program. Given those disclosures (along with the various earlier acknowledgments), the government's claimed bases in this FOIA litigation for its withholding of information and documents are not logical or credible. The government's own disclosures show it has determined that information beyond what was provided to the ACLU can be released without endangering the public or violating the law.

Sincerely,

A handwritten signature in black ink, appearing to read "Colin Wicker", written over a horizontal line.

Colin Wicker

Enclosures

cc: Sarah S. Normand, Esq., Assistant United States Attorney (by Email)  
David McGraw, Esq., Counsel for The New York Times (by Email)

**JA835**

Dorsey Whitney LLP

\*\*\*\*\*  
\*\*\* TX REPORT \*\*\*  
\*\*\*\*\*

*file copy*

TRANSMISSION OK

TX/RX NO 1928  
RECIPIENT ADDRESS 5573#700124#3#12128056326ppp#  
DESTINATION ID  
ST. TIME 11/20 13:20  
TIME USE 08'19  
PAGES SENT 27  
RESULT OK



**FAX COVER SHEET**

The information contained in this facsimile message, if a client of this firm is a named addressee, or the message is otherwise intended for a client, is presumptively legally privileged and confidential information. If you are not a named addressee, or if there is any reason to believe that you may have received this message in error, (1) do not read the message below; (2) do not distribute or copy this facsimile; and (3) please immediately call us collect at the number of the sender below.

DATE:	November 20, 2012	TOTAL # OF PAGES: (INCLUDING THIS COVER SHEET)	27
TO:	The Honorable Colleen McMahon	FAX #:	212-805-6326
FIRM NAME:	SDNY	PHONE #:	
FROM:	Colin Wicker	FAX #:	(952) 516-5531
PHONE #:	(612) 492-6687	EMAIL:	wicker.colin@dorsey.com

**COMMENTS:**

Please see attached correspondence.

**JA836**

11/14/12

CIA veteran John Brennan has transformed U.S. counterterrorism policy - The Washington Post

# The Washington Post

[Back to previous page](#)

## A CIA veteran transforms U.S. counterterrorism policy

By Karen DeYoung, Published: October 24

*This is the second of three articles.*

In his windowless White House office, presidential counterterrorism adviser John O. Brennan is compiling the rules for a war the Obama administration believes will far outlast its own time in office, whether that is just a few more months or four more years.

The “playbook,” as Brennan calls it, will lay out the administration’s evolving procedures for the targeted killings that have come to define its fight against al-Qaeda and its affiliates. It will cover the selection and approval of targets from the “disposition matrix,” the designation of who should pull the trigger when a killing is warranted, and the legal authorities the administration thinks sanction its actions in Pakistan, Yemen, Somalia and beyond.

“What we’re trying to do right now is to have a set of standards, a set of criteria, and have a decision-making process that will govern our counterterrorism actions — we’re talking about direct action, lethal action — so that irrespective of the venue where they’re taking place, we have a high confidence that they’re being done for the right reasons in the right way,” Brennan said in a lengthy interview at the end of August.

A burly 25-year CIA veteran with a stern public demeanor, Brennan is the principal architect of a policy that has transformed counterterrorism from a conventional fight centered in Afghanistan to a high-tech global effort to track down and eliminate perceived enemies one by one.

What was once a disparate collection of tactics — drone strikes by the CIA and the military, overhead surveillance, deployment of small Special Forces ground units at far-flung bases, and distribution of military and economic aid to threatened governments — has become a White House-centered strategy with Brennan at its core.

Four years ago, Brennan felt compelled to withdraw from consideration as President Obama’s first CIA director because of what he regarded as unfair criticism of his role in counterterrorism practices as an intelligence official during the George W. Bush administration. Instead, he stepped into a job in the Obama administration with greater responsibility and influence.

Brennan is leading efforts to curtail the CIA’s primary responsibility for targeted killings. Over opposition from the agency, he has argued that it should focus on intelligence activities and leave lethal action to its





11/14/12

CIA veteran John Brennan has transformed U.S. counterterrorism policy - The Washington Post

more traditional home in the military, where the law requires greater transparency. Still, during Brennan's tenure, the CIA has carried out hundreds of drone strikes in Pakistan and opened a new base for armed drones in the Arabian Peninsula.

Although he insists that all agencies have the opportunity to weigh in on decisions, making differing perspectives available to the Oval Office, Brennan wields enormous power in shaping decisions on "kill" lists and the allocation of armed drones, the war's signature weapon.

When operations are proposed in Yemen, Somalia or elsewhere, it is Brennan alone who takes the recommendations to Obama for a final sign-off.

As the war against al-Qaeda and related groups moves to new locations and new threats, Brennan and other senior officials describe the playbook as an effort to constrain the deployment of drones by future administrations as much as it provides a framework for their expanded use in what has become the United States' permanent war.

"This needs to be sustainable," one senior administration official said, "and we need to think of it in ways that contemplate other people sitting in all the chairs around the table."

### **A critical player**

There is widespread agreement that Obama and Brennan, one of the president's most trusted aides, are like-minded on counterterrorism policy.

"Ever since the first couple of months, I felt there was a real similarity of views that gave me a sense of comfort," Brennan said. "I don't think we've had a disagreement."

But the concentration of power in one person, who is unelected and unconfirmed by Congress, does not sit well with critics.

To many in the international legal community and among human rights and civil liberties activists, Brennan runs a policy so secret that it is impossible for outsiders to judge whether it complies with the laws of war or U.S. values — or even determine the total number of people killed.

"Brennan says the administration is committed to 'greater transparency,'" Human Rights Watch said in response to a speech he gave in May about drones. But despite "administration assertions that 'innocent civilians' have not been injured or killed, except in the 'rarest of circumstances,' there has been no clear accounting of civilian loss or opportunity to meaningfully examine the administration's assertions."

Although outsiders have criticized the policy itself, some inside the administration take issue with how Brennan has run it. One former senior counterterrorism official described Brennan as the "single point of failure" in the strategy, saying he controls too much and delegates too little.

A former top Defense Department official sounded a similar note. "He holds his cards incredibly close," he said. "If I ask for the right one to be seen, he'll show it to me. But he's not going to show me everything he's got in his hand."

Michael E. Leiter, who headed the National Counterterrorism Center until mid-2011, described Brennan as a forceful leader and "a critical player in getting this president comfortable with the tools of the trade."

Leiter said that he and Brennan "disagreed not infrequently" on fleeting issues, including interpretations of a piece of intelligence or how to respond to a specific threat. But there was a more significant issue: Leiter

11/14/12

CIA veteran John Brennan has transformed U.S. counterterrorism policy – The Washington Post

said Brennan was less focused on root causes of radicalization, in part because of how Brennan and the White House defined his job.

Leiter was one of the few people who allowed his name to be used among the nearly dozen current and former senior national security officials interviewed for this article. Most spoke on the condition of anonymity under restrictions imposed by the administration or because they were not authorized to discuss certain issues.

For each of Brennan's critics, there are many associates who use the words "moral compass" to describe his role in the White House. It is Brennan, they say, who questions the justification for each drone attack, who often dials back what he considers excessive zeal by the CIA and the military, and who stands up for diplomatic and economic assistance components in the overall strategy.

Brennan's bedrock belief in a "just war," they said, is tempered by his deep knowledge of the Middle East, Islam and the CIA, and the critical thinking forged during a classic Jesuit education.

Some White House aides describe him as a nearly priest-like presence in their midst, with a moral depth leavened by a dry Irish wit.

One CIA colleague, former general counsel John Rizzo, recalled his rectitude surfacing in unexpected ways. Brennan once questioned Rizzo's use of the "BCC" function in the agency's e-mail system to send a blind copy of a message to a third party without the primary recipient's knowledge.

"He wasn't joking," Rizzo said. "He regarded that as underhanded."

Brennan, 57, was born in the gritty New Jersey town of North Bergen, across the Hudson River from Midtown Manhattan. His Irish-immigrant parents, now in their early 90s, were strict and devout Catholics, traits his brother Tom said Brennan embodied from an early age. "It was almost like I had two fathers," Tom Brennan said.

John Brennan's formative experiences at Fordham University, where he earned a degree in political science, included a summer in Indonesia, which has the world's largest Muslim population, and a junior year at the American University in Cairo, where he studied Arabic and the region that would dominate his intelligence career and greatly influence his White House tenure.

In 1980, soon after receiving a master's degree in government from the University of Texas at Austin, Brennan answered a CIA recruitment ad in a newspaper. By the middle of the decade, he had spent two years in Saudi Arabia and was among the agency's leading Middle Eastern analysts.

"He was probably the hardest-working human being I ever encountered," said a former senior CIA official who worked for Brennan on the Middle East desk. Brennan, he said, was regarded as insightful, even imaginative, but had a seriousness that set him apart.

In 1999, after a second tour in Saudi Arabia as CIA station chief, he returned to headquarters as chief of staff for then-Director George J. Tenet. In 2001, he became deputy executive director, just months before a team of al-Qaeda operatives — most of them from Saudi Arabia — used four hijacked U.S. airliners to kill nearly 3,000 people on Sept. 11.

### **'I . . . do what I think is right'**

Brennan's belief in his competence and probity has sometimes led to political blind spots. Tenet tapped him in 2003 to build the new CIA-based Terrorist Threat Integration Center to bridge pre-Sept. 11 intelligence

11/14/12

CIA veteran John Brennan has transformed U.S. counterterrorism policy - The Washington Post

gaps. But Brennan was bypassed by the Bush administration a year later for two key jobs — head of the National Counterterrorism Center and deputy to the new director of national intelligence — largely because of his criticism of the Iraq war.

