

A TIME TO REFORM: OVERSIGHT OF THE ACTIVITIES OF THE JUSTICE DEPARTMENT'S CIVIL, TAX, AND ENVIRONMENT AND NATURAL RESOURCES DIVISIONS AND THE U.S. TRUSTEE PROGRAM

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BEFORE THE
SUBCOMMITTEE ON
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COMMERCIAL AND ANTITRUST LAW
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A TIME TO REFORM: OVERSIGHT OF THE ACTIVITIES OF THE JUSTICE DEPARTMENT'S CIVIL, TAX AND ENVIRONMENT AND NATURAL RESOURCES DIVISIONS AND THE U.S. TRUSTEE PROGRAM

THURSDAY, JUNE 8, 2017

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON REGULATORY REFORM,
COMMERCIAL AND ANTITRUST LAW,
Washington, DC.

The Subcommittee met, pursuant to call, at 1:00 p.m., in Room 2141, Rayburn House Office Building, Hon. Blake Farenthold (Vice-Chairman of the Subcommittee) presiding.

Present: Representatives Farenthold, Goodlatte, Ratchiffe, Gaetz, Cicilline, Conyers, Johnson of Georgia, Jayapal, and Schneider.

Staff Present: Dan Huff, Counsel; Slade Bond, Minority Counsel; and Andrea Woodard, Clerk.

Mr. FARENTHOLD. Good afternoon. The Subcommittee on Regulatory Reform, Commercial and Antitrust Laws shall come to order. Without objection, the Chair is authorized to declare a recess of the Committee at any time. We welcome everyone to today's hearing on a time to reform: oversight of the activities of the Justice Department's Civil, Tax, Environment, and Natural Resources Divisions, and the U.S. Trustees Program. And I will now recognize myself for a brief opening statement.

Welcome to this oversight hearing on four of the Justice Department components within this Subcommittee's jurisdiction. The new administration creates an opportunity for introspection and reform within the DOJ. This hearing will aid that process by reviewing abuses under the prior administration, determining whether the new DOJ leadership has started to initiate reforms, how far these reforms have progressed, and will explore, with the DOJ, what other forms will be appropriate.

This Subcommittee has examined numerous examples of Administration lawyers straining the meaning of the statutes to justify activities never contemplated by Congress.

For example, Operation Choke Point was a Justice-Department-led program to deny merchants, like firearm dealers or payday lenders—that the Obama administration deemed objectionable—access to the financial networks they needed to survive. The DOJ has cited its special authority to issue administrative subpoenas when fighting fraud, “affecting” banks. But the claimed fraud in Operation Choke Point was far removed from banks, perpetrated osten-

sibly on the customers of their customers' customers. Furthermore, Committee oversight has found that the program was inflicting an unacceptable level of collateral damage on legitimate businesses, whether intended or not. That damage lingers, and I would like to know what the DOJ is planning to do to reverse it.

In another instance, a New York Times expose revealed that, on the eve of an inevitable victory in court, the Department abruptly switched courses away from litigation and settled a discrimination case, despite vigorous objections from career attorneys within the DOJ. It appears the Department settled in order to pay off friends, including a plaintiff's lawyer, who was on President Obama's transition team. What can the Department's new management do to halt Justice Fund abuse?

Another troubling pattern from the last administration was sue and settle abuse. This kind of abuse occurs when a regulatory agency agrees to settle a lawsuit with the friendly plaintiff, requiring it to implement a desired policy under the cloak of judicial authority, circumventing the normal rulemaking process, and paying both sides attorneys' fees.

On May 27th, a report by the U.S. Chamber of Commerce found that, in 8 years, the Obama administration welcomed 137 Clean Air Act settlements, far more than the 93 settlements that the previous administration did over a preceding 12-year period. What steps is the DOJ considering to halt abusive sue and settle practices?

Additionally, the Tax Division has been defending the Internal Revenue Service in lawsuits arising out of IRS's inappropriate targeting of conservative groups. The Sixth Circuit rebuked the Obama Justice Department's Tax Division lawyers for delaying one of the leading cases, saying: "[T]he government is doing everything it possibly can to make this as complicated as it possibly can, to last as long as it possibly can, so that, by the time there is a result, nobody is going to care except the plaintiffs."

Finally, I am interested in an update from the U.S. Trustee's Office on its need for funding assistance, the reduction of fraud in the Asbestos Trust, and its oversight of Puerto Rico's bankruptcy processing filing its May 3, 2017 filing.

I appreciate the DOJ making witnesses available amidst this transition, and I hope this hearing will help the new management implement reforms by identifying problem areas and solutions. I also look forward to the suggestions of our second panel that has been carefully monitoring DOJ activities.

At this time, the Chair will now recognize the Ranking Member of the Subcommittee on Regulatory Reform, Commercial and Antitrust Law, Mr. Cicilline from Rhode Island, for his opening statement.

Mr. CICILLINE. Thank you, Mr. Chairman. Today's hearing is an important opportunity to conduct oversight into the work of several components of the Justice Department within the Subcommittee's jurisdiction. The importance of legislative oversight cannot be overstated. It is a fundamental check and balance, key to the public's confidence in government, and it cannot be overstated.

In less than 5 months, President Trump has fired Acting Attorney General Sally Yates after she informed the White House that

National Security Advisor Michael Flynn was a security risk; fired FBI Director James Comey, who was overseeing an ongoing investigation into the Trump campaign's ties to Vladimir Putin; former National Intelligence Director James Clapper has called this "egregious and inexcusable"; refused to disclose his tax returns, breaking with the tradition of Presidents from the last four decades; refused to release White House visitor logs; refused to release documents requested by Congress; appointed numerous officials with serious and unresolved conflicts of interest to key government positions; repeatedly attacked the Federal Judiciary, a co-equal branch of government, eroding trust in our legal system and the rule of law; and took the alarming and extreme step of instructing government officials to ignore congressional oversight requests unless supported by a Republican Committee Chair.

