

UNITED STATES DEPARTMENT OF JUSTICE

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

FIRST SESSION

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MAY 15, 2013
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UNITED STATES DEPARTMENT OF JUSTICE

WEDNESDAY, MAY 15, 2013

HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
Washington, DC.

The Committee met, pursuant to call, at 1:08 p.m., in room 2141, Rayburn House Office Building, the Honorable Bob Goodlatte (Chairman of the Committee) presiding.

Present: Representatives Goodlatte, Sensenbrenner, Coble, Smith, Chabot, Bachus, Issa, Forbes, King, Franks, Gohmert, Jordan, Poe, Chaffetz, Marino, Gowdy, Amodei, Labrador, Farenthold, Holding, Collins, DeSantis, Conyers, Nadler, Scott, Watt, Lofgren, Jackson Lee, Cohen, Johnson, Chu, Deutch, Bass, Richmond, DelBene, Garcia, and Jeffries.

Staff Present: (Majority) Shelley Husband, Chief of Staff & General Counsel; Branden Ritchie, Deputy Chief of Staff & Chief Counsel; Allison Halataei, Parliamentarian & General Counsel; Sarah Allen, Counsel; Caroline Lynch, Counsel; Kelsey Deterding, Clerk; (Minority) Perry Apfelbaum, Staff Director & Chief Counsel; Danielle Brown, Parliamentarian; and Aaron Hiller, Counsel.

Mr. GOODLATTE. The Committee will come to order. Without objection, the Chair is authorized to declare recesses of the Committee at any time.

We welcome everyone to today's hearing on the oversight of the United States Department of Justice.

Welcome, Attorney General Holder, to your sixth appearance before the House Judiciary Committee since your confirmation in 2009. We are happy to have you here with us today.

Last month, the City of Boston and the Nation as a whole was gripped with fear as the historic Boston Marathon, traditionally a day of celebration, was attacked by twin explosions that killed 3 people and injured more than 250. Dzhokhar Tsarnaev and his older brother Tamerlan Tsarnaev set off the explosions, then shot and killed MIT police officer Sean Collier and seriously wounded Boston transit police officer Richard Donohue while attempting to elude capture.

Tamerlan died after a fierce gun battle with police. Dzhokhar eventually surrendered after sustaining serious injuries himself.

I would like to commend the FBI and all of the Federal, State, and local law enforcement agents who worked tirelessly to identify the bombers and apprehend Dzhokhar. The Patriots Day attack in Boston shows us that domestic terror threats are real, ongoing, and

can have deadly consequences. In 2010, FBI Director Mueller and other intelligence officials warned us that domestic and lone wolf extremists are now just as serious a threat to our safety as al-Qaeda.

We have been fortunate that until April 15th of this year previous domestic terror plots have been foiled. The bombings in Boston remind us that the terror threat has not diminished, but that it is ever present and evolving. It is critical that Congress and this Committee in particular ensure that our ability to detect, deter, and prosecute these threats keeps pace with this evolution.

To that end, I look forward to hearing from you today about ways that Congress can amend the Federal rules for criminal cases to make sure that we are able to prosecute terrorism cases while still allowing law enforcement to learn critical information to stop future attacks. I am also concerned about reports that in the years leading up to the Boston attack, several different Federal agencies or departments received intelligence about the bombers.

These agencies did not connect the dots, and this is not the first time that this has happened in recent years. The question that the Administration and we in Congress need to address is whether there are any improvements that can be made going forward to facilitate interagency information sharing so that we can better thwart future domestic terrorists.

I am also interested today to hear about how the Department intends to tighten its belt in a responsible way during this time of fiscal uncertainty. I was pleased to hear that the Department was ultimately able to prioritize its spending to avoid furloughing Federal agents and prison guards in response to the sequester, which reduced the Department's more than \$27 billion budget by approximately 5 percent.

However, after learning of elaborate conferences with \$12 cups of coffee, \$10,000 pizza parties, and a vast array of duplicative grant programs and the purchase of a \$170 million prison from the State of Illinois, I am confident there are many ways the Department can root out waste and duplication without harming critical missions. With our national debt at more than \$16 trillion, the American people deserve no less.

I am also deeply concerned about a pattern I see emerging at the Department under your leadership in which conclusions reached by career attorneys after thorough investigation are overruled by Administration appointees for political reasons. For instance, investigators from this Committee and the Oversight and Government Reform Committee have uncovered conclusive evidence that Assistant Attorney General Tom Perez, against the strong recommendations of career attorneys, struck a secret deal with the City of St. Paul in order to block the Supreme Court—

Mr. NADLER. Point of order, Mr. Chairman. That is not correct information. That is not what the Subcommittee found.

Mr. GOODLATTE. The gentleman will have his opportunity to speak at a later time.

This secret deal undermined the rule of law and robbed the American taxpayers of the opportunity to recover over \$200 million in fraudulently obtained funds.

What is more, the New York Times recently reported that political appointees at the Department, over the vehement objections of career attorneys, decided to commit as much as \$4.4 billion in taxpayer money to compensate thousands of farmers who had never claimed bias in court. A small group of female and Hispanic farmers, based on claims similar to those in *Pigford*, had made allegations that the Department of Agriculture had discriminated against them in administering its loan programs.

However, according to the Times, career attorneys within the Department determined that there was no credible evidence of widespread discrimination and that the legal risks did not justify the costs and that it was legally questionable to sidestep Congress and compensate the farmers out of the judgment fund.

Just last week, we learned that IRS employees have admittedly targeted conservative groups for additional and unwanted scrutiny just because they chose to exercise their First Amendment rights. This is outrageous, and Congress and the American people expect answers and accountability.

Finally, just 2 days ago, it was revealed that the Justice Department obtained telephone records for more than 20 Associated Press reporters and editors over a 2-month period. These requests appear to be very broad and intersect important First Amendment protections.

Any abridgment of the First Amendment right to the freedom of the press is very concerning, and Members of the Committee want to hear an explanation today.

I look forward to hearing your answers on all of these important topics today, as well as on other issues of significance to the Justice Department and the country.

And it is now my pleasure to recognize for his opening statement the Ranking Member of the Committee, the gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you, Chairman Goodlatte.

Today is Peace Officers Memorial Day, and I would like to begin by honoring those who gave the ultimate sacrifice in serving our Nation, the fallen officers who selflessly defend our streets and keep our communities safe. As flags across the country fly at half staff, our thoughts turn toward these brave law enforcement officers and officials, and I thank each and every officer for their dedicated public service.

Members of the Committee, first, with respect to the Government's subpoena of phone records at the Associated Press, I am troubled by the notion that our Government would pursue such a broad array of media phone records over such a long period of time. At the same time, I know also that the Attorney General himself has recused himself from the investigation, and we will hear more about that.

Policy questions on this topic are fair, and I want you to know that I intend to reintroduce the Free Flow of Information, which passed the House floor with overwhelming support bipartisan in both the 110th and 111th Congress, and we hope to do so with the continued support of Members of this Committee on the other side of the aisle.

This Federal press shield bill would require the Government to show cause before they may compel disclosure of this sort of information from or about a news media organization. It is a common sense measure. It has comparable provisions in 49 other States and the District of Columbia. I would also note that the Free Flow of Information Act that protects the media against overbroad Government investigation, that has been commented publicly by many Members of the Congress, as well as the Administration.

We have also learned that some employees at IRS appear to have improperly targeted Tea Party groups as they applied for tax exempt status. No one takes allegations of discriminatory enforcement of the law more seriously than myself, and I thank the Attorney General for opening an investigation to uncover any criminal activity.

And then there is no issue more important than the continuing mission to ensure the safety and security of the American public. The Department and local law enforcement are to be commended for their coordinated response in identifying and apprehending the apparent perpetrators in the Boston bombings.

I have no doubt, Mr. Attorney General, that your own investigation into this matter will carefully review and consider gaps in our counterterrorism efforts that need to be addressed.

I also want to commend the Department of Justice and the FBI for their commitment to the most powerful counterterrorism tools in our arsenal, the Federal criminal process and the Federal court system. Since September 11, 2001, Federal courts have convicted nearly 500 individuals on terrorism-related charges. Military commissions have at best a troubled track record and have convicted only seven individuals and have never successfully prosecuted a U.S. citizen.

Mr. Attorney General, your commitment to the rule of law in this matter is to be commended not just because it is the right thing to do, but also because it keeps us safer in the long run.

And finally, I would like to recognize the dedication to the enforcement of civil rights and voting under the law. Under your leadership and under the leadership of the Assistant Attorney General Tom Perez, the Department has obtained \$660 million in lending settlements, including the three largest discrimination settlements in the Department's history. Has obtained a \$128 million award recovery in an employment discrimination case in history, secured \$16 million as a part of a settlement to enforce the Americans with Disabilities Act at more than 10,000 banks and other financial retail offices across the country.

And last year alone, the Civil Rights Division of the Department of Justice opened 43 new voting rights cases, more than twice the number than in any previous year, filed 13 additional objections to the discriminatory voting practices under Section 5 of the Voting Rights Act. And of course, all this has been done with devastating reductions in the Department's budget that I will put in the record and, of course, sequester, which further aggravates this problem.

That means that the cuts will affect our first responders, will mean fewer cases brought to court, fewer police officers on the street, fewer resources dedicated to keeping our citizens safe.

And so, I look forward to you elaborating on those issues raised by the Chairman of the Committee and myself, and I suspect that you will need more than 5 minutes to do so.

I thank you, Mr. Chairman, and I return my time.

Mr. GOODLATTE. I thank the gentleman for his opening statement.

Without objection, other Members' opening statements will be made a part of the record.

And without objection, the Chair will be authorized to declare recesses during votes on the House floor.

We again thank our only witness, the Attorney General of the United States, for joining us today. And Attorney General Holder, if you would please rise, I will begin by swearing you in.

[Witness sworn.]

Mr. GOODLATTE. Thank you. And let the record reflect that Attorney General Holder responded in the affirmative.

Our only witness today is United States Attorney General Eric H. Holder Jr. On February 3, 2009, General Holder was sworn in as the 82nd Attorney General of the United States. 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 United States attorney for the District of Columbia.

In 1997, General Holder was named by President Clinton to be the Deputy Attorney General. Prior to becoming Attorney General, he was a litigation partner at the Covington and Burling law firm in Washington, D.C. General Holder, a native of New York City, is a graduate of Columbia University and Columbia School of Law.

General Holder, we appreciate your presence today and look forward to your testimony. Your entire written statement will be entered into the record, and we ask that you summarize your testimony in 5 minutes.

The gentleman noted that may be difficult, but we will appreciate as close to that mark as you can keep. And the time is yours, General Holder.

TESTIMONY OF THE HONORABLE ERIC J. HOLDER, JR., ATTORNEY GENERAL, UNITED STATES DEPARTMENT OF JUSTICE

Attorney General HOLDER. I bet I can get it under 5 minutes.

But anyway, good afternoon, Chairman Goodlatte, Ranking Member Conyers. I appreciate this opportunity to appear before all of you today to discuss the Justice Department's recent achievements and to provide an overview of our top priorities.

Particularly in recent years, the Department has taken critical steps to prevent and to combat violence, to confront national security threats, and to ensure the civil rights of everyone in this country, and to safeguard the most vulnerable members of our society.

Thanks to the extraordinary efforts of my colleagues, the nearly 116,000 dedicated men and women who serve in the Justice Department offices around the world, I'm pleased to report that we

have established a remarkable record of progress in expanding our Nation's founding promise of equal justice under law and ensuring the safety and the security of all of our citizens.

Now the need to continue these efforts and to remain vigilant against a range of evolving threats was really brought into sharp focus last month in the most shocking of ways when a horrific terrorist attack in Boston left three innocent people dead and hundreds injured.

In the days that followed, thanks to the valor of State and local police, the dedication of Federal law enforcement and intelligence officials, and the cooperation of members of the public, those suspected of carrying out this terrorist act were identified. One suspect died following a shootout with police, and the other has been brought into custody and charged in Federal court with using a weapon of mass destruction. Three others have been charged in connection with the investigation of this case, which is active and ongoing.

As we continue working to achieve justice on behalf of our fellow citizens and brave law enforcement officers who were injured and killed in connection with these tragic events, and to hold accountable to the fullest extent of the law all who were responsible for this heinous attack, I want to assure you that my colleagues and I are also committed to strengthening our broader national security efforts.

For the past 4 years, we have identified, investigated, and disrupted multiple potential plots involving foreign terrorist organizations as well as homegrown extremists. We've secured convictions as well as tough sentences against numerous individuals for terrorism-related offenses. We've utilized essential intelligence gathering and surveillance capability in a manner that is consistent with the rule of law and consistent with our most treasured values.

Beyond this work, my colleagues and I are enhancing our focus on a variety of emerging threats and persistent challenges from drug trafficking and transnational organized crime to cyber threats and human trafficking. We're moving to ensure robust enforcement of our antitrust laws, to combat tax fraud schemes, and to safeguard the environment.

We're building on the significant progress that's been made in identifying and thwarting financial and healthcare-related fraud crimes. And for example, in fiscal year 2012, our fraud detection and enforcement efforts resulted in the record-breaking recovery and return of roughly \$4.2 billion.

Over the last 3 fiscal years alone, thanks to the President's Financial Fraud Enforcement Task Force and its Federal, State, and local partners, we have filed nearly 10,000 financial fraud cases against nearly 14,500 defendants, including more than 2,000 mortgage fraud defendants.

As these actions prove, our resolve to protect consumers and to seek justice against anyone who would seek to take advantage of their fellow citizens has never been stronger. And the same can be said of the Department's vigorous commitment to the enforcement of key civil rights protections.

Since 2009, this commitment has led our Civil Rights Division to file more criminal civil rights cases than ever before, including

record numbers of human trafficking cases. Under new tools and authorities, including the Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act, we have improved our ability to safeguard our civil rights and pursue justice for those who are victimized because of their gender, their sexual orientation, their gender identity, or their disability.

We will continue to work to guarantee that in our workplaces and in our military bases, in our housing and lending markets, in our schools and our places of worship, in our immigrant communities, and also in our voting booths that the rights of all Americans are protected.

But all of this is really only the beginning. As we look toward the future, my colleagues and I are also determined to work closely with Members of Congress to secure essential legislative changes, including common sense steps to prevent and to reduce gun violence and comprehensive legislation to fix our Nation's broken immigration system.

It is long past the time to allow the estimated 11 million individuals who are here in an undocumented status to step out of the shadows, to guarantee that all are playing by the same rules, and to require responsibility from everyone, both undocumented workers and those who would hire them.

Like many of you, I am encouraged to see that these basic principles are reflected in the bipartisan reform proposal that is currently being considered by the Senate. The Department will do all that it can to help strengthen that proposal and to advance a constructive, responsible dialogue on this issue.

I understand that this Committee and other Members are working on immigration reform proposals as well, and I look forward to working with you as those efforts move forward to enact comprehensive reforms.

However, I must note that our capacity to continue building upon the Department's recent progress is threatened by the long-term consequences of budget sequestration and joint committee reductions, which will worsen in fiscal year 2014 unless Congress adopts a balanced deficit reduction plan. Should Congress fail to do so, I fear that these reductions will undermine our ability to deliver justice for millions of Americans and to keep essential public safety professionals on the job.

We simply cannot allow this to happen. This afternoon, I ask for your support in preventing these cuts and ensuring that the Department has the resources it needs to fulfill its critical missions.

I thank you once again for the chance to discuss our current efforts with you today, and I would be happy to answer any questions that you might have. I see I didn't make my 5 minutes.

[The prepared statement of Attorney General Holder follows:]



Department of Justice

STATEMENT OF

ERIC H. HOLDER, JR.
ATTORNEY GENERAL

BEFORE THE

COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES

ENTITLED

“OVERSIGHT OF THE U.S. DEPARTMENT OF JUSTICE”

PRESENTED

MAY 15, 2013

**Statement of
Eric H. Holder, Jr.
Attorney General
U.S. Department of Justice**

**Committee on the Judiciary
U.S. House of Representatives**

**“Oversight of the U.S. Department of Justice”
May 15, 2013**

Good morning, Chairman Goodlatte; Ranking Member Conyers; and distinguished Members of the Committee. I appreciate this opportunity to appear before you today to discuss the Justice Department’s recent achievements, to provide an overview of our top priorities, and to join with you in advancing our important ongoing work.

Particularly in recent years, the Department has taken critical steps to prevent and combat violent crime, to confront national security threats, to ensure the civil rights of everyone in this country, and to safeguard the most vulnerable members of our society. Thanks to the extraordinary efforts of my colleagues – the nearly 116,000 dedicated men and women who serve in Justice Department offices around the world – I’m pleased to report that we’ve established a remarkable record of progress in expanding our nation’s founding promise of equal justice under law, and ensuring the safety and security of our citizens.

The need to continue these efforts – and to remain vigilant against a range of evolving threats – was brought into sharp focus last month, in the most shocking of ways, when a cowardly terrorist attack in Boston left three innocent people dead and hundreds injured. In the days that followed– thanks to the valor of state and local police, the dedication of federal law enforcement and intelligence officials, and the cooperation of members of the public – those suspected of carrying out this terrorist act were identified. One suspect died following a shootout with police and the other has been brought into custody and charged in federal court with using a weapon of mass destruction. Three others have been charged in connection with the investigation of this case, which is active and ongoing.

As we continue working to achieve justice on behalf of the ordinary citizens and brave law enforcement officers who were injured or killed in connection with these tragic events – and to hold accountable, to the fullest extent of the law, all who were responsible for this heinous attack – I want to assure you that my colleagues and I are also committed to strengthening our broader national security efforts. Over the past four years, we’ve identified, investigated, and disrupted multiple potential plots involving foreign terrorist organizations as well as homegrown extremists. We’ve secured convictions – and tough sentences – against numerous individuals for terrorism-related offenses. We’ve utilized essential intelligence-gathering and surveillance capabilities in a manner that’s consistent with the rule of law, and with our most treasured values.

Beyond this work, my colleagues and I are enhancing our focus on a variety of emerging threats and persistent challenges – from drug trafficking and transnational organized crime, to cyber-threats and human trafficking. We’re moving to ensure robust enforcement of antitrust laws, to combat tax fraud schemes, and to safeguard the environment. We’re building on the significant progress that’s been made in identifying and thwarting financial and health care-related fraud crimes. For example, in FY 2012, our fraud detection and enforcement efforts resulted in the record-breaking recovery and return of roughly \$4.2 billion.

Over the last three fiscal years alone – thanks to the President’s Financial Fraud Enforcement Task Force and its federal, state, and local partners – we have filed nearly 10,000 financial fraud cases against nearly 14,500 defendants, including more than 2,900 mortgage fraud defendants. As these actions prove, our resolve to protect consumers and seek justice against any who would take advantage of their fellow citizens has never been stronger.

The same can be said of the Department’s vigorous commitment to the enforcement of key civil rights protections. Since 2009, this commitment has led our Civil Rights Division to file more criminal civil rights cases than ever before – including record numbers of human trafficking cases. Using new tools and authorities, including the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, we’ve improved our ability to safeguard our civil rights and pursue justice for those who are victimized because of their gender, sexual orientation, gender identity, or disability. We will continue working to guarantee that – in our workplaces and military bases, in our housing and lending markets; in our schools and places of worship; in our immigrant communities and our voting booths – the rights of *all* Americans are protected.

But all of this is only the beginning. As we look toward the future, my colleagues and I are also determined to work closely with Members of Congress to secure essential legislative changes – including commonsense steps to prevent and reduce gun violence, and comprehensive legislation to fix our nation’s broken immigration system.

It’s long past time to allow the estimated 11 million individuals who are here in an undocumented status to step out of the shadows, to guarantee that all are playing by the same rules, and to require responsibility from everyone – both undocumented workers and those who hire them. Like many of you, I am encouraged to see that these basic principles are reflected in the bipartisan reform proposal that is currently being considered by the Senate. The Department will do all it can to help strengthen that proposal, and to advance a constructive, responsible dialogue on this issue. I understand that this Committee and other Members are working on immigration reform proposals as well, and I look forward to working with you as those efforts move forward to enact comprehensive reforms.

However, I must note that our capacity to continue building upon the Department’s recent progress is threatened by the long-term consequences of budget sequestration and Joint Committee reductions, which will worsen in Fiscal Year 2014, unless Congress adopts a balanced deficit reduction plan. Should Congress fail to do so, I fear that these reductions will undermine our ability to deliver justice for millions of Americans, and to keep essential public safety professionals on the job.

We cannot allow this to happen. This morning, I ask for your support in preventing these cuts and ensuring that the Department has the resources it needs to fulfill its critical missions. I thank you, once again, for the chance to discuss our current efforts with you today. And I would be happy to answer any questions you may have.

Mr. GOODLATTE. Your consideration was very good, and you were close. And we thank you for your opening statement. We will now proceed with questions under the 5-minute rule, and I will begin by recognizing myself for 5 minutes.

You, in fact, addressed in your remarks my first question, which deals with the troubling information that was received by the FBI

and other agencies of the Government prior to the Boston Marathon bombing, but it does not appear that all of the information was received by all of the pertinent parties, particularly the FBI, which had conducted an investigation prior to Tamerlan Tsarnaev's trip to Russia, but not after.

And we would like to continue to work with you and know what the Department is doing to adopt procedures for handling hits in relevant databases and making sure that the information between agencies is improved.

Attorney General HOLDER. Well, we certainly want to work with you in that regard. There is an ongoing Inspector General investigation, as you know, as to how information was or was not shared in the context that you have described.

I think that, generally, FBI did a very good job in acquiring information to the extent that it could. I'm not at all certain that all of the responses—or all of the requests that were made to a foreign country by the FBI were replied to in an adequate manner, and I think that is at least one of the problems that we have.

But this matter is ongoing by the IGs.

Mr. GOODLATTE. In 2010—this relates to the aftermath of the arrest of Dzhokhar Tsarnaev. In 2010, you indicated strong support for modifying the criminal rules to ensure that investigators could obtain critical intelligence from terrorism suspects.

Specifically, you said in 2010, “We are now dealing with international terrorists, and I think that we have to think about perhaps modifying the rules that interrogators have in somehow coming up with something that is flexible and is more consistent with the threat that we now face.”

Can you articulate how the Department would propose fixing the relevant rules, and would you be willing to work with Members of the Committee to ensure that our criminal rules are up to the task of handling terrorism questions, particularly this issue of how long the FBI or other law enforcement can question somebody about imminent threats?

There is a Supreme Court case recognizing that, but it collides with another Supreme Court case saying you have to be presented within 48 hours. And obviously, that caused some consternation about the completion of the questioning by the FBI about future events, other conspirators, and the location of bombs and other equipment related to this terrorist attack.

Attorney General HOLDER. Yes, I think you're right, Mr. Chairman. There is a tension between the public safety exception, as defined in the Quarles case and Rule 5 of the Rules of Criminal Procedure. There was a proposal that we floated out there that I talked about. What I would prefer to do would be to work with Members of Congress who are interested perhaps in looking at the world as we see it now.

The Quarles case dealt with somebody who was asked, “Where is the gun?” The reality is, as we deal with terrorist suspects, there are much more broad questions that we need to ask, much more detailed information that we need to know. Who else was involved in this matter? Are there other explosive devices that we need to know about? Are there other threats that are going to happen not only today, but perhaps in the next 2 or 3 days?

And so, it seems to me that the need for an extensive Quarles public safety exception question period would be appropriate. I think that this would require interaction between the executive and legislative branches to come up with something that would pass constitutional muster.

Mr. GOODLATTE. It was recently reported by the Justice Department or reported that the Justice Department obtained 2 months of telephone records of more than 20 reporters and editors with the Associated Press, including both work and personal phone lines. There has been a lot of criticism raised about the scope of this investigation, including why the Department needed to subpoena records for 20 people over a lengthy 2-month period. Why was such a broad scope approved?

Attorney General HOLDER. Yes, there's been a lot of the criticism. In fact, the head of the RNC called for my resignation in spite of the fact that I was not the person who was involved in that decision. But be that as it may, I was recused in that matter, as I described, in a press conference that I held yesterday. The decision to issue this subpoena was made by the people who are presently involved in the case. The matter is being supervised by the Deputy Attorney General.

I am not familiar with the reasons why the case—why the subpoena was constructed in the way that it was because I'm simply not a part of the case.

Mr. GOODLATTE. It is my understanding that one of the requirements before compelling process from a media outlet is to give the outlet notice. Do you know why that was not done?

Attorney General HOLDER. There are exceptions to that rule. I do not know, however, with regard to this particular case why that was or was not done. I simply don't have a factual basis to answer that question.

Mr. GOODLATTE. And it has also been reported that the Associated Press refrained from releasing this story for a week until the Department confirmed that doing so would not jeopardize national security interests. That indicates that the AP was amenable to working with you on this matter.

If that is the case, why was it necessary to subpoena the telephone records? Did you seek the AP's assistance in the first place? And if not, why not?

Attorney General HOLDER. Again, Mr. Chairman, I don't know what happened there with the interaction between the AP and the Justice Department. I was recused from the case.

Mr. GOODLATTE. I take it that you or others in the Justice Department will be forthcoming with those answers to those questions as you explore why this was handled what appears to be contrary to the law and standard procedure.

Attorney General HOLDER. Well, again, there are exceptions to some of the rules that you pointed out, and I have faith in the people who actually were responsible for this case that they were aware of the rules and that they followed them. But I don't have a factual basis to answer the questions that you have asked because I was recused. I don't know what has happened in this matter.

Mr. GOODLATTE. Thank you very much.

My time has expired. And I now recognize the gentleman from Michigan, Mr. Conyers, for 5 minutes.

Mr. CONYERS. Thank you, Mr. Chairman.

I note that some of our Members have been outspoken in opposition to the Free Flow of Information Act in the past and have commented publicly about their outrage over the Associated Press subpoenas. But now I am very delighted to learn that many have changed their attitude on this, and I am particularly glad to welcome the support of Chairman Darrell Issa as we move forward with this legislation.

Mr. Attorney General, there has been criticism about Tom Perez as Assistant Attorney General, and that he may have mismanaged employees at the Civil Rights Division in the Department of Justice. Are you able to comment on Mr. Perez's track record as manager of the division and allegations that he politicized enforcement of civil rights laws?

Attorney General HOLDER. Yes, I think that Tom Perez has been an outstanding Assistant Attorney General for the Civil Rights Division. I think he will be a great Secretary of Labor.

There have been reports done that looked at the condition of the Civil Rights Division. The Inspector General has spent 2 years looking at the Voting Section. There have been—there's a joint report by OPR, the Office of Professional Responsibility, as well as the Inspector General. I guess that was issued in 2008. And I think those findings are really important.

They found that the enforcement of voting rights law during this Administration was not based on improper racial or political considerations. They found that the hiring practices were not politically motivated. They found that there was no basis to believe that the Voting Section politicizes its FOIA responses.

Now there have been some indications that people in the Voting Section in particular have not gotten along with each other too well. There were a number of incidents, the majority of which were in the prior Administration, that I think are not really good examples of how DOJ employees are supposed to work with one another.

But I think if you look at Tom Perez's record—record numbers of cases brought against police departments that have acted inappropriately, record amounts of money recovered in discrimination suits, record numbers of voting rights cases filed—he has done what we expect of a person who would head the Civil Rights Division, which I think is the conscience of the Justice Department. He's done an outstanding job and deserves to be confirmed as Secretary of Labor.

Mr. CONYERS. Thank you.

Now there has been a lot of discussion about banks being too big to prosecute. And I would like to—I think this is very critical because much of the sagging economy that we are climbing out of is a direct result of Wall Street intransigence and perhaps improper conduct and activity.

Now can you distinguish between cases that we might bring against those on Wall Street who caused the financial crisis or were responsible in large part? Have we an economic system in which we have banks that are too big to prosecute? I mean, the Department of Justice has got to look at this very carefully.

Attorney General HOLDER. Let me make something real clear right away. I made a statement in a Senate hearing that I think has been misconstrued. I said it was difficult at times to bring cases against large financial institutions because of the potential consequences that they would have on the financial system.

But let me make it very clear that there is no bank, there is no institution, there is no individual who cannot be investigated and prosecuted by the United States Department of Justice. As I indicated in my opening statement, we have brought thousands of financially based cases over the course of the last 4½ years.

Now there are a number of factors that we have to take into consideration as we decide who we're going to prosecute. Innocent people can be impacted by a prosecution brought of a financial institution or any corporation.

But let me be very, very, very clear. Banks are not too big to jail. If we find a bank or a financial institution that has done something wrong, if we can prove it beyond a reasonable doubt, those cases will be brought.

Mr. CONYERS. Thank you very much.

Thank you, Mr. Chairman.

Mr. GOODLATTE. I thank the gentleman.

The Chair now recognizes the gentleman from Wisconsin, Mr. Sensenbrenner, the Chairman of the Subcommittee on Crime, Terrorism, Homeland Security, and Investigations, for 5 minutes.

Mr. SENSENBRENNER. Mr. Attorney General, thank you for coming.

I would like to try to pin down who authorized the subpoenas for the AP. And the Code of Federal Regulations is pretty specific on subpoenas for media. Did Deputy Attorney General Cole do that?

Attorney General HOLDER. Yes, I have to assume he did. I only say assume because you have to understand that recusals are such that I don't have any interaction with the people who are involved in the case. Under the regulations, the Attorney General has to authorize the subpoena. In my absence, the Deputy Attorney General would, in essence, act as the acting Attorney General.

Mr. SENSENBRENNER. Do you know if Deputy Attorney General Cole was also interviewed in the investigation that caused your recusal?

Attorney General HOLDER. I don't know. I don't know. I assume he was, but I don't know.

Mr. SENSENBRENNER. Why were you interviewed? Were you a witness, or was this a part of your official duties as Attorney General?

Attorney General HOLDER. No, I was interviewed as one of the people who had access to the information that was a subject of the investigation. I, along with other members of the National Security Division, recused myself. The head of the National Security Division was left. The present head of the National Security Division, we all recused ourselves.

I recused myself because I thought it would be inappropriate and have a bad appearance to be a person who was a fact witness in the case to actually lead the investigation, given the fact, unlike Mr. Cole, that I have a greater interaction with members of the press than he does.

Mr. SENSENBRENNER. How does that make you a fact witness? If you are getting the work product, the assistant U.S. attorneys and the FBI that are looking into a matter. You would be a policy person in deciding whether or not to proceed with subpoenas or, ultimately, signing off on an indictment.

Attorney General HOLDER. Well, I'm a fact witness in the fact that I am a possessor—I was a possessor, I am a possessor—of the information that was ultimately leaked, and the question then is who of those people who possessed that information, which was a relatively limited number of people within the Justice Department, who of those people, who of those possessors actually spoke in an inappropriate way to members of the Associated Press?

Mr. SENSENBRENNER. Who else had access to that information?

Attorney General HOLDER. Well, this is an ongoing investigation. I would not want to reveal what I know, and I don't know if there are other people who've been developed as possible recipients or possessors of that information during the course of the investigation. I don't know.

Mr. SENSENBRENNER. I am trying to find out who authorized the subpoena. You can't tell me if Deputy Attorney General Cole authorized the subpoena. Somebody had to authorize the subpoena because the Code of Federal Regulations is pretty specific that this is supposed to go as close to the top as possible.

Attorney General HOLDER. Well, no, what I'm saying is that I can't say as a matter of fact. But I have to assume, and I would say I would probably be 95, 99 percent certain, that the Deputy Attorney General, acting in my stead, was the one who authorized the subpoena.

Mr. SENSENBRENNER. Well, okay. The Code of Federal Regulations also is very specific that there should be negotiations prior to the issuance of the subpoena with the news media organization involved, and the AP has said there was no negotiations at all.

Now there are two different parts of the regulation that may be in conflict with each other. One is more generic than the other. But there were no negotiations whatsoever. And why weren't there negotiations?

Attorney General HOLDER. That I don't know. There are exceptions to that rule that say that if the integrity of the investigation might be impacted, the negotiations don't have to occur. I don't know why that didn't happen.

Mr. SENSENBRENNER. But hasn't somebody in the Justice Department said that the integrity of the investigation would not be impacted with negotiations either under Subsection C, which is generic, or Subsection D, which is more specific?

Attorney General HOLDER. I don't know. But let me say this, I've just been given a note that we have, in fact, confirmed that the Deputy was the one who authorized the subpoena.

Mr. SENSENBRENNER. Okay. Well, I think we are going to have to talk to him about this. But, Mr. Attorney General, I think that this Committee has been frustrated for at least the last 2½ years, if not the last 4½ years, that there doesn't seem to be any acceptance of responsibility in the Justice Department for things that have gone wrong.

Now may I suggest that you and maybe Mr. Cole and a few other people go to the Truman Library and take a picture of this thing that he had on his desk that said "The buck stops here," because we don't know where the buck stops. And I think to do adequate oversight, we better find out and we better find out how this mess happened.

I yield back the balance of my time.

Mr. GOODLATTE. I thank the gentleman.

The Chair now recognizes the gentleman from New York, the Ranking Member on the Subcommittee on Constitution and Civil Justice, Mr. Nadler, for 5 minutes.

Mr. NADLER. I thank the Chairman. I thank the Chairman.

And I want to talk about a dozen subjects, but I think I will stick to three in the time I have.

I have no doubt, and we have already been hearing much hue and cry about the Department of Justice probe of AP records. But I think we should put this in context and remember that less than a year ago, this Committee's Republican leadership demanded aggressive investigation of press leaks, accusing the Administration itself of orchestrating those leaks.

Then Members of this Committee wanted reporters subpoenaed, put in front of grand juries, and potentially jailed for contempt. Now, of course, it is convenient to attack the Attorney General for being too aggressive, or the Justice Department for being too aggressive.

But this inconsistency on the part of my Republican colleagues should not distract us from legitimate questions worthy of congressional oversight, including whether the Espionage Act has been inappropriately used in looking at leakers, whether there is a need for a greater press shield, which I believe there is, such as measures my colleagues have worked—some of my colleagues have worked to defeat in the past, and Congress' broad grants of surveillance authority and immunity that some of my Republican colleagues supported and before today have been unwilling to reexamine.

Those are questions we need to pursue, and I hope that today's rhetoric translates into meaningful bipartisan support for looking into those questions.

Now to switch topics, this was brought up already. But the Committee has engaged—this Committee has engaged in a relentless, unfounded, grossly unfair attack on the leadership and integrity of Assistant Attorney General Tom Perez. They have questioned his management of the Civil Rights Division and his efforts to get the City of St. Paul to withdraw its appeal in a case challenging the use of disparate impact theory to enforce civil rights law.

I would like to give you, sir, an opportunity to address two questions. First, can you comment on Assistant Attorney General Perez's track record briefly, because I have other, as manager of the Civil Rights Division?

Attorney General HOLDER. I think he's been an outstanding head of the Civil Rights Division. I think you look at the giants of the Department in that regard, you think of John Doar. I think he served 50 years or so ago.

I think 50 years from now, people will look back on Tom Perez's time as Assistant Attorney General of the Civil Rights Division and compare him to somebody like John Doar.

Mr. NADLER. Thank you.

Second, my colleagues allege that Assistant Attorney General Perez brokered a "dubious bargain," an inappropriate quid pro quo with the City of St. Paul, whereby he convinced the city to withdraw its appeal in *Magner v. Gallagher*, and the Department of Justice Civil Division agreed not to intervene in a False Claims Act case against the city.

The minority's conclusion after more than 18 months investigating it is that Assistant Attorney General Perez did nothing wrong and, in fact, appropriately carried out his duties as a steward of the Civil Rights Division. That, in fact, the facts showed that it was senior career officials in the Civil Division who overruled junior career officials in the Civil Division and ruled that—believed that that particular False Claims Act case was a very bad case, a weak case, and that the Department should not join it, although they did not prevent the complainant from continuing.

And that it was—there was nothing inappropriate in making a decision not to take the Magner case to the Supreme Court because bad cases—hard facts—what is it? Bad facts make hard law, or the other way around. I forget. In your view, was there anything inappropriate done with regard to this matter?

Attorney General HOLDER. I don't think so. I mean, I think the city reached out. Consideration was given to the action that was taken. Before Mr. Perez moved forward with what he did, he consulted with the ethics people, legal and ethics people and professional responsibility people within the Civil Rights Division to make sure that the course of action he was proposing was ethically sound.

It seems to me that what was done was in the best interests of the people of the United States.

Mr. NADLER. Thank you.

Let me ask with respect to Guantanamo. Congress has placed several restrictions on the Administration with regard to the transfer or potential trial of detainees still being held in Guantanamo. What steps, if any, can the President take on his own, assuming that Congress remains obdurate, to ensure that we either bring these individuals to justice through trial or find a way to release, transfer, or repatriate them?

I just take it as axiomatic that it is wrong and unworthy of the United States to simply grab individuals whom we may believe to be terrorists, never try them, and never release them. It is wrong to hold people indefinitely for life without any charges and, in fact, especially since 66 of them have been declared by our own Government to pose no risk.

So what can we do avoid—it is 86 of them. I am sorry. What can we do to avoid the situation where, without any claim of right at all, the United States indefinitely holds 166 people in jail with no due process, no trial, military or otherwise, and no release?

Attorney General HOLDER. Well, I think the Congress has unwisely put in place impediments to what the President wants to do and what I have said I think is the wise thing to do, which is to

close Guantanamo. There are steps that the Administration can do and that we will do in an attempt to close that facility.

There are a substantial number of people who can, for instance, be moved back to Yemen. The President put a hold on that, given the situation that we had in Yemen at the time. But I think that is something that we have to review.

I think we have to revitalize our efforts at getting a representative to go to different countries in the way that Mr. Dan Fried, who was an employee of the State Department, I think did a very effective job finding alternative placements for people where their home countries will not accept them.

I had the responsibility when I came into office of looking at the population at Guantanamo and making determinations as to who could be released, who needs to be tried, and then who needs to be held under the laws of war. The task force that I set up I think did a great job in that regard.

There have been subsequent actions by Congress that I think have made it difficult, but not impossible, for us to move people out of Guantanamo, and I think the President has indicated that we will be taking renewed action in that regard.

Mr. GOODLATTE. The time of the gentleman has expired.

Mr. NADLER. Thank you.

Mr. GOODLATTE. The Chair would note that the Committee has requested the appearance of the Assistant Attorney General and head of the Civil Rights Division, Mr. Perez, to testify and answer the numerous questions that have been posed about his activities, and he has refused the Committee's request.

The Chair now recognizes the gentleman from North Carolina, Mr. Coble, for 5 minutes.

Mr. COBLE. I thank the Chairman.

Attorney General, good to have you on the Hill today.

I want to visit Benghazi for a moment. Some recent days ago, former Secretary of State Hillary Clinton appeared before a Senate hearing, and she was asked about her comment concerning misstatements or inconsistencies surrounding the Libyan tragedy. She responded, "What difference does it make?"

I took umbrage with that response when I heard it. And I went to the House floor in early February to take further umbrage. I can assure Mrs. Clinton that it makes a whole lot of difference to the survivors of the four Americans who were killed that fateful day in Benghazi.

Now having said that, Mr. Attorney General, can you give us an update on where the FBI's investigation of Benghazi stands today?

Attorney General HOLDER. I can't be definitive other than to say that the investigation is ongoing, that we are at a point where we have taken steps that I would say are definitive, concrete, and we will be prepared shortly, I think, to reveal all that we have done.

Mr. COBLE. I thank you, sir. I just find Mrs. Clinton's response to have been condescending and just laced with insincerity. I am very impartial, but that will be for another day.

Last month, Mr. Attorney General, in the wake of the Boston bombing, you warned in a lengthy statement against acts of violence or retaliation against Muslims and other groups. Can you share with us a specific reason that supported your giving this

warning, A? And B, have there been actual instances of retaliation linked to Boston that the—with which the Department was aware?

Attorney General HOLDER. That was more a preventive statement, I think, than anything. We have seen in the past where people who were perceived as Muslims—might not have been—and who were attacked as a result of incidents that might have happened. And the statement that I was making was simply for people not to let emotions, stereotypical action come into play and so that people who were Muslim, perceived to be Muslim, might somehow be physically harmed.

Mr. COBLE. I thank you for that.

This—I am shifting gears now. My visibility is blocked between you and the Attorney General. I like to see you. You like to see me when you are responding. Now I am having a senior moment. I forgot what I was going to ask you. It will come back to me in due time.

Well, maybe it won't. [Laughter.]

I still have time. I still see the green light. So I am going to try to get through here. Senior moment recovered.

The *Simmons* decision in North Carolina, which, if retroactively applied, could result in the release of convicted felons. Members of my staff have been in touch with members of your staff, and do you have a comment on this? If not, you and I can get together subsequently. Are you familiar with the case?

Attorney General HOLDER. Yes, I am. The en banc decision in *Simmons* establishes that certain Federal convictions and enhanced penalties that depend on proof of a prior felony conviction we now know is only a misdemeanor, and that has caused some problems.

So we have to decide who is now entitled to post conviction relief. We have to balance, I think, this notion of fundamental fairness against the need for finality and protection of the public from people who are really dangerous. And so, we want to look at the facts and try to determine what relief is warranted.

And the ability to work perhaps with you and members of your staff in this regard I think would be something that would be appropriate, and this is essentially, I think, a law enforcement matter. But some guidance or the thoughts that you have in this regard would be appreciated.

Mr. COBLE. Well, I think thus far the exchange between your staff and our staff has been favorable and effective, and I thank you for that.

And Mr. Chairman, I hope you will note that the red light has not yet appeared, and I am yielding back.

Mr. SENSENBRENNER [presiding]. That is 26 seconds.

The gentleman from Virginia, Mr. Scott?

Mr. SCOTT. Thank you, Mr. Chairman.

And thank you, Mr. Attorney General.

On the Internal Revenue situation, I think we can all agree that the published reports which suggest that IRS agents were denying people their proper consideration based on politics, that is the allegation. I assume you haven't completed your investigation. But I think there is bipartisan agreement that you shouldn't be able to do that.

Now you have publicly said you are having a criminal investigation. There are obviously criminal laws against denial of civil rights, 1983. There is also a specific IRS code that says any officer or employee of the United States acting in connection with any revenue law of the United States, who with the intent to defeat the application of any provision of this title fails to perform any of the duties of his office or employment.” And then goes in to show that is—if you violate that, that is a 5-year felony.

Are there any gaps in the criminal code that would make it difficult for you to pursue criminal sanctions if you find that IRS agents were denying benefits under the Internal Revenue Code based on politics?

Attorney General HOLDER. That actually is a good question, and I’m not sure what the answer is. I think the provisions that you have noted are ones that we are looking at—the civil rights provisions, IRS provisions, potentially the Hatch Act. And I think we’re going to have to get into the investigation before I can answer that question more intelligently.

But to the extent that there are enforcement gaps that we find, we will let this Committee know and, hopefully, work with this Committee to make sure that what happened and was outrageous, as I’ve said, and hope—if we have to bring criminal actions so that kind of action, that kind of activity does not happen again.

Mr. SCOTT. I understand that certain officials in the IRS have apologized. Does an apology immunize you from criminal prosecution?

Attorney General HOLDER. No.

Mr. SCOTT. Under the Fair Sentencing Act, we went from 100 to 1 to 18 to 1 under the differential on crack and powder. Is the Department of Justice reviewing sentences that were done under the 100 to 1 for possible commutation?

Attorney General HOLDER. I put together a working group to look at exactly who we have imprisoned in our Bureau of Prisons and to make sure that we are holding the appropriate people for appropriate lengths of time and to see whether or not there are some changes that need to be made.

We have, for instance, over 133 people, I think, who are above the age of 80 in the Federal prison system. I think I have about 35 who are over the age of 85. Now there may be good reasons why they should serve the rest of their lives in jail. On the other hand, it may be that there’s a basis for them to be released.

So we are looking at this question overall as to what our prison population looks like, whether the commutation policy should be changed the IG had a very useful report about compassionate release and how we should use that.

We can save money by releasing people a little before their time, but we would only do so if it would not endanger the public safety. So we’re looking at the question really in a broader way.

Mr. SCOTT. Thank you.

Now under the faith-based initiative, apparently although since 1965, you could not discriminate based on race, color, creed, national origin, or sex, apparently there is a new idea about this, that some kind of exemptions are awarded that allows some faith-based organizations to discriminate based on religion with the Federal

money. How do you decide who can discriminate with Federal money based on religion?

Attorney General HOLDER. Well, I think what we want to try to do is make sure that no inappropriate discrimination—no discrimination occurs. You and I have talked about this since before I was sworn in.

Mr. SCOTT. Well, there is discrimination going on, and you award some kind of certificate or something that allows them to—let me get one more question in.

The effects of sequester on the judicial branch. Public defenders, court bailiff, and other court personnel are being furloughed. What effect does that have on the administration of justice?

Attorney General HOLDER. That's actually a very good question. I met with the chiefs of all of the district courts around the United States about 2 weeks or so ago, and they asked me to perhaps be their voice. Judges don't get a chance to speak in the way that I do.

And I think that as we consider this whole problem—and it is a problem—of sequestration, that we take into account the impact that it has on our courts and our probation offices. If we want to have the court system that we need to have, if we want to process criminal cases, if we want to assess people for probation, incarceration, the courts have to have sufficient funds to do so, and they are in a very bad way with regard to the situation that exists now and certainly for the situation that exists in 2014.

So as we're thinking about sequester fixes, I would ask that everybody remember the court system and all of its constituents.

Mr. SENSENBRENNER. The time of the gentleman has expired.

The Chair recognizes the former Chairman of the Committee, the gentleman from Texas, Mr. Smith.

Mr. SMITH. Thank you, Mr. Chairman.

Welcome, Mr. Attorney General.

You have announced a criminal investigation into allegations that IRS employees have unfairly targeted conservative organizations, and I am sure you would agree that when the Federal Government targets individuals or organizations because of their political beliefs that that is a threat to our democracy and quite possibly a violation of an individual or an organization's First Amendment rights. So far, we have allegations, I think, involving four cities—Cincinnati, Washington, D.C., two California cities, where IRS agents might have targeted conservative groups.

And it so happens that a year ago, on behalf of the San Antonio Tea Party, I wrote the Commissioner of the IRS asking him to look into what appeared to be targeted actions by the IRS against the San Antonio Tea Party.

My first question is this. Is your investigation going to go beyond Cincinnati, beyond Ohio? Is it going to be a national investigation that includes Washington, D.C., as well and includes any allegations wherever they might occur?

Attorney General HOLDER. Yes, it would. The facts will take us wherever they take us. It will not be only one city. We will go wherever the facts lead us.

Mr. SMITH. You haven't done anything to limit this to the U.S. attorney in Ohio, for example?. You are going to go nationwide?

Attorney General HOLDER. This is something that we will base at least—we're at the beginning stages. But we're basing it in Washington, and that way we can have a better impact nationwide.

Mr. SMITH. Okay. Without saying whether any criminal laws have actually been broken, what are some possible criminal laws that could have been violated if, in fact, individuals or organizations were targeted for their conservative views?

Attorney General HOLDER. Well, I think it was Congressman Scott who really put his finger on it. There are civil—potential rights—

Mr. SMITH. Right. But do you know of any criminal laws that might have been violated?

Attorney General HOLDER. I am talking about criminal cases, criminal violations in the civil rights statutes, IRS, that I think we find there. There is also the possibility of 1,000—false statements violations that might have been made, given at least what I know at this point.

Mr. SMITH. Okay. I think some of the criminal laws that might have been violated—18 United States Code 242 makes it a crime to deprive any person of rights, privileges, or immunities guaranteed by the Constitution. 18 United States Code 1346 makes it a crime for Government employees to deprive taxpayers of their honest services. So that is a couple of examples.

What civil recourse might be obtained by individuals or organizations that were unfairly targeted for their conservative beliefs?

Attorney General HOLDER. That I'm not sure. We probably have to get back to you with an answer on that. I just don't know what civil recourse they might have.

Mr. SMITH. I think it is possible that they might be able to recoup any expenses that they incurred trying to respond to the targeted approach by the IRS. Does that sound likely to you?

Attorney General HOLDER. It's possible. I know that in other instances where somebody is tried in a criminal case and acquitted, they can get their costs back at times.

Mr. SMITH. Okay. Another subject, Mr. Attorney General.

Last week, you responded to a letter that I wrote you last year in regard to the Anti-Lobbying Act, as amended in 2002. And you said in your response to me, this is a quote, "The act prohibits the use of appropriated funds to influence an official of any government."

Does that apply to Health and Human Services grantees who might use those dollars to lobby State and local officials?

Attorney General HOLDER. I'm sorry. I didn't hear the last part. Appropriate money to?

Mr. SMITH. I don't know if you understood the beginning of that. You responded to my letter last week in regard to the Anti-Lobbying Act, as amended in 2002, and you said that the act prohibits the use of appropriated funds to influence an official of any government.

And my question to you is does your statement and evaluation of the Anti-Lobbying Act apply to Health and Human Services grantees who may have used those dollars to lobby State and local governments?

Attorney General HOLDER. Well, I think you might be referring to what I have only read about in the newspapers involving what HHS is doing as far as implementation of the act, and I don't know whether or not what funds are being used or whether that letter would apply to that effort. I just don't know.

Mr. SMITH. Okay. Would you get back to me then? If you don't think your statement, which is pretty clear to me that it would apply, would you get back to me as to why you think it should not apply to Health and Human Services or other Government agencies that might be grantees and they would use that money to lobby local and State governments?

Attorney General HOLDER. We'll do that. And given the relationship that you and I have, Mr. Chairman, Mr. Former Chairman, we'll try to get back to you in a more timely fashion than we did on that first one.

Mr. SMITH. Than a year. That would be appreciated.

Thank you, Mr. Attorney General.

Mr. SENSENBRENNER. The gentleman's time has expired.

The gentleman from North Carolina, Mr. Watt?

Mr. WATT. Thank you, Mr. Chairman. Sorry.

Attorney General HOLDER. Mr. Watt, you're only supposed to do that at your confirmation hearing, you know? [Laughter.]

That's when you roll out the kids.

Mr. WATT. I am just trying to get my line of questions. I have been in the back listening, and Nico says you have done a good job up to this point.

Mr. Attorney General, I am going to just ask you a couple of questions related to intellectual property, which is the Subcommittee that I am Ranking Member on. The Administration has called on Congress to make illegal distribution by streaming a felony. Can you describe the current tools at the Department's disposal to combat copyright infringement, and how would classifying streaming as a felony enhance the Department's enforcement efforts in this area?

Attorney General HOLDER. I think what we're looking for are just an expanded set of tools so that we can have a prosecution and enforcement effort that's consistent with the nature of the harm. All we can do now is bring a misdemeanor charge, and sometimes these crimes involve thousands, potentially millions of dollars where a felony prosecution might be appropriate.

We're not saying that we should only have a felony capability, but we think that we should have a felony capability, in addition to the misdemeanor capability that we already have, that would take into account the nature of the crime that we're looking at.

Mr. WATT. According to World Customs Organization, the international sale of counterfeit goods is a multi-billion dollar industry. Many of the sales are increasingly made over the Internet, where criminals can hide their identities— [Child talking.] [Laughter.]

Where criminals can hide their identities and elude capture.

What steps has the Department made to educate the public on the safety and security risk posed by these illicit sales?

Attorney General HOLDER. That was by the illicit?

Mr. WATT. What steps has the Department made to educate the public on the safety and security risks posed by illicit sales of Internet theft property?

Attorney General HOLDER. Oh, I see. That is a problem that we have tried to really focus on in terms of educational efforts. There are medicines that are stolen, intellectual property stolen that put the public health at risk. We have found some of our airplanes bolts that were inappropriately made. And what we have tried to do as part of our enforcement effort is to educate the public and to educate business about the dangers that flow from the theft of intellectual property.

Mr. WATT. And are there increasing indications of links between this problem and terrorism? Have you found any of those links, and would you describe those for the Committee?

Attorney General HOLDER. Yes. I think that's actually a very good question, and I think it's something that's very worrisome. As we saw organized crime get into a variety of businesses in order to support their efforts, we are now seeing terrorist groups getting into the theft of intellectual property, again to generate money to support what they are trying to do for their terrorist means.

And so, it means that we have to broaden our enforcement efforts, broaden the investigative efforts that we take to examine the precise reasons why people are engaging in this kind of intellectual property thievery and to consider, unfortunately, whether or not there is a terrorist connection to it. That is, I think, a relatively new phenomenon, but one that we have to be aware of.

Mr. WATT. And are there steps that you would recommend that Congress consider to check the growth of this industry?

Attorney General HOLDER. Yes. There's something that I think we should try to work with Members of this Committee and, more generally, Members of Congress about. I am particularly concerned about the theft of intellectual property to support terrorist activities, and it would seem to me that in those instances, enhanced penalties might be appropriate. And so, I think that is something that working with Congress we should consider.

Mr. WATT. Thank you, Mr. Chairman.

And Nico thanks you also. I yield back—we yield back the balance of our time.

Mr. GOODLATTE [presiding]. And a very effective line of questioning, particularly on the part of Nico. We are glad to have both of you here and—

Mr. WATT. Mr. Chairman, the press has asked what the relationship is. So just for everybody's information, this is my grandson. [Laughter.]

Mr. GOODLATTE. And a very proud grandpa as well there.

The Chair now recognizes the gentleman from Ohio, Mr. Chabot, for 5 minutes.

Mr. CHABOT. Thank you.

Mr. Attorney General, let me start with a term “tone at the top.” This was a principle—

Attorney General HOLDER. I'm sorry. Tone at the top?

Mr. CHABOT. Yes. This was a principle referred to in Sarbanes-Oxley and incorporated by reference in Dodd-Frank.

Do you believe that the same rigorous standards of conduct in enforcement should be applied to public and private entities? In other words, in short, do you think that the Government should be held accountable to a separate set of standards, a weaker set of standards than corporations, or do you think the standards should be the same?

Attorney General HOLDER. I think the standards ought to be the same, although I'd probably say that when it comes to Government, given the public trust that is involved as opposed to private interests, that there are probably higher standards that ought to apply to all levels of those of us who serve in Government.

Mr. CHABOT. Okay. Let me follow up with that. The person at the top in a business, and I think it would probably apply to Government as well. Even if he or she didn't necessarily know what the people under him or her was up to can be held accountable, actually personally accountable, under Sarbanes-Oxley, for example. Even if they didn't necessarily know what the people under them were doing all the time.

Now this Administration currently has at least three scandals swirling around it. One, misleading the American people on Benghazi. Number two, the IRS discriminating, targeting conservative groups for special treatment. And three, seizing the phone records of Associated Press reporters. Now I think you can debate whether that is actually a scandal yet. Many people are calling it that, but I think all three probably are.

When the story broke last week about these conservative groups being targeted by the IRS for special treatment, one of the spins by this Administration was, well, this was out in Cincinnati. It was out there. It is not us here in Washington. We didn't know anything about it.

Well, I happen to represent Cincinnati in the United States Congress, and I have for 17 of the last 19 years. The 2008 election didn't go so well for me.

Now I know that you aren't the Commissioner of the IRS, and you are not the Secretary of the Treasury, and I know that you know an awful lot of stuff. And I would like to ask you, I assume that you are aware that Cincinnati handles exempt organizations all across the country. It is not just in the local area. Is that—do you know that?

Attorney General HOLDER. I'm not aware of that. We're at the beginning of our investigation. I don't know exactly how IRS is constructed at this point. But if that's what you say, I take you at your word.

Mr. CHABOT. Okay. Now, and I know that you are not at the conclusion. You have got a lot to learn yet. But do you think that these were just some low-level IRS workers who decided to harass or examine with great scrutiny conservative groups, Tea Party organizations, patriot groups, 9/12 groups, groups who might have had "Tea Party" in their name, or groups who were concerned that the Government was too big and too intrusive. Kind of ironic, isn't it?

And on the other hand, they would allow groups that had, say, "progressive" in their names to proceed, as was supposed to happen, in a reasonable amount of time. Do you think that these were just some low-level folks, or do you think it goes higher than that?

Attorney General HOLDER. I simply don't know at this stage. We have not begun our—we've only begun our investigation, and I think it will take us time to determine exactly who was involved in these matters.

One thing I would say is that this whole notion of these 501(c)(4) groups, I think that some inquiry into that area is appropriate, but it has to be done in a way that does not depend on the political persuasion of the group.

Mr. CHABOT. Now let me ask you this. Who does the Cincinnati IRS office, for example, who do they answer to?

Attorney General HOLDER. I assume that, ultimately, they answer to the folks here in Washington.

Mr. CHABOT. Okay. Now Mr. Sensenbrenner referred a little while ago to the Truman's "buck stops here" reference, and I will just conclude because I am almost out of time by saying that I believe there has been a pattern by this Administration in not taking responsibility for failures, avoiding blame, pointing the fingers in somebody else's direction. Would you agree with that?

Attorney General HOLDER. No.

Mr. CHABOT. I thought you might say that. I think a lot of people do, including myself, and I think a lot of Members of this Committee. And we might be divided, obviously.

But these are very significant things which have occurred here, and I would strongly encourage this Administration to get out front, get all the facts out, let the chips fall where they may. I think that is in the best interests of the Administration. I think it is in the best interests of the country.

And I yield back my time.

Attorney General HOLDER. I would agree with that last part of your statement. It is one of the reasons why I ordered the investigation last Friday because it seemed to me that there was the need for a review, given the potential criminal investigations that exist that the Justice Department needed to be ahead of this matter.

And I can assure you and the American people that we will take a dispassionate view of this. This will not be about parties. This will not be about ideological persuasions. Anybody who has broken the law will be held accountable.

Mr. GOODLATTE. The time of the gentleman has expired.

The Chair recognizes the gentlewoman from California, Ms. Lofgren, for 5 minutes.

Ms. LOFGREN. Thank you, Mr. Chairman.

And thank you, Mr. Attorney General, for your presence here today.

I want to return to the issue of the freedom of the press. You know, Mr. Sensenbrenner quoted certain sections of the Code of Federal Regulations. But I would like to read the beginning of that section, which says, "Because freedom of the press can be no broader than the freedom of reporters to investigate and report the news, the prosecutorial power of the Government should not be used in such a way that it impairs a reporter's responsibility to cover as broadly as possible controversial public issues. This policy statement is thus intended to provide protection for the news media

from forms of compulsory process, whether civil or criminal, which might impair the news gathering function.”

Now I realize there are exceptions and that you have recused yourself. But it seems to me clear that the actions of the Department have, in fact, impaired the First Amendment. Reporters who might have previously believed that a confidential source would speak to them would no longer have that level of confidence because those confidential sources are now going to be chilled in their relationship with the press.

Whether or not this impairment of the First Amendment was, in fact, justified by the criminal case before you is not something I am sure you are at liberty to discuss in a public forum. But I still don't understand, number one, why and how you recused yourself.

I am concerned. It says no subpoena may be issued to any member of the news media or for the telephone toll records of any member of the news media without the express authorization of the Attorney General. Did you delegate that express authorization in writing to Mr. Cole?

Attorney General HOLDER. No, I don't think the recusal—we've looked for this. I don't think there is anything in writing with regard to my recusal, which is, again, not—

Ms. LOFGREN. No, but the question was what about the requirement in the code that you expressly approve—now you recused yourself, was that express authorization authority delegated to Mr. Cole?

Attorney General HOLDER. Once I recused myself in that matter, he, in essence—not in essence, he does become the acting Attorney General with all the powers that the Attorney General has.

Ms. LOFGREN. Okay. Could you explain again, or maybe you can't. Let me ask a hypothetical because I realize you can't talk about this case. But the regulations say that these records should not be obtained in a compulsory manner unless—and that there would be negotiation with the news media unless it would impair the negotiations.

Now the New York Times has got an opinion piece today expressing the concern that how could this be the fact? I mean, the records, the telephone records would not disappear if the AP had been notified. I mean, they were in the possession of the phone companies, never at risk for disappearing. How could it ever be the case that the availability of this information would be impaired?

Attorney General HOLDER. Well, this is both an ongoing matter and an ongoing matter about which I know nothing. So I'm not in a position really to answer that question.

But here is what I do think. I do think that at the conclusion of this matter and when I can be back involved in it, that given the attention that it has generated, that some kind of after action analysis would be appropriate.

And I will pledge to this Committee and to the American people that I will engage in such an analysis. But that would be after the case is done and when I can appropriately be involved in it once again.

Ms. LOFGREN. Well, I think that is good, and I wonder if we might also, Mr. Chairman, have Mr. Cole come before the Committee since he is the one who knows this information. But I don't

know how long this case will go on, and since you have recused yourself, certainly you would not be in a position to tell us that.

But it seems to me the damage done to a free press is substantial and will continue until corrective action is taken, and I would hope that we might be able to further pursue this, Mr. Chairman, and get some clarification on future action, either through legislative efforts or through further revision of the Code of Federal Regulation by the Administration because I think this is a very serious matter that I think concerns all of us, no matter our party affiliation.

And with that, I would yield back.

Mr. GOODLATTE. The comments of the gentlewoman from California are very pertinent, and the Committee would definitely be interested in the appearance of the Deputy Attorney General to answer questions regarding this matter.

The Chair now recognizes the gentleman from Alabama, Mr. Bachus, for 5 minutes.

Mr. BACHUS. Attorney General Holder, is Deputy Cole willing and able to appear before this Committee and answer the questions that you cannot answer?

Attorney General HOLDER. I'm sure he'd be willing to. I'm not sure he'd be in a position to answer the questions because you'd be asking questions about an ongoing matter, and I think he'd be in a difficult position to fully respond to the questions that you might put to him.

Mr. BACHUS. Will you urge him to make himself available, make that a priority?

Attorney General HOLDER. I will certainly convey to him the desire that has been expressed here today. But I really caution the Committee that asking the lead prosecutor about a matter that is ongoing puts him in a—

Mr. BACHUS. Well, let me ask you this. You have heard Ms. Lofgren, and there is a very high bar before a subpoena to members of the press because of retribution, the fear of retribution. As she said, you are supposed to explore, supposed to negotiate, and we are not aware of any negotiation. You say there are exceptions. You are supposed to try alternative sources.

Let me ask you this, on what date did you recuse yourself?

Attorney General HOLDER. I'm not sure. I think it was just toward the beginning of the matter. I don't know exactly when, but it was toward the beginning of the matter.

Mr. BACHUS. Doesn't—isn't that sort of an unacceptable procedure that you wouldn't formally? Because the statute actually says that the Attorney General shall approve the subpoena. So shouldn't there have been some memorandum?

There was no memorandum, no email when you recused yourself. I mean, was there any—was it in writing? Was it orally? Who did you recuse—did you alert the White House?

Attorney General HOLDER. I certainly did not alert the White House. We don't talk to the White House about—

Mr. BACHUS. Who do you recuse yourself to?

Attorney General HOLDER. I would have told the Deputy Attorney General, as I have done in other matters. In the Edwards case, for instance, I—

Mr. BACHUS. No, I understand. But do you not do that formally or in writing?

Attorney General HOLDER. No.

Mr. BACHUS. Do you see any reason for a formal or there to be some memorandum so we know the time and date of your recusal?

Attorney General HOLDER. Well, as I said, we have made a preliminary examination to see if there is anything in writing. But I know that I have recused myself in matters where I have not put something in writing.

Mr. BACHUS. Well, would you—do you think that it would be best practice to memorialize that recusal?

Attorney General HOLDER. I guess it might be helpful.

Mr. BACHUS. Well, it would be in this case because you apparently don't know when you recused yourself. Is that correct?

Attorney General HOLDER. Well, I don't know precisely. I know that, as I said, it was toward the beginning of the investigation.

Mr. BACHUS. So it was before the subpoenas?

Attorney General HOLDER. Yes, I don't know when the subpoena was issued.

Mr. BACHUS. So it could have been after the subpoenas were issued?

Attorney General HOLDER. No, I certainly recused myself before the subpoenas were issued.

Mr. BACHUS. Well, did you have any knowledge—you had knowledge that there was going to be an investigation? Is that correct?

Attorney General HOLDER. Yes, I appointed two people to lead the investigation.

Mr. BACHUS. Were you aware at that time that—

Attorney General HOLDER. I was criticized at that time for not appointing independent people, as has been pointed out. And I appointed two good U.S. attorneys—

Mr. BACHUS. At that time that you made that appointment, had there been any discussion of the press's involvement?

Attorney General HOLDER. Of the President's involvement?

Mr. BACHUS. The press's involvement—

Attorney General HOLDER. I'm sorry. The President?

Mr. BACHUS [continuing]. In the investigation of the leak. You were aware that it was an investigation of a leak to the press at the time you recused yourself?

Attorney General HOLDER. A leak to the President? I don't know.

Mr. BACHUS. A leak to the press.

Attorney General HOLDER. Oh, I'm sorry.