As a private citizen after leaving government, Brennan spoke publicly about counterterrorism controversies of the day. He defended the CIA's rendition of suspected terrorists as “an absolutely vital tool” but described waterboarding as within “the classic definition of torture.” Brennan also criticized the military as moving too far into traditional intelligence spheres.

His career in government appeared to be over until he was invited in late 2007 to join the nascent presidential campaign of Barack Obama. Although Obama and Brennan did not meet until after the election, their first conversation during the transition revealed profound harmony on issues of intelligence and what the president-elect called the “war against al-Qaeda.”

But when Brennan's name circulated as Obama's choice to head the CIA, he again came under political fire — this time from liberals who accused him of complicity in the agency's use of brutal interrogation measures under Bush. Spooked by the criticism, Obama quickly backtracked and Brennan withdrew.

“It has been immaterial to the critics that I have been a strong opponent of many of the policies of the Bush administration such as preemptive war in Iraq and coercive interrogation tactics, to include waterboarding,” he wrote in an angry withdrawal letter released to the media.

Several former intelligence colleagues said that, although Brennan had criticized the CIA interrogation methods after he left the government, they could not recall him doing so as a senior executive at the agency.

Brennan was given responsibility in the White House for counterterrorism and homeland security, a position that required no Senate confirmation and had no well-defined duties. At the outset, colleagues said they wondered what his job would be.

But to a young administration new to the secret details of national security threats and responsibilities, Brennan was a godsend.

And for the man passed over for other posts, it was vindication. “I've been crucified by the left and the right, equally so,” and rejected by the Bush administration “because I was not seen as someone who was a team player,” Brennan said in the interview.

“I'm probably not a team player here, either,” he said of the Obama administration. “I tend to do what I think is right. But I find much more comfort, I guess, in the views and values of this president.”

Brennan and others on the inside found that Obama, hailed as a peacemaker by the left and criticized by the right as a naive pacifist, was willing to move far more aggressively than Bush against perceived extremists.

### **Yemen is a 'model'**

From the outset, Brennan expressed concern about the spread of al-Qaeda beyond South Asia, particularly to Yemen, according to administration officials involved in the early talks.

U.S. counterterrorism policy had long been concentrated on Pakistan, where the Bush administration had launched sporadic CIA drone attacks against senior al-Qaeda and Taliban leaders. Within two years, Obama had more than tripled the number of strikes in Pakistan, from 36 in 2008 to 122 in 2010, according to the New America Foundation.

**JA840**

11/14/12

CIA veteran John Brennan has transformed U.S. counterterrorism policy - The Washington Post

Eventually, Obama and Brennan decided the program was getting out of hand. High-value targets were becoming elusive, accusations of civilian deaths were rising, and strikes were increasingly directed toward what the angry Pakistanis called mere “foot soldiers.”

But with Pakistan’s adamant refusal to allow U.S. military operations on its soil, taking what was considered a highly successful program out of CIA hands was viewed as counterproductive and too complicated. Although CIA strikes in other countries and military strikes outside Afghanistan require Obama’s approval, the agency has standing permission to attack targets on an approved list in Pakistan without asking the White House.

Although the administration has “wrestled with” the Pakistan program, it was always considered an initiative of the previous administration, a senior official said. In Yemen, the Obama team began to build its own counterterrorism architecture.

The turning point came on Christmas Day in 2009, when a Nigerian trained by Yemen-based al-Qaeda in the Arabian Peninsula, an offshoot of Osama bin Laden’s terrorist group, penetrated post-Sept. 11 defenses and nearly detonated a bomb aboard a Detroit-bound airliner.

In the wake of the failed attack, Brennan “got more into tactical issues,” said Leiter, the former NCTC head. “He dug into more operational stuff than he had before.”

Brennan made frequent visits to Yemen and Saudi Arabia, its closest neighbor and the dominant regional power. He used his longtime contacts in the region to cement a joint U.S.-Saudi policy that would ultimately — with the help of Yemen’s Arab Spring revolt — bring a more cooperative government to power. He often spoke of the need to address “upstream” problems of poverty and poor governance that led to “downstream” radicalization, and pushed for economic aid to buttress a growing military and intelligence presence.

Yemen quickly became the place where the United States would “get ahead of the curve” on terrorism that had become so difficult to round in Pakistan, one official said. As intelligence and military training programs were expanded, the military attacked AQAP targets in Yemen and neighboring Somalia using both fixed-wing aircraft and drones launched from a base in Djibouti on the Horn of Africa.

Despite Brennan’s professed dismay at the transformation of the CIA into a paramilitary entity with killing authority, the agency was authorized to operate its own armed aircraft out of a new base in the Arabian Peninsula.

Beginning in 2011, discussions on targeting, strikes and intelligence that had been coordinated by a committee set up by Adm. Mike Mullen, then the chairman of the Joint Chiefs of Staff, were gradually drawn into the White House under Brennan, who, according to several accounts, struggled to pare back increasingly expansive target lists in Yemen. At one meeting last year, one senior official said, Obama weighed in to warn that Yemen was not Afghanistan, and that “we are not going to war in Yemen.”

Today, Brennan said, “there are aspects of the Yemen program that I think are a true model of what I think the U.S. counterterrorism community should be doing” as it tracks the spread of al-Qaeda allies across Northern Africa.

As targets move to different locations, and new threats “to U.S. interests and to U.S. persons and property” are identified in Africa and elsewhere, Brennan described a step-by-step program of escalation. “First and foremost, I would want to work through local authorities and see whether or not we can provide them the intelligence, and maybe even give them some enhanced capability, to take action to bring that person to justice,” he said.

11/14/12

CIA veteran John Brennan has transformed U.S. counterterrorism policy - The Washington Post

For those governments that are “unwilling or unable” to act, he said, “then we have an obligation as a government to protect our people, and if we need then to take action ourselves . . . we look at what those options are as well.”

In late August, Brennan said he saw no need “to go forward with some kind of kinetic action in places like Mali,” where al-Qaeda allies have seized control of a broad swath of territory. Since then, Brennan and other officials have begun to compare the situation in Mali to Somalia, where drone and other air attacks have supplemented a U.S.-backed African military force.

### An opaque process

Where Obama and Brennan envision a standardized counterterrorism program bound by domestic and international law, some others see a secretive killing machine of questionable legality and limitless expansion.

Many civil libertarians and human rights experts disdain claims by Brennan and others that the drone program has become increasingly transparent, noting that the administration has yet to provide even minimal details about targeting decisions or to take responsibility for the vast majority of attacks.

“For more than two years, senior officials have been making claims about the program both on the record and off. They’ve claimed that the program is effective, lawful and closely supervised,” Jameel Jaffer, deputy legal director of the American Civil Liberties Union, said last month in appealing repeated court refusals to force the administration to release more information.

Some critics have described it as immoral, rejecting the administration’s claims that few civilians have been among the nearly 3,000 people estimated to have been killed in drone attacks. There is ample evidence in Pakistan that the more than 300 strikes launched under Obama have helped turn the vast majority of the population vehemently against the United States.

None of the United States’ chief allies has publicly supported the targeted killings; many of them privately question the administration’s claim that it comports with international law and worry about the precedent it sets for others who inevitably will acquire the same technology.

To the extent that it aspires to make the program’s standards and processes more visible, the playbook has been a source of friction inside the administration. “Other than the State Department, there are not a lot of advocates for transparency,” one official said. Some officials expressed concern that the playbook has become a “default” option for counterterrorism.

The CIA, which declined to comment for this article, is said to oppose codifying procedures that might lock it into roles it cannot expand or maneuver around in the future. Directors at most national security agencies agree on targeting rules that are already in place, an official close to Brennan said. But “when it’s written down on paper, institutions may look at it in a different way.”

The CIA, which is preparing a proposal to increase its drone fleet, considers Brennan “a rein, a constrictor. He is using his intimate knowledge of intelligence and the process to pick apart their arguments that might be expansionary,” a senior official outside the White House said.

Two administration officials said that CIA drones were responsible for two of the most controversial attacks in Yemen in 2011 — one that killed American-born cleric Anwar al-Awlaki, a prominent figure in al-Qaeda in the Arabian Peninsula, and a second a few days later that killed his 16-year-old son, also an American citizen. One of the officials called the second attack “an outrageous mistake. . . . They were going after the guy sitting next to him.”

11/14/12

CIA veteran John Brennan has transformed U.S. counterterrorism policy – The Washington Post

Both operations remain secret and unacknowledged, because of what officials said were covert-action rules that tied their hands when it came to providing information.

Some intelligence officials said Brennan has made little substantive effort to shift more responsibility to the military. But Brennan and others described a future in which the CIA is eased out of the clandestine-killing business, and said the process will become more transparent under Defense Department oversight and disclosure rules.

“Deniable missions” are not the military norm, one official said.

Said Brennan: “I think the president always needs the ability to do things under his chief executive powers and authorities, to include covert action.” But, he added, “I think the rule should be that if we’re going to take actions overseas that result in the deaths of people, the United States should take responsibility for that.”

One official said that “for a guy whose reputation is focused on how tough he is on counterterrorism,” Brennan is “more focused than anybody in the government on the legal, ethical and transparency questions associated with all this.” By drawing so much decision-making directly into his own office, said another, he has “forced a much better process at the CIA and the Defense Department.”