Because my Republican colleagues have shown little interest in examining any of these matters, this hearing is one of the few opportunities that we have to hear from the Justice Department on the issues important to our constituents. Today's oversight hearing concerns the work of Civil, Environment, and Natural Resources and Tax Divisions along with the U.S. Trustee Program. The Civil Division is the largest litigating component of this Justice Department. Among its many other responsibilities, it is tasked with defending the President's unconstitutional Muslim travel ban.

The President recently lashed out at his own Justice Department, stating on Twitter that it, "Should have stayed with the original travel ban, not the watered-down politically-correct version." The editorial board of the Wall Street Journal referred to these comments as "reckless on multiple levels and merely the latest incident in which Mr. Trump, popping off, undermined his own lawyers."

George Conway, the husband of White House Counselor Kellyanne Conway, referred to the President's statements as sad, adding that "every sensible lawyer in the White House's counsel office and every political appointee at DOJ would agree with me." Mr. Conway personally recently removed himself from contention for the appointment as permanent assistant attorney general of the Civil Division, suggesting that the President's toxic conduct and statements have discouraged qualified individuals from serving in this administration. It is important that we hear from the Civil Division on this matter.

The Civil Division is also responsible for representing President Trump in lawsuits relating to conflicts of interest in his alleged violations of the Constitution's Foreign Emoluments Clause by profiting from foreign investments in his property, which has not been divested. Together with Ranking Member Mr. Conyers, I have co-sponsored H.R. 371, the "Presidential Conflicts of Interest Act", to require the President and Vice President to disclose and divest any potential financial conflict of interest.

The Environment and Natural Resources Division is responsible for enforcing the Nation's environmental laws to ensure that America's air, water, and lands are clean. Early this week, the Trump administration announced that it plans to appoint Jeffrey Bossert Clark, a climate skeptic, who represented BP in lawsuits related to the Deepwater Horizon spill, one of the Nation's worst environ-

mental disasters. While he will not testify for today's hearings, I am concerned that these types of serious conflicts of interest will imperil the Environment Division's mission.

The Tax Division litigates all matters under the Internal Revenue laws, collecting more each year than its entire budget. It also plays an important role in investigating and prosecuting offshore tax invasion, a significant concern of mine. Every year, U.S. corporations hide trillions of dollars of profits offshore, securing \$90 billion in Federal income taxes. In April, I introduced H.R. 2005, the "Offshore Prevention Act", to keep jobs in America by eliminating tax breaks for companies that evade our tax laws by hiding income overseas. I look forward to hearing from the Tax Division on its enforcement efforts to level the playing field for hardworking Americans and small businesses.

Finally, the U.S. Trustee Program is responsible for promoting integrity and efficiency of the bankruptcy system. I look forward to hearing from the program about its efforts to combat creditor abuse, particularly the practice of robo-signing, and its other initiatives to protect consumer debtors. The American people demand and deserve transparency. It is critical that we hear from the Justice Department on how these matters affect its statutory responsibilities.

In September, Chairman Goodlatte noted at this hearing, "It is an opportunity to conduct aggressive oversight of these four components of DOJ to determine where they are making decisions to uphold the law or follow the political whims of the administration." I agree, and I thank the witnesses for appearing today and look forward to your testimony. With that, I yield back, Mr. Chairman.

Mr. FARENTHOLD. Thank you, Mr. Cicilline. The Chair now recognizes the Chairman of the full Judicial Committee, Mr. Goodlatte of Virginia, for his opening statement.

Chairman GOODLATTE. Thank you, and I second your remarks about the need for reforms at DOJ. I am very pleased that already a major reform is in place. Yesterday, Attorney General Sessions announced a ban on payments to non-victim, third parties in Department of Justice settlements. I applaud the Attorney General's action. The new Justice Department's respect for the Separation of Powers stands in stark contrast to the behavior of the Obama Administration officials, who used their positions to funnel billions of settlement dollars to their political allies. The Committee will continue working to pass the bipartisan "Stop Settlement Slush Funds Act of 2017" which would ban this practice permanently.

Additional reforms are also needed. The Department of Justice did not just force settling defendants to pay non-victims. In 2013, a shocking New York Times expose revealed that the Obama administration bilked over a billion dollars from the tax payer-funded Judgement Fund and handed it to special interests.

The vehicles for this giveaway were parallel, weak cases alleging bias by the Department of Agriculture. The Times described how, after a succession of Department of Justice legal victories, including in the Supreme Court, "political appointees . . . engineered a stunning turnabout: they committed \$1.33 billion to compensate . . . thousands of Hispanic and female farmers who had never claimed bias in court." The deal was "fashioned in White House

meetings, despite the vehement objections . . . of career lawyers . . . who had argued that there was no credible evidence of widespread discrimination.”

The government’s statistical expert from U.C. Berkeley told the Times regarding the parallel Keepseagle case, “[i]f they had gone to trial, the government would have prevailed . . . It was just a joke . . . I was so disgusted. It was simply buying the support of Native Americans.”

The Keepseagle settlement was based on the plaintiffs’ lawyers’ self-serving estimate that there were 19,000 claimants. The plaintiff’s attorneys collected \$60.8 million in attorneys’ fees. Just a year before, the lead plaintiffs’ attorney, Joseph Sellers, had served on President Obama’s 2008 transition team.

In the end, there were just 4,400 claimants—fewer than even the government had estimated—and \$380 million left over. This was taxpayer money, but instead of demanding it back, DOJ agreed to direct it to non-victim third parties. This troubled the presiding judge who wrote: “Although a \$380 million donation by the Federal Government to charities . . . might well be in the public interest, the Court doubts that the Judgement Fund from which this money came was intended to serve such a purpose. The public would do well to ask why \$380 million is being spent in such a manner.”