Mr. BACHUS. My southern is probably— [Laughter.]

Attorney General HOLDER. Oh, I'm sorry.

Mr. BACHUS. Press.

Attorney General HOLDER. I'm sorry. Yes, a leak to the press?

Mr. BACHUS. You were aware of the involvement of the press in an investigation that was—

Attorney General HOLDER. Sure. That was the basis of the investigation, the leak to the press.

Mr. BACHUS. So you knew at that time of the statute which authorized you, and you alone, to authorize subpoenas and take those actions?

Attorney General HOLDER. Sure.

Mr. BACHUS. So you could have anticipated there would be a subpoena to the press?

Attorney General HOLDER. No, not necessarily. There are leak investigations that are done very frequently where interaction with the press does not occur.

Mr. BACHUS. For what period of time after the investigation started were alternative measures that are called for by the codes or negotiations with the press, between the time of the investigation and discussion of subpoenaing press and the time that the subpoenas were issued, what period of time was that?

Attorney General HOLDER. I don't know because, as I said—

Mr. BACHUS. No idea?

Attorney General HOLDER [continuing]. I recused myself early on in the matter and also gave a great deal of independence to the U.S. attorneys who were involved in these matters. They did not have to report back to Washington every investigative step they were taking.

Mr. BACHUS. At what point did you inform the White House, or do you have any knowledge as when the White House was informed by DOJ that they were investigating the press?

Attorney General HOLDER. My guess would be that the White House found out about this by reading the newspapers.

Mr. BACHUS. By what? Last Tuesday?

Attorney General HOLDER. By reading the newspapers or watching television. We would not have had—

Mr. BACHUS. Well, how long before—

Mr. GOODLATTE. The time of the gentleman has expired.

Mr. BACHUS. Thank you.

Mr. GOODLATTE. The Chair recognizes the gentlewoman from Texas, Ms. Jackson Lee, for 5 minutes.

Ms. JACKSON LEE. I think it is worthy to put on the record that that is not enough time to be able to engage on some very important issues, but I do want to take a moment of my time to be able to thank the General for one of the most passionate and driven efforts of the Department of Justice, and we are well aware of it in Texas, which is the effort of the Department of Justice to increase the number of human trafficking prosecutions.

We are the epicenter of human trafficking in Houston. You have come on more than one occasion. I want to cite my local officials and the Human Trafficking Task Force and to indicate to you, as the Ranking Member on the Border Security Committee and Homeland Security, my Chairman and myself will be embracing that topic. Hope that we will be able to join in with the efforts of the Department of Justice.

Mr. General, I appreciate that, and I hope that this is an ongoing effort.

Attorney General HOLDER. It is. It is a priority for this Attorney General. It's a priority for this Administration. Secretary Clinton was a big leader in this effort. I think Secretary Kerry will be as well.

But it really involves not only the Federal Government, as you indicate. It really has to have a local and State connection, an international connection for us to be effective because this is an international crime.

Ms. JACKSON LEE. Well, let me thank you very much. There is so much that we could thank you for and your years of service, and I think that should be noted when you come before a Committee that has a responsibility, as you do, for upholding the laws of this Nation.

I am going to have a series of questions, and they are sort of yes/no answers, and I appreciate your cooperation. Let me just start with the tragedy of the Boston Marathon. There is no doubt that we have all mourned, and I think we, as those who have the responsibility in this Committee, do well not to make this partisan, not to point the fingers.

But can I ask you, can we look to, as you review the FBI and coordinating their investigation, which I understand is active, that we not reject the concept that it is important to connect the dots? And that as you review it that you will hold those responsible in terms of however you address it, whether it is let us do this better, but for the idea of connecting the dots.

Attorney General HOLDER. No, I think that's vitally important, and that's why the Inspector General report—Inspectors General inquiry I think is so important. It has not only the Justice Department Inspector General, but IGs from the intelligence community as well.

And so, I think we're going to really have a good sense of who had what information when and whether or not it was properly distributed.

Ms. JACKSON LEE. I thank you, and I would ask the Chairman of this Committee that we have a full hearing on that topic alone, only because as you well know, Mr. General, that that was put in the 9/11 report, and I thank you for acknowledging that. I think that is very important.

I want to move quickly to the IRS report and say to you that the Inspector General gave a number of recommendations, and if I am reading it clearly, they did not mention criminal, but I want it to be on the record one of them was to finalize interim action, better document reasons. I think we have all made our bipartisan statements on it.

My point is that I understand, as the President has directed Secretary of Treasury to act, that you have also taken this to a higher level of a criminal investigation. Can you put that on the record, please?

And I have a series of questions. So I just want to make clear that you have not taken this lightly and that this is now a Federal criminal investigation?

Attorney General HOLDER. No, that is correct. As I said, as of Friday of last week, I ordered that an investigation, criminal investigation be begun.

Ms. JACKSON LEE. Do you have any limits on that? You are letting it free flow and fall where it may?

Attorney General HOLDER. As I indicated in response to an earlier question, the facts will take us wherever they take us.

Ms. JACKSON LEE. In testimony before the Senate, you were asked a question about the shield law, the protection of the press. My recollection is that you said you support it. Is that the case now?

Attorney General HOLDER. It was when I testified during my confirmation. It continues to be something that I think that we should pass.

Ms. JACKSON LEE. And let me ask unanimous consent to put into the record the letter of May 16, 2013, from Director—not Director—Attorney General Cole, Deputy Attorney General Cole to Mr. Pruitt. I ask unanimous consent, Mr. Chairman.

Mr. GOODLATTE. Without objection, the letter will be made a part of the record.

[The information referred to follows:]



Office of the Deputy Attorney General
Washington, D.C. 20530

May 14, 2013

Gary B. Pruitt
President and CEO
Associated Press
450 W. 33rd Street
New York, NY 10001

Dear Mr. Pruitt:

I am writing in response to your May 13, 2013, letter concerning the Department of Justice's notification on Friday, May 10, 2013, that it is in receipt of subpoenaed toll records for April and May 2012 for certain telephone numbers associated with the Associated Press.

As you know, Department policy provides that we should issue subpoenas for phone records associated with media organizations only in certain circumstances. There should be reasonable grounds to believe that a federal crime has been committed and that the information sought by the subpoena is essential to a successful investigation. The Department should take all reasonable alternative investigative steps before even considering the issuance of a subpoena for toll records related to a media organization. Any subpoena that is issued should be drawn as narrowly as possible, be directed at relevant information regarding a limited subject matter, and should cover a reasonably limited period of time. We are required to negotiate with the media organization in advance of issuing the subpoenas unless doing so would pose a substantial threat to the integrity of the investigation. We take this policy, and the interests that it is intended to protect, very seriously and followed it in this matter.

✓ In May 2012, the Department of Justice opened criminal investigations into the unauthorized disclosure of classified information. Because such disclosures can risk lives and cause grave harm to the security of all Americans, the Department thoroughly investigates cases in which government employees and contractors trusted with our nation's secrets are suspected of willfully disclosing that information to individuals not entitled to them. Even given the significant public interest in enforcing criminal laws that protect our national security, seeking toll records associated with media organizations is undertaken only after all other reasonable alternative investigative steps have been taken. In this case, the Department undertook a comprehensive investigation, including, among other investigative steps, conducting over 550 interviews and reviewing tens of thousands of documents, before seeking the toll records at issue.

We understand your position that these subpoenas should have been more narrowly drawn, but in fact, consistent with Department policy, the subpoenas were limited in both time and scope. As you know, for each of the phone numbers referenced in our May 10, 2013, letter there was a basis to believe the numbers were associated with AP personnel involved in the

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reporting of classified information. The subpoenas were limited to a reasonable period of time and did not seek the content of any calls. Indeed, although the records do span two months, as we indicated to you last week, they cover only a portion of that two-month period. In addition, these records have been closely held and reviewed solely for the purposes of this ongoing criminal investigation. The records have not been and will not be provided for use in any other investigations.

Given the ongoing nature of this criminal investigation involving highly classified material, I am limited in the information that I can provide to you. Please understand that I appreciate your concerns and that we do not take lightly the decision to issue subpoenas for toll records associated with members of the news media. We strive in every case to strike the proper balance between the public's interest in the free flow of information and the public's interest in the protection of national security and effective enforcement of our criminal laws. We believe we have done so in this matter.

Sincerely,



James M. Cole
Deputy Attorney General

Ms. JACKSON LEE. Which it explains the expansive range, which you are not involved in, of work that was done in order to get information before proceeding as they did. However, will we be able to believe that the Justice Department still holds the protection of the First Amendment in high esteem and to protect it?

And I am coming with some other questions. I am just trying to get a yes or no.

Attorney General HOLDER. Yes, putting that case aside because it is ongoing, I was not aware of it. But the Justice Department has rules and regulations that have been followed, will be followed about our interaction with the press.

Ms. JACKSON LEE. Mr. Chairman—

Mr. GOODLATTE. The time of the gentlewoman has expired, and the Chair would advise all the Members of the Committee we have 28 more Members awaiting the opportunity to ask questions. And the Attorney General will be generous with his time, but he does have an obligation later today.

Ms. JACKSON LEE. I thank the gentleman for his answers.

Mr. GOODLATTE. I thank the gentlewoman.

And the Chair now recognizes the gentleman from California, Mr. Issa, Chairman of the Committee on Oversight and Government Reform.

Mr. ISSA. Thank you, Mr. Chairman.

And I want to start by playing a short voice recording, if it comes out okay. Please play it.

[Audio presentation.]

Mr. ISSA. Thank you.

Mr. Attorney General, that recording, as was earlier in my Committee, the Oversight Committee's report, is Thomas Perez, an individual who is one of your deputies, arranging for something not to be disclosed as part of his quid pro quo in St. Paul.

Do you think it is appropriate for someone to—at a Federal level to try to keep information out in order to disguise what is actually going on?

Attorney General HOLDER. I am not sure I'd necessarily agree with that characterization. I am not intimately familiar with all that happened in connection with the inquiry that was—

Mr. ISSA. Okay. Well, let us just go through a hypothetical that is a little easier. You have got a case that is going to gain the United States people \$180 million. You have got another case you do not want to go to the U.S. Supreme Court. You trade those two cases because you do not want to have that happen, and then you tell somebody, you know, we would like to keep things quiet. Let us make sure we do not disclose it. Is that right or wrong?

Attorney General HOLDER. Well, there are a whole variety of reasons why we as a government, the Justice Department, decide not to become involved in qui tam cases: the strength of the evidence, questions of law, position of the—

Mr. ISSA. Is it okay to trade a case you do not want going to the Supreme Court for a dollar damage case? That is the real question here.

Attorney General HOLDER. One has to look at this in its totality and decide exactly if there—

Mr. ISSA. Okay, I will take that as a, yes, it is okay to do that trade in your mind.

Attorney General HOLDER. That was not a yes. I was trying to answer the question.

Mr. ISSA. Well, you know, Mr. Attorney General, I need a yes or no before you go into the long dialogue. Otherwise, I am wasting my time.

There was a quid pro quo. There was a trade of \$180 million worth of revenue to the American people in return for dropping a case that your Justice Department did not want to go before the High Court. To coin the phrases used, "bad facts make bad decisions or bad law."

Now, I understand you, or at least Mr. Perez, did not want things going to the Supreme Court. But let us go through where we are today.

Attorney General HOLDER. Well, the decision not to take over the false claims act case did not end the case.

Mr. ISSA. Well, you may say that, but the plaintiff who saw himself abandoned did not see it that way. But let me go onto another line of questioning.

Attorney General HOLDER [continuing]. Had the ability to try the case. I do not think it worked out well, as I understand it. But the case was not over simply because the United States had not become involved. We——

Mr. ISSA. Right, but the case going to the U.S. Supreme Court was over.

Attorney General HOLDER. We do not become involved in qui tam 80 percent of the time.

Mr. ISSA. The case going to the U.S. Supreme Court was over as a result.

Attorney General HOLDER. The decision was made not to pursue that case.

Mr. ISSA. Okay. So the American people were denied the Highest Court considering a case. That is an undeniable fact. Let me go through some questions here.

Attorney General HOLDER. That is incorrect.

Mr. ISSA. I have been working with——

Attorney General HOLDER. That is a fact that is——

Mr. ISSA. Well, we will let the people decide whether they were denied a Supreme Court decision.

Attorney General HOLDER. You are characterizing it as undeniable, but it is not at all. And that is typically what you do.

Mr. ISSA. Mr. Attorney General, Thomas Perez falsely stated to our Committee that he had apparently none, then 1, then 2, then 34, then 35 emails that violated the Federal Records Act. Your office has only, I think yesterday or today, allowed us to see in camera the two and from on these emails. We have not seen the contents.

But in seeing the two and from——

Ms. JACKSON LEE. Mr. Chairman, I have a parliamentary inquiry, please.

Mr. GOODLATTE. The gentleman from California will suspend. The gentlewoman will state her parliamentary inquiry.

Ms. JACKSON LEE. I thank the gentleman. First of all, I would like to know, I have been on this Committee for more than I would like to count. Was there notice given of this recording to be played? I have not in the life of the time that I have been on this Committee heard a recording——

Mr. GOODLATTE. The gentlewoman——

Ms. JACKSON LEE. Was the minority noticed on this recording? Is this a hearing about Mr. Tom Perez, or is this a question about——

Mr. GOODLATTE. The gentlewoman will suspend.

Ms. JACKSON LEE. I would be happy to yield to you. First, I would like to know has notice been given? Was the Attorney General's office given notice about a recording——

Mr. GOODLATTE. The gentlewoman will suspend and the Chair will answer her question.

Ms. JACKSON LEE. I would be happy to.

Mr. GOODLATTE. There is no requirement under the Rules of the Committee that a Member cannot use evidence before the Committee as a part of the hearing.

Mr. ISSA. Mr. Chairman, if I could clarify for the gentlelady.

Ms. JACKSON LEE. I would be happy for the gentleman to do so.

Mr. ISSA. That recording was produced by the Justice Department. It is a piece of evidence that came from the Attorney General. So I would hope that playing back his own evidence would not be unreasonable.

Ms. JACKSON LEE. Let me, just if I can continue.

Mr. GOODLATTE. The gentlewoman may state a parliamentary inquiry and that is all because the gentleman from California has the time.

Ms. JACKSON LEE. I do understand it, and I appreciate it. So may I hear this again? Are you saying that evidence can be presented, but the question I asked was the Attorney General given notice that this recording would be played?

Mr. GOODLATTE. There is no requirement under the Rules of the Committee that a witness before the Committee be given evidence of or notice of evidence that may be presented to the witness at the hearing.

Ms. JACKSON LEE. Continuing my further inquiry, as I think I heard the gentleman from California make a point. But has this been authenticated as the actual true voice for the individual who is allegedly on it? Did the Committee authenticate it?

Mr. ISSA. If the gentlelady would yield. If the gentlelady would yield.

Ms. JACKSON LEE. I would be happy to yield.

Mr. ISSA. Thomas Perez has owned up to this being his voice. [Laughter.]

Ms. JACKSON LEE. Then the only thing, if I might continue my—

Mr. GOODLATTE. The gentlewoman has not stated a valid parliamentary inquiry.

Ms. JACKSON LEE. If I may continue it so that I may—

Mr. GOODLATTE. And the gentlewoman will suspend, and the gentleman from California will be recognized for the remainder of his question.

Ms. JACKSON LEE. Mr. Chairman, point of order.

Mr. ISSA. Mr. Chairman, I would ask that I have just 2 minutes to conclude.

Mr. GOODLATTE. The gentleman's time will be restored to 2 minutes.

Ms. JACKSON LEE. Can I make a point of order, Mr. Chairman?

Mr. GOODLATTE. The gentlewoman will state her point of order.

Ms. JACKSON LEE. The point of order is that Mr. Perez has authenticated his voice. Is the General authenticating his voice by answering the question? How is he authenticating Mr. Perez's voice?

Mr. GOODLATTE. The gentlewoman will suspend. That is not a parliamentary inquiry, nor is it an appropriate point of order.

Ms. JACKSON LEE. I am going to a point of order.

Mr. SENSENBRENNER. Mr. Chairman, I demand regular order.

Ms. JACKSON LEE. I thank the Chairman for his courtesies.

Mr. GOODLATTE. The gentlewoman's point of order is not well taken because there is no such rule that would require this Committee to treat this like we were in a trial. This is an opportunity for Members of the Committee on both sides of the aisle to ask questions of the witness.

And the gentleman from California will continue his line of questioning.

Mr. ISSA. Thank you, Mr. Chairman.

Mr. Attorney General, our investigators have seen 34 of the 35 admitted emails that violate the Federal Records Act. They have only seen the to and from. They have not seen the deliberative contents, and they have not seen the remainder of the 1,200 emails.

Mr. Cummings, my Ranking Member, joined in a letter requesting that we have the full contents pursuant to our subpoena of all 1,200. Will you make them available to the Committee based on our bipartisan request?

Attorney General HOLDER. I will certainly look at the request. It is not something that I have personally been involved in, but I will look at the request and try to be as responsive as we can. I am sure there must have been a good reason why only the to and from parts were provided.

Mr. ISSA. Yes, you did not want us to see the details.

Mr. Attorney General, in knowing the to and from—

Attorney General HOLDER. No, no. That is what you typically do.

Mr. ISSA. I knowing the to and from.

Attorney General HOLDER. No, I am not going to stop talking now. You characterized something as something that goes to the credibility of people at the Justice Department.

Mr. ISSA. Mr. Chairman, would you inform the witness as to the rules of this Committee?

Attorney General HOLDER. That is inappropriate and it is too consistent with the way in which you conduct yourself as a Member of Congress. It is unacceptable, and it is shameful.

Mr. GOODLATTE. The gentleman has the time, and the gentleman may ask the questions that he deems appropriate.

Mr. ISSA. Thank you, Mr. Chairman. In these email headers, one of them was to Melanie Barnes, Domestic Policy Counsel. In other words, it was to the White House. We have not seen the contents. Secondly, one of them was to Sara Pratt at HUD. Now, that is germane to our discovery of this quid pro. But more importantly, it is to an AOL account. So communications went on between two government officials, both of whom were circumventing the Federal Records Act. Additionally, in these emails we learned that Thomas Perez has yet another non-government account which he uses for government use. So in addition to his Verizon account, he has an RCN account.

Would you agree to make all of this available to us since, first of all, it violates the Federal Records Act and your own rules. Second of all, it is pursuant to a legitimate use of Congress under which we would have it, and lastly, because you have asked for transparency.

And before you answer, if you would, please, in the AP case, you have appointed Ronald Machen the U.S. attorney. And I am sure he is a fine U.S. attorney. But can he be considered to be independent when, in fact, when this Congress held you in contempt, he was the individual who recused on your orders to prosecute the case. If he will obey your orders and not living up to a contempt of Congress, can we believe that he is, in fact, independent?

Mr. JOHNSON. Mr. Chairman, I would ask for regular order.

Mr. GOODLATTE. We have regular order. The gentleman's time has expired, but the Attorney General is allowed to answer the question.

Mr. JOHNSON. It expired 45 seconds ago, Mr. Chairman.

Attorney General HOLDER. Well, first off, I did not order Mr. Machen not to do anything with regard—I will not characterize it—the contempt finding from this Congress. He made the determination about what he was going to do on his own. So I did not have anything to do with that.

With regard to the email request, I think that if your request is for relevant emails that have something to do with the subject matter that you are looking at, that is certainly something that I think we should consider.

With regard to the entirety of his email accounts, 1,200 or 1,300, I am not sure what the number was that you used. If they do not have anything to do with the matter at hand, I am not sure why they should be turned over.

Mr. ISSA. Mr. Chairman, a point of inquiry. When Congress issues a subpoena, in your understanding, is it to be determined, or, for that matter, when the Justice Department issues a subpoena, is it a decision of the recipient as to what is germane, or is it a decision of the subpoenaing authority?

Mr. GOODLATTE. That is a question beyond the scope of this hearing, but it is—

Mr. ISSA. Well, we have a few lawyers present.

Mr. GOODLATTE. We have many lawyers present, and certainly it is the opinion of the Chair that the subpoenaing party would determine the scope of their inquiry. If the respondent does not agree, then it would be appropriate for a court, and we hope that a court will soon decide the appropriateness of that subpoena because it is very disappointing that this has not been responded to, and that the Congress found it necessary to take the action that it took.

The time of the gentleman has expired, and the Chair now recognizes the gentleman from Tennessee, Mr. Cohen, for 5 minutes.

Mr. COHEN. Thank you, Mr. Chair. Firstly, General, I want to thank the work of the Civil Rights Division. I guess Mr. Perez was responsible for that for, first, working with the Liberty Bowl Stadium in Memphis and working out our accessible capacity seating arrangement, and also working on the juvenile court issue, where the Division saw to it that our juvenile court will be a model for the Nation and protect the rights of young people, which was so necessary.

And I also want to thank you for working with Mr. Scott and I to see that the Tax Division filed suit against Mo'Money that took advantage of people with fraudulent tax preparations. I thank you for that.

I would like to question you about a few issues that bother me. One is the former Alabama governor, Don Siegelman, who was the government of Alabama and probably the last Democrat statewide official there in the past and maybe in the future for a long time. And he tried to get a lottery in his State, which I did in Tennessee, and I know how difficult it is. And in so doing, he found himself in court and convicted and in jail, and a case in which an unprecedented 113 former attorneys general, Republican and Democrat, representing 44 of the 55 States have said his prosecution was a grave injustice. Just a numerous amount of legal experts have said that it was a grave injustice, and that the prosecution should never have taken place because the U.S. attorney, a Bush appointee, was the wife of the campaign manager of his opponent in a gubernatorial election. And that while she recused herself, she stayed involved.

I know there are procedural issues about a pardon or commutation, but the President could pardon him now. Each day he is in prison, in my opinion, is a grave injustice because all that man did in appointing that individual to a board that he was accused of doing, a man who had been on that State board twice before, and he appointed him, was politics.

And I would like to ask you—I am sure you are aware of the case—if you can assure me that you will review his case, because, in my opinion and the opinion of 113 former attorneys general, an innocent man is in jail being deprived of liberty.

Attorney General HOLDER. Well, he is not eligible. There are procedural issues. He is not eligible to apply for a pardon because he is currently serving a sentence. Commutation is not possible because I understand he has an active appeal. So those are the regulations under which we operate, and those are potentially and obviously problematic with regard to the relief that you are seeking.

Mr. COHEN. So you do not believe the President could issue a pardon now? I mean, the procedures you have are limitations you have put on your Justice Department. The President has no limitations.

Attorney General HOLDER. No, that is true. The President's pardon power is close to absolute, and so I think that is right. I am talking about Justice Department regulations.

Mr. COHEN. And is the Justice Department, the head of your division that looks over these is a Mr. Ronald Rodgers, another Bush appointee? Is that not correct?

Attorney General HOLDER. I believe he was appointed in the Bush Administration.

Mr. COHEN. Right. And he has been brought up by the IG, and the IG has said he should be investigated because he gave false information on a pardon request. He misstated what was the facts, and I want to know if he is under investigation, and have you looked into the IG's suggestions about Mr. Rodgers for misrepresenting information transmitted to the White House?

Attorney General HOLDER. There was some difficulties in connection—I do not remember what the individual's name was—about information that was, I guess, related to the White House from the pardon attorney's office. But I think corrective measures have been in place so that that kind of mistake would not occur in the future.

Mr. COHEN. Well, I hope not, sir, and I would have great faith in you.

My concern is that there is nothing more important than liberty, and taking your liberty is probably the most harshest thing the government can do a person. And we have taken the liberty of this gentleman, and I believe we need to look at that case. When 113 former AGs and Republicans and Democrats say it was a grave injustice, I think it needs to be looked at and try to remedy.

And I think there are other cases. Mr. Scott brought them up: the disparity in crack and cocaine. We change the law. All those people in there who serve longer time than they would have under the law now, the President could commute their sentences.

And one of the greatest threats to liberty has been the government taking people's liberty for things that people are in favor of. The Pew Research Group shows that 52 percent of Americans think marijuana should not be illegal, and yet there are people in jail, and your Justice Department has continued to put people in jail, for sale and use on occasion of marijuana. That is something the American public has finally caught up with. It was a cultural lag, and it has been an injustice for 40 years in this country to take people's liberty for something that was similar to alcohol.

You have continued what is allowing the Mexican cartels power, and the power to make money, ruin Mexico, and hurt our country, by having a prohibition in the late 20th and 21st century. We saw it did not work in this country in the 20's. We remedied it. This is the time to remedy this prohibition, and I would hope you would do so.

I know my time is almost gone. I would like to ask the Chair for just one brief moment.

Mr. GOODLATTE. The gentleman's time has expired, and we still have more than 24 Members who have not asked questions of the Attorney General, so—

Mr. COHEN. I yield back the balance of my time.

Mr. GOODLATTE. And the Chair would advise Members that if they have additional questions, we understand. I have additional questions, and I know most Members have additional questions. They can submit those to the Committee in writing, and we will submit all of them to the Attorney General so he can have the opportunity to respond to those as well.

Mr. COHEN. Thank you, Mr. Chairman.

Mr. GOODLATTE. But the Chair now recognizes the gentleman from Virginia, Mr. Forbes, for 5 minutes.

Mr. FORBES. Thank you, Mr. Chairman. General, we get the theatrics. We know we wait 650 days from the time IRS officials become aware of the abuses of the Internal Revenue Service until the Department opens an investigation. And then we say we cannot comment because we have got investigations going. Saying I cannot comment because of an ongoing investigation has kind of become the Fifth Amendment of politics for this Administration.

But I want to ask you not about ongoing investigations, but what you know currently today as the chief law enforcement officer of the Federal Government. This is a picture. I do not expect you to be able to see it from where you are. It is Tyrone Woods. His father gave it to me yesterday.

As you know, he and three other Americans were brutally murdered in Benghazi, many people believe, because we had inadequate security or we had an inadequate response. Many people are concerned, of course, of the manipulation of facts that took place after that. Yet this Administration, to my knowledge, has continued to say that there was nothing the Secretary of State could reasonably or should reasonably have done to have prevented those murders, and certainly she has had no personal repercussions.

This is an individual I think you can see better. This is Brian Terry. He was brutally murdered, and so were about 150 innocent Mexican citizens, because of Fast and Furious, which you have testified about here. And as far as I remember from your testimony, there was nothing you felt that you should reasonably have done to have prevented those murders. And you have suffered no personal repercussions from that.

Just a few months ago, we had someone sit right where you are sitting, John Morton, the director of ICE, after we had the release of 2,000 illegal immigrant detainees, some of whom were being held for aggravated felonies. And we were basically told by the director that there was nothing that he should have reasonably done to stop that, and he had no personal repercussions.

Now we have all of this stuff we are hearing from the Internal Revenue Service where we see these atrocious actions, some against individuals who were simply teaching about the Constitution and the Bill of Rights. And yet so far we have heard nothing from the Administration about what they should have done to reasonably have stopped these atrocities, and certainly no personal repercussions yet.

So, General, my question to you today is, based on what you know today, not ongoing investigations that we may never conclude or we may never see or that we do see—we will not have you back here—just what you know today, in any of these situations, is there anything that you are aware of today that any of the heads of the those departments or agencies should reasonably have done to have stopped the situations that I have just outlined that took place?

Attorney General HOLDER. Well, I know that Benghazi is something that I am not as familiar with, but I am familiar with Fast and Furious. And I will tell you that with regard to that, once I became aware of it, I stopped the policy.

Mr. FORBES. No, no, I am saying anything you should have done to have stopped them from taking place. It is too late afterwards. I am saying anything you should have done beforehand.

Attorney General HOLDER. Well hindsight is always 20/20. It is always accurate, and it is an easy thing to stand up or sit up where you are and do that. I have got to run an agency of 116,000 people, and we do it as best we can. When there are mistakes that are made, we hold people accountable. We change policies. That is what we do in the executive branch.

To the extent that there is fault, I have acknowledged that as the head of the Agency, I am ultimately responsible for that which happened in my Agency.

Mr. FORBES. And, General Holder, I appreciate the fact that we say I am responsible, but when irresponsible actions take place, no-

body has any personal repercussions, On any of those situations, did any of those individuals have any personal repercussions from the actions that took place?

Attorney General HOLDER. Yeah. There were people that we held—

Mr. FORBES. I am talking about the head of the Agency or the Department. You did not have any personal repercussions, did you?

Attorney General HOLDER. I held people accountable.

Mr. FORBES. You held people accountable. Let me say why I am saying that, because if, in fact, you cannot say anything that you should have reasonably done, the Secretary of State should have reasonably done, the Commissioner should have reasonably done, the Director should have reasonably done. If there is no personal repercussions, should Americans not realize that the only way we can stop these abuses from happening with the Internal Revenue Service from this massive amount of data they are going to get under the Affordable Health Care Act, is to make sure that data never gets to the Internal Revenue Service in the first place? Because if it does and the abuse occurs, nobody is going to be held accountable at the top, and also we are going to say afterwards there is nothing that we should have reasonably done to stop it?

Mr. Chairman, with that, we actually have a piece of legislation we are putting in today to make sure the IRS is not involved in our health care decisions. And I hope we will get it passed out of this House, and hopefully the Senate, so we can make sure those abuses do not take place.

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

Mr. GOODLATTE. I thank the gentleman for his comments.

And the Chair now recognizes the gentleman from Georgia, Mr. Johnson, for 5 minutes.

Mr. JOHNSON. Thank you, Mr. Chairman. General, the issue of the AP investigation, or actually the investigation into the illegal disclosure of classified information. To conduct that investigation, the Justice Department has various tools, among which is the subpoena. And a subpoena can be issued without judicial oversight, and it was through a subpoena that the Justice Department obtained phone records from the carrier that related to certain personnel at the Associated Press. Is that correct?

Attorney General HOLDER. Again, I assume that is correct. I am not—

Mr. JOHNSON. Well, subpoena is what we know that the information was compiled from. Now, we can or the Justice Department has the lawful authority by way of subpoena power to obtain those records. Is that correct?

Attorney General HOLDER. The Justice Department does have that subpoena power?

Mr. JOHNSON. Yes.

Attorney General HOLDER. Yes.

Mr. JOHNSON. And so it is legal for the Justice Department to obtain that information, but it certainly could cast a cool breeze over the First Amendment rights of freedom of the speech and freedom of the press. And that is why we have some special rules with respect to the issuance of subpoenas by law enforcement to obtain information from media sources. That is correct, is it not?

Attorney General HOLDER. Yeah. Again, without getting into the AP case, for lack of a better term, because the case is really not about the AP. It is about the people who leaked.

Mr. JOHNSON. Correct.

Attorney General HOLDER. Be that as it may, there is a recognition within the Justice Department that in dealing with interacting with the press, you are dealing with a special entity, and there have to be special rules about how that interaction occurs.

Mr. JOHNSON. And those rules are by way of regulations, but they are not by way of legislation, correct?

Attorney General HOLDER. That is correct.

Mr. JOHNSON. And that being the case, it might be a good thing for Congress to visit that issue and to determine whether or not we want to turn those guidelines and regulations into law.

And now, you made an important distinction. You said that the crime that is being investigated—well, you did not say this, but I will say this. It is not the publishing of the information, of the classified information, but it was actually the leaking of the classified information which is the basis of your investigation, correct?

Attorney General HOLDER. That is correct.

Mr. JOHNSON. But now, we also have an old law that would allow for prosecution of anyone who published the classified information. Is that not correct?

Attorney General HOLDER. You got a long way to go to try to prosecute people, the press, for the publication of that material. Those prosecutions have not fared well in American history.

Mr. JOHNSON. Well, I would argue that the Espionage Act of 1917 would authorize the prosecution of anyone who disclosed classified information. And perhaps that is another area that we may need to take action on here in this Congress.

Now, I will note that in this Congress, we have had a lot of bills, the most famous of which in my mind was the Helium legislation. And we wanted to ensure that we had enough helium to keep everything moving forward here in America, but we certainly need to protect the privacy of individuals, and we need to protect the ability of the press to engage in its First Amendment responsibilities to be free and to give us information about our government so as to keep the people informed. And I think it is a shame that we get caught up in so-called scandals and oversight of unimportant matters when we should be here addressing these real problems that things like the AP scandal illustrate us for us.

I will yield the balance of my time to you.

Attorney General HOLDER. Well, I would say this. With regard to potential prosecution of the press for the disclosure of material, that is not something that I have ever been involved, heard of, or would think would be a wise policy. In fact, my view is quite the opposite, that what I proposed during my confirmation, what the Obama Administration supported during 2009, and I think Senator Schumer is now introducing a bill that we are going to support as well, that there should be a shield law with regard to the press' ability to gather information and to disseminate it.

The focus should be on those people who break their oaths and put the American people at risk, not reporters who gather this information. That should not be the focus of these investigations.

Mr. GOODLATTE. The time of the gentleman has expired.
The Chair now recognizes the gentleman from Iowa, Mr. King, for 5 minutes.

Mr. KING. Thank you, Mr. Chairman. General Holder, I thank you for your testimony here today, and I have a number of curiosities remaining.

One of them is this. Are you aware of any plans or any discussion of an effort to transfer one or more detainees from Bagram Air Force Base to the United States for trial?

Attorney General HOLDER. Nothing immediately comes to my mind. I am not aware of that.

Mr. KING. Then you have not been in discussions of such a thing? Are you aware of any cases in the past where that has happened?

Attorney General HOLDER. That is what is giving me some pause. I am not sure if we have brought people back from Bagram or not. I just do not know. Maybe I can get a written response to that, but I am not sure about that.

Mr. KING. And perhaps I am too precise, and I should probably say the Afghanistan theater instead. Would that change your response?

Attorney General HOLDER. I am thinking of cases that we have brought of people here in the United States who committed acts overseas, and I am just not sure, as I think about these people, where those acts actually occurred. I am not sure if it was Afghanistan. I just do not remember.

Mr. KING. Do you understand the concept of my question, out of the theater and the global War on Terror? Out of the theater and the global War on Terror, and I use Bagram specifically, but with regard to Afghanistan or that theater of war, then you would assert that currently you are not in discussions about transferring a detainee to the United States for trial.

Attorney General HOLDER. Not that I am aware of as we speak. I would have to look into that, and if I have a contrary answer to that, I will get you something in writing.

Mr. KING. Thank you, General Holder. I would look back on past testimony here before the Committee, and you and I have had a couple of discussions about the *Pigford* issue. I think each time, it will be the third time in the course of a couple of years. And as that has unfolded before us, I would ask have you read the New York Times article dated April 25th?

Attorney General HOLDER. Yes, I did.

Mr. KING. And I would offer the opportunity to comment on your review of that article.

Attorney General HOLDER. Yeah. I think that the article missed a few things. There are steps that we have in place to limit the amount of fraud that goes on there both in terms of getting sworn statements from claimants from doing audits. There are a variety of things that we have in place to ensure that the kind of fraud that was described in that article—I think the article made the fraud seem more widespread than it actually is.

Mr. KING. What about the surplus funds that remain that have apparently been budgeted for the, I believe it is the Native American case, about \$400 plus million?

Attorney General HOLDER. Right.

Mr. KING. What would your recommendation be to claw that money back from there rather than to distribute it to locations that apparently do not have the ability to utilize that?

Attorney General HOLDER. Well, first of all, it is not going to the lawyers. There was some misapprehension about that.

Mr. KING. No, I think we understood that.

Attorney General HOLDER. Okay.

Mr. KING. There is a component of it, around \$60 million and about \$400 million that would be sitting there waiting to be distributed to organizations that were supportive of Native Americans.

Attorney General HOLDER. Right, and I think that is the way in which the settlement was crafted. And so to the extent that these kinds of organizations can be found, that is where the money should appropriately go.

Mr. KING. Now, would it not bring to your attention, though, that if you cannot find a place to put the money, maybe there was not a level of discrimination to the level that was originally claimed if there are not enough claimants?

And let me broaden this question a little bit consistent with this them, and that is that we saw with *Pigford I* and then *Pigford II*, a testimony before this very Committee several years ago from the head of the Black Farmer's Organization that were 18,000 Black farmers. If one presumed that 100 percent of them were discriminated against and we ended up with some 96,000 claims, and we have at least 15,000 plus payouts at this point, and all of *Pigford II* to be determined yet that has over 66,000 claims within that universe, so totaling up around 96,000 altogether within Black Farmers, then we add to that Garcia and Kiefsiegel and Love. And we see this number grow to at least \$4.4 billion, and I believe I quoted to you last time \$4.93 billion.

And are you aware of a single perpetrator of discrimination—they all would have had to have been under the payroll of the USDA. Have you investigated to identify a single perpetrator of discrimination against minorities or female farmers that always under the payroll of the USDA? Have you identified even one?

Attorney General HOLDER. Well, there was certainly a basis for the payments and the settlements.

Mr. KING. That was the confession of the USDA.

Attorney General HOLDER. I am sorry?

Mr. KING. It was a confession or a stipulation of the USDA back in about 1996 where it began.

Attorney General HOLDER. Right. There was a determination made, admissions made, that, in fact, this kind of discrimination did occur. And it was on that basis that the settlements were actually reached.

Mr. KING. But does that absolve the perpetrators of \$4.4 or more billion worth of discrimination? Are they not still out there? Should they not be dealt with? Should there not be a means to try to identify the individuals that would allegedly commit that kind of discrimination?

Mr. GOODLATTE. The time of the gentleman has expired, but the Attorney General is welcome to answer.

Attorney General HOLDER. We are talking about discrimination that occurred many, many years ago in some instances, and I am

not sure that our time, our limited resources, would be well spent trying to deal with identifying those people as much as trying to make sure that people are compensated and that these kinds of actions do not occur in the future.

Mr. KING. Thank you, Mr. Attorney General.

I yield back.

Mr. GOODLATTE. I thank the gentleman for his questions.

The Chair now recognizes the gentlewoman from California, Ms. Chu, for 5 minutes.

Ms. CHU. Mr. Attorney General, I would like to focus my questions on hate crimes and racial profiling. First of all, I ask unanimous consent to submit testimony from the Sikh Coalition and a letter led by Representative Joe Crowley with over 100 Members of Congress regarding tracking hate crimes against Sikh, Hindu, and Arab Americans for the record.

Mr. GOODLATTE. Without objection, they will be made a part of the record.

[The information referred to follows:]



May 10, 2013

Committee on the Judiciary
U. S. House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515

Re: May 15, 2013 Hearing on Oversight of the United States Department of Justice

Dear Committee Members

The Sikh Coalition, the largest Sikh American civil rights organization in the United States, submits this letter to highlight the need for the U.S. Department of Justice and Federal Bureau of Investigation (FBI) to begin tracking hate crimes against Sikhs on the federal government's Hate Crime Incident Report (Form 1-699).¹ We respectfully request that this letter and its enclosures be incorporated into the hearing record.

On May 5, 2013, Mr. Piara Singh—an 81-year-old Sikh American—sustained head injuries and a punctured lung after being viciously beaten with a steel rod in a suspected hate crime outside a Sikh Gurdwara (Sikh House of Worship) in Fresno, California.² Sadly, this was only the latest in a string of attacks on Sikh Americans. In the last two years alone, two elderly Sikhs were murdered in Elk Grove, California³; a Sikh cab driver was assaulted in Sacramento, California⁴; a Sikh transit worker was assaulted in New York City⁵; a Sikh cab driver was assaulted in Seattle, Washington⁶; a Sikh business owner was shot and injured in Port Orange, Florida⁷; and six Wisconsin Sikhs were murdered and several more injured at the Oak Creek Gurdwara by a gunman with known ties to hate groups in one of the worst attacks on an American place of worship since the 1963 bombing of the 16th Street Baptist Church.⁸

¹ See Federal Bureau of Investigation, Hate Crime Incident Report Form 1-699, available at <http://www.fbi.gov/about-us/cjis/hcr/reporting-forms/hate-crime-incident-report-pdf>. The Sikh Coalition also strongly supports the addition of categories for hate crimes against Hindu and Arab Americans. See Anti-Defamation League, *ADL Leads Coalition Urging FBI to Collect Data on Hate Crimes Against Sikhs, Arabs, and Hindus* (Dec. 16, 2012), available at <http://www.adl.org/combating-hate/hate-crimes-law/c/hate-crimes-data-sikhs-arabs-hindus.html>.

² Jacob Rayburn, *Fresno police chief Jerry Dyer speaks to Sikhs about attack*, Fresno Bee (May 8, 2013), available at <http://www.fresnobee.com/2013/05/08/3290627/fresno-police-chief-jerry-dyer.html>.

³ Nick Carbone, *Timeline: A History of Violence Against Sikhs in the Wake of 9/11*, Time (Aug. 6, 2012), available at <http://newsfeed.time.com/2012/08/06/timeline-a-history-of-violence-against-sikhs-in-the-wake-of-911>.

⁴ Cathy Locke, *Two men enter no-contest pleas in attack on Sikh taxi driver*, Sacramento Bee (Mar. 7, 2011), available at <http://blogs.sacbee.com/crime/archives/2011/03/w-sacramento-pd-2.html>.

⁵ John Lauinger, *MTA employee loses three teeth to hate nut's sucker punch on A train Memorial Day*, New York Daily News (Jun 5, 2011), available at http://articles.nydailynews.com/2011-06-05/local/29640761_1_bias-attacks-bias-incident-tiwan-singh.

⁶ Levi Palkkinen, *Anti-Muslim bigot beat Sikh cab driver*, Seattle Post-Intelligencer (Oct. 28, 2012), available at <http://www.seattlepi.com/local/article/Police-Anti-Muslim-bigot-beat-Sikh-cab-driver-3985421.php>.

⁷ Lyda Longa, *Port Orange Sikh forgives attackers, but wants them brought to justice*, Daytona Beach News Journal (Mar. 8, 2013), available at <http://www.news-journalonline.com/article/2013/03/08/NEWS/303089971>.

⁸ Joe Heim, *Wade Michael Page was steeped in neo-Nazi 'hate music' movement*, Washington Post (Aug. 7, 2012), available at http://www.washingtonpost.com/lifestyle/style/wade-michael-page-was-steeped-in-neo-nazi-hate-music-movement/2012/08/07/h879451e-df68-11e1-a19c-fcfa365396c8_story.html.

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Given that the Sikh American population may be no more than half a million, Sikhs may be hundreds of times more likely than their fellow Americans to experience hate crimes. A survey of Sikh Americans published in 2006 by Harvard University revealed that 83 percent of respondents either personally experienced or knew someone who experienced a hate crime or incident on account of their religion.⁹ A grassroots survey of Sikhs in New York City published by the Sikh Coalition in 2008 revealed that nine percent of respondents had experienced physical assaults on account of their religion.¹⁰ A similar survey of Sikhs in the San Francisco Bay Area published by the Sikh Coalition in 2010 revealed that ten percent of respondents had experienced bias-based assaults or property damage on account of their religion.¹¹

Despite the high volume of hate crimes against Sikh Americans, there is currently no mechanism in place for the federal government to document hate crimes against Sikhs in the United States. Pursuant to the Hate Crime Statistics Act of 1990,¹² the FBI collects data on hate crimes in the United States, including the bias motivations on the basis of which such crimes are committed, and uses Form 1-699 to do so. Although Form 1-699 allows users to document hate crimes against Protestants, Catholics, Jews, Muslims, and Atheists/Agnostics, there is no mechanism for tracking hate crimes against Sikhs. To address this gap in federal hate crime statistics, the Sikh Coalition in January 2011 formally requested that the FBI begin tracking hate crimes against Sikhs on Form 1-699. Our request has since been endorsed by 135 members of the United States Senate¹³ and House of Representatives,¹⁴ as well as the Community Relations Service and Civil Rights Division of the U.S. Department of Justice.¹⁵

We believe that the practice of enumerating vulnerable religious groups on the Hate Crime Incident Report (Form 1-699) makes it more likely that hate crime victims in such groups will report hate crimes to law enforcement agencies. We also believe that enumerating vulnerable religious groups on Form 1-699 strengthens efforts by law enforcement agencies to identify, learn about, foster partnerships with, and accurately prosecute hate crimes on behalf of the affected communities. These hypotheses are underscored by social research in the school bullying context, which suggests that enumerated anti-bullying policies are

⁹ June Han, *We Are Americans Too: A Comparative Study of the Effects of 9/11 on South Asian Communities*, Discrimination and National Security Initiative, Pluralism Project, Harvard University 2-3 (2006), available at http://pluralism.org/affiliates/kaur_sidhu/We_Are_Americans_Too.pdf.

¹⁰ Sikh Coalition, *Making Our Voices Heard: A Civil Rights Agenda for New York City's Sikhs* 6 (2008), available at <http://www.sikhcoalition.org/documents/pdf/RaisingOurVoicesReport.pdf>.

¹¹ Sikh Coalition, *Sikh Coalition Bay Area Civil Rights Report 2012* 4 (2010), available at http://www.sikhcoalition.org/documents/pdf/Bay_Area_Civil_Rights_Agenda.pdf.

¹² Hate Crime Statistics Act, 28 U.S.C. § 534.

¹³ Senator Dianne Feinstein, *Feinstein Urges Tracking of Hate Crimes against Sikh, Hindu, and Arab Americans* (Feb. 19, 2013), available at <http://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=12edfd3-d762-4933-b1b4-5dfc1cdc51bd>. A bipartisan group of 19 Senators issued a similar letter in August 2012. See Senator Dianne Feinstein, *Senators to Justice Department: Revise Hate Crime Laws to Protect Sikhs* (Aug. 23, 2012), available at <http://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=587527d4-a458-4126-a87e-c96214e1cc89>.

¹⁴ Congressman Joseph Crowley, *Crowley, Over 100 Members of Congress Urge Stronger Action to Protect Sikh, Hindu, and Arab-American Communities from Hate Crimes* (Mar. 21, 2013), available at <http://crowley.house.gov/press-releases/crowley-over-100-members-congress-urge-stronger-action-protect-sikh-hindu-arab>. A bipartisan group of 94 members of the House of Representatives issued a similar letter in April 2012. See Congressman Joseph Crowley, *Congressman Crowley Leads Over 90 Members of Congress in Urging FBI to Collect Data on Hate Crimes Against Sikh Community* (Apr. 19, 2012), available at <http://crowley.house.gov/press-releases/congressman-crowley-leads-over-90-members-congress-urging-fbi-collect-data-hate-crimes>.

¹⁵ U.S. Department of Justice, *A Visit to Oak Creek*, The Justice Blog (Dec. 12, 2012), available at <http://blogs.justice.gov/main/archives/2593>.

more effectively enforced than those which lack enumerated categories.¹⁶ By analogy, we believe that adding an Anti-Sikh category to Form I-699 will enhance partnerships between law enforcement agencies and Sikh communities nationwide and increase hate crime reporting by Sikhs.

On September 19, 2012, Mr. Harpreet Singh Saini testified before the Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights. Mr. Saini—whose mother was among those who lost their lives during the August 5, 2012 attack on the Gurdwara in Oak Creek, Wisconsin—made the following appeal:

I came here today to ask the government to give my mother the dignity of being a statistic. The FBI does not track hate crimes against Sikhs. My mother and those shot that day will not even count on a federal form. We cannot solve a problem we refuse to recognize.¹⁷

The FBI's failure to track hate crimes against Sikh Americans undermines a fundamental purpose of hate crime data collection, which is to strengthen diagnostic and deterrence efforts. Our modest request for improvements to Form I-699 will make law enforcement agencies more effective at their jobs and increase the accuracy of hate crime reporting over time. Our request is also designed to give hate crime victims the dignity of recognition.

We hope that the Committee on the Judiciary will formally endorse our request and ask the Attorney General of the United States to do the same.

Respectfully submitted,

Rajdeep Singh
Director of Law Policy, The Sikh Coalition
rajdeep@sikhcoalition.org | (202) 747-4944

¹⁶ GLSEN, The 2011 National School Climate Survey, Executive Summary 19 (2012), available at http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/000/002/2106-1.pdf

¹⁷ See *Hate Crimes and the Threat of Domestic Extremism: Hearing Before the Senate Subcommittee on the Constitution, Civil Rights, and Human Rights of the Senate Committee on the Judiciary* (2012) (statement of Harpreet Singh Saini), available at <http://www.judiciary.senate.gov/pdf/9-19-12SainiTestimony.pdf>

Testimony of Harpreet Singh Saini
before the
UNITED STATES SENATE
Subcommittee on the Constitution, Civil Rights and Human Rights
Committee on the Judiciary
on
“Hate Crimes and the Threat of Domestic Extremism”
September 19, 2012

My name is Harpreet Singh Saini. I would like to thank Senator Durbin, Ranking Member Graham, and the entire subcommittee for giving me the opportunity to be here today. I am here because my mother was murdered in an act of hate 45 days ago. I am here on behalf of all the children who lost parents or grandparents during the massacre in Oak Creek, Wisconsin.

A little over a month ago, I never imagined I'd be here. I never imagined that anyone outside of Oak Creek would know my name. Or my mother's name. Paramjit Kaur Saini. Or my brother's name, Kamaljit Singh Saini. Kamal, my brother and best friend, is here with me today.

As we all know, on Sunday, August 5, 2012, a white supremacist fueled by hatred walked into our local *Gurdwara* with a loaded gun. He killed my mother, Paramjit Kaur, while she was sitting for morning prayers. He shot and killed five more men – all of them were fathers, all had turbans like me.

And now people know all our names: Sita Singh. Ranjit Singh. Prakash Singh. Suvegh Singh. Satwant Singh Kaleka.

This was not supposed to be our American story. This was not my mother's dream.

My mother and father brought Kamal and me to America in 2004. I was only 10 years-old. Like many other immigrants, they wanted us to have a better life, a better education. More options. In the land of the free. In the land of diversity.

It was a Tuesday, 2 days after our mother was killed, that my brother Kamal and I ate the leftovers of the last meal she had made for us. We ate her last rotis – which are a type of South Asian flatbread. She had made the rotis from scratch the night before she died. **Along with the last bite of our food that Tuesday...came the realization that this was the last meal, made by the hands of our mother, that we will ever eat in our lifetime.**

My mother was a brilliant woman, a reasonable woman. Everyone knew she was smart, but she never had the chance to get a formal education. She couldn't. As a hard-working immigrant, she had to work long hours to feed her family, to get her sons educated, and help us achieve our American dreams. This was more important to her than anything else.

Senators, my mother was our biggest fan, our biggest supporter. She was always there for us, she always had a smile on her face.

But now she's gone. Because of a man who hated her because she wasn't his color? His religion?

I just had my first day of college. And my mother wasn't there to send me off. She won't be there for my graduation. She won't be there on my wedding day. She won't be there to meet her grandchildren.

I want to tell the gunman who took her from me: You may have been full of hate, but my mother was full of love.

She was an American. And this was not our American dream.

It was not the American dream of Prakash Singh, who had only been reunited with his family for a few precious weeks after 6 years apart. When he heard gunshots that morning, he told his two children to hide in the basement. He saved their lives. When it was over, his children found him lying in a pool of blood. They shook his body and cried "Papa! Get up!" But he was gone.

It was not the American dream of Suvegh Singh Khattrra, a retired farmer who came here to be with his children and grandchildren. That morning, his family found him face down, a bullet in his head, his turban thrown to the side.

It was not the American dream of Satwant Singh Kaleka, president of the *gurdwara* who was killed while bravely fighting the gunman.

It was not the American dream of Sita Singh and Ranjit Singh, two brothers who sang prayers for our community and were separated from their families for 16 years. Their wives and children came to this country for the first time for their funerals.

It was not the American dream of Santokh Singh or Punjab Singh who were injured in the massacre. Punjab Singh's sons are by his side day and night, but he may never fully recover from his multiple gunshot wounds.

We ache for our loved ones. We have lost so much. But I want people to know that our heads are held high.

My mother was a devout Sikh. Like all Sikhs, she was bound to live in Chardi Kala – a state of high spirits and optimism. She was also taught as a Sikh to neither have fear of anyone nor strike fear in anyone.

So despite what happened, we will not live in a state of fear, nor will we make anyone fearful.

Like my Mother, my brother and I are working every day to be in a state of high spirits and optimism.

We also know that we are not alone. Tens of thousands of people sent us letters, attended vigils, and gave us their support – Oak Creek’s Mayor and Police Chief, Wisconsin’s Governor, the President and the First Lady. All their support also gave me the strength to come here today.

Senators, I came here today to ask the government to give my mother the dignity of being a statistic. The FBI does not track hate crimes against Sikhs. My mother and those shot that day will not even count on a federal form. We cannot solve a problem we refuse to recognize.

Senators, I also ask that the government pursue domestic terrorists with the same vigor as attackers from abroad. The man who killed my mother was on the watch lists of public interest groups. I believe the government could have tracked him long before he went on a shooting spree.

Finally, Senators, I ask that you stand up for us. As lawmakers and leaders, you have the power to shape public opinion. Your words carry weight. When others scapegoat or demean people because of who they are, use your power to say that is wrong.

So many have asked Sikhs to simply blame Muslims for attacks against our community or just say “We are not Muslim.” But we won’t blame anyone else. An attack on one of us is an attack on all of us.

I also want to be a part of the solution. That’s why I want to be a law enforcement officer like Lt. Brian Murphy, who saved so many lives on August 5, 2012. I want to protect other people from what happened to my mother. I want to combat hate – not just against Sikhs but against all people. Senators, I know what happened at Oak Creek was not an isolated incident. I fear it may happen again if we don’t stand up and do something.

I don’t want *anyone* to suffer what we have suffered. I want to build a world where all people can live, work, and worship in America in peace.

Because you see, despite everything, I still believe in the American dream. In my mother’s memory, I ask that you stand up for it with me. Today. And in the days to come.

Thank you for considering my testimony.

Bias Motivation Information

Check up to five bias motivations for Offense #1.

Race

- 11 Anti-White
- 12 Anti-Black or African American
- 13 Anti-American Indian or Alaska Native
- 14 Anti-Asian
- 15 Anti-Multiple Races, Group
- 16 Anti-Native Hawaiian or Other Pacific Islander

Religion

- 21 Anti-Jewish
- 22 Anti-Catholic
- 23 Anti-Protestant
- 24 Anti-Islamic (Muslim)
- 25 Anti-Other Religion
- 26 Anti-Multiple Religions, Group
- 27 Anti-Atheism/Agnosticism

Ethnicity

- 32 Anti-Hispanic or Latino
- 33 Anti-Not Hispanic or Latino

Sexual Orientation

- 41 Anti-Gay (Male)
- 42 Anti-Lesbian
- 43 Anti-Lesbian, Gay, Bisexual, or Transgender (Mixed Group)
- 44 Anti-Heterosexual
- 45 Anti-Bisexual

Disability

- 51 Anti-Physical Disability
- 52 Anti-Mental Disability

Gender

- 61 Anti-Male
- 62 Anti-Female

Gender Identity

- 71 Anti-Transgender
- 72 Anti-Gender Non-Conforming

If more than one offense occurred, enter up to five bias motivations for each additional offense having a different bias motivation than Offense #1.

	Bias #1	Bias #2	Bias #3	Bias #4	Bias #5
Offense #2	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Offense #3	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Offense #4	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Offense #5	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Victim Information

Check all applicable victim types for each offense listed above.

	Offense #1	Offense #2	Offense #3	Offense #4	Offense #5
1 Individual*	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
2 Business	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3 Financial Institution	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
4 Government	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
5 Religious Organization	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
7 Other	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
8 Unknown	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

*Indicate the number of Individuals (persons) who were victims in the incident.

Total number of victims.	<input type="text"/>	<input type="text"/>	<input type="text"/>
Total number of victims 18 and over.	<input type="text"/>	<input type="text"/>	<input type="text"/>
Total number of victims under 18.	<input type="text"/>	<input type="text"/>	<input type="text"/>

Offender Information

Indicate the number of Individuals (persons) who were offenders in the incident.

Total number of offenders. If unknown, enter 00.

Total number of offenders 18 and over. If unknown, enter 00.

Total number of offenders under 18. If unknown, enter 00.

Race and Ethnicity of Offender or Offender Group

Check one race and one ethnicity.

Race

- 1 White
- 2 Black or African American
- 3 American Indian or Alaska Native
- 4 Asian
- 5 Group of Multiple Races
- 6 Unknown
- 7 Native Hawaiian or Other Pacific Islander

Ethnicity

- H Hispanic or Latino
- N Not Hispanic or Latino
- M Group of Multiple Ethnicities
- U Unknown

This report is authorized by Title 28, Section 534, U.S. Code, and the Hate Crime Statistics Act of 1990. Even though you are not required to respond, your cooperation in using this form to report hate crimes known to law enforcement during the quarter will assist the FBI in compiling timely, comprehensive, and accurate data regarding the incidence and prevalence of hate crime throughout the Nation. Please submit this report quarterly, by the 15th day after the close of the quarter, and any questions to the FBI, Criminal Justice Information Services Division, Attention: Uniform Crime Reports/Module E-3, 1000 Custer Hollow Road, Clarksburg, West Virginia 26306; telephone 304-625-4830, facsimile 304-625-3566. Under the Paperwork Reduction Act, you are not required to complete this form unless it contains a valid OMB control number. The form takes approximately 7 minutes to complete. Instructions for preparing the form appear below.

GENERAL

This report is separate from and in addition to the traditional Summary Reporting System submission. In hate crime reporting, there is no Hierarchy Rule. Offense data (not just arrest data) for Intimidation and Destruction/Damage/Vandalism of Property should be reported. On this form, all reportable bias motivated offenses should be included regardless of whether arrests have taken place. Please refer to the publication *Hate Crime Data Collection Guidelines and Training Manual* for additional information.

QUARTERLY HATE CRIME REPORT

At the end of each calendar quarter, each reporting agency should submit a single Quarterly Hate Crime Report, together with an individual Hate Crime Incident Report for each bias motivated incident identified during the quarter (if any). If no hate crimes occurred during the quarter, the agency should submit only the Quarterly Hate Crime Report.

The Quarterly Hate Crime Report should be used to identify your agency, to state the number of bias motivated incidents being reported for the calendar quarter, and to delete any incidents previously reported that have been determined during the reporting period not to have been motivated by bias.

HATE CRIME INCIDENT REPORT

The Incident Report should be used to report a bias motivated incident or to adjust information in a previously reported incident. Include additional information on separate paper if you feel it will add clarity to the report.

Instructions for preparing the Hate Crime Incident Report

Administrative Information

Report Type: (Required.) Indicate the type of report as Initial or Adjustment.

Initial-To report a hate crime incident.

Adjustment-To update a hate crime incident previously reported. (Note: This will delete the information already on file and insert the information provided in this report.)

ORI Number: (Required.) Enter the nine-character Originating Agency Identifier assigned to your agency.

Date of Incident: (Required for Initial or Adjustment Reports.) Provide the date of the hate crime incident in the format of MMDDYYYY.

Incident Number: (Required for Initial or Adjustment Reports.) Provide an identifying incident number, preferably your case or file number. The number can be up to 12 characters in length. Valid characters include: A through Z, 0 through 9, hyphens, and/or blanks.

Page of of same incident: If additional Incident Reports are used, make an appropriate entry into this portion.

Offense Information

Offense Code: Enter the two-digit offense code for each bias motivated offense. The offense codes that are specific to hate crime are: 01 Murder, 02 Rape, 03 Robbery, 04 Aggravated Assault, 05 Burglary, 06 Larceny-theft, 07 Motor Vehicle Theft, 08 Arson, 09 Simple Assault, 10 Intimidation, and 11 Destruction/Damage/Vandalism.

Number of Victims: Enter the number of victims for each bias motivated offense. The field allows for up to a three-digit number to be entered. Number of victims are inclusive of Individual, Business, Financial Institution, Government, Religious Organization, Other, and Unknown.

Location Information

Offense #1 Location: Check one location for Offense #1.

Additional Offense Locations: Enter a two-digit location code for each additional offense that has a different location than Offense #1.

Bias Motivation Information

Offense #1 Bias Motivation: Check up to five bias motivations for Offense #1.

Additional Offense Bias Motivations: Enter up to five two-digit bias motivation codes for each additional offense that has a different bias motivation than Offense #1.

Victim Information

Victim Type: Check all applicable victim types identified within the incident.

Number of Victims: When victim type is individual enter the total number of individuals (persons) who were victims in the incident. Enter the total number of individuals (persons) who were victims in the incident that are 18 and over. Enter the total number of individuals (persons) who were victims in the incident that are under the age of 18.

Offender Information

Number of Offenders: Enter the total number of individuals (persons) who were offenders in the incident. If unknown, enter 00 in the two-digit field. Enter the total number of individuals (persons) who were offenders in the incident that were 18 and over. If unknown, enter 00 in the two-digit field. Enter the total number of individuals (persons) who were offenders in the incident that were under the age of 18. If unknown, enter 00 in the two-digit field. Incidents involving multiple offenders must not be coded as Unknown Offender. Indicate an Unknown Offender when nothing is known about the offender including the offender's race. When the Race of Offender(s) has been identified, indicate at least one offender.

Race and Ethnicity of Offender or Offender Group

Race: Check one race for the offender. If there was more than one offender, provide the race of the group as a whole. If the number of offenders is entered as Unknown Offender, then the offender's race must also be indicated as Unknown.

Ethnicity: Check one ethnicity for the offender. If there was more than one offender, provide the ethnicity of the group as a whole. If the number of offenders is entered as Unknown Offender, then the offender's ethnicity must also be indicated as Unknown.

Congress of the United States
Washington, DC 20515

April 19, 2012

The Honorable Eric Holder
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Dear Attorney General Holder:

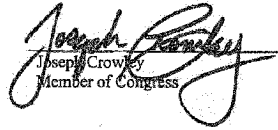
As you know, many Sikh-Americans have been subjected, unfortunately, to bigoted hate crimes. In the last year alone, two Sikh-American men in Sacramento were murdered, a Sikh Gurdwara in Michigan was defaced and a Sikh-American man was beaten in New York. These kinds of hate-motivated attacks have no place in the United States. To address this growing concern, we urge the Department of Justice and Federal Bureau of Investigation to begin recording and tracking hate crimes suffered by Sikh-Americans as part of its *Hate Crime Incident Report Form* (1-699).

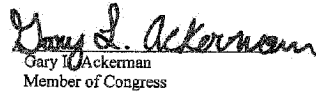
According to its accompanying guide, Form 1-699 is designed to "assist the FBI in compiling timely, comprehensive, and accurate data regarding the incidence and prevalence of hate crime throughout the [n]ation." The *Report Form* not only serves as the primary mechanism by which the federal government collects and documents hate crimes committed in the United States, it also helps form the basis for decision-making on the deployment of law enforcement resources. Yet, our understanding is that the FBI may be relying on older forms which count hate crimes against Sikhs as anti-Islamic (Muslim) hate crimes. We believe that not including Sikhs within hate-crime data-collection may diminish the safety of the 500,000-strong Sikh-American community and weaken the quality of essential hate crimes data overall.

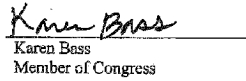
Numerous reports have documented how those practicing the Sikh religion are often targeted for hate violence because of their religiously-mandated turbans -- i.e. *because* of their Sikh identity, regardless of whether the attacker understands the victim to be Sikh or not. Sadly, victimization begins at a young age -- Sikh youth are among the most bullied in the nation, with approximately 3 out of 4 Sikh boys severely bullied in school. Given that this discrete community is so acutely susceptible to hate violence in the United States, we believe it is critically important for authorities to devise means of tracking crimes committed against Sikhs. We also believe, as do many leaders in the Sikh community, that doing so would further encourage affected community members to report hate crimes to law enforcement officials and strengthen relationships between communities, the FBI and the Department of Justice.

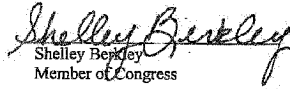
We understand that the Department of Justice has carried out a variety of outreach efforts in coalition with members of the 500,000-strong Sikh-American community. We applaud these very important efforts and strongly urge you to take the next step by making this administrative alteration. We understand there may be a few options for how to put this change into practice and would appreciate an opportunity to meet with you to discuss this matter further.