Even if Obama is reelected, Brennan may not stay for another term. That means someone else is likely to be interpreting his playbook.

“Do I want this system to last forever?” a senior official said. “No. Do I think it’s the best system for now? Yes.”

“What is scary,” he concluded, “is the apparatus set up without John to run it.”

Greg Miller and Julie Tate contributed to this report.

### Sponsored Links

#### LifeLock® Fraud Services

LifeLock® Credit Alerts For Fraud Protect Against Identity Fraud.  
LifeLock.com

#### Penny Stock Ready to Soar

Small Stock Set to Skyrocket Over 1,000%  
www.PennyStockWizard.com

#### Overactive Bladder

Your Bladder Symptoms Might Be OAB. Learn About A Treatable Condition.  
www.TreatOAB.com

[Buy a link here](#)

© The Washington Post Company

**JA843**

11/14/12

Plan for hunting terrorists signals U.S. intends to keep adding names to kill lists – The Washington Post

# The Washington Post

[Back to previous page](#)

## Plan for hunting terrorists signals U.S. intends to keep adding names to kill lists

By Greg Miller, Published: October 23

Over the past two years, the Obama administration has been secretly developing a new blueprint for pursuing terrorists, a next-generation targeting list called the “disposition matrix.”

The matrix contains the names of terrorism suspects arrayed against an accounting of the resources being marshaled to track them down, including sealed indictments and clandestine operations. U.S. officials said the database is designed to go beyond existing kill lists, mapping plans for the “disposition” of suspects beyond the reach of American drones.

Although the matrix is a work in progress, the effort to create it reflects a reality setting in among the nation’s counterterrorism ranks: The United States’ conventional wars are winding down, but the government expects to continue adding names to kill or capture lists for years.

Among senior Obama administration officials, there is a broad consensus that such operations are likely to be extended at least another decade. Given the way al-Qaeda continues to metastasize, some officials said no clear end is in sight.

“We can’t possibly kill everyone who wants to harm us,” a senior administration official said. “It’s a necessary part of what we do. . . . We’re not going to wind up in 10 years in a world of everybody holding hands and saying, ‘We love America.’ ”

That timeline suggests that the United States has reached only the midpoint of what was once known as the global war on terrorism. Targeting lists that were regarded as finite emergency measures after the attacks of Sept. 11, 2001, are now fixtures of the national security apparatus. The rosters expand and contract with the pace of drone strikes but never go to zero.

Meanwhile, a significant milestone looms: The number of militants and civilians killed in the drone campaign over the past 10 years will soon exceed 3,000 by certain estimates, surpassing the number of people al-Qaeda killed in the Sept. 11 attacks.

The Obama administration has touted its successes against the terrorist network, including the death of Osama bin Laden, as signature achievements that argue for President Obama’s reelection. The



11/14/12

Plan for hunting terrorists signals U.S. intends to keep adding names to kill lists - The Washington Post

administration has taken tentative steps toward greater transparency, formally acknowledging for the first time the United States' use of armed drones.

Less visible is the extent to which Obama has institutionalized the highly classified practice of targeted killing, transforming ad-hoc elements into a counterterrorism infrastructure capable of sustaining a seemingly permanent war. Spokesmen for the White House, the National Counterterrorism Center, the CIA and other agencies declined to comment on the matrix or other counterterrorism programs.

Privately, officials acknowledge that the development of the matrix is part of a series of moves, in Washington and overseas, to embed counterterrorism tools into U.S. policy for the long haul.

White House counterterrorism adviser John O. Brennan is seeking to codify the administration's approach to generating capture/kill lists, part of a broader effort to guide future administrations through the counterterrorism processes that Obama has embraced.

CIA Director David H. Petraeus is pushing for an expansion of the agency's fleet of armed drones, U.S. officials said. The proposal, which would need White House approval, reflects the agency's transformation into a paramilitary force, and makes clear that it does not intend to dismantle its drone program and return to its pre-Sept. 11 focus on gathering intelligence.

The U.S. Joint Special Operations Command, which carried out the raid that killed bin Laden, has moved commando teams into suspected terrorist hotbeds in Africa. A rugged U.S. outpost in Djibouti has been transformed into a launching pad for counterterrorism operations across the Horn of Africa and the Middle East.

JSOC also has established a secret targeting center across the Potomac River from Washington, current and former U.S. officials said. The elite command's targeting cells have traditionally been located near the front lines of its missions, including in Iraq and Afghanistan. But JSOC created a "national capital region" task force that is a 15-minute commute from the White House so it could be more directly involved in deliberations about al-Qaeda lists.

The developments were described by current and former officials from the White House and the Pentagon, as well as intelligence and counterterrorism agencies. Most spoke on the condition of anonymity because of the sensitivity of the subject.

These counterterrorism components have been affixed to a legal foundation for targeted killing that the Obama administration has discussed more openly over the past year. In a series of speeches, administration officials have cited legal bases, including the congressional authorization to use military force granted after the Sept. 11 attacks, as well as the nation's right to defend itself.

Critics contend that those justifications have become more tenuous as the drone campaign has expanded far beyond the core group of al-Qaeda operatives behind the strikes on New York and Washington. Critics note that the administration still doesn't confirm the CIA's involvement or the identities of those who are killed. Certain strikes are now under legal challenge, including the killings last year in Yemen of U.S.-born al-Qaeda operative Anwar al-Awlaki and his 16-year-old son.

Counterterrorism experts said the reliance on targeted killing is self-perpetuating, yielding undeniable short-term results that may obscure long-term costs.

"The problem with the drone is it's like your lawn mower," said Bruce Riedel, a former CIA analyst and Obama counterterrorism adviser. "You've got to mow the lawn all the time. The minute you stop mowing, the grass is going to grow back."



11/14/12 Plan for hunting terrorists signals U.S. intends to keep adding names to kill lists - The Washington Post

## An evolving database

The United States now operates multiple drone programs, including acknowledged U.S. military patrols over conflict zones in Afghanistan and Libya, and classified CIA surveillance flights over Iran.

Strikes against al-Qaeda, however, are carried out under secret lethal programs involving the CIA and JSOC. The matrix was developed by the NCTC, under former director Michael Leiter, to augment those organizations' separate but overlapping kill lists, officials said.

The result is a single, continually evolving database in which biographies, locations, known associates and affiliated organizations are all catalogued. So are strategies for taking targets down, including extradition requests, capture operations and drone patrols.

Obama's decision to shutter the CIA's secret prisons ended a program that had become a source of international scorn, but it also complicated the pursuit of terrorists. Unless a suspect surfaced in the sights of a drone in Pakistan or Yemen, the United States had to scramble to figure out what to do.

"We had a disposition problem," said a former U.S. counterterrorism official involved in developing the matrix.

The database is meant to map out contingencies, creating an operational menu that spells out each agency's role in case a suspect surfaces in an unexpected spot. "If he's in Saudi Arabia, pick up with the Saudis," the former official said. "If traveling overseas to al-Shabaab [in Somalia] we can pick him up by ship. If in Yemen, kill or have the Yemenis pick him up."

Officials declined to disclose the identities of suspects on the matrix. They pointed, however, to the capture last year of alleged al-Qaeda operative Ahmed Abdulkadir Warsame off the coast of Yemen. Warsame was held for two months aboard a U.S. ship before being transferred to the custody of the Justice Department and charged in federal court in New York.

"Warsame was a classic case of 'What are we going to do with him?'" the former counterterrorism official said. In such cases, the matrix lays out plans, including which U.S. naval vessels are in the vicinity and which charges the Justice Department should prepare.

"Clearly, there were people in Yemen that we had on the matrix," as well as others in Pakistan and Afghanistan, the former counterterrorism official said. The matrix was a way to be ready if they moved. "How do we deal with these guys in transit? You weren't going to fire a drone if they were moving through Turkey or Iran."

Officials described the matrix as a database in development, although its status is unclear. Some said it has not been implemented because it is too cumbersome. Others, including officials from the White House, Congress and intelligence agencies, described it as a blueprint that could help the United States adapt to al-Qaeda's morphing structure and its efforts to exploit turmoil across North Africa and the Middle East.

A year after Defense Secretary Leon E. Panetta declared the core of al-Qaeda near strategic defeat, officials see an array of emerging threats beyond Pakistan, Yemen and Somalia — the three countries where almost all U.S. drone strikes have occurred.

The Arab spring has upended U.S. counterterrorism partnerships in countries including Egypt where U.S. officials fear al-Qaeda could establish new roots. The network's affiliate in North Africa, al-Qaeda in the Islamic Maghreb, has seized territory in northern Mali and acquired weapons that were smuggled out of Libya.

11/14/12

Plan for hunting terrorists signals U.S. intends to keep adding names to kill lists - The Washington Post

“Egypt worries me to no end,” a high-ranking administration official said. “Look at Libya, Algeria and Mali and then across the Sahel. You’re talking about such wide expanses of territory, with open borders and military, security and intelligence capabilities that are basically nonexistent.”

### Streamlining targeted killing

The creation of the matrix and the institutionalization of kill/capture lists reflect a shift that is as psychological as it is strategic.

Before the attacks of Sept. 11, 2001, the United States recoiled at the idea of targeted killing. The Sept. 11 commission recounted how the Clinton administration had passed on a series of opportunities to target bin Laden in the years before the attacks — before armed drones existed. President Bill Clinton approved a set of cruise-missile strikes in 1998 after al-Qaeda bombed embassies in East Africa, but after extensive deliberation, and the group’s leader escaped harm.