On May 25, 2017, I wrote the Attorney General, alerting him to a potential opportunity for the Department to recover the \$380 million for taxpayers. I look forward to discussing remedies for the larger issue of Judgement Fund abuse.

Overreach is not limited to the executive branch. District court judges are issuing preliminary injunctions outside of their jurisdictions and for the protection of nonparties.

According to a forthcoming article in the Harvard Law Review, this is a recent development, not in accord with traditional practice. The traditional view was that court injunctions restrained the defendant’s conduct, vis-a-vis the plaintiff, not vis-a-vis the world. Nationwide injunctions trample the sovereignty of sister courts. They also create a “shop till the statute drops” problem. Opponents of government action can lose in 93 judicial districts, win one preliminary injunction in the 94th, and then government action can be stayed nationwide, despite it being upheld everywhere else. Such perverse results might be avoided if the Department of Justice insisted on the original understanding that courts do not have authority to issue such sweeping injunctions.

There are many additional issues to cover. This hearing is one of a series that the Committee is holding on the Justice Department to identify areas that are in need of reform. I want to thank our witnesses for their participation here today, and I look forward to hearing their thoughts on restoring the Justice Department to its proper role. Mr. Chairman, I yield back.

Mr. FARENTHOLD. Thank you very much, Chairman. It is my understanding Mr. Conyers will submit a statement for the record, and Mr. Johnson has a brief opening statement in lieu of Mr. Conyers, so we will recognize the gentleman from Georgia.

[Statement submitted by the Honorable John Conyers, Jr., Michigan, Committee on the Judiciary. This material is available at the Committee and can be accessed on the Committee Repository at:

<http://docs.house.gov/meetings/JU/JU05/20170608/106076/HHRG-115-JU05-MState-C000714-20170608.pdf>

Mr. JOHNSON of Georgia. Thank you. I thank the Chair, and I must recognize the fact that we are in the Trump administration now. The Obama administration has gone bye-bye. The need for oversight of the Obama administration has ended back on January 20th over 100-and-some-odd days ago. And so, now it is time to do oversight into the operations of the Trump administration, and that is the focus of this hearing, and with that, I will yield back.

Mr. FARENTHOLD. Thank you very much. Actually, I think we need to swear in our witnesses, so gentleman, if you would please rise.

Do you swear that the testimony that you are about to give before the Committee is the truth, the whole truth, and nothing but the truth, so help you God?

Let the record reflect all witnesses have responded in the affirmative. You all may be seated.

I would like to introduce our distinguished panel of witnesses: Chad A. Readler, if I am pronouncing that right, was appointed acting assistant attorney general for the Civil Division on January 30, 2017. Prior to joining the Department, Mr. Readler was a partner at the Jones Day law firm where he handled complex civil and criminal litigation matters with an emphasis on appellate litigation. Mr. Readler is a recipient of the Marshall Memorial Fellowship and previously served as a volunteer for Lawyers Without Borders, training Kenyan lawyers in Nairobi. Mr. Readler earned his bachelor's degree and his J.D. with honors from the University of Michigan. Following law school, he clerked for Judge Allen Norris of the U.S. court of appeals for the Sixth Circuit. Welcome, Mr. Readler.

Jeffrey H. Wood was appointed Acting Assistant Attorney General of the Environment and Natural Resources Division on January 20, 2017. Prior to this appointment, Mr. Woods served as environmental counselor for U.S. Senator Jeff Sessions and as the Republican staff director for the U.S. Subcommittee on Clean Air and Nuclear Safety and Water and Wildlife. Mr. Wood has also worked in private practice, both as an environmental and energy lawyer and as in-house counsel for a transportation company. Mr. Wood earned his bachelor's degree and J.D. from Florida State University. A welcome to you as well, sir.

David H. Hubbert was appointed Acting Assistant Attorney General of the Tax Division in January of 2017. He was previously Tax Division's Deputy Assistant Attorney General for several trial matters. Mr. Hubbert has vast experience with the Tax Division, overseeing litigation functions and the operations of the six regional, civil trial sections, the Court of Federal Claims section, and the Office of Civil Litigation. He also served as a trial attorney in both the civil and trial section and the appellate section covering various regions of the country. Mr. Hubbert earned his bachelor's degree in accounting from the University of Arizona and his J.D. cum laude from the University of Pennsylvania Law School. Welcome, sir.

Mr. Clifford White III has served as the Director of the U.S. Trustee's Program since 2006. Mr. White has more than 30 years in Federal service, and most of his tenure has been with the United

States Trustee Program including formerly as a Deputy Director and an Assistant United States Trustee. Prior to joining the program, Mr. White served as the deputy assistant attorney general within the Department of Justice and is official at two other Federal agencies. He has been recognized with an Attorney General's award for distinguished service and was conferred the Presidential Award of Meritorious Executive in 2016 and Distinguished Executive in 2009. Mr. White earned his bachelor's degree and his J.D. with honors from George Washington University and the George Washington University Law School.

So, gentleman, each of you have prepared and presented with us a written statement, which will be entered into the record in its entirety. I ask each witness to summarize his testimony in 5 minutes or less, and to help you stay within that, there is a timing device in front of you. The light will switch from yellow to green, indicating it is time to speed up, and you have 1 minute to conclude your testimony. When the light turns red, it indicates that your time has expired, so please wrap it up promptly, so we will get started with Mr. Readler. You are recognized for 5 minutes, sir.