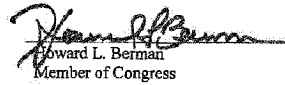
Sincerely,


Joseph Crowley
Member of Congress

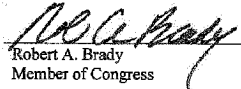

Gary Ackerman
Member of Congress

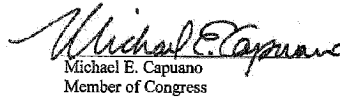

Karen Bass
Member of Congress

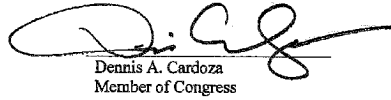

Shelley Berkley
Member of Congress

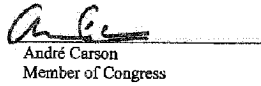

Howard L. Berman
Member of Congress

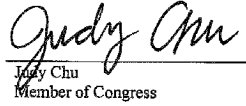

Earl Blumenauer
Member of Congress

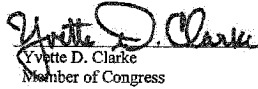

Robert A. Brady
Member of Congress

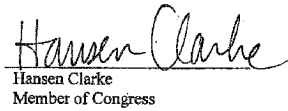

Michael E. Capuano
Member of Congress

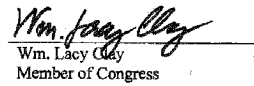

Dennis A. Cardoza
Member of Congress


André Carson
Member of Congress


Judy Chu
Member of Congress


Yvette D. Clarke
Member of Congress


Hansen Clarke
Member of Congress


Wm. Lacy Clay
Member of Congress

Gerald E. Connolly
Gerald E. Connolly
Member of Congress

Elijah E. Cummings
Elijah E. Cummings
Member of Congress

Danny K. Davis
Danny K. Davis
Member of Congress

Eloyd Doggett
Eloyd Doggett
Member of Congress

Donna F. Edwards
Donna F. Edwards
Member of Congress

Kathleen Ellison
Kathleen Ellison
Member of Congress

Sam Farr
Sam Farr
Member of Congress

Bob Filner
Bob Filner
Member of Congress

Barney Frank
Barney Frank
Member of Congress

John Garamendi
John Garamendi
Member of Congress

Raul M. Grijalva
Raul M. Grijalva
Member of Congress

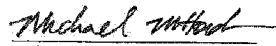
Luis V. Guterres
Luis V. Gutierrez
Member of Congress

Alcee L. Hastings
Alcee L. Hastings
Member of Congress

Martin Heinrich
Martin Heinrich
Member of Congress

Maurice D. Hinchey
Maurice D. Hinchey
Member of Congress

Rush Holt
Rush D. Holt
Member of Congress



Michael M. Honda
Member of Congress



Steve Israel
Member of Congress



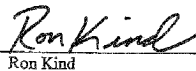
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Member of Congress



Sheila Jackson Lee
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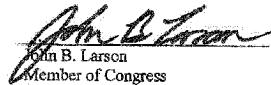
Henry C. "Hank" Johnson, Jr.
Member of Congress



Ron Kind
Member of Congress



Dennis J. Kucinich
Member of Congress



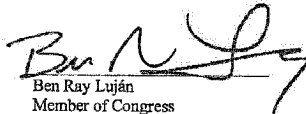
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Member of Congress



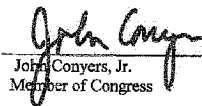
Barbara Lee
Member of Congress



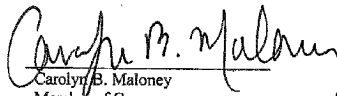
Zoe Lofgren
Member of Congress



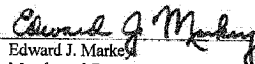
Ben Ray Lujan
Member of Congress



John Conyers, Jr.
Member of Congress



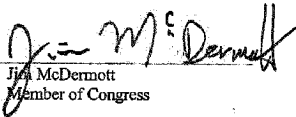
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Edward J. Markey
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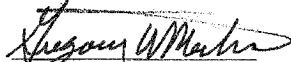



Betty McCollum
Member of Congress



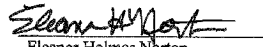
Jim McDermott
Member of Congress

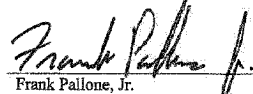

James P. McGovern
Member of Congress


Gregory W. Meeks
Member of Congress

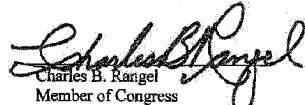

Gwen Moore
Member of Congress

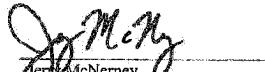

Grace F. Napolitano
Member of Congress


Eleanor Holmes Norton
Member of Congress

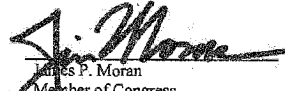

Frank Pallone, Jr.
Member of Congress



Gary C. Peters
Member of Congress

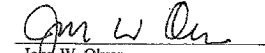

Charles B. Rangel
Member of Congress



Jerry McNerney
Member of Congress

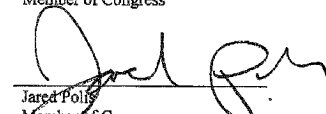

George Miller
Member of Congress

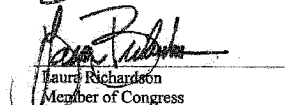

James P. Moran
Member of Congress


Richard E. Neal
Member of Congress

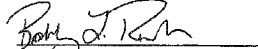

John W. Olver
Member of Congress

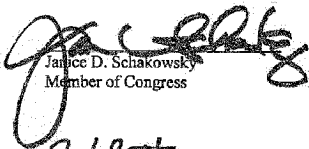

Bill Pascrell, Jr.
Member of Congress



Jared Polis
Member of Congress



Laura Richardson
Member of Congress



Steven R. Rothman
Member of Congress



Bobby Rush
Member of Congress



Janice D. Schakowsky
Member of Congress



Robert C. "Bobby" Scott
Member of Congress



Brad Sherman
Member of Congress



Adam Smith
Member of Congress



Fortney Pete Stark
Member of Congress



Edolphus Towns
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C. A. Dutch Ruppersberger
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Adam B. Schiff
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Jose E. Serrano
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Albio Sires
Member of Congress


Jackie Speier
Member of Congress


Bennie G. Thompson
Member of Congress


Chris Van Hollen
Member of Congress

Maxine Waters
Maxine Waters
Member of Congress

Melvia L. Watt
Melvia L. Watt
Member of Congress

Henry A. Waxman
Henry A. Waxman
Member of Congress

Peter Welch
Peter Welch
Member of Congress

Frederica S. Wilson
Frederica S. Wilson
Member of Congress

Lynn C. Woolsey
Lynn C. Woolsey
Member of Congress

Marcy Kaptur
Marcy Kaptur
Member of Congress

Eni F. H. Faleomavaega
Eni F. H. Faleomavaega
Member of Congress

Lucille Roybal-Allard
Lucille Roybal-Allard
Member of Congress

Carolyn McCarthy
Carolyn McCarthy
Member of Congress

David E. Price
David E. Price
Member of Congress

Daniel E. Lungren
Daniel E. Lungren
Member of Congress

Janice Hahn
Janice Hahn
Member of Congress

Pedro R. Pierluisi
Pedro R. Pierluisi
Member of Congress

Mike Thompson
Mike Thompson
Member of Congress

CC: Robert Mueller, Director, Federal Bureau of Investigation

United States Senate
WASHINGTON, DC 20510

August 23, 2012

The Honorable Eric H. Holder, Jr.
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Dear Mr. Attorney General:

We write to respectfully request that you revise the Hate Crime Incident Report form (1-699) to allow for the collection and tracking of hate crimes committed against Sikh-Americans.

As you are well aware, on August 5th, Wade Michael Page killed six and wounded four other members of the Sikh Temple of Wisconsin in Oak Creek, Wisconsin. From all indications, Page targeted members of the Sikh Temple because of their religion.

This tragic shooting is the latest hate crime committed against Sikhs in the United States. Over the past two years, two Sikhs in California were murdered, a Sikh temple in Michigan was desecrated, a Sikh transit worker in New York City was assaulted, and a Sikh taxi driver in California was severely beaten. According to a recent survey of 1,370 Sikhs living in the California Bay Area, 10% reported being the victim of a hate crime. Sixty-eight percent of those crimes were in the form of physical attacks.

Because many Sikhs wear turbans and do not cut their facial hair, they are often viewed as foreign and are easy to target for harassment and crime. Thus, Sikhs are particularly susceptible to violence committed because of their Sikh identity, even if the perpetrator does not understand that the victim is a Sikh.

Although the limited data available suggests that a disproportionately high rate of violence and other crimes are committed against Sikhs, it is difficult to understand the true scope of the problem because the Department of Justice does not specifically track hate crimes against Sikhs. The Hate Crime Statistics Act requires the Department to maintain data on crimes committed on the basis of religion. Pursuant to this law, the Department publishes the Hate Crime Incident Report for law enforcement agencies to complete when they investigate a

suspected hate crime. That form allows a law enforcement officer to denote that a crime was motivated by a bias against Jews, Catholics, Protestants, Muslims, or atheists, among others. The form does not allow an officer to denote that a crime was motivated by a bias against Sikhs.


It is important to collect data on hate crimes committed against Sikhs because this data can identify trends and help federal, state, and local law enforcement agencies properly allocate resources. Until we have a more comprehensive understanding of the number and type of hate crimes committed against Sikhs, our law enforcement agencies will not be able to allocate the appropriate level of personnel and other resources to prevent and respond to these crimes. Moreover, the collection of this information will likely encourage members of the Sikh community to report hate crimes to law enforcement officials.

We urge you to take prompt action to ensure that hate crimes against Sikhs are recorded and tracked. Thank you for your attention to this important issue.


Sincerely,




Dianne Feinstein
United States Senator



Patrick Leahy
United States Senator



Richard J. Durbin
United States Senator



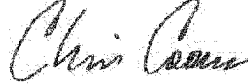
Charles E. Schumer
United States Senator




Sheldon Whitehouse
United States Senator




Al Franken
United States Senator



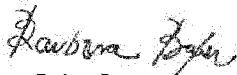
Chris Coons
United States Senator





Richard Blumenthal
United States Senator



Jeff Blumenthal
United States Senator

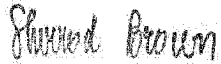

John F. Kerry
United States Senator



Barbara Boxer
United States Senator

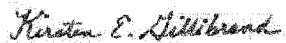

Maria Cantwell
United States Senator

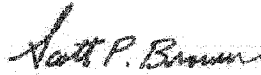

Frank R. Lautenberg
United States Senator


Robert Menendez
United States Senator


Sherrod Brown
United States Senator


Tom Udall
United States Senator


Kirsten E. Gillibrand
United States Senator


Scott P. Brown
United States Senator


Mark Kirk
United States Senator

Cc: The Honorable Robert S. Mueller, III
Director
Federal Bureau of Investigation

Ms. CHU. Thank you. Last week, an elderly Sikh man, dedicated to his faith and his community, was doing what he did every day, volunteering at his Gurdwara when a man viciously attacked him. At 82 years old, Piara Singh was beaten with an iron bar, puncturing one of his lungs, fracturing his face, and breaking several ribs.

This is only the latest of a string of attacks on American Sikhs in recent years. In the last 2 years alone, two elderly Sikhs were murdered in Elk Grove, California, a Sikh cab driver was assaulted in Sacramento, California, a Sikh transit worker was assaulted in New York City, a Sikh cab driver was assaulted in Seattle, Washington, a Sikh business owner was shot and injured in Port Orange, Florida, and six Sikhs in Oak Creek, Wisconsin were murdered, of course, in one of the worst attacks in an American place

of worship since the 1963 bombing of the 16th Street Baptist Church.

The FBI tracks hate crimes on Form 1-699. As you can see, there is no current way to document hate crimes against Sikhs on this form, even though Sikh-Americans continue to experience hate crimes at rates that are disproportionate to their population.

According to Sikh Coalition surveys in New York City and the San Francisco Bay area, approximately 10 percent of Sikhs believe they have been subject to hate crimes. Arab-Americans and Hindu-Americans also face hate crimes, but they, too, are excluded from tracking. If someone were to look at FBI data today, it would be as though Sikhs, Arab-Americans, and Hindus did not exist.

We have asked for revisions to Form 1-699, and there are 135 Members of the U.S. Congress that have signed on to this, as well as the Civil Rights Division and Community Relations Service of the U.S. Department of Justice in supporting revisions to Form 1-699. Can you tell us what the status of this is so that hate crimes against these population can finally be tracked?

Attorney General HOLDER. We agree with what you are saying. The Department recommended what is called the Advisory Policy Board last year that the UCR be amended to include anti-Sikh, anti-Hindu, anti-Arab, anti-Middle Eastern categories in the ethnicity or race section. That board is supposed to meet again in June, next month, where it will consider those potential changes before they make them to the FBI director. But it would be my strong recommendation that the form be modified so that it captures Sikh, anti-Muslim, anti-Middle Eastern violence.

Ms. CHU. I truly appreciate that. And I would also like to ask about racial profiling. Immediately after the Boston bombing, fears of racial profiling and investigation by the broader community surfaced. The first person of interest following the bombing was a Saudi Arabian student who was tackled by a fellow bystander because to them he looked suspicious. He was questioned in the hospital after suffering severe burns from the bombing and had his apartment searched. But it turns out he was a victim of the bombing, not the perpetrator. We have also seen other instances of racial profiling by law enforcement at our Nation's airports, at the border, at NYPD, and other local and State law enforcement.

DoJ's existing guidelines on racial profiling were issued in 2003. It outlines provisions to ban racial profiling, but includes broad exceptions. It also does not apply to profiling based on religion or national origin. And it has allowed profiling against Arab-Americans, American Muslims, American Sikhs, and immigrants. And it also does not apply to State and local law enforcement, and also lacks a meaningful enforcement mechanism.

This guidance on racial profiling from the Department of Justice has not been updated in a decade. I know that you are reviewing this guidance, but what is the status of your review, and when will you issue a new guidance to prohibit profiling based on religion and national origin, and address my other concerns?

Attorney General HOLDER. Racial or ethnic profiling is not good law enforcement. It is simply not good law enforcement. In fact, if you look at Al-Qaeda, what they try to do is find people who they

identify as having clean skins to try to get past our intelligence and security apparatus.

The matter, as you said, the policy is under review. I had a meeting as recently as, I think, the week before last, so I think we are at the end stages of that review process. And I would expect that we will have what the product of that process is in a relatively short period of time.

But this is something that is actively under review that I have been personally involved in.

Ms. CHU. Thank you, and I yield back.

Mr. GOODLATTE. The Chair thanks the gentlewoman.

And the Chair now recognizes the gentleman from Arizona, the Chairman of the Subcommittee on Constitution and Civil Justice, Mr. Franks, for 5 minutes.

Mr. FRANKS. Well, thank you, Mr. Chairman. General, we are glad to have you here today. I am going to kind of shift gears here a little bit and be a little bit philosophical, and kind of reflect on the notion as to why we are really all here today and why we are really all here in this place.

I think, as I noticed earlier, that Mel Watts' little grandchild was symbolic in the sense of what we all hope to try to protect in the future. I have a little boy at home, 4 years old, and I think it is very important that we keep a statesman's eye on the future and recognize with all the politics that are inevitable with the challenges that we face, we need to kind of keep an eye on why we are all here. You know, this notion of America that all of us are created equal, that all of us are God's children, and should be protected is a pretty important thing. And I know as the Nation's chief law enforcement officer in a sense that occurs to you as well.

And it just seems to contrast pretty significantly with what we heard here in the last few months about a guy named Kermit Gosnell, who ran an abortion clinic and aborted late-term babies. And if they survived, he would proceed to cut their spines with scissors. And somehow I do not know when we are going to ask ourselves if that is who we really are.

I suppose the unique thing about it is that it is not all that unique. While we might sanitize the clinics and other places, about 18,000 babies a year 20 weeks or older are aborted in this country, and that is the Guttmacher Institute's quotes. And there are about 44,000 abortion survivors living in the country today, so this is not as unique as it might be. And though we might sanitize the clinics in the future, I do not know how we can sanitize the horror and inhumanity that is forced upon these little babies.

Now I guess my first question would be along the lines, where is our President on this subject, but unfortunately I already know that answer. He voted against the Born Alive Infant Protection Act when he was in his home State several times. And so I already know where he is.

So the question today is, as a law enforcement officer, you know, we passed the Born Alive Infant Protection Act on the Federal level, and it says in part the words "person, human being, child, and individual shall include every infant member of the homo sapiens who is born alive at any stage of development." Now, I am almost to my question, Mr. Attorney General.

But I would just remind you that there was a lady named Ashley Baldwin that worked for Kermit Gosnell, and she described one of these little babies that was breathing. She described him as around 2 feet long, who because of the process, had no eyes or mouth, but was making this little screeching noise. She said it sounded like a little alien.

Sometimes I just wonder if we really could back up as a society and ask ourselves what it is going to take change our minds on some of these kinds of tragedies.

So my question to you, and it is a sincere question, and I hope you take it so. In 2002, Congress enacted the Born Alive Infant Protection Act, and it provides that all Federal protections, including from your office, sir, for persons apply to every infant born alive.

So will you enforce the Born Alive Infant Protection Act as Attorney General, and will you consider carefully what is happening in clinics across the country like happened at the clinic that Kermit Gosnell ran?

Attorney General HOLDER. Well, like you, I share many of the concerns that you talked about. I am a father. I have three kids. And I am interestingly married to a woman who is an obstetrician, a gynecologist, very accomplished in her field. I have responsibilities as Attorney General to enforce all the laws that Congress—

Mr. FRANKS. Have you ever enforced this law even one time?

Attorney General HOLDER. I do not know.

Mr. FRANKS. Will you get back to us on that? Have you ever enforced the Born Alive Infant Protection Act even one time?

Attorney General HOLDER. We can examine that and see whether the U.S. attorneys since the law passed—you said in 2002?

Mr. FRANKS. Yes.

Attorney General HOLDER. How many prosecutions there have been under that law.

Mr. FRANKS. Well, there has been 18,000 opportunities a year since then approximately, so I am just wondering if you have even enforced it once.

Attorney General HOLDER. I do not know whether there was enforcement during the Bush Administration or the Obama Administration since the passage of the law in 2002. I just do not know what the statistics are.

Mr. FRANKS. Okay. Well, you know, I guess I hear the mantra so often that, you know, that somehow this is choice. But to stand by in silence while the most helpless of all children are tortuously and agonizingly dismembered day after day after day, year after year, Mr. Attorney General, is quite honestly a heartless disgrace that really cannot be described by the vocabulary of man. And I hope you consider that carefully, sir.

Mr. GOODLATTE. The Chair thanks the gentleman for his line of questioning and comments, and now recognizes the gentleman from Florida, Mr. Deutch, for 5 minutes.

Mr. DEUTCH. Thank you, Mr. Chairman. General Holder, in today's hearing some of my colleagues have brought up to you the news that the IRS engaged in allegedly improper targeting of certain groups based on their political persuasions. The revelation obviously is disturbing because any display of political bias by the

IRS is outrageous. And as the FBI carries out the Department of Justice's request for an inquiry into possible criminal activity at the IRS, it is absolutely imperative that those responsible are held accountable.

However, my hope, Mr. Attorney General, is that this inquiry into potential criminal activity will generate another policy debate that this scandal beckons us to have here in Congress. The debate that we need to have is whether there are too many groups of all political persuasions, across the political spectrum, that receive improper tax exempt status from the IRS by claiming that they are social welfare groups.

Since the Supreme Court Citizens United decision, the number of groups applying for this tax exempt status to the IRS has more than doubled. In 2010, the number of (c)(4)s registered with the IRS jumped to over 139,000, up from just 2,000 the year before. That is because these so-called social welfare organizations do not have to disclose their donors. They can still maintain their 501(c)(4) status even if they write huge checks and even if they write them to super PACs.

In 2012, when a record \$1.28 billion was spent by super PACs and outside groups to influence the election, and a quarter of that money cannot be traced to any source, the evidence shows that many of the (c)(4)s are being established for the sole purpose of funneling anonymous cash to super PACs.

Now the IRS should not automatically accept all applications for tax exempt status when groups are increasingly being established for explicit political purposes. So as part of the investigation, part of the discussion, we need to know whether the tax exempt status of any (c)(4), whatever its politics, was either denied or revoked, not because of politics, but because they are ripping of taxpayers by gaining this tax exempt status.

Of course, the American people should be outraged that IRS employees would scrutinize specific groups based on political affiliations, but I am sure that my colleagues would all agree that the American people, the hardworking taxpayers of this Nation, should also be outraged that they are likely subsidizing tax breaks for the makers of the malicious super PAC ads that poisoned our airwaves during the 2012 election season. The American people were disgusted by these ads, but to think that these ads may have been subsidized by the American taxpayers, that, too, I would suggest is a scandal.

Now, 50 years ago, General Holder, 50 years after the Supreme Court's seminal decision in Gideon, recognizing the provision of counsel for indigent defendants in criminal cases is a requirement of the Sixth Amendment. Our Nation's indigent defense system is in crisis. The crisis has been well documented by the ABA, National Association of Criminal Defense Lawyers, legal scholars, and other organizations. In fact, you have spoken extensively on the indigent defense crisis facing the Nation.

The current statutory authority under 42 U.S. Code 14141 in which the Department of Justice can seek remedies for a pattern or practice of conduct that violates the constitutional or Federal statutory rights of children in the juvenile justice system can pro-

vide an important tool to encourage systemic reforms that protect the right to counsel for indigent adults as well.

As you are aware, in December of last year, DoJ reached the landmark settlement agreement with the juvenile justice court of Memphis in Shelby County, Tennessee that will lead to major reforms in the juvenile system court system there.

The agreement was reached with the county and will implement many of the ABA's 10 principles of a public defense and delivery system to ensure that a system is in place that will protect the constitutional right to counsel for children in the juvenile justice system.

On April 26th, 2012, the Department issued a report of findings describing the numerous failures to protect the constitutional rights of juveniles. The juvenile court of Memphis in Shelby County responded to the report by beginning to voluntarily institute reforms to the system, and indicating they would promptly correct the violations identified in the Department of Justice report, which resulted in this comprehensive settlement agreement. And I want to commend you and your staff at DoJ for all of their hard work in this case to ensure that the constitutional right to counsel for juveniles is protected.

Now, this landmark settlement agreement was made possible by your Department exercising its authority under 42 U.S. Code Section 14141. The Department has been conducting similar investigations and has found numerous violations in the juvenile justice system elsewhere.

But I would like to ask you, since I along with Ranking Member of the Crime Subcommittee, Bobby Scott, have introduced H.R. 1967, the Right to Counsel and Taxpayer Protection Act, which will permit the DoJ to seek similar remedies for patterns of practice of conduct that violate the constitutional right to counsel for adults in the criminal justice system, whether you think the effectiveness of the section for juveniles would also be helpful to take the kind of action that was taken there this time to help adults?

Attorney General HOLDER. Well, I think your focus on this issue is right. I mean, your time is limited, but focusing on this whole question of indigent representation of juveniles, adults, especially 50 years after Gideon, I think is precisely what we should be about. It is something that I have tried to focus on as Attorney General. We have started it in the Justice Department an Access to Justice Office. I think the legislation that you are talking about is something we would like to work with you on because I think the need is there.

With regard to the first part of your question, the whole question of these 501(c)(4)s, as I said, we are going to be very aggressive, appropriately aggressive, and we will let the facts take us where they may with regard to the potential problems that existed at the IRS.

But I think that should not distract us as a Nation from asking that broader question that you raised, and that is about 501(c)(4)s, and this is irrespective of what your ideological bent is, whether you are left, right, progressive, conservative, Republican, Democrat.

The use of the Tax Code in the way that it potentially seems to have been used in these 501(c)(4)s is something that I think we

need to ask ourselves about. And I would hope that what we are going to do in our criminal investigation will not have a chilling effect or chilling impact on asking that question about 501(c)(4)s.

Mr. GOODLATTE. The time of the gentleman has expired.

The Chair now recognizes the gentleman from Texas, Mr. Gohmert, for 5 minutes.

Mr. GOHMERT. Hello, Attorney General. Down here on the end, thank you.

I remember we have talked about this before, but I want to bring it up again. The Holy Land Foundation trial that occurred in Dallas, convictions obtained in 2008, there were boxes and boxes of documents that were provided to the people that were convicted of supporting terrorism. And I would like to ask again for Congress to be allowed to have copies of the same things the people supporting terrorism got before they were convicted.

Will you provide those documents without us having to go through a formal subpoena process? The big ones they got.

Attorney General HOLDER. Yeah. Again, I have this note here because I asked this question. We did, in fact, promise you access to those documents that were made public in the case. But now, what my people tell me is that we never heard from your staff to make those arrangements. We will promise to make them available to you. What I would just ask is to have your staff contact mine, and we will—

Mr. GOHMERT. Well, then we will work that out, all right?

Attorney General HOLDER. We can make that happen.

Mr. GOHMERT. And also you had mentioned that the FBI did a good job in following up the lead from the Russians about Tamerlan Tsarnaev. Do you know what questions FBI agents asked of Tamerlan to determine that he was not a threat?

Attorney General HOLDER. I do not know the specific questions.

Mr. GOHMERT. Do you know if they would have asked who his favorite Islamic writer was? Are they allowed to ask those questions?

Attorney General HOLDER. I know—

Mr. GOHMERT. Whether you know or you do not know, were they allowed to ask who his favorite imam was? Were they allowed to ask about the mosque he was attending at Cambridge or had been in Boston, from what I understand? Were they allowed to ask those questions?

Attorney General HOLDER. I know a good deal about what was asked of him in connection with the interaction that occurred, but that is potentially part of this ongoing case. And that is why I am a little hesitant to—

Mr. GOHMERT. Well, it is also in trying to determine how the FBI blew the opportunity to save people's lives by accepting the Russian information and following up on it, because what we have dealt with, and it should not have been classified, but the information being purged from FBI documents has been classified. And I have reviewed that information, and I am aware of what has been purged in the efforts to avoid offending anyone who is Islamic. I am not concerned about offending anybody that wants to blow us up, but I am concerned about religious freedom, which is another topic with the IRS.

But were you aware of the Cambridge mosque where Tamerlan was attending back at the time that the Russians gave us that information?

Attorney General HOLDER. Not at that time.

Mr. GOHMERT. All right. Well, let me tell you. He was attending a mosque in Cambridge, and obviously as you are not sure about that, you would probably not have had anybody provide you the organization papers for the Islamic Society of Boston that was also the founder of the mosque in Cambridge, a guy named Alamoudi that I am sure you know is doing 23 years for being involved in terrorism, also working with the Clinton Administration back before he was arrested and then convicted and sent to prison for 23 years. But he started that mosque.

What kind of follow-up was done on the mosque at Cambridge and the mosque at Boston where you had a convicted terrorist that was involved in the organizing? Do you know what they did about it?

Attorney General HOLDER. All I can say at this point is I think that what the FBI did in connection with the information that they received was thorough. There are questions of the Inspector General—

Mr. GOHMERT. Well, thorough is an opinion. I am asking if you knew specifically about the mosque at Cambridge, who founded it, that a terrorist founded it, the one that he attended. And it sounds like from your answer you feel satisfied it was thorough, but you do not really know what they looked at. So let me move on then—

Attorney General HOLDER. My answer to the question is that the FBI, as I said, I think was thorough. But there were problems that were not of the FBI's making with regard to their—

Mr. GOHMERT. Look, the FBI got a head's up from Russia that you have a radicalized terrorist on your hands. They should not have had to give anything else whatsoever. That should have been enough. But because of political correctness, it was not a thorough enough examination of Tamerlan to determine this kid had been radicalized. And that is the concern I have.

On the one hand, we go after Christian groups, like Billy Graham's group. We go after Franklin Graham's group. But then we are hands off when it comes to possibly offending someone who has been radicalized as a terrorist. And I appreciate Ms. Chu's comment, there were people concerned about possible profiling. But I would submit, Attorney General, there were a lot more people in America concerned about being blown up by terrorists.

And I regret very much my time has expired.

Attorney General HOLDER. Well, let me just say this. You have made statements as matters of fact, and, you know—

Mr. GOHMERT. You point out one thing that I said that was not true.

Mr. GOODLATTE. The time of the gentleman has expired. The Attorney General may—

Mr. GOHMERT. Mr. Chairman, I would ask a point of personal privilege. He said I said something as fact that he does not believe was. I would like to know specifically what it was so that I can—

Ms. JACKSON LEE. Regular order, Mr. Chairman.

Mr. GOODLATTE. The gentleman from Texas should suspend because the Attorney General has the opportunity to answer the question. Once he has completed the question, if the gentleman has a point of personal privilege, he can exercise it.

Mr. GOHMERT. Thank you.

Mr. GOODLATTE. But at this point, the Attorney General gets to answer.

Attorney General HOLDER. The only observation I was going to make is that you state as a matter of fact what the FBI did and did not do. And unless somebody has done something inappropriate, you do not have access to the FBI files. You do not know what the FBI did. You do not know what the FBI's interaction was with the Russians. You do not know what questions were put to the Russians, whether those questions were responded to. You simply do not know that.

And you have characterized the FBI as being not thorough or taking exception to my characterization of them as being thorough. I know what the FBI did. You cannot know what I know. That is all.

Mr. GOHMERT. Well, thank you, Mr. Chairman. And that is simply the reason—I did not assert what they did or did not do. I asserted what the—

Mr. GOODLATTE. The time of the gentleman—

Mr. GOHMERT. I cannot have him—

Ms. JACKSON LEE. Regular order.

Mr. GOHMERT [continuing]. Challenge my character and my integrity without having a chance to respond to that.

Mr. RICHMOND. Mr. Chairman, regular order.

Mr. GOODLATTE. The gentleman will suspend. If the gentleman believes that he has a point of personal privilege, he can state it.

Mr. GOHMERT. Mr. Chairman, I have a point of personal privilege. He said that I do not know that of which I spoke as being true, and the Attorney General is wrong on the things that I asserted as fact. And he has to understand the reason I ask questions, specifically about what the individual Tamerlan was asked was so I would find out, and the Attorney General then sits there and acts like he knows that I did not—

Mr. RICHMOND. Mr. Chairman, I would still assert regular order as I did the first time.

Mr. GOHMERT. So, Mr. Chairman, the point of personal privilege is—

Mr. GOODLATTE. The gentleman will suspend.

Mr. RICHMOND. Mr. Chairman, I would still point out regular order.

Mr. GOODLATTE. The gentleman from Texas will suspend.

Mr. GOHMERT. All right.

Mr. GOODLATTE. The gentleman's characterization of the Attorney General's answer is not an appropriate exercise of the gentleman's right of personal privilege.

Mr. GOHMERT. All right.

Mr. GOODLATTE. The gentleman may exercise that privilege.

Mr. GOHMERT. Mr. Chairman, point of personal privilege.

Mr. GOODLATTE. The gentleman may complete his statement, and then we will move on.

Mr. GOHMERT. All right, thank you. The Attorney General made statements that what I said was not true when actually the reverse is what happened. I asked the Attorney General——

Mr. RICHMOND. Mr. Chair——

Mr. GOHMERT [continuing]. What was asked——

Mr. RICHMOND. Mr. Chairman, regular order.

Mr. GOHMERT. This is my point of personal privilege, and then the gentleman can respond.

Mr. RICHMOND. No, it is not a point of personal privilege.

Mr. GOHMERT. Yes, it is. So when you attack somebody's integrity and say that they made statements that were not true, then of course that raises a point of personal privilege. But the Attorney General failed to answer my questions about what was asked——

Mr. GOODLATTE. The gentleman will suspend.

Mr. RICHMOND. Regular order, Mr. Chairman.

Mr. GOHMERT [continuing]. And cast aspersions on my asparagus.

Mr. GOODLATTE. The gentleman is entitled to state a point of personal privilege, which he has now done, and we will move on.

Mr. GOHMERT. Thank you.

Mr. GOODLATTE. But he does not have under a point of personal privilege the opportunity to characterize the answer of the witness. So the time of the gentleman——

Attorney General HOLDER. All I was saying for the record was that the congressman could not know, unless, as I said, something inappropriate has happened with regard to the——

Mr. GOHMERT. Or unless the Attorney General answered my questions——

Mr. GOODLATTE. The gentleman will suspend.

Mr. GOHMERT [continuing]. As I asked, and then we would have had the answers.

Mr. GOODLATTE. The gentleman will suspend.

Attorney General HOLDER. There could not be a basis for the assertions he is making, not the questions, but the assertions that he made unless he was provided information, and I would say inappropriately, from members of the FBI or people who were involved in the very things that he questioned me about. And I do not think that that happened.

Mr. GOODLATTE. Both the gentleman from Texas and the Attorney General have had their opportunity to clarify their positions.

And we will now turn to the gentlewoman from California, Ms. Bass, who is recognized for 5 minutes.

Ms. BASS. Let me just begin by thanking the Attorney General for your patience because it seems to me every couple of months we go through this exercise with you. And I appreciate your patience.

I have three questions. One, I want to join others in expressing concern and frankly condemning what I understand is the targeting of conservative groups by the IRS. Frankly, it brought back memories from several years ago when I remember liberal groups being targeted. And it was before my time in Congress, but I certainly remember when African-American churches were targeted by the IRS, and it frankly sent a chill through the community.

I wanted to know if during that time if an investigation was done, and, if so, what was the result, and what were the consequences?

Attorney General HOLDER. I do not know what happened with regard to those matters.

Ms. BASS. Well, I think it would be interesting to find out if investigations had been done, because the way I am hearing this characterized, it was as though this is the first time the IRS has done something like this. And I certainly remember very well this happening to liberal groups.

My second question is, if Congress had passed the Free Flow of Information Act in 2007, how would the situation have been handled with the Associated Press?

Attorney General HOLDER. I am not familiar with the Free Flow of Information Act. All I can say is that I know that with regard to the shield law that we proposed, that there were greater protections that would have been in place for members of the press, though some have noted there was a national security exception.

But I think that in the view of the Administration, that a shield law should still be something that we work on together and that we can craft a national security exception that would give the press adequate protection, while at the same time keeping safe the American people.

Ms. BASS. What happened to the shield law?

Attorney General HOLDER. Excuse me?

Ms. BASS. What happened to it? You said it was—the shield law?

Attorney General HOLDER. It was proposed, and then was never passed. I do not think it was ever seriously considered, but it was pushed. I certainly talked about it during my confirmation hearings and I think during my first hearings as Attorney General. The President was behind it. But it was never passed.

Ms. BASS. So had that been passed, it would have alleviated the situation that we just experienced with the Associated Press?

Attorney General HOLDER. Again, I am recused from that case, but I think it would certainly have had the potential to have an impact on all national security stories.

Ms. BASS. Okay. Switching subjects completely and talking about trafficking, an area that I am very interested in working on child welfare issues is the trafficking, in particular, sex trafficking of minors who are in the child welfare system. And I wanted to know if anything is being done at the Federal level to ensure that youth that are designated as victims in juvenile courts are treated as victims as opposed to criminals.

And I wanted to know if, given existing Federal law included in the Trafficking Victim's Protection Act, how can we work with local jurisdictions to ensure that youth do not have criminal records due to their victimization.

Attorney General HOLDER. I think that is actually very important, and I think that what we need to do is come up with mechanisms by which we identify best practices. Also in spite of sequestration, we come up with ways in which we provide local and State jurisdictions with the necessary funds perhaps to reform their systems, because the reality is that too many young people, who are

victimized in the way that you have described, can be characterized as criminals, as prostitutes, when, in fact, they are simply victims.

Now, you would hope that prosecutors would exercise appropriate discretion and charge only the appropriate people, but that is not always the case, and that is why the identification of best practices and raising the sensitivity of people who exercise that discretion is so important. And I think that the Federal Government should take the lead in that, given that human trafficking generally is something that we have identified as a priority, and sex trafficking of minors specifically as a priority.

Ms. BASS. And maybe I can work with your office in the future, because I frankly think that no juvenile should ever be arrested for prostitution. I do not know how you can prostitute if you are under the age of consent. I mean, to me, that would be rape, and maybe there is a way that we can change it so a child is never charged with that.

Attorney General HOLDER. I would look forward to that. There are clearly going to be services that need to be made available to such a juvenile, but that does not mean that that juvenile should have to get them being part of the juvenile justice system with all the stigma that is, therefore, attached to that treatment.

Ms. BASS. Right, absolutely. And then finally, what is the Office of Juvenile Justice and Delinquency Prevention doing to prevent now foster youth from entering the criminal justice system? So I am not referring to trafficking. I am referring to what is known as crossover youth.

Attorney General HOLDER. You said?

Ms. BASS. Crossover youth, meaning crossing from the dependency to the delinquency system. So the question is, what is the Office of Juvenile Justice and Delinquency Prevention doing to prevent this.

Attorney General HOLDER. Well, again, we are identifying best practices. We make grants. We hold conferences. It is one of the things that, sequestration, when we talk about cutting back money and cutting back on conferences, I understand that. But one of the things that OJJDP does so well, the Office of Justice Programs does so well, through conferences is bring together people to talk about these kinds of issues, identify best practices, and then come up with determinations of what practices we are going to fund.

So that is what OJJDP is doing in that regard. It is always trying to find, again, best practices, identifying negative practices that are occurring, and then trying to support those things that are occurring and that are in the best interest of our children.

Mr. GOODLATTE. The gentlewoman's time has expired.

Ms. BASS. Okay, thank you.

Mr. GOODLATTE. If she has additional questions, please submit them for the record.

And the Chair now recognizes the gentleman from Ohio, Mr. Jordan, for 5 minutes.

Mr. JORDAN. Thank the Chairman. Mr. Holder, you announced last Friday a criminal investigation into the IRS.

I really only have one question. Will you assure Congress and the American people that your investigation will not impede or slow

the investigation Congress is doing into the Internal Revenue Service? And here is why I am concerned.

We have heard you today say—we lost track. We are actually keeping track of it and we started having a little tally how many times you said ongoing investigation. But the point that comes to mind for me is Solyndra. And I would argue that investigation has netted nothing, no new information to Congress, and has only impeded and slowed down our investigation into that company that went bankrupt and lost taxpayer money.

Next week, Chairman Issa has announced Lois Lerner and three other witnesses will be in front of the Oversight Committee next Wednesday on the IRS issue. I know for a fact Lois Lerner lied to me, she lied to our personal staff, she lied to Committee staff, she lied in correspondence to Mr. Issa and myself that we had sent her written correspondence.

And here is what concerns me, is because there is now a criminal investigation. Next week when Lois Lerner, who lied to Congress and, therefore, the American people, comes in front of our Committee for us to get information about what took place at the IRS, is she just going to throw up her hands and say, you know what, the Attorney General and the Department of Justice is doing a criminal investigation, I cannot really comment now. And that is a, I think, concern that Members of Congress have, and certainly the American people.

So again, will you do everything you can and what assurances can you give the United States Congress that that, in fact, is not going to take place?

Attorney General HOLDER. Well, I think the responsibility I have is to investigate violations of the law. And I think what we will try to do is to work with Congress so that we do not get in your way, you do not get in our way.

Mr. JORDAN. But the point is it has already happened. It has happened with other issues. This is the big one. This is people's First Amendment rights being violated. We want to know what are you going to do different this time.

And let us just be frank, Mr. Holder. You do not have all that much credibility. There are lots of folks on this panel—I am not one of them, but there are lots of folks here who have called your resignation. You have been held in contempt and a host of other things.

So this is why this question, I think, is of paramount importance.

Attorney General HOLDER. Well, to be frank then, your characterization of Ms. Lerner as lying before Congress by itself—I mean, forget about the investigation—

Mr. JORDAN. We will be happy to show that. We are going to show it next week, but we want her to be able to respond to us and not say, oh, I cannot comment because Mr. Attorney General has got a criminal investigation going. We will show that next Wednesday.

Attorney General HOLDER. I understand that. But your characterization of her testimony in and of itself and the way you have characterized could—forget about our investigation—could put her in the very situation that you say you do not want to have happen. So it might—

Mr. JORDAN. That is already out there. She has done responded. We have it in writing. There is no news there. It is a fact. I want her on the witness stand and be able to answer our questions, and what I do not want her to do is say, oh, I cannot because a criminal investigation is going on at the Department of Justice.

Attorney General HOLDER. Based on what you said—forget about the investigation—on the basis of what you said, she could say I cannot answer this question because you think that I have already lied, and I might be charged with a false—

Mr. JORDAN. You know this. There is a much stronger likelihood based on what you are doing than what I just said here.

Attorney General HOLDER. Well, as I said, my—

Mr. JORDAN. And you know that is the case.

Attorney General HOLDER. Our responsibility is to investigate violations of criminal law. We will do that. We will try to work with Congress in a way that we do not impede that which you want to do. In the same way I would hope that Congress will work with us so that you do not impede our criminal investigation, and ultimately hold people accountable.

There is certainly a role for Congress to play in exposing what has happened, but I think we have the ultimate responsibility in holding people accountable, and that is something that is uniquely the ability of the executive branch to do, not the legislative branch.

Mr. JORDAN. Mr. Chairman, I yield back.

Mr. GOODLATTE. The Chair thanks the gentleman.

And the Chair now recognizes the gentleman from Louisiana, Mr. Richmond, for 5 minutes.

Mr. RICHMOND. Thank you, Mr. Attorney General, for coming.

Answer these two quick questions for me, and then I will go into what I really wanted to talk about. But based on the dialogue and the back and forth earlier, here is my question. Is there any lawful way that anyone in Congress could know what was asked and not asked by the FBI in their investigation before the Boston bombing of those terrorists?

Attorney General HOLDER. There is no appropriate way, I think, that any Member of Congress could know that.

Mr. RICHMOND. Earlier also a statement was made that people or the government, some of us are so worried about offending Islamists, but they are not worried about offending any person that would bomb America. Certainly not all Islamists bomb America, right?

Attorney General HOLDER. No, it is a small minority of people of that faith who engage in these activities. And we are not politically correct in the way in which we conduct our investigations. We go after individuals. We do not go after religions.

Mr. RICHMOND. The other thing, and I am looking at, I guess, a July 12 letter from then Chairman of the Committee, Lamar Smith, because I was not on the Committee. But the points that strike me the most about the investigation into the leaks which you have recused yourself, which is “to conduct our foreign policy and keep Americans safe, some operations and sources of intelligence must be kept strictly secret. Concern about these leaks know no party line. When national security secrets leak and become public knowledge, our people and our national interests are jeopardized.

And when our enemies know our secrets, American lives are threatened." It goes on to say, "These leaks are probably the most damaging in America's history."

Was that not a call for the Department of Justice to do any and all things to ascertain where these leaks are coming from in our national security interests?

Attorney General HOLDER. I was criticized at that time for not appointing a special prosecutor. I said that I had faith in the Justice Department and in the two U.S. attorneys who I appointed to conduct those investigations. And that decision was criticized as not being aggressive enough. It strikes me as interesting now a year or so later—whatever the time period is—that in some ways we are being criticized for being too aggressive.

Now again, I do not know what happened in the case and what happened with regard to, you know, the subpoena. But there was certainly a clarion call from many that the Attorney General needed to do more than he actually did.

Mr. RICHMOND. And there was also criticism that your subpoena was too broad. And earlier today, you were challenged and criticized for the fact that you said that you would answer to the appropriate things in a subpoena. And the question was asserted, well, do you answer everything that a subpoena says, or do you answer to things that relevant to the subpoena. Would that not be the same irony that, you know, you cannot have it both ways?

Attorney General HOLDER. Well, I think Mr. Goodlatte, Chairman Goodlatte, had it right that, yeah, you can subpoena anything, but that people have the right once they receive a subpoena—obviously the acknowledgment of it—to challenge that which they are called to produce pursuant to the subpoena.

Mr. RICHMOND. And let me just take a second to thank the Civil Rights Division of your office because earlier this year, and why we certainly still need the Civil Rights Division, our chief ranking African-American on the Louisiana Supreme Court, who by far had the tenure, and ours is strictly a seniority process to get to chief judge, was challenged by other judges, and brought into court to challenge whether she could become chief justice. And it was with the help of the Civil Rights Division and other lawyers in Louisiana that the Federal judge ruled that she, in fact, did have the tenure. And as long as we still examples of that and we have a Justice Department that is willing to step up, even though it may not be popular to some. But part of faith in the justice system is that laws will be applied equally. Everybody will play by the same rules.

And I would like to close with, as ugly and nasty as Fast and Furious was, and the uproar that followed it, which I agree with, every day in my community and communities across the country, Federal agents and others will use drug dealers as pawns to get the bigger drug dealer. And as that crack or that heroine or those other drugs go back into our community and create more crack babies, and put more young kids in harm's way, I have not heard the same uproar. And I would just like to put that out there so while we are having an uproar about people putting things back into the community to get the bigger fish, please do not forget the thou-

sands and thousands of lives and murders every year associated with the drug trade. Thank you.

Mr. GOODLATTE. The time of the gentleman has expired.

And the Chair recognizes the gentleman from Texas, Mr. Poe, for 5 minutes.

Mr. POE. Thank you, Mr. Chairman. Thank you, Mr. Attorney General, for being here.

Yesterday I sent you a three-page letter with seven questions on it. I know you have not had time to go over those, so I ask unanimous consent, Mr. Chairman, to introduce that letter with the seven questions for the Attorney General into the record to be answered at some appropriate time.

Mr. GOODLATTE. Without objection, the letter will be made a part of the record, and the questions will be submitted to the Attorney General.*

Mr. POE. Let me approach this kind of historically the way I see things occurring, and then I have two questions at the end of this dialogue.

Over the last several years, government action has become suspect to many of us. In Fast and Furious, government action, then we have not resolved that yet. We are in court, and we still have not gotten a resolution on the issue that whether the subpoena should be or should not be upheld. People died in Fast and Furious. Then there is Benghazi, and there are some bungling going on, and what happened, who is responsible. Four Americans died.

But government action or inaction is suspect. Recently in Health and Human Services Department, there are accusations of improper use by people in office of their position to obtain funds to support the new health care law. I do not know if that is true or not. But government action.

And then the two that we are recently aware of, the AP reporters, 100 journalists, their phone records being seized. It looks like bruising the First Amendment at least to me. And by the way, our staff filed, Mr. Attorney General, in 2007 the shield law. I filed that bill as well. President Obama supported in 2007, and I hope we can get that shield law passed through both houses this time. But the most recent is with the IRS and what has taken place not only with the IRS, but other government agencies.

And let me give you a personal case, a real person. It is a constituent of mine. Catherine Engelbrecht and her husband, they run a business in Houston. Catherine Engelbrecht decided just as a regular citizen to get involved in voter fraud and started a group called True to Vote, and another group, King Street Patriots. And here is what she said in a recent interview: "We applied for non-profit status in 2010. Since that time, the IRS has run us through a gauntlet of analysts and hundreds and hundreds of questions over and over again. They've requested to see each and every tweet I have ever tweeted, or every Facebook post I have ever posted. They've asked to know every place I've ever spoken since our inception, and to whom and everywhere I intend to speak in the future."

*The questions referred to were submitted to the Attorney General by the Committee as part of its Questions for the Record.

That is part of her comments. We have learned that the IRS has even asked this group and other groups for their donor lists.

The Federal Government's snooping of Engelbrecht's two organizations included six visits from the FBI—set aside the IRS—six visits from the FBI, unannounced visits by OSHA, and even the ATF showed up several times to investigate this organization. And the Engelbrechts, both Catherine and her husband, have been personally audited. And keep in mind, Mr. Attorney General, Catherine and her husband have owned this family business for over 20 years, and never seen an auditor until all of this occurred. And yet here we are today since 2010, they still do not have that tax exempt status.

I have requested over the years FBI, OSHA, and ATF FOIA requests to see if they are under criminal investigation. These organizations say, no, they are not, but why are they continuing to be treated like criminals?

The IRS response, as we now know, they have apologized. I guess they want this to go away by their apology. But meanwhile, back on the ranch, today USA Today reported that only one Tea Party group has been given tax exempt status, but numerous progressive groups have been given tax exempt status in the last 2 or 3 years. Not much of a coincidence as far as I am concerned.

So based on my experience, you know, being in the courthouse as a prosecutor, you as a prosecutor and judge, it just seems like government credibility, because these are government actions. These are not private actions. These are government actions.

Do you not think it would be best that since now the FBI, ATF, which is under the Justice Department, are involved in some of these accusations of harassment, unequal protection under the law, targeting specific groups because of discrimination. I mean, those are the accusations. That we should set the Department aside and say, look, we are going to get a special prosecutor in here to investigate all of these organizations, all of these departments, to see if they are targeting specific conservative groups, for lack of a better phrase, for their actions, and to see if there are some violations under the Hatch Act, numerous law violations.

I am just asking you, do you think maybe that would help restore some credibility in your Department if you set that aside and said we are going to get a special prosecutor to clear this whole air and find out exactly what is going on in the government?

Attorney General HOLDER. Well, I would not agree with your characterization that there is a lack of credibility in either the Justice Department or any of its components.

Mr. POE. Well, I am giving you my opinion that the Justice Department lacks credibility and some of these departments because of the action by the Federal authority. So that is my opinion.

Attorney General HOLDER. Okay, well, that is fine. I will mark you as a fan not of government.

Bill Clinton once said that, you know, the era of big government was over. I would say that the need for government endures. Government—

Mr. POE. Just answer my question because I am out of time. I am sorry, Mr. Attorney General. Just answer my question. Do you think we need a special prosecutor to prosecute these accusations?

Attorney General HOLDER. And I said, I think the need for good government endures. You know, people talk about how government and government agencies do all these negative things, and then when it comes to Sandy, Katrina, wildfires, tornadoes, terrorism, the thing in West Texas, then people want government there.

And my point is that the notion that government has or that the Justice Department has credibility problems, I think is belied by the notion that people, I think, more generally have of government, and the good that government does, and the need for, as I said, for good government.

Mr. GOODLATTE. The time of gentleman has expired.

Mr. POE. I will submit that question in writing then for an answer.

Mr. GOODLATTE. The gentleman will submit the question in writing, and we will submit it to the Attorney General.

And the Chair now recognizes the gentlewoman from Washington, Ms. DelBene, for 5 minutes.

Ms. DELBENE. Thank you, Mr. Chair, and thank you, Mr. Attorney General, for being here and for all of your time.

A few weeks ago, there were news reports about documents obtained by the American Civil Liberties Union, the ACLU, that revealed internal memos that said the FBI believed it could obtain the contents of Americans' emails without a warrant if the emails were sent to or received by a third party service, like Hotmail or Yahoo!, Outlook.com, Gmail. Do you believe the government has a right to obtain emails without a warrant? And, well, first, I will ask you that.

Attorney General HOLDER. The authorities that we have, I guess, in some ways, you know, defined by ECPA, and there have been people who have testified on behalf of the Justice Department, is how we update the abilities that we have so that we have the ability to conduct investigations in as quick a fashion as we can, given the new technologies that we face. And how would we apply rules that exist with regard to obtaining information without court orders in this new era? And so I think that is the question that we wrestle with.

Ms. DELBENE. Today this piece of paper, if I had a letter here, would require a warrant for someone to have access, but if it were a digital email, it may not require that same warrant. And so, we are looking at whether there should be an equal playing field and whether we need to update our law. You were talking about the Electronic Communications Privacy Act. That was written in 1986, and much before much of the technology that many folks use today was in place. And so do you believe it is important that we update that law to reflect the way people work today and the way communication work today, so that we have those civil liberties protected in the digital world?

Attorney General HOLDER. Absolutely. I think we have become more and more an information society, and we still have and should have expectations of privacy however it is that we communicate. At the same time, I want to make sure that law enforcement, in the way that it did 40, 50 years ago, has the ability to acquire information. And how we strike that balance I think is really important, and is really one of the most important conversa-

tions I think that we can have in the 21st century, and one that I think that this Administration would like to engage with Congress so that we come up with a set of rules that probably not perfect, but will meet somewhere in the middle so that we can maintain privacy while at the same time maintaining that ability that law enforcement has to have.

Ms. DELBENE. There is a piece of legislation that I have co-sponsored, along with Congressman Poe and Congresswoman Lofgren to update the Electronics Communications Privacy Act, and to have a warrant standard for online communications, and for geo location information that people have on their cell phones, you know. We look to have support from the Department of Justice and yourself on those reforms as we look to update the Electronics Communications Privacy Act, and have something that is more current.

Attorney General HOLDER. I know that Senator Leahy has introduced a bill very similar to that, and it is something that I think that the Department will support. Our only concern is with regard to, as I said making sure that in certain very limited circumstances, that we have the ability, perhaps in civil cases or in other matters, to acquire information. But the more general notion of having a warrant to obtain the content of communication from a service provider is something that we support.

Ms. DELBENE. And a warrant standard would be the same. I know the current warrant standard for communications, there are exceptions in emergencies and other cases. So we are looking to have a similar warrant standard in the online world.

Attorney General HOLDER. And that is what I was talking about when I talk about these limited circumstances where we would want to make sure that we maintain the abilities. But the more general proposition that you are talking about is one that we support.

Ms. DELBENE. Thank you. Thank you very much. And I yield back the remainder of my time.

Mr. GOODLATTE. The Chair very much appreciates the gentleman's brevity, and now recognizes the gentleman from Utah, Mr. Chaffetz, for 5 minutes.

Mr. CHAFFETZ. Thank you, Mr. Attorney General. I appreciate you being here.

I want to go back and talk about, if we could, about the investigation of General Petraeus, which I understand the FBI started in the sort of May/June time frame. When did you first learn about the investigation into General Petraeus, who was then the CIA director?

Attorney General HOLDER. Yes. I am not sure. Some months, I think, or a couple of months after it began.

Mr. CHAFFETZ. The news reports say that that happened sometime in the summer. Would that be a fair, accurate representation?

Attorney General HOLDER. I think that is probably right.

Mr. CHAFFETZ. Do you know when General Petraeus was notified or had any sense that he was under investigation?

Attorney General HOLDER. I would have to go back and look. I do not know when he was actually made aware of it. I think as a result of an FBI interview I think, but I am not sure exactly when that happened.

Mr. CHAFFETZ. Do you have any idea when he would have become aware of it other than that—I see that somebody is trying to hand you something. Do you have a sense as to when he became aware of it?

Attorney General HOLDER. This just says we will look into it and get back to you.

Mr. CHAFFETZ. You need notes for that?

Attorney General HOLDER. I do not know. I just do not know when exactly all these events happened.

Mr. CHAFFETZ. You know, one of the questions and the criticisms here of your actions on this is that you knew about this in the summer, and yet when did you notify the director of the National Intelligence, Mr. Clapper?

Attorney General HOLDER. I do not remember when that happened. I knew about it for a while before he was notified. I do not know exactly what the time frame was.

Mr. CHAFFETZ. And when was the President of the United States notified?

Attorney General HOLDER. It was much later. Again, I am not exactly certain, but as I remember, like late fall, and perhaps even maybe early winter. Again, do not hold me to these exact—

Mr. CHAFFETZ. And I appreciate that, and I am asking you dates. But the concern is that you for months based on that timeline, and I recognize it is loose here. But for months you knew about it, but you did not notify the President of the United States. Why is that?

Attorney General HOLDER. Because it was an ongoing criminal investigation.

Mr. CHAFFETZ. You do not think that there was any national intelligence lap over? I mean, was there any national intelligence ramification?

Attorney General HOLDER. Not on the basis of what we were investigating. If we had thought or if I had thought that what we were looking at potentially would have been compromising of General Petraeus or would have led to a national security problem or breach, then I—

Mr. CHAFFETZ. But according to the Congressional Research Service, let me read it from their report in April. “While the extramarital affair itself is not classified as an intelligence activity, the investigation by the FBI originated with the possible hacking of Director Petraeus’ email account, an act that had the potential of compromising national intelligence.”

As I have said before, he was not the head of the, you know, Fish and Wildlife. This is the director of Central Intelligence. Why would you not share that with the President of the United States?

Attorney General HOLDER. Well, as we talked about it among us at the FBI and at the Justice Department, we did not think that we had a national security problem or a potential national security problem.

Mr. CHAFFETZ. But why were you investigating him? Why would FBI investigate him? It is not just an extramarital affair, right? That does not raise to the level of FBI involvement. There certainly had to be some suspicion that there was some national intelligence implication.

Attorney General HOLDER. Well, the investigation began, as I remember, because of complaints that one party made against another about the use of computers and threats. That is how the investigation—

Mr. CHAFFETZ. But when it involves the director of the Central Intelligence Agency. Senator Feinstein, who is the chair of Intelligence said, “This is something that could have an effect on national security. I think we should have been told.” Why not notify under the law the proper authorities here in the United States Congress, specifically the head of the intelligence committees? And why not notify the President of the United States?

Attorney General HOLDER. Well, again, as I said, there is a strong tradition and concern within the Justice Department not to reveal—and the FBI—not to reveal ongoing criminal investigations. But I think we were sensitive to the possibility of a national security concern, but did not think that one existed. And if we look back at that—

Mr. CHAFFETZ. But why not share that with the President of the United States? Do you not trust him with that information? I would think that is the one person who should absolutely know about what is going on. And if it was a potential that our director of the CIA had been compromised, that you were investigating something, why not share that with President Obama?

Attorney General HOLDER. Because, as I said, we do not share ongoing criminal investigations. And if you look back, the conclusions that we reached, in fact, were correct that we did not have a national—

Mr. CHAFFETZ. Is this is an ongoing investigation?

Attorney General HOLDER. It is an ongoing investigation.

Mr. GOODLATTE. The time of the gentleman has expired. The Chair thanks the gentleman for the line of questioning, and now recognizes the gentleman from Florida, Mr. Garcia, for 5 minutes.

Mr. GARCIA. Over here, Mr. Attorney General. Mr. Attorney General, thank you for being here and thank you for your time today. And thank you for your long and distinguished career.

My first question, and I know you have answered some of this, but maybe in a less hostile environment, it will give you an opportunity to dazzle you with your brilliance and your personal knowledge.

I, unlike the majority here, know Mr. Tom Perez and have known him for many years as a dedicated personal servant. A few weeks ago we ascended ourselves and began a confirmation hearing for Mr. Perez here, a duty and a responsibility that was beyond the purview of my office, but nonetheless we participated in that.

But I would like to hear from you as someone who has worked with Mr. Perez closely in his capacity in your office, if you could tell us about him and your view on him as Labor Secretary.

Attorney General HOLDER. Well, I think he is uniquely qualified for this job given his experience in Maryland in a similar position, given the way he has distinguished himself over a long and storied public service career, certainly with regard to the way in which he has conducted himself as Assistant Attorney General, showing himself to be concerned about and responsive to working class people.

He is a person who I think has the ability to see both sides of an issue. He is not an ideologue as I think he has been portrayed. He is both a good lawyer, I think, a loyal public servant, who I think will distinguish himself if he is given the opportunity to become our next Secretary of Labor.

Mr. GARCIA. Thank you, Mr. General. I wanted to ask two more questions. One is on immigration, and thank you for addressing comprehensive immigration reform in your comments.

I notice as someone who has been around immigration and worked with the Immigration Service that the rules that we have created have sort of bound us in certain circumstances, and to some degree has limited the discretion of our immigration judges, which are overworked, but sometimes do not have the legal ability or the ability to resolve many cases which seem to be simple.

If we could get your opinion on returning some of that discretion to the immigration judges.

Attorney General HOLDER. Well, I agree with you. I served for 5 years as a judge here in Washington, D.C., and we put a great deal of effort into finding good people to serve on our Article 3 courts and our immigration courts. And I think that they should have requisite amounts of discretion so that they can decide what justice is in a particular case, what is justice for the person who is in front of them.

Obviously it is constrained by rules, regulations, and by laws. But within that range, I think judges should have discretion, perhaps a greater degree of discretion. Immigration judges should have a greater degree of discretion than they presently have.

We do a good job of selecting who these people are, and we should trust, therefore, in their abilities and their ability to use their discretion appropriately.

Mr. GARCIA. Let us stay on that real quick and then I will close with this and return the balance of my time.

I wanted to ask you about the cuts that sequestration has had on immigration, the impact that it has had. I think it is a reduction about \$15 million in funding for immigration review. Could you tell me a little bit about what impact that has had on already overburdened case loads, and has that led to prolonged detention, which, of course, adds a further burden to taxpayers?

Attorney General HOLDER. Yeah, we just have numbers here. There are serious problems with regard to this whole question of sequestration. The immigration docket has gone up every year. The resources that we need to deal with that have to be dealt with, and sequestration runs in the opposite direction where we are actually taking resources away from a growing problem.

If you look at the immigration bill, there is contained within it a provision for an enhanced number, a greater number of immigration judges. The President's budget for 2014 asks for more immigration judges to handle the problems of the growing docket.

Sequestration is something that is more than simply people getting on an airplane and getting to their destination, you know, in time. Sequestration has a negative impact on a whole variety of areas that are my responsibility: in the immigration courts, with regard to ATF, FBI, DEA agents having the ability to be on the streets and doing the things that the American people expect.

We have had problems in 2013. This Department has far fewer people than it did in 2011 when we put into place a freeze. This is going to have an impact. You will see, I bet, 2 and a half, 3 years from now lower numbers out of the Justice Department, and some attorney general perhaps will be criticized for that. And it will be a function not of a lack of desire and dedication on the part of the people of this Justice Department, but simply because there are fewer of them.

Mr. GARCIA. Thank you, Mr. General. I yield back the balance of my time.

Mr. GOODLATTE. The Chair thanks the gentleman, and recognizes the gentleman from Pennsylvania, Mr. Marino, for 5 minutes.

Mr. MARINO. Thank you, Chairman. General, it is good to see you again.

Attorney General HOLDER. You, too.

Mr. MARINO. Let us focus for a moment on the Boston terrorist defendant while he was in the hospital, if you would, please. Why were charges filed at that particular time instead of waiting for, just running the time more so on the public exception of Miranda? I understand it was about 16 hours and then charges were filed. Certainly the magistrate does not have the right to go and do that in and of themselves.

So charges had to be filed. He was in the hospital, so as a result, the magistrate was brought there, but also a public defender was brought there. But why at that time? Why did you make that decision or who made the decision to file charges at that time?

Attorney General HOLDER. Well, let me just not talk about that case, again, ongoing, but charges, I mean, there are rules that we have. The Supreme Court has said that with regard to detention, you have got, in essence, 48 hours to bring charges. And what we did there was to do things that are, I think, consistent with the rules, while at the same time, without getting into too much, while at the same time using the public safety exception in the best way that we could.

Mr. MARINO. I do not want you to get into anything that would jeopardize this prosecution. But there was time. You could still have used the public exception rule to allow the FBI to interrogate this individual before Mirandizing. Do you agree with that?

Attorney General HOLDER. Yeah. The Justice Department and the FBI agent never Mirandized—

Mr. MARINO. No, no, that is not my question. I know they did not Mirandize him because they did not have to because of the exception. But it seemed to me that there was a rush to file the charges that would then force the magistrate to inform the defendant of his rights. Why did you not let that time run longer so the FBI could question him?

Attorney General HOLDER. The charges were filed at about from the time of capture—I guess capture—about 46 hours after that. So that is—

Mr. MARINO. But that is a benchmark, correct? The 46 hours is a benchmark. I mean, I have read a case where it has been days where the exception has continued.

All right. Was that discussed with Director Mueller? Did he know prior to that that charges were going to be filed?

Attorney General HOLDER. Yeah. We worked with the FBI both in Washington and in Boston. Everybody was aware, and the State and local folks as well. Everybody was aware of how we were going to proceed.

Mr. MARINO. Why were State charges not filed? Then you would have more time to question that individual before you had to file Federal charges? As a former prosecutor both at the State and Federal level, I mean, we use these tools to our advantage.

Attorney General HOLDER. Well, after the bombing, the decision was made, and I think correctly so. The Joint Terrorism Task Force got together and made a decision that this was going to be a Federal matter, a Federal investigation, and that Federal rules applied.

Mr. MARINO. All right. Let us switch gears here to your recusal in this other situation. I got into a little argument with the Justice Department on cases where I not only recused myself, but I wanted my entire office recused. Now, you are in a little different predicament here.

But I always followed it up with written documentation, a letter saying why I am recusing myself, why I am recusing my office, making sure there is a paper trail from here to yesterday filed in my office and with the Justice Department. Are you saying that there is no paper trail here when you recused yourself and for what reasons?

Attorney General HOLDER. I do not think there is. As I said, that is something that we were looking for, and nothing has been found. And I am not sure. Somebody else raised that point. As I have thought about it actually during the course of this hearing, that that actually might be a better policy to have in place for recusals.

Mr. MARINO. I would think so to have those documents in place. You also have the authority to appoint a special prosecutor, whether it is another sitting U.S. attorney or someone outside of Justice completely. So you have the deputy who gave the approval, but yet is heading the investigation. Do you not think there is a conflict of interest there and someone else should be appointed to handle this matter?

Attorney General HOLDER. I am not sure I understand. That somebody other than the deputy should be handling this?

Mr. MARINO. Yes, as far as the investigation is concerned.

Attorney General HOLDER. I see what you mean. Okay. Well, I made the determination and was criticized at the time for making the determination that the prosecutors at the U.S. attorneys in Maryland and the District of Columbia could handle these cases in a fair and appropriate way.