Targeted killing is now so routine that the Obama administration has spent much of the past year codifying and streamlining the processes that sustain it.

This year, the White House scrapped a system in which the Pentagon and the National Security Council had overlapping roles in scrutinizing the names being added to U.S. target lists.

Now the system functions like a funnel, starting with input from half a dozen agencies and narrowing through layers of review until proposed revisions are laid on Brennan’s desk, and subsequently presented to the president.

Video-conference calls that were previously convened by Adm. Mike Mullen, then-chairman of the Joint Chiefs of Staff, have been discontinued. Officials said Brennan thought the process shouldn’t be run by those who pull the trigger on strikes.

“What changed is rather than the chairman doing that, John chairs the meeting,” said Leiter, the former head of the NCTC.

The administration has also elevated the role of the NCTC, which was conceived as a clearinghouse for threat data and has no operational capability. Under Brennan, who served as its founding director, the center has emerged as a targeting hub.

Other entities have far more resources focused on al-Qaeda. The CIA, JSOC and U.S. Central Command have hundreds of analysts devoted to the terrorist network’s franchise in Yemen, while the NCTC has fewer than two dozen. But the center controls a key function.

“It is the keeper of the criteria,” a former U.S. counterterrorism official said, meaning that it is in charge of culling names from al-Qaeda databases for targeting lists based on criteria dictated by the White House.

The criteria are classified but center on obvious questions: Who are the operational leaders? Who are the key facilitators? A typical White House request will direct the NCTC to generate a list of al-Qaeda operatives in Yemen involved in carrying out or plotting attacks against U.S. personnel in Sanaa.

The lists are reviewed at regular three-month intervals during meetings at the NCTC headquarters that involve analysts from other organizations, including the CIA, the State Department and JSOC. Officials stress that these sessions don’t equate to approval for additions to kill lists, an authority that rests exclusively with the White House.

**JA847**

11/14/12 Plan for hunting terrorists signals U.S. intends to keep adding names to kill lists - The Washington Post

With no objections — and officials said those have been rare — names are submitted to a panel of National Security Council officials that is chaired by Brennan and includes the deputy directors of the CIA and the FBI, as well as top officials from the State Department, the Pentagon and the NCTC.

Obama approves the criteria for lists and signs off on drone strikes outside Pakistan, where decisions on when to fire are made by the director of the CIA. But aside from Obama's presence at "Terror Tuesday" meetings — which generally are devoted to discussing terrorism threats and trends rather than approving targets — the president's involvement is more indirect.

"The president would never come to a deputies meeting," a senior administration official said, although participants recalled cases in which Brennan stepped out of the situation room to get Obama's direction on questions the group couldn't resolve.

The review process is compressed but not skipped when the CIA or JSOC has compelling intelligence and a narrow window in which to strike, officials said. The approach also applies to the development of criteria for "signature strikes," which allow the CIA and JSOC to hit targets based on patterns of activity — packing a vehicle with explosives, for example — even when the identities of those who would be killed is unclear.

### **A model approach**

For an administration that is the first to embrace targeted killing on a wide scale, officials seem confident that they have devised an approach that is so bureaucratically, legally and morally sound that future administrations will follow suit.

During Monday's presidential debate, Republican nominee Mitt Romney made it clear that he would continue the drone campaign. "We can't kill our way out of this," he said, but added later that Obama was "right to up the usage" of drone strikes and that he would do the same.

As Obama nears the end of his term, officials said the kill list in Pakistan has slipped to fewer than 10 al-Qaeda targets, down from as many as two dozen. The agency now aims many of its Predator strikes at the Haqqani network, which has been blamed for attacks on U.S. forces in Afghanistan.

In Yemen, the number of militants on the list has ranged from 10 to 15, officials said, and is not likely to slip into the single digits anytime soon, even though there have been 36 U.S. airstrikes this year.

The number of targets on the lists isn't fixed, officials said, but fluctuates based on adjustments to criteria. Officials defended the arrangement even while acknowledging an erosion in the caliber of operatives placed in the drones' cross hairs.

"Is the person currently Number 4 as good as the Number 4 seven years ago? Probably not," said a former senior U.S. counterterrorism official involved in the process until earlier this year. "But it doesn't mean he's not dangerous."

In focusing on bureaucratic refinements, the administration has largely avoided confronting more fundamental questions about the lists. Internal doubts about the effectiveness of the drone campaign are almost nonexistent. So are apparent alternatives.

"When you rely on a particular tactic, it starts to become the core of your strategy — you see the puff of smoke, and he's gone," said Paul Pillar, a former deputy director of the CIA's counterterrorism center. "When we institutionalize certain things, including targeted killing, it does cross a threshold that makes it harder to cross back."

11/14/12 Plan for hunting terrorists signals U.S. intends to keep adding names to kill lists – The Washington Post

For a decade, the dimensions of the drone campaign have been driven by short-term objectives: the degradation of al-Qaeda and the prevention of a follow-on, large-scale attack on American soil.

Side effects are more difficult to measure — including the extent to which strikes breed more enemies of the United States — but could be more consequential if the campaign continues for 10 more years.

“We are looking at something that is potentially indefinite,” Pillar said. “We have to pay particular attention, maybe more than we collectively have so far, to the longer-term pros and cons to the methods we use.”

Obama administration officials at times have sought to trigger debate over how long the nation might employ the kill lists. But officials said the discussions became dead ends.

In one instance, Mullen, the former Joint Chiefs chairman, returned from Pakistan and recounted a heated confrontation with his counterpart, Gen. Ashfaq Parvez Kayani.

Mullen told White House and counterterrorism officials that the Pakistani military chief had demanded an answer to a seemingly reasonable question: After hundreds of drone strikes, how could the United States possibly still be working its way through a “top 20” list?

The issue resurfaced after the U.S. raid that killed bin Laden. Seeking to repair a rift with Pakistan, Panetta, the CIA director, told Kayani and others that the United States had only a handful of targets left and would be able to wind down the drone campaign.

A senior aide to Panetta disputed this account, and said Panetta mentioned the shrinking target list during his trip to Islamabad but didn’t raise the prospect that drone strikes would end. Two former U.S. officials said the White House told Panetta to avoid even hinting at commitments the United States was not prepared to keep.

“We didn’t want to get into the business of limitless lists,” said a former senior U.S. counterterrorism official who spent years overseeing the lists. “There is this apparatus created to deal with counterterrorism. It’s still useful. The question is: When will it stop being useful? I don’t know.”

Karen DeYoung, Craig Whitlock and Julie Tate contributed to this report.

### Sponsored Links

#### LifeLock® Fraud Services

LifeLock® Credit Alerts For Fraud Protect Against Identity Fraud.  
LifeLock.com

#### Penny Stock Ready to Soar

Small Stock Set to Skyrocket Over 1,000%  
www.PennyStockWizard.com

#### Overactive Bladder

Your Bladder Symptoms Might Be OAB. Learn About A Treatable Condition.  
www.TreatOAB.com

[Buy a link here](#)

© The Washington Post Company

**JA849**

11/14/12

Remote U.S. base at core of secret operations – The Washington Post

# The Washington Post

[Back to previous page](#)

## Remote U.S. base at core of secret operations

By [Craig Whitlock](#), Published: October 25

*This is the third of three articles.*

DJIBOUTI CITY, Djibouti — Around the clock, about 16 times a day, drones take off or land at a U.S. military base here, the combat hub for the Obama administration's counterterrorism wars in the Horn of Africa and the Middle East.

Some of the unmanned aircraft are bound for Somalia, the collapsed state whose border lies just 10 miles to the southeast. Most of the armed drones, however, veer north across the Gulf of Aden to Yemen, another unstable country where they are being used in an increasingly deadly war with an al-Qaeda franchise that has targeted the United States.

Camp Lemonnier, a sun-baked Third World outpost established by the French Foreign Legion, began as a temporary staging ground for U.S. Marines looking for a foothold in the region a decade ago. Over the past two years, the U.S. military has clandestinely transformed it into the busiest Predator drone base outside the Afghan war zone, a model for fighting a new generation of terrorist groups.

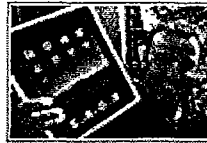
The Obama administration has gone to extraordinary lengths to conceal the legal and operational details of its targeted-killing program. Behind closed doors, painstaking debates precede each decision to place an individual in the cross hairs of the United States' perpetual war against al-Qaeda and its allies.

Increasingly, the orders to find, track or kill those people are delivered to Camp Lemonnier. Virtually the entire 500-acre camp is dedicated to counterterrorism, making it the only installation of its kind in the Pentagon's global network of bases.

Secrecy blankets most of the camp's activities. The U.S. military rejected requests from The Washington Post to tour Lemonnier last month. Officials cited "operational security concerns," although they have permitted journalists to visit in the past.

After a Post reporter showed up in Djibouti uninvited, the camp's highest-ranking commander consented to an interview — on the condition that it take place away from the base, at Djibouti's lone luxury hotel. The commander, Army Maj. Gen. Ralph O. Baker, answered some general queries but declined to comment on drone operations or missions related to Somalia or Yemen.

Despite the secrecy, thousands of pages of military records obtained by The Post — including construction blueprints, drone accident reports and internal planning memos — open a revealing window into Camp



How New iPads are Selling for Under \$40



Why Snoring Can Kill - and How to Stop It



How Cruise Lines Fill All Those Unsold Cruise Cabins

11/14/12

Remote U.S. base at core of secret operations – The Washington Post

Lemonnier. None of the documents is classified and many were acquired via public-records requests.