STATEMENTS OF CHAD READLER, ACTING ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION; JEFFREY WOOD, ACTING ASSISTANT ATTORNEY GENERAL, ENVIRONMENT AND NATURAL RESOURCES DIVISION; DAVID HUBBERT, ACTING ASSISTANT ATTORNEY GENERAL, TAX DIVISION; AND CLIFFORD WHITE III, DIRECTOR, U.S. TRUSTEE PROGRAM

STATEMENT OF CHAD READLER

Mr. READLER. Good afternoon, Mr. Chairman, Ranking Member Cicilline, and Ranking Members of the Subcommittee. Thank you for inviting me to testify this afternoon about the work of the Civil Division of the Department of Justice. I was honored to join the Division on January 30th of this year. It is a privilege to lead the Division, and I appreciate the opportunity to discuss with you the important work we are doing, as well as to discuss our budget and resource needs for fiscal year 2018.

The Civil Division is made up of more than 1,350 career employees including more than 1,000 attorneys. Each year, the Division handles tens of thousands of cases that involve billions of dollars in claims and recoveries. Even in my relatively brief tenure, I have been highly impressed by the capabilities and professionalism of our attorneys and support staff. The Division has the privilege of representing the United States, its agencies, members of Congress, Cabinet officers, and other Federal employees. Chief among our duties is defending and enforcing various Federal programs and actions. In so doing, the Division routinely confronts significant policy issues, often with constitutional dimensions. I would like to highlight a few examples of the significant and varied work done by the talented and dedicated public servants in the Division.

First is national security: defending our Nation is one of the highest priorities of the Department and the Division. The Division's efforts to support our national security interest include defending lawsuits against government officials arising out of efforts to protect national security; defending policies and procedures re-

lated to the security of our borders, such as screening procedures for individuals entering the United States; defending against habeas petitions filed by individuals detained at Guantanamo Bay; defending against challenges to alleged surveillance activities conducted by the National Security Agency; and protecting against the disclosure of national security or classified information in the context of civil litigation.

Second is defending immigration actions. The Division defends and prosecutes civil immigration matters in Federal court including actions challenging an order of removal. The Division also defends numerous cases brought by known or suspected terrorists and convicted criminals attempting to acquire immigration benefits or avoid removal. The Division also works to prevent known or specific terrorists from becoming naturalized citizens or to revoke such naturalizations. And, third, let me highlight our work in the area of fraud and consumer safety. The Division takes legal action against conduct that threatens the health or safety of American consumers, such as misbranding or adulteration of drugs and against conduct that seeks to defraud consumers or wrongly deplete the Federal fisc. We vigorously pursue false claims that target Federal healthcare programs. The pharmaceutical industry continues to account for part of the Division's health care fraud recoveries. In addition, the Division has put a special focus on elder fraud issues and has addressed both consumer fraud schemes targeting the elderly as well as fraud targeting medical services for the elderly.

In each of the last 7 fiscal years, the government's health care fraud recoveries have equaled or exceeded \$2 billion. The Division's efforts to include targeting fraud that contributed to the 2008 financial crisis. In the last year, the Division has recovered nearly \$1.7 billion in losses from financial institutions that arose out of failed mortgages. The President's fiscal year 2018 budget request seeks 1,140 positions and \$291,758,000. While consistent with prior budget request in many respects, the proposed budget includes a request for an increase in funding for immigration litigation. These resources are necessary to maintain the superior legal representation services provided by the Division. We hope the House and Senate will fully fund the request.

In closing, let me see it is an honor to work in the Civil Division and to participate in important and challenging work my talented colleagues perform on a daily basis. Mr. Chairman, I look forward to addressing any questions you or any members of the Subcommittee may have. Thank you.

[Mr. Readler's written statement is available at the Committee or on the Committee Repository at: <http://docs.house.gov/meetings/JU/JU05/20170608/106076/HHRG-115-JU05-Wstate-ReadlerC-20170608.pdf>]

Mr. FARENTHOLD. Thank you very much and well within the time, then. Mr. Wood, you are recognized for 5 minutes.

STATEMENT OF JEFFREY WOOD

Mr. WOOD. Thank you, Representative Farenthold; Mr. Chairman, thank you. Ranking Member Cicilline and other Members of this Subcommittee, thank you for the opportunity to discuss the

vital work of the Environment and Natural Resources Division, or ENRD.

I currently serve as the acting assistant attorney general for ENRD where I have the privilege of leading the Nation's premiere team of environmental lawyers, paralegals, and staff. I am also proud to be part of the Department-wide team led by Attorney General Jeff Sessions, for whom I worked when he was a Senior Member of the Senate and Environment Public Works Committee. On Tuesday, the President announced his intent to nominate Jeff Clark to be our next Senate-confirmed AAG. We look forward to welcoming Mr. Clark back to ENRD, where he served from 2001 to 2005 as a deputy assistant attorney general.

Over more than a century, ENRD has protected the country's air, land, and water; safeguarded the rights and resources of Indian tribes; and promoted responsible stewardship of America's wildlife, natural resources, and public lands. As detailed in my written statement, the Division's record of legal excellence continues to the present day. Looking forward, I believe ENRD is key to the successful implementation of President Trump's new directions for our Nation, including his call for an America First Energy Policy: a major reduction in regulatory burdens, particularly for agriculture and manufacturing, and rebuilding our Nation's infrastructure, while at the same time protecting the environment.

To guide our work, I have emphasized four primary goals for ENRD at this time. First, we will pursue our core mission of protecting clean air, clean water, and clean land for all Americans through the vigorous enforcement of statutes and regulations and the defense of the lawful actions of our client agencies. Fundamentally, this is about respect for the Constitution and laws passed by Congress. As this Subcommittee is aware, ENRD is representing the United States in many cases involving agency actions now under review or reconsideration by the new administration. Agencies have inherent authority to review past decisions and to revise, replace, or repeal a decision to the extent permitted by law and supported by a reasoned explanation. As Justice Rehnquist once wrote, "[a] change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations." In these kinds of cases, our aim is to avoid unnecessary litigation, support the integrity of the administrative process, and conserve the resources of the courts, the agencies, and other litigants.