Mr. MARINO. I will be the last guy to criticize you about a U.S. attorney handling a case no matter where he or she is. Being one, I know the caliber of people that work at Justice. So be that as it may, I see my time has expired. Thank you.

Attorney General HOLDER. Thank you.

Mr. GOODLATTE. The Chair thanks the gentleman, and recognizes the gentleman from New York, Mr. Jeffries, for 5 minutes.

Mr. JEFFRIES. Mr. Chairman, thank you, and, Mr. Attorney General, thank you for your testimony here today, and thank you for your great service to this country.

Let me just first note for the record my concern as it relates to the AP matter that, one, the subpoenas that were issued appear to be overly broad in scope, and hopefully that is something that the investigation that takes place will examine with close scrutiny. And second, that I think as many of my colleagues have expressed, I am also troubled by the fact that the negotiation or consultation with the AP did not occur in advance of the decision to issue the subpoena, and hopefully, again, that will be covered.

You mentioned earlier today in your testimony that racial and ethnical profiling is not good law enforcement. I appreciate that observation. As you know, in New York City we are grappling with a very aggressive stop and frisk program being administered by the NYPD where many of us are concerned that African-Americans and Latinos are being racially profiled in the context of these stop and frisk encounters.

As you may know, more than 3 million stop, question, and frisk encounters have occurred in the City of New York over the last decade. And approximately 90 percent of those individuals, more than 3 million stop, question, and frisk encounters are Black and Latino citizens of the City of New York. Are you familiar with that fact?

Attorney General HOLDER. Yes.

Mr. JEFFRIES. And I think you are also familiar with the fact that according to the NYPD's own statistics, approximately 90 percent of the individuals who possibly had their Fourth Amendment rights violated because they were stopped, questioned, and frisked without reasonable suspicion or any basis to conclude that they presented a danger to anyone else, approximately 90 percent of these individuals did nothing wrong. According to the NYPD's statistics, no gun, no drugs, no weapon, no contraband, no basis for the arrest or the encounter whatsoever. Are you familiar with that statistic as well?

Attorney General HOLDER. I have read that. I do not know about the accuracy, but I have certainly read that.

Mr. JEFFRIES. Okay. Well, that is the NYPD's own statistics. Now, you participated in a meeting graciously—I was not involved at the time—last year on June 7 with Members of the Congressional Black Caucus who were from New York City, as well as elected officials from many of the communities that were impacted. And we are thankful that you granted that meeting.

At that meeting, there was a request that was made that the Justice Department look into what we believe is systematic racial profiling in violations of the Fourth Amendment that has taken place in New York City as a result of the aggressive stop and frisk program. Almost a year has passed since that meeting took place. Have you come to a conclusion as to whether it is appropriate for the Justice Department to look into the matter?

Attorney General HOLDER. We have not reached any final determinations, but this is something that is under review at the Justice Department. I hope that we will be able to move this along. I know there is a civil suit from which a lot of information is coming out. But it is something, as I think I said then, that we were prepared to look at, and something that, in fact, we are examining.

Mr. JEFFRIES. Okay. And as we approach the 1-year anniversary of that meeting, I would hope that we can come to an expedited

conclusion. But I appreciate the deliberateness and the care with which, and the sensitivity taken toward this matter.

I want to turn briefly to the IRS issue. Now, in 2004, George Bush was the President, is that right?

Attorney General HOLDER. Yes.

Mr. JEFFRIES. And he was in the midst of a very competitive re-election, correct?

Attorney General HOLDER. Yeah, I guess.

Mr. JEFFRIES. Okay. And in 2004, it was revealed that the IRS went after the NAACP for alleged political activity in violation of its status as a not-for-profit organization. Are you familiar with that fact?

Attorney General HOLDER. Yeah, I remember that.

Mr. JEFFRIES. Okay. And it was subsequently uncovered that they had done nothing wrong, but what was also determined as a result of a FOIA request by the NAACP was that seven Members of the United States Congress on the other side of the aisle had written letters to the IRS requesting that the IRS investigate the NAACP. Are you aware of that fact?

Attorney General HOLDER. I do not remember that, no.

Mr. JEFFRIES. Now, was a criminal investigation ever launched in connection with the alleged political interference that took place leading to an unsubstantiated investigation of the NAACP? I know you were not at Justice at the time.

Attorney General HOLDER. I do not believe so, but I am not sure.

Mr. JEFFRIES. Okay. But I am thankful that you have taken the step to launch an investigation into similar allegations of alleged political interference, albeit not by Members of Congress, and we look forward to the results of that inquiry.

Attorney General HOLDER. Okay, thank you.

Mr. GOODLATTE. The time of the gentleman has expired.

The Chair recognizes the gentleman from South Carolina, the Chairman of the Immigration and Border Security Subcommittee, Mr. Gowdy, for 5 minutes.

Mr. GOWDY. Thank you, Mr. Chairman. Good afternoon, Mr. Attorney General.

Attorney General HOLDER. Good afternoon.

Mr. GOWDY. Do you think it is reasonable to evaluate how effectively prosecutors and law enforcement are using current firearm statutes as we debate whether or not we need additional firearm statutes?

Attorney General HOLDER. Sure, that ought to be a factor, but I think we are using the laws effectively.

Mr. GOWDY. Well, I would have to take your word for it for this reason. I wrote you 6 months ago and asked for statistics specifically on two Code sections, 922(d) and 922(g), which deal, as you know, specifically with the possession or transfer of firearms by those who have been adjudicated mentally defective or committed to mental institutions. I wrote that letter in December. Thinking that being a low-level House Member was not enough to garner any attention, I then got a senator to co-sign the exact same letter with me, and we have not heard back yet.

So you agree that it is relevant how effectively those Code sections are being prosecuted as we evaluate whether or not we need additional tools.

Attorney General HOLDER. Excuse me. I think we should take into account what we are doing in terms of weapons prosecutions. One-seventh of all the cases that we bring in the Federal system are gun cases.

Mr. GOWDY. What percentage of current background check failures are prosecuted?

Attorney General HOLDER. A much smaller number. There were 83,000 background check failures in Fiscal Year 2012. There were 85,000 cases brought. A much smaller number of those failures were actually brought. The purpose of the background check system, though, is to prevent people from acquiring guns. 1.5 million have been stopped since the beginning of this system, as opposed to the prosecution. And that is why—

Mr. GOWDY. I understand that, Mr. Attorney General. I also understand a little something about a lack of jury appeal. I know certain cases do not have tremendous jury appeal. But when you are advocating for increased background checks, and it can be argued that you are not a good steward of the current background check laws that you have, I just frankly think it undercuts the argument. But reasonable minds can differ on that, I suppose.

I do not think reasonable minds can differ on 922(d) and 922(g), which deal with people—these are not my words, it is in the statute—been adjudged mentally defective or committed to a mental institution. If you want to search for a theme throughout lots of our mass killings, I think we will find that theme.

I want to read to you a quote that has been attributed to you. If the quote is inaccurate, I want to give you a chance to tell me it is inaccurate. I am not going to read the whole thing. “Creating a pathway to earned citizenship for the 11 million unauthorized immigrants in this country is essential. This is a matter of civil and human rights.” Is that an accurate quote?

Attorney General HOLDER. Yeah, I think that is a speech I gave at the Anti-Defamation League.

Mr. GOWDY. All right. You would agree with me that persons who cannot pass background checks should not have the civil right, as you call it, of citizenship.

Attorney General HOLDER. Well, as I used that phrase, I did not use it in the strictly legal sense.

Mr. GOWDY. But, Mr. Attorney General, with all due respect, that is the problem with using the phrase. I mean, you are a highly trained lawyer, and you know what the phrase “civil right” means. And when you say that you have a civil right to citizenship when you have broken the laws to come to the country, that comment has consequences. And surely you have to know that.

Attorney General HOLDER. Well, with all due respect, it was my speech, and they were the words that I chose. And I did not mean to convey, and I did not think that it would be taken that way. Some have said that, many have not, that that meant that there was a legal right or anything like that. It was in the context of that phrase where I said civil and, I think, human right. I think that is the word that I used there.

Mr. GOWDY. Right. But you can understand how it is problematic for those of us, frankly, who are working on immigration reform and do not come from districts where it is a really popular political idea to have the Attorney General say you have a civil and human right to citizenship, even though you are in the country in violation of our laws. That is a non sequiter. And it is hard for some of us to explain that. So I do not know what you meant, I just know what you said.

Attorney General HOLDER. Yeah, and what I meant was that you have 11 million undocumented people here who are, we must admit, contributing to this country in substantial ways, but oftentimes are exploited because they are in that undocumented status. And we have to deal with the—

Mr. GOWDY. But, Mr. Attorney General, my point is all 11 million are not valedictorians, which is why every bill has a background check provision. And all 11 million do not want citizenship. So to call it a human and civil right, speaking for a broad group of 11 million, with all due respect, it is just not helpful to those of us who are trying to be part of the conversation.

Attorney General HOLDER. And I did not mean to say by that all 11 million either want to be citizens, you are right, or will ultimately as the bills have been crafted, and I think appropriately so, will pass the necessary background checks. I am talking about the universe of people who we have generally accepted as 11 million. And from that 11 million, and I suspect it is going to be a large portion of that 11 million, will pass background checks, will desire to become citizens, and then will be entitled to the human rights that all Americans have after they go through that period that allows them to acquire citizenship, along that pathway.

Mr. GOWDY. I am out of time, Mr. Chairman.

Mr. GOODLATTE. The Chair thanks the gentleman, and now recognizes the gentleman from Idaho, Mr. Labrador, for 5 minutes.

Mr. LABRADOR. Good afternoon, Mr. Attorney General. One of your favorite phrases during this hearing and in many other hearings where I have heard you is “ongoing criminal investigations.” I also have heard you several times talk about best practices and proprieties.

When you decided to recuse yourself, did you look at best practices? I think you admitted already that it would have been probably a better practice for you to put in writing. But there is already a statute, 28 U.S.C. Section 591, that requires to put in writing your reasons for recusal in certain circumstances. Frankly, I have read it a couple of times. I do not know if it applied to your situation right now. But do you not think it would have been the best practice for you to just put it in writing, especially when you are talking about an issue of such significance?

Attorney General HOLDER. Well, as I said, and as I have thought about it even during the course of this last couple of hours, that I think that I am going to go back and actually think about whether or not there is some kind of policy that I should put in place, examine how often recusals have happened in writing as opposed to orally. And I think that the better practice, as I said, frankly, I think we probably ought to put them in place.

Mr. LABRADOR. And I think you should look at whether 28 U.S.C. 591—again, I do not if that applies to you, but you should really look at whether that applies to you or not or whether there is any other law that would have required you to.

Attorney General HOLDER. Well, there are two things on my to do list here.

Mr. LABRADOR. Okay. The second thing I want to talk about is, we already discussed the targeting by the IRS, admitting that they targeted conservative groups. Will you state today under oath that the Department of Justice under your watch has not targeted conservative groups for prosecution for political reasons or to gain political advantage?

Attorney General HOLDER. Not to my knowledge. I have no knowledge that has ever occurred.

Mr. LABRADOR. Do you know if the IRS leaked tax information related to Mitt Romney during the Republicans presidential primary or general campaign?

Attorney General HOLDER. I do not know.

Mr. LABRADOR. And if you do not know, will you attempt to find out in your investigation?

Attorney General HOLDER. I am not sure I have a predicate for that. I will be honest with you, I do not just remember that.

Mr. LABRADOR. There were several claims during the campaign that there was personal information from Mitt Romney's tax records that were being leaked to the press, and I just want to know if the IRS was the one leaking that information.

We also know that some of Mitt Romney's top donors were targeted by the IRS and the Labor Department, including a gentleman from Idaho. So if you could look at that as well, why it was that specifically people who were giving who were some of Romney's top campaign donors, that were actually, immediately after they became public about how much money they had donated, that all of a sudden the IRS and the Labor Department was looking at them.

And I have an important question. We have heard about numerous groups that were targeted that were conservative groups. Can you tell me whether Obama For America, Organizing for America, Occupy Wall Street, or any other progressive group has been targeted in the last 3 to 4 years by the IRS?

Attorney General HOLDER. We are at the beginning of the investigation, so I do not know what, if any groups, were targeted. All I know is what I have read about in the press. I am not in a position to say—we are at the beginning stages of this investigation—which groups might have been inappropriately looked at.

Mr. LABRADOR. Can you find out if it was only conservative, because I think this is important. I think it is rather strange that it is only one group, a political group, but not the other kind of political group. Can you find out for our Committee whether that—

Attorney General HOLDER. Well, I mean, the investigation would be designed to find out which groups were looked at, make sure that if they were looked at, it was done on an appropriate basis, and if it was inappropriate, then to hold people accountable. And that will be done regardless of whether or not they are conservative or liberal, Republican leaning, or Democratic leaning.

Mr. LABRADOR. And if you find out that they were only conservative, can you find out why it was that only conservative groups were targeted?

Attorney General HOLDER. Yeah.

Mr. LABRADOR. Now, I am going to read to you a quote that you stated about your contempt of Congress from last year. In February of this year you said, "I have to tell you that for me to really be affected by what happened," meaning the contempt of Congress, "I have to have respect for the people who voted in that way. And I didn't, so it didn't have that huge an impact on me." Do you not think that quote shows contempt for the Republican Members of Congress that are here that voted for this? And there were actually some Democratic Members who also voted for contempt?

Attorney General HOLDER. Well, I have to say that the process that we went through, or that you all went through, in making that contempt determination seemed inconsistent with both prior practice, and also consistent with not taking into account the good faith attempts that we were making to try to share the information that was sought. And I also thought that it was telling that when the NRA decided to score that vote, what was the NRA? What was the involvement of the NRA in that vote at all?

It seemed to me then that this was something that was not about me, not about—well, it was about me, but it was about things beyond just the exchange of documents. It was an attempt by certain people to get at this Attorney General. And that is why I said that with regard to that process, I simply did not and do not have respect for it.

Mr. LABRADOR. But you said you did not have respect for the people who voted. And I think that same contempt may have led also to people in this Administration thinking that they could go after conservatives and conservative groups.

Thank you. I yield back.

Attorney General HOLDER. I am not the cause of people in the IRS doing things that might have been illegal. I will not take that—

Mr. LABRADOR. No, no, I am not accusing you of that. I am just saying that maybe that same statement emboldened people to think that they could also go after other conservative groups. Thank you very much.

Mr. GOODLATTE. The Chair thanks the gentleman, and yields to the gentleman from Michigan for a unanimous consent request.

Mr. CONYERS. Mr. Chairman, I ask unanimous consent to insert into our record the statement of the Lawyers Committee for Civil Rights Under Law.

Mr. GOODLATTE. Without objection, the document will be made a part of the record.

[The information referred to follows:]



STATEMENT OF

**THE LAWYERS' COMMITTEE
FOR CIVIL RIGHTS UNDER LAW**

**SUBMITTED TO:
THE U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY**

On

**"Oversight of the United States
Department of Justice"**

May 14, 2013

The Lawyers' Committee for Civil Rights Under Law (Lawyers' Committee) strongly supports and encourages the Administration's efforts to protect the voting rights of all Americans, especially in connection with the defense of the constitutionality of Section 5 of the Voting Rights Act and its enforcement of that provision. We would like to thank the House Committee on the Judiciary for holding this hearing on the "Oversight of the United States Department of Justice."

Background

The Lawyers' Committee was founded in 1963 following a meeting at which President John F. Kennedy charged the private bar with the mission of providing legal services to address racial discrimination. We continue to work with private law firms as well as public interest organizations to advance racial equality in our country by increasing educational opportunities, fair employment and business opportunities, community development, fair housing, environmental health and criminal justice, and meaningful participation in the electoral process.

Indeed, since our inception, voting rights has been at the center of our work. For example, in recent years, the Lawyers' Committee played a key role in the 2006 reauthorization of Section 5 (by organizing the National Commission on the Voting Rights Act, which conducted hearings and submitted a lengthy report to Congress), and has intervened in several lawsuits to defend the constitutionality of Section 5 and to enforce Section 5. The Lawyers' Committee also has been active in filing suits to enforce the National Voter Registration Act, including *Arizona v. ITCA* now pending in the Supreme Court.

In addition, as part our voting and election administration work, we lead the Election Protection coalition. Election Protection works throughout the election cycle to expand access to our democracy for all eligible Americans, educates and empowers voters through various tools, including the 1-866-OURVOTE, 1-888-VE-Y-VOTA and 888-API-VOTE hotlines, collects data about the real problems with our election system, and puts a comprehensive support structure in place on Election Day. During the 2012 Election cycle, the 1-866-OURVOTE hotline received over 170,000 calls from voters seeking information and assistance. As a supplement to this statement, we have included excerpts of our Election Protection Report that highlights the program for the 2012 election cycle.

The Voting Rights Act and the Importance of Section 5

Section 5 often is referred to as the heart of the Voting Rights Act. It has played, and continues to play, an indispensable role in promoting and protecting political participation of racial minorities. In 2006, Congress gave its powerful endorsement to Section 5 when it voted overwhelmingly to reauthorize the statute for an additional 25 years. Section 5 requires certain jurisdictions that have a history and recent record of voting discrimination to obtain preclearance from the Attorney General or the United States District Court for the District of Columbia prior to implementing a new voting practice or procedure.

Following Congress' reauthorization of Section 5 in 2006, several lawsuits were filed claiming that the legislation was beyond Congress' 14th and 15th Amendment enforcement authority. This

issue is now before the Supreme Court in the case of *Shelby County v. Holder*, where a largely white suburb of Birmingham, Alabama is challenging the constitutionality of Congress' 2006 reauthorization. The relief sought by the county's "facial" challenge is the complete termination of Section 5. A ruling is expected in late June of this year. The Lawyers' Committee represents Bobby Lee Harris, a resident of Shelby County and former elected official there, who intervened in the case to defend the constitutionality of Section 5.

During the current Administration, the United States Department of Justice (DOJ) has achieved extraordinary success in enforcing Section 5. This has included its defense against four separate lawsuits brought by the states of Florida, South Carolina, and Texas to obtain preclearance for major changes to their election laws adopted in 2011. In the Florida case, the state legislature reduced the opportunities for early voting, which would have impacted African American voters disproportionately. The South Carolina case involved a 2011 photo ID requirement for in-person voting, which as enacted had a strong potential for discriminatory effect and application. One case brought by Texas involved redistricting plans for Congress and the state legislature which discriminated against minority voters. In a separate case, Texas sought preclearance for the most stringent photo ID requirement in the country. DOJ recognized the central importance of these cases to voting rights, and committed the substantial staff resources required to ensure that, in each instance, all of the relevant facts were uncovered and presented at trial in a clear, accurate, and effective manner. As a result, the Civil Rights Division won three of the four cases, and in the fourth case, brought by South Carolina, the State obtained preclearance for an interpretation of its voter ID law that negated much of the law's discriminatory potential.

South Carolina's 2011 voter ID law contained a provision allowing voters to cast ballots after signing an affidavit at the polling place that a "reasonable impediment" prevented them from obtaining a qualifying photo ID. This provision, as originally passed and interpreted by the State, was both unclear and quite narrow. As the lawsuit developed, however, the State reworked its interpretation of this provision to be both clear and substantially broader, effectively permitting *all* registered voters to vote. The federal court specifically conditioned preclearance of the law upon this revised "extremely broad interpretation" of the provision, saying that if South Carolina wanted to interpret the law more strictly in the future, it would have to obtain preclearance under Section 5 to do so. Therefore, the reinterpreted version of the South Carolina voter ID law that the district court precleared is a far cry from the proposed application of that law to which DOJ originally issued a Section 5 objection. The federal court specifically pointed out the salutary effect of Section 5 and the preclearance process in reaching this outcome.

While achieving this commendable record in enforcing Section 5 to block discriminatory voting changes, the Civil Rights Division has continued to devote substantial resources to allow jurisdictions covered by Section 5 with a clean record in voting for the past ten years to "bail out" of Section 5 coverage. The Civil Rights Division has been consistently responsive to bailout requests, and a substantial number of qualified jurisdictions have bailed out over the past four years, while no jurisdiction has been denied bailout.

Conclusion

The cases in Florida, Texas, and South Carolina underscore that the work of Section 5 is still incomplete. The Lawyers' Committee will continue to work with the Administration and the Department of Justice to ensure every American has equal access to the ballot. The Lawyers' Committee also looks forward to working with leaders on both sides of the aisle to ensure a truly accessible and secure system of elections

Mr. CONYERS. Thank you.

Mr. GOODLATTE. And the Chair would ask unanimous consent that a letter sent to Attorney General Holder on November 13, 2012, pertinent to the investigation of the matter involving former CIA Director David Petraeus, signed by former Chairman Lamar Smith, and containing 15 questions, which to our knowledge and to the knowledge of former Chairman Smith, have never been an-

swered. And we would ask the Attorney General to, again, answer them. But we will put those as a part of the record and resubmit them to you, General Holder. They were pertinent to this hearing, and I think the answers to those questions would be of interest to the Members of the Committee.

[The information referred to follows:]



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Intelligence James Clapper was notified at 5:00 p.m. on Election Day, November 6, 2012.⁴
President Obama was reportedly not notified until Thursday, November 8.

Accordingly, I write to seek clarification of the timeline of the investigation.

Please respond to the following questions and requests by November 26, 2012:

1. On what date did the investigation begin?
2. On what date did the investigation first implicate classified intelligence information?
3. On what date did the FBI first become aware of contact between Mrs. Broadwell and General Petraeus?
4. When were you first notified of the investigation? When were you first notified of General Petraeus's involvement in the investigation?
5. Did you or anyone within the Justice Department notify the President or anyone within the White House of the investigation? If so, on what date?
6. To the extent that there was a gap between the date that you were first notified and White House officials were first notified, why was there such a delay?
7. Did you discuss the investigation or whether to disclose the investigation with FBI Director Mueller? If so, please provide the date and describe the nature of those discussions.
8. Please provide the names of all individuals outside the Department of Justice and the FBI with whom Department of Justice personnel discussed the investigation before Director Clapper was notified, and the dates of those discussions.
9. Please provide all legal analysis conducted within the Department regarding whether you were obligated by the National Security Act⁵ or other law to report the investigation to any person outside of the Department and the FBI.
10. When did the Department first engage in an analysis of potential obligations to disclose the investigation to persons outside of the DOJ or FBI?

⁴ Scott Shane and Eric Schmitt, Biographer's E-Mails to Woman Led F.B.I. to Petraeus, NY Times (Nov. 10, 2012), available at <http://www.nytimes.com/2012/11/11/us/fbi-said-to-have-stumbled-into-news-of-david-petraeus-affair.html>.

⁵ 50 U.S.C. §413a.

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11. When did the Department of Justice make the decision to notify Obama Administration officials or Congress about the investigation?
12. Has the Department concluded that General Petraeus is not the subject of any criminal or intelligence-related investigation? If so, on what date did it reach that conclusion?
13. Is the Department pursuing an investigation into allegations that Ms. Broadwell was in possession of classified materials and the source of those materials? Is General Petraeus a person of interest or subject of any such investigation?
14. Please provide any other information that would aid the Committee in reconstructing the timeline of the investigation and the decision by the Department and the FBI to delay notifying outside individuals about the investigation.
15. Please make the Department of Justice officials and supervisors with the greatest knowledge of the investigation's timeline and the Department's decision regarding when to disclose the investigation available for interviews on or before December 3, 2012.

I look forward to your prompt reply.

Sincerely,



Lamar Smith
Chairman

cc: The Hon. John Conyers, Jr., Ranking Member

Mr. GOODLATTE. The gentlewoman from Texas has a unanimous consent request?

Ms. JACKSON LEE. I do, Mr. Chairman. I was happy to wait until the end of the session. Are you—

Mr. GOODLATTE. If you would like to do it now, we can. Otherwise, we will go to Mr. Farenthold.

Ms. JACKSON LEE. I will let Mr. Farenthold—

Mr. GOODLATTE. Very well. The Chair recognizes the gentleman from Texas, Mr. Farenthold, for 5 minutes.

Mr. FARENTHOLD. Thank you, Mr. Chairman. I am batting clean-up here, and I would like to express my appreciation for Mr. Hold-

er for sticking with us so long. I have got a big stack of questions, so if you would keep your answers as short as possible, I would appreciate it.

And I think we have covered a lot about the IRS and your investigation. I think Judge Poe did a really, really good job. I am appalled by what happened. I was appalled when the Nixon Administration did it, and I am appalled when it is happening under this Administration. I am a little concerned, you said you had marked Mr. Poe down as not a fan of government. I hope he has his taxes in order.

On the DoJ website, you all say the Department has demonstrated its historic commitment to transparency, and upon taking office, President Obama directed the Department of Justice with a clear presumption in the face of doubt, openness prevails. And on March 19th, you called for greater government transparency in the new era of open government. Yet we had the result of contempt of Congress. You, I think, called Chairman Issa shameless. I would like to offer you the opportunity to just give us the stuff we are asking for and be consistent with that transparency.

Would you please just do it and make it easier for all of us?

Attorney General HOLDER. We have been in good faith negotiations. We went through mediation that the House Republicans, as I remember, did not want to do. We have tried to find ways in which we could share the requested information—

Mr. FARENTHOLD. We need the information, and we want to protect it. But I do have a lot of questions, so I am going to go on.

Let us move onto the Justice Department's action with respect to the Associated Press. Do you think the massive intrusion of freedom of the press could cause an intimidating and chilling effect on whistleblowers and confidential sources? And what do you think of today's New York Times editorial that says these tactics will not scare us or the AP, but they could reveal sources and frighten confidential contacts vital to the coverage of government.

Attorney General HOLDER. Again, I will answer the question, but separate and apart from the ongoing investigation. The Justice Department does not want its actions chill sources, have a negative impact on the news gathering abilities of newspapers, television, stations—

Mr. FARENTHOLD. You would admit it offends you as an American that we are targeting the media in such a broad fashion. Would that be a fair statement?

Attorney General HOLDER. Well, I am not going to, again, comment on an investigation that I am—

Mr. FARENTHOLD. Okay. In a hypothetical situation, we are going to go after and subpoena hundreds of phone records for journalists. I mean, just does that offend you as an American?

Attorney General HOLDER. It would depend on the facts. You would have to know what the facts were and why the actions were taken—

Mr. FARENTHOLD. So you stated earlier that you recused yourself from this because you were questioned about this investigation. So as part of that investigation, are you aware if any of your telephones were tapped or telephone records were subpoenaed? I mean, you were subject to that investigation as well.

Attorney General HOLDER. There were, yes. Some of my telephone records were examined.

Mr. FARENTHOLD. Okay. And other Administrations as well. I guess my question is, it seems to me the media ought to be the last resort. Did they subpoena them, or did you voluntarily turn them over, the phone records?

Attorney General HOLDER. I am not even sure I remember. I think I probably voluntarily turned them over? I voluntarily turned them over.

Mr. FARENTHOLD. All right. There is a difference obviously then between subpoena.

All right. And let us go to Benghazi for a second. Gregory Hicks, the former Chief of Mission in Libya, testified before the Government Oversight and Reform Committee that as a result of the appearance of Susan Rice on various talk shows, that the President of Libya was offended and delayed the FBI's access to the consulate in Benghazi by 17 days. Do you think this would have a negative effect on the FBI's investigation and ability to get to the bottom of what happened in Benghazi?

Attorney General HOLDER. I am satisfied with the progress that we have made in the investigation regardless of what happened previously. We have made very, very, very—

Mr. FARENTHOLD. But not having access to an unsecured crime scene for 17 days, that is bound to have had a negative impact?

Attorney General HOLDER. It has not had a negative impact on this investigation.

Mr. FARENTHOLD. All right. There was a story today that Media Matters issued a defense of the Justice Department's use of these subpoenas for telephone—are you all regularly still consulting with Media Matters for spinning your PR stories? We talked about that in an Oversight and Government Reform hearing last year.

Attorney General HOLDER. I'm not sure I know what you're talking about.

Mr. FARENTHOLD. All right. And then, finally, I see I am out of time. I don't want to break the rules. So thank you very much.

Mr. ISSA. Mr. Chairman? Mr. Chairman?

Mr. GOODLATTE. Oh, yes?

Mr. ISSA. If I could just place, because of what the Attorney General said, in the record House Republicans did not object to mediation. The Attorney General's, the Government's position was that the judge did not have—and still position is did not have the ability to adjudicate this dispute at all, and we said it was premature to talk about settlement as to the actual document request until she made a determination that she would and could decide.

Mr. CONYERS. Mr. Chairman?

Mr. ISSA. And that remains the House—

Mr. CONYERS. Could we have regular order? We are short of time now. With all due respect to the distinguished Chairman.

Mr. ISSA. I just think that a case under—that affects the House and its ability to do its business needed to be properly defined.

I thank the Chairman.

Mr. GOODLATTE. I think that is now part of the record, and both gentlemen's points are well taken.

Attorney General HOLDER. Well, let me just say this. There was information that I just shared, but I perhaps should not have. This was apparently something that the judge shared. Well, all right. Let me just stop there.

Mr. GOODLATTE. The Chair now recognizes the gentleman from North Carolina, Mr. Holding, for 5 minutes.

Mr. HOLDING. General Holder, it is good to see you. During my tenure in the United States attorney's office, I served with four Attorney Generals, including yourself, and during the 2 years that our service overlapped, I always felt you were very supportive to our mission in North Carolina and to the law enforcement community.

I was somewhat surprised, taking you back about 2½ hours ago, you mentioned that you spoke to the chief district judges here in Washington, and you gave a speech. And in your comments, you criticized the length of Federal prison sentences that were being handed out in some instances. And although I don't have a text of the speech, maybe you could provide that text.

I did see that in April, you made similar remarks to the National Action Network. Specifically, you stated that too many people will go to too many prisons for far too long for no good law enforcement reason and that sentences too often bear no relation to the conduct at issue, breed disrespect for the system, and are ultimately counterproductive.

Now, candidly, I would expect to hear those remarks more from maybe the chief Federal public defender rather than the chief Federal law enforcement officer. And for the thousands of cases that went through the Eastern District of North Carolina when I was there, I can think of none that got a prison sentence that was too long.

So if you could elaborate just a bit on which criminals are you referring to that are getting too long of a prison sentence in the Federal system?

Attorney General HOLDER. Yes, I view my responsibility as larger than simply being the chief prosecutor. It seems to me that an Attorney General—and not just me, the office of the Attorney General has a responsibility to the system.

And the observations or the comments that I made in that National Action Network speech, I don't—with regard to the judges, I don't have a text. That was extemporaneous. Are what I feel, that if you look at particularly people who got sentenced to long prison sentences in drug cases that are more a function of the weight that was involved in a drug case, as opposed to that person's role in the drug scheme.

I think Judge Gleason is his name, in New York, has made the same observation, and I think that, you know, these mandatory minimum sentences that we—that we see, particularly in drugs, particularly when it comes to drugs, I think are unnecessarily long and don't actually go to the purposes of sentencing, that is deterrence and rehabilitation.

Mr. HOLDING. But General Holder, you know as well as I do that by the time a defendant ends up in Federal court, they usually have been through the State process numerous times.

Attorney General HOLDER. Well, that's not always the case.

Mr. HOLDING. It's predominantly the case that they will have been through the State system numerous times. And I think particularly in light of prosecuting felons in possession of a firearm. In the Eastern District of North Carolina in 2002, we prosecuted approximately 50 of those cases. We ramped them up to about 300 a year and consistently did 300 a year, average prison sentences of approximately 10 years.

These are cases which you can do in large numbers and have significant impact not only with prison sentences, but with deterrent value as well. And I am concerned that the Department of Justice under this Administration has slacked off on making that a priority, of prosecuting felons in possession of firearms.

And I am concerned that the numbers are falling, and I know that this Committee has asked to get specific numbers of 922, 924 cases, and I don't understand why it is taking so long to get them. Because unless you have changed the software in the last 20 months since I was a sitting U.S. attorney, you can have those statistics in a matter of minutes by culling them through the line system.

So are the numbers falling, and will you please produce the numbers to the Committee as soon as you can?

Attorney General HOLDER. We'll provide you with those numbers, but there has not been a policy decision to deemphasize those cases. I actually think that when it comes to the use of mandatory minimums that felon in possession cases, that's actually a place where mandatory minimums are appropriate.

Mr. HOLDING. Are the priorities—prosecution priorities of the Department of Justice under review right now?

Attorney General HOLDER. With regard to the gun cases?

Mr. HOLDING. All the priorities of prosecutions in the Department of Justice, are the U.S. attorneys putting those under review right now through the AGAC?

Attorney General HOLDER. Yes, I have a working group working with the AGAC to look at our prosecution priorities, yes.

Mr. HOLDING. And will you keep the Committee apprised of what you determine that the priorities ought to be at the Department of Justice for prosecution?

Attorney General HOLDER. I'd be more than glad to have a dialogue with the Committee in that regard.

Mr. HOLDING. Thank you.

I yield back.

Mr. GOODLATTE. The Chair thanks the gentleman and recognizes the gentleman from Georgia, Mr. Collins, for 5 minutes.

Mr. COLLINS. Thank you, Mr. Chairman.

I appreciate you being here, Mr. Attorney General. It is the first time you and I have had a chance to talk. I have listened here. One of the advantages of being on the bottom row here, you get to hear everybody else ask questions and also hear your answers.

And I think your answers today to me have been enlightening in some ways and very discouraging in others. And I think some of it is you have said on several times, and I will go back to some of your statements today.

You made a quote when you were quoting I believe then-President Clinton, talking about the era of big government is over and

a good government will endure. I think the problem that I have here is that I agree with you. Good government should be a limited form of government.

And I think what we have seen over the past week or so has really shook the foundations again of discussing this issue of limited government. When we understand this, and especially in your agency right now, as we look at this, you have said on a couple of occasions. I marked it down. You may have said it more, if you did. So you started about the role of the executive.

That is the role of the executive. That is what we are supposed to be doing. Is that a fair statement that you said that on several times today?

Attorney General HOLDER. Yes, I said that, but I think I was saying that in reference to who in the Government ought to be deciding matters—

Mr. COLLINS. I understand. It is the role of the executive. Correct? But there is a role for Congress. Correct?

Attorney General HOLDER. Absolutely.

Mr. COLLINS. And that is why you are here today.

Attorney General HOLDER. Absolutely.

Mr. COLLINS. Because this Committee has oversight over your department. Correct?

Attorney General HOLDER. I didn't show up here because I really wanted to.

Mr. COLLINS. Well, that has been— [Laughter.]

And that has been painfully obvious in some of the ways you have answered some of the questions. So, I mean, as we come by here, the problem is, though, is that is the checks and balances.

Attorney General HOLDER. Absolutely.

Mr. COLLINS. Sure it is. That you come here, you answer questions, and we are the constitutional oversight, to have oversight, budgetary control and oversight of what goes on and ask these questions. And these are not asking questions from up here—at least from my perspective, as I have made comment before. The people of north Georgia in the Ninth District in which I am from, many times they just want the truth.

And they are frustrated right now that they don't get the truth, and they keep hearing other issues that come up on threatening to them and the very sanctity of what they believe, whether it be the IRS or the issues with the reporters or a litany of issues we have talked about today.

The question that I have is this being the Committee in which is oversight that you need—that you come to, and this will be maybe the first but probably not the only time we will talk in this capacity, is it concerns me the lack of preparation or at least perceived lack of preparation which you come here today.

And Ms. Lofgren from across the aisle made a statement about did you put it in writing? And we have had this discussion about your recusal, and your answer to that was that "I don't think I put it in writing. I am not sure."

Did you not think those questions were going to be asked of you today? That when you recused yourself from this, when you were actually—did you just honestly think those would not be asked today?

Attorney General HOLDER. I didn't think about whether or not you were going to ask me that question at—one way or the other, but I wanted to—

Mr. COLLINS. You are kidding me? You come to this Committee today with these issues like they are right now—

Attorney General HOLDER. Would you let me finish, Congressman? What I said—what I was going to say was that I asked my own people whether or not—

Mr. COLLINS. Mr. Attorney General? Mr. Attorney General, I reclaim my time for just a second.

Attorney General HOLDER [continuing]. There was a written—

Mr. CONYERS. Mr. Chairman?

Mr. RICHMOND. Mr. Chairman, can you state your ruling again on who controls the time?

Mr. GOODLATTE. The time is controlled by the gentleman from Georgia.

Attorney General HOLDER. He can have extra time. Let me just answer the question.

Mr. COLLINS. Mr. Attorney General, you don't control the time here.

Attorney General HOLDER. I'm willing to give—okay. That's fine.

Mr. COLLINS. My question is this. As I come back to this, did you not honestly—

Mr. CONYERS. Mr. Chairman, could the witness have a chance—

Mr. GOODLATTE. The witness will have a full opportunity to respond, but the gentleman from Georgia has the opportunity first to ask his question.

Mr. RICHMOND. Mr. Chairman, just to make a point. The Attorney General stayed here extra time to make sure that everyone had a chance to ask their question. Considering the fact that he is still here past his time, why can't he answer the question that is posed to him?

Mr. GOODLATTE. He will get an opportunity to answer the question just as soon as Mr. Collins finishes posing his question, and we will give him extra time after Mr. Collins' time has expired, just as we have done for the Attorney General on several occasions.

Ms. JACKSON LEE. Mr. Chairman, may I just a moment? I would appreciate it. I know that some of us have deep bass-like voices, might sound that we are not being friendly and happy. But I would appreciate a little civility in the questioning of the Attorney General as we proceed to the conclusion.

I yield back.

Mr. GOODLATTE. The gentleman from Georgia may proceed.

Mr. COLLINS. I thank you, Mr. Chairman.

And I will pose it. I just have just a simple question. It was amazing to me that the question was did you not think that you would be asked about maybe the timeline on when you might have recused yourself because you also said at one point you recused yourself before subpoenas. Or there was some question even in your own dialogue about when you actually did this.

So I am just asking a simple question, as the others on the other side, they got to ask their questions. I am now asking mine. Did

you not think that someone on this panel would have asked you those questions?

Attorney General HOLDER. I did not know whether anybody would ask me that question. But irrespective of that, I thought that was an important factor, an important fact, and it was one of the reasons why I asked my staff to find out, irrespective of what was going to happen up here today, whether or not there was in writing a recusal.

I asked that question myself, thinking that it was an important question. I did not know. I don't know what you all are going to ask me. So that's why I was saying I didn't know whether or not you were going to ask the question.

But I thought it was an important one and one that I put to my staff.

Mr. COLLINS. In light of the impartation of my time, I do have one question on that regard. Have you recused yourself—in using your recusal, have you put that in writing before?

Attorney General HOLDER. I'm not sure about that. In Mr. Holding's case, the Edwards case, I recused myself in that matter. I've recused myself in other cases because my law firm, my former law firm was involved in those cases.

I'm not sure that those are in writing, but I do think, as has been raised—I don't remember what congressman—that putting these things in writing would—I think might be the better practice.

Mr. COLLINS. Mr. Attorney General, I appreciate your answers to the question. And this is an issue that needs to be dealt with. It is just amazing, again, as you have stated, there is a role of the executive. And there is a role of—

Mr. RICHMOND. Mr. Chairman, point of order. Is that light red right there?

Mr. GOODLATTE. The gentleman's time was interrupted considerably by a debate over whether or not he was entitled to ask his question. So he can complete this question, and the Attorney General can answer it.

Mr. COLLINS. And I did not interrupt the gentleman from Louisiana in his questions. So I would just appreciate the opportunity to close, and the opportunity to close is I appreciate your answers. We are going to ask more of these questions, and these are the roles that we both, in your role and our role, play.

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

Attorney General HOLDER. Well, that's fine. And look, I respect the oversight role that Congress plays. This isn't always a pleasant experience. It's one that I recognize that you go through as an executive branch officer.

The one thing I've tried to do is always be respectful of the people who've asked me questions. I don't, frankly, think I've always been treated with a great deal of respect, and it's not even a personal thing. If you don't like me, that's one thing. But I am the Attorney General of the United States, and this is the first time you and I have met. So I'm certainly not referring to you or any of the questions you've just asked.

But I think that is something that is emblematic of the problem that we have in Washington nowadays. There's almost a toxic partisan atmosphere here where basic role—levels of civility simply

don't exist. We can have really serious partisan fights, disagreements about a whole variety of things, but I think people should have the ability, especially in this context, to treat one another with respect.

I've tried to do that. Maybe I've not always been successful, but I certainly know that I have not been treated in that way all the time.

Mr. GOODLATTE. The time of the gentleman has expired. The Chair recognizes the gentleman from Florida, Mr. DeSantis, for 5 minutes.

Mr. DESANTIS. Thank you, Mr. Chairman.

Mr. Attorney General, I am going to talk about credibility and accountability because I think this is kind of something that is underneath all of these issues we have been dealing with. And as I understand your testimony today with this AP case, something that bothers me is that by your own admission, this is one of the most serious leak cases in the past 40 years.

Your comments yesterday, you said it put the American people at risk. And yet, as you testified today, you don't know when you recused yourself. You have no record of you recusing yourself, and you didn't tell the White House that you recused yourself.

And that bothers me because that explanation, one, I think is insufficient and, two, it insulates you and it insulates the President from any accountability about what happened. So is this really the best you can do in terms of explaining what you did for one of the most serious cases that you have ever seen in your professional life?

Attorney General HOLDER. As I said, with regard to the question of how recusals are memorialized, I think a written response would make a great deal of sense. But the notion that I would share with the White House information about an ongoing criminal investigation is simply not something that I, as Attorney General, unless there is some kind of national security—serious, serious national—

Mr. DESANTIS. Which there was. By your own admission, it put the American people at risk. Correct?

Attorney General HOLDER. But we are talking about a limited group of people who had access to this information, some of whom were in the White House. And so, the notion that I would share that information with the White House, I didn't share this information with people in the Justice Department. I mean, it was—

Mr. DESANTIS. But the people in the Justice Department, with all due respect, are not responsible for protecting the American people. The President is. So we just have a disagreement on that. Now in terms of—

Attorney General HOLDER. No, the Justice Department, we are responsible for protecting the American people.

Mr. DESANTIS. The buck stops with the President in terms of a serious risk to the American people. I understand they have duties to enforce the law. They are important duties. But ultimately, the President is who we rely on.

Now in terms of with this Internal Revenue Service issue. Do you agree—I mean, you are the head lawyer in the entire country and your office, you are, due respect for your office. Do you acknowledge

that the IRS is a part of the Treasury Department, and it is accountable to the President and that it is not an independent agency?

Attorney General HOLDER. Technically, I don't know. I've heard that it's an independent agency. There is some kind of reporting responsibility within Treasury. Exactly how that is defined, I don't know.

Mr. DESANTIS. You have been in law for 40 years. You're one of the most accomplished in terms of the positions you have had, and you don't know whether the IRS is a part of Treasury, whether the IRS Commissioner is responsible to the President, or whether it is considered an independent agency? You really don't know the difference between those?

Attorney General HOLDER. I didn't say that. I said the IRS, as I understand it, is a part of the Treasury Department. The IRS Commissioner is independent, but is appointed by the President to a fixed term.

Mr. DESANTIS. And can be removed at the will of the President, correct, per Federal statutes?

Attorney General HOLDER. All executive branch employees can be removed by the President.

Mr. DESANTIS. Okay. So then it is not an independent agency, right? Is it—can we just understand what it is?

Attorney General HOLDER. I'm not sure where you're going with this question. If you're trying to put what the IRS did into the White House, that's not going to work.

Mr. DESANTIS. No, is it an independent agency? Yes or no.

Attorney General HOLDER. It is an independent agency that operates within the executive branch.

Mr. DESANTIS. Well, that is completely begging the question. See, the President and his press secretary have said—

Attorney General HOLDER. No, that's an accurate answer.

Mr. DESANTIS [continuing]. That it is an independent agency, that it is outside the purview of the executive branch. And my point is, yes, maybe the President is not micromanaging every decision, but that IRS Commissioner is accountable to the President, and the President can remove that individual.

If the agency was truly independent, then the President would not have that authority to remove that individual. And so, I think we need to be clear when we are making statements, and you haven't made that statement before today. But the White House press secretary and the President did, and I just don't think it was accurate.

One more thing, with these Benghazi—

Attorney General HOLDER. Was there a question? Do you have a question? Okay. I'm sorry. Go ahead.

Mr. DESANTIS. With Benghazi terrorists, I know nobody has really been brought to justice for this. I know the FBI was over there investigating. At this point in time, is this your purview to bring those people to justice, or is it a military issue? Who is in charge of exacting justice for the terrorists who killed four Americans?

Attorney General HOLDER. It's my responsibility. It's ultimately, I think, my responsibility. And I mean, it's now, what, 5—7 minutes after 5 p.m. on whatever today's date is. And as of this date,

this time, I am confident and proud of the work that we have done in determining who was responsible for the killings in Benghazi.

Mr. DESANTIS. But there has not been any action taken to bring them to justice?

Attorney General HOLDER. None that I can talk about right now.

Mr. DESANTIS. Okay. Very well.

Thank you, Mr. Attorney General.

Mr. Chairman, I yield back the balance of my time.

Attorney General HOLDER. Let me just say that in response, add to that last response, that because I'm not able to talk about it now does not mean that definitive, concrete action has not been taken. That should not be read that way.

We have been aggressive. We have been—we have moved as quickly as we can, and we are in a good position with regard to that investigation.

Mr. DESANTIS. Could I just—5 seconds to follow up, Mr. Chairman?

Mr. GOODLATTE. The time of the gentleman has expired.

Attorney General HOLDER. That is okay. That is okay.

Mr. GOODLATTE. The Attorney General is going to give you 5 seconds.

Mr. DESANTIS. Can you say whether the concrete action—

Attorney General HOLDER. He has to call me “Mr. Chairman,” though.

Mr. DESANTIS. Can you say whether the concrete action is law enforcement based or in terms of military based being a kinetic response?

Attorney General HOLDER. I can say that within the purview of the things that we do in the Justice Department, definitive action has been taken.

Mr. GOODLATTE. Now the time of the gentleman has expired, and the Chair recognizes the gentlewoman from Texas for her unanimous consent request.

Ms. JACKSON LEE. Mr. Chairman, thank you for your courtesies. I am glad we are ending on a smiling note.

I have three documents. My first document is AA—this is the title of it. AAG Perez Restores Integrity to the Voting Section. OIG Confirms Nonpartisan. Merit-Based Hiring Has Returned under AAG Tom Perez.

I would ask unanimous consent to put that in the record.

Mr. GOODLATTE. Without objection.

[The information referred to follows:]

AAG Perez Restores Integrity to Voting Section of the Civil Rights Division

OIG Confirms Non-Partisan Merit-Based Hiring Has Returned Under AAG Tom Perez

Allegation: The OIG investigated the hiring practices of the Voting Section since 2009 after allegations were made that the department had engaged in improper hiring practices akin to the illegal and improper hiring practices that the OIG and OPR found took place from 2003-2006.

- **OIG FINDING:** "Our review of thousands of internal CRT documents, including e-mails, hand-written notes, and interviews of CRT staff who participated in the selection of the Voting Section's experienced attorneys did not reveal that CRT staff allowed political or ideological bias to influence their hiring decisions." (OIG Report at 214 – emphasis added)

OIG rejects allegations of bias or partisan preferential treatment in response to FOIA requests

Allegation: At the request of Congressman Frank Wolf, the OIG investigated whether "the political or ideological position of the requester may have influence the timing and nature of the Civil Rights Division's responses to requests for records from the public." (OIG Report at 223)

- **OIG FINDING:** "Our review did not find any substantiation of ideological favoritism or political interference in such responses." (OIG Report at 249 – emphasis added)

OIG Confirms No Improper Racial or Political Considerations in Voting Rights Enforcement

Allegation: The OIG investigated allegations that the Voting Section of the Civil Rights Division made enforcement decisions based on improper partisan or racial considerations.

- **OIG FINDING:** "[T]he decisions that Division or Section leadership made in controversial cases did not substantiate claims of political or racial bias.... We also found that allegations of politicized decision-making in Section 5 decisions were not substantiated." (OIG Report at 114)

Allegation: The OIG investigated allegations that the Division enforced the NVRA in a partisan manner.

- **OIG FINDING:** "Although we found that current Division leadership has a clear priority structure for NVRA enforcement, we found insufficient evidence to conclude that they enforced the NVRA in a discriminatory manner. We found no direct evidence, such as e-mails, indicating or implying a racial or partisan motive for such prioritization.... It was within the discretion of senior management to prioritize enforcement efforts, particularly based on what appeared to be genuinely held perceptions about the need to redress previous enforcement imbalances." (OIG Report at 107)

OIG Confirms Civil Rights Division Has Taken Action to Foster a More Collegial Workplace

Allegation: The OIG investigated incidents of harassment of Voting Section staff based on perceived political affiliation. The vast majority of the incidents occurred between 2004 - 2007. The Division has taken a number of strong steps to implement and reinforce policies to prevent future incidents.

- **OIG FINDING:** "[I]n direct response to complaints about harassment in the Voting Section Division leadership began the process for developing a mandatory Division-wide anti-harassment training program... additional steps taken by Division leadership under the current administration to prevent inappropriate or harassing conduct, include[e] providing annual EEO and anti-harassment training to all employees and managers; issuing EEO, prohibited personnel practice and anti-harassment policies that are available to all employees on the CRT intranet and that set forth the various procedures for reporting misconduct." (OIG Report at 133)

A Record of Accomplishment, 2009-2012

- \$660 million** The monetary relief the Division has obtained in lending settlements since the beginning of this Administration, including the three largest residential lending discrimination settlements in the Justice Department's history.
- \$4+ million** The monetary relief obtained in the two largest settlements ever reached by the Department in sexual harassment suits filed under the Fair Housing Act.
- 8,500** The number of English Language Learner students in Boston who were offered the language instruction they need for the first time under an agreement the Division and the Department of Education reached in 2010.
- \$128 million** The Justice Department's largest-ever damages award in an employment discrimination case. The Division challenged discriminatory hiring practices in the New York Fire Department, winning monetary damages and 293 jobs for people who applied to work as firefighters and experienced discrimination because of their race or national origin.
- 44** The number of matters in which the Division has participated across 23 states to ensure that people with disabilities have the opportunity to live and thrive in their communities, as they are entitled to under federal law.
- 5,000** The number of individuals with disabilities who will gain access to such opportunities under a single agreement the Division reached with the State of Virginia in 2012.
- \$16 million** The largest monetary settlement the Division has ever secured to enforce the Americans with Disabilities Act. Reached in 2011, the settlement requires 10,000 bank and financial-related retail offices to ensure access for people with hearing or speech disabilities.
- 46** The number of cases the Division filed to protect the employment rights of servicemembers since 2009, a 44% increase over the previous four years.
- 141** The number of defendants the Division convicted on federal hate crimes charges over the past four fiscal years, a 74% increase over the previous four years.
- 194** The number of human trafficking cases the Division and U.S. Attorneys' Offices have brought over the past four fiscal years — a 40% increase over the previous four years — including a record 55 cases in 2012 alone.
- 43** The number of new voting cases the Division handled in fiscal year 2012 — almost twice as many as in any other year.
- 13** The number of objections to voting practices and procedures interposed by the Division in fiscal year 2012, pursuant to our administrative authority under Section 5 of the Voting Rights Act. The Division also litigated four cases to oppose voting changes filed for judicial review in the D.C. District Court.
- 89** The number of amicus briefs the Division's Appellate Section filed under this Administration, a more than 50% increase.
- 9** The number of civil lawsuits the Division brought to enforce the Freedom of Access to Clinic Entrances Act, as opposed to one such suit during the previous eight years.

Mr. ISSA. I would reserve. We haven't seen these documents. Can the gentlelady make the documents available?

Ms. JACKSON LEE. I certainly will.

The second document is Loving All Our Neighbors, Even Our Muslim Ones. The title is, "Don't be so lazy to assume that the words of a group represents the entire group. They hardly ever do. Perhaps a better idea is to meet them, learn about them, and treat them as your neighbor." This is in USA Today, and the date is April 23, 2013.

I ask unanimous consent to place in the record.

Mr. GOODLATTE. Without objection, so ordered.
[The information referred to follows:]

Loving all our neighbors, even our Muslim ones: Column

Page 1 of 1

Loving all our neighbors, even our Muslim ones: Column

Ed Stetzer 4:55 p.m. EDT April 23, 2013

Don't be so lazy to assume that the worst of a group represents the entire group. They hardly ever do. Perhaps a better idea is to meet them, learn about them and treat them as your neighbor.



(Photo: John A. Gilis, The Marlhesboro, Tenn. Daily News Journal)

For many Americans, their knowledge of Muslims is what they see on television news rather than what they know from experience. Yet, forming your view of any group based solely on what you see on the news is a bad idea.

When the Boston Marathon bombing occurred, many Americans were quick to assume it was the work of Muslim extremists, even before it was confirmed. The connection of terrorism to radicalized Islam is no secret. Yet, far too many take it further, leading me to ask, why do some people assume that all, most, or even many Muslims must be terrorists? Why is so much hate directed at Muslims today -- the vast majority of whom are peaceful people and, when living here, love their country?

Simply put, too many people make decisions about a group based on what they see on television news -- and that's a bad place to make sweeping conclusions.

For example, a couple of years ago my young daughter was watching a television news report about a black man charged with a crime -- one of two reports that night. "I don't want to be a racist, but why are so many black people arrested?" she asked. She was contrasting the African Americans she saw on the news with several of our neighbors, who she plays with in our cul-de-sac, who are African-American.

The reports of disproportionate number of young black men being arrested is not what she knows from her own experience and, she now knows after our conversation, it is not representative of the vast majority of African Americans. We widely recognize that people who don't understand this are intellectually lazy.

I am neither a Muslim nor African American, so here is another example that is closer to home, though it is hardly on the same level.

Watching the evening news, you might conclude that evangelicals are hate-filled bigots constantly making vitriolic statements and saying crazy things about hurricanes being caused by immorality. Why? Because, evangelicals are often depicted in news reports as angry people who say crazy things. Often, neither the journalists nor those who read or hear their reports know many evangelicals personally. As such, they connect with what they see on television, rather than reality. That, too, is intellectually lazy.

The same is true of Muslims, Hispanics, Mormons, homosexuals, union members, and any group of people with whom we are not personally familiar. Our lack of personal knowledge and experience, coupled with our unwillingness to learn more, leads us to jump to conclusions that are, more often than not, wrong. We believe it is true because we have seen it on television or read it on the Internet.

On the day before the Tsarnaev brothers were identified as Chechen Muslims, I drove by my Muslim neighbor's home on the way out of our neighborhood. His trash can had spilled into the street, so I stopped, picked everything up and put it back on his curb. Why? Because I know him. He is my neighbor. Because our kids play together. And he more realistically represents his religion to me than terrorists do. And my African American neighbors also better represent African Americans than news reports. And, I pray, I am a better representative of my faith than some of the nuts in the news.

As an evangelical leader and researcher, I have no vested interest in -- and receive no personal benefit from -- speaking out for my Muslim neighbors and friends. Yet, while it is irresponsible not to see the link between radical Islam and terrorism, it is the height of ignorance to assume that all (or most, or even many) Muslims are terrorists.

Don't be so lazy to assume that the worst of a group represents the entire group. They hardly ever do. Perhaps a better idea is to meet them, learn about them and treat them as your neighbor.

Ed Stetzer is president of LifeWay Research.

In addition to its own editorials, USA TODAY publishes diverse opinions from outside writers, including our Board of Contributors.

<http://www.usatoday.com/story/opinion/2013/04/26/islam-boston-terrorism-column/2107447/>

5/15/2013

Ms. JACKSON LEE. And I am asking to place in the record a statement on Medicare prosecutions as relates to minority hospitals and separating out monies that are not tainted by the investigation to allow those hospitals to treat indigent minority patients.

I ask unanimous consent.

Mr. GOODLATTE. Without objection, that will be made a part of the record.

[The information referred to follows:]

- *Mr. Attorney General, you have characterized the information given to the AP, "a very, very serious leak ... among the most serious" you have in your 37-year career. Could you explain what you meant when you said "it put the American people at risk"?*

ASSOCIATED PRESS STORY

Mr. Attorney General, you mentioned at your news conference yesterday that you were certain that DOJ investigators had followed appropriate Department of Justice rules and regulations in their probe, which I note has raised concerns about the freedom of the press. Can you please elaborate on this probe.

[The AG had recused himself from the matter out of an "abundance of caution."]

MEDICARE PROSECUTIONS/FRAUD RIVERSIDE HOSPITAL

1. The cost and time required to run modern health care institutions can be enormous and many doctors will tell that they need not only an in-house accountant but a lawyer as well. I want to be on the record Has there been an increased focus on prosecuting alleged Medicare fraud in hospitals and other health care institutions that serve predominantly poor communities?

BOSTON BOMBING

Did the response in Boston suffer from a lack of communication?

IRS 501(C)(4) AND POLITICAL TARGETING

1. You noted in your press conference yesterday that the Justice Department has opened a criminal probe of the Internal Revenue

- 3 -

Ms. JACKSON LEE. I thank the gentleman for his courtesies, and I am smiling. Thank you very much.

Mr. GOODLATTE. The gentleman from California had reserved the right to object to the first request. So we are awaiting the gentleman's question and whether he is exercising his right to object.

Mr. ISSA. Yes, this is not public information, nor is it annotated. I would—I have no problem with the other two.

Mr. GOODLATTE. Well, the gentleman exercises his right to object to your—

Ms. JACKSON LEE. Can I have an inquiry further for the individual? What is he indicating that it is not public information? The OIG report, as I understand it, is a public document.

Mr. ISSA. Yes, and certainly if you want to put actual portions of the OIG report in, that is fine. The record of accomplishments, which is the second page here, as the gentlelady would understand, if the gentlelady wants to put in things about how great Thomas Perez is, we are perfectly willing to say yes. And if the gentleman doesn't mind, my putting in the entire report on his quid pro quo, his false statements made to Congress, and the other companion information which is the fruit of Committee work.

Mr. GOODLATTE. Is that a unanimous consent request?

Mr. ISSA. It is.

Ms. JACKSON LEE. Then——

Mr. GOODLATTE. Without objection, the gentlewoman's unanimous consent request will be granted.*

And without objection, the gentleman from California's unanimous consent request will be——

[The information referred to follows:]

*See page 116.

House Committee on Oversight and Government Reform

Darrell Issa (CA-49), Chairman

Patrick McHenry (NC-10)

Senate Committee on the Judiciary

Charles E. Grassley (IA), Ranking Member

House Committee on the Judiciary

Bob Goodlatte (VA-6), Chairman



**DOJ'S *QUID PRO QUO* WITH ST. PAUL:
HOW ASSISTANT ATTORNEY GENERAL THOMAS PEREZ MANIPULATED
JUSTICE AND IGNORED THE RULE OF LAW**

Joint Staff Report
United States Congress
113th Congress
April 15, 2013

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Executive Summary

In early February 2012, Assistant Attorney General Thomas E. Perez made a secret deal behind closed doors with St. Paul, Minnesota, Mayor Christopher Coleman and St. Paul's outside counsel, David Lillehaug. Perez agreed to commit the Department of Justice to declining intervention in a False Claims Act *qui tam* complaint filed by whistleblower Fredrick Newell against the City of St. Paul, as well as a second *qui tam* complaint pending against the City, in exchange for the City's commitment to withdraw its appeal in *Magner v. Gallagher* from the Supreme Court, an appeal involving the validity of disparate impact claims under the Fair Housing Act. Perez sought, facilitated, and consummated this deal because he feared that the Court would find disparate impact unsupported by the text of the Fair Housing Act. Calling disparate impact theory the "lynchpin" of civil rights enforcement, Perez simply could not allow the Court to rule. Perez sought leverage to stop the City from pressing its appeal. His search led him to David Lillehaug and then to Newell's lawsuit against the City.

Fredrick Newell, a minister and small-business owner in St. Paul, had spent almost a decade working to improve economic opportunities for low-income residents in his community. In 2009, Newell filed a whistleblower lawsuit alleging that the City of St. Paul had received tens of millions of dollars of community development funds, including stimulus funding, by improperly certifying its compliance with federal law. By November 2011, Newell had spent over two years discussing his case with career attorneys in the Department of Housing and Urban Development, the U.S. Attorney's Office in Minnesota, and the Civil Fraud Section within the Justice Department's Civil Division. These three entities, which had each invested a substantial amount of time and resources into Newell's case, regarded this as a strong case potentially worth as much as \$200 million for taxpayers and recommended that the federal government join the suit. These career attorneys even went so far as to prepare a formal memorandum recommending intervention, calling St. Paul's actions a "particularly egregious example of false certifications."

All this work was for naught. In late November 2011, Lillehaug made Perez aware of Newell's pending case against the City and the possibility that the Justice Department may intervene. A trade was proposed: non-intervention in Newell's case for the withdrawal of *Magner*. Perez contacted HUD General Counsel Helen Kanovsky and asked her to reconsider HUD's support for intervention in Newell's case. Perez also spoke to then-Civil Division Assistant Attorney General Tony West and B. Todd Jones, the U.S. Attorney for the District of Minnesota, alerting them to his new interest in Newell's case. The withdrawal of HUD's support for Newell's case led to an erosion of support in the Civil Division, a process that was actively managed by Perez.

In January 2012, Perez began leading negotiations with Lillehaug, offering him a "roadmap" to a global settlement. Once negotiations appeared to break down, Perez boarded a plane and flew to Minnesota to meet face-to-face with Mayor Coleman. At that early February meeting, Perez pleaded for the fate of disparate impact and reiterated the Justice Department's willingness to strike a deal. His lobbying paid off when Lillehaug accepted the deal on Mayor

Coleman's behalf. The next week, the Civil Division declined to intervene in Newell's case and the City withdrew its *Magner* appeal. The *quid pro quo* had been accomplished.

Still, Perez and several of his colleagues at the Justice Department are unwilling to acknowledge that the *quid pro quo* occurred despite clear and convincing evidence to the contrary. The Administration maintains that although career attorneys in the Department of Justice recommended intervention in Newell's case – and, in fact, characterized the False Claims Act infractions reported by Newell as “particularly egregious” – the case was nonetheless quite weak and never should have been a serious candidate for intervention. The Administration maintains that the United States gave up nothing to secure the withdrawal of *Magner*. Left unexplained by the Administration is why the City of St. Paul would ever agree to withdraw a Supreme Court appeal it believed it would win if the City knew the Department would not intervene in Newell's case. Dozens of documents referring to the “deal,” “settlement,” and “exchange” between the City of St. Paul and DOJ show that the Administration's narrative is not believable.

There is much more to the story of how Assistant Attorney General Perez manipulated the rule of law and pushed the limits of justice to make this deal happen. In his fervor to protect disparate impact, Perez attempted to cover up the true reasons behind the Justice Department's decision to decline Fredrick Newell's case by asking career attorneys to obfuscate the presence of *Magner* as a factor in the declination decision and by refraining from a written agreement. In his zeal to get the City to agree, Perez offered to provide HUD's assistance to the City in moving to dismiss Newell's whistleblower complaint. The facts surrounding this *quid pro quo* show that Perez may have exceeded the scope of the ethics and professional responsibility opinions he received from the Department and thereby violated his duties of loyalty and confidentiality to the United States. Perez also misled senior Justice Department officials about the *quid pro quo* when he misinformed then-Associate Attorney General Thomas Perrelli about the reasons for *Magner*'s withdrawal.

The *quid pro quo* between the Department of Justice and the City of St. Paul, Minnesota, is largely the result of the machinations of one man: Assistant Attorney General Thomas Perez. Yet the consequences of his actions will negatively affect not only Fredrick Newell and the low-income residents of St. Paul who he championed. The effects of this *quid pro quo* will be felt by future whistleblowers who act courageously, and often at great personal risk, to fight fraud and identify waste on behalf of federal taxpayers. The effects of withdrawing *Magner* will be felt by the minority tenants in St. Paul who, due to the case's challenge to the City's housing code, continue to live with rampant rodent infestations and inadequate plumbing. The effects of sacrificing Newell's case will cost American taxpayers the opportunity to recover up to \$200 million and allow St. Paul's misdeeds to go unpunished. Far more troubling, however, is the fundamental damage that this *quid pro quo* has done to the rule of law in the United States and to the reputation of the Department of Justice as a fair and impartial arbiter of justice.