Taken together, the previously undisclosed documents show how the Djibouti-based drone wars sharply escalated early last year after eight Predators arrived at Lemonnier. The records also chronicle the Pentagon's ambitious plan to further intensify drone operations here in the coming months.

The documents point to the central role played by the Joint Special Operations Command (JSOC), which President Obama has repeatedly relied on to execute the nation's most sensitive counterterrorism missions.

About 300 Special Operations personnel plan raids and coordinate drone flights from inside a high-security compound at Lemonnier that is dotted with satellite dishes and ringed by concertina wire. Most of the commandos work incognito, concealing their names even from conventional troops on the base.

Other counterterrorism work at Lemonnier is more overt. All told, about 3,200 U.S. troops, civilians and contractors are assigned to the camp, where they train foreign militaries, gather intelligence and dole out humanitarian aid across East Africa as part of a campaign to prevent extremists from taking root.

In Washington, the Obama administration has taken a series of steps to sustain the drone campaign for another decade, developing an elaborate new targeting database, called the "disposition matrix," and a classified "playbook" to spell out how decisions on targeted killing are made.

Djibouti is the clearest example of how the United States is laying the groundwork to carry out these operations overseas. For the past decade, the Pentagon has labeled Lemonnier an "expeditionary," or temporary, camp. But it is now hardening into the U.S. military's first permanent drone war base.

### Centerpiece base

In August, the Defense Department delivered a master plan to Congress detailing how the camp will be used over the next quarter-century. About \$1.4 billion in construction projects are on the drawing board, including a huge new compound that could house up to 1,100 Special Operations forces, more than triple the current number.

Drones will continue to be in the forefront. In response to written questions from The Post, the U.S. military confirmed publicly for the first time the presence of remotely piloted aircraft — military parlance for drones — at Camp Lemonnier and said they support "a wide variety of regional security missions."

Intelligence collected from drone and other surveillance missions "is used to develop a full picture of the activities of violent extremist organizations and other activities of interest," Africa Command, the arm of the U.S. military that oversees the camp, said in a statement. "However, operational security considerations prevent us from commenting on specific missions."

For nearly a decade, the United States flew drones from Lemonnier only rarely, starting with a 2002 strike in Yemen that killed a suspected ringleader of the attack on the USS Cole.

That swiftly changed in 2010, however, after al-Qaeda's network in Yemen attempted to bomb two U.S.-bound airliners and jihadists in Somalia separately consolidated their hold on that country. Late that year, records show, the Pentagon dispatched eight unmanned MQ-1B Predator aircraft to Djibouti and turned Lemonnier into a full-time drone base.

The impact was apparent months later: JSOC drones from Djibouti and CIA Predators from a secret base on the Arabian Peninsula converged over Yemen and killed Anwar al-Awlaki, a U.S.-born cleric and prominent al-Qaeda member.

11/14/12

Remote U.S. base at core of secret operations – The Washington Post

Today, Camp Lemonnier is the centerpiece of an expanding constellation of half a dozen U.S. drone and surveillance bases in Africa, created to combat a new generation of terrorist groups across the continent, from Mali to Libya to the Central African Republic. The U.S. military also flies drones from small civilian airports in Ethiopia and the Seychelles, but those operations pale in comparison to what is unfolding in Djibouti.

Lemonnier also has become a hub for conventional aircraft. In October 2011, the military boosted the airpower at the base by deploying a squadron of F-15E Strike Eagle fighter jets, which can fly faster and carry more munitions than Predators.

In its written responses, Africa Command confirmed the warplanes' presence but declined to answer questions about their mission. Two former U.S. defense officials, speaking on the condition of anonymity, said the F-15s are flying combat sorties over Yemen, an undeclared development in the growing war against al-Qaeda forces there.

The drones and other military aircraft have crowded the skies over the Horn of Africa so much that the risk of an aviation disaster has soared.

Since January 2011, Air Force records show, five Predators armed with Hellfire missiles crashed after taking off from Lemonnier, including one drone that plummeted to the ground in a residential area of Djibouti City. No injuries were reported but four of the drones were destroyed.

Predator drones in particular are more prone to mishaps than manned aircraft, Air Force statistics show. But the accidents rarely draw public attention because there are no pilots or passengers.

As the pace of drone operations has intensified in Djibouti, Air Force mechanics have reported mysterious incidents in which the airborne robots went haywire.

In March 2011, a Predator parked at the camp started its engine without any human direction, even though the ignition had been turned off and the fuel lines closed. Technicians concluded that a software bug had infected the "brains" of the drone, but never pinpointed the problem.

"After that whole starting-itself incident, we were fairly wary of the aircraft and watched it pretty closely," an unnamed Air Force squadron commander testified to an investigative board, according to a transcript. "Right now, I still think the software is not good."

### **Prime location**

Djibouti is an impoverished former French colony with fewer than 1 million people, scarce natural resources and miserably hot weather.

But as far as the U.S. military is concerned, the country's strategic value is unparalleled. Sandwiched between East Africa and the Arabian Peninsula, Camp Lemonnier enables U.S. aircraft to reach hot spots such as Yemen or Somalia in minutes. Djibouti's port also offers easy access to the Indian Ocean and the Red Sea.

"This is not an outpost in the middle of nowhere that is of marginal interest," said Amanda J. Dory, the Pentagon's deputy assistant secretary for Africa. "This is a very important location in terms of U.S. interests, in terms of freedom of navigation, when it comes to power projection."

The U.S. military pays \$38 million a year to lease Camp Lemonnier from the Djiboutian government. The base rolls across flat, sandy terrain on the edge of Djibouti City, a somnolent capital with eerily empty

11/14/12

Remote U.S. base at core of secret operations – The Washington Post

streets. During the day, many people stay indoors to avoid the heat and to chew khat, a mildly intoxicating plant that is popular in the region.

Hemmed in by the sea and residential areas, Camp Lemonnier's primary shortcoming is that it has no space to expand. It is forced to share a single runway with Djibouti's only international airport, as well as an adjoining French military base and the tiny Djiboutian armed forces.

Passengers arriving on commercial flights — there are about eight per day — can occasionally spy a Predator drone preparing for a mission. In between flights, the unmanned aircraft park under portable, fabric-covered hangars to shield them from the wind and curious eyes.

Behind the perimeter fence, construction crews are rebuilding the base to better accommodate the influx of drones. Glimpses of the secret operations can be found in an assortment of little-noticed Pentagon memoranda submitted to Congress.

Last month, for example, the Defense Department awarded a \$62 million contract to build an airport taxiway extension to handle increased drone traffic at Lemonnier, an ammunition storage site and a combat-loading area for bombs and missiles.

In an Aug. 20 letter to Congress explaining the emergency contract, Deputy Defense Secretary Ashton B. Carter said that 16 drones and four fighter jets take off or land at the Djibouti airfield each day, on average. Those operations are expected to increase, he added, without giving details.

In a separate letter to Congress, Carter said Camp Lemonnier is running out of space to park its drones, which he referred to as remotely piloted aircraft (RPA), and other planes. "The recent addition of fighters and RPAs has exacerbated the situation, causing mission delays," he said.

Carter's letters revealed that the drones and fighter aircraft at the base support three classified military operations, code-named Copper Dune, Jupiter Garret and Octave Shield.

Copper Dune is the name of the military's counterterrorism operations in Yemen. Africa Command said it could not provide information about Jupiter Garret and Octave Shield, citing secrecy restrictions. The code names are unclassified.

The military often assigns similar names to related missions. Octave Fusion was the code name for a Navy SEAL-led operation in Somalia that rescued an American and a Danish hostage on Jan. 24.

### Spilled secrets

Another window into the Djibouti drone operations can be found in U.S. Air Force safety records.

Whenever a military aircraft is involved in a mishap, the Air Force appoints an Accident Investigation Board to determine the cause. Although the reports focus on technical questions, supplementary documents make it possible to re-create a narrative of what happened in the hours leading up to a crash.

Air Force officers investigating the crash of a Predator on May 17, 2011, found that things started to go awry at Camp Lemonnier late that night when a man known as Frog emerged from the Special Operations compound.

The camp's main power supply had failed and the phone lines were down. So Frog walked over to the flight line to deliver some important news to the Predator ground crew on duty, according to the investigators' files, which were obtained by The Post as part of a public-records request.



11/14/12

Remote U.S. base at core of secret operations – The Washington Post

“Frog” was the alias chosen by a major assigned to the Joint Special Operations Command. At Lemonnier, he belonged to a special collection of Navy SEALs, Delta Force soldiers, Air Force commandos and Marines known simply as “the task force.”

JSOC commandos spend their days and nights inside their compound as they plot raids against terrorist camps and pirate hideouts. Everybody on the base is aware of what they do, but the topic is taboo. “I can’t acknowledge the task force,” said Baker, the Army general and highest-ranking commander at Lemonnier.

Frog coordinated Predator hunts. He did not reveal his real name to anyone without a need to know, not even the ground-crew supervisors and operators and mechanics who cared for the Predators. The only contact came when Frog or his friends occasionally called from their compound to say it was time to ready a drone for takeoff or to prepare for a landing.

Information about each Predator mission was kept so tightly compartmentalized that the ground crews were ignorant of the drones’ targets and destinations. All they knew was that most of their Predators eventually came back, usually 20 or 22 hours later, earlier if something went awry.