Second, a key goal is to effectively support and defend the infrastructure decisions of our client agencies. For example, ENRD is vigorously defending vital infrastructure projects today including the Dakota Access and Keystone XL Pipelines as well as many highway, port, and other projects of importance to communities around the Nation. Third, we will work cooperatively with the States and Indian tribes to achieve shared environmental goals. Many of the laws entrusted to us give a primary role to the States and tribes, and we aim to keep that important principle at the forefront of our minds as we fulfill our mission. In this regard, I have greatly appreciated the positive outreach from a wide range of stakeholders, especially our State partners, during the first 4

months of my tenure at ENRD. State Attorney General Offices and State environmental officials have reached out or visited to share their perspectives about a broad range of issues.

The Environmental Council of the States, the Association of Air Pollution Control Agencies, and other State groups have afforded me an opportunity to visit with their members to hear about their concerns and priorities. On many occasions, when discussing a matter that is taking place in a State, I have asked our attorneys a straightforward question: what does the State have to say about it? Fourth, we will accomplish our work as efficiently and effectively as possible, keeping in mind that every tax dollar we are given must be put to good and appropriate use for the American people.

For fiscal year 2018, our Division has requested appropriations of approximately \$115.6 million. Within that funding level, we also seek one proposed budget enhancement of approximately \$1.8 million for additional attorneys and staff to support land acquisition and related efforts to secure the southern border of the United States. In closing, let me say again that I am proud of our team at ENRD. In just the last few months alone, the Division has obtained a record breaking monetary penalty in a criminal vessel pollution case, prosecuted multiple cases involving renewable fuels fraud, brought significant new actions involving violations of the Clean Air Act, and successfully intervened to stop illegal wildlife trafficking. These are just a few examples of the important work that ENRD lawyers, paralegals, and staff do every day on behalf of the American people. I appreciate the opportunity to participate in this hearing and would be happy to address your questions. Thank you.

[Mr. Wood's written statement is available at the Committee or on the Committee Repository at: <http://docs.house.gov/meetings/JU/JU05/20170608/106076/HHRG-115-JU05-Wstate-WoodJ-20170608.pdf>]

Mr. FARENTHOLD. Thank you very much. Mr. Hubbert, you are recognized for 5 minutes.

STATEMENT OF DAVID HUBBERT

Mr. HUBBERT. Thank you, Chairman Farenthold, Ranking Member Johnson, and members of the Committee. Thank you for this opportunity to appear before you today to discuss the Tax Division's important work.

The Tax Division's mission is to enforce the Internal Revenue's laws fully and fairly and consistently in Federal and State courts throughout the country. We do so through two types of litigation: civil investigations and cases and criminal investigations and prosecutions. In this litigation, we aim to promote voluntary compliance with the Nation's tax laws by deterring those who would avoid paying what they owe and promoting the sound development of law by carefully considering the legitimate issues raised in our cases. In each and every civil case, the Tax Division's attorneys strive to collect the proper amount due in owing, no more and no less. In each and every criminal case, Tax Division's attorneys authorize and prosecute cases after determining there is a reasonable culpability of conviction.

In recent years, the Division typically has 6,000 civil cases in various stages, handles hundreds of civil and criminal appeals, and authorizes between 1,300 and 1,600 criminal tax investigations and prosecutions, which are then handled by the Division's prosecutors, prosecutors in the United States Attorney Offices, or some combination of the two. The Tax Division has currently approximately 350 attorneys and 145 administrative professionals handling all of this work. I am honored to be able to represent them here today; they serve the American people with great skill and dedication.

Among the Division's top priorities is civil and criminal employment tax enforcement. Employers have a legal responsibility to collect, account for, and pay over what they withhold from their employee's wages. Amounts withheld from their employee's wages represent nearly 70 percent of all revenue collected by the Internal Revenue Service. Unfortunately, billions of dollars of employment taxes go unpaid when employers fail to comply with their obligations; they are stealing not only from their employees, but also the U.S. Treasury, as well as gaining an unfair advantage over their honest competitors. Since 2014, the Tax Division has obtained more than 70 permanent injunctions against delinquent employers and pursued criminal investigations and prosecutions against those who willfully fail to comply with their obligations. These cases send a clear message that the conduct will not be tolerated. The Department remains committed to addressing this serious issue and leveling the playing field for all employers.

Addressing offshore tax evasion remains a top priority in the Tax Division and the Department. Since 2008, the Department has criminally charged more than 130 U.S. taxpayers who used foreign, financial accounts to evade their tax and reporting obligations, and more than 40 individuals who facilitated that criminal conduct. In August 2013, the Department announced the Swiss Bank Program, which provided a path for Swiss banks to resolve their potential criminal liabilities in the United States. By January 2016, the Department had executed 78 agreements with 80 Swiss banks and financial institutions collecting more than \$1.3 billion in penalties. The information we received from that program provides substantial insight into the methods used to facilitate offshore tax evasion. Along with the IRS, we are reviewing the information to pursue ongoing and new criminal tax investigations and to support civil tax enforcement efforts. According to the Internal Revenue Service, it has received more than 55,000 voluntary offshore disclosures and collected more than \$10 billion in taxes, interest, and penalty.

Another significant area of concern is identity theft and stolen identity refund fraud, commonly referred to as SIRF, which involves stealing personal identifying information and filing fictitious tax returns to claim refunds. Through March 2017, the Department authorized more than 1,400 SIRF investigations involving more than 2,400 subjects and authorized more than 1,100 prosecutions of more than 2,200 individuals. While the ultimate goal is to stop fraudulent refunds at the door, and that ability is improving, the Department will continue to work with its law enforcement partners to prosecute these cases and hold those who engage in this conduct accountable. I have only touched on a few of the many issues being litigated by the Tax Division. Through our criminal

and civil litigation, we send a clear message: when individuals or entities engage in this conduct to avoid or evade their legal, tax obligations, the Tax Division will use all available tools to firmly but fairly hold them accountable.