Findings

- The Department of Justice entered into a *quid pro quo* arrangement with the City of St. Paul, Minnesota, in which the Department agreed to decline intervention in *United States ex rel. Newell v. City of St. Paul* and *United States ex rel. Ellis v. City of St. Paul et al.* in exchange for the City withdrawing *Magner v. Gallagher* from the Supreme Court.
- The *quid pro quo* was a direct result of Assistant Attorney General Perez’s successful efforts to pressure the Department of Housing and Urban Development, the U.S. Attorney’s Office in Minnesota, and the Civil Division within the Department of Justice to reconsider their support for *Newell* in the context of the proposal to withdraw *Magner*.
- The initial development of the *quid pro quo* by senior political appointees, and the subsequent 180 degree change of position, confused and frustrated the career Department of Justice attorneys responsible for enforcing the False Claims Act, who described the situation as “weirdness,” “ridiculous,” and a case of “cover your head ping pong.”
- The reasons given by the Department of Housing and Urban Development for recommending declination in *Newell* are unsupported by documentary evidence and instead appear to be pretextual post-hoc rationalizations for a purely political decision.
- The “consensus” of the federal government to switch its recommendation and decline intervention in *Newell* was the direct result of Assistant Attorney General Perez manipulating the process and advising and overseeing the communications between the City of St. Paul, the Department of Housing and Urban Development, and the Civil Division within the Department of Justice.
- Assistant Attorney General Perez was personally and directly involved in negotiating the mechanics of the *quid pro quo* with David Lillehaug and he personally agreed to the *quid pro quo* on behalf of the United States during a closed-door meeting with the Mayor in St. Paul.
- Despite the Department of Justice’s contention that the intervention recommendation in *Newell* was a “close call” and “marginal,” contemporaneous documents show the Department believed that *Newell* alleged a “particularly egregious example of false certifications” and therefore the United States sacrificed strong allegations of false claims worth as much as \$200 million to the Treasury.
- Assistant Attorney General Perez offered to arrange for the Department of Housing and Urban Development to provide material to the City of St. Paul to assist the City in its motion to dismiss the *Newell* whistleblower complaint. This offer was inappropriate and potentially violated Perez’s duty of loyalty to his client, the United States.
- Assistant Attorney General Perez attempted to cover up the *quid pro quo* when he personally instructed career attorneys to omit a discussion of *Magner* in the declination memos that outlined the reasons for the Department’s decision to decline intervention in *Newell* and *Ellis*, and focus instead only “on the merits.”

- Assistant Attorney General Perez attempted to cover up the *quid pro quo* when he insisted that the final deal with the City settling two cases worth potentially millions of dollars to the Treasury not be reduced to writing, instead insisting that your “word was your bond.”
- Assistant Attorney General Perez likely violated both the spirit and letter of the Federal Records Act and the regulations promulgated thereunder when he communicated with the City’s lawyers about the *quid pro quo* on his personal email account.
- Assistant Attorney General Perez made multiple statements to the Committees that contradicted testimony from other witnesses and documentary evidence. Perez’s inconsistent testimony on a range of subjects calls into question the reliability of his testimony and raises questions about his truthfulness during his transcribed interview.
- The ethics and professional responsibility opinions obtained by Assistant Attorney General Thomas Perez and his staff were narrowly focused on his personal and financial interests in a deal and his authority to speak on behalf of the Civil Division, and thus do not address the *quid pro quo* itself or Perez’s particular actions in effectuating the *quid pro quo*.
- The Department of Justice violated the spirit and intent of the False Claims Act by privately acknowledging the *quid pro quo* was a settlement while not affording Fredrick Newell the opportunity to be heard, as the statute requires, on the fairness and adequacy of this settlement.
- The *quid pro quo* exposed serious management failures within the Department of Justice, with senior leadership – including Attorney General Holder and then-Associate Attorney General Perrelli – unaware that Assistant Attorney General Perez had entered into an agreement with the City of St. Paul.
- The Department of Justice, the Department of Housing and Urban Development, and the City of St. Paul failed to fully cooperate with the Committees’ investigation, refusing for months to speak on the record about the *quid pro quo* and obstructing the Committees’ inquiry.
- In declining to intervene in Fredrick Newell’s whistleblower complaint as part of the *quid pro quo* with the City of St. Paul, the Department of Justice gave up the opportunity to recover as much as \$200 million.

Table of Names

Department of Justice

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City of St. Paul

Christopher Coleman
Mayor

Sara Grewing
City Attorney

David Lillehaug
Attorney, Fredrickson & Byron P.A.

John Lundquist
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Thomas Fraser
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"[T]he role of a lawyer at the Department of Justice, whether you are in the Civil Division or the Civil Rights Division, is to do justice, is to do what is in the best interests of the United States."

—Thomas Perez, Assistant Attorney General for the Civil Rights Division¹

"The matters at hand are not just - the ethics of [the Department of Justice] leveraging the False Claims Act lawsuit to secure the disparate impact regulations, or the treatment of myself as a whistleblower, or the influence of the Supreme Court docket. . . . The way that HUD and Justice have used me to further their own agenda is appalling - and that's putting it mildly."

—Fredrick Newell, small-business owner and minister, St. Paul, Minnesota²

Introduction

When Assistant Attorney General Thomas Perez traveled to St. Paul, Minnesota, in early February 2012 to meet with St. Paul Mayor Christopher Coleman and other City officials in the Mayor's City Hall offices, he had one goal in mind. He wanted the City to withdraw a potential landmark case scheduled for argument before the United States Supreme Court only days later. The agreement struck between Assistant Attorney General Perez and Mayor Coleman at that closed-door meeting resulted not only in the withdrawal of the appeal, but also the fatal weakening of a whistleblower lawsuit potentially worth \$200 million to the federal treasury. The story of this *quid pro quo* is a story of leverage and political opportunism. The effects of the *quid pro quo* are even more unfortunate. The *quid pro quo* not only reflects poorly on the senior leadership of the Department of Justice, but it will have real and lasting consequences for public policy and federal taxpayers.

In the early 2000s, the City of St. Paul began aggressively enforcing the health and safety provisions of its housing code, targeting rental properties. With increased inspections and stricter certifications, the City cited various infractions ranging from broken handrails and torn screens to a toilet in a kitchen and rats in a bathtub.³ The owners of these properties sued the City, arguing that the aggressive code enforcement adversely impacted their mostly minority tenants. The lawsuit worked its way through the federal court system for years, eventually arriving at the Supreme Court. In November 2011, the Supreme Court agreed to hear the case, known as *Magner v. Gallagher*, to decide whether the Fair Housing Act allows for claims of disparate impact.

Meanwhile, Fredrick Newell, a small-business owner and minister in St. Paul, had been working for years to improve low-income jobs programs in his community. After pursuing

¹ Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 208 (Mar. 22, 2013).

² Transcribed Interview of Fredrick Newell in Wash., D.C. at 16 (Mar. 28, 2013).

³ See Fredrick Melo, *St. Paul Landlords Discuss their Fight over City Rental Housing Inspection Practices*, Pioneer Press, Oct. 15, 2012, Kevin Diaz, *St. Paul Yanks Housing Fight from High Court*, Star Tribune (Feb. 10, 2012).

various administrative avenues through the Department of Housing and Urban Development, Newell filed a federal whistleblower lawsuit against the City of St. Paul in May 2009. His suit, known as a *qui tam* action and brought under the False Claims Act,⁴ was encouraged by HUD employees and supported by career officials in the Justice Department. If successful, Newell's lawsuit could have returned over \$200 million of taxpayer funds to the federal Treasury. Although career officials viewed Mr. Newell's lawsuit as a "particularly egregious example" of false claims, Mr. Newell, as it turned out, would never receive a fair shot.

Documents and testimony given to the Committees show that after the Supreme Court agreed to hear *Magner* in November 2011, Assistant Attorney General Perez sought to find a way to prevent the Court from hearing the case and eviscerating disparate impact theory, which Perez had used to secure multimillion dollar settlements. His outreach put him in contact with a Minnesota lawyer named David Lillehaug, a former U.S. Attorney and outside counsel to the City of St. Paul. In discussions between Perez and Lillehaug, a proposal was raised to link the *Magner* and *Newell* cases, in which the City would withdraw *Magner* if the Department did not join Newell's suit. With *Newell* as leverage, Perez went to work to get *Magner* withdrawn. He asked HUD's General Counsel to reconsider HUD's support for *Newell* and raised the prospect of a deal with senior DOJ officials. Slowly, support for intervening in *Newell* eroded among the political DOJ leadership while career DOJ attorneys wondered among themselves what caused the sudden change of course.

Perez facilitated the slow bureaucratic march toward a *quid pro quo* with the City. In early January 2012, as progress on an agreement stalled, Perez began personally leading negotiations with Lillehaug. Once negotiations broke down in late January, and with *Magner* oral arguments looming, Perez made one last attempt to strike a deal. He flew to St. Paul on Friday, February 3, 2012, to lobby the Mayor directly. His persuasion proved successful; the City accepted the deal on the spot. Six days later, DOJ formally declined to join Newell's case. The following day, Friday, February 10, 2012, the City upheld its end of the bargain by withdrawing its *Magner* appeal. Perez's coup was complete.

This joint staff report is the product of a year-long investigation conducted by the House Committee on Oversight and Government Reform, the House Committee on the Judiciary, and the Senate Committee on the Judiciary. The Committees reviewed over 1,500 pages of documents produced by the Department of Justice, the Department of Housing and Urban Development, and the City of St. Paul.⁵ The Committees conducted transcribed interviews with Assistant Attorney General Thomas Perez, Acting Associate Attorney General Tony West, former Associate Attorney General Thomas Perrelli, United States Attorney B. Todd Jones, HUD General Counsel Helen Kanovsky, HUD Deputy Assistant Secretary Sara Pratt, and Fredrick Newell. The Committees also interviewed David Lillehaug and St. Paul City Attorney Sara Grewing; Joyce Branda, a Deputy Assistant Attorney General in DOJ's Civil Division; Mark Kappelhoff, former Criminal Section Chief in DOJ's Civil Rights Division; Kevin Simpson, HUD's Principal Deputy General Counsel; and Bryan Green, HUD's Principal Deputy

⁴ Under the False Claims Act, an individual may bring a *qui tam* action on behalf of the United States. 31 U.S.C. § 3730.

⁵ The City of Saint Paul, however, continues to withhold twenty documents and one audio recording from the Committees.

Assistant Secretary for Fair Housing. Despite repeated requests, DOJ refused to allow the Committees to speak to the Assistant United States Attorney who handled the *Newell* case and HUD refused to allow the Committees to speak to Associate General Counsel Dane Narode and Regional Director Maurice McGough.

How the *Quid Pro Quo* Developed

The Fair Housing Act and Disparate Impact

The Fair Housing Act, found in Title VIII of the Civil Rights Act of 1968, prohibits discrimination in the sale or rental of housing units.⁶ As passed by Congress, the Act made it unlawful to “refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.”⁷ The Act charged the Secretary of Housing and Urban Development with administering the provisions of the law.⁸

Unlike other federal laws concerning employment discrimination and age discrimination, the plain text of the Fair Housing Act only includes language prohibiting disparate *treatment* – not disparate effects. By contrast, in the employment context, Title VII of the Civil Rights Act of 1964 prohibits an employer from “fail[ing] or refus[ing] to hire or . . . discharg[ing] any individual” on the basis of a protected status, as well as prohibiting action that would “otherwise adversely affect [a person’s] status as an employee.”⁹ Although the Fair Housing Act has language prohibiting the disparate *treatment* of individuals in the housing context, it does not include any similar language prohibiting the disparate *effects* of housing practices.¹⁰ Because the plain language of the Fair Housing Act lacks this disparate effects language, it is clear that Congress never intended the disparate *impact* standard to be cognizable under the Fair Housing Act.

Nonetheless, despite the clear statutory language, some courts and policymakers have read the disparate impact standard into the Fair Housing Act. The roots of disparate impact under the Fair Housing Act can be traced back to Title VII of the Civil Rights Act of 1964, which prohibited employment discrimination based on race, color, religion, sex, or national origin.¹¹ In a case called *Griggs v. Duke Power Co.*, the Supreme Court interpreted the broad statutory text of Title VII to prohibit “not only overt discrimination but also practices that are fair in form, but discriminatory in operation.”¹² Congress subsequently codified this disparate impact standard in the context of employment discrimination, creating a separate prohibition in Title VII

⁶ 42 U.S.C. § 3604.

⁷ *Id.* § 3604(a).

⁸ *Id.* § 3608.

⁹ 42 U.S.C. § 2000e-2(a).

¹⁰ 42 U.S.C. § 3604.

¹¹ Pub. L. 88-352 tit. VII, 78 Stat. 241, 253 (1964).

¹² *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

for “a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin.”¹³

As the courts gained familiarity with the disparate impact standard for employment discrimination, they simultaneously began to interpret the text of the Fair Housing Act “to draw an inference of actual intent to discriminate from evidence of disproportionate impact.”¹⁴ Federal agencies likewise began interpreting the Fair Housing Act beyond the strictures of its plain language. In November 2011, HUD issued a proposed rule codifying the disparate impact standard for discrimination claims arising under the Fair Housing Act.¹⁵ The rule proposed to prohibit discriminatory effects under the Fair Housing Act, “where a facially neutral housing practice actually or predictably results in a discriminatory effect on a group of persons.”¹⁶ HUD finalized the rule in February 2013.¹⁷ The new Consumer Financial Protection Bureau has also adopted the disparate impact standard for enforcing lending discrimination.¹⁸

This broad and controversial interpretation of the Fair Housing Act has been roundly criticized. The American Bankers Association, the Consumer Bankers Association, the Financial Services Roundtable, and the Housing Policy Council argue that the Act does not permit disparate impact claims because the law’s plain text prohibits only intentional discrimination.¹⁹ Likewise, attorneys from Ballard Spahr note that the Supreme Court’s precedents “with regard to disparate impact claims make it clear that such claims cannot be brought under the Fair Housing Act”²⁰ Attorneys with BuckleySandler LLP criticize the analogous treatment between Fair Housing Act claims and Title VII claims – due to the express differences in the statutory language – and concluded that disparate impact “claims were neither provided for in the [Fair Housing Act] nor anticipated by the lawmakers who enacted the Act.”²¹

The Supreme Court has never directly considered whether the Fair Housing Act supports the disparate impact standard. Although the Court has heard two cases involving disparate impact claims under the Fair Housing Act, both cases were decided on other grounds and the issue was never settled by the Court.²² By the fall of 2011, as a case involving this precise issue was making its way through the federal court system, the Court was poised to resolve the dispute.

¹³ 42 U.S.C. § 2000e-2(k)(1)(A)(i).

¹⁴ Peter E. Mahoney, *The End(s) of Disparate Impact: Doctrinal Reconstruction, Fair Housing and Lending Law, and the Antidiscrimination Principle*, 47 Emory L.J. 409, 426 (1998).

¹⁵ See Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 76 Fed. Reg. 70,921 (Nov. 16, 2011).

¹⁶ *Id.* at 70,924.

¹⁷ Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. 11,460 (Feb. 15, 2013).

¹⁸ Consumer Financial Prot. Bureau, CFPB Bulletin 2012-04 (Apr. 18, 2012).

¹⁹ See Brief of Amici Curiae American Bankers Association, Consumer Bankers Association, Financial Services Roundtable, and Housing Policy Council Suggesting Reversal, *Magner et al. v. Gallagher et al.*, No. 10-1032 (filed Dec. 29, 2011).

²⁰ Ballard Spahr LLP, *Dismissal of Fair Housing Case Perpetuates Uncertainty on Disparate Impact Claims*, Feb. 15, 2012.

²¹ Kirk D. Jensen & Jeffrey P. Naimon, *The Fair Housing Act, Disparate Impact Claims, and Magner v. Gallagher: An Opportunity to Return to the Primacy of the Statutory Text*, 129 Bank. L.J. 99 (Feb. 2012).

²² See *City of Cuyahoga Falls, Ohio v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 199-200 (2003); *Town of Huntington, N.Y. v. Huntington Branch, N.A.A.C.P.*, 488 U.S. 15, 18 (1988).

Magner v. Gallagher

On November 7, 2011, the United States Supreme Court granted a petition for a writ of certiorari filed by the City of St. Paul, Minnesota, in the case *Magner v. Gallagher*. In agreeing to hear the case, the Court decided to answer a fairly straightforward question: “Are disparate impact claims cognizable under the Fair Housing Act?”²³

Magner arose from the City’s enhanced enforcement of its housing codes from 2002 to 2005, particularly with respect to rental properties. The City directed inspectors to enforce the “code to the max,” conducting unannounced sweeps for code violations and asking residents to report so-called “problem properties.”²⁴ These enhanced enforcement measures documented violations in many properties occupied by low-income residents, including violations for rodent infestations, inoperable smoke detectors, inadequate sanitation, and inadequate heat.²⁵ The owners of these low-income properties, which housed a disproportionate percentage of African Americans, faced increased maintenance costs, higher fees, and condemnations as a result.²⁶

In 2004 and 2005, several of the affected property owners sued the City in federal district court, alleging that the City’s aggressive enforcement of the housing code violated the Fair Housing Act.²⁷ The City asked the court to throw out the cases before trial, arguing in part that its code enforcement did not have a disparate impact on minorities and therefore did not violate the Act.²⁸ The court agreed and granted summary judgment in the City’s favor in 2008.²⁹ Appealing to the Eighth Circuit Court of Appeals, the property owners renewed their argument that the City violated the Fair Housing Act “because [its] aggressive enforcement of the housing code had a disparate impact on racial minorities.”³⁰ The Eighth Circuit agreed. In its 2010 opinion reversing the lower court, the Eighth Circuit stated:

Viewed in the light most favorable to [the property owners], the evidence shows that the City’s Housing Code enforcement temporarily, if not permanently, burdened [the property owners’] rental businesses, which indirectly burdened their tenants. Given the existing shortfall of affordable housing in the City, it is reasonable to infer that the overall amount of affordable housing decreased as a result. And taking into account the demographic evidence in the record, it is reasonable to infer racial minorities, particularly African-Americans, were disproportionately affected by these events.³¹

²³ Petition for Writ of Certiorari, *Magner v. Gallagher*, No. 10-1032 (U.S. filed Feb. 14, 2011).

²⁴ *Gallagher v. Magner*, 619 F.3d 823, 829 (8th Cir. 2010).

²⁵ *Id.* at 830.

²⁶ *Id.*

²⁷ *Steinhauser et al. v. City of St. Paul et al.*, 595 F. Supp. 2d 987 (D. Minn. 2008).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Gallagher v. Magner*, 619 F.3d 823 (8th Cir. 2010).

³¹ *Id.* at 835.

With an adverse decision at the appellate level, the City faced a decision whether to litigate the disparate impact claim before the district court or to appeal the decision to the United States Supreme Court. On February 14, 2011, the City filed a petition for a writ of certiorari, asking the Court to take the case.³² On November 7, 2011, the Court granted the petition to finally settle whether the Fair Housing Act supports claims of disparate impact.

United States ex rel. Newell v. City of Saint Paul

Fredrick Newell's history with Section 3 of the Housing and Urban Development Act dates back to 1997.³³ Section 3 requires recipients of HUD financial assistance to provide job training, employment, and contracting opportunities "to the greatest extent feasible" to low- and very-low-income residents, as distinct from minority residents.³⁴ In 2000, Newell began to pursue Section 3 opportunities in St. Paul, but quickly found that although the City had programs for minority business and women business enterprises, the City did not have a program to comply with Section 3 in particular. Newell even offered to start a Section 3 program in St. Paul, but the City refused.³⁵

After a lawsuit Newell filed was dismissed because Section 3 does not allow for a private right of action, Newell initiated an administrative complaint with HUD.³⁶ This administrative complaint led to a formal finding by HUD that St. Paul was not in compliance with Section 3,³⁷ and eventually to a Voluntary Compliance Agreement that required St. Paul to improve its future compliance with Section 3.³⁸ The Voluntary Compliance Agreement, however, did not release the City from any liability under the False Claims Act.³⁹ According to Newell's attorney, the Justice Department reviewed the language of the Voluntary Compliance Agreement to ensure it did not disturb any False Claims Act liability.⁴⁰

In May 2009, Fredrick Newell filed a whistleblower complaint under the *qui tam* provisions of the False Claims Act, alleging that the City of St. Paul had falsely certified that it was in compliance with Section 3 of the HUD Act from 2003 to 2009.⁴¹ In particular, Newell alleged that the City had falsely certified on applications for HUD funds that it had complied with Section 3's requirements when in fact the City knew it had not complied.⁴² He alleged that based on these knowingly false certifications, the City had improperly received more than \$62

³² Petition for Writ of Certiorari, *Magner v. Gallagher*, No. 10-1032 (U.S. filed Feb. 14, 2011).

³³ Transcribed Interview of Fredrick Newell in Wash., D.C. at 9-10 (Mar. 28, 2013).

³⁴ 12 U.S.C. § 1701u.

³⁵ Transcribed Interview of Fredrick Newell in Wash., D.C. at 27-28 (Mar. 28, 2013).

³⁶ Transcribed Interview of Fredrick Newell in Wash., D.C. at 9-10 (Mar. 28, 2013).

³⁷ See Letter from Barbara Knox, Dep't of Housing and Urban Development, to Chris Coleman, City of St. Paul (Aug. 25, 2009).

³⁸ Voluntary Compliance Agreement; Section 3 of the Housing and Community Development Act between U.S. Dep't of Housing and Urban Development and the City of Saint Paul, MN (Feb. 2010).

³⁹ *Id.*

⁴⁰ Transcribed Interview of Fredrick Newell in Wash., D.C. at 33 (Mar. 28, 2013).

⁴¹ Complaint, *United States ex rel. Newell v. City of Saint Paul*, No. 0:09-cv-1177 (D. Minn. May 19, 2009).

⁴² *Id.*

million in federal HUD funds.⁴³ As a whistleblower, Newell brought the case – *United States ex rel. Newell v. City of St. Paul* – on behalf of the United States.

Like all other alleged violations of the False Claims Act, Newell’s complaint was evaluated by career attorneys in the Civil Fraud Section within DOJ’s Civil Division as well as career Assistant United States Attorneys in Minnesota. These attorneys spent over two years conducting an exhaustive investigation of Newell’s allegations. As a part of this investigation, the attorneys interviewed Newell and his attorney several times, gathered information from HUD, and spoke with the City about its actions. At the conclusion of this investigation, both the Civil Fraud Section and the U.S. Attorneys’ Office in Minnesota strongly supported the case.

That these career DOJ officials enthusiastically supported Newell’s lawsuit was obvious to Newell and to HUD. His initial relator⁴⁴ interview with federal officials in the summer of 2009 included an unusually large number of HUD and DOJ attendees.⁴⁵ During his transcribed interview, Newell told the Committees that “[t]here was a real interest . . . and the DOJ felt it was a good case.”⁴⁶ His attorney stated: “I believe around . . . September-October of 2011, my information was that Justice was working on finalizing its intervention decision. And I don’t mean what the decision was. I mean finalizing intervention, because they were going to intervene in the case.”⁴⁷

This understanding was confirmed by HUD General Counsel Helen Kanovsky, who told the Committees that career attorneys in DOJ’s Civil Fraud Section and U.S. Attorney’s Office in Minnesota felt so strongly about intervening in Newell’s case that they requested a special meeting with her to convince her to lend HUD’s support.⁴⁸

On October 4, 2011, a line attorney in the Civil Fraud Section wrote to HUD General Counsel Dane Narode about the *Newell* case: “Our office is recommending intervention. Does HUD concur?”⁴⁹ Three days later, Narode replied, “HUD concurs with DOJ’s recommendation.”⁵⁰ The AUSA in Minnesota handling *Newell* forwarded HUD’s concurrence to his supervisor with the comment, “[l]ooks like everyone is on board.”⁵¹ On October 26, 2011, the AUSA transmitted a memorandum to the two Civil Fraud Section line attorneys with the official recommendation from the U.S. Attorney’s Office.⁵² The memorandum recommended intervention. It stated:

⁴³ Amended Complaint, *United States ex rel. Newell v. City of Saint Paul*, No. 0:09-cv-1177 (D. Minn. Mar. 12, 2012). The Civil Fraud Section of the Justice Department valued the fraud at \$86 million. *See infra* note 336.

⁴⁴ A “relator” is the private party who initiates a *qui tam* lawsuit under the False Claims Act on behalf of the United States.

⁴⁵ Transcribed Interview of Fredrick Newell in Wash., D.C. at 192-93 (Mar. 28, 2013).

⁴⁶ *Id.* at 48.

⁴⁷ *Id.* at 55.

⁴⁸ Transcribed Interview of Helen Kanovsky, U.S. Dep’t of Housing & Urban Development, in Wash., D.C. at 25-30 (Apr. 5, 2013).

⁴⁹ Email from Line Attorney 1 to HUD Line Employee (Oct. 4, 2011, 5:05 p.m.). [DOJ 67]

⁵⁰ Email from HUD Line Employee to Line Attorney 1 (Oct. 7, 2011, 11:27 a.m.). [DOJ 68]

⁵¹ Email from Line Attorney 3 to Greg Brooker (Oct. 7, 2011, 11:28 a.m.). [DOJ 69]

⁵² Email from Line Attorney 3 to Line Attorney 2 & Line Attorney 1 (Oct. 26, 2011, 3:39 p.m.). [DOJ 71]

The City was repeatedly put on notice of its obligations to comply with Section 3. At best, its failure to take any steps towards compliance, while continually telling federal courts, HUD and others that it was in compliance with Section 3, represents a reckless disregard for the truth. Its certifications of Section 3 compliance to obtain HUD funds during the relevant time period were knowingly false.⁵³

The memo also referenced the HUD administrative proceeding initiated by Fredrick Newell, noting that in the proceeding “HUD determined that the City was out of compliance with Section 3. **It did not appear to be a particularly close call.** The City initially contested that finding, but dropped its challenge in order to retain its eligibility to compete for and secure discretionary HUD funding.”⁵⁴

The Civil Fraud Section also prepared an official memorandum recommending intervention in Newell’s case. This memo, dated November 22, 2011, found that “[t]he City was required to comply with the statute. Our investigation confirms that the City failed to do so.”⁵⁵ The memorandum stated:

To qualify for HUD grant funds, the City was required to certify each year that it was in compliance with Section 3. The City then made claims for payment, drawing down its federal grant funds. Distribution of funds by HUD to the City was based on the City’s certifications. Each time the City asked HUD for money, it impliedly certified its compliance with Section 3. At best, the City’s failure to take any steps towards compliance while continually telling federal courts, HUD and others that it was in compliance with Section 3 represents a reckless disregard for the truth. **We believe its certifications of Section 3 compliance to obtain HUD funds were actually more than reckless and that the City had actual knowledge that they were false.**⁵⁶

Thus, as of November 22, 2011, HUD, the Civil Fraud Section, and the U.S. Attorney’s Office in Minnesota all strongly supported intervention in Fredrick Newell’s case, believing it was worthy of federal assistance. There was no documentation that it was a marginal case or a close call.

Executing the Quid Pro Quo

Shortly after the Supreme Court granted certiorari in *Magner* on November 7, 2011, Assistant Attorney General Perez became aware of the appeal.⁵⁷ On November 17, he emailed

⁵³ U.S. Attorney, District of Minnesota, Intervention Memo: *U.S. ex rel. Newell v. City of St. Paul, Minnesota* (Oct. 25, 2011). [DOJ 72-79]

⁵⁴ *Id.* (emphasis added).

⁵⁵ U.S. Dep’t of Justice, Civil Division, Memorandum for Tony West, Assistant Attorney General, Civil Division, *U.S. ex rel. Newell v. City of St. Paul, Minnesota* (Nov. 22, 2011). [DOJ 80-91]

⁵⁶ *Id.* at 5 (emphasis added).

⁵⁷ Assistant Attorney General Perez testified that he did not become aware of the *Magner* case until after the Court agreed to hear the appeal; however, HUD Deputy Assistant Secretary Sara Pratt told the Committees that she and Perez likely had discussions about the case before the Court granted certiorari.

Thomas Fraser, a partner at the Minneapolis law firm Fredrickson & Bryon, P.A. and an old colleague. Fraser put Perez in touch with his law partner David Lillehaug, who was defending the City of St. Paul in the *Newell* False Claims Act litigation.

On the morning of November 23, 2011, Perez had a telephone conversation with Lillehaug and Fraser. During this conversation, Perez explained the importance of disparate impact theory, calling it the “lynchpin” of civil rights enforcement,⁵⁸ and his concerns about the *Magner* appeal. Their accounts of the conversation differed as to when and who first raised the prospect that the City would withdraw *Magner* if the Department declined to intervene in *Newell*. Lillehaug told the Committees that he told Perez that he should know that the City was potentially adverse to the United States in a separate False Claims Act case.⁵⁹ Lillehaug further told the Committees that at a subsequent meeting, approximately one week later on November 29, Perez told Lillehaug that he had looked into *Newell* and he had a “potential solution.”⁶⁰ According to Perez, however, during the initial telephone call on November 23, Lillehaug actually linked the two cases and in fact suggested that if the United States would decline to intervene in *Newell*, the City would withdraw the *Magner* case.⁶¹ Both parties agreed that Perez indicated he would look into the *Newell* case, and they would meet approximately one week later on November 29.

Following his conversation with Lillehaug and Fraser, Perez immediately reached out to HUD Deputy Assistant Secretary Sara Pratt, HUD General Counsel Helen Kanovsky, and then-Assistant Attorney General Tony West. During a telephone conversation with Kanovsky, Perez told her that he had discussions with the City about *Magner* and asked her to reconsider HUD’s support for the *Newell* case.⁶² On November 29, 2011 – only seven weeks after he signaled HUD’s support for intervention and less than one week after Perez’s initial telephone call with Lillehaug – HUD Associate General Counsel Dane Narode informed career Civil Fraud Section attorneys that HUD had reconsidered its position in *Newell*.⁶³ On December 1, Narode memorialized the change in an email to the line attorney.⁶⁴

On December 13, 2011, several City officials – including Mayor Coleman and City Attorney Sara Grewing, as well as Lillehaug – traveled to Washington, D.C., for meetings with HUD and DOJ’s Civil Division. In the morning, the City officials met with Sara Pratt, discussing ideas for expanding the City’s Section 3 compliance programs. In the afternoon, the City met with officials from the Civil Fraud Section to discuss *Newell* and *Ellis* – which was a second False Claims Act *qui tam* case filed against the City – as well as *Magner*.

At the conclusion of the December 13, 2011, meeting, the Civil Division asked HUD to better explain the reasons for its changed recommendation. Eventually, late on December 20,

⁵⁸ Interview with David Lillehaug in Wash., D.C. (Oct. 16, 2012).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Transcribed Interview of Thomas Edward Perez, U.S. Dep’t of Justice, in Wash., D.C. at 47-48 (Mar. 22, 2013).

⁶² Transcribed Interview with Helen Kanovsky, U.S. Dep’t of Housing & Urban Development, in Wash., D.C. at 40-41 (Apr. 5, 2013).

⁶³ Email from Dane Narode to Line Attorney 1 (Nov. 29, 2011, 8:06 p.m.). [HUD 130]

⁶⁴ Email from HUD Line Employee to Line Attorney 1 (Dec. 1, 2011, 10:08 a.m.). [DOJ 161/156]

HUD sent its formal explanation to the Civil Fraud Section.⁶⁵ The memorandum referenced HUD's voluntary compliance agreement with the City, describing it as "a comprehensive document that broadly addresses St. Paul's Section 3 compliance, including the compliance problems at issue in the False Claims Act case."⁶⁶ This explanation did not satisfy the career attorneys in the Civil Fraud Section.

Throughout this period, Perez continued conversations with Lillehaug and the City. In mid-December, Perez had a telephone conversation with B. Todd Jones, the U.S. Attorney for the District of Minnesota, and began to speak regularly with Assistant U.S. Attorney Greg Brooker in Jones's office. In early January 2012, Perez had a meeting with Tony West and Deputy Assistant Attorney General Michael Hertz. According to the DOJ officials with whom the Committees spoke, the Civil Division reached a "consensus" around this same period that the Division would decline intervention in *Newell*.

In early January, Perez personally led the negotiations with Lillehaug about DOJ declining intervention in *Newell* in exchange for the City withdrawing *Magner*. According to Lillehaug, Perez presented a proposal on January 9, 2012, which Lillehaug described as a "roadmap" designed to get the City "to yes."⁶⁷ In this proposal, DOJ would decline to intervene in *Ellis*, the City would then withdraw *Magner*, and DOJ would subsequently decline to intervene in *Newell*. In mid-January, Lillehaug made a "counterproposal"⁶⁸ in which instead of merely declining to intervene in the *qui tam* cases, DOJ would intervene and settle *Newell* and *Ellis* in exchange for the City withdrawing *Magner*.

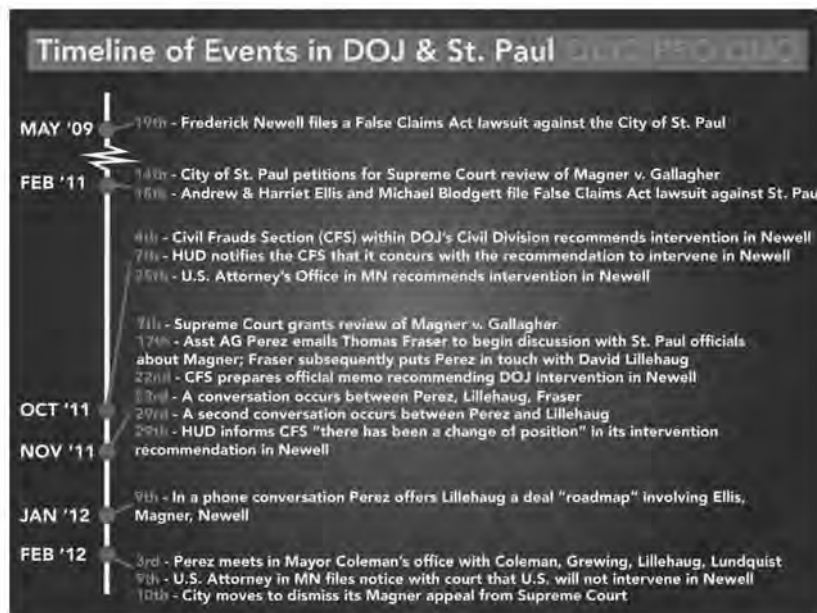
By late January, it appeared as if no deal would be reached between the federal government and the City of St. Paul. With the oral argument date in *Magner* quickly approaching, Perez flew to St. Paul to personally meet the Mayor and try once more for an agreement. At a meeting in City Hall on February 3, 2012, Perez lobbied the Mayor on the importance of disparate impact and told him DOJ could not go so far as intervening and settling the cases out from under the relator, but was still willing to decline *Newell* in exchange for the City withdrawing *Magner*. The City officials caucused privately for a short time and eventually returned to accept the deal. The next week, DOJ formally declined to intervene in *Newell* and the City formally withdrew its appeal in *Magner*. After DOJ declined to intervene, *Newell*'s case was fatally weakened, as the declination allowed the City to move for dismissal on grounds that would have been unavailable if the Department had intervened in the case.

⁶⁵ See Email from HUD Line Employee to Joyce Branda (Dec. 20, 2011, 6:21 p.m.). [DOJ 408/369]

⁶⁶ Memorandum for Joyce R. Branda (Dec. 20, 2011). [DOJ 409-10/370-71]

⁶⁷ Assistant Attorney General Perez and Acting Associate Attorney General West testified that DOJ never made an offer to Lillehaug. Other testimony and documentary evidence, however, supports Lillehaug's characterization.

⁶⁸ In his transcribed interview, West initially characterized this offer as a "counterproposal" from the City, stating: "[T]here was this counterproposal from the City, which we rejected, of intervention and dismissal." Transcribed Interview of Derek Anthony West, U.S. Dep't of Justice, in Wash., D.C. at 90 (Mar. 18, 2013).



The Quid Pro Quo Explained

The story of the *quid pro quo* – how one man manipulated the levers of government to prevent the Supreme Court from hearing an important appeal – is itself incredible. The Administration's version of events is even more unbelievable. The post hoc explanations defy common sense and are contradicted by both the tenor and substance of numerous internal documents produced to the Committees.

The Administration maintains that although career attorneys in the Department of Justice recommended intervention in *Newell* – and, in fact, characterized the infractions as "particularly egregious" – the case was nonetheless quite weak and never should have been a serious candidate for intervention. Accepting this as true, Perez's intervention was merely fortuitous to ensuring that the career attorneys with expertise on the False Claims Act had one more shot to reevaluate the case. Because the decision was made to decline *Newell* and – as Tony West told the Committee – that decision was communicated to the City, the Administration maintains that the United States gave up nothing to secure the withdrawal of *Magner*. But the Administration offers no explanation as to why the City would ever agree to withdraw a Supreme Court appeal it believed it would win, if *already* it knew the Department intended to decline intervention in *Newell*. Dozens of documents refer to the "deal," "settlement," and "exchange" between the City and DOJ. These documents cast doubt on the Administration's narrative, as well.

After almost fourteen months of investigating, the Committees found that the Department of Justice agreed to a *quid pro quo* with the City of St. Paul, Minnesota, in which the Department agreed to decline intervention in *Newell* and *Ellis* in exchange for the City withdrawing its appeal in *Magner*. This *quid pro quo* was facilitated, overseen, and consummated by Assistant Attorney General Thomas Perez, who made it known to the City that his “top priority” was to have *Magner* withdrawn from the Supreme Court. To get the deal done, Perez exceeded the scope and authority of his office, manipulated the protocols designed to preserve the integrity of intervention decisions, worked behind the scenes – and at times behind the backs of his colleagues at the Department with whom decision-making authority rested – and took it upon himself to strike an agreement with the City. These are the findings of the Committees’ investigation:

The Agreement Was a Quid Pro Quo Exchange

The Department of Justice and the Department of Housing and Urban Development have repeatedly insisted that the agreement with the City was not a “*quid pro quo*.” In transcribed interviews, Assistant Attorney General Perez, Acting Associate Attorney General West, and U.S. Attorney Jones all contested the characterization that the agreement was a *quid pro quo* or an exchange between the parties.⁶⁹ In particular, Perez told the Committees: “I would disagree with the term ‘*quid pro quo*,’ because when I think of a *quid pro quo*, I think of, like in a sports context, you trade person A for person B and it’s a – it’s a binary exchange.”⁷⁰ In fact, that is precisely what transpired.

Although these officials disputed the existence of an exchange, they did not dispute the fact that discussions with the City concerned a proposal that the City withdraw *Magner* if the Department declined *Newell*. Perez testified: “[St. Paul’s outside counsel David] Lillehaug raised the prospect that the city would withdraw its petition in the *Magner* case if the Department would decline to intervene in *Newell*.”⁷¹ Perez subsequently testified: “What I recall Mr. Lillehaug indicating in this initial telephone call was that if the Department would decline to intervene in the *Newell* matter, that the city would then withdraw the petition” in *Magner*.⁷² This testimony shows the exchange between the City and the Department was conditional.

Contemporaneous documents confirm that an exchange took place. An email from a Civil Fraud Section line attorney to then-Civil Fraud Director Joyce Branda expressly characterized the agreement as an “exchange” while explaining the state of negotiations. The attorney wrote: “We are working toward declining both matters [*Newell* and *Ellis*]. It appears that AAG for Civil Rights (Tom Perez) is working with the city on a deal to withdraw its petition before the Supreme Court in the *Gallagher* case **in exchange** for the government’s declination in both cases.”⁷³

⁶⁹ See Transcribed Interview of Thomas Edward Perez, U.S. Dep’t of Justice, in Wash., D.C. at 170-71 (Mar. 22, 2013); Transcribed Interview of Derek Anthony West, U.S. Dep’t of Justice, in Wash., D.C. at 117 (Mar. 18, 2013); Transcribed Interview of Byron Todd Jones, U.S. Dep’t of Justice, in Wash., D.C. at 140-41 (Mar. 8, 2013).

⁷⁰ Transcribed Interview of Thomas Edward Perez, U.S. Dep’t of Justice, in Wash., D.C. at 170 (Mar. 22, 2013).

⁷¹ Transcribed Interview of Thomas Edward Perez, U.S. Dep’t of Justice, in Wash., D.C. at 10 (Mar. 22, 2013).

⁷² Transcribed Interview of Thomas Edward Perez, U.S. Dep’t of Justice, in Wash., D.C. at 47-48 (Mar. 22, 2013).

⁷³ Email from Line Attorney I to Joyce Branda (Jan. 9, 2012, 1:53 p.m.) (emphasis added). [DOJ 686/641]

In addition, a draft version of the *Newell* declination memo prepared by career attorneys in the Civil Fraud Section in early 2012 clearly stated that the Department entered into an exchange with the City:

The City tells us that Mr. Perez reached out to them and asked them to withdrawal [*sic*] the *Gallagher* petition. The City responded that they would be willing to do so, only if the United States declined to intervene in this case, and in *U.S. ex rel. Ellis v. the City of St. Paul et al.* The Civil Rights Division believes that the [Fair Housing Act] policy interests at issue here are significant enough to justify such a deal.”⁷⁴

The final version signed by Tony West, Assistant Attorney General for the Civil Division, obfuscated the true nature of the exchange. The memo signed by West stated: “The City has indicated that it will dismiss the *Gallagher* petition, and declination here will facilitate the City’s doing so.”⁷⁵

Former Associate Attorney General Thomas Perrelli told the Committees that he understood from speaking with Perez that the proposal included an exchange. Perrelli testified:

[Perez] indicated to me that this case [*Magner*] was before the Supreme Court. He indicated the desire for the United States to not file a brief in the case, and expressed the view that this was not a good vehicle to decide the issue of disparate impact, and indicated that the city had proposed to him the possibility of dismissing – and I don’t remember whether it was one or more *qui tam* cases – in exchange for them not pursuing their appeal to the Supreme Court.⁷⁶

In addition, a chart of significant matters within the Civil Division prepared for the Deputy Attorney General James Cole in March 2012 characterized the agreement with the City as follows: “Government declined to intervene in *Newell*, and has agreed to decline to intervene in *Ellis*, in exchange for defendant[’]s withdrawal of cert. petition in *Gallagher* case (a civil rights action).”⁷⁷

Based on Perez’s admission that negotiations centered on the City of St. Paul’s withdrawal of *Magner* if the Department declined intervention in *Newell* and DOJ’s own characterization of an exchange, it is apparent that the agreement reached between Perez and the City involved the exchange of *Newell* and *Ellis* for *Magner*. In this exchange, the City gave up its rights to litigate *Magner* before the Supreme Court – an appeal it publicly stated it believed it

⁷⁴ U.S. Dep’t of Justice, Civil Division, Memorandum for Tony West, Assistant Attorney General, Civil Division, *U.S. ex rel. Newell v. City of St. Paul, Minnesota* (Jan. 10, 2012) (draft declination memorandum). [DOJ 1089-99/979-89]

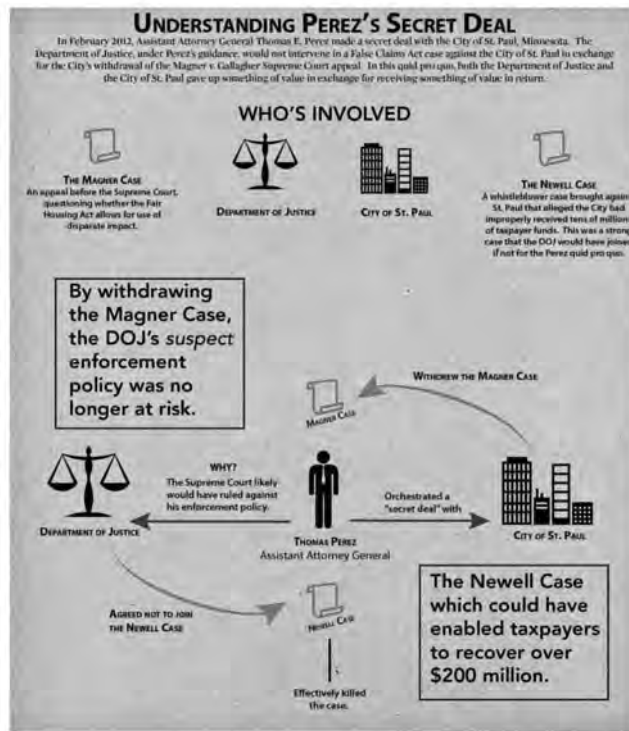
⁷⁵ U.S. Dep’t of Justice, Civil Division, Memorandum for Tony West, Assistant Attorney General, Civil Division, *U.S. ex rel. Newell v. City of St. Paul, Minnesota* (Feb. 9, 2012). [DOJ 1318-29/1162-73]

⁷⁶ Transcribed Interview of Thomas John Perrelli in Wash., D.C. at 16 (Nov. 19, 2012) (emphasis added).

⁷⁷ Significant Affirmative Civil and Criminal Matters (Mar. 8, 2012) (emphasis added). [DOJ 1410-12/1248-50]

would win⁷⁸ – and DOJ gave up its right to intervene and prosecute the alleged fraud against HUD in *Newell* – a case that career attorneys strongly supported. In return, the City received certainty that DOJ would not litigate *Newell* and DOJ received assurance that the Supreme Court would not consider *Magner*. Therefore, under the common usage of the term, the agreement between DOJ and the City clearly amounted to a *quid pro quo* exchange.

Finding: The Department of Justice entered into a *quid pro quo* arrangement with the City of St. Paul, Minnesota, in which the Department agreed to decline intervention in *United States ex rel. Newell v. City of St. Paul* and *United States ex rel. Ellis v. City of St. Paul et al.* in exchange for the City withdrawing *Magner v. Gallagher* from the Supreme Court.



⁷⁸ Press Release, City of Saint Paul Seeks to Dismiss United States Supreme Court Case *Magner v. Gallagher* (Feb. 10, 2012)

Assistant Attorney General Perez Facilitated the Initial Stages of the Quid Pro Quo

In the early stages of developing the *quid pro quo*, Assistant Attorney General Perez told the City's outside counsel, David Lillehaug, that withdrawing *Magner* was his "top priority."⁷⁹ But arriving at that point was no certainty. Already, three separate entities within the federal government had recommended intervention in *Newell*. For a deal to be made and for *Magner* to be withdrawn, Perez would have to aggressively court key officials in DOJ and HUD.

On November 13, 2011, Perez had an email exchange with HUD Deputy Assistant Secretary Sara Pratt about efforts by housing advocates to facilitate a settlement to prevent the Court from hearing the appeal.⁸⁰ After the Court granted certiorari in *Magner*, Perez contacted Minnesota lawyer Thomas Fraser to start a "conversation" with the Mayor and City Attorney about his "concerns about *Magner* and to see whether the City might reconsider its position."⁸¹ When Fraser connected Perez with Lillehaug and Perez became aware of the *Newell* case pending against the City,⁸² Perez had found his leverage.⁸³

Perez and Lillehaug spoke on the telephone on the afternoon of November 23, 2011.⁸⁴ Perez and Lillehaug gave differing accounts of this initial conversation. Perez testified that Lillehaug linked the *Magner* case with the *Newell* case, and offered that the City would withdraw the *Magner* appeal if DOJ declined to intervene in *Newell*.⁸⁵ Lillehaug, however, told the Committees that he merely mentioned the *Newell* case because the City may be adverse to the United States, and Perez promised that he would look into the case.⁸⁶ Lillehaug told the Committees that it was Perez who first raised the possibility of a joint resolution of *Magner* and *Newell* in a November 29 meeting with Lillehaug and St. Paul City Attorney Sara Grewing.⁸⁷ Again, Perez's version of events strains credulity. It is difficult to believe that Lillehaug, during this initial telephone call, would immediately be in a position to make an offer of this nature on behalf of the City without discussing it first with his client.

Immediately after speaking with Lillehaug at 2:00 p.m., Perez went to work, somewhat frenetically. At 2:29 p.m. that day, Perez emailed HUD Deputy Assistant Secretary Pratt, asking to speak with her as soon as possible.⁸⁸ At 2:30 p.m., Perez emailed HUD General Counsel Helen Kanovsky, asking to speak about a "rather urgent matter."⁸⁹ At 2:33 p.m., Perez emailed Tony West, head of DOJ's Civil Division and thus ultimately responsible for False Claims Act cases like *Newell*. Perez wrote: "I was wondering if I could talk to you today if possible about a

⁷⁹ Interview of David Lillehaug in Wash., D.C. (Oct. 16, 2012).

⁸⁰ Email from Sara K. Pratt to Thomas E. Perez (Nov. 13, 2011, 2:59 p.m.). [DOJ 93]

⁸¹ Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 9 (Mar. 22, 2013).

⁸² Email from Thomas Fraser to Thomas E. Perez (Nov. 22, 2011, 7:07 p.m.). [DOJ 95-96]

⁸³ Given that Perez called Fraser, who had no involvement with the *Magner* appeal, instead of directly contacting the St. Paul City Attorney's Office, it is likely that Perez contacted Fraser in search of leverage to use to get the *Magner* case withdrawn – and not to start a "conversation" with the City.

⁸⁴ Interview of David Lillehaug in Wash., D.C. (Oct. 16, 2012); Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 127-28 (Mar. 22, 2013).

⁸⁵ Transcribed Interview of Thomas E. Perez, U.S. Dep't of Justice, in Wash., D.C. at 10 (Mar. 22, 2013).

⁸⁶ Interview of David Lillehaug in Wash., D.C. (Oct. 16, 2012).

⁸⁷ *Id.*

⁸⁸ Email from Thomas E. Perez to Sara K. Pratt (Nov. 23, 2011, 2:29 p.m.). [DOJ 103]

⁸⁹ Email from Thomas E. Perez to Helen Kanovsky (Nov. 23, 2011, 2:30 p.m.). [DOJ 165-66]

separate matter of some urgency.”⁹⁰ All three officials – Pratt, Kanovsky, and West – would be vital for making the withdrawal of *Magner* a reality.

The next week, on November 28, Perez had a meeting with several of his senior advisers in the Civil Rights Division. During this meeting, Perez and his advisers discussed a search for leverage in *Magner* and the fact that St. Paul Mayor Coleman’s political mentor is former Vice President Walter Mondale, a champion of the Fair Housing Act.⁹¹ Civil Rights Division Appellate Section Chief Greg Friel’s notes from the meeting reflect a discussion of the *Newell qui tam* case. Friel’s notes stated that “HUD is will[ing] to leverage [the] case to help resolve [the] other case,” presumably referring to *Magner*.⁹² The last lines of the notes state the Civil Rights Division’s “ideal resolution” would be the dismissal of *Magner* and the other case “goes away.”⁹³

Perez testified that he did not recall ever asking HUD to reconsider its initial intervention recommendation in *Newell*.⁹⁴ However, HUD General Counsel Helen Kanovsky’s testimony to the Committees directly contradicted Perez’s testimony. Kanovsky testified that after HUD recommended intervention in *Newell*, Perez called her to ask her to reconsider. Kanovsky stated:

Q Did [Perez] ask you to go back to your original position, to reconsider?

A He did. He did.

Q He did? What did he say?

A He said, well, if you don’t feel strongly about it, how would you feel about withdrawing your approval and indicating that you didn’t endorse the position? And I said, I would do that.⁹⁵

HUD Principal Deputy General Counsel Kevin Simpson verified this account in an earlier non-transcribed briefing with the Committees.⁹⁶ Once HUD flipped, support for *Newell* eroded within the U.S. Attorney’s Office and the Civil Division. In transcribed interviews, both Acting Associate Attorney General Tony West and U.S. Attorney B. Todd Jones cited HUD’s change of heart as a strong factor in their decision to ultimately decline intervention in *Newell*.⁹⁷

Although it is in dispute as to who first raised the idea of exchanging *Newell* for *Magner*, it is clear that the proposal got off the ground within the bureaucracies of HUD and DOJ as a

⁹⁰ Email from Thomas E. Perez to Tony West (Nov. 23, 2011, 2:33 p.m.). [DOJ 104]

⁹¹ Handwritten notes of conversation between Thomas Perez, Jocelyn Samuels, Vicki Schultz, and Eric Halperin (Nov. 28, 2011). [DOJ 111-13/106-08]

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Transcribed Interview of Thomas Edward Perez, U.S. Dep’t of Justice, in Wash., D.C. at 131 (Mar. 22, 2013).

⁹⁵ Transcribed Interview of Helen Kanovsky, U.S. Dep’t of Housing & Urban Development, in Wash., D.C. at 40-41 (Apr. 5, 2013).

⁹⁶ Briefing with Kevin Simpson and Bryan Greene in Wash., D.C. (Jan. 10, 2013).

⁹⁷ Transcribed Interview of Derek Anthony West, U.S. Dep’t of Justice, in Wash., D.C. at 100 (Mar. 18, 2013);

Transcribed Interview of Byron Todd Jones, U.S. Dep’t of Justice, in Wash., D.C. at 39 (Mar. 8, 2013).

result of the machinations of Assistant Attorney General Perez. It was Perez who became aware of the existence of the *Newell* complaint against the City and it was Perez who asked Helen Kanovsky to reconsider HUD's initial recommendation for intervention.⁹⁸ Perez also initiated conversations with Tony West about the Civil Division's interests in *Newell*. It was Perez who spoke to HUD's General Counsel Helen Kanovsky about calling Tony West – without telling West that he was doing so.⁹⁹ The eventual agreement between the City and DOJ in February 2012 was only possible due to the early politicking done by Perez in late November 2011.

Finding: The *quid pro quo* was as a direct result of Assistant Attorney General Perez's successful efforts to pressure the Department of Housing and Urban Development, the U.S. Attorney's Office in Minnesota, and the Civil Division within the Department of Justice to reconsider their support for *Newell* in the context of the proposal to withdraw *Magner*.

The Initial Stages of the Quid Pro Quo Confused and Frustrated Career Attorneys

As Assistant Attorney General Perez facilitated the early stages of the *quid pro quo*, the high-level communications he initiated about the rather routine intervention decision in *Newell* led to confusion and frustration among career Civil Fraud Section attorneys. HUD's unexpected and unexplained change in its intervention recommendation in late November and the ripple effects it caused in the Civil Fraud Section and U.S. Attorney's Office in Minnesota created an atmosphere of uncertainty and disorder. From late November 2011 to early January 2012, the career attorneys in the Justice Department – including those with expertise and responsibility for enforcing the False Claims Act – were working at cross-purposes with some of the Department's senior political appointees.

In late November 2011, HUD Associate General Counsel Dane Narode informed the Civil Fraud Section that HUD had changed its recommendation. Career officials in DOJ's Civil Fraud Section and the U.S. Attorney's Office expressed surprise about the sudden shift within HUD. One attorney called it "weirdness,"¹⁰⁰ and Greg Brooker, the civil division chief in the U.S. Attorney's Office in Minnesota, wrote "HUD is so messed up."¹⁰¹ A Civil Fraud line attorney reported to then-Civil Fraud Section Director Joyce Branda that Narode cryptically told her "if DOJ wants further information about what is driving HUD's decision, someone high level within DOJ might need to call [HUD General Counsel] Helen Kanovsky."¹⁰² She also told Branda that Greg Friel, the Appellate Section chief in the Civil Rights Division, had "never heard of the *Newell* case, so he cannot imagine how the *Gallagher* case can be affecting the *Newell* case."¹⁰³ Branda passed this uncertainty along to Deputy Assistant Attorney General

⁹⁸ Here, again, Perez's testimony contradicts other testimony received by the Committees. Perez testified that he did not recall asking HUD to reconsider its intervention decision, however, Helen Kanovsky told the Committees that HUD only changed its position after being asked to do so by Perez.

⁹⁹ See Transcribed Interview of Derek Anthony West, U.S. Dep't of Justice, in Wash., D.C. at 149-50, 188-89 (Mar. 18, 2013).

¹⁰⁰ Email from Line Attorney 3 to Greg Brooker (Dec. 2, 2011, 12:02 p.m.). [DOJ 172/164]

¹⁰¹ Email from Greg Brooker to Line Attorney 3 (Nov. 30, 2011, 10:48 a.m.). [DOJ 120/115]

¹⁰² Email from Line Attorney 1 to Joyce Branda (Dec. 2, 2011, 11:59 a.m.). [DOJ 169/161]

¹⁰³ *Id.*

Michael Hertz in an email, where she stated: “I am not sure [h]ow [G]allagher impacts [N]jewell.”¹⁰⁴

HUD’s change of heart, however, was no surprise to Assistant Attorney General Perez. On November 30, then-Assistant Attorney General Tony West emailed Perez about *Newell*. He stated: “HUD formally recommended intervention. Let’s discuss.”¹⁰⁵ Perez responded only minutes later. He wrote: “I am confident that position has changed. You will be hearing from Helen [Kanovsky] today.”¹⁰⁶

What Perez did not tell West was that he was simultaneously communicating with Kanovsky – a fact that West did not know at the time.¹⁰⁷ Later on November 30, after West and Kanovsky spoke, Perez emailed Kanovsky and asked: “How did things do with Tony?”¹⁰⁸ Kanovsky responded the next day. She wrote: “I hope ok. He was aware of our communication to his staff earlier and asked for it in writing. We sent [Line Attorney 1] the requested email this morning.”¹⁰⁹

As the month of December wore on, confusion mounted. At the conclusion of the December 13 meeting with City officials, DOJ’s Hertz asked HUD’s Dane Narode to provide a fuller explanation of HUD’s changed recommendation in *Newell*.¹¹⁰ When HUD had not offered an explanation by December 20, Civil Fraud reiterated Hertz’s request.¹¹¹ A Civil Fraud line attorney explained the situation to then-Civil Fraud Section Director Branda in an e-mail: He stated:

[T]he USAO is inquiring about the status of our position. It is not withdrawing its recommendation to intervene, HUD does not seem inclined to give us its position in writing short of the email it sent Mike Hertz told Dane at the conclusion of the meeting on December 13 that [HUD’s given basis] was not a reason to decline a *qui tam* and asked Dane to follow-up with a formal position. In the meantime, Mike Hertz sent the authority memo back to our office. We are in a difficult position because we have an intervention deadline of January 13 and the USAO does not know what, if anything, it is being asked to do at this point.¹¹²

Branda told the Committees that when Hertz returned the initial intervention memo, she took that to mean that he had decided against intervention.¹¹³ However, an email between two line attorneys in December 2011 indicates that Hertz returned the memo to allow the attorneys to

¹⁰⁴ Email from Joyce Branda to Michael Hertz (Dec. 5, 2011, 7:05 a.m.). [DOJ 186/175]

¹⁰⁵ Email from Tony West to Thomas E. Perez (Nov. 30, 2011, 3:07 p.m.). [DOJ 124/119]

¹⁰⁶ Email from Thomas E. Perez to Tony West (Nov. 30, 2011, 3:14 p.m.). [DOJ 124/119]

¹⁰⁷ Transcribed Interview of Derck Anthony West, U.S. Dep’t of Justice, in Wash., D.C. at 149-50, 188-89 (Mar. 18, 2013).

¹⁰⁸ Email from Thomas E. Perez to Helen R. Kanovsky (Nov. 30, 2011, 7:20 p.m.). [DOJ 165]

¹⁰⁹ Email from Helen R. Kanovsky to Thomas E. Perez (Dec. 1, 2011, 10:50 a.m.). [DOJ 165]

¹¹⁰ See Email from Line Attorney 1 to HUD Line Employee (Dec. 20, 2011, 4:38 p.m.). [DOJ 387/349]

¹¹¹ *Id.*

¹¹² Email from Line Attorney 1 to Joyce Branda (Dec. 20, 2011, 4:44 p.m.). [DOJ 388/350]

¹¹³ Briefing with Joyce Branda in Wash., D.C. (Dec. 5, 2012).

incorporate HUD's "new analysis and explanation for its changed position."¹¹⁴ A contemporaneous email from Branda supports this understanding. Branda wrote: "I guess the other issue we need to flesh out better (hopefully with HUD) is the extent to which they had a reasonable belief that their compliance with other requirements for minorities and women satisfied Section 3, which I think troubled Mike The memo may need to address that more fully"¹¹⁵

As the career attorneys at DOJ attempted to get further information on HUD's position, their frustration mounted. One career attorney wrote: "This is ridiculous. I have no control over any of this. Why are higher level people making phone calls?"¹¹⁶ Another career attorney wrote: "It feels a little like 'cover your head' ping pong. Do we need to suggest that the big people sit in a room and then tell us what to do? I kinda think Perez, West, Helen, and someone from the Solicitor's office need to make a decision."¹¹⁷

Kanovsky told the Committees that she was aware of this frustration among the career attorneys in the Civil Fraud Section. Kanovsky testified that the career attorneys were "upset that there was another part of the Justice Department that wanted to go a different direction, which was going to get in the way of them doing what they want to do."¹¹⁸

On December 23, 2011, a line attorney in the Civil Fraud Section wrote to another line attorney about HUD's change of heart and the silence from the U.S. Attorney's Office about its position. She wrote: "It seems as though everyone is waiting for someone else to blink."¹¹⁹ The same day, the line attorney emailed Joyce Branda. The email stated:

I thought our marching orders were to draft a declination memo and to concur with the USAO-Minn. USAO-Minn. called me today (Greg Brooker, [Line Attorney 3], [Line Attorney 4]). Tony West, Todd Jones, and Tom Perez have apparently had conversations about this. Everything I have is third hand. Tom Perez called Greg Brooker directly yesterday. We discussed this plan today and the USA blessed the idea of [Line Attorney 2] and [Line Attorney 3] reaching out to defendant. The clear implication is that this is what should happen, but certainly I have not heard this directly from Tony West or Perez.¹²⁰

In another email to Branda minutes later, the same line attorney elaborated on her frustration with the process. The email stated:

By the way, when the district called me this morning to discuss the case, I did not tell them I knew that their USA was planning to decline (as we

¹¹⁴ Email from Line Attorney 1 to Line Attorney 2 (Dec. 17, 2011, 3:10 p.m.). [DOJ 381/346]

¹¹⁵ Email from Joyce Branda to Line Attorney 1 (Dec. 20, 4:54 p.m.). [DOJ 390/352]

¹¹⁶ Email from Line Attorney 1 to Line Attorney 2 (Dec. 20, 5:00 p.m.). [DOJ 397/359]

¹¹⁷ Email from Line Attorney 2 to Line Attorney 1 (Dec. 20, 2011, 5:02 p.m.). [DOJ 400/362]

¹¹⁸ Transcribed Interview of Helen Kanovsky, U.S. Dep't of Housing & Urban Development, in Wash., D.C. at 137 (Apr. 5, 2013).

¹¹⁹ Email from Line Attorney 1 to Line Attorney 2 (Dec. 23, 2011, 9:35 a.m.). [DOJ 541/501]

¹²⁰ Email from Line Attorney 1 to Joyce Branda & Line Attorney 2 (Dec. 23, 2011, 3:47 p.m.). [DOJ 552/512]

discussed I would not tell them). **It was a difficult conversation to be honest, me playing dumb and them clearly feeling me out to see [if] I had been told about the conversation with their USA.** Eventually they got around to telling me, but clearly they were hoping not to be the first office to say “we will decline.” I did tell them that I felt confident that we would concur with their declination and that our offices would not be split on this question (of course I know that was our position). **This really seems extremely off and inefficient.** Why are hire-ups [sic] having numerous one on one conversations instead of us all having a conference call with Tony West, Perez, and the USA so we can get perfectly clear on what we are to do.¹²¹

Documents produced to the Committees show that this confusion continued throughout December 2011. In an early January 2012 meeting between Assistant Attorney General Perez, then-Assistant Attorney General West, and Deputy Assistant Attorney General Michael Hertz, West and Hertz agreed to allow Perez to lead negotiations with the City about *Magner* and the two False Claims Act matters.¹²² At this point, the career trial attorneys in the Civil Fraud Section became merely a rubberstamp for Perez’s eventual agreement.

Finding: The initial development of the *quid pro quo* by senior political appointees, and the subsequent 180 degree change of position, confused and frustrated the career Department of Justice attorneys responsible for enforcing the False Claims Act, who described the situation as “weirdness,” “ridiculous,” and a case of “cover your head ping pong.”

HUD’s Purported Reasons for Its Changed Recommendation in Newell Are Unpersuasive and a Pretext for HUD’s Desired Withdrawal of Magner

The Department of Housing and Urban Development initially notified the Civil Fraud Section that it had changed its *Newell* recommendation in late November 2011. HUD did not fully explain its reasons until mid-December 2011 – and only then after DOJ attorneys asked HUD to do so. A careful examination of HUD’s purported reasons for its changed recommendation reveals that those reasons are unsupported by the evidence and suggests a pretext for a politically motivated decision to prevent the Supreme Court from hearing *Magner*.

On November 29, 2011 – only seven weeks after he signaled HUD’s support for intervention and only six days after Perez’s first discussion with Lillehaug – HUD Associate General Counsel Dane Narode informed career Civil Fraud Section attorneys that HUD had reconsidered its intervention recommendation in *Newell*.¹²³ On December 1, Narode memorialized the change in an email. He stated:

¹²¹ Email from Line Attorney 1 to Joyce Brandt & Line Attorney 2 (Dec. 23, 2011, 4:11 p.m.) (emphases added) [DOJ 559/519]

¹²² See Transcribed Interview of Derek Anthony West, U.S. Dep’t of Justice, in Wash., D.C. at 79-84 (Mar. 18, 2013).