On this particular night, Frog informed the crew that his Predator was returning unexpectedly, 17 hours into the flight, because of a slow oil leak.

It was not an emergency. But as the drone descended toward Djibouti City it entered a low-hanging cloud that obscured its camera sensor. Making matters worse, the GPS malfunctioned and gave incorrect altitude readings.

The crew operating the drone was flying blind. It guided the Predator on a “dangerously low glidepath,” Air Force investigators concluded, and crashed the remote-controlled plane 2.7 miles short of the runway.

The site was in a residential area and fire trucks rushed to the scene. The drone had crashed in a vacant lot and its single Hellfire missile had not detonated.

The Predator splintered apart and was a total loss. With a \$3 million price tag, it had cost less than one-tenth the price of an F-15 Strike Eagle.

But in terms of spilling secrets, the damage was severe. Word spread quickly about the mysterious insect-shaped plane that had dropped from the sky. Hundreds of Djiboutians gathered and gawked at the wreckage for hours until the U.S. military arrived to retrieve the pieces.

One secret that survived, however, was Frog’s identity. The official Air Force panel assigned to investigate the Predator accident couldn’t determine his real name, much less track him down for questioning.

“Who is Frog?” one investigator demanded weeks later while interrogating a ground crew member, according to a transcript. “I’m sorry, I was just getting more explanation as to who Frog — is that a person? Or is that like a position?”

The crew member explained that Frog was a liaison officer from the task force. “He’s a Pred guy,” he shrugged. “I actually don’t know his last name.”

The accident triggered alarms at the upper echelons of the Air Force because it was the fourth drone in four months from Camp Lemonnier to crash.

Ten days earlier, on May 7, 2011, a drone carrying a Hellfire missile had an electrical malfunction shortly after it entered Yemeni airspace, according to an Air Force investigative report. The Predator turned back

11/14/12

Remote U.S. base at core of secret operations - The Washington Post

toward Djibouti. About one mile offshore, it rolled uncontrollably to the right, then back to the left before flipping belly up and hurtling into the sea.

"I've never seen a Predator do that before in my life, except in videos of other crashes," a sensor operator from the ground crew told investigators, according to a transcript. "I'm just glad we landed it in the ocean and not someplace else."

### **Flying every sortie**

The remote-control drones in Djibouti are flown, via satellite link, by pilots 8,000 miles away in the United States, sitting at consoles in air-conditioned quarters at Creech Air Force Base in Nevada and Cannon Air Force Base in New Mexico.

At Camp Lemonnier, conditions are much less pleasant for the Air Force ground crews that launch, recover and fix the drones.

In late 2010, after military cargo planes transported the fleet of eight Predators to Djibouti, airmen from the 60th Air Force Expeditionary Reconnaissance Squadron unpacked the drones from their crates and assembled them.

Soon after, without warning, a microburst storm with 80-mph winds struck the camp.

The 87-member squadron scrambled to secure the Predators and other exposed aircraft. They managed to save more than half of the "high-value, Remotely Piloted Aircraft assets from destruction, and most importantly, prevented injury and any loss of life," according to a brief account published in *Combat Edge*, an Air Force safety magazine.

Even normal weather conditions could be brutal, with summertime temperatures reaching 120 degrees on top of 80 percent humidity.

"Our war reserve air conditioners literally short-circuited in the vain attempt to cool the tents in which we worked," recalled Lt. Col. Thomas McCurley, the squadron commander. "Our small group of security forces personnel guarded the compound, flight line and other allied assets at posts exposed to the elements with no air conditioning at all."

McCurley's rare public account of the squadron's activities came in June, when the Air Force awarded him a Bronze Star. At the ceremony, he avoided any explicit mention of the Predators or Camp Lemonnier. But his narrative matched what is known about the squadron's deployment to Djibouti.

"Our greatest accomplishment was that we flew every single sortie the Air Force asked us to fly, despite the challenges we encountered," he said. "We were an integral part in taking down some very important targets, which means a lot to me."

He did not mention it, but the unit had gotten into the spirit of its mission by designing a uniform patch emblazoned with a skull, crossbones and a suitable nickname: "East Africa Air Pirates."

The Air Force denied a request from The Post to interview McCurley.

### **Increased traffic**

The frequency of U.S. military flights from Djibouti has soared, overwhelming air-traffic controllers and making the skies more dangerous.

11/14/12

Remote U.S. base at core of secret operations – The Washington Post

The number of takeoffs and landings each month has more than doubled, reaching a peak of 1,666 in July compared with a monthly average of 768 two years ago, according to air-traffic statistics disclosed in Defense Department contracting documents.

Drones now account for about 30 percent of daily U.S. military flight operations at Lemonnier, according to a Post analysis.

The increased activity has meant more mishaps. Last year, drones were involved in “a string of near mid-air collisions” with NATO planes off the Horn of Africa, according to a [brief safety alert](#) published in Combat Edge magazine.

Drones also pose [an aviation risk next door in Somalia](#). Over the past year, remote-controlled aircraft have plunged into a refugee camp, flown perilously close to a fuel dump and almost collided with a large passenger plane over Mogadishu, the capital, according to a United Nations report.

Manned planes are crashing, too. An Air Force [U-28A surveillance plane](#) crashed five miles from Camp Lemonnier while returning from a secret mission on Feb. 18, killing the four-person crew. An Air Force investigation attributed the accident to “unrecognized spatial disorientation” on the part of the crew, which ignored sensor warnings that it was flying too close to the ground.

Baker, the two-star commander at Lemonnier, played down the crashes and near-misses. He said safety had improved since he arrived in Djibouti in May.

“We’ve dramatically reduced any incidents of concern, certainly since I’ve been here,” he said.

Last month, the Defense Department awarded a \$7 million contract to retrain beleaguered air-traffic controllers at Ambouli International Airport and improve their English skills.

The Djiboutian controllers handle all civilian and U.S. military aircraft. But they are “undermanned” and “over tasked due to the recent rapid increase in U.S. military flights,” according to the contract. It also states that the controllers and the airport are not in compliance with international aviation standards.

Resolving those deficiencies may not be sufficient. Records show the U.S. military is also scrambling for an alternative place for its planes to land in an emergency.

Last month, it awarded a contract to install portable lighting at the only backup site available: a tiny, makeshift airstrip in the Djiboutian desert, several miles from Lemonnier.

### Sponsored Links

#### LifeLock® Official Site

Relax this vacation season & stay protected with LifeLock® protection. Learn how.  
LifeLock.com

#### Penny Stock Ready to Soar

Small Stock Set to Skyrocket Over 1,000%  
www.PennyStockWizard.com

#### Overactive Bladder

Your Bladder Symptoms Might Be OAB. Learn About A Treatable Condition.  
www.TreatOAB.com

[Buy a link here](#)

11/14/12

Remote U.S. base at core of secret operations - The Washington Post

© The Washington Post Company

11/14/12

11/14/12

11/14/12

CIA seeks to expand drone fleet, officials say - The Washington Post

# The Washington Post

[Back to previous page](#)

## CIA seeks to expand drone fleet, officials say

By Greg Miller, Published: October 18

The CIA is urging the White House to approve a significant expansion of the agency's fleet of armed drones, a move that would extend the spy service's decade-long transformation into a paramilitary force, U.S. officials said.

The proposal by CIA Director David H. Petraeus would bolster the agency's ability to sustain its campaigns of lethal strikes in Pakistan and Yemen and enable it, if directed, to shift aircraft to emerging al-Qaeda threats in North Africa or other trouble spots, officials said.

If approved, the CIA could add as many as 10 drones, the officials said, to an inventory that has ranged between 30 and 35 over the past few years.

The outcome has broad implications for counterterrorism policy and whether the CIA gradually returns to being an organization focused mainly on gathering intelligence, or remains a central player in the targeted killing of terrorism suspects abroad.

In the past, officials from the Pentagon and other departments have raised concerns about the CIA's expanding arsenal and involvement in lethal operations, but a senior Defense official said that the Pentagon had not opposed the agency's current plan.

Officials from the White House, the CIA and the Pentagon declined to comment on the proposal. Officials who discussed it did so on the condition of anonymity, citing the sensitive nature of the subject.

One U.S. official said the request reflects a concern that political turmoil across the Middle East and North Africa has created new openings for al-Qaeda and its affiliates.

"With what happened in Libya, we're realizing that these places are going to heat up," the official said, referring to the Sept. 11 attack on a U.S. diplomatic outpost in Benghazi. No decisions have been made about moving armed CIA drones into these regions, but officials have begun to map out contingencies. "I think we're actually looking forward a little bit," the official said.

White House officials are particularly concerned about the emergence of al-Qaeda's affiliate in North Africa, which has gained weapons and territory following the collapse of the governments in Libya and Mali. Seeking to bolster surveillance in the region, the United States has been forced to rely on small, unarmed turboprop aircraft disguised as private planes.



11/14/12

CIA seeks to expand drone fleet, officials say – The Washington Post

Meanwhile, the campaign of U.S. airstrikes in Yemen has heated up. Yemeni officials said a strike on Thursday — the 35th this year — killed at least seven al-Qaeda-linked militants near Jaar, a town in southern Yemen previously controlled by al-Qaeda in the Arabian Peninsula, as the terrorist group's affiliate is known.

The CIA's proposal would have to be evaluated by a group led by President Obama's counterterrorism adviser, John O. Brennan, officials said.