In conclusion, I am honored to represent the bright, honest, and truly dedicated public servants working at the Tax Division, and I am happy to answer any questions you may have.

[Mr. Hubbert's written statement is available at the Committee or on the Committee Repository at: <http://docs.house.gov/meetings/JU/JU05/20170608/106076/HHRG-115-JU05-Wstate-HubbertD-20170608.pdf>]

Mr. FARENTHOLD. Thank you very much. We appreciate your testimony. I know your job is very taxing.

Mr. White, you are recognized for 5 minutes. Could you turn your microphone on and get real close to it? We bought the budget mics, so you need to be real close so we can hear you.

STATEMENT OF CLIFFORD WHITE

Mr. WHITE. Thank you for the reminder. Good afternoon, Mr. Chairman, Ranking Member, and members of the Subcommittee. I am grateful for the opportunity, once again, to report to you on the activities of the U.S. Trustee Program and to discuss our success in achieving our mission to promote the integrity and the efficiency of the bankruptcy system for the benefit of all stakeholders, debtors, creditors, and the public.

As recited in greater detail in my written testimony, we perform a wide array of administrative, regulatory, and enforcement activities that are essential to the proper functioning of the bankruptcy system. Basic case administration depends upon our appointing and overseeing 1,400 private trustees who administer more than \$10 billion in assets annually; i.e. protecting the rights of all stakeholders relies in significant measure on the neutral United States Trustee enforcing the law as the law was written by the Congress; and ferreting out fraudulent abuse depends upon the Program serving as the vigilant watchdog of the bankruptcy system. Since our last oversight hearing, the USTP has continued on a steady path of vigorous and balanced enforcement of the Bankruptcy Code. Each year we take more than 30,000 formal and informal civil enforcement actions and make about 2,000 criminal referrals to our law enforcement partners.

A majority of these actions curb debtor abuse, but a cornerstone of our efforts also has been consumer protection. For example, we remain vigilant in policing mortgage servicer and other creditor misconduct. Earlier this year, we filed two additional settlements with Chase Bank to resolve violations involving improper billing and noticing of 16,000 accounts in bankruptcy. As remediation, Chase is providing about \$2.8 million in payments, refunds, and credits to affected homeowners. Several months ago, we also launched an initiative to address professional misconduct by consumer debtor lawyers including those who work across district lines and advertise on the Internet. Two national bankruptcy firms ceased operations as a result of enforcement efforts, and we are litigating and investigating other cases.

In business bankruptcies, we frequently are the only party to uphold statutory mandates to restrain management professionals and other parties. In the Jevic Holding Corporation case, for example, we litigated on the side of truck drivers who were laid off the day before the company filed bankruptcy. Over our objection, the debtor obtained bankruptcy court approval to pay unsecured creditors but not the truck drivers whose claims were entitled a higher priority under the statute. Although we lost in the lower courts, our position prevailed in the Supreme Court.

Among our new chapter 11 initiatives, we are reaching out to stakeholders in anticipation of developing guidelines governing our review of fees charged to the bankruptcy estate by financial professionals including investment bankers. In recent years, the fees of these professionals have grown and even exceeded attorneys' fees in some cases.

Similarly, we are revising extant guidelines governing our review of conflicts in the employment of chief restructuring officers. Over the past decade, CROs have been hired more frequently, and the scope of their employment sometimes provides issues of corporate governance and conflicts of interest. Both of these guidelines will bring greater transparency and greater predictability in the bankruptcy system. In early May, as was mentioned by Mr. Farenthold, the Commonwealth of Puerto Rico filed for debt adjustment under Title III of PROMESA. As in municipal bankruptcies, the courts and the USTP play a more limited role than under corporate reorganization cases. Under PROMESA, we have two major duties: one, to appoint one or more creditor's committees that represent the interests of unsecured creditors including retirees, and, two, to review and object to professional fees. We are taking steps to perform both of these tasks.

To achieve our mission, we are requesting an appropriation for fiscal year 2018 of \$225.5 million. This is essentially the same amount appropriated in each of the past 3 years. Over 10 years, our budget has increased by less than 2 percent, and our staffing level has decreased by 14 percent. We are grateful to this Committee for favorably acting on our proposal to increase quarterly fees paid into the U.S. Trustee System Fund. If enacted, it will ensure that appropriations made to the Program will be fully offset by revenues.

We have achieved our mission in a period of scarce resources by adopting innovative work processes, allocating field staff to perform region-wide and nationwide tasks, and taking other prudent cost cutting steps. But more than that, the primary reason we have succeeded is the extraordinary dedication of my colleagues in the U.S. Trustee Program. They deserve respect and appreciation for their talent, for their service to the public, and for their noteworthy accomplishments. I would be happy to respond to any questions.

[Mr. White's written statement is available at the Committee or on the Committee Repository at: <http://docs.house.gov/meetings/JU/JU05/20170608/106076/HHRG-115-JU05-Wstate-WhiteC-20170608.pdf>]

Mr. FARENTHOLD. Thank you very much, Mr. White. As is typical when I Chair a committee, since I am here the whole time, I reserve my questions for last out of respect for other members' time

and it gives me an opportunity to back clean up so to speak. So, with that, we will recognize the gentleman from Florida for his line of questioning first.

Mr. GAETZ. Thank you, Mr. Chairman. Mr. Wood, good to be here with a fellow Seminole. I wanted to ask some questions about the mechanism by which the Department of Justice enforces environmental laws. When the Department of Justice is bringing an action under the Clean Air Act, does it require any sort of pre-clearance or permission from the EPA?