¹²³ Email from Dane Narode to Line Attorney 1 (Nov. 29, 2011, 8:06 p.m.) [HUD 130]

This is to confirm our telephone conversation of Tuesday night in which I informed you that HUD has reconsidered its support for intervention by the government in the St. Paul *qui tam* matter. HUD has determined that intervention is not necessary because St. Paul's programmatic non-compliance has been corrected through a Voluntary Compliance Agreement with HUD.¹²⁴

After DOJ asked for further explanation, a HUD attorney sent HUD's formal explanation in a memorandum to the Civil Fraud Section on December 20.¹²⁵ The memorandum referenced HUD's Voluntary Compliance Agreement with the City, describing it as "a comprehensive document that broadly addresses St. Paul's Section 3 compliance, including the compliance problems at issue in the False Claims Act case."¹²⁶ The memo stated:

Given the City's success in ensuring that its low- and very low-income residents are receiving economic opportunities generated by federal housing and community development funding, as required by Section 3, and the financial and other investments that the City has made and is continuing to make from its own resources to accomplish this, HUD considers it imprudent to expend the limited resources of the federal government on this matter.¹²⁷

This explanation initially did not satisfy the career attorneys in the Civil Fraud Section. One line attorney, in an email to her colleague, wrote: "Well that was a fast change of heart."¹²⁸ Joyce Branda, the then-Director of the Civil Fraud Section, was even more direct: "It doesn't address the question I have. Do they agree their belief was reasonable about section 3 compliance? Nothing about the merits."¹²⁹ When Deputy Assistant Attorney General Hertz forwarded the memo to then-Assistant Attorney General Tony West, he stated that the memo "[s]till principally focuses on the prospective relief."¹³⁰

Unconvinced by HUD's explanation, the Civil Fraud Section asked Narode to address whether HUD believed that St. Paul had complied with Section 3 through its women- and minority-owned business enterprises (WBEs and MBEs).¹³¹ This request sparked a mild panic within HUD. Melissa Silverman, a HUD Assistant General Counsel, wrote to Dane Narode about the City's Vendor Outreach Program (VOP) for WBEs and MBEs, explaining that there were significant problems with the City's VOP and "just because St. Paul had a VOP doesn't mean it met the goals of the VOP or Section 3."¹³² Silverman also emailed HUD Deputy Assistant Secretary Sara Pratt to inform her about press reports and an independent audit that

¹²⁴ Email from HUD Line Employee to Line Attorney 1 (Dec. 1, 2011, 10:08 a.m.). [DOJ 161/156]

¹²⁵ See Email from HUD Line Employee to Joyce Branda (Dec. 20, 2011, 6:21 p.m.). [DOJ 408/369]

¹²⁶ Memorandum for Joyce R. Branda (Dec. 20, 2011). [DOJ 409-10/370-71]

¹²⁷ *Id.*

¹²⁸ Line Attorney 1 to Joyce Branda (Dec. 21, 2011, 7:13 a.m.). [DOJ 418/379]

¹²⁹ Email from Joyce Branda to Line Attorney 1 & Line Attorney 2 (Dec. 21, 2011, 7:51 a.m.). [DOJ 420/381]

¹³⁰ Email from Michael Hertz to Tony West (Dec. 21, 2011, 10:57 a.m.). [DOJ 440/401]

¹³¹ Email from Melissa Silverman to Michelle Aronowitz (Dec. 22, 2011, 3:58 p.m.). [HUD 232]

¹³² Email from Melissa Silverman to Dane Narode (Dec. 22, 2011, 12:01 p.m.). [HUD 222]

found problems with the City's WBE and MBE enforcement.¹³³ Pratt responded: "Yes, I'm treading carefully here."¹³⁴

As HUD struggled to respond to the Civil Fraud Section, Sara Pratt reached out directly to the City to seek its assistance. On the same day that the Civil Fraud Section made its request, Pratt spoke with St. Paul's outside counsel, John Lundquist, a law partner of David Lillehaug.¹³⁵ Lundquist responded by sending three separate emails to Pratt with information about the City's programs.¹³⁶ These emails included information about the City's VOP and the independent audit, as well as a position paper that the City prepared for the Civil Division.¹³⁷ When Pratt forwarded this information to Silverman, Silverman noted her concerns about the information in an email to Narode. She stated:

Sara's attachment is the City's 'position paper' setting forth reasons why the City thinks the Govt should decline to intervene. Among other things, the City references the Hall audit's review of its VOP, but says nothing other than: 'overall, the results were largely positive.' **This is just not true.** The Hall audit reports the small percentages of contracting dollars directed toward MBEs and WBEs . . . and describes a lack of responsibility, enforcement, etc.¹³⁸

With this information calling into doubt the City's WBE and MBE programs, HUD had difficulty crafting an adequate response. Pratt and other attorneys traded draft language before HUD Deputy General Counsel Michelle Aronowitz suggested, "if we respond at all, why wouldn't we just reiterate that HUD does not want to proceed with the false claims for the reasons stated in our letter, the city is in compliance with HUD's section 3 VCA, and it is possible that compliance with MBE, etc, requirements could result in compliance with Section 3."¹³⁹

This is the path HUD took. On December 22, Melissa Silverman wrote to the Civil Fraud Section line attorney. She stated:

HUD's Office of Fair Housing and Equal Opportunity has determined that the City of St. Paul is not only in compliance with the VCA, but is also in compliance with its Section 3 obligations at this time. As described in our December 20, 2001 [*sic*] memo, HUD does not wish to proceed with the False Claims Act case. It is possible that notification to MBEs, WBEs, and SBES could result in compliance with Section 3 requirements, in

¹³³ Email from Melissa Silverman to Sara K. Pratt (Dec. 22, 2011, 2:16 p.m.). [HUD 225]

¹³⁴ Email from Sara K. Pratt to Melissa Silverman (Dec. 22, 2011, 2:24 p.m.). [HUD 225]

¹³⁵ See Email from John Lundquist to Sara K. Pratt (Dec. 22, 2011, 1:45 p.m.). [SPA 144]

¹³⁶ Email from John Lundquist to Sara K. Pratt (Dec. 22, 2011, 2:37 p.m.); [SPA 145] Email from John Lundquist to Sara K. Pratt (Dec. 22, 2011, 3:16 p.m.); [SPA 146] Email from John Lundquist to Sara K. Pratt (Dec. 23, 2011, 2:05 p.m.). [SPA 150-51]

¹³⁷ *Id.*

¹³⁸ Email from Melissa Silverman to Dane Narode (Dec. 22, 2011, 2:57 p.m.) (emphasis added). [HU D231]

¹³⁹ Email from Michelle Aronowitz to Melissa Silverman, Sara Pratt, & Dane Narode (Dec. 22, 2011, 4:57 p.m.). [HUD 240-41]

which case the existence or non-existence of Section 3 notification procedures would essentially be the basis for technical assistance, not a finding of a violation.¹⁴⁰

HUD's rationale was so unconvincing that the Civil Fraud Section line attorney had to confirm with Narode that Silverman's email was in response to the Civil Fraud Section's question about St. Paul's compliance with Section 3 via its WBE and MBE programs.¹⁴¹

HUD's rationale supporting its declination recommendation is flawed in at least two respects. First, HUD's Voluntary Compliance Agreement (VCA) with the City was never intended to remedy the City's past violations of Section 3. At the time the VCA was consummated, HUD Regional Director Maurice McGough publicly stated: "The purpose of the VCA isn't to address past noncompliance, but to be a blueprint to ensure future compliance."¹⁴²

Further, the plain language of the agreement acknowledges its non-application to the False Claims Act. The agreement states: "[t]his Voluntary Compliance Agreement does not release the City from any claims, damages, penalties, issues, assessments, disputes, or demands arising under the False Claims Act . . ."¹⁴³ By its own terms, therefore, the VCA cannot address the City's "Section 3 compliance, including the compliance problems at issue in the False Claims Act case" as asserted by HUD.¹⁴⁴

The preservation of False Claims Act liability in the language of the VCA matches what HUD told whistleblower Fredrick Newell at the time. Newell testified to the Committees that "when we met with [HUD Regional Director] Maury McGough in the first interview regarding the [administrative] complaint process, Maury had stated that the process would allow me to be part of the negotiation and that our companies would be made whole."¹⁴⁵ Instead, when HUD settled the administrative complaint without remedying Newell, McGough told him that he would be made whole through the False Claims Act process.¹⁴⁶ Fredrick Newell's attorney stated: "[T]oward the end of 2009, after Fredrick's input was solicited and then it became clear that he wasn't going to be at the table, then they said, 'Don't worry, we'll take care of you later.' . . . I was told, 'do not worry, Fredrick will be taken care of through the False Claims Act.'"¹⁴⁷

Second, HUD never asserted whether it believed that St. Paul had actually complied with Section 3 through its WBE and MBE programs. The most HUD ever asserted was that "it is **possible**" that the City's WBE and MBE initiatives in its Vendor Outreach Program satisfied the strictures of Section 3.¹⁴⁸ Privately, however, HUD officials acknowledged that the City's WBE

¹⁴⁰ Email from Melissa Silverman to Line Attorney 1 (Dec. 22, 2011, 6:01 p.m.). [DOJ 541/501]

¹⁴¹ Email from Line Attorney 1 to Dane Narode (Dec. 23, 2011, 9:43 a.m.). [DOJ 542/502]

¹⁴² Anna Pratt, *Faith Leaders Want St. Paul to Pay for Its Sins*, Minnesota Spokesman-Recorder, Feb. 17, 2010.

¹⁴³ Voluntary Compliance Agreement: Section 3 of the Housing and Community Development Act between U.S. Dep't of Housing and Urban Development and the City of Saint Paul, MN (Feb. 2010).

¹⁴⁴ Memorandum for Joyce R. Branda (Dec. 20, 2011). [DOJ 409-10/370-71]

¹⁴⁵ Transcribed Interview of Fredrick Newell in Wash., D.C. at 38 (Mar. 28, 2013).

¹⁴⁶ *Id.* at 39-41

¹⁴⁷ *Id.* at 43-44

¹⁴⁸ Email from Melissa Silverman to Line Attorney 1 (Dec. 22, 2011, 6:01 p.m.) (emphasis added). [DOJ 541/501]

and MBE initiatives were deficient. Newell explained the City's Vendor Outreach Program to the Committees during his transcribed interview. Newell testified:

St. Paul created had [*sic*] a program called – that resulted in its final naming of the Vendor Outreach Program. That was solely and particularly set up to address minorities and minority contractors. That program is what St. Paul would often throw up when I would say to them that they're not doing Section 3. They would say, We're complying based on our Vendor Outreach Program. The truth of the matter is they wasn't even complying with the Vendor Outreach Program. But I explained to them that they could not meet the Section 3 goals based on the Vendor Outreach Program because the Vendor Outreach was a race based program, and Section 3 was an income based program.¹⁴⁹

Tellingly, Sara Pratt – a senior HUD official in the Office of Fair Housing and Equal Opportunity, with responsibility for enforcing Section 3 – could not tell the Committee whether the City of St. Paul's WBE and MBE programs satisfied the requirements of Section 3.¹⁵⁰

Seen in this context, HUD's changed recommendation appears motivated more by ideology than by merits. Early in the process, Assistant Attorney General Perez told his staff that "HUD is willing to leverage the case."¹⁵¹ Perez testified that HUD recognized the "importance" of the disparate impact doctrine and that HUD's Pratt and Kanovsky "rather clearly expressed their belief" that it would be in the interests of HUD to use *Newell* to withdraw *Magner*.¹⁵² In addition, shortly after the Court agreed to hear the *Magner* appeal, HUD promulgated a proposed regulation codifying the Department's use of disparate impact.¹⁵³ HUD did not want *Magner* decided before it could finalize its regulation, as its General Counsel Kanovsky admitted to the Committees. She stated: "[T]o have the Supreme Court grant cert on a legal theory which had been developed by the courts but hadn't yet been part of the regulations of the United States under the Administrative Procedure Act was very problematic to us. We . . . were in the process of meeting our responsibilities to promulgate the rule, and the timing of this was of grave concern."¹⁵⁴

After carefully examining HUD's reasons for recommending declination in *Newell*, it is apparent that neither basis – the Voluntary Compliance Agreement or the Vendor Outreach Program for women business enterprises and minority business enterprises – justifies the declination. There is simply no documentation to refute the assertion that the only changed circumstance from October 7, 2011 – when HUD recommended intervention – to November 29,

¹⁴⁹ Transcribed Interview of Fredrick Newell in Wash., D.C. at 24-25 (Mar. 28, 2013).

¹⁵⁰ Transcribed Interview of Sara Pratt, U.S. Dep't of Housing & Urban Development, in Wash., D.C. at 58-59 (Apr. 3, 2013).

¹⁵¹ Handwritten notes of conversation between Thomas Perez, Jocelyn Samuels, Vicki Schultz, and Eric Halperin (Nov. 28, 2011). [DOJ 111-13/106-08]

¹⁵² Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 130-31 (Mar. 22, 2013).

¹⁵³ See Implementation of the Fair Housing Act's Discriminatory Effects Standard, 76 Fed. Reg. 70,921 (Nov. 16, 2011).

¹⁵⁴ Transcribed Interview of Helen Kanovsky, U.S. Dep't of Housing & Urban Development, in Wash., D.C. at 35 (Apr. 5, 2013).

2011 – when HUD changed its recommendation – was the Supreme Court’s decision to hear the *Magner* appeal and the subsequent association between *Magner* and *Newell*.

Finding: The reasons given by the Department of Housing and Urban Development for recommending declination in *Newell* are unsupported by documentary evidence and instead appear to be pretextual post-hoc rationalizations for a purely political decision.

The “Consensus” that Emerged for Declining Intervention in Newell Directly Resulted from Assistant Attorney General Perez’s Stewardship of the Quid Pro Quo

Acting Associate Attorney General West testified that the recommendation of the Civil Division for intervention in *Newell* shifted in January 2011 after a “consensus” began to emerge for declination. As West stated, “by early, mid-January, there was a consensus that had coalesced in the Civil Division that we were going to decline the *Newell* case.”¹⁵⁵ Assistant Attorney General Perez similarly testified that a “consensus began to emerge . . . shortly before Christmas that it was in the interest of the United States” to decline intervention in *Newell*.¹⁵⁶ This consensus, however, only resulted from the careful stewardship of Perez in shaping the deal.

After laying the groundwork for the *quid pro quo*, Assistant Attorney General Perez remained closely involved in overseeing the development and execution of the deal. Perez openly advised senior officials at HUD how to communicate with the Civil Division career attorneys and what steps had to be taken to change the Civil Division’s impression of *Newell*. He also counseled St. Paul’s outside counsel, David Lillehaug, how to approach Civil Division officials about the cases. Throughout the entire process, documents and testimony suggest that Perez remained keenly aware of all the moving parts and what steps needed to occur to arrive at a consensus for declining *Newell*.

As discussions on a possible agreement progressed in early December 2011, Perez began to counsel senior HUD officials about how to effectively shift the opinion of the Civil Division. On December 8, Perez advised HUD Deputy Assistant Secretary Sara Pratt about which Civil Fraud personnel were handling the *Newell* case and who to approach. In an email to Pratt, Perez stated:

The trial atty assigned to the matter is [Line Attorney 2]. He reports to [Line Attorney 1], who can be reached at 202-[redacted]. [Line Attorney 1] in turn reports to Joyce Branda, I am told, who can be reached at 202-[redacted]. My instinct would be to start with [Line Attorney 1], and see how it goes. I do not know any of these folks. Thx again for agreeing to conduct an independent review of this matter.¹⁵⁷

¹⁵⁵ Transcribed Interview of Derek Anthony West, U.S. Dep’t of Justice, in Wash., D.C. at 82-83 (Mar. 18, 2013).

¹⁵⁶ Transcribed Interview of Thomas Edward Perez, U.S. Dep’t of Justice, in Wash., D.C. at 87-88 (Mar. 22, 2013).

¹⁵⁷ Email from Thomas E. Perez to Sara K. Pratt (Dec. 8, 2011, 9:27 a.m.). [DOJ 272-74]

Perez offered this information while acknowledging that he was not acquainted with these career attorneys and while he was aware that HUD had already been talking to the Civil Fraud Section. When asked by the Committees, Pratt testified that she did not recall receiving this email.¹⁵⁸

The same day, Perez alerted HUD General Counsel Kanovsky about “a step that needs to occur in your office that has not occurred and has therefore prevented progress from occurring.”¹⁵⁹ Perez testified that he was referring to “the communication to the Civil Division by HUD that they believe that the *Newell* matter is not a candidate for intervention.”¹⁶⁰ Perez also told the Committees that at the time, although he was aware that HUD’s recommendation had changed, he was unsure if HUD had already conveyed its new recommendation to the Civil Division.¹⁶¹ His email to Kanovsky, therefore, seems to have been calculated to ensure that the Civil Division knew of HUD’s new recommendation so that the *quid pro quo* could continue to progress. When interviewed by the Committees, Kanovsky could not recall this email.¹⁶²

Perez likewise facilitated discussions between the City and HUD. In early December 2011, he asked HUD’s Sara Pratt to meet the City’s lawyer, David Lillehaug, in advance of a December 13 meeting between the Civil Division and City officials in Washington, D.C.¹⁶³ Lillehaug, along with St. Paul City Attorney Sara Grewing, subsequently spoke with Pratt on the morning of December 9, discussing ideas for how the City’s Section 3 compliance program could be enhanced.¹⁶⁴ Pratt and Lillehaug agreed to meet on December 13 before the City’s meeting with the Civil Division.¹⁶⁵ Lillehaug called Perez afterward and told him that the conversation with Pratt had been “helpful.”¹⁶⁶ Pratt similarly reported to Perez that she had a “very excellent call” with Lillehaug and Grewing.¹⁶⁷ The effect of these discussions between the City and HUD was not lost on DOJ officials, as evidenced by notes of one phone call. Notes from the call stated: “HUD is now abandoning ship – may be lobbied by St. Paul.”¹⁶⁸

In advance of the City’s meetings on December 13, Perez took an active role in moving the different offices. Perez also appears to have been coaching the City on how to approach its discussions with the Department of Justice. Perez advised Lillehaug “that he should be prepared to make a presentation to the Civil Division about why they think the case, the *Newell* case,

¹⁵⁸ Transcribed Interview of Sara Pratt, U.S. Dep’t of Housing & Urban Development, in Wash., D.C. at 74 (Apr. 3, 2013).

¹⁵⁹ Email from Thomas E. Perez to Helen R. Kanovsky (Dec. 8, 2011, 9:03 p.m.) [DOJ 275-76]

¹⁶⁰ Transcribed Interview of Thomas Edward Perez, U.S. Dep’t of Justice, in Wash., D.C. at 139-40 (Mar. 22, 2013).

¹⁶¹ *Id.* at 140

¹⁶² Transcribed Interview of Helen Kanovsky, U.S. Dep’t of Housing & Urban Development, in Wash., D.C. at 54-55 (Apr. 5, 2013).

¹⁶³ Interview of David Lillehaug (Oct. 16, 2012); Transcribed Interview of Sara Pratt, U.S. Dep’t of Housing & Urban Development, in Wash., D.C. at 65 (Apr. 3, 2013); Email from Thomas E. Perez to Sara K. Pratt (Dec. 8, 2011, 10:42 p.m.) [DOJ 279]

¹⁶⁴ Interview of David Lillehaug in Wash., D.C. (Oct. 16, 2012). Pratt testified that this call was between her and Lillehaug. Transcribed Interview of Sara Pratt, U.S. Dep’t of Housing & Urban Development, in Wash., D.C. at 65 (Apr. 3, 2013).

¹⁶⁵ See Email from Sara K. Pratt to David Lillehaug (Dec. 9, 2011, 10:47 a.m.) (“Thank you for a helpful discussion this morning. I look forward to meeting you on Tuesday at 9:00 am.”) [SPA 158]

¹⁶⁶ *Id.*

¹⁶⁷ Email from Sara K. Pratt to Thomas E. Perez (Dec. 9, 2011, 1:04 p.m.) [DOJ 283]

¹⁶⁸ Handwritten notes of conversation between Joyce Branda, Line Attorney 2, and Greg Brooker (Dec. 28, 2011). [DOJ 618/576]

should be declined.”¹⁶⁹ Perez also asked Pratt to include him in her meeting with the City. In an email to Pratt, he wrote: “Maybe after you meet with them, you can patch me in telephonically and we can talk to them. We need to talk them off the ledge.”¹⁷⁰

After the meetings, Lillehaug emailed Pratt thanking her for the “productive” meeting with the City.¹⁷¹ Lillehaug told Pratt “[u]nfortunately, our meeting in the afternoon did not go as well. The possibility of an expanded VCA did not seem to be given much weight by the representatives of the DOJ’s Civil Division, who described their job as ‘bringing in money to the U.S. Treasury.’”¹⁷² Pratt later emailed Perez: “We should talk; the Tuesday afternoon meeting did NOT go well at all.”¹⁷³ Perez responded: “I am well aware of that. We will figure it out.”¹⁷⁴

Perez continued to closely oversee the progress of the *quid pro quo* as December progressed. On December 19, Lillehaug and Perez spoke on the telephone. Lillehaug expressed dismay to Perez about the meeting with the Civil Division.¹⁷⁵ Perez told Lillehaug that his “top priority” was to ensure that *Magner* was withdrawn.¹⁷⁶ Perez told Lillehaug that HUD was working the matter “as we speak.”¹⁷⁷ Meanwhile, Perez kept the pressure on HUD to ensure that it was satisfying the requests and answering the questions of the Civil Division. In particular, he kept tabs on the progress of a detailed declination memo that Deputy Assistant Attorney General Michael Hertz had requested from HUD after the December 13th meeting. Perez wrote to HUD Deputy Assistant Secretary Pratt on December 20 to ask if the memo had been sent.¹⁷⁸ Pratt responded: “Am trying to find out. I sent to [HUD Line Employee] but didn’t hear back from him. [General Counsel] Helen [Kanovsky] has them both and she could send them too . . . but I can’t.”¹⁷⁹

In the early weeks of discussions on the *quid pro quo*, there was no guarantee that an agreement would be reached. By the time Perez became aware of *Newell*, three separate entities in the federal government – HUD, the U.S. Attorney’s Office in Minnesota, and the Civil Fraud Section – had each recommended that the government intervene in the case. The recommendations of each of these three entities would have to be changed to reach a deal with the City. In early-to-mid-December, Perez painstakingly advised HUD and the City and oversaw their communications with the Civil Division to ensure that these recommendations were changed. Only then did a “consensus” emerge for declining intervention in *Newell*.

¹⁶⁹ Transcribed Interview of Thomas Edward Perez, U.S. Dep’t of Justice, in Wash., D.C. at 196 (Mar. 22, 2013).

¹⁷⁰ Email from Thomas E. Perez to Sara K. Pratt (Dec. 12, 2011, 2:03 p.m.). [DOJ 312-13]

¹⁷¹ Email from David Lillehaug to Sara K. Pratt (Dec. 14, 2011, 12:46 p.m.). [DOJ 371/336]

¹⁷² *Id.*

¹⁷³ Email from Sara K. Pratt to Thomas E. Perez (Dec. 16, 2011, 6:13 a.m.). [DOJ 369]

¹⁷⁴ Email from Thomas E. Perez to Sara K. Pratt (Dec. 16, 2011, 8:04 a.m.). [DOJ 369]

¹⁷⁵ Interview of David Lillehaug in Wash., D.C. (Oct. 16, 2012).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ Email from Thomas E. Perez to Sara K. Pratt (Dec. 20, 2011, 4:56 p.m.). [DOJ 403]

¹⁷⁹ Email from Sara K. Pratt to Thomas E. Perez (Dec. 20, 2011, 5:34 p.m.). [DOJ 403]

Finding: The “consensus” of the federal government to switch its recommendation and decline intervention in *Newell* was the direct result of Assistant Attorney General Perez manipulating the process and advising and overseeing the communications between the City of St. Paul, the Department of Housing and Urban Development, and the Civil Division within the Department of Justice.

As Discussions Stalled, Assistant Attorney General Perez Took the Lead and Personally Brokered the Agreement

From the day that Assistant Attorney General Thomas Perez became aware that the Supreme Court granted certiorari in *Magner*, time was working against him. The Court was poised to hear oral arguments in the appeal on February 29, 2012, and the deadline for the Department of Justice to file its amicus brief was December 29, 2011. By early January 2012, with only weeks remaining until oral arguments, Perez personally assumed the lead and negotiated directly with the City’s outside counsel, David Lillehaug. When discussions broke down in late January 2012, Perez traveled to St. Paul to seal the deal in person with St. Paul Mayor Coleman.

Once Perez had secured a consensus in support of declining *Newell* in exchange for the City’s withdrawal of *Magner*, he began to directly negotiate with Lillehaug on the mechanics of the eventual agreement. Acting Associate Attorney General West testified that the decision to allow Perez to begin leading discussions with the City resulted from a meeting between West, Perez, and Deputy Assistant Attorney General Michael Hertz on January 9, 2012.¹⁸⁰ However, documents show that Perez may have taken it upon himself to lead negotiations even before that meeting. An email from a line attorney in Civil Fraud to then-Civil Fraud Section Director Joyce Branda on January 6 states: “[Line Attorney 2] and I just spoke with USAO-Minn. [Assistant U.S. Attorney] Greg Brooker received a call yesterday from Tom Perez. It sounds like Tom Perez agreed to take the lead on the negotiations with the City of St. Paul, in terms of negotiating a withdraw [*sic*] by the City of the cert petition.”¹⁸¹ Notes of this line attorney’s call with Assistant U.S. Attorney Brooker show Perez asked Brooker “where are we on these cases” and “who has lead negotiating,” and that Perez said that “he needs to start doing this.”¹⁸²

According to Lillehaug, he and Perez had a telephone conversation on January 9 – the same day Perez received the approval of then-Assistant Attorney General West to negotiate on behalf of the Civil Division – in which Perez offered a precise “roadmap” to use in executing the *quid pro quo*.¹⁸³ Lillehaug told the Committees that Perez proposed that the Department would first decline to intervene in *Ellis*, then the City would withdraw *Magner*, and finally the Department would decline to intervene in *Newell*.¹⁸⁴ Lillehaug further told the Committees that Perez promised “HUD would be helpful” with the *Newell* case in the event *Newell* continued his suit after the Department declined intervention.¹⁸⁵ This account is confirmed by a voicemail left

¹⁸⁰ Transcribed Interview of Derek Anthony West, U.S. Dep’t of Justice, in Wash., D.C. at 79-82 (Mar. 18, 2013).

¹⁸¹ Email from Line Attorney 1 to Joyce Branda (Jan. 6, 2012, 11:52 a.m.). [DOJ 656/611]

¹⁸² Handwritten Notes (Jan. 6, 2012). [DOJ 647-54/602-09]

¹⁸³ Interview of David Lillehaug in Wash., D.C. (Oct. 18, 2012).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

for Assistant U.S. Attorney Brooker by Perez on January 12, in which Perez stated: “We should have an answer on whether **our proposal** is a go tomorrow or Monday and just wanted to let you know that.”¹⁸⁶ During his transcribed interview, the Committees asked Perez about his use of the phrase “our proposal” on the voicemail during his transcribed interview. Perez testified:

- Q The voicemail says, “And we should have an answer on whether our proposal is a go.” What are you referring to when you say “our proposal”?
- A Again, up until about the middle of January, the proposal of the United States – the proposal of Mr. Lillehaug was the proposal that was under consideration.
- Q Okay.
- A And so the Civil Division had completed its review, as I have described, and had determined that it, the *Newell* case, was a weak candidate for intervention. And that is what we are referring to.
- Q Okay. I ask because you described it a number of times today as Mr. Lillehaug’s proposal, the one he offered the first time you guys spoke on the phone. This is the first time that it’s been described, to my knowledge, as “our proposal.” And I am wondering if this was a proposal by you on behalf of the Department to Mr. Lillehaug? Or are you describing there the proposal that Lillehaug made to you?
- A Well, again, I don’t know what you’re looking at in reference. But what I meant to communicate in that period of time in January was that the United States was prepared to accept Mr. Lillehaug’s proposal.

On January 13, the Civil Fraud Section became aware that Lillehaug had presented a counteroffer to the U.S. Attorney’s Office. A DOJ line attorney described the phone conversation in an email to a colleague. He stated:

Lillehaug says they have been thinking about it, and the City feels pretty strongly that it can win the Gallagher case in the Supreme Court, and will win back at the trial court when it is remanded. The City is concerned that getting us to decline does not really get them what they want – they would still have to deal with the case. The City wants us to consider an arrangement where we agree to a settlement where it will extend the VCA for another year, value that as an alternative remedy, and it would add a small amount of cash for relator’s attorney fees, and a small relator’s share. They say this has to be a very modest amount of money. In exchange we would have to intervene and move to dismiss.¹⁸⁷

¹⁸⁶ Voicemail from Thomas Perez to Greg Brooker (Jan. 12, 2012, 5:58 p.m.) (emphasis added). [DOJ 719/670]

¹⁸⁷ Email from Line Attorney 2 to Line Attorney 1 (Jan. 13, 2012, 4:00 p.m.). [DOJ 721/671]

Then-Civil Fraud Section Director Branda's reaction to the development was "quite negative." In an email the same day, she stated: "This is so not what was discussed with [T]om [P]erez as what the plan was – basically we were to decline [E]llis first and use that as the good faith government gesture to get them to dismiss the petition."¹⁸⁸

By January 18, the prospects for an agreement were beginning to look bleak. In updating Branda on the state of negotiations, a Civil Fraud line attorney explained that the deal was falling apart. He stated:

[The Assistant U.S. Attorney] says he understood that West, Perez, and Hertz had had a meeting and that the resulting go forward was the plan to decline Ellis, resolve Gallagher, and then decline Newell. . . . [T]he City called and said they are no longer willing to accept the decline [of the] two *qui tams* and dismiss Gallagher deal. That they will not withdrawal [*sic*] Gallagher on that basis, that they are only willing to do the new deal they propose. . . . If we are unwilling to accept this deal, they said they will not dismiss Gallagher.¹⁸⁹

In the ensuing week, DOJ deliberated about how to respond to the counterproposal from Lillehaug. By late January, the Department had decided to reject the City's counterproposal. On or around January 30, the Assistant U.S. Attorney in Minnesota conveyed to Lillehaug that the Department had declined the counterproposal.¹⁹⁰ The attorney's "conclusion [was] that we are no longer on a settlement track, and we should move forward with our decision making process."¹⁹¹

The next day, January 31, Perez emailed Lillehaug, proposing a meeting with the Mayor and City Attorney in St. Paul for February 3.¹⁹² Perez was joined at this meeting by Eric Halperin, a special counsel in the Civil Rights Division. No officials from the Civil Division or the U.S. Attorney's Office were present. At the meeting, Perez initiated a "healthy, robust exchange" about disparate impact and the *Magner* appeal.¹⁹³ Perez raised the initial proposal to decline intervention in *Newell* and *Ellis* in exchange for the withdrawal of *Magner* and said the Department could agree to that exchange.¹⁹⁴ The City officials then left the room to caucus privately, and Lillehaug returned to accept the proposal on behalf of the Mayor.¹⁹⁵

Finding: Assistant Attorney General Perez was personally and directly involved in negotiating the mechanics of the *quid pro quo* with David Lillehaug and he personally agreed to the *quid pro quo* on behalf of the United States during a closed-door meeting with the Mayor in St. Paul.

¹⁸⁸ Email from Joyce Branda to Line Attorney 1 and Line Attorney 2 (Jan. 13, 2012, 5:35 p.m.). [DOJ 735/685]

¹⁸⁹ Email from Line Attorney 2 to Joyce Branda (Jan. 18, 2012, 4:06 p.m.). [DOJ 754/702]

¹⁹⁰ Email from Line Attorney 2 to Line Attorney 1 & Joyce Branda (Jan. 30, 2012, 5:18 p.m.). [DOJ 993/918]

¹⁹¹ *Id.*

¹⁹² Email from Thomas E. Perez to David Lillehaug (Jan. 31, 2012, 12:09 p.m.). [DOJ 59]

¹⁹³ Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 48-56 (Mar. 22, 2013).

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

The Department of Justice Sacrificed a Strong Case Alleging a “Particularly Egregious Example” of Fraud to Execute the Quid Pro Quo with the City of St. Paul

In several settings, officials from the Department of Justice have told the Committees that the decision whether to intervene in *Newell* was a close decision and therefore the United States never gave up anything of substance in exchange for the City withdrawing *Magner*. Assistant Attorney General Perez testified: “[M]y understanding is that the original recommendation was to proceed with intervention, but it was a marginal case.”¹⁹⁶ Acting Associate Attorney General West told the Committees “I can tell you that this case was a close call. It was a close call throughout.”¹⁹⁷ U.S. Attorney Jones likewise testified: “[T]hey were both marginal cases. We could have gone either way on *Newell*.”¹⁹⁸ In addition, now-Deputy Assistant Attorney General Joyce Branda briefed the Committees that after the December 13 meeting with the City, Deputy Assistant Attorney General Michael Hertz whispered to her, “this case sucks,” which she interpreted to mean that it was unlikely the Department would intervene.¹⁹⁹ Branda also told the Committees that she personally felt the case was a “close call.”²⁰⁰

However, testimony and contemporaneous documents indicate that the career Civil Fraud Section and U.S. Attorney’s Office in Minnesota officials thought the *Newell* suit was indeed a strong case for intervention. HUD General Counsel Kanovsky told the Committees that these officials had a strong desire to intervene in the case and that they personally met with her in fall 2011 to lobby her to lend HUD’s support for the intervention decision.²⁰¹ Attorneys from the U.S. Attorney’s Office in Minnesota even flew to Washington, D.C. at taxpayer expense specifically for the meeting.²⁰² At this meeting, Kanovsky did not recall any career attorney mentioning that the case was a “close call” or “marginal.”²⁰³

On October 4, 2011, a line attorney in the Civil Fraud Section wrote to HUD’s Associate General Counsel Dane Narode about the *Newell* case: “Our office is recommending intervention. Does HUD concur?”²⁰⁴ Three days later, Narode replied: “HUD concurs with DOJ’s recommendation.”²⁰⁵ The AUSA handling *Newell* in Minnesota forwarded HUD’s concurrence to his supervisor with a comment. He wrote: “Looks like everyone is on board.”²⁰⁶

The memo prepared by the U.S. Attorney’s Office in Minnesota recommending intervention used strong language to explain its support for intervention, explaining that the City

¹⁹⁶ Transcribed Interview of Thomas Edward Perez, U.S. Dep’t of Justice, in Wash., D.C. at 185-86 (Mar. 22, 2013).

¹⁹⁷ Transcribed Interview of Derek Anthony West, U.S. Dep’t of Justice, in Wash., D.C. at 53 (Mar. 18, 2013).

¹⁹⁸ Transcribed Interview of Byron Todd Jones, U.S. Dep’t of Justice, in Wash., D.C. at 80 (Mar. 8, 2013).

¹⁹⁹ Briefing with Joyce Branda in Wash., D.C. (Dec. 5, 2012).

²⁰⁰ *Id.*

²⁰¹ Transcribed Interview of Helen Kanovsky, U.S. Dep’t of Housing & Urban Development, in Wash., D.C. at 25-30 (Apr. 5, 2013).

²⁰² *Id.*

²⁰³ *Id.* at 109-11.

²⁰⁴ Email from Line Attorney 1 to HUD Line Employee (Oct. 4, 2011, 5:05 p.m.). [DOJ 67]

²⁰⁵ Email from HUD Line Employee to Line Attorney 1 (Oct. 7, 2011, 11:27 a.m.). [DOJ 68]

²⁰⁶ Email from Line Attorney 3 to Greg Brooker (Oct. 7, 2011, 11:28 a.m.). [DOJ 69]

made “knowingly false” statements and had a “reckless disregard for the truth.”²⁰⁷ This memo also emphasized that administrative proceedings performed by HUD found the City’s noncompliance with Section 3 “not . . . to be a particularly close call.”²⁰⁸ Similarly, the initial intervention memo prepared by career attorneys in the Civil Fraud Section described St. Paul’s conduct as a “particularly egregious example of false certifications.” The memo stated:

To qualify for HUD grant funds, the City was required to certify each year that it was in compliance with Section 3. . . . Each time the City asked HUD for money, it impliedly certified its compliance with Section 3. At best, the City’s failure to take any steps towards compliance while continually telling federal courts, HUD and others that it was in compliance with Section 3 represents a reckless disregard for the truth. We believe its certifications of Section 3 compliance to obtain HUD funds were actually more than reckless and that the City had actual knowledge that they were false.²⁰⁹

Neither the U.S. Attorney’s Office memo nor the memo prepared by the Civil Fraud Section described the recommendation to intervene as a “close call” or “marginal.”²¹⁰

Other documents show that as late as mid-December 2011, career officials in DOJ still supported intervention in *Newell*. On December 20, 2011, then-Civil Fraud Section Director Branda wrote to Deputy Assistant Attorney General Hertz: “The USAO wants to intervene notwithstanding HUD. I feel we have a case but I also think HUD needs to address the question St. Paul is so fixated on, i.e. was their belief they satisfied Section 3 by doing enough with minorities and women reasonable?”²¹¹ On December 21, a line attorney in the Civil Fraud Section wrote to Branda about HUD’s memo to decline intervention. The line attorney stated: “Are we supposed to incorporate this into our memo and send up our joint recommendation with the [U.S. Attorney’s Office] that we intervene?”²¹²

Fredrick Newell and his attorney testified that no individual from DOJ or HUD ever told them that his case was a “close call” or “marginal” or otherwise indicated it was weak.²¹³ In fact, Newell told the Committees that “[t]here was a real interest . . . and the DOJ felt it was a good case.”²¹⁴ Newell’s attorney stated:

²⁰⁷ U.S. Attorney, District of Minnesota, Intervention Memo: *U.S. ex rel. Newell v. City of St. Paul, Minnesota* (Oct. 25, 2011). [DOJ 72-79]

²⁰⁸ *Id.*

²⁰⁹ U.S. Dep’t of Justice, Civil Division, Memorandum for Tony West, Assistant Attorney General, Civil Division, *U.S. ex rel. Newell v. City of St. Paul, Minnesota* (Nov. 22, 2011). [DOJ 80-91]

²¹⁰ U.S. Attorney, District of Minnesota, Intervention Memo: *U.S. ex rel. Newell v. City of St. Paul, Minnesota* (Oct. 25, 2011); [DOJ 72-79] U.S. Dep’t of Justice, Civil Division, Memorandum for Tony West, Assistant Attorney General, Civil Division, *U.S. ex rel. Newell v. City of St. Paul, Minnesota* (Nov. 22, 2011). [DOJ 80-91]

²¹¹ Email from Joyce Branda to Michael Hertz (Dec. 20, 2011, 5:05 p.m.). [DOJ 404/365]

²¹² Email from Line Attorney 1 to Joyce Branda (Dec. 21, 2011, 7:36 a.m.). [DOJ 419/380]

²¹³ Transcribed Interview of Fredrick Newell in Wash., D.C. at 55-56 (Mar. 28, 2013).

²¹⁴ *Id.* at 48.

And to build on that, there were a number of indications that Justice was going to intervene in the case, up to and including them saying, we're going to intervene in the case. But it started with the relator interview. And I would say that just the attendance at the interview and the amount of travel expense you're looking at, at the interview, knowing that Justice had already spoken to HUD about the substance of the action and then having that many people from Washington at the meeting [in Minnesota], sent a clear signal to me that this was a case of priority.²¹⁵

Newell's attorney also told the Committees that when the City initially met with DOJ and HUD in 2011, the attorneys from DOJ and HUD were unconvinced by the City's defenses.²¹⁶ According to Newell, even then-HUD Deputy Secretary Ron Sims acknowledged the strength of the case, telling Newell in 2009 that the False Claims Act would be the new model for Section 3 enforcement and directing Newell to "keep up the good work."²¹⁷

That the U.S. Attorney's Office in Minnesota and DOJ's Civil Fraud Section perceived Newell's case to be strong is also corroborated by HUD General Counsel Helen Kanovsky's testimony to the Committees. Kanovsky testified that because she believed HUD's programmatic goals regarding future compliance had been met by the VCA, she was not inclined to recommend intervening in *Newell* when it was first presented to her in the summer or early fall of 2011.²¹⁸ However, the U.S. Attorney's Office in Minnesota and DOJ's Civil Fraud Division requested a meeting with her in order to persuade her to support intervention. Kanovsky testified:

Then attorneys from the U.S. Attorney's Office in Minnesota and from Civil Frauds asked if they could meet with me to dissuade me of that and to get the Department to accede to their request to intervene, so there was that meeting. Assistant U.S. Attorneys flew in from Minnesota, people from Civil Frauds came over. They did a presentation on the matter and why they thought this was important from Justice's equities to intervene. And after that presentation, and because this seemed like a matter that was so important to both Main Justice and the U.S. Attorney's Office, we then acceded to their request that we agree to the intervention.²¹⁹

When questioned more closely about her basis for understanding Civil Fraud Division's position, Kanovsky testified:

A Came from the fact that they and the U.S. Attorney's Office in Minnesota asked for a meeting, came to HUD, spent an amount of time briefing me and trying to convince me that it was in HUD's best interests to agree to

²¹⁵ *Id.* at 53-54.

²¹⁶ *Id.* at 122-26.

²¹⁷ *Id.* at 133-36.

²¹⁸ Transcribed Interview of Helen Kanovsky, U.S. Dep't of Housing & Urban Development, in Wash., D.C. at 25, 30 (Apr. 5, 2013).

²¹⁹ *Id.* at 25.

intervention. So . . . I concluded that the fact that they had come over to make that argument to convince me to go the direction that I had already indicated was not my inclination certainly strongly suggested to me that was where they wanted to go.²²⁰

This meeting undermines the Justice Department's post hoc claim made during the Committees' investigation that the Civil Frauds Division and the U.S. Attorney's Office in Minnesota saw the case as weak from the beginning.

Finding: Despite the Department of Justice's contention that the intervention recommendation in *Newell* was a "close call" and "marginal," contemporaneous documents show the Department believed that *Newell* alleged a "particularly egregious example of false certifications" and therefore the United States sacrificed strong allegations of false claims worth potentially \$200 million to the Treasury.

Assistant Attorney General Perez Offered to Provide the City of St. Paul with Assistance in Dismissing Newell's Complaint

St. Paul's outside counsel, David Lillehaug, told the Committees that during a discussion with Assistant Attorney General Thomas Perez on January 9, 2012, Perez told Lillehaug that "HUD would be helpful" if the *Newell* case proceeded after DOJ declined intervention.²²¹ Lillehaug further told the Committees that on February 4 – the day after Perez reached the agreement with the City – Perez told Lillehaug that HUD Deputy Assistant Secretary Sara Pratt had begun assembling information from local HUD officials to assist the City in a motion to dismiss the *Newell* complaint on original source grounds.²²² This assistance disappeared, Lillehaug stated, after Civil Division attorneys told Perez that DOJ should not assist a False Claims Act defendant in dismissing a whistleblower suit.²²³

In his transcribed interview with the Committees, Perez testified that he did not recall ever suggesting to Lillehaug that HUD would provide material in support of the City's motion to dismiss the *Newell* complaint on original source grounds.²²⁴ However, contemporaneous emails support Lillehaug's version of events and suggest that Lillehaug in fact believed this additional "support" was included as part of the agreement. On February 7, Lillehaug had a conversation with the Assistant U.S. Attorney handling *Newell* in Minnesota.²²⁵ Later that same day, a line attorney in the Civil Fraud Section emailed then-Civil Fraud Section Director Joyce Branda, explaining that Lillehaug had told the Assistant U.S. Attorney that he believed the deal included an agreement that "HUD will provide material to the City in support of their motion to dismiss on original source grounds."²²⁶ The Civil Fraud Section attorneys disagreed strongly with this promise, and they conveyed their concern to then-Assistant Attorney General Tony West.²²⁷

²²⁰ *Id.* at 91-92.

²²¹ Interview of David Lillehaug in Wash., D.C. (Oct. 16, 2012).

²²² *Id.*

²²³ *Id.*

²²⁴ Transcribed Interview of Thomas Edward Perez, U.S. Dept of Justice, in Wash., D.C. at 60-61 (Mar. 22, 20113).

²²⁵ Interview of David Lillehaug in Wash., D.C. (Oct. 16, 2012).

²²⁶ Email from Line Attorney 2 to Joyce Branda (Feb. 7, 2012, 7:17 p.m.). [DOJ 1141/1020]

²²⁷ Email from Joyce Branda to Tony West & Brian Martinez (Feb. 8, 2012, 9:35 a.m.). [DOJ 1141/1020]

West asked his chief of staff, Brian Martinez, to schedule a call with Perez for the morning of February 8.²²⁸

West told the Committees that providing material to the City outside of the normal discovery processes would have been “inappropriate” and “there was not a question in my mind that we were not going to allow discovery to occur outside the normal *Touhy* channels.”²²⁹ West did not recall speaking to Perez about the email from Lillehaug.²³⁰ When asked how the matter was resolved, he replied “[m]y recollection is this somehow got resolved” and “[w]hen I say I don’t recall, I don’t even know if I know how it was resolved. I just know that that wasn’t going to happen, and it didn’t happen.”²³¹

HUD’s Sara Pratt testified that she was unaware of any offer for HUD to provide information to the City in support of its motion to dismiss; however, she did state that “to the extent that existing documents or knowledge available at HUD would have supported the City’s motion, . . . that doesn’t concern me.”²³² Although Pratt did not recall any offer for HUD to assist the City in dismissing the *Newell* complaint, on February 8 – the same day West attempted to speak with Perez about the offer – Perez emailed Pratt asking for her to call him.²³³ Lillehaug likewise told the Committees that Perez told him on February 8 that HUD would not be providing assistance to the City.²³⁴

Although Perez testified that he did not recall ever offering HUD’s assistance to the City, contemporaneous documents and Lillehaug’s statements to the Committees strongly suggest that such an offer was made. This offer was inappropriate, as acknowledged by Acting Associate Attorney General Tony West. However, on a broader level, this offer of assistance potentially violated Perez’s duty of loyalty to his client, the United States, in that *Newell*’s lawsuit was brought on behalf of the United States and any assistance by Perez or HUD with the City’s dismissal of the case would have harmed the interests of the United States. Because the original source defense would have been unavailable if the United States had intervened in *Newell*’s case,²³⁵ Perez’s offer to the City went beyond simply declining intervention to affirmatively aiding the City in its defense of the case.

Finding: Assistant Attorney General Perez offered to arrange for the Department of Housing and Urban Development to provide material to the City of St. Paul to assist the City in its motion to dismiss the *Newell* whistleblower complaint. This offer was inappropriate and potentially violated Perez’s duty of loyalty to his client, the United States.

²²⁸ Email from Tony West to Joyce Branda & Brian Martinez (Feb. 8, 2012, 9:48 a.m.). [DOJ 1141/1020]

²²⁹ Transcribed Interview of Derek Anthony West, U.S. Dep’t of Justice, in Wash., D.C. at 165-67 (Mar. 18, 2013).

²³⁰ *Id.*

²³¹ *Id.*

²³² Transcribed Interview of Sara Pratt, U.S. Dep’t of Housing & Urban Development, in Wash., D.C. at 82-83 (Apr. 3, 2013).

²³³ See Email from Thomas E. Perez to Sara K. Pratt (Feb. 8, 2012, 12:35 p.m.). [DOJ 1177/1056]

²³⁴ Interview with David Lillehaug in Wash., D.C. (Oct. 16, 2012).

²³⁵ See 31 U.S.C. § 3730(e)(4).

Assistant Attorney General Perez Attempted to Cover Up the Presence of Magner as a Factor in the Intervention Decision on Newell

On the morning of January 10, 2012, Assistant Attorney General Perez left a voicemail for Greg Brooker, the Civil Division Section Chief in the U.S. Attorney's Office in Minnesota. In that voicemail, Perez said:

Hey, Greg. This is Tom Perez calling you at – excuse me, calling you at 9 o'clock on Tuesday. I got your message. The main thing I wanted to ask you, I spoke to some folks in the Civil Division yesterday and **wanted to make sure that the declination memo that you sent to the Civil Division – and I am sure it probably already does this – but it doesn't make any mention of the Magner case.** It is just a memo on the merits of the two cases that are under review in the *qui tam* context. So that was the main thing I wanted to talk to you about. I think, to use your words, we are just about ready to rock and roll. I did talk to David Lillehaug last night. So if you can give me a call, I just want to confirm that you got this message and that you were able to get your stuff over to the Civil Division. 202 [redacted] is my number. I hope you are feeling better. Take care.²³⁶

A career line attorney's notes from a subsequent phone conversation between Brooker and attorneys in the Civil Fraud Section and the U.S. Attorney's Office confirm Perez's request. The notes describe a Tuesday morning "message from Perez" in which he told Brooker "when you are working on memos – make sure you don't talk about Sup. Ct. case."²³⁷ Brooker told those on the call that Perez's request was a "concern" and a "red flag," and that he left a voicemail for Perez indicating that *Magner* would be an explicit factor in any declination memo.²³⁸

During his transcribed interview, the Committees asked Perez about this voicemail. Perez maintained that the voicemail was merely an "inartful" attempt to encourage Brooker to expedite the preparation of a concurrence memo by the U.S. Attorney's Office. Perez testified:

So I was – I was confused – "confused" is the wrong term – I was impatient on the 9th of January when I learned that the U.S. Attorney's Office still hadn't sent in their concurrence, because I had a clear impression from my conversation with Todd Jones that they would do that. So I called up and I was trying to put it together in my head, what would be the source of the delay, and the one and only thing I could really think of at the time was that perhaps they hadn't – they didn't write in or they hadn't prepared the language on the *Magner* issue, and so I admittedly inartfully told them, I left a voicemail and what I meant in that voicemail to say was time is moving. . . . And so what I really meant to

²³⁶ Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 120-21 (Mar. 22, 2013) (emphasis added).

²³⁷ Handwritten Notes of Line Attorney 2 (Jan. 11, 2012). [DOJ 713/666]

²³⁸ *Id.*

communicate in that voice message, and I should have – and what I meant to communicate was it is time to bring this to closure, and if the only issue that is standing in the way is how you talk about *Magner*, then don't talk about it.²³⁹

When pressed, however, Perez stated that he never asked Brooker about the reason for the delay and that he only assumed through “the process of elimination” that the presence of *Magner* as a factor in the decision was delaying the preparation of the memo.²⁴⁰ He also testified that he believed the memos had not been transmitted to the Civil Division at the time he left the voicemail.²⁴¹

When presented with a transcription of the voicemail and asked why he used the past tense verb “sent” if he believed the memos had not be transmitted to the Civil Division, Perez stated that he disagreed with the transcription of the voicemail.²⁴² After the Committees played an audio recording of the voicemail for Perez, he suggested that he was unable to ascertain what he had said. He stated: “Having listened to that, I don't think that – I would have to listen to it a number of additional times.”²⁴³ However, later in the voicemail Perez again used the past tense, saying he wanted to confirm with Brooker “that you **were** able to get your stuff over to the Civil Division.”²⁴⁴ Perez did acknowledge that his voicemail for Brooker did not mention anything about a delay.²⁴⁵

The words that Perez spoke in his voicemail speak for themselves. Perez said: “I . . . wanted to make sure that the declination memo that you sent to the Civil Division . . . doesn't make any mention of the *Magner* case. It is just a memo on the merits of the two cases that are under review in the *qui tam* context. So that was the main thing I wanted to talk to you about.” No other witness interviewed by the Committees has indicated that there was any delay in the preparation of a concurrence memo from the U.S. Attorney's Office. Indeed, the U.S. Attorney's Office did not even prepare a concurrence memo for the *Newell* case – instead, it communicated its concurrence in an email from Greg Brooker to then-Civil Fraud Section Director Joyce Branda on February 8, 2012.²⁴⁶

Moreover, in a contemporaneous email to Brooker – sent less than an hour after the voicemail – Perez wrote to him: “I left you a detailed voicemail. Call me if you can after you have a chance to review [the] voice mail.”²⁴⁷ This email does not mention any concern about a delay in transmitting concurrence memos. Instead, the email suggests that Perez intended to leave instructions for Brooker, which matches the tone and content of the voicemail to omit a

²³⁹ Transcribed Interview of Thomas E. Perez, U.S. Dep't of Justice, in Wash., D.C. at 111-12 (Mar. 22, 2013).

²⁴⁰ *Id.* at 113-17.

²⁴¹ *Id.* at 117.

²⁴² *Id.* at 119.

²⁴³ *Id.* at 121.

²⁴⁴ *Id.* at 121 (emphasis added).

²⁴⁵ *Id.* at 124.

²⁴⁶ Email from Greg Brooker to Joyce Branda (Feb. 8, 2012, 4:01 p.m.). [DOJ 1198/1077]

²⁴⁷ Email from Thomas E. Perez to Greg Brooker (Jan. 10, 2012, 9:52 a.m.). [DOJ 707-08]

discussion of *Magner* from the declination memos. Later the same day, at 1:45 p.m., Perez again emailed Brooker, asking “[w]ere you able to listen to my message?”²⁴⁸

Finally, additional contemporaneous documents support a common sense interpretation of Perez’ intent. For instance, Perez testified that after he left the January 10 voicemail, Brooker called him back the next day and said he [Brooker] would not accede to his request. And, according to Perez, he told Brooker that in that case he should “follow the normal process.”²⁴⁹ Yet, one month later on February 6, 2012, following Perez’ meeting in St. Paul where he finalized the agreement, Line Attorney I wrote to Branda updating her on the apparent agreement. The email included eight “additional facts” regarding the deal.²⁵⁰ Points five and six were:

5. Perez wants declination approval by Wednesday, but there is no apparent basis for that deadline.
6. USA-MN considers it non-negotiable that its office will include a discussion of the Supreme Court case and the policy issues in its declination memo.²⁵¹

If Perez’s version of events were accurate, and the issue was resolved on January 11, 2012, when Brooker returned Perez’s phone call, then it is difficult to understand why the U.S. Attorney’s office would still feel the need to emphatically state its position that a discussion of *Magner* must be included in the final declination memo approximately one month later on February 6, 2012.

The only reasonable interpretation of the words spoken by Assistant Attorney General Perez in his January 10 voicemail is that he desired the *Newell* and *Ellis* memos to omit a discussion of *Magner*. Acting Associate Attorney General West told the Committees that it would have been “inappropriate” to omit a discussion of *Magner* in the *Newell* and *Ellis* memos.²⁵² U.S. Attorney B. Todd Jones also told the Committees that it would have been inappropriate to omit a discussion of *Magner*.²⁵³ Thus, even other senior DOJ political appointees felt that Perez was going too far in his cover-up attempt. In addition, the fact that the *quid pro quo* was not reduced to writing allowed Perez to cover up the true factors behind DOJ’s intervention decision. When asked by career Civil Fraud attorneys about whether the deal was in writing, Perez responded: “No, just oral discussions; word was your bond.”²⁵⁴ Thus, with nothing in writing, only the fortitude of Assistant U.S. Attorney Greg Brooker in resisting the voicemail request prevented Perez from inappropriately masking the factors in the Department’s decision to decline intervention in *Newell* and *Ellis*.

²⁴⁸ Email from Thomas E. Perez to Greg Brooker (Jan. 10, 2012, 1:45 p.m.). [DOJ 717-18]

²⁴⁹ Transcribed Interview of Thomas E. Perez, U.S. Dep’t of Justice, in Wash., D.C. at 220 (March 22, 2013).

²⁵⁰ Email from Line Attorney I to Joyce Branda (Feb. 6, 2012, 2:58 p.m.). [DOJ 1027-28/948]

²⁵¹ *Id.*

²⁵² Transcribed Interview of Derek Anthony West, U.S. Dep’t of Justice, in Wash., D.C. at 133 (Mar. 18, 2013) (“For me, yes, it would have been inappropriate, which is why I included it along with all of the other things I thought were relevant.”).

²⁵³ Transcribed Interview of Byron Todd Jones, U.S. Dep’t of Justice, in Wash., D.C. at 177-78 (Mar. 8, 2013).

²⁵⁴ Handwritten notes (Feb. 7, 2012). [DOJ 1059-60/975-76]

Finding: Assistant Attorney General Perez attempted to cover up the *quid pro quo* when he personally instructed career attorneys to omit a discussion of *Magner* in the declination memos that outlined the reasons for the Department's decision to decline intervention in *Newell* and *Ellis*, and focus instead only "on the merits."²⁵⁵

Finding: Assistant Attorney General Perez attempted to cover up the *quid pro quo* when he insisted that the final deal with the City settling two cases worth potentially millions of dollars to the Treasury not be reduced to writing, instead insisting that your "word was your bond."²⁵⁶

Assistant Attorney General Perez Made Statements to the Committees that Were Largely Contradicted by Other Testimony and Documentary Evidence

Several times during his transcribed interview with the Committees, Assistant Attorney General Thomas Perez gave testimony that was contradicted by other testimony and documentary evidence obtained by the Committees. These contradictions in Perez's testimony call into question the veracity of his statements and his credibility in general. During his interview, Perez stated that he understood that he was required to answer the questions posed truthfully and stated he had no reason to provide untruthful answers.²⁵⁵

Section 1001 of title 18 of the United States makes it a crime to "knowingly and willfully . . . make[] any materially false, fictitious, or fraudulent statement or representation" to a congressional proceeding.²⁵⁶ Any individual who knowingly and willfully makes false statements could be subject to five years of imprisonment.²⁵⁷ This section applies to "any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with the applicable rules of the House or Senate."²⁵⁸

First, Perez testified repeatedly – both in response to questions and during his prepared testimony delivered at the beginning of the interview – that it was St. Paul's outside counsel, David Lillehaug, during a November 23, 2011, phone conversation, who first proposed the idea of a joint resolution of *Magner* and *Newell* in which the City would withdraw the *Magner* appeal if DOJ declined to intervene in *Newell*.²⁵⁹ Lillehaug, however, told the Committees that it was in fact Perez who first raised the possibility of a joint resolution of *Magner* and *Newell* in a November 29 meeting with Lillehaug and City Attorney Grewing.²⁶⁰ Lillehaug also stated that it was Perez who first proposed the precise "roadmap" in early January 2012 that guided how the Department would decline the False Claims Act cases and the City would withdraw *Magner*.²⁶¹ This statement is verified by a voicemail from Perez to Assistant U.S. Attorney Greg Brooker on

²⁵⁵ Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 6-7 (Mar. 22, 2013).

²⁵⁶ 18 U.S.C. § 1001(a).

²⁵⁷ *Id.*

²⁵⁸ *Id.* at § 1001(c)(2).

²⁵⁹ Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 10, 43-44 (Mar. 22, 2013).

²⁶⁰ Interview of David Lillehaug in Wash., D.C. (Oct. 16, 2012).

²⁶¹ *Id.*

January 12, 2012, in which he stated “we should have an answer on whether **our proposal** is a go tomorrow or Monday and just wanted to let you know that.”²⁶²

Second, Perez testified that he did not recall ever asking HUD General Counsel Helen Kanovsky to reconsider HUD’s recommendation for intervention in *Newell*.²⁶³ Perez testified:

Q So just to be clear, you never affirmatively asked [HUD Deputy Assistant Secretary] Pratt or Ms. Kanovsky to reconsider HUD’s position in *Newell*, is that correct?

A Again, my recollection of my conversations with Helen Kanovsky and Sara Pratt was that they concluded, their sense of the *Newell* case was that it was a weak case and that disparate impact enforcement was a very important priority of HUD, and that they had spent a lot of time preparing a regulation. They were very concerned, as I was, that the Supreme Court had granted cert without the benefit of the Reagan HUD’s interpretation. And so for both of them it was based on my conversations with them, they were both very – they rather clearly expressed their belief that it would be in the interests of the Department of Housing and Urban Development to determine whether they could – whether the proposal of Mr. Lillehaug could go forward.

Q I just want to be clear. You never asked them to reconsider that, is that right?

A Again, I don’t recall asking them. I don’t recall that I needed to ask them because they both understood and indicated their sense that it was a marginal or weak case to begin with, and the importance of disparate impact.²⁶⁴

Helen Kanovsky, however, testified that Perez did in fact ask her to reconsider HUD’s recommendation. She stated: “He said, well, if you don’t feel strongly about it, how would you feel about withdrawing your approval and indicating that you didn’t endorse the position? And I said, I would do that.”²⁶⁵ Kanovsky acknowledged that Perez’ request was the only new factor in HUD’s decision-making process between the time it initially recommended intervention in *Newell* and the time it recommended to not intervene.²⁶⁶

Third, Perez’s testimony that his voicemail request that Assistant U.S. Attorney Greg Brooker omit a discussion of *Magner* as a factor in the *Newell* declination memo was merely an “inartful” attempt to expedite the memo contradicts the plain language of his request and defies a

²⁶² Voicemail from Thomas Perez to Greg Brooker (Jan. 12, 2012, 5:58 p.m.) (emphasis added). [DOJ 719/670]

²⁶³ Transcribed Interview of Thomas Edward Perez, U.S. Dep’t of Justice, in Wash., D.C. at 131 (Mar. 22, 2013).

²⁶⁴ *Id.*

²⁶⁵ Transcribed Interview of Helen Kanovsky, U.S. Dep’t of Housing & Urban Development, in Wash., D.C. at 41 (Apr. 5, 2013).

²⁶⁶ *Id.* at 48.

commonsensical interpretation. When presented with a transcription and an audio recording of the voicemail, Perez testified that he could not be certain what he had said in the voicemail. Contemporaneous documents show, however, that Brooker, the recipient of the voicemail, understood the voicemail to be a “message from Perez” that “when you are working on memos – make sure you don’t talk about Sup. Ct. case.”²⁶⁷

Fourth, Perez testified before the Committees that he had no recollection of offering to provide HUD assistance to the City in support of the City’s motion to dismiss the *Newell* complaint.²⁶⁸ However, contrary to Perez’s testimony, the City’s outside counsel, David Lillehaug, told the Committees that Perez told him as early as January 9, 2012, that “HUD would be helpful” if the *Newell* case proceeded after DOJ declined intervention.²⁶⁹ Lillehaug also explained to the Committees that Perez told him on February 4, 2012, that HUD had begun assembling information to assist the City in a motion to dismiss the *Newell* complaint on original source grounds.²⁷⁰ Evidence produced to the Committees – including a DOJ email from early February 2012 noting Lillehaug’s recitation of the agreement included an understanding that “HUD will provide material to the City in support of their motion to dismiss on original source grounds”²⁷¹ – support Lillehaug’s account.

Fifth, Perez told the Committee that he only became aware of the *Magner* appeal once the Supreme Court granted certiorari,²⁷² however, HUD Deputy Assistant Secretary Sara Pratt testified that she and Perez likely had discussions about the *Magner* case well before the Court granted certiorari.²⁷³ Pratt testified:

Q Do you recall speaking to Mr. Perez during that time period?

A The time frame?

Q Between February 2011 and November 2011?

A I’m sure we did have a conversation.

Q About the *Magner* case?

A Yes. Yes. Nothing surprising, nothing shocking about that.

Q Okay.

A Along with many, many other people.²⁷⁴

²⁶⁷ Handwritten Notes of Line Attorney 2 (Jan. 11, 2012). [DOJ 713/666]

²⁶⁸ Transcribed Interview of Thomas Edward Perez, U.S. Dep’t of Justice, in Wash., D.C. at 60-61 (Mar. 22, 2013).

²⁶⁹ Interview of David Lillehaug in Wash., D.C. (Oct. 16, 2012).

²⁷⁰ *Id.*

²⁷¹ Email from Line Attorney 2 to Joyce Branda (Feb. 7, 2012, 7:17 p.m.). [DOJ 1141/1020]

²⁷² Transcribed Interview of Thomas Edward Perez, U.S. Dep’t of Justice, in Wash., D.C. at 39-40 (Mar. 22, 2013).

²⁷³ Transcribed Interview of Sara Pratt, U.S. Dep’t of Housing & Urban Development, in Wash., D.C. at 33 (Apr. 3, 2013).

²⁷⁴ *Id.*

Sixth, during his transcribed interview, Perez was asked whether he had used a personal email to communicate about matters relating to the *quid pro quo* with the City of St. Paul.²⁷⁵ Perez answered: “I don’t recall whether I did or didn’t” and later clarified, “I don’t have any recollection of having communicated via personal email on – on this matter.”²⁷⁶ However, a document produced to the Committees by the City of St. Paul indicates that Perez emailed David Lillehaug from his personal email account on December 10, 2011, to attempt to arrange a meeting with the City the following week.²⁷⁷ This revelation that Perez used his personal email address to communicate with Lillehaug about the *quid pro quo* raises the troubling likelihood that his actions violated the spirit and the letter of the Federal Records Act.