The group, which includes senior officials from the CIA, the Pentagon, the State Department and other agencies, is directly involved in deciding which alleged al-Qaeda operatives are added to "kill" lists. But current and former officials said the group also plays a lesser-known role as referee in deciding the allocation of assets, including whether the CIA or the Defense Department takes possession of newly delivered drones.

"You have to state your requirements and the system has to agree that your requirements trump somebody else," said a former high-ranking official who participated in the deliberations. "Sometimes there is a food fight."

The administration has touted the collaboration between the CIA and the military in counterterrorism operations, contributing to a blurring of their traditional roles. In Yemen, the CIA routinely "borrows" the aircraft of the military's Joint Special Operations Command to carry out strikes. The JSOC is increasingly engaged in activities that resemble espionage.

The CIA's request for more drones indicates that Petraeus has become convinced that there are limits to those sharing arrangements and that the agency needs full control over a larger number of aircraft.

The U.S. military's fleet dwarfs that of the CIA. A Pentagon report issued this year counted 246 Predators, Reapers and Global Hawks in the Air Force inventory alone, with hundreds of other remotely piloted aircraft distributed among the Army, the Navy and the Marines.

Petraeus, who had control of large portions of those fleets while serving as U.S. commander in Iraq and Afghanistan, has had to adjust to a different resource scale at the CIA, officials said. The agency's budget has begun to tighten, after double-digit increases over much of the past decade.

"He's not used to the small budget over there," a U.S. congressional official said. In briefings on Capitol Hill, Petraeus often marvels at the agency's role relative to its resources, saying, "We do so well with so little money we have." The official declined to comment on whether Petraeus had requested additional drones.

Early in his tenure at the CIA, Petraeus was forced into a triage situation with the agency's inventory of armed drones. To augment the hunt for Anwar al-Awlaki, a U.S.-born cleric linked to al-Qaeda terrorist plots, Petraeus moved several CIA drones from Pakistan to Yemen. After Awlaki was killed in a drone strike, the aircraft were sent back to Pakistan, officials said.

The number of strikes in Pakistan has dropped from 122 two years ago to 40 this year, according to the New America Foundation. But officials said the agency has not cut back on its patrols there, despite the killing of Osama bin Laden and a dwindling number of targets.

The agency continues to search for bin Laden's successor, Ayman al-Zawahiri, and has carried out dozens of strikes against the Haqqani network, a militant group behind attacks on U.S. forces in Afghanistan.

The CIA also maintains a separate, smaller fleet of stealth surveillance aircraft. Stealth drones were used to

11/14/12

CIA seeks to expand drone fleet, officials say – The Washington Post

monitor bin Laden's compound in Abbottabad, Pakistan. Their use in surveillance flights over Iran's nuclear facilities was exposed when one crashed in that country last year.

Any move to expand the reach of the CIA's fleet of armed drones probably would require the agency to establish additional secret bases. The agency relies on U.S. military pilots to fly the planes from bases in the southwestern United States but has been reluctant to share overseas landing strips with the Defense Department.

CIA Predators that are used in Pakistan are flown out of airstrips along the border in Afghanistan. The agency opened a secret base on the Arabian Peninsula when it began flights over Yemen, even though JSOC planes are flown from a separate facility in Djibouti.

Karen DeYoung contributed to this report.

### Sponsored Links

#### LifeLock® Fraud Services

LifeLock® Credit Alerts For Fraud Protect Against Identity Fraud.  
LifeLock.com

#### Penny Stock Ready to Soar

Small Stock Set to Skyrocket Over 1,000%  
www.PennyStockWizard.com

#### Small Business Solutions

Check out the latest solutions for your business from Verizon Wireless.  
Verizonwireless.com/smallbusiness

[Buy a link here](#)

© The Washington Post Company

JA860

U.S. Department of Justice



United States Attorney  
Southern District of New York

86 Chambers Street  
New York, New York 10007

November 26, 2012

BY FACSIMILE

Hon. Colleen McMahon  
United States District Judge  
United States Courthouse  
500 Pearl Street, Room 1350  
New York, New York 10007

Re: ACLU v. Department of Justice  
12 Civ. 794 (CM)

Dear Judge McMahon:

Plaintiffs have again submitted media reports to this Court that they characterize as establishing "the CIA's use of armed drones to carry out targeted killings." Letter dated November 20, 2012, at 1. Like plaintiffs' earlier submissions, these sources do not establish official acknowledgment by the CIA.

Plaintiffs' own letter describes numerous statements quoted in the media reports as being attributed to unidentified "'officials,' 'administration officials,' 'high-ranking administration officials,' and 'senior administration officials.'" The law is clear that statements made by such unidentified sources do not constitute official disclosure. *See Wilson v. CIA*, 586 F.3d 171, 186 (2d Cir. 2009) ("the law will not infer official disclosure of information classified by the CIA from (1) widespread public discussion of a classified matter; (2) statements made by a person not authorized to speak for the Agency; or (3) release of information by another agency, or even by Congress"); *see also Halpern v. FBI*, 181 F.3d 279, 294 (2d Cir. 1999) (even information that has "entered the realm of public knowledge" remains properly classified and exempt from disclosure unless "the government has officially disclosed the specific information the requester seeks"). Similarly, plaintiffs rely on statements by former National Counterterrorism Center Director Michael Leiter, but the statements of a former agency official "cannot be deemed an 'official' act of the Agency." *Wilson*, 586 F.3d at 189.

Plaintiffs also rely on press reporting of statements attributed to Deputy National Security Advisor John Brennan. In addition to the fact that Brennan is not a CIA official, plaintiffs have identified no statement by Brennan acknowledging the CIA's use of armed drones for targeted killing. For example, although the letter suggests that Brennan was quoted discussing his "efforts to curtail the CIA's primary responsibility for targeted killings," the quoted language is not a direct quote from Brennan (nor, for that matter, does it mention drones). That a reporter may reach that conclusion, based in part on statements made by unidentified current and former

JA861



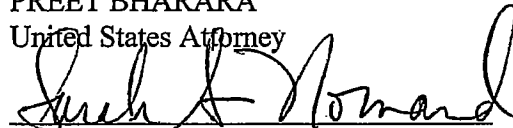
officials, *see* K. DeYoung, "A CIA veteran transforms U.S. counterterrorism policy," Wash. Post. (Oct. 24, 2012), does not meet the "strict test" for official disclosure. *Wilson*, 586 F.3d at 186. Classified information cannot be deemed officially disclosed for these purposes unless it "(1) is as specific as the information previously released, (2) matches the information previously disclosed, and (3) was made public through an official and documented disclosure." *Id.* Plaintiffs' press reports fall far short of this exacting standard.

Respectfully,

STUART DELERY  
Principal Deputy Assistant Attorney General

PREET BHARARA  
United States Attorney

By:



ELIZABETH J. SHAPIRO  
AMY POWELL  
Trial Attorneys  
Telephone: (202) 514-5302  
[Elizabeth.Shapiro@usdoj.gov](mailto:Elizabeth.Shapiro@usdoj.gov)

SARAH S. NORMAND  
Assistant United States Attorney  
Telephone: 212.637.2709  
Fax: 212.637.2702  
Email: [sarah.normand@usdoj.gov](mailto:sarah.normand@usdoj.gov)

cc: Eric A.O. Ruzicka, Esq.  
Dorsey & Whitney LLP  
Suite 1500  
50 South Sixth Street  
Minneapolis, MN 55402-1498  
*Counsel for ACLU Plaintiffs*  
By Email

David McCraw, Esq.  
The New York Times Company  
620 Eighth Ave.  
New York, NY 10018  
*Counsel for Plaintiffs in New York Times v. Department of Justice*, 11 Civ. 9336 (CM)  
By Email

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

AMERICAN CIVIL LIBERTIES UNION and THE	)	
AMERICAN CIVIL LIBERTIES UNION FOUNDATION)	)	
	)	
Plaintiffs,	)	
	)	12 Civ. 794 (CM)
v.	)	
	)	
U.S. DEPARTMENT OF JUSTICE, including its	)	
component the Office of Legal Counsel,	)	
U.S. DEPARTMENT OF DEFENSE, including its	)	
component U.S. Special Operations Command,	)	
and CENTRAL INTELLIGENCE AGENCY,	)	
	)	
Defendants.	)	

**DECLARATION OF BRIGADIER GENERAL RICHARD C. GROSS, UNITED STATES  
ARMY**

Pursuant to 28 U.S.C. § 1746, I, Richard C. Gross, Brigadier General, United States Army, hereby declare under penalty of perjury that the following is true and correct:

1. I am the Legal Counsel to the Chairman of the Joint Chiefs of Staff. In this capacity, pursuant to 10 USC Sec. 156(d)(1), I “perform such legal duties in support of the responsibilities of the Chairman of the Joint Chiefs of Staff as the Chairman may prescribe.” Specifically, this includes providing advice to the Chairman and Vice Chairman of the Joint Chiefs of Staff, the Director of the Joint Staff, and Directors of Joint Staff Directorates. I am responsible for providing legal advice on all matters, to include operational law, administrative and civil law, domestic law, international law, and the law of armed conflict. I participate in the development and review of national-level strategic plans and operations. I represent the Chairman’s interests in the interagency and regularly interact with the principal legal advisors of the National Security Staff, Department of State, Department of Justice, the Office of the

Director of National Intelligence, the Central Intelligence Agency (CIA), combatant commands, military departments, and defense agencies. It is not my duty, nor do I have the authority, to make policy decisions. I provide advice and counsel to the Chairman of the Joint Chiefs of Staff, and to others, who can reject or accept that advice.