Mr. WOOD. First, thank you. Go 'Noles. We are honored to be able to work in the defense of the Nation's Clean Air laws, and we work closely with EPA. Civil matters are not brought as a first matter by the Department of Justice. They are first referred to us from EPA, and we continue to work in consultation with them including in our Clean Air Act Cases.

Mr. GAETZ. I also want to ask a question regarding your testimony on border security. You have indicated that land acquisition will be an essential component of building a wall on the southern border with Mexico. What would be the time frame for that acquisition?

Mr. WOOD. Thank you very much. So, there are approximately 2,000 miles, as you know, along the southern border. 5 border Districts. We work closely with the U.S. Attorney's Offices in those districts. We have no specific time frame at this point and I would refer you to CBP on specific details related to the border construction. Our responsibility is to make sure that, to the extent that land acquisition is required, that it is done in compliance with the 5th Amendment, which we take very seriously.

Mr. GAETZ. I also wanted to ask a question. I believe it is, I guess, a tax question. I am sorry, a trust question. It was mentioned in testimony that there is misuse of trust laws as it relates to marijuana businesses and their access to bankruptcy laws. If marijuana was no longer a Schedule 1 drug, but was instead a Schedule 3 drug, would those challenges continue to persist?

Mr. WHITE. Excuse me again for not pressing the microphone. I would have to consider that issue further, but as long as something is an illegal asset under Federal law, and if it cannot be sold under Federal law, then we would take steps to ensure it cannot be administered under the Federal bankruptcy law.

We recently issued a directive which really restated longstanding policy that we have had in the program to move to dismiss or take other enforcement actions, which among other things, protects trustees who otherwise are not allowed to sell a marijuana asset. They cannot break Federal law in order to sell an asset to distribute to creditors in bankruptcy, and we also wanted to ensure that we are being made aware of all of the marijuana asset cases that have been filed so that we can intervene and take the appropriate action and be consistent in our enforcement. With regard to which schedule it is on, I would have to go back, and I would have to do some more research with that, but the basic point is, if it is illegal under Federal law to sell an asset, to sell a controlled substance, which you cannot do, or to possess a controlled substance, then we would take action to ensure that the Federal Bankruptcy Code does not provide an avenue to evade those Federal laws.

Mr. GAETZ. Do we know how much in taxes is paid from marijuana companies in cash?

Mr. WHITE. I do not know.

Mr. GAETZ. If we were able to have Federal law consistent with State law that allows marijuana transactions to occur, what would we anticipate would be the impact on creditors in circumstances where there is a failed marijuana business and their outstanding obligations?

Mr. WHITE. I do not know, dollar wise, what the size of the marijuana operations are that have come into bankruptcy, and so forth. But our job as watchdog of the bankruptcy system is to ensure that the laws as passed by Congress are upheld, and that is why we have taken the position through two administrations with regard to marijuana assets. They will not be administered through the bankruptcy system; trustees will not sell those assets. And yes, in some cases, that means that assets that otherwise would be liquidated by a trustee will not be distributed to creditors, but if the case is dismissed, it simply puts the parties in the same position they would be under State law had there never been a bankruptcy.

Mr. GAETZ. Thank you for your indulgence, Mr. Chairman. I will yield back.

Mr. FARENTHOLD. Thank you very much, and we will now recognize the Ranking Member of the full Committee, Mr. Conyers, the best dressed man on this panel today.

Mr. CONYERS. Thank you so much for the compliment. Ladies and gentlemen, this is an important hearing, and I would like to begin by asking whoever talked about the Flint water crisis, or wants to talk about it, or deal with the situation. Americans deserve access to safe drinking water. What is the Environment and Natural Resources Division doing to ensure that the Flint Water Crisis is not repeated in other communities?

Mr. WOOD. Thank you for the question. It is a very important issue.

Mr. CONYERS. It is.

Mr. WOOD. I recognize that in recent months the administration released \$100 million to address issues in Flint, Michigan. I know that there are important resources that will go to help. It is a bigger, national issue. Our mission at the ENRD is to ensure that all Americans have safe, clean drinking water and clean air, so we enforce the laws to ensure that that is provided for. One of our recent cases may be of interest on this point: we worked with the State of Mississippi, MDEQ, to prosecute an individual who had intentionally contaminated local drinking water. And so, we take this issue seriously nationwide, and we would be glad to talk to you or your staff about more details about our specific work in many other areas.

Mr. CONYERS. Do any of the other witnesses have any thoughts about what went on in Flint and would like to add to this part of our discussion? Okay.

Let's look at the issue of identity theft. And whoever is prepared for some discussion about this, please join in. Criminals have electronically filed tax returns using the stolen identities and personal data of innocent taxpayers to file returns and obtain refunds fraud-

ulently. How substantial or widespread is this problem? What efforts has the Division made to address this issue?

Mr. HUBBERT. Thank you for raising this issue. It is an important one. I think the Department has said from the outset of this problem that we were never going to prosecute our way out of it, and, really, the best way to address it is to have the fictitious refunds and the false returns stop at the door. And I think the Internal Revenue Service has reported that their efforts in that area have improved. I think the commissioner has stated that from 2016, there was a 46 percent decline in new victims from 2015, so there is some progress being made with the filters in stopping the refunds.

With respect to what the Tax Division is doing, often these are more like street crimes than they are financial crimes, and so we have pushed out the authority to handle these cases to the U.S. Attorney's Office to the greatest extent we can. We have a cadre within the Tax Division that focus on these cases, so that when there is an unusual case or a matter that is unusually complex, we can provide resources to the U.S. Attorney's Office. Where there is a spike in a particular scam in an area, we have attorneys that we can send out there to help in the area, in that particular district, so we have tried to do what we can to make these cases move as efficiently as we can and as effectively. The sentences that the Department has been obtaining are significant, and we hope that those who would think about those crimes are being deterred from continuing.