Seventh, Perez testified that he understood *Newell* to be a “marginal case” and a “weak” case,²⁷⁸ however, the initial memoranda prepared in fall 2011 by the Civil Fraud Section and the U.S. Attorney’s Office never described the recommendation to intervene as a “close call” or “marginal.”²⁷⁹ In addition, whistleblower Fredrick Newell and his attorney testified that no individual from DOJ or HUD ever told them that the case was a “close call” or “marginal” or otherwise indicated it was weak.²⁸⁰

The contradictions and discrepancies in Perez’s statements in his transcribed interview cast considerable doubt on his truthfulness and candor to the Committees. His testimony departed significantly from that of the City outside counsel, David Lillehaug, on several key elements about the development and execution of the *quid pro quo*. Because documentary evidence exists to support Lillehaug’s testimony, the Committees can only conclude that Perez was less than candid during his transcribed interview.

Finding: Assistant Attorney General Perez made multiple statements to the Committees that contradicted testimony from other witnesses and documentary evidence. Perez’s inconsistent testimony on a range of subjects calls into question the reliability of his testimony and raises questions about his truthfulness during his transcribed interview.

Finding: Assistant Attorney General Perez likely violated both the spirit and letter of the Federal Records Act and the regulations promulgated thereunder when he communicated with the City’s lawyers about the *quid pro quo* on his personal email account.

²⁷⁵ Transcribed Interview of Thomas Edward Perez, U.S. Dep’t of Justice, in Wash., D.C. at 161 (Mar. 22, 2013).

²⁷⁶ *Id.*

²⁷⁷ Email from Thomas Perez to David Lillehaug (Dec. 10, 2011). [SPA 159]

²⁷⁸ Transcribed Interview of Thomas Edward Perez, U.S. Dep’t of Justice, in Wash., D.C. at 185-86, 257 (Mar. 22, 2013).

²⁷⁹ U.S. Attorney, District of Minnesota, Intervention Memo: *U.S. ex rel. Newell v. City of St. Paul, Minnesota* (Oct. 25, 2011). [DOJ 72-79] U.S. Dep’t of Justice, Civil Division, Memorandum for Tony West, Assistant Attorney General, Civil Division, *U.S. ex rel. Newell v. City of St. Paul, Minnesota* (Nov. 22, 2011). [DOJ 80-91]

²⁸⁰ Transcribed Interview of Fredrick Newell in Wash., D.C. at 55-56 (Mar. 28, 2013).

The Ethics and Professional Responsibility Opinions Obtained by Assistant Attorney General Perez Were Not Sufficient to Cover His Actions

In late November 2011, Assistant Attorney General Thomas Perez obtained an ethics opinion from the designated ethics official within the Civil Rights Division and his staff obtained separate professional responsibility guidance from another official.²⁸¹ Perez told the Committees that he orally recited the situation to the ethics officer.²⁸² And when asked, he testified that he “believe[d]” he explained that the United States was not a party to the *Magner* appeal.²⁸³ The ethics official – who was also a trial attorney reporting to Perez in the normal course of his duties – found no ethical prohibition. The attorney wrote:

You asked me whether there was an ethics concern with your involvement in settling a Fair Lending Act challenge in St. Paul that would include an agreement by the government not to intervene in a False Claims Act claim involving St. Paul. You indicated that you have no personal or financial interest in either matter. Having reviewed the standards of ethical conduct and related sources, there is no ethics rule implicated by the situation and therefore no prohibition against your proposed course of action. Please let me know if you have any questions.²⁸⁴

By its terms, the ethics opinion that Perez received advised him that there were no personal or financial conflicts prohibiting his involvement in the *quid pro quo*. It did not address the propriety of the agreement itself or any conflicts broader than Perez’s personal or financial interests. As a general matter, ethics officers within the Justice Department answer questions of government ethics, such as conflicts of interest. These officials do not handle questions of professional ethics at issue here, such as duties to clients and global resolution of unrelated cases. The Justice Department’s ethics website specifically states: “Questions concerning professional responsibility issues such as the McDade amendment and contacts with represented parties should be directed to the Department’s Professional Responsibility Advisory Office.”²⁸⁵ Thus, the ethics opinion Perez received did not address the propriety of the agreement itself or any conflicts broader than Perez’s personal or financial interests.

Moreover, two additional points cast doubt on the adequacy of the opinion. First, based on Perez’s testimony that he “believe[d]” he informed the ethics advisor the United States was not party in *Magner*, it is not clear Perez equipped him with a full set of facts. Understanding that the United States was not a party to *Magner* – and in fact that it had no direct stake in the outcome – was of course a significant fact. Second, it is curious that Perez did not seek the ethics opinion until well after he had set in motion the entire chain events. More specifically, Perez spoke with Lillehaug for the first time on November 23, 2011. Nine minutes after that telephone call, Perez emailed HUD Deputy Assistant Secretary Pratt, asking to speak with her as

²⁸¹ Transcribed Interview of Thomas Edward Perez, U.S. Dep’t of Justice, in Wash., D.C. at 191, 202-03 (Mar. 22, 2013).

²⁸² *Id.* at 194-95.

²⁸³ *Id.*

²⁸⁴ Email from Civil Rights Division Ethics Officer to Thomas E. Perez (Nov. 28, 2011, 3:53 p.m.). [DOJ 114/109]

²⁸⁵ U.S. Dep’t of Justice, Departmental Ethics Office, <http://www.justice.gov/jmd/ethics/>.

soon as possible.²⁸⁶ One minute later, at 2:30 p.m., Perez emailed HUD General Counsel Helen Kanovsky, asking to speak about a “rather urgent matter.”²⁸⁷ At 2:33 p.m., Perez emailed Tony West, head of DOJ’s Civil Division and thus ultimately responsible for False Claims Act cases like *Newell*. Perez wrote: “I was wondering if I could talk to you today if possible about a separate matter of some urgency.”²⁸⁸ All of these actions set in motion the quid pro quo. Yet, he did not receive his “ethics opinion” until five days later on November 28.

Assistant Attorney General Perez received no written professional responsibility opinion about his involvement in the *quid pro quo*. Perez told the Committees that he inquired orally, through an intermediary, and “the answer that we received on the professional responsibility front was that because the United States is a unitary actor, that we could indeed proceed so long as the other component did not object and . . . would continue to be the decisionmaking body on those matters that fall within their jurisdiction.”²⁸⁹ This guidance, as described to the Committees by Perez, focused narrowly on his authority to speak on behalf of the Civil Division when negotiating with the City of St. Paul. It did not affirmatively authorize Perez to enter into the *quid pro quo*.

Because both the ethics opinion and the professional responsibility opinion were limited to Assistant Attorney General Perez’s theoretical involvement in negotiating the *quid pro quo* – and do not affirmatively approve the agreement or his particular actions in reaching the agreement – the opinions do not suffice to cover the entirety of his actions in the *quid pro quo*. Neither the ethics opinion nor the professional responsibility opinion sanctioned Perez’s actions in offering the City assistance in dismissing the whistleblower complaint against his client, the United States. Nor would the ethics opinion have absolved him of responsibility for his attempt to cover up the fact that *Magner* was underlying reason for the *Newell* declination decision.

Finding: The ethics and professional responsibility opinions obtained by Assistant Attorney General Thomas Perez and his staff were narrowly focused on his personal and financial interests in a deal and his authority to speak on behalf of the Civil Division, and thus do not address the *quid pro quo* itself or Perez’s particular actions in effectuating the *quid pro quo*.

The Department of Justice Likely Violated the Spirit and Intent of the False Claims Act by Internally Calling the Quid Pro Quo a “Settlement”

The False Claims Act exists to help the United States recover taxpayer dollars misspent or misallocated on the basis of fraud committed against the government. Since it was amended in 1986, the False Claims Act has helped recover over \$40 billion of taxpayer dollars that would otherwise be lost to fraud and abuse of federal programs.²⁹⁰ The Act includes a whistleblower provision allowing private citizens to bring an action on behalf of the United States.²⁹¹ This

²⁸⁶ Email from Thomas E. Perez to Sara K. Pratt (Nov. 23, 2011, 2:29 p.m.). [DOJ 103]

²⁸⁷ Email from Thomas E. Perez to Helen Kanovsky (Nov. 23, 2011, 2:30 p.m.). [DOJ 165-66]

²⁸⁸ Email from Thomas E. Perez to Tony West (Nov. 23, 2011, 2:33 p.m.). [DOJ 104]

²⁸⁹ Transcribed Interview of Thomas Edward Perez, U.S. Dep’t of Justice, in Wash., D.C. at 201-02 (Mar. 22, 2013)

²⁹⁰ *The False Claims Act*, TAF <http://www.taf.org/fraud-cases/false-claims-act> (last visited April 12, 2013).

²⁹¹ See 31 U.S.C. § 3730.

provision is powerful, and according to the Department's own press release, since 1986, 8,500 *qui tam* whistleblower suits have been filed since 1986 totaling \$24.2 billion in recoveries.²⁹² Where the government intervenes in the private action and settles the complaint, or where the government pursues an alternate remedy, the whistleblower is afforded the opportunity to contest the fairness and adequacy of the settlement or alternate remedy.²⁹³

As a result, the False Claims Act, and the *qui tam* whistleblower provisions have become an important part of the Civil Division's enforcement efforts and a key component of Senate confirmation hearings for senior officials at the Department. In fact, Attorney General Holder, Deputy Attorney General Cole, then-Associate Attorney General Perrelli, and Assistant Attorney General West were all asked specific questions about the False Claims Act and all answered that they supported the law and would work with whistleblowers to ensure that their cases were afforded due consideration and assistance from the Department.²⁹⁴

Unfortunately, despite these successes, and contrary to the assertions about support for the False Claims Act, the *qui tam* whistleblower provisions, and whistleblowers, Fredrick Newell, was treated differently and given no opportunity to contest the fairness and adequacy of the settlement or alternate remedy—despite DOJ privately labeling the resolution a “settlement.”

Several contemporaneous documents suggest that DOJ viewed the *quid pro quo* with St. Paul as a settlement. In fact, in the initial ethics opinion that Perez received, the Division ethics officer evaluated Perez's “involvement in **settling** a Fair Lending Act challenge in St. Paul that would include an agreement by the government not to intervene in a False Claims Act claim involving St. Paul.”²⁹⁵ Handwritten notes of a subsequent meeting between then-Civil Frauds Section Director Joyce Branda, Deputy Assistant Attorney General Michael Hertz, and a Civil Fraud line attorney likewise reflect that “Civil Rights wants a settlement; St. Paul brought up another case,” in reference to the *Newell qui tam*.²⁹⁶ Even then-Assistant Attorney General Tony West's own handwritten notes of a Civil Division senior staff meeting in early January 2012 call the *quid pro quo* a settlement. West's notes state: “City: we've learned that as settlement City means they'll just withdraw the petition.”²⁹⁷ Other notes from January 2012 similarly state:

²⁹² Press Release, Office of Public Affairs, U.S. Department of Justice, Justice Department Recovers Nearly \$5 Billion in False Claims Act Cases in Fiscal Year 2012 (Dec. 4, 2012), available at <http://www.justice.gov/opa/pr/2012/December/12-ag-1439.html>.

²⁹³ *Id.* § 3730(c).

²⁹⁴ See generally, *Nomination of Eric H. Holder, Jr., Nominee to be Attorney General of the United States*, 111th Cong. 276–277 (2009) (Responses to Written Questions of Senator Chuck Grassley); *Nomination of James Micheal Cole, Nominee to be Deputy Attorney General, U.S. Department of Justice*, 111th Cong. 148–150 (2010) (Responses to Written Questions of Senator Chuck Grassley); *Confirmation Hearings on the Nominations of Thomas Perrelli Nominee to be Associate Attorney General of the United States and Elena Kagen Nominee to be Solicitor General of the United States*, 111th Cong. 129 (2009) (Responses to Written Questions of Senator Chuck Grassley to Thomas Perrelli, to be Associate Attorney General for the U.S. Department of Justice); and *Confirmation Hearings on Federal Appointments*, 111th Cong. 784–785 (2009) (Responses to Written Questions by Senator Chuck Grassley).

²⁹⁵ Email from Civil Rights Division Ethics Officer to Thomas E. Perez (Nov. 28, 2011, 3:53 p.m.) (emphasis added). [DOJ 114/109]

²⁹⁶ Handwritten Notes of Line Attorney 2 (Dec. 7, 2012). [DOJ 230/217]

²⁹⁷ Handwritten Notes of Tony West (Jan. 3, 2012). [DOJ 627/S85]

“Newell – mtg w/ Joyce; decline the second case first; do not say there is a *quid pro quo* settlement; settlement is not contingent on declination.”²⁹⁸

When Perez testified before the Committees, he stated that his discussions with the City’s outside counsel, David Lillehaug, about the *quid pro quo* were “settlement negotiations.” Perez testified:

Q Mr. Perez, I just have a couple of follow up questions for you just to clarify some of the discussion you had with my colleague in the previous round. In the time period that we have been discussing, November 2011 to February 2012, is it fair to say that you were the primary representative of the Department in the settlement negotiations with the *Magner* and *Newell* cases with the city?

A Here is how I look at it. I had initial conversations with Mr. Lillehaug, after I had spoken to Mr. Fraser and then Mr. Fraser put me in touch with Mr. Lillehaug. We had those conversations and then took the appropriate measures that I discussed this morning. During a substantial part of this period, Mr. Lillehaug, as I understand it, was also in contact with the U.S. Attorney’s Office in Minnesota, so those conversations were occurring. And he obviously met directly with the Civil Division in connection with the discussion of the *qui tams* when the mayor came in, and I was not part of that. So there were a number of different conversations that were ongoing. I was involved in some of them, the U.S. Attorney’s Office was involved in others, and the Civil Division was involved in yet others.

* * *

Q Were there settlement negotiations going on with the city in January and February of 2012?

A We had – there were discussions underway in January and February of 2012 relating to Mr. Lillehaug’s proposal.

Q So the answer to my question is yes then?

A Well, again, there were a number of different – Mr. Lillehaug was talking to the U.S. Attorney’s Office, I was discussing – I was having discussions with him. So the reason I wanted to be complete in your other question was about whether it was just me, and I wanted to make sure that the record was complete in connection with the various people with whom Mr. Lillehaug I think was communicating.²⁹⁹

²⁹⁸ Handwritten Notes (Jan. 2012). [DOJ 653/608]

²⁹⁹ Transcribed Interview of Thomas Edward Perez, U.S. Dep’t of Justice, in Wash., D.C. at 105-07 (Mar. 22, 2013).

Only after the Department's counsel interjected did Perez begin to contest the characterization of the discussions as "settlement negotiations."³⁰⁰

Although the Department of Justice decided to decline intervention in Newell's case in exchange for the City's withdrawal of the *Magner* Supreme Court appeal, Newell was never afforded the opportunity to contest the fairness or adequacy of this resolution. Simultaneously, however, internal Department documents reflect that high-level officials with the Department saw the *quid pro quo* as the outgrowth of settlement discussions with the City. As such, Newell should have been involved in these discussions and allowed the opportunity to opine on the resolution in a fairness hearing. Because he was not, the Department of Justice likely violated the spirit and intent of the False Claims Act.

Finding: The Department of Justice violated the spirit and intent of the False Claims Act by privately acknowledging the *quid pro quo* was a settlement while not affording Fredrick Newell the opportunity to be heard, as the statute requires, on the fairness and adequacy of this settlement.

The Quid Pro Quo Exposed Management Failures Within the Department of Justice

The process by which the Department of Justice arrived at this *quid pro quo* with the City of St. Paul is not at all a template for Departmental management. The Committees' investigation has exposed how Assistant Attorney General Thomas Perez was able to manipulate the bureaucratic mazes of DOJ and HUD to ensure that *Magner* was withdrawn from the Supreme Court. The management failures, however, run far deeper. According to information given to the Committees, senior leadership in the Department – up to and including Attorney General Holder – was unaware of the extent to which Perez had gone to realize his goal.

In November 2011, after the Supreme Court granted the City's appeal in *Magner*, Assistant Attorney General Perez initiated a process that ultimately resulted in an agreement with the City to withdraw the appeal. In this process, Perez asked HUD to reconsider its support for *Newell*, causing HUD to change its recommendation and subsequently eroding support for the case in DOJ's Civil Division. Once a consensus had been reached to decline *Newell*, Perez personally began leading negotiations with the City on the *quid pro quo*. His efforts paid off in February 2012, as the City agreed to withdraw *Magner* in exchange for the Department's declination in *Newell* and *Ellis*.

Senior leadership within the Department of Justice, however, was unaware of the full extent of Perez's actions. Former Associate Attorney General Thomas Perrelli, Perez's supervisor at the time of the *quid pro quo*, told the Committees that he was not aware that the Department of Justice entered into an agreement with the City until he was interviewed by Department officials in preparation for dealing with congressional scrutiny of this matter.³⁰¹ While Perrelli stated he was aware of Perez's discussions with the City, he was under the impression that an agreement had never been reached.³⁰² Perrelli testified that when he became

³⁰⁰ *Id.* at 109-10.

³⁰¹ Transcribed Interview of Thomas John Perrelli in Wash., D.C. at 19 (Nov. 19, 2012).

³⁰² *Id.* at 94.

aware that *Magner* had been withdrawn from the Supreme Court, Perez told him that it was the “civil rights community” that had encouraged the City to withdraw the case. Perrelli testified:

A I do remember a conversation with Tom Perez – and I can’t remember whether it was a conversation or voicemail, what it was – where he – where I expressed surprise that the case had been dismissed. And he indicated that the civil rights community had encouraged the city to dismiss.

Q So that’s all he told you, civil rights community had encouraged the city to dismiss?

A That’s what he told me.

Q He didn’t tell you anything about the arrangement, *Newell*, the two *qui tam* cases?

A That was the substance of the conversation.

* * *

Q And you were surprised because you had thought that this would be so difficult to get done?

A I was surprised because I wasn’t aware that the case was going to be dismissed. Obviously, I knew, you know, as Tom had indicated, that was something he was interested in. But I hadn’t talked to him about it in a long time and was unaware that that would happen.

Q And at that time, did it occur to you that an agreement may have been reached been [*sic*] the department and the city?

A I was not aware that one was reached at that time and

Q Did the thought cross your mind?

A It didn’t, frankly, or at least I don’t remember it crossing my mind.³⁰³

Perrelli also testified that after a congressional inquiry from House Judiciary Committee Chairman Lamar Smith, Perrelli briefed Attorney General Holder on the *quid pro quo* and he “indicated to him that there had been these discussions in the Department that the City had put on the table this idea of the *qui tam* cases, but that that hadn’t happened.”³⁰⁴ Instead, Perrelli passed on to Attorney General Holder the incomplete information from Perez that

³⁰³ *Id.* at 96-97.

³⁰⁴ *Id.* at 104.

encouragement from the civil rights community led to the City's withdrawal of the appeal.³⁰⁵ Perrelli acknowledged that due to Perez's omission, he "didn't give [Attorney General Holder] a complete set of facts" about the *quid pro quo*.³⁰⁶

Finding: The *quid pro quo* exposed serious management failures within the Department of Justice, with senior leadership – including Attorney General Holder and then-Associate Attorney General Perrelli – unaware that Assistant Attorney General Perez had entered into an agreement with the City of St. Paul.

The Department of Justice, the Department of Housing and Urban Development, and the City of St. Paul Obstructed the Committees' Investigation

The House Committee on Oversight and Government Reform and the House Committee on the Judiciary first began investigating the circumstances surrounding the withdrawal of *Magner* in February 2012. The Department of Justice did not acknowledge the existence of the *quid pro quo* until a non-transcribed staff briefing in August 2012. The City of St. Paul, likewise, did not acknowledge the existence of the *quid pro quo* to the Committees until October 2012. This obstruction by DOJ and the City – as well as similar obstruction by HUD – has unnecessarily delayed the Committees' investigation.

For six months, DOJ refused to allow the Committees to speak on the record about the *quid pro quo* with Department officials. The Department reluctantly allowed the Committees to speak to Assistant Attorney General Perez, U.S. Attorney Jones, and Acting Associate Attorney General West in March 2013 only after the Committee on Oversight and Government Reform began to prepare deposition subpoenas. DOJ also refused to allow the Committees to transcribe an interview in December 2012 with Deputy Assistant Attorney General Joyce Branda. During the transcribed interviews, DOJ also attempted to frustrate the Committee's fact-finding effort. A Department attorney directed Perez not to answer questions posed to him about whether he has communicated with any officials at HUD or the parties to *Township of Mt. Holly v. Mt. Holly Gardens Citizens in Action*, a pending Supreme Court appeal with precisely the same legal question as *Magner*.³⁰⁷

Similarly, HUD refused for over four months to allow the Committees to speak on the record about the *quid pro quo* with HUD officials. HUD eventually agreed to allow the Committees to speak with General Counsel Helen Kanovsky and Deputy Assistant Secretary Sara Pratt; however, the Department continues to refuse the Committees' requests to speak with Associate General Counsel Dane Narode and Regional Director Maurice McGough. Even during the interviews of Kanovsky and Pratt, HUD objected to the presence of Senator Grassley's staff and their right to ask questions of the witnesses. HUD attorneys also directed Kanovsky and Pratt to not answer questions about the *Mt. Holly* Supreme Court appeal.³⁰⁸

³⁰⁵ *Id.* at 152.

³⁰⁶ *Id.* at 154.

³⁰⁷ Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 141-43 (Mar. 22, 2013).

³⁰⁸ Transcribed Interview of Helen Kanovsky, U.S. Dep't of Housing & Urban Development, in Wash., D.C. at 80-82 (Apr. 5, 2013); Transcribed Interview of Sara Pratt, U.S. Dep't of Housing & Urban Development, in Wash., D.C. at 85-90 (Apr. 3, 2013).

The City of St. Paul's cooperation with the investigation has been no better. After the Oversight Committee first wrote to Mayor Coleman in February 2012, City Attorney Grewing telephoned Committee staff and indicated that the City would fully respond to the inquiry. When the City eventually sent its response, it declined to answer any questions about the withdrawal of *Magner*. It was not until May 2012 that the City substantially complied with the investigation. Even today, however, the City continues to withhold twenty documents and one audio recording from the Committees. The City also denied the Committees the opportunity to review these documents *in camera*.

A key difficulty throughout this investigation has been DOJ's insistence that former Deputy Assistant Attorney General Michael Hertz motivated the Department's ultimate decision to decline intervention in *Newell*. Both Acting Associate Attorney General West and Assistant Attorney General Perez testified that Hertz expressed concern about the *Newell* case and suggested that Hertz's negative opinion about the case carried considerable weight.³⁰⁹ Branda also told the Committees that Hertz expressed to her privately that the *Newell* case "sucks," which she understood to mean that it was unlikely the Department would intervene.³¹⁰ The Department positioned Hertz as the central figure in its narrative, which Perez alluded to in his testimony. Perez testified:

Well, as I said before, in the end, the United States made a decision in this matter, and the decisions in the *qui tam* matters were made at the highest levels of the Civil Division, Mike Hertz and – who is, again, the Department's preeminent expert on *qui tam* matters, personally participated in the meeting and weighed all of the factors, including the weakness of the evidence, in his judgment, resource issues, and policy considerations, and the *Magner* matter, and they made the decision that it was in the interests of justice to agree to the proposal that – the original proposal that Mr. Lillehaug had put forth.

Sadly, Michael Hertz passed away in May 2012, so the Committees have been unable to ask him about DOJ's assertions about his statements and opinions. Documents produced by the Department, however, call into question the Department's narrative about Hertz's opinions. In particular, an email from Principal Deputy Attorney General Elizabeth Taylor to then-Associate Attorney General Thomas Perrelli in January 2012 suggests that Hertz had some concern about declining *Newell* as a part of the *quid pro quo*. Taylor stated: "Mike Hertz brought up the St. Paul 'disparate impact' case in which the SG just filed an amicus in the Supreme Court. He's concerned about the recommendation that we decline to intervene in two *qui tam* cases against St. Paul."³¹¹

In addition, notes from a meeting in early January 2012 reflect that Hertz expressed the opinion that the *quid pro quo* "looks like buying off St. Paul" and "should be whether there are

³⁰⁹ Transcribed Interview of Derek Anthony West, U.S. Dep't of Justice, in Wash., D.C. at 54-56, 77-78 (Mar. 18, 2013); Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 89-90 (Mar. 22, 2013).

³¹⁰ Briefing with Joyce Branda in Wash., D.C. (Dec. 5, 2012).

³¹¹ Email from Elizabeth Taylor to Thomas Perrelli (Jan. 5, 2012, 34:43 p.m.). [DOJ 631/588]

legit reasons to decline as to past practice.”³¹² It remains unclear how Hertz truly viewed the merits of the *Newell* case or the propriety of the *quid pro quo* in general.

Finding: The Department of Justice, the Department of Housing and Urban Development, and the City of St. Paul failed to fully cooperate with the Committees’ investigation, refusing for months to speak on the record about the *quid pro quo* and obstructing the Committees’ inquiry.

Consequences of the *Quid Pro Quo*

The *quid pro quo* exchange between the Department of Justice and City of St. Paul, Minnesota, is no mere abstraction and not simply a theoretical proposition. This *quid pro quo* has direct and discernible real-world effects. The manner in which the Department of Justice – and in particular Assistant Attorney General Thomas Perez – sought to encourage a private litigant to forego its Supreme Court appeal and the leverage used to achieve that goal have lasting consequences for whistleblowers, taxpayers, and the rule of law.

The Sacrifice of Fredrick Newell

Fredrick Newell has spent over a decade of his life working to improve jobs and contracting programs for low-income residents in St. Paul. A part-owner of three small construction companies, Newell became exposed to the value of Section 3 programs in creating economic opportunities for low-income individuals. St. Paul’s noncompliance with Section 3 limited the available contracting opportunities and prevented him from hiring and training new workers.³¹³ As a minister as well, Newell was acutely aware of the broader effect of Section 3 noncompliance on the community. To help solve this problem, Newell founded a nonprofit organization “to be a watchdog group that would be able to ensure that Section 3 was taking place” in his community.³¹⁴

Since 2005, Newell has fought in the courts and through HUD to improve Section 3 programs in the City of St. Paul. As a result of his advocacy, HUD found six separate areas of noncompliance with Section 3 in St. Paul and further found that the City had “no working knowledge of Section 3 and was generally unaware of the City’s programmatic obligations thereto.”³¹⁵ Newell’s advocacy resulted in a Voluntary Compliance Agreement between HUD and the City to ensure improved compliance with Section 3 in the future. Newell pressed for the agreement to include some restitution for the community’s opportunities lost by the City’s noncompliance. HUD finalized the agreement without Newell’s suggestions, however, and HUD officials told Newell that his goals would be met through the False Claims Act.

³¹² Handwritten Notes (Jan. 4, 2012). [DOJ 639/587]

³¹³ Newell testified that “St Paul is a union town, and . . . one of the problems we ran across is most of [the trained workers] couldn’t get into the union because they couldn’t get someone to hire them.” Transcribed Interview of Fredrick Newell in Wash., D.C. at 169 (Mar. 28, 2013).

³¹⁴ Transcribed Interview of Fredrick Newell, U.S. Dep’t of Justice, in Wash., D.C. at 20 (Mar. 28, 2013).

³¹⁵ *Id.* at 11.

In pursuing his False Claims Act cases, Newell indicated that he intended to put the recovered money back into the community. “From the beginning,” Newell testified, “when I first started this – and, like I said, as I trace it back to 2000 – it’s all been with the efforts of trying to build the Section 3 community.”³¹⁶ He stated:

[T]he bottom line is those opportunities belong to those communities. And what’s been happening is you’ve got companies coming out of the suburbs come in, do the [construction] work, hire nobody from the city, and go and take the funds back to the suburbs. And so we wanted this program to work that these communities could be rebuilt.³¹⁷

Every indication Newell received from HUD and DOJ about his False Claims Act lawsuit was positive – that is, until the day that the Department declined to intervene in his case. With DOJ declining to intervene, Newell’s complaint stood little chance of success.

The Justice Department – including all three DOJ officials interviewed by the Committees – has maintained that its non-intervention did not affect Newell’s case because Newell was still able to pursue the claim on his own.³¹⁸ However, the Department’s decision had a direct practical effect on Newell’s case by allowing the City to move for dismissal of the case on grounds that would have otherwise been unavailable if the Department had intervened. Newell’s attorney testified:

The jurisdictional defense raised in the district court by the City of St. Paul is not available against the United States. Ultimately, at the trial court level, St. Paul prevailed on the theory that the court lacked subject matter jurisdiction over the claims because the relator was not an original source, and the court also relied on prior public disclosures The point being: a defendant can’t raise those defenses on an intervening case because the United States – there’s always the subject matter of jurisdiction when the United States intervenes and is the plaintiff before the court.³¹⁹

The Department of Justice’s *quid pro quo* sacrificed Fredrick Newell to ensure that an abstract legal doctrine would remain unchallenged. It cut loose a real-world whistleblower and an advocate for low-income residents to protect a legally questionable tactic. When asked whether he believed justice was done in this case, Newell answered “no” and explained: “The problems that existed, they still exist. Our aims weren’t just to walk in and blow a whistle on someone or collect money; it was for the greater good of our community. And I have yet to see that happen.”³²⁰ Yet, despite the double crossing by the Justice Department, Newell remains optimistic that greater good may still be achieved. He testified: “And like I said earlier, when I

³¹⁶ *Id.* at 81.

³¹⁷ *Id.* at 83.

³¹⁸ See Transcribed Interview of Thomas Edward Perez, U.S. Dep’t of Justice, in Wash., D.C. at 110 (Mar. 22, 2013); Transcribed Interview of Derek Anthony West, U.S. Dep’t of Justice, in Wash., D.C. at 98-99 (Mar. 18, 2013); Transcribed Interview of Byron Todd Jones, U.S. Dep’t of Justice, in Wash., D.C. at 54 (Mar. 8, 2013).

³¹⁹ Transcribed Interview of Fredrick Newell in Wash., D.C. at 101-02 (Mar. 28, 2013).

³²⁰ *Id.* at 134.

said Section 3 is that important, to me, and I'm going to speak from the minister's perspective, God just moved us into a bigger ballpark."³²¹

The Chilling Effect on Whistleblowers

Above and beyond Fredrick Newell, the *quid pro quo* will likely have a severe chilling effect on whistleblowers in general. The Civil Fraud Section within DOJ's Civil Division is entirely dedicated to litigating and recovering financial frauds perpetrated against the federal government.³²² Acting Associate Attorney General Tony West – who had previously led the Civil Division – told the Committees that the Division takes fraud “very seriously” and that he made “fighting fraud one of [the Division’s] top priorities.”³²³ In particular, he praised the whistleblower *qui tam* provision of the False Claims Act, calling them “a very important tool” that “really allow us to be aggressive in rooting out . . . fraud against the government.”³²⁴

The current *qui tam* provisions of the False Claims Act were authored by Senator Grassley in 1986 and have been a valuable incentive for private citizens to expose waste and wrongdoing. Since 1986, whistleblowers have used the *qui tam* provisions to return over \$35 billion of taxpayer dollars to the federal treasury.³²⁵ Without the assistance of private citizens in uncovering waste, fraud, and abuse, the Justice Department’s enforcement of the False Claims Act would not be as robust.

The *quid pro quo* between Assistant Attorney General Perez and the City of St. Paul threatens the vitality of the False Claims Act’s *qui tam* provisions. In this deal, the Department gave up the opportunity to litigate a multimillion dollar fraud against the government in *Newell* in order to protect the disparate impact legal theory in *Magner*. In doing so, political appointees overruled trial-level career attorneys who initially stated that the allegations in *Newell* amounted to a “particularly egregious example of false certifications.” These career attorneys were never given the opportunity to prove Newell’s allegations and hold the City of St. Paul accountable for its transgressions.

More alarmingly, the Department abandoned the whistleblower, Fredrick Newell, after telling him for years that it supported his case. The manner in which the Department treated Newell presents a disconcerting precedent for whistleblower relations. Newell stated:

As noted by Congress, the protection of the whistle blower is key to encouraging individuals to report fraud and abuse. The way that HUD and Justice have used me to further their own agenda is appalling – and that’s putting it mildly. This type of treatment presents a persuasive argument

³²¹ *Id.* at 86.

³²² See U.S. Dep’t of Justice, Commercial Litigation Branch, Fraud Section, <http://www.justice.gov/civil/commercial/fraud/6-fraud.html>.

³²³ Transcribed Interview of Derek Anthony West, U.S. Dep’t of Justice, in Wash., D.C. at 18 (Mar. 22, 2013).

³²⁴ *Id.* at 19.

³²⁵ Press Release, Senator Charles Grassley, Grassley Law Recovers Another \$3.3 Billion of Taxpayer Money Otherwise Lost to Fraud (Dec. 4, 2012).

for anyone who is looking for a reason to not get involved in reporting fraud claim or even discrimination.³²⁶

Rather than protecting and empowering the whistleblower, the Department used him and his case as a bargaining chip to resolve unrelated matters. This type of treatment and horse trading will likely discourage other potential whistleblowers from staking their time, money, and reputations on the line to fight fraud. This conduct should not be practice of the Department and it should not have been the treatment of Fredrick Newell.

The Missed Opportunities for Low-Income Residents of St. Paul

The saddest irony of this *quid pro quo* is that the Department of Justice and the Department of Housing and Urban Development, by maneuvering to protect a legally questionable legal doctrine, directly harmed the real-life low-income residents of St. Paul who they were supposed to protect. By declining intervention in *Newell*, the Department of Justice has contributed to a continuation of Section 3 problems in St. Paul.

Congress passed Section 3 of the Housing and Urban Development Act of 1968 “to ensure that the employment and other economic opportunities generated by Federal financial assistance for housing and community development programs shall, to the greatest extent feasible, be directed toward low- and very low-income persons.”³²⁷ Section 3 requires recipients of HUD financial assistance to provide job training, employment, and contracting opportunities to these low- and very-low-income residents.³²⁸ However, HUD by its own admission has failed to vigorously enforce Section 3. Even Sara Pratt told the Committees that HUD does “not do a lot of enforcement work under Section 3, much, much less than we do in all our other civil rights matters.”³²⁹

In the wake of the settlement in *United States ex rel. Anti-Discrimination Center v. Westchester County*,³³⁰ a landmark 2009 case in which DOJ and HUD used the False Claims Act to enforce fair housing laws, the Administration signaled a new reinvigorated approach to fair housing enforcement. At the time, then-HUD Deputy Secretary Ron Sims proclaimed: “Until now, we tended to lay dormant. This is historic, because we are going to hold people’s feet to the fire.”³³¹ Deputy Secretary Sims even told Newell in 2009 that “the False Claims Act lawsuit was the new model for ensuring compliance” with federal housing laws.³³²

With the Administration’s actions in the *quid pro quo*, HUD has all but given up on using the False Claims Act as a tool to promote fair housing and economic opportunity. Fredrick Newell testified:

³²⁶ Transcribed Interview of Fredrick Newell in Wash., D.C. at 16 (Mar. 28, 2013).

³²⁷ 12 U.S.C. § 1701u(b).

³²⁸ 12 U.S.C. § 1701u.

³²⁹ Transcribed Interview of Sara Pratt, U.S. Dep’t of Housing & Urban Development, in Wash., D.C. at 22 (Apr. 3, 2013).

³³⁰ *United States ex rel. Anti-Discrimination Center v. Westchester County*, No. 06-Civ.-2860 (S.D.N.Y. 2009).

³³¹ Peter Applebome, *Integration Faces a New Test in the Suburbs*, N.Y. Times, Aug. 22, 2009.

³³² Transcribed Interview of Fredrick Newell in Wash., D.C. at 134-35 (Mar. 28, 2013); *see also id.* at 170-71.

The Section 3 regulations and the Section 3 community have languished under a period of noncompliance and lack of enforcement of the Section 3 statute and regulations for over 45 years. The Section 3 program received its impetus from incidents such as the Watts riot of 1968 and the Rodney King riots of 1992. The Section 3 community has long sought a catalyst to revive this program, the Section 3 program. The Section 3 False Claims Act lawsuit was heralded even by HUD itself to be such a catalyst [of] Section 3 compliance – a nonviolent catalyst. A valuable tool was taken away with the *quid pro quo*.³³³

Newell still sees problems with Section 3 compliance in St. Paul, explaining that: “there’s a whole list and host of problems that are there. Some of it is not knowing how the program works. Some of it is just simply no interest, from my belief, no interest in really complying.”³³⁴

If given a fair opportunity with the assistance of the federal government, he could have made a difference. Newell told the Committees that he intended to use his lawsuit as a vehicle to improve economic opportunities in the St. Paul community by putting any False Claims Act recovery back into the community.³³⁵ Now, unfortunately, the *quid pro quo* is just a missed opportunity for the federal government to provide real assistance to the low- and very-low-income residents of St. Paul.

Taxpayers Paid for the Quid Pro Quo

The *quid pro quo* was not cheap for federal taxpayers. The Department of Housing and Urban Development, the U.S. Attorney’s Office in Minnesota, and the Civil Fraud Section within the Justice Department each spent over two years investigating and preparing the *Newell* case. By November 2011, all three entities were uniformly recommending that the government join the case. According to the memorandum prepared at the time by the Civil Fraud Section, Newell had exposed a fraud totaling over \$86 million.³³⁶ Because the False Claims Act allows for recovery up to three times the amount of the fraud, the United States was poised to potentially recover over \$200 million.³³⁷

The deal reached by Assistant Attorney General Thomas Perez prevented the United States from ever having a chance to recover that money – and odds were high that the case would be successful. The memorandum prepared by the Civil Fraud Section in November 2011 called St. Paul’s actions “a particularly egregious example of false certifications” and found that the City knowingly made these false certifications.³³⁸ Newell told the Committees his impression

³³³ Transcribed Interview of Fredrick Newell in Wash., D.C. at 17-18 (Mar. 28, 2013).

³³⁴ *Id.* at 22.

³³⁵ *Id.* at 78-79.

³³⁶ U.S. Dep’t of Justice, Civil Division, Memorandum for Tony West, Assistant Attorney General, Civil Division, *U.S. ex rel. Newell v. City of St. Paul, Minnesota* (Nov. 22, 2011). [DOJ 80-91]

³³⁷ In his amended complaint, Newell valued the fraud at \$62 million, meaning the government could have recovered over \$180 million. See First Amended Complaint, *United States ex rel. Newell v. City of St. Paul, Minnesota*, No. 09-SC-1177 (D. Minn. filed Mar. 12, 2012).

³³⁸ U.S. Dep’t of Justice, Civil Division, Memorandum for Tony West, Assistant Attorney General, Civil Division, *U.S. ex rel. Newell v. City of St. Paul, Minnesota* (Nov. 22, 2011). [DOJ 80-91]

that it was a strong case matched the language used by the November 2011 memorandum.³³⁹ Newell's attorney called the case a "dead-bang winner,"³⁴⁰ and indicated to the Committees that federal officials expressed their support for the case to him.³⁴¹

Some of the dollars improperly received by the City appear to be HUD funds financed by the Obama Administration's stimulus in 2009. According to the Civil Fraud Section memorandum, the City initially contested HUD's administrative finding that it was out of compliance with Section 3, "but dropped its challenge in order to renew its eligibility to compete for and secure discretionary stimulus HUD funding."³⁴² Newell and his attorney confirmed this understanding, telling the Committees that the City disputed HUD's findings and HUD put a deadline on the City to resolve the dispute or risk losing stimulus funding.³⁴³

The amount of the fraud alleged in *Newell* did not appear to be a concern for HUD. In a briefing with Committee staff, HUD Principal Deputy General Counsel Kevin Simpson stated: "The monies don't supplement HUD's coffers, so [the money] wasn't much of a factor."³⁴⁴ He elaborated that "HUD did have an institutional interest [in recovering the funds], but it was outweighed by other factors."³⁴⁵ In the same briefing, Elliot Mincberg, HUD's General Deputy Assistant Secretary for Congressional and Intergovernmental Relations, added that \$200 million "wasn't all that much money anyway."³⁴⁶ HUD Deputy Assistant Secretary Sara Pratt testified that the amount of the alleged fraud was not a factor in her decision whether to recommend intervention in the case.³⁴⁷ While this funding may not be "much of a factor" for federal bureaucrats, it is no insignificant amount to American taxpayers.

Finding: In declining to intervene in Fredrick Newell's whistleblower complaint as part of the *quid pro quo* with the City of St. Paul, the Department of Justice gave up the opportunity to recover as much as \$200 million.

Disparate Impact Theory Remains on Legally Unsound Ground

Assistant Attorney General Perez's machinations to stop the Supreme Court from hearing *Magner* prevented the Court from finally adjudicating whether the plain language of the Fair Housing Act supports a claim of disparate impact. Although courts and federal agencies have asserted that it does, considerable doubts remain about the legality of disparate impact claims. Perez's *quid pro quo* prevented the Court from finally bringing clarity and guidance to this important area of federal law.

³³⁹ Transcribed Interview of Fredrick Newell in Wash., D.C. at 58-61 (Mar. 28, 2013).

³⁴⁰ Jim Efstathiou Jr., *Whistle-Blower Blames Lost Millions on Perez's Settlement*, Bloomberg, Mar. 22, 2013.

³⁴¹ Transcribed Interview of Fredrick Newell in Wash., D.C. at 53-55 (Mar. 28, 2013).

³⁴² U.S. Dep't of Justice, Civil Division, Memorandum for Tom West, Assistant Attorney General, Civil Division, *U.S. ex rel. Newell v. City of St. Paul, Minnesota* (Nov. 22, 2011). [DOJ 80-91]

³⁴³ Transcribed Interview of Fredrick Newell in Wash., D.C. at 41-46 (Mar. 28, 2013).

³⁴⁴ Briefing with Kevin Simpson and Bryan Greene in Wash., D.C. (Jan. 10, 2013).

³⁴⁵ *Id.*

³⁴⁶ *Id.*

³⁴⁷ Transcribed Interview of Sara Pratt, U.S. Dep't of Housing & Urban Development, in Wash., D.C. at 123 (Apr. 3, 2013).

Perez testified to the Committees that he encouraged the City to withdraw its *Magner* appeal – and later agreed to exchange *Newell* and *Ellis* for *Magner* – because he believed that “*Magner* was an undesirable factual context in which to consider disparate impact.”³⁴⁸ He also stated that he was concerned that HUD had not yet finalized a rule codifying its use of disparate and believed the Court would benefit from HUD’s final regulation.³⁴⁹ Perez testified:

[T]he particular facts of *Magner* I thought did not present a good vehicle for addressing the viability of disparate impact. If the court is going to take on the question of the viability of disparate impact it was my hope that they would do so in connection with a typical set of facts. This was not a typical set of facts. And it was further in my view that if the court was going to take a case of this nature that they should have the benefit of HUD’s thinking, and the reg was very much in the works and I don’t believe the court was aware of that. And so those two factors were sources of concern for me.³⁵⁰

HUD General Counsel Helen Kanovsky also testified to the Committees that she feared an “adverse decision” from the Supreme Court that could upset HUD’s rulemaking.³⁵¹

The *quid pro quo* did little to bring certainty or clarity to disparate impact claims arising under the Fair Housing Act. In June 2012, the Township of Mount Holly, New Jersey, filed a petition for certiorari asking the Supreme Court to hear its appeal on precisely the same legal issue as *Magner*: whether claims of disparate impact are cognizable under the Fair Housing Act.³⁵² The Court has yet to decide whether to take the appeal, but has asked the Solicitor General for his thoughts on whether to hear the case. Within this context, there are concerns in some quarters that discussions are underway to prevent the Court from hearing this case as well.³⁵³ When the Committees inquired about the *Mt. Holly* case during the transcribed interviews, Assistant Attorney General Perez, HUD General Counsel Kanovsky, and HUD Deputy Assistant Secretary Pratt were all ordered not to answer by Administration lawyers.³⁵⁴

The Rule of Law

Most fundamentally, the actions of the Department of Justice in facilitating and executing the *quid pro quo* with the City of St. Paul represent a tremendous disregard for the rule of law. The Department of Justice was created “[t]o enforce the law and defend the interests of the

³⁴⁸ Transcribed Interview of Thomas Edward Perez, U.S. Dep’t of Justice, in Wash., D.C. at 9 (Mar. 22, 2013).

³⁴⁹ *Id.* at 43.

³⁵⁰ *Id.* at 42.

³⁵¹ Transcribed Interview of Helen Kanovsky, U.S. Dep’t of Housing & Urban Development, in Wash., D.C. at 36 (Apr. 5, 2013).

³⁵² Petition for a Writ of Certiorari, Township of Mount Holly et al. v. Mt. Holly Gardens Citizens in Action, Inc., No. 11-1507 (U.S. filed June 11, 2012).

³⁵³ See Alan S. Kaplinsky, *Will Mt. Holly Take A Dive Just Like St. Paul*, CFPB Monitor (Jan. 10, 2013).

³⁵⁴ Transcribed Interview of Thomas Edward Perez, U.S. Dep’t of Justice, in Wash., D.C. at 141-43 (Mar. 22, 2013); Transcribed Interview of Helen Kanovsky, U.S. Dep’t of Housing & Urban Development, in Wash., D.C. at 80-82 (Apr. 5, 2013); Transcribed Interview of Sara Pratt, U.S. Dep’t of Housing & Urban Development, in Wash., D.C. at 85-90 (Apr. 3, 2013).

United States according to the law; . . . to seek just punishment for those guilty of unlawful behavior; and to ensure fair and impartial administration of justice for all Americans.”³⁵⁵ In this *quid pro quo* with the City of St. Paul, the Department of Justice failed in each of those respects.

Rather than allowing the Supreme Court to freely and impartially adjudicate an appeal that the Court had affirmatively chosen to hear, the Department – led by Assistant Attorney General Thomas Perez – openly worked to get the appeal off of the Court’s docket. Rather than allowing the normal intervention decision-making process to occur within the Civil Division, Assistant Attorney General Perez usurped the process to ensure his preferred course of action occurred. The Department’s action in departing from the rule of law to exert arbitrary authority to jointly resolve two wholly unrelated matters, including one in which the United States is not even a party, is extremely concerning.

Conclusion

The *quid pro quo* resulted in the Department of Justice declining to intervene in two whistleblower False Claims Act lawsuits, *Newell* and *Ellis*, in exchange for the City of St. Paul’s withdrawal of *Magner v. Gallagher* from the Supreme Court. The process that culminated in this *quid pro quo* was facilitated and executed by Assistant Attorney General for the Civil Rights Division Thomas E. Perez.

In November 2011, after the Court agreed to hear the *Magner* appeal, Perez’s search for leverage against the City led him to discover the existence of *Newell* and the City’s desire to jointly resolve both cases. This discovery began a series of events in which Perez asked the Department of Housing and Urban Development to reconsider its initial support for *Newell* and the subsequent erosion of support in DOJ’s Civil Division and the U.S. Attorney’s Office in Minnesota. Eventually, by January 2012, Perez’s machinations had created a “consensus” within DOJ to decline *Newell* and *Ellis* as part of the deal with the City. Perez then began personally leading negotiations with the City, offering a roadmap in early January for how to jointly resolve the cases and asking career attorneys to cover up a linkage between the cases. By late January, as negotiations broke down, Perez flew to St. Paul to personally meet with Mayor Coleman and strike a deal. The agreement he reached with the Mayor led to the Department declining intervention in *Newell* and *Ellis* in exchange for the City withdrawing *Magner*.

This *quid pro quo* has lasting consequences for the Department of Justice, the City of St. Paul, and American taxpayers. In sacrificing Fredrick Newell to protect an inchoate theory, the Department weakened its own False Claims Act standards and created a large disincentive for citizens to expose fraud. The City of St. Paul, likewise, missed a tremendous opportunity to improve the economic opportunities available to the low- and very-low-income residents that Newell championed. American taxpayers lost a good chance to recover as much as \$200 million of fraudulently spent funds. Above all, however, the *quid pro quo* demonstrated that the Department of Justice, led by Assistant Attorney General Thomas Perez, placed ideology over objectivity and politics over the rule of law.

³⁵⁵ U.S. Dep’t of Justice, About DOJ, <http://www.justice.gov/about/about.html>.

Ms. JACKSON LEE. And may I make—excuse me, Mr. Chairman. The gentleman was generous enough to say—and I thank the gentleman for his courtesies, he is generous enough to say that he had a report. We have a report, and we would ask unanimous consent for that report to be submitted as well.

Mr. GOODLATTE. Without objection, the report that the gentleman from Texas refers to will be made a part of the record.

[The information referred to follows:]

Washington, DC 20515

April 14, 2013

To: Democratic Members of the Committees on Oversight and Government Reform and Judiciary

Fr: Democratic Staff

Re: Results of Investigation of Justice Department Role in St. Paul's Decision to Withdraw Appeal to Supreme Court in *Magner v. Gallagher*

This memo sets forth the preliminary results of an investigation conducted by the House Committee on Oversight and Government Reform and the House Committee on the Judiciary into the role of the Department of Justice in urging the City of St. Paul, Minnesota, to withdraw its appeal to the U.S. Supreme Court in *Magner v. Gallagher*. As part of this extensive investigation, Committee staff reviewed more than 3,500 pages of documents and conducted six transcribed interviews with officials from the Department of Justice (DOJ) and the Department of Housing and Urban Development (HUD).

This investigation was initiated when former Judiciary Committee Chairman Lamar Smith, Oversight Committee Chairman Darrell Issa, Representative Patrick McHenry, and Senator Charles Grassley accused Tom Perez, the Assistant Attorney General for the Civil Rights Division, of brokering a "dubious bargain" and a "quid pro quo arrangement" with St. Paul "in which the Department agreed, over the objections of career attorneys, not to join an unrelated fraud lawsuit against the City in exchange for the City's dropping its *Magner* appeal."

This memo sets forth several key findings based on the documents produced to the Committees and the transcribed interviews conducted by Committee staff to date:

- First, rather than identifying any unethical or improper actions by the Department, the overwhelming evidence obtained during this investigation indicates that Mr. Perez and other Department officials acted professionally to advance the interests of civil rights and effectively combat the scourge of discrimination in housing.
- Second, the evidence demonstrates that the Department's decisions not to intervene in unrelated False Claims Act cases were based on the recommendations of senior career officials who are regarded as the nation's preeminent experts in their field.

Instead of identifying inappropriate conduct by Mr. Perez, it appears that the accusations against him are part of a broader political campaign to undermine the legal safeguards against discrimination that Mr. Perez was protecting.

The remainder of this memo provides additional background and details regarding these findings.

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BACKGROUND

The Fair Housing Act was passed in 1968 as Title VIII of the Civil Rights Act to prohibit discrimination by landlords and other housing providers based on race, religion, sex, national origin, familial status, or disability.¹ The Act has long been interpreted to ban practices that have an unjustified “discriminatory effect” or “disparate impact,” regardless of whether there is evidence of specific intent to discriminate, and eleven federal courts of appeals have upheld this disparate impact standard.²

On November 16, 2011, HUD issued a Notice of Proposed Rulemaking to codify uniform standards for “discriminatory effect” claims under the Act, and that rule was finalized in February 2013.³ Republican Members of Congress opposed codifying this standard and offered an amendment by Rep. Scott Garrett (R-NJ), in the Transportation, Housing and Urban Development, and Related Agencies Appropriations Act for the 2013 Fiscal Year, to prohibit HUD from using funds to finalize or enforce the disparate impact rule. Although this prohibition passed the House, it was not taken up by the Senate.⁴

Before HUD finalized its rule, landlords of low-income housing units filed a lawsuit, *Magner v. Gallagher*, alleging that St. Paul was enforcing its housing safety codes too aggressively in addressing “rodent infestation, missing dead bolt locks, inoperable smoke detectors, poor sanitation, and inadequate heat.”⁵ The landlords made the novel argument that St. Paul was violating the Fair Housing Act because its enforcement efforts had a racially disparate impact on their tenants. St. Paul challenged the application of the disparate impact standard in this context, arguing that the Act should not be used to permit landlords to avoid bringing low-income housing units into compliance with uniform safety codes.⁶ On November

¹ Department of Justice, *The Fair Housing Act* (accessed Apr. 13, 2013) (online at www.justice.gov/crt/about/hcc/housing_coverage.php).

² Department of Housing and Urban Development, *Implementation of the Fair Housing Act’s Discriminatory Effects Standard*, 78 Fed. Reg. 11460-11482 (Feb. 15, 2013) (final rule) (online at www.gpo.gov/fdsys/pkg/FR-2013-02-15/pdf/2013-03375.pdf).

³ *Id.*

⁴ H.AMDT.1363, 112th Cong. (2012); U.S. House of Representatives, Debate on Amendment Numbered A048, to H.R. 5972 (Jun. 27, 2012); U.S. House of Representatives, Roll Call Vote on Agreeing to H.R. 5972 (Jun. 29, 2012); Legislative Research Service, *Bill Summary & Status: H.R. 5972 (112th)*.

⁵ City of St. Paul, Minnesota, *City of Saint Paul Seeks to Dismiss United States Supreme Court Case Magner vs. Gallagher* (Feb. 10, 2012) (online at www.stpaul.gov/index.aspx?NID=4874&ART=9308&ADMIN=1).

⁶ Petitioners’ Reply Brief on Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit (June 28, 2011) *Magner v. Gallagher* (No. 10-1032) (online at <http://sblog.s3.amazonaws.com/wp-content/uploads/2011/07/Petitioners-Reply-10-1032-Magner.pdf>).

7, 2011, the Supreme Court granted St. Paul's petition to hear the case.⁷ The first question presented in the case was whether disparate impact claims are cognizable under the Fair Housing Act, thus placing at risk this key civil rights enforcement tool.

On December 29, 2011, the United States filed an *amicus* brief in *Magner* urging the Supreme Court to uphold the disparate impact standard based on the text and history of the Fair Housing Act, as well as consistent interpretations of the Act by appellate courts that allowed the use of disparate impact claims to enforce non-discrimination and equal opportunity requirements.⁸

As this memo explains in more detail below, in November 2011, the Department proposed that St. Paul withdraw the *Magner* case to avoid an adverse ruling by the Supreme Court that could have invalidated the disparate impact standard and impaired its ability to combat discrimination in housing. In response, St. Paul proposed that the Department refrain from intervening in two unrelated False Claims Act cases in which St. Paul was a defendant.

Under the False Claims Act, private citizens referred to as "relators" may file lawsuits alleging fraud against the government and may recover a percentage of awards if fraud is proven. These are also known as "qui tam" cases. The Department of Justice may intervene in False Claims Act cases on the side of relators to become the primary litigant. If the Department declines to intervene, relators may continue to litigate and, if successful, recover damages for themselves and the government.⁹

One of the False Claims Act cases at issue was *U.S. ex. Rel. Newell v. City of St. Paul*, in which the relator argued that St. Paul falsely certified that it was in compliance with Section 3 of the Housing and Urban Development Act of 1968.¹⁰ Under Section 3, HUD requires Public Housing Authorities to use their best efforts to give low-income individuals training and employment opportunities and to award contracts to businesses that provide economic opportunities for low-income individuals.¹¹

⁷ Docket, *Magner v. Gallagher* (No. 10-1032) (online at www.supremecourt.gov/Search.aspx?FileName=/docketfiles/10-1032.htm).

⁸ Brief for The United States as Amicus Curiae in Support of Neither Party (Dec. 2011) *Magner v. Gallagher* U.S. (No. 10-1032) (online at <http://sblog.s3.amazonaws.com/wp-content/uploads/2012/01/10-1032-SG-amicus-brief.pdf>).

⁹ Department of Justice, *The False Claims Act: A Primer* (undated) (online at www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Primer.pdf).

¹⁰ First Amended Complaint (Mar. 12, 2012), *U.S. ex. Rel. Newell v. City of St. Paul*, D. Minn. (0:09-cv-01177).

¹¹ Department of Housing and Urban Development, *Programs Administered by FHEO* (Sept. 25, 2007) (online at http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/progdesc/title8).

The other False Claims Act case at issue was *U.S. ex rel. Ellis v. City of St. Paul*, in which the relators argued that Minneapolis, St. Paul, and the Metropolitan Council for the Twin Cities Metro Region falsely certified that they were complying with the Fair Housing Act's requirement to affirmatively further fair housing.¹²

On February 9, 2012, the Department officially declined to intervene in the *Newell* case, while the relator continued to pursue his case and is now appealing a District Court decision dismissing the case.¹³ On February 10, 2012, St. Paul withdrew the *Magner* case from consideration by the Supreme Court.¹⁴ On June 18, 2012, the Department declined to intervene in the *Ellis* case, and the relators continued to pursue their case.¹⁵

METHODOLOGY

Pursuant to multiple requests from the Committees, the Department of Justice produced more than 1,400 pages of documents, HUD produced more than 2,200 pages of documents, and St. Paul produced approximately 150 pages of documents.

Committee staff conducted extensive transcribed interviews with six government officials: Thomas Perez, Assistant Attorney General for the Civil Rights Division; Derek Anthony West, Acting Associate Attorney General and former Assistant Attorney General for the Civil Division; B. Todd Jones, former U.S. Attorney for the District of Minnesota; Thomas Perrelli, former Associate Attorney General; Helen Kanovsky, HUD General Counsel; and Sara Pratt, HUD Deputy Assistant Secretary for Enforcement and Programs.

Committee staff also received briefings from Joyce Branda, Deputy Assistant Attorney General for the Commercial Litigation Branch at DOJ and former Director of the Fraud Section at DOJ; Bryan Greene, Principal Deputy in the Office of Fair Housing and Equal Opportunity at HUD; and Kevin Simpson, Principal Deputy in the Office of General Counsel at HUD. Committee staff also spoke with attorneys representing St. Paul and interviewed Fredrick Newell, the relator who filed a False Claims Act lawsuit against St. Paul.

¹² Order (Dec. 12, 2012) *U.S. ex rel. Ellis v. City of St. Paul*, D. Minn. (No. 11-CV-0416).

¹³ The Government's Notice of Election to Decline Intervention (Feb. 9, 2012), *Newell v. City of Saint Paul, Minnesota*, D. Minn. (No. 0:09-cv-01177-DWF-TNL); Notice of Appeal to the United States Court of Appeals for the Eighth Circuit (Dec. 4, 2012), *U.S. ex. Rel. Newell v. City of St. Paul*, D. Minn. (0:09-cv-01177).

¹⁴ City of Saint Paul, Minnesota, *City of Saint Paul Seeks to Dismiss United States Supreme Court Case Magner vs. Gallagher* (Feb. 10, 2012) (online at www.stpaul.gov/index.aspx?NID=4874&ART=9308&ADMIN=1)

¹⁵ United States' Notice of Election to Decline Intervention (Jun. 18, 2012) *U.S. ex rel. Ellis v. City of St. Paul*, D. Minn. (No. 11-CV-0416).

FINDINGS

I. NO EVIDENCE OF UNETHICAL OR IMPROPER ACTIONS

Rather than identifying any unethical or improper actions by the Department, the overwhelming evidence obtained during this investigation indicates that Mr. Perez and other Department officials acted professionally to advance the interests of civil rights and effectively combat the scourge of discrimination in housing.

A. **Efforts by Perez to Urge St. Paul to Withdraw *Magner* Served the National Interest in Combating Discrimination in Housing**

The evidence obtained by the Committee indicates that, by encouraging St. Paul to withdraw the *Magner* case, Mr. Perez was properly performing his role as head of the Civil Rights Division, effectively representing the position of the United States government, and advancing the national interest in combating discrimination in housing.

Multiple witnesses interviewed by the Committee expressed concern that the highly unusual fact pattern of *Magner* involving landlords who were invoking the disparate impact standard to avoid complying with building safety codes rather than tenants utilizing it to ensure equal housing opportunities, did not provide a strong factual context to highlight the importance of the disparate impact theory. Specifically, witnesses expressed concern that the Court could invalidate the disparate impact standard, which has been used for decades to enforce the Fair Housing Act's prohibition against housing discrimination. As the Department stated in a letter to Congress on February 12, 2013:

[T]he Department believes that carrying out the Fair Housing Act's (FHA) purpose of remedying discrimination, including through disparate-impact enforcement, is an important law enforcement and policy objective.¹⁶

During his transcribed interview with Committee staff, Mr. Perez explained these vital interests:

[W]e are a guardian of what Attorney General Holder called the crown jewels, which are the civil rights laws that were passed. The Fair Housing Act was passed a few short days after Dr. King's assassination in 1968. And the United States has very strong equities, and so does HUD, in ensuring the effective and full enforcement of the Fair Housing Act. ... [T]hese civil rights matters are very important, I think, to our national interest.¹⁷

¹⁶ Letter from Judith C. Appelbaum, Principal Deputy Assistant Attorney General, Department of Justice, to Senator Patrick J. Leahy, Rep. Bob Goodlatte and Rep. Darrell E. Issa (Feb. 12, 2013).

¹⁷ House Committee on Oversight and Government Reform, Interview of Thomas Edward Perez (Mar. 22, 2013).

Mr. Perez explained that urging St. Paul to withdraw *Magner* would avoid a negative Supreme Court decision that could have impaired the ability to enforce laws to combat housing discrimination. He stated:

I was concerned because I thought that *Magner* was an undesirable factual context in which to consider disparate impact. And because bad facts make bad law, this could have resulted in a decision that undermined our ability and the City of St. Paul's ability to protect victims of housing and lending discrimination.¹⁸

Mr. Perez also highlighted the importance of the disparate impact standard in obtaining relief for hundreds of thousands of victims in previous Fair Housing Act cases:

[W]e had just settled a case involving Countrywide Financial, which was the largest residential fair lending settlement in the history of the Fair Housing Act, assisting hundreds of thousands of victims of funding discrimination, including hundreds who reside in the Twin Cities area. And so I was making the point that disparate impact theory in the vast majority of cases assists the Department in these efforts.¹⁹

Similarly, Assistant Attorney General Tony West, who led the Department's Civil Division, explained during his transcribed interview that a negative Supreme Court ruling would have impaired the ability of law enforcement officials to effectively enforce civil rights protections against housing discrimination. He stated:

[T]here was a risk of bad law if the Supreme Court had considered this question, that it could undermine the disparate impact work in a very significant way. And, therefore, impair effective civil rights enforcement. And so it was a very important interest of the United States to try to minimize that possibility.²⁰

In addition, Associate Attorney General Tom Perrelli stated during his transcribed interview that it was common Department practice to encourage parties not to pursue Supreme Court cases with poor fact patterns that could adversely impact national interests:

I think the idea of incentivizing parties not to pursue a Supreme Court matter because it's a poor vehicle is not an unusual thing. You know, parties, you know, work to settle cases or resolve cases all the time.²¹

These interests were also extremely important to HUD, which had serious concerns about the Supreme Court issuing a ruling in the *Magner* case before HUD issued its final disparate

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ House Committee on Oversight and Government Reform, Interview of Derek Anthony West (Mar. 18, 2013).

²¹ House Committee on Oversight and Government Reform, Interview of Thomas John Perrelli (Nov. 19, 2012).

impact rule. Helen Kanovsky, HUD's General Counsel, explained during her transcribed interview:

With respect to *Magner*, we had very, very strong equities in not wanting that case to be heard by the Supreme Court at the time and in the posture that it was at because it was directly undermining our rulemaking, and we had huge equities in our discriminatory effects rulemaking process.²²

There was no dispute among the witnesses interviewed by the Committees that it was appropriate for Mr. Perez, as head of the Department's Civil Rights Division, to handle the *Magner* matter and contact St. Paul to urge the City to withdraw the case. During the course of this investigation, no witness interviewed by the Committees identified any improper or unethical action by Mr. Perez.

B. Perez Received Approval from Ethics Official, Professional Responsibility Official, and Head of Civil Division

When St. Paul proposed linking its withdrawal of the *Magner* case to its request for the Department not to intervene in two unrelated False Claims Act cases, Mr. Perez sought and received approval from a DOJ ethics official, a DOJ professional responsibility official, and the head of the Civil Division before proceeding. These officials agreed that because the United States is a "unitary actor" seeking the best overall results for the nation, it was proper for Mr. Perez to negotiate both the *Magner* case and the False Claims Act cases on behalf of the United States.