2. The statements in this declaration are based upon my personal knowledge and upon my review of information available to me in my official capacity.

**Administrative Background**

3. I am familiar with the FOIA request, dated October 19, 2011, which plaintiffs sent to the DoD Office of Freedom of Information (OFOI) and Headquarters, United States Special Operations Command (SOCOM), seeking “six categories of documents created after September 11, 2001 (see Annex I for the full contents of the ACLU’s request): 1) Records pertaining to the legal basis in domestic, foreign, and international law upon which US citizens can be subjected to targeted killings; 2) Records pertaining to the process by which U.S. citizens can be designated for targeted killings, including who is authorized to make such determinations and what evidence is needed to support them; 3) Records pertaining to the legal basis in domestic, foreign, and international law upon which the targeted killing of Anwar al-Awlaki was authorized and upon which he was killed, including discussions of: (a) The domestic-law prohibitions on murder, assassination, and excessive use of force; (b) The Fifth Amendment Due Process Clause; (c) International-law prohibitions on extra-judicial killing; (d) The Treason Clause; (e) The legal basis authorizing the CIA, [Joint Special Operations Command] JSOC, or other U.S. Government entities to carry out the targeted killing of Anwar Al-Awlaki; (f) The Government’s understanding of “imminence of harm” in the case of Anwar Al-Awlaki; and (g) Any requirement that the U.S. Government first attempt to capture Anwar Al-Awlaki before killing him; 4) Records pertaining to the factual basis for the targeted killing of al-Awlaki; 5)

All records pertaining to the factual basis for the targeted killing of Samir Khan; 6) All records pertaining to the factual basis for the targeted killing of Abdulrahman al-Awlaki.” *ACLU v. DOJ*, case et al, 1:11-cv-09336-CM, Memorandum Opinion, Jan. 3, 2013 at 6-7.

4. As described in the unclassified declaration of Robert R. Neller, Lieutenant General, United States Marine Corps, dated June 20, 2012, the search conducted by the Joint Staff located two unclassified memoranda which were responsive to plaintiffs’ request. Those documents, both described in the *Vaughn* index as “Memorandum from Legal Counsel to the Chairman of the Joint Chiefs of Staff to the National Security legal advisor with legal analysis regarding the effect of U.S. citizenship on targeting enemy belligerents,” were withheld in full, pursuant to 5 U.S.C. § 552(b)(5), the deliberative process privilege.

**Purpose of this Declaration**

5. The purpose of this declaration is to satisfy the Court’s order, dated January 3, 2013, which directed that the Department of Defense provide a supplemental and more detailed justification for why the deliberative process privilege applies to the two “Unclassified Memos” on the *Vaughn* Index.

**Information Exempt Under Exemption 5**

6. Exemption 5, 5 U.S.C. § 552(b)(5), permits the withholding of “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” Exemption 5 allows an agency to withhold information that is normally privileged in the civil discovery context, including, as relevant here, information protected by the deliberative process privilege.

7. The two memoranda at issue were created by my predecessor and provided to the National Security Council’s (NSC’s) legal advisor. They consist of informal discussions between attorneys regarding legal advice to be delivered to the decision-making members of the

NSC. The memoranda were created to aid in the formation of the Administration's position regarding the targeting of enemy belligerents. The legal advice contained in the memoranda addressed a specific legal consideration relevant to this broader policy, specifically whether the U.S. Constitution affords an enemy belligerent additional protections from targeting based upon the belligerent's status as a U.S. citizen.

8. The memoranda are predecisional, insofar as my predecessor was providing advice in connection with subsequent decisions concerning the Administration's position regarding the targeting of enemy belligerents, and he had no responsibility for making final policy decisions in this area. Indeed, neither my predecessor nor the NSC's legal advisor are even statutory members of the NSC, which, pursuant to the National Security Act of 1947, as amended, include the President, Vice President, Secretary of State, Secretary of Defense, and Secretary of Energy. The NSC is the principal forum for consideration of national security policy issues requiring Presidential determination. The informality of these memoranda is evidenced by their brevity (2 and 4 pages respectively), the fact that the formats utilized bullet points to analyze particular legal authorities, and the fact that the second memo did not contain either a date or even a formal header indicating who sent the memorandum to whom. The memoranda are also deliberative, as they represent the opinions, advice, analysis and recommendations of the author. They are an attempt to influence and inform the formation of policy and are not a recitation of a final policy position or decision. The predecisional and deliberative nature of the documents is also reflected in their language. In the later memorandum, for example, it expressly notes that the analysis previously provided in the earlier memorandum had been provided for the receiving party's "consideration." The later memorandum also makes clear that the earlier memorandum is expressing the author's own view ("my view"), and offers suggestions as to helpful analysis and the proper analytical framework.


9. Both of these memoranda provide frank and candid opinions, the release of which could chill future deliberations. There is a particular need for confidentiality with respect to the advice and work product of lawyers who advise Executive Branch policymakers regarding the legal implications of contemplated policy determinations. By its very nature, such legal advice is pre-decisional and deliberative—part of the exchange of ideas and suggestions that accompanies careful Executive Branch decision-making. The ability to candidly express views, even preliminary views, is especially critical for legal advisors when articulating and refining their legal advice and analysis. Compelled disclosure of such analysis would seriously inhibit the candor and effectiveness of the advisors engaged in this highly deliberative process, and the quality and integrity of the final result would inevitably suffer. In addition, because the memoranda represent only the views of the author, their release could confuse or mislead the public regarding the Government's position on the legality of targeting enemy belligerents who happen to be U.S. citizens.

10. These memoranda have been consistently protected as confidential and deliberative legal advice, and have not been distributed outside the Executive Branch.

11. Any further description of these memos would reveal the deliberative material. There is no reasonably segregable information, factual or otherwise, contained in either memorandum.

12. I declare under penalty of perjury of the laws of the United States of America that the foregoing is true and correct to the best of my knowledge and information.

Dated this 16<sup>th</sup> day of January, 2013, in Arlington, VA.



Brigadier General Richard C. Gross, USA  
Legal Counsel to the Chairman of the Joint  
Chiefs of Staff

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

THE NEW YORK TIMES CO., CHARLIE SAVAGE, AND SCOTT SHANE,  
*(In the space above enter the full name(s) of the plaintiff(s)/petitioner(s).)*

11 Civ. 9336 (CM) ( )

- against -

U.S. DEPARTMENT OF JUSTICE

NOTICE OF APPEAL  
IN A CIVIL CASE

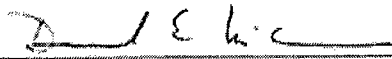
*(In the space above enter the full name(s) of the defendant(s)/respondent(s).)*

Notice is hereby given that THE NEW YORK TIMES CO., CHARLIE SAVAGE, AND SCOTT SHANE  
*(party)*

hereby appeals to the United States Court of Appeals for the Second Circuit from the Judgment  
granting summary judgment to defendant and denying summary judgment to plaintiffs.

*(describe the judgment)*

entered in this action on the 24th day of January, 2013.  
*(date) (month) (year)*

  
*Signature*

New York Times Legal Dept., 620 8th Ave.  
*Address*

New York, NY 10018  
*City, State & Zip Code*

DATED: January 31, 2013

(212) 556-4031  
*Telephone Number*

NOTE: To take an appeal, this form must be received by the *Pro Se* Office of the Southern District of New York within thirty (30) days of the date on which the judgment was entered, or sixty (60) days if the United States or an officer or agency of the United States is a party.

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

-----X

No. 12-cv-00794-CM

American Civil Liberties Union and The  
American Civil Liberties Union  
Foundation

Plaintiffs,

**NOTICE OF APPEAL**

-v-

U.S. Department of Justice, including its  
component the Office of Legal Counsel,  
U.S. Department of Defense, including its  
component U.S. Special Operations  
Command, and Central Intelligence  
Agency

Defendants.

-----X

**NOTICE IS HEREBY GIVEN** that the American Civil Liberties Union and The American Civil Liberties Union Foundation, Plaintiffs in the above-named case, hereby appeal to the United States Court of Appeals for the Second Circuit from the Judgment entered in this action on January 24, 2013 [Docket 61], granting summary judgment to Defendants U.S. Department of Justice, including its component the Office of Legal Counsel, U.S. Department of Defense, including its component U.S. Special Operations Command, and Central Intelligence Agency.

Dated: February 1, 2013

DORSEY & WHITNEY LLP

By: /s/Eric A.O. Ruzicka  
Eric A.O. Ruzicka (*pro hac vice*)  
Colin Wicker (*pro hac vice*)  
50 South Sixth Street, Suite 1500  
Minneapolis, MN 55402-1498  
612-340-2600



Joshua Colangelo-Bryan  
51 West 52nd Street  
New York, NY 10019-6119  
212-415-9234

AMERICAN CIVIL LIBERTIES UNION  
FOUNDATION

Hina Shamsi  
Jameel Jaffer  
Brett Max Kaufman  
125 Broad Street, 18th Floor  
New York, NY 10004  
212-549-2500

*Attorneys for Plaintiffs American Civil  
Liberties Union and The American Civil  
Liberties Union Foundation*

TO: Sarah Sheive Normand  
U.S. Attorney's Office, SDNY  
86 Chambers Street  
New York, NY 10007

*Attorneys for Defendants U.S. Dep't  
of Justice, including its component the  
Office of Legal Counsel, U.S. Dep't of  
Defense, including its component U.S.  
Special Operations Command, and  
Central Intelligence Agency*