During his transcribed interview, Mr. Perez explained that he first contacted David Lillehaug, an attorney representing St. Paul, to urge the City to withdraw the *Magner* case in November 2011. During this conversation, Mr. Lillehaug responded to Mr. Perez's request by proposing that the Department refrain from intervening in the *Newell* case, which had been filed against St. Paul.²³ Mr. Perez described this conversation during his transcribed interview:

I outlined my concerns about the *Magner* case and my feeling that the mayor, given his longstanding commitment to expanding opportunity for underserved communities, benefits from disparate impact. And he then raised the prospect of linking the two cases, at which point I told him I can't speak for the Civil Division on this qui tam matters, and that's not my area of expertise, and it's not my area of responsibility, and so I'd have to get back to you on whether this proposal that you've presented is something that we can discuss further.²⁴

²² House Committee on Oversight and Government Reform, Interview of Helen Renee Kanovsky (Apr. 5, 2013).

²³ At the time, St. Paul did not know about the *Ellis* case, which was in a more preliminary stage. In later discussions, the proposal was that the Department decline to intervene in both the *Newell* and *Ellis* cases.

²⁴ House Committee on Oversight and Government Reform, Interview of Thomas Edward Perez (Mar. 22, 2013).

Since the *Newell* case was being brought under the False Claims Act, it fell under the authority of the Department's Civil Division headed by Mr. West instead of the Civil Rights Division headed by Mr. Percz. During his transcribed interview, Mr. Perez explained that he consulted with the Civil Rights Division's Ethics Official and separately with the Division's Professional Responsibility Official. In response to his inquiries, he was informed that his discussions with St. Paul about the *Magner* case and the False Claims Act cases were appropriate. Mr. Perez explained:

To address this concern my staff and I sought ethical and professional responsibility advice. I was informed that there would be no concern so long as I had permission from the Civil Division to engage in these conversations. I was also informed that because the United States is a unitary actor and entitled to act in its overall best interest, there was no prohibition on linking matters as Mr. Lillehaug had suggested.²⁵

Documents obtained by the Committees confirm Mr. Perez's account. Specifically, on November 28, 2011, the Civil Rights Division's Ethics Officer sent an email to Mr. Perez stating:

You asked me whether there was an ethics concern with your involvement in settling a Fair Lending Act challenge in St. Paul that would include an agreement by the government not to intervene in a False Claims Act claim involving St. Paul. You indicated that you have no personal or financial interest in either matter. Having reviewed the standards of ethical conduct and related sources, there is no ethics rule implicated by this situation and therefore no prohibition against your proposed course of action.²⁶

Mr. Perez also reported that a Department professional responsibility official also approved his actions. He stated:

[T]he answer that we received on the professional responsibility front was that because the United States is a unitary actor, that we could indeed proceed so long as the other component did not object and as long as and with the understanding that they would continue to be the decisionmaking body on those matters that fall within their jurisdiction.²⁷

In addition to obtaining approval from the ethics and professional responsibility officers to engage in these discussions, Mr. Perez also obtained the approval of Mr. West, who led the Civil Division. Mr. Perez stated:

²⁵ *Id.*

²⁶ Email from ["Civil Rights Division Ethics Officer"] to Thomas E. Perez (Nov. 28, 2012) (HJC/HOGR STP 114).

²⁷ House Committee on Oversight and Government Reform, Interview of Thomas Edward Perez (Mar. 22, 2013).

He [Mr. West] indicated that he had no objection with proceeding, understanding, of course, that the Civil Division was going to conduct the review of the *Newell* and later the *Ellis* matters, and they were going to make that decision and pursuant to their practice they would make that decision looking at a host of factors, including the strength of the case, the resource issues and potentially the *Magner* case.²⁸

Mr. West confirmed this account during his transcribed interview:

I felt comfortable with him [Mr. Perez] speaking for the department when he was talking to the City of St. Paul because I knew that ultimately, any intervention decision rested with the Civil Division.²⁹

Mr. West also explained that he and Mr. Perez met in January 2011 and agreed that Mr. Perez would discuss the *Magner* and *Newell* cases with St. Paul with the understanding that the Civil Division “had a process that we had to complete in the Civil Division, and that that decision rested with us as to whether there would be an intervention or a declination.”³⁰

II. DECISION NOT TO INTERVENE IN FALSE CLAIMS ACT CASES BASED ON RECOMMENDATIONS OF CAREER EXPERTS

The evidence obtained by the Committees during this investigation demonstrates that the Department’s decisions not to intervene in the two unrelated False Claims Act cases were based on the recommendations of senior career officials regarded as the nation’s preeminent experts in their field.

A. Decision Not to Intervene in *Newell* Based on Recommendation of Preeminent Career Experts with Decades of Experience

The decision not to intervene in the *Newell* case was made by Tony West, Assistant Attorney General for the Civil Division, based on the recommendation of then Deputy Assistant Attorney General Michael Hertz. Mr. Hertz, who passed away in May 2012, had been a career employee of the Department for more than 30 years and was widely regarded as the Department’s preeminent career expert on False Claims Act cases.³¹

During his transcribed interview, Mr. West elaborated on Mr. Hertz’s qualifications and experience:

²⁸ *Id.*

²⁹ House Committee on Oversight and Government Reform, Interview of Derek Anthony West (Mar. 18, 2013).

³⁰ *Id.*

³¹ *Long Time Civil Division Leader Dies of Cancer*, Main Justice (May 7, 2012) (online at www.mainjustice.com/2012/05/07/longtime-civil-division-leader-dies-of-cancer/).

Mike Hertz was the undisputed expert on qui tam and False Claims Act in the Department of Justice. And that was his reputation. It was his reputation amongst my predecessors in the Civil Division, and certainly I knew that to be true based on my work with him.³²

According to several witnesses interviewed by Committee staff, Mr. Hertz had concerns about the *Newell* case from the outset, despite the fact that some junior attorneys initially supported intervention. Joyce Branda, who served under Mr. Hertz as Director of the Fraud Section, informed Committee staff that when she submitted a draft memo to Mr. Hertz initially supporting intervention in November 2011, Mr. Hertz returned the memo, which she understood from their 28-years of working together to mean that he disagreed with intervening.³³ Ms. Branda explained that, even as she submitted this draft recommendation, she viewed the decision regarding whether to intervene as “a close call from day one” and communicated that understanding to Mr. Hertz.³⁴

Mr. West, the head of the Civil Division, also confirmed during his transcribed interview that Mr. Hertz had concerns with intervening even before learning of the potential link to the *Magner* case. He explained:

I went to ask Mike Hertz about the *Newell* case. What is this *Newell* case? Mike reminded me in that conversation that he had previously brought the *Newell* case to my attention saying, remember this is that close-call case that I told you I had some doubts about and, you know, some concerns about. He said, I haven't sent you anything on it because I, you know, want the career attorneys to do more work on it.³⁵

Mr. Hertz's opposition to intervening in the *Newell* case intensified after a meeting he and Ms. Branda had with the Mayor of St. Paul and other City officials on December 13, 2011. Ms. Branda informed Committee staff that the Mayor was “articulate and persuasive” during the meeting.³⁶ She also explained that, after the meeting concluded, Mr. Hertz pulled her aside and told her “this case sucks.”³⁷

³² House Committee on Oversight and Government Reform, Interview of Derek Anthony West (Mar. 18, 2013).

³³ Briefing by Joyce Branda, Deputy Assistant Attorney General for the Commercial Litigation Branch, Department of Justice, to the House Committees on Oversight and Government Reform and the Judiciary, Majority and Minority Staffs (Dec. 5, 2012).

³⁴ *Id.*

³⁵ House Committee on Oversight and Government Reform, Interview of Derek Anthony West (Mar. 18, 2013).

³⁶ Briefing by Joyce Branda, Deputy Assistant Attorney General for the Commercial Litigation Branch, Department of Justice, to the House Committees on Oversight and Government Reform and the Judiciary, Majority and Minority Staffs (Dec. 5, 2012).

³⁷ *Id.*

Ms. Branda explained to Committee staff that the December meeting was also a “turning point” for her and that after the meeting, she agreed with Mr. Hertz that the Department should not intervene in the case based on the litigation concerns.³⁸ Ms. Branda told Committee staff that she never felt any pressure to change her decision.³⁹

This account was also confirmed by Mr. West, who stated during his transcribed interview:

Mike Hertz, who I have described previously as the undisputed expert in the Department on qui tam and False Claims Act, he, the more he learned about the case, and the deeper he got into the case, the more doubtful he became about its worthiness as an intervention candidate, and came away from the impression that it was weak and that we should not litigate this case. That was very significant because when Mike spoke, you know, his opinion carried an enormous amount of weight within the Department, and within the Civil Frauds Section, appropriately so.⁴⁰

During his transcribed interview, former Associate Attorney General Tom Perrelli also confirmed that Mr. Hertz had serious concerns about the merits of intervening in *Newell* and *Ellis*. He explained:

Mike did give me his impression of the first case, in my parlance. He very clearly said I think we’re going to decline. In the second case, he said I think we’re going to decline, but it’s going to take more time.⁴¹

On February 9, 2012, Mr. West, the head of the Civil Division, signed an official “declination memo” formalizing the Department’s decision not to intervene in the *Newell* case. Since Mr. Hertz had become ill by that time, Ms. Branda submitted the memo in his stead.⁴² The declination memo explained the Department’s investigation of the *Newell* case and described in detail the factual, legal, and policy reasoning on which the declination decision was based.⁴³

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ House Committee on Oversight and Government Reform, Interview of Derck Anthony West (Mar. 18, 2013).

⁴¹ House Committee on Oversight and Government Reform, Interview of Thomas John Perrelli (Nov. 19, 2012).

⁴² Memorandum from Tony West, Assistant Attorney General, Civil Division, Department of Justice, for File, *U.S. ex rel. Newell v. City of St. Paul, Minnesota* (Feb. 9, 2012) (HJC/HOGR 1307-17/A1151-61). Ms. Branda, who has more than 30 years of experience working as a career attorney on False Claims Act cases for the Department, has now replaced Mr. Hertz as the Deputy Assistant Attorney General for the Commercial Litigation Branch.

⁴³ *See, e.g.*, Memorandum from Tony West, Assistant Attorney General, Civil Division, Department of Justice, for File, *U.S. ex rel. Newell v. City of St. Paul, Minnesota* (Feb. 9, 2012) (HJC/HOGR 1307-17/A1151-61).

Based on the evidence obtained by the Committees, the recommendation to decline intervention was the only recommendation sent to Mr. West, and it was made by senior career officials who concluded that declining to intervene served the best interests of the United States. Although some attorneys within the Department and the U.S. Attorney's Office had advocated in favor of intervention, the ultimate decision reached by Mr. Hertz and Ms. Branda, who were experts in the False Claims Act, was that the Department should not intervene. As Mr. West explained in his transcribed interview:

The way the process would work is after, you know, the line attorneys, working with Joyce Branda and Mike Hertz, come to a view as to whether or not we ought to intervene, a memo would be prepared, and it would be forwarded to me. And usually there is a cover sheet that indicates whether or not I approve or disapprove of the recommendation decision that is contained in the memo.⁴⁴

According to Mr. West, "by early, mid-January, there was a consensus that had coalesced in the Civil Division that we were going to decline the *Newell* case."⁴⁵ He added:

I wanted to make sure that we employed our normal, regular process in assessing whether or not intervention was appropriate in this case, and that's what we did.⁴⁶

B. Ellis Case Was Never Serious Candidate for Intervention

Career officials at the Justice Department, the U.S. Attorney's Office in Minnesota, and HUD agreed that the *Ellis* case was not a serious candidate for intervention. Mr. West, the head of the Civil Division, stated during his transcribed interview:

[T]he only conversations I had about the merits of the *Ellis* case tended to be conversations that talked about how weak the case was. And so I don't recall anyone calling the *Ellis* case a close call, for instance. I recall only Mike, and to the extent I was aware of the *Ellis* case, people talking about it as if it were a very weak case, a weak candidate for intervention.⁴⁷

Mr. West also stated:

My consistent recollection of the conversations I had with *Ellis* -- about *Ellis* with members of the Civil Division were all along the lines that *Ellis* was not an appropriate candidate for intervention.⁴⁸

⁴⁴ House Committee on Oversight and Government Reform, Interview of Derek Anthony West (Mar. 18, 2013).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

Todd Jones, the U.S. Attorney for the District of Minnesota, confirmed this account during his transcribed interview:

We weren't going to go with *Ellis*. And I don't -- my recollection is that we weren't -- we weren't considering *Ellis* and an intervention in *Ellis* at any point, as I recall. That was going to be a declination.⁴⁹

C. Department Openly and Properly Considered Impact of *Magner* on Decision Not to Intervene in *Newell*

The evidence obtained by the Committees indicates that the Department openly and properly considered the Department's request to St. Paul to withdraw the *Magner* case as one of many factors it evaluated when deciding when deciding not to intervene in the *Newell* case.

The memo officially declining to intervene in the *Newell* case, which was submitted by Ms. Branda and signed by Mr. West on February 9, 2012, set forth "a number of factual and legal arguments that support a decision not to intervene," including St. Paul's withdrawal of the *Magner* case. It stated:

[T]he City is dismissing a Supreme Court appeal in the *Gallagher v. Magner* case, a result the Civil Rights Division is anxious to achieve. Declination here would facilitate that result which, we are advised, is in the interests of the United States.⁵⁰

In addition, in a section entitled "Other Considerations," the memo explained:

The Supreme Court has not decided whether the FHA [Fair Housing Act] allows for recovery based on a disparate-impact theory. We understand that the Civil Rights Division is concerned that there is a risk of bad law if the Court rules on the question of whether the City's health and safety efforts her justify a departure from the mandates of the FHA. The City has indicated that it will dismiss the *Gallagher* petition, and declination here will facilitate the City's doing so. Under the circumstances, we believe this is another factor weighing in favor of declination.⁵¹

During his transcribed interview with Committee staff, Mr. West explained that the False Claims Act provides the Department with broad discretion to consider multiple factors when deciding whether to intervene:

⁴⁹ House Committee on Oversight and Government Reform, Interview of Byron Todd Jones (Mar. 8, 2013).

⁵⁰ Memorandum from Joyce R. Branda, Director, Commercial Litigation Branch, Department of Justice, *Request for Authority to Intervene Re: U.S. ex rel. Newell V. City of St. Paul, Minnesota* Case No. 09-SC-001177 (D. Minn.) (Feb. 9, 2012) (HJC/HOGR 1310-17/A1154-61).

⁵¹ *Id.*

Not only are we given broad discretion under the False Claims Act to consider a wide variety of factors in making our intervention decision; it's appropriate because we have a responsibility to act in the best interests of the United States as a whole. And this -- it was appropriate to note that a declination decision here for all of the reasons that we previously stated in our memo, another factor that weighs in favor of declination is that it advances an interest of the United States, an important civil rights equity.⁵²

Mr. West explained that his understanding was based on advice from Mr. Hertz, the career expert on False Claims Act cases:

Mike Hertz had advised me, not just in this context, but just generally about the wide discretion we have under the False Claims Act to reach intervention decisions. And so, you know, it was always the presumption that this was an appropriate consideration under that discretion.⁵³

Similarly, Ms. Branda, then the Director of the Fraud Division, confirmed that it was appropriate to consider the *Magner* case and the civil rights equities when weighing the equities of intervening in the *Newell* case.⁵⁴

Associate Attorney General Tom Perrelli also agreed during his transcribed interview that it was appropriate to consider the *Magner* case as one factor in this context:

I think it is appropriate to consider policy interests, so I don't think there's anything inappropriate about considering any policy interest of the United States.⁵⁵

He also stated that it was not unusual to resolve multiple unrelated issues jointly:

[T]here are all manner of situations where the United States -- or where parties or the United States will resolve things on multiple fronts at the same time, you know, recognizing that some claims maybe connected, some claims may be unconnected. So I don't think that's atypical.⁵⁶

⁵² House Committee on Oversight and Government Reform, Interview of Derek Anthony West (Mar. 18, 2013).

⁵³ *Id.*

⁵⁴ Briefing by Joyce Branda, Deputy Assistant Attorney General for the Commercial Litigation Branch, Department of Justice, to the House Committees on Oversight and Government Reform and the Judiciary, Majority and Minority Staffs (Dec. 5, 2012).

⁵⁵ House Committee on Oversight and Government Reform, Interview of Thomas John Perrelli (Nov. 19, 2012).

⁵⁶ *Id.*

Several documents obtained by the Committees include handwritten notes by third parties indicating that, during internal meetings with staff charged with drafting the declination memo, Mr. Hertz supported transparency regarding consideration of the *Magner* case in order to fully explain the Department's decision and avoid any misconceptions about the optics of linking the cases. For example, one note from a regular meeting with the Associate Attorney General's office on January 4, 2012, stated: "Mike – Odd, looks like buying off St. Paul, should be whether there are legit reasons to decline as to past practice." Subsequent notes indicate that all parties, including Mr. Hertz and in particular the U.S. Attorney's Office, agreed on the need for "a very comprehensive memo that discusses the Supreme Ct. case."⁵⁷

Associate Attorney General Tom Perrelli stated during his transcribed interview that he understood that Mr. Hertz's evaluation of the False Claims Act case was "on the merits."⁵⁸ He stated:

I am confident that what he was articulating to me was his view about the case and whether --notwithstanding any other factors related to *Magner*, whether the United States was going to intervene.⁵⁹

According to Mr. West, the head of the Civil Rights Division, by mid-January 2011, there was a broad consensus that the Department should decline intervening in the *Newell* case:

[B]y early, mid-January, there was a consensus that had coalesced in the Civil Division that we were going to decline the *Newell* case. ... My understanding is that certainly that was Mike Hertz' view, it was Joyce Branda's view, and that represented the view of the branch, U.S. Attorney's Office. Also, I think around that time period would be included in that consensus, it was my view too. It was the view of the client agency, HUD. And this was a view that we had all arrived to having taken into consideration the numerous factors, including the *Magner* case, as really as reflected in our memo. I think the memo -- the declination memo that I signed really does encapsulate what our view was, what that consensus was in the early to mid-January time frame.⁶⁰

D. HUD Recommended Against Intervention in *Newell*

During her transcribed interview, Helen Kanóvsky, HUD General Counsel, stated that it was not in HUD's interest to intervene in the *Newell* case because HUD had already entered into a Voluntary Compliance Agreement (VCA) with St. Paul, and the City was complying with that agreement. She stated:

⁵⁷ Handwritten Notes of ["Line Attorney"], Department of Justice (undated) (HJC/HOGR STP 000651).

⁵⁸ House Committee on Oversight and Government Reform, Interview of Thomas John Perrelli (Nov. 19, 2012).

⁵⁹ *Id.*

⁶⁰ House Committee on Oversight and Government Reform, Interview of Derek Anthony West (Mar. 18, 2013).

[T]hey, “they” meaning Civil Frauds and the U.S. Attorney’s Office, understood that I had reservations about proceeding, in large part because HUD had no equities in this issue any longer. All of our programmatic goals had already been met. We had a VCA. We were monitoring compliance with the VCA. There was compliance with the VCA. So in terms of the interest that the Department had with respect to ensuring compliance with Section 3, those goals had been met.⁶¹

Sara Pratt, HUD’s career Deputy Assistant Secretary for Enforcement and Programs, confirmed this account in her transcribed interview:

I had confirmed with my staff that their view was that the City of St. Paul was not only in compliance with the voluntary compliance agreement and had been since it had been entered into, but they were also very much operating in good faith to try to address issues beyond the ones in the voluntary compliance agreement.⁶²

As a result, Ms. Pratt also concluded that there would be no programmatic benefit for HUD if the Department intervened in the *Newell* case:

HUD’s programmatic concerns had been fully resolved with the VCA and other activities by the City of St. Paul and that our engagement in further False Claims Act activities would be a drain on our resources financially and staff-wise.⁶³

Ms. Kanovsky also expressed concerns about the difficulties in proving the case at issue, stating:

Because Section 3 cases are very hard to prove, because the standard is best efforts, and since you can’t look at the end result, you have to look at the effort. That becomes very difficult and very resource intensive.⁶⁴

Ms. Kanovsky also stated that she did not think that the government would recover funds as a result of the government’s intervention in the case:

Q: But does HUD have an interest in recovering funds that were allegedly improperly allocated based on a false certification to HUD?

⁶¹ House Committee on Oversight and Government Reform, Interview of Helen Renee Kanovsky (Apr. 5, 2013).

⁶² House Committee on Oversight and Government Reform, Interview of Sara Pratt (Apr. 3, 2013).

⁶³ *Id.*

⁶⁴ House Committee on Oversight and Government Reform, Interview of Helen Renee Kanovsky (Apr. 5, 2013).

A: As a hypothetical matter, sure. Did we actually think that there was the capability to do that in this case? No.⁶⁵

Although Ms. Kanovsky initially opposed intervening in the case, she stated that she was approached by attorneys from the Civil Fraud Division and the U.S. Attorney's Office in September or October 2011 requesting that she change her position. Ms. Kanovsky stated that she reluctantly agreed to this request not based on the merits, but because they wanted HUD's support to make their case. She ultimately returned to her original position opposing intervention, however, after being informed that they these attorneys did not represent the Department's consensus position. She stated:

[W]hen it turned out that we weren't really accommodating Justice, we were just accommodating certain lawyers in Civil Frauds, we sent the memo that said on the merits of the Section 3 claim, which is the basis for the False Claims Act claim, we do not think that the government should go forward.⁶⁶

Ms. Kanovsky stated that she explained her changes in position during a conversation with Mr. Perez:

I told him that it had been my original inclination that this was not a strong case, and that HUD's equities had already been met, and that we were not inclined to recommend that the United States intervene, but that this had been -- it appeared to me something that Civil Frauds and the U.S. Attorney in Minnesota felt very strongly about and were committed to proceeding with, and therefore we had acceded to their request.⁶⁷

She explained further:

I said, well, if Justice is not of one mind here, then I certainly have no problem going back to my original position, which is this was not an appropriate case for the United States to intervene in.⁶⁸

Mr. Perez confirmed Ms. Kanovsky's account during his transcribed interview with Committee staff:

[M]y principal recollection of my conversations with Helen Kanovsky was that she said that in her judgment the *Newell* case was a weak case and that given the pendency of the regulation and the importance of disparate impact for HUD and for United States

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

generally that in her judgment it would be in the interest of justice to see if we could pursue through Mr. Lillehaug's proposal.⁶⁹

Several documents obtained during the investigation include email exchanges among junior line attorneys expressing frustration with Ms. Kanovsky's decision to return to her original position opposing intervention. For example, in one email exchange, a line attorney in the U.S. Attorney's Office reacted to learning of HUD's decision to return to its original position by writing that he would "work to figure out what[']s going on with this."⁷⁰ In another email, that same attorney referred to HUD's returning to its original position as "weirdness."⁷¹

Ms. Kanovsky explained that although she could understand their frustration, she believed HUD's substantive position was justified. She stated:

They thought that they had the go-ahead to proceed. They asked for the go-ahead to proceed, and we had said we weren't inclined. They had come over and thought they had convinced me to do it, they had gotten a go-ahead and now we were reversing the decision and saying, no, we want to go back to our original position and, no, we do not think this is an appropriate manner in which to intervene.⁷²

She explained further:

If the decision had been totally mine in October, and there weren't any dealings with the Department of Justice that I needed to worry about in terms of a relationship with the Department of Justice, we never -- we never would have recommended an intervening, and if it were my decision whether to intervene or not, I never would have intervened.⁷³

During his transcribed interview, Mr. West, the head of the Civil Division, explained the importance of HUD's position on this matter:

[T]here were a whole variety of factors that went into our decision to decline the *Newell* case. *Magner* was one of them. It was one of many. And as far as I was concerned, it wasn't even the most important one. The most important one was the decision of the

⁶⁹ House Committee on Oversight and Government Reform, Interview of Thomas Edward Perez (Mar. 22, 2013).

⁷⁰ E-mail from ["Line Attorney 3"] to Assistant U.S. Attorney Gregory G. Brooker, Office of the U.S. Attorney for the District of Minnesota, Department of Justice (Nov. 30, 2011) (HJC/HOGR STP 000119).

⁷¹ E-mail from ["Line Attorney 3"] to Assistant U.S. Attorney Gregory G. Brooker, Office of the U.S. Attorney for the District of Minnesota, Department of Justice (Dec. 2, 2011) (HJC/HOGR STP 000172).

⁷² House Committee on Oversight and Government Reform, Interview of Helen Renee Kanovsky (Apr. 5, 2013).

⁷³ *Id.*

client agency not to stand behind this case in the litigation risk analysis that we engaged in.⁷⁴

E. U.S. Attorney Recommended Against Intervention in *Newell*

The evidence obtained by the Committees indicates that Todd Jones, the U.S. Attorney in Minnesota, recommended against intervening in the *Newell* case after being informed that intervention would not serve HUD's interests.

During his transcribed interview with Committee staff, Mr. Jones stated that he concurred with all of the recommendations in the final declination memo that was signed by Mr. West on February 9, 2012. As he explained, he agreed with "all of the rationale, including the *Magner v. Gallagher* factor that was in the Civil – the Civil Fraud Division memo."⁷⁵

Mr. Jones explained that he recommended against intervention because it would have been difficult to prove the case without HUD's concurrence:

Well, first and foremost was the fact that our client agency, HUD, was not in concurrence about proceeding with the intervention decision anymore. That was first and foremost, because we can't do it without their help.⁷⁶

Mr. Jones also explained that he was not concerned with HUD returning to its original position opposing intervention:

[I]t didn't cause me any concern, because I've been doing this a long time, and the dynamics and factors that go into litigation decisionmaking, litigation risk, ranging from witnesses' changing positions to the state of the law changing, to staffing or individual – there is all kinds of dynamics. So, no, the fact that at a certain point in time, here is what our decision is and, later on down the road, that decision is changed because there are factors that have changed that add or enhance to the litigation risk, it is not unusual in my experience, and it is not something I am uncomfortable dealing with.⁷⁷

Greg Brooker, the career Chief of the Civil Division within the U.S. Attorney's Office, also concurred with the ultimate decision not to intervene, according to Mr. Jones.⁷⁸ This account was confirmed by Mr. Perez, who stated during his transcribed interview:

⁷⁴ House Committee on Oversight and Government Reform, Interview of Derek Anthony West (Mar. 18, 2013).

⁷⁵ House Committee on Oversight and Government Reform, Interview of Byron Todd Jones (Mar. 8, 2013).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

I had discussions with Greg Brooker, who was our point of contact in the U.S. Attorney's Office in Minnesota. ... And it was my impression from conversations I had with him that he concurred with the conclusions of Mike Hertz and the other senior people in the Civil Division who had determined that this was a weak candidate for intervention.⁷⁹

On January 10, 2012, Mr. Perez returned a telephone call from Mr. Brooker about the status of the declination memo, which had not yet been completed, and left the following voicemail message:

Hey, Greg. This is Tom Perez calling you at -- excuse me, calling you at 9 o'clock on Tuesday. I got your message.

The main thing I wanted to ask you, I spoke to some folks in the Civil Division yesterday and wanted to make sure that the declination memo that you sent to the Civil Division -- and I am sure it probably already does this -- but it doesn't make any mention of the *Magner* case. It is just a memo on the merits of the two cases that are under review in the *qui tam* context.

So that was the main thing I wanted to talk to you about. I think, to use your words, we are just about ready to rock and roll. I did talk to David Lillehaug last night. So if you can give me a call, I just want to confirm that you got this message and that you were able to get your stuff over to the Civil Division.⁸⁰

When asked about this voicemail, Mr. Perez explained that he was concerned that delay in completing the memo could cause St. Paul to raise additional demands. He stated:

I was impatient in part because on the 9th of January, I had had another conversation with Mr. Lillehaug [the attorney representing St. Paul] that I outlined earlier and I was growing increasingly concerned that he was running out of patience and might in fact raise additional terms and conditions which turned out to be accurate.⁸¹

Mr. Perez also stated:

I was trying to put it together in my head, what would be the source of the delay, and the one and only thing I could really think of at the time was that perhaps they hadn't -- they didn't write in or they hadn't prepared the language on the *Magner* issue, and so I admittedly inartfully told them, I left a voicemail and what I meant in that voicemail to say was time is moving. ... [I]f the only issue that is standing in the way is how you talk about *Magner*, then don't talk about it.⁸²

⁷⁹ House Committee on Oversight and Government Reform, Interview of Thomas Edward Perez (Mar. 22, 3013).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

According to Mr. Perez, Mr. Brooker returned his call the next day and informed him that the protocols governing declination memos required a discussion of the *Magner* case as one factor that was considered:

Mr. Brooker promptly corrected me and indicated that the *Magner* issue would be part of the discussion. I said fine, follow the standard protocols. But my aim and my goal in that message and in the ensuing conversations was to get him to communicate that, so that we could bring the matter to closure.⁸³

A document obtained by the Committees includes handwritten notes from a line attorney in the U.S. Attorney's Office confirming this account. The notes indicate that Mr. Brooker received the voicemail from Mr. Perez, describing it as a "Concern for Greg" and a "Red flag."⁸⁴ The notes then confirm that Mr. Brooker resolved this question within one day: "Greg left message saying the Sup. Ct. info. will be in the memo."⁸⁵

Mr. Perez stated that although he did not see the final declination memo, he understood that it "did have a discussion of the *Magner* case as a factor."⁸⁶

During his transcribed interview, Mr. Jones, the U.S. Attorney, confirmed that the declination memo did include an appropriate discussion of the *Magner* case.⁸⁷ He stated that no attorneys in his office reported feeling pressure to concur in its recommendation, and he characterized the recommendation as "based on the litigation risk and the facts in front of us."⁸⁸ He stated:

[W]hat's reflected in that memo [the *Newell* declination memo] is what's important to us. And that's all the relevant factors articulated in a memo for Tony West's consideration as to whether or not the United States should intervene in the *Newell* case. And that included the *Magner* decision.⁸⁹

F. Justice Decided Not to Intervene Even if St. Paul Pursued *Magner*

⁸³ *Id.*

⁸⁴ Handwritten Notes of ["Line Attorney"], Office of the U.S. Attorney for the District of Minnesota, Department of Justice (Jan. 11, 2012) (HJC/HOGR STP 000713 / Formerly HJC/HOGR A 000666).

⁸⁵ *Id.*

⁸⁶ House Committee on Oversight and Government Reform, Interview of Thomas Edward Perez (Mar. 22, 2013).

⁸⁷ House Committee on Oversight and Government Reform, Interview of Byron Todd Jones (Mar. 8, 2013).

⁸⁸ *Id.*

⁸⁹ *Id.*

The evidence obtained by the Committee demonstrates that the Department decided not to intervene in the *Newell* case even if St. Paul planned to go forward with the *Magner* case in the Supreme Court.

During his transcribed interview with Committee staff, Mr. West, the head of the Civil Division, explained that consensus had been reached in January 2012 that the Department would not intervene in the *Newell* case. He explained that at that time, however, St. Paul made a new demand for the Department to intervene in order to settle the *Newell* case, which would mean the relator could not pursue his own case against St. Paul. According to Mr. West, that course of action “was a non-starter” for the Department.⁹⁰

Because the Department refused to agree to this new demand, Mr. West stated that he believed St. Paul would not withdraw the *Magner* case. He stated:

Our decision in the Civil Division is that we were not going to go forward and litigate the *Newell* case. That meant we were either going to decline it, and if the city was willing to withdraw its *Magner* petition because we declined it, that is great. But it looked like, at one point, that the City was no longer willing to do that. We still weren’t going to litigate the case.⁹¹

During his interview with Committee staff, Mr. Perez confirmed this account:

Mr. Lillehaug changed the terms of the proposal. He wanted the United States to intervene and settle the case from underneath the relator. And we communicated clearly, based upon the judgment and direction from the Civil Division, that that was unacceptable and that the United States could not agree to those terms.⁹²

Ms. Branda, then head of the Civil Fraud Section, also confirmed that the Civil Division decided not to litigate the *Newell* case, regardless of the impact on the *Magner* case.⁹³ Ms. Branda stated that the decision by her and her office not to intervene was made “on the merits” based primarily on St. Paul’s arguments at the December 13, 2012 meeting.⁹⁴ Ms. Branda

⁹⁰ House Committee on Oversight and Government Reform, Interview of Derek Anthony West (Mar. 18, 2013).

⁹¹ *Id.*

⁹² House Committee on Oversight and Government Reform, Interview of Thomas Edward Perez (Mar. 22, 2013).

⁹³ Briefing by Joyce Branda, Deputy Assistant Attorney General for the Commercial Litigation Branch, Department of Justice, to the House Committees on Oversight and Government Reform and the Judiciary, Majority and Minority Staffs (Dec. 5, 2012).

⁹⁴ *Id.*

rejected the argument that she would have recommended intervention “but for” the *Magner* factor.⁹⁵

Once the Civil Division decided not to intervene in the *Newell* case, Mr. Perez accepted and communicated that decision to St. Paul, understanding that the impact of that decision was that St. Paul would go forward with the *Magner* case. During his transcribed interview, he stated: “for a period of time in January it appeared that there would be no agreement.”⁹⁶ He also stated:

I remember saying to someone, shortly after this, words to the effect of, well, we gave it our best efforts and we will move on and get ready for oral argument.⁹⁷

In a final attempt to convince St. Paul to withdraw the *Magner* case, Mr. Perez met with the Mayor on February 3, 2012. Mr. Perez described this meeting during his transcribed interview:

I was aware, however, that civil rights organizations were continuing their efforts and that Vice President Mondale was his mentor and was apparently reaching out to the mayor. And I know when I met with the mayor on February 3rd, he indicated that he had had at least one, and I believe more conversations with the Vice President, who was really one of his idols.⁹⁸

At the February 3 meeting, St. Paul confirmed that it would, in fact, withdraw the *Magner* case, and Mr. Perez reiterated the Department’s decision not to intervene in either the *Newell* or *Ellis* cases.⁹⁹ Mr. Perez explained:

During that meeting the city reconsidered its position and we reached an agreement that had as its central terms the original proposal made by Mr. Lillehaug. The Civil Division, having completed its review process, thereafter authorized declination in the False Claims Act cases and the city dismissed its *Magner* appeal.¹⁰⁰

⁹⁵ *Id.*

⁹⁶ House Committee on Oversight and Government Reform, Interview of Thomas Edward Perez (Mar. 22, 3013).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* Although some documents produced to the Committees include inquiries by Department attorneys about whether in these discussions Mr. Perez promised to provide HUD documents to support St. Paul’s litigation, Mr. Perez said in his transcribed interview that he did not make that offer, and other witnesses confirmed that no documents were ultimately provided. House Committee on Oversight and Government Reform, Interview of Thomas Edward Perez (Mar. 22, 3013).

¹⁰⁰ House Committee on Oversight and Government Reform, Interview of Thomas Edward Perez (Mar. 22, 3013).

St. Paul formally withdrew the *Magner* case on February 10, 2012, and issued the following public statement:

The City of Saint Paul, national civil rights organizations, and legal scholars believe that, if Saint Paul prevails in the U.S. Supreme Court, such a result could completely eliminate “disparate impact” civil rights enforcement, including under the Fair Housing Act and the Equal Credit Opportunity Act. This would undercut important and necessary civil rights cases throughout the nation. The risk of such an unfortunate outcome is the primary reason the city has asked the Supreme Court to dismiss the petition.¹⁰¹

During his transcribed interview with Committee staff, Tom Perrelli, the former Associate Attorney General, stated:

[I]f you weren’t going to intervene in either of the cases, okay, based on the -- based on the merits of those cases, then -- I know you guys talk about quid pro quo. You know, there is no quid because you weren’t going to intervene anyways, or maybe no quo.¹⁰²

CONCLUSION

Far from supporting allegations that Assistant Attorney General Tom Perez brokered an unethical or improper *quid pro quo* arrangement with the City of St. Paul, the overwhelming evidence obtained during this investigation indicates that Mr. Perez and other Department officials acted professionally to advance the interests of civil rights and effectively combat the scourge of housing discrimination.

Rather than identifying any inappropriate conduct by Mr. Perez or other Department officials, it appears that the accusations against Mr. Perez are part of a broader political campaign to undermine the legal safeguards against discrimination that Mr. Perez was protecting.

For example, in their letter to the Department on September 24, 2012, former Chairman Smith, Chairman Issa, Representative McHenry, and Senator Grassley attacked the disparate impact standard as a “questionable legal theory” despite the fact that it has been used by law enforcement for decades to combat discrimination, and despite the fact that it has been upheld by eleven federal courts of appeals.¹⁰³ They wrote:

¹⁰¹ City of St. Paul, Minnesota, *City of Saint Paul Seeks to Dismiss United States Supreme Court Case Magner vs. Gallagher* (Feb. 10, 2012) (online at www.stpaul.gov/index.aspx?NID=4874&ART=9308&ADMIN=1).

¹⁰² House Committee on Oversight and Government Reform, Interview of Thomas John Perrelli (Nov. 19, 2012).

¹⁰³ Letter from Reps. Lamar Smith, Rep. Darrell Issa, Rep. Patrick McHenry, and Senator Charles E. Grassley to Hon. Attorney General Eric H. Holder, Jr. (Sept. 24, 2012).

One of the features of this quid pro quo, distinguishing it from a standard settlement or plea deal, was that it obstructed rather than furthered the ends of justice. It was possible only because Perez knew the disparate impact theory he was using to bring fair lending cases was poised to be overturned by the Supreme Court. So he bargained away a valid case of fraud against American taxpayers in order to shield a questionable legal theory from Supreme Court scrutiny in order to keep on using it.¹⁰⁴

In other words, their letter contends that eliminating the disparate impact standard and diminishing the ability of law enforcement officials to combat discrimination would further “the ends of justice.”

These arguments echo those of several conservative organizations that submitted an amicus brief in the *Magner* case in 2011 urging the Court to strike down the disparate impact standard. Filed by the Pacific Legal Foundation, the Center for Equal Opportunity, the Conservative Enterprise Institute, and the CATO Institute, the brief argues that the disparate impact doctrine “encourages racial quotas,” would “require imprudent mortgage eligibility determinations to avoid racial disproportionalities,” and could place “pressure on banks and mortgage companies to grant loans to applicants with poor credit.”¹⁰⁵

Despite efforts by some to use ethics complaints against Mr. Perez as a proxy for their opposition to legal standards for combating housing discrimination, the Committees have identified no evidence during this investigation that calls into question Mr. Perez’s integrity, professionalism, or effectiveness as Assistant Attorney General for the Civil Rights Division in the Department of Justice.

¹⁰⁴ *Id.*

¹⁰⁵ Brief Amicus Curiae of Pacific Legal Foundation, Center for Equal Opportunity, Competitive Enterprise Institute and CATO Institute in Support of Petitioners *Magner v. Gallagher*, U.S. (No. 10-1032) (online at <http://sblog.s3.amazonaws.com/wp-content/uploads/2012/01/10-1032-PLF-amicus.pdf>).

Ms. JACKSON LEE. And the report that the gentleman from California?

Mr. GOODLATTE. We have already covered that one.

Ms. JACKSON LEE. All right. That the gentleman has indicated an expanded report because he is putting in another report, Mr. Chairman?

Mr. GOODLATTE. Well, we are not putting in reports that don't exist. We are putting in reports that already exist. [Laughter.]

Ms. JACKSON LEE. No, this one exists. This one does exist.

Mr. GOODLATTE. And we have covered it.

Ms. JACKSON LEE. Thank you, Mr. Chairman.

Mr. GOODLATTE. Attorney General Holder, we thank you for the amount of time. As was noted by the gentleman from Louisiana, you spent more time than was requested.

As you know, there is a lot of questions that Members have, and a lot of Members are not satisfied with all the answers. A number of questions are being submitted to you in writing. There are questions existing from previous correspondence that we would ask that you answer, and nothing would do more to show the respect that you referred to for this Committee than for you to answer those questions.

And as Attorney General of the United States, I think it would reflect well on the respect that the Attorney General of the United States is entitled to, to see those questions entered, answered as a part of the separation of powers, operation of checks and balances that exist in the oversight responsibility of this Committee.

I thank you again.

Attorney General HOLDER. That's a fair point, Mr. Chairman. That's a fair point.

Mr. GOODLATTE. Without objection, all Members will have 5 legislative days to submit additional written questions for the witness or additional materials for the record, if we don't have enough already.

This hearing is adjourned.

[Whereupon, at 5:15 p.m., the Committee was adjourned.]

A P P E N D I X

MATERIAL SUBMITTED FOR THE HEARING RECORD

Questions for the Record submitted to the Honorable Eric J. Holder, Jr., Attorney General, United States Department of Justice*

BOB GOODLATTE, Virginia
 CHAIRMAN

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Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

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May 31, 2013

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The Honorable Eric H. Holder, Jr.
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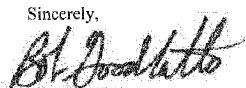
Dear Attorney General Holder,

The Judiciary Committee held a hearing on "Oversight of the United States Department of Justice" on Wednesday, May 15, 2013 at 1:00 p.m. in room 2141 of the Rayburn House Office Building. Thank you for your testimony.

Questions for the record have been submitted to the Committee within five legislative days of the hearing. The questions addressed to you are attached. We will appreciate a full and complete response as they will be included in the official hearing record.

Please submit your written answers to Kelsey Deterding at kelsev.deterding@mail.house.gov or 2138 Rayburn House Office Building, Washington, DC, 20515 by July 26, 2013. If you have any further questions or concerns, please contact or at 202-225-3951.

Thank you again for your participation in the hearing.

Sincerely,

 Bob Goodlatte
 Chairman

Enclosure

*The Committee had not received a response to these questions at the time this hearing record was finalized and submitted for printing on November 22, 2013.

The Honorable Eric H. Holder, Jr.
May 31, 2013
Page 2

QUESTIONS FOR THE RECORD FROM REPRESENTATIVE SPENCER BACHUS:

1. Attorney General Holder, it is my understanding that DOJ is pursuing cases against package delivery companies regarding the shipment of prescription drugs -- including Schedule II painkillers. Has the DOJ supplied these shippers with a list of offending pharmacies that would allow the package delivery companies to identify the bad actors?
2. The DOJ action regarding these package delivery companies concerns me, because it appears the DOJ is subjecting these companies to new regulations. What specific statutory authority is DOJ using in this instance? If these are indeed new requirements, does DOJ intend to put out a notice and comment period for rulemaking so all affected stakeholders can have input in the process?

The Honorable Eric H. Holder, Jr.
 May 31, 2013
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QUESTIONS FOR THE RECORD FROM REPRESENTATIVE STEVE KING:

1. As you know, the government settled the *Keepseagle* case regarding Native American farmers to the tune of \$760 million in 2010. According to the New York Times, Justice Department lawyers argued that that \$760 million “far outstripped the potential cost of a defeat in court.” Agriculture officials said that not enough Native American farmers would file claims to justify a \$760 million settlement.
Are you aware of internal DOJ disagreements regarding that settlement? If so, please describe those disagreements.

2. According to the New York Times, the concerns of the career officials at DOJ about the size of the \$760 million *Keepseagle* settlement were not unfounded, as only 3,600 claimants won compensation at a cost of \$300 million. That leaves \$460 million, roughly \$400 million of which must be given to “nonprofit groups that aid Native American Farmers” under the settlement (the remaining \$60.8 million will go to the plaintiffs’ lawyers). However, the Intertribal Agricultural Council, which is perhaps the largest eligible organization to receive this \$400 million, has an annual budget of just \$1 million.
Please explain the status of the remaining \$400 million-or-so in money that has been settled for the *Keepseagle* case. What does the government plan on doing with this money? Given that it was not anticipated that such a sum of money would be remaining after the payment of individual claims, does the DOJ have any intention of going back to the Court to request a change in the terms of the *Keepseagle* settlement?

3. In the 2008 Farm Bill (P.L. 110-246), Congress included a provision permitting claimants who had submitted a late-filing request under *Pigford I* and had not received a final determination on the merits of their claims to bring a civil action in federal court to obtain such a determination. The legislation made available a maximum of \$100 million for payment of successful claims. Subsequently, 23 separate complaints were filed, representing approximately 40,000 individual claims, which were consolidated as *Pigford II*. Despite the \$100 million maximum prescribed by Congress, on February 18, 2010, you, along with USDA Secretary Tom Vilsack, announced a \$1.25 billion settlement agreement for *Pigford II*.
Please describe the process by which you and USDA Secretary Vilsack negotiated the \$1.25 billion settlement for *Pigford II*. Were there any concerns from career lawyers, agency officials, or other employees of the DOJ or the USDA about the magnitude of this settlement agreement? If there were concerns, please explain who raised those concerns and what those concerns were, specifically.

The Honorable Eric H. Holder, Jr.
 May 31, 2013
 Page 4

4. As you know, claims for *Pigford II* had to be filed by May 11, 2012. Those claims had to reference previously late-filed *Pigford I* claims that should have been submitted before June 19, 2008. Those claims had to reference discrimination that occurred before December 31, 1996.

Are there any cases going forward, or any efforts being made by the DOJ, or, to your knowledge, the USDA, to expand the class of individuals or extend the statute of limitations for cases involving alleged discrimination by the USDA, in other words to have a “*Pigford III*” or a second round of any of the other USDA discrimination cases?

5. Right now the Judgment Fund it is a permanent, infinite appropriation by Congress. The government can negotiate settlements and pay out taxpayer dollars and Congress can be left entirely out of the loop. David Aufhauser, the Treasury’s general counsel from 2001 to 2003, said that the Judgment Fund, if used inappropriately, can be a “license to raid the till.”

Would you suggest any statutory reforms to the Judgment Fund? Do you have any concerns that the Judgment Fund could be used as a way to funnel money to preferred special interest groups, especially if political appointees override the legal judgment of career government officials?

6. According to the Congressional Research Service, the Judgment Fund can only pay for “actual or threatened litigation.” In other words, “the Judgment Fund is limited to litigative awards, meaning awards that were or could have been made in court. Litigative awards are distinguished from administrative awards...[f]or settlement awards to be considered litigative, the settlement must be negotiated by the Department of Justice (or any person authorized by the Attorney General) and based on a claim that could have resulted in a monetary judgment in court.” As the New York Times puts it, some government officials argued that “it was legally questionable to sidestep Congress and compensate the Hispanic and female farmers out of a special Treasury Department account, known as the Judgment Fund. The fund is restricted to payments of court-approved judgments and settlements, as well as to out-of-court settlements in cases where the government faces imminent litigation that it could lose. Some officials argued that tapping the fund for the farmers set a bad precedent, since most had arguably never contemplated suing and might not have won if they had.” Court after court dismissed the plaintiffs’ claims in *Garcia* and *Love* and on January 19, 2010, the Supreme Court declined to hear their appeal, effectively ending ability of the cases to become class action lawsuits. At that point, according to court records, the DOJ argued that the cases for the 91 named plaintiffs should be sent back to the local jurisdictions to be handled individually. The DOJ had also argued in court that some of the cases had no merit and the DOJ had no intention to settle those cases.

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With the *Garcia* and *Love* cases being denied class action status, what reason did the government have to agree to pay claims for tens of thousands of individuals? Did the DOJ conclude that the federal government faced a potential liability large enough to justify a \$1.33 billion resolution to the *Garcia* and *Love* cases? If so, please provide the analysis that justifies that conclusion.

Did the USDA urge the DOJ to change its initial position following the Supreme Court's denial of the plaintiffs' appeal (that the cases should be decided individually by the lower courts)? Did the USDA urge the DOJ to resolve these cases in the manner in which they were ultimately resolved? If the answer is "no" to the previous two questions, please explain why the DOJ reversed its initial position about sending the *Garcia* and *Love* cases to the lower courts following the Supreme Court's denial of appeal. If the USDA did urge the DOJ to change its position, please explain who, specifically, made those requests, and what the USDA's arguments for resolving the case in this manner were.

What criteria does the DOJ use to determine whether or not to use the Judgment Fund to make payments? Please explain what basis was used to justify using the Judgment Fund for payments under the *Garcia* and *Love* cases, considering the action was an administrative decision, not a litigative settlement, and there did not appear to be a plausible threat of significant litigation threat to the federal government after the Supreme Court denied the plaintiffs' appeal for class status. Has the Judgment Fund ever been used to pay administrative claims in bulk and in a non-adversarial process such as the government has now set up for *Garcia* and *Love* claimants? If so, please provide the relevant circumstances.

7. The New York Times cites "senior officials," presumably from the DOJ, saying that resolving the various discrimination lawsuits "averted potentially higher costs from an onslaught of new plaintiffs or losses in court."

Please provide the DOJ's analysis on the possible outcomes of pursuing each of the USDA discrimination cases in court. In addition, please explain how the DOJ typically weighs the legal risks of losing class action and other cases filed against the government with the cost of negotiating settlements for these cases.
8. In the matter of the *Garcia* case, the New York Times has reported that, as the deadline for filing claims approached and the government was facing far fewer claimants than expected, the USDA instructed processors to call about 16,000 people to remind them that time was running out. Some government officials worried that the government was virtually recruiting claims against itself.

Are there any restrictions on federal government employees that prevent them from inviting claims against the government in a class action lawsuit?

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QUESTIONS FOR THE RECORD FROM REPRESENTATIVE TRENT FRANKS:

1. What is your interpretation of Title II of the Americans with Disabilities Act (ADA) and the 1999 U.S. Supreme Court decision in *Olmstead v. L.C.* as it pertains to the choice of institutional care facilities for persons with cognitive and developmental disabilities? Specifically, does your Department recognize that qualified persons, by law, are given the choice of institutional or home and community based care? (42 CFR 441.302(d).
2. Do you believe that the *Olmstead* decision requires a movement from institutional care facilities for persons with cognitive and developmental disabilities?
3. Why is there a Department Policy to:
 - a. Allow the Civil Rights Division to investigate and sue states' institutional care facilities that are homes to persons living with the most severe forms of developmental disabilities when no resident, resident's legal representative, staff member, or federal or state inspector has requested such actions be taken or has joined with the Department in alleging civil rights violations?
 - b. Permit its Civil Rights Division attorneys to "partner" with organizations that work assiduously to undermine and eliminate the option of licensed institutional care facilities for persons with profound and severe cognitive-developmental disabilities?

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QUESTIONS FOR THE RECORD FROM REPRESENTATIVE TED POE:

1. 26 USC §7217 states that, “It shall be unlawful for any applicable person to request, directly or indirectly, any officer or employee of the Internal Revenue Service to conduct or terminate an audit or other investigation of any particular taxpayer with respect to the tax liability of such taxpayer” and this section covers “the President, the Vice President, any employee of the executive office of the President, and any employee of the executive office of the Vice President”. Should evidence come to light that a covered individual directly or indirectly encouraged this behavior; will you direct your agency to prosecute such individuals for violating this section of the US Code?
2. 26 USC §7217 also states that: “Any officer or employee of the Internal Revenue Service receiving any request prohibited by subsection (a) shall report the receipt of such request to the Treasury Inspector General for Tax Administration.” Based on the facts that have been made public so far, numerous IRS employees clearly knew of this targeted enforcement and based on what we know now, did not report this conduct as required under this section. Do you believe the IRS employees who knew of this conduct (some knew as far back as June 2011) should be prosecuted under 26 USC §7217? Will you call for the Department of Justice to open an investigation as to IRS employees who violated 26 USC §7217? If not, why not?
3. 5 USC §7323, commonly known as the Hatch Act, states that a covered federal employee may not “use his official authority or influence for the purpose of interfering with or affecting the result of an election.” Do you think that specifically targeting conservative groups for increased scrutiny by the IRS prior to the 2012 election violates this statute? If not, why not? Do you believe, as I do, that the intent of this targeting and harassment was to disrupt the work that these organizations were doing to promote their political beliefs prior to the election?
4. As you know, the U.S. Office of Special Counsel has jurisdiction to investigate and prosecute alleged violations of the Hatch Act. Would you support a special investigation by the U.S. Office of Special Counsel into possible violations of the Hatch Act by employees of the IRS or other Administration officials who encouraged such behavior?
5. The U.S. Supreme Court Case *Heckler v. Chaney*, 40 US. 821 (1985), addressed the question of to what extent an administrative agency’s decision to exercise its discretion to not take certain enforcement actions is subject to judicial review under the Administrative Procedures Act. While the Court held that an agency’s determination not to enforce a

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law was generally unreviewable, the Court also stated that this un-reviewability was rebuttable in the situation where an agency "consciously and expressly" adopts a policy that is so extreme that it represents an abdication of its statutory responsibilities. Do you believe that a situation where the IRS decided, in a systematic and widespread fashion, to selectively enforce our nation's tax laws against groups who had certain political beliefs would qualify as an example where an agency is "consciously and expressly" adopting a policy that is directly opposite of their constitutional duty to equally enforce the laws and Constitution of the United States? If not, why not? Would your analysis change if facts were to come to light that this enhanced IRS targeting was also directed towards religious groups that may have had different political views than the Administration?

6. As you know, the U.S. Supreme Court has held that selective prosecution exists where the enforcement or prosecution of a Criminal Law¹ is "directed so exclusively against a particular class of persons ... with a mind so unequal and oppressive" that the administration of the criminal law amounts to a practical denial of Equal Protection² of the law (*United States v. Armstrong*, 517 U.S. 456 (1996), quoting *YICK WO V. HOPKINS*, 118 U.S. 356 (1886)). If, as the IRS has indicated they were guilty of doing in their recent apology, it is proved that the IRS specifically targeted conservative groups for additional scrutiny in the application of the laws of the United States, do you believe that the agency (and all those in the Administration who were involved) would be guilty of violating the equal protection rights of the individual Americans who make up the membership of the targeted groups? If not, why not?
7. Given the seriousness of these crimes, the threat to our democratic process which arises from the alleged conduct, and the potential for high level members of the Administration being involved in the initial conduct and the ensuring cover-up; will you call for a special prosecutor to be appointed to investigate these allegations? If not, why not?

¹ <http://legal-dictionary.thefreedictionary.com/Criminal+Law>

² <http://legal-dictionary.thefreedictionary.com/Equal+Protection>

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QUESTIONS FOR THE RECORD FROM REPRESENTATIVE JASON CHAFFETZ:

1. Does the Department of Justice believe that probable cause is the correct standard for law enforcement to access geolocation information?
 - a. If no, what is the appropriate standard?
 - b. If yes, does the Department advise FBI agents and U.S. Attorneys to always obtain a warrant based on probable cause when seeking geolocation information?

2. Does the Department of Justice believe that there should be a lower/different standard for law enforcement to access geolocation information from smartphones and other mobile devices than the standard for attaching tracking devices to cars under *Jones*?
 - a. If yes, why?
 - b. If no, why not?

3. Does the Department of Justice believe there should be different standards for historical geolocation data and prospective, real time data?
 - a. If no, again, what is the appropriate standard?
 - b. If yes, why? Is it really less privacy invasive to look at someone's past movements as opposed to their current movements?

4. There has been a lot of concern about the investigative technique called "cell tower dumps"—that's when law enforcement gets from a phone company a list of all the phone numbers that connected to a particular cell tower in a particular place around a particular time—because it reveals the location of so many innocent people who are irrelevant to the crime being investigated.
 - a. What rules does the DOJ have in place to protect privacy when it comes to cell tower dumps?
 - b. What legal process is used, what limits are there on how you use all of that information and how long you keep it, and what procedures, if any, are in place to notify all of those people that the government has collected these records?

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QUESTIONS FOR THE RECORD FROM REPRESENTATIVE ROBERT C. "BOBBY" SCOTT:

1. What is the Administration's response to the "Defending Childhood" report issued by your National Task Force on Children Exposed to Violence just before the shootings in Newtown regarding the lasting effects that exposure to violence has on children?
2. What is the effect of the sequester on criminal and civil trial proceedings?
3. According to the Washington Post, two thirds of those sentenced to death have their convictions overturned. Why should we have confidence that those who are put to death by drones are not actually innocent?
4. What are the rules for considering evidence for determining who is put on the kill list? Is hearsay considered? Is illegally obtained evidence considered?
5. If someone is on the kill list, can they be put to death by methods other than by drone?
6. What opportunity is there for someone put on the kill list to be heard in order to present evidence that he or she should not be on the list?
7. The Sixth Circuit ruled that the Fair Sentencing Act must be applied retroactively. What is the Administration's position on applications for retroactive resentencing and is it consistent with the Sixth Circuit's interpretation of the law and the legislation?
8. The 2007 OJP policy allows faith-based recipients of taxpayer dollars to be granted certificates of exemption from federal laws prohibiting religious discrimination in employment. What the basis and process used to award these exemptions?

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QUESTIONS FOR THE RECORD FROM REPRESENTATIVE MELVIN L. WATT:

As the Ranking Member of the Subcommittee on Intellectual Property, I'm concerned with safeguarding creative and intellectual property and the Americans who work in various creative industries, including film and TV production. I want to commend you and the Department for the work done in the *Megaupload* investigation.

Not only does the indictment of Megaupload's founder and several of his employees on charges of criminal copyright infringement and racketeering represent important enforcement of our laws to protect U.S. intellectual property and jobs, but it has had meaningful results. Megaupload was one of the most popular sites on the Internet. It hosted popular creative content produced by U.S. workers providing millions of dollars in advertising and subscriptions to the operator of the site while the creators received no benefit.

We now have evidence that the closure of Megaupload has had a real positive impact. A research study released by Carnegie Mellon University found that the closure of Megaupload last year led to more legitimate digital sales and rentals by a factor of 6-10%. The study concludes that customers shifted from cyberlocker-based piracy to purchasing or renting through *legitimate* digital channels, providing compensation to U.S. workers and companies. Although the Megaupload indictment is significant, similar sites continue to operate with impunity. Given the effectiveness this enforcement action represented for consumers and creators, and the real world impact of the action, is the Department pursuing other similar investigations/cases related to similar sophisticated criminal enterprises? What challenges does the Department face in seeking to prosecute such egregious cases of American IP theft? What additional tools would assist the Department in curtailing these illegitimate foreign operators?

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QUESTIONS FOR THE RECORD FROM REPRESENTATIVE STEVE COHEN:

Marijuana

Respecting the States and Issuing DOJ Guidance

General Holder, you and I have had several conversations over the years about federal policy towards marijuana. In particular, I've expressed my disappointment in the federal government's continued targeting and prosecution of individuals and businesses who are acting in compliance with their state laws legalizing medical marijuana.

Since you last testified before our Committee, two major events have happened: (1) a Pew Research poll found that a majority of Americans favor legalizing marijuana and (2) the voters of Colorado and Washington voted to legalize marijuana for personal use. Since then, both states have asked for guidance from the Justice Department about whether it intends to respect their laws but they're still awaiting answers. I understand that you've been looking into this issue and have said you will report something soon.

1. With all of the other priorities of the Justice Department, not to mention the significant cuts it took due to sequestration, why does it make sense for the federal government to use its resources to target marijuana?
2. Is it a good use of resources for the federal government to deprive someone of their liberty because of marijuana use?
3. Does marijuana pose as great or any greater risk to public safety than alcohol?
4. Can you tell me when you expect to issue guidance on whether the Justice Department will respect Colorado and Washington's laws?
5. Wouldn't it be a waste of federal resources to prosecute those who are acting in full compliance with the laws of their states? And shouldn't we encourage the states to be the laboratories of democracy?
6. Would you support a national blue ribbon commission that looks at these issues and our federal marijuana policy more broadly?

Conflict with State Laws, Particularly Banking Laws

One of the major issues that Colorado and Washington are confronting is that businesses that intend to sell marijuana in full compliance with their state laws are unable to open bank accounts because of risks that the banks will be subject to scrutiny by the federal government for money laundering violations.

1. Would the DOJ be willing to issue a policy statement declaring that for the purposes of determining whether money laundering has occurred, state-legal marijuana activity shall not be considered "unlawful activity" or "specified unlawful activity"? The federal government would retain the ability to charge an individual for the predicate offense of drug trafficking, if that is deemed necessary. But it would ensure that individuals who are

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not trying to conceal their activities -- or the activities of their customers -- are not prosecuted under statutes intended to prevent such concealment. Otherwise, aren't you actually fostering a greater risk of money laundering by forcing these businesses to engage in all cash transactions and taking hundreds of millions of dollars out of the regulated financial system?

Pardons and Commutations

As we have discussed, I am very concerned about the leadership of the Pardon Office and the slow pace of pardons and commutations we have seen from the Obama Administration. It is not only individual applications that call out for pardons and commutations, but there are entire classes of people sitting in prison serving sentences that no longer comport with public policy or public opinion.

1. Do you think it would be a good idea to create a special unit within the Pardon Office to review current prison sentences and recommend equitable group commutations?
2. Would you consider recommending commutations for people who were sentenced under the old crack cocaine laws and are serving a longer sentence than they would if they were sentenced today under the Fair Sentencing Act? Shouldn't their sentences be considered void for public policy reasons because they run counter to the policy that Congress has now determined is appropriate?
3. Would you support granting commutations to other classes of drug offenders who are imprisoned under laws that the public no longer supports? For example, a majority of Americans now support legalization of marijuana but many people continue to serve sentences for crimes related to marijuana that make no sense under today's standards. Wouldn't it be appropriate to grant equitable commutations to people who are serving time for crimes that the public no longer supports?

Transporting Pharmaceuticals

Mr. Holder, according to recent press reports, the Justice Department has been investigating common carriers for their role in transporting pharmaceuticals that may not have been prescribed legally.

1. Given that the Controlled Substances Act gives these companies a safe harbor, can you tell me the legal theory under which you are operating?
2. How can these companies be expected to know whether the contents of the packages were validly prescribed? What sort of investigation or due diligence do you expect of them?

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QUESTIONS FOR THE RECORD FROM REPRESENTATIVE HENRY C. "HANK" JOHNSON:

1. What is the standard for issuing a subpoena under 28 CFR 50.10? Does it involve judicial oversight?
2. When is a warrant required for investigations of electronic communications? What is the standard for obtaining a warrant under the Fourth Amendment, and how does this differ from obtaining a subpoena?
3. Would the Espionage Act of 1917 authorize the prosecution of a journalist, or anyone else who leaked or disseminated national security information?

As a member of both the Judiciary and House Armed Services Committees, I also have serious concerns with Republicans' opposition to closing the Guantanamo detention facility.

1. Of the 166 detainees housed in the Guantanamo detention facility, how many are cleared for release?
2. Does "cleared for release" mean that these detainees are being held unlawfully or pose no threat to the public? Or does it mean risk certain detainees posed could be managed by means other than detention?
3. Does Section 1027 of the NDAA strictly prohibit using **any** funds to transfer detainees to the United States
4. And doesn't Section 1028 of the NDAA also prohibit transferring detainees to foreign countries unless these countries can prevent the detainees from committing any terrorist activity?
5. What prevents a country like Yemen from meeting this standard?
6. So by enacting these sections of the NDAA, Congress has effectively stripped the Executive's power to close the detention facility at Guantanamo?

We must find a way to resolve the status of detainees who are not charged but are too dangerous to release or whom other countries will not accept.

1. If established, wouldn't these courts assist in the effort to close the detention facility at Guantanamo?
2. What barriers exist to establishing these courts?

This hearing also raises many important questions concerning Congress' role in ensuring the Justice Department upholds its mission to promote and establish justice. In March, this body failed to come together to prevent sequestration. The Republican leadership failure is already being felt nationwide, and its impact on my home state of Georgia continues to be a grave concern to me. It arbitrarily took billions out our economy, cost jobs, valuable programs, and stunting our economic recovery. As a result of sequestration, Congress reduced the Justice Department's funding by \$1.655 billion.

1. How has this affected the mission of the Justice Department to promote and establish justice?

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2. How has this meat-cleaver approach threatened long-term programs critical to law enforcement?
3. Wouldn't eliminating justice programs negatively affect local communities?
4. This Committee has not yet answered the call from the families of the Newtown victims by acting to prevent gun violence. Won't cuts to ATF funding impede criminal investigations and firearms tracing?

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QUESTIONS FOR THE RECORD FROM REPRESENTATIVE PEDRO PIERLUISI:

Drug-related violence in Puerto Rico

The most recent CJS bill specifically addressed the issue of a DOJ surge of personnel and resources to Puerto Rico. In it, the Committee states that “efforts by Federal law enforcement to reduce drug trafficking and associated violence in the Southwest border region have affected trafficking routes and crime rates in the Caribbean.” The Committee says that it “expects the Attorney General to address these trends by allocating necessary resources to areas substantially affected by drug-related violence, and reporting such actions to the Committee.” The murder rate in Puerto Rico is far higher than any state, and most murders are linked to the drug trade. In 2012, drug seizures or disruptions by the Coast Guard, CBP and DEA increased very significantly while the price of drugs in Puerto Rico has decreased. This is a problem of national scope, because most drugs that enter Puerto Rico are transported to the U.S. mainland.

1. Can the DOJ describe what concrete steps it has been taking to respond to the sharp increase in drug-related violence in Puerto Rico in recent years? Are additional steps planned going forward? Is the possibility of a surge still under consideration?