Mr. CONYERS. Thanks you, Mr. Hubbard. Let me turn now from my last question to Mr. Clifford White III, the Director of the Trustee Program. With respect to the \$60 fee that a Chapter 7 trustee receives from administering a no asset case you note that the United States Trustee Program supports increasing this fee. Now, it is known that the Chapter 7 trustee administers a bankruptcy case primarily for the benefit of the creditors with respect to investigating any fraud and the availability of any assets. Accordingly, should the creditors pay for this fee and this fee increase for Chapter 7 trustees? Director White?

Mr. WHITE. Well, Mr. Conyers, our position on that has been, as a general proposition, that the no asset fee, which is what the \$60 is—it is provided in every case, as you said—has not been increased for more than 20 years, and as a general proposition, ought to be increased. How that can be done in a way that is fair to all stakeholders has been a debate that has been had in Congress for some period of time, so we are not endorsing any particular proposal.

I just make one additional point, however, Mr. Conyers, and that is that with regard to most of the trustees—when you say most of the trustee's work is liquidating assets and so forth—in fact, they are dealing with thousands and thousands of cases—95 percent of all of the cases that they are assigned, in fact, have no assets. There will be no distribution, but it takes some fair degree of review of the papers filed in the case before they can come to that conclusion. So, for so many of these cases that are no assets and that no money goes to creditors at all, that is primarily where the

rub comes with regard to the economics of not having changed that \$60 fee for more than 20 years.

Mr. CONYERS. Thank you very much. My time has expired, and I may send questions to some of you to be added to our record today, and I yield back and thank the Chairman.

Mr. FARENTHOLD. Thank you very much, Mr. Ranking Member. Since I am the one left on our side, I will go ahead and do a few questions myself. I will start with Director White. There has been substantial press coverage about fraud and asbestos litigation and fraudulent claims made against the Asbestos Bankruptcy Trust. One bankruptcy judge cited a "startling pattern of misrepresentation," and that is a quote by trial attorneys seeking payment from these trust sand from companies in bankruptcy. A former trial lawyer turned whistle-blower even stated that asbestos trusts are platforms for institutionalized fraud.

Does the DOJ agree there is enough controversy related to fraud against bankruptcy trust to warrant a review by the DOJ?

Mr. WHITE. I cannot speak for all of the Justice Department, Mr. Farenthold, so let me just speak for the U.S. Trustee Program. It is a fact that there is a lack of transparency in corporate governance in post-confirmation trusts in general, and I have testified on that in the past as well. It was recognized, in fact, by a panel of bankruptcy experts assembled by the American Bankruptcy Institute as a commission to study the reform of Chapter 11. As a watchdog of the system, when you look at post-confirmation trusts, and asbestos trusts in particular, it is very clear there is no independent policeman. There is no watchdog for that; neither the court nor the U.S. Trustee Program have significant jurisdiction post-confirmation, so when you do not have an independent review of any kind of an entity in bankruptcy, including the asbestos trust, then you run certain risks for abuse.

Mr. FARENTHOLD. I appreciate it. I have got a lot of questions. I do not mean to cut you short, because this is a topic of interest to me, but I do have several questions for Mr. Wood on the Sue and Settle Program.

As you know, under a process called sue and settle, agencies like the EPA and Department of Interior enter into court appointed agreements with outside environmental groups. These agreements mandate agency actions, reorganize agency priorities and funding, and bypass the laws that allow a public to provide a meaningful impact. What do you think the implications of sue and settle agreements given that agencies often end up diverting their focus from congressional priorities are?

Mr. WOOD. Thank you. That is a very important question and important issue. First, let me say our focus in our Division is on defending the lawful regulations and actions of our client agencies. Under my watch, there will be no collusion involving any sue and settle actions whatsoever. And with respect to the longstanding policy of the Department of Justice, we will abide by Attorney General Meese's memorandum. In fact, whenever settlement agreements are presented to my desk, we will look closely at that to make sure it abides by those requirements.

Mr. FARENTHOLD. Now, the other issue with sue and settle agreements is that following an agreement, the taxpayers' hard-earned

dollars usually goes to paying for the environmental groups' attorney fees. These expenses can hurtle into hundreds of thousands of dollars per settlement. Do you think we will be seeing fewer sue and settle cases if the environmental groups filing them could not recover attorney fees from the government?

Mr. WOOD. Well, I cannot comment on any specific legislative proposal, but I can say that it is important to make sure that any payment in any case is based soundly in law. The statutes provide that attorney's fees are not necessarily owed in every case, and in fact, attorney's fees are not owed if the position of the agency is substantially justified under the statute. However, that may not have been enforced as closely as we might have hoped it would have been in the past. But, certainly, looking at that issue is an important priority, I think, for Congress.

Mr. FARENTHOLD. On May 25, 2017, Chairman Goodlatte wrote a letter to the Attorney General alerting him to the potential opportunity for the DOJ to recover \$380 million in taxpayer dollars that the Obama administration improperly handed to their political allies. This is real money, but the necessary motions would have to be filed quickly. Does anybody on the panel know if a decision has been made on this issue yet?

Mr. READLER. Thank you, Mr. Chairman. I can address that question. First off, we appreciate Chairman Goodlatte's letter, and Chairman Goodlatte, I think, referenced in his opening remarks, there was a policy issued yesterday by the Attorney General that addresses the topic of payments to third parties, and it is a very important policy that the Department will adhere to. It emphasizes that victims in any given case will be compensated according with court order or settlement. But, otherwise, any additional dollars will be returned to the public fisc and not paid out to third parties. Now with respect to the Keepseagle case specifically, pursuant to longstanding Department practice, we do not comment on pending cases, but we are certainly aware of the request from the Chairman, and we are reviewing the issue.

Mr. FARENTHOLD. One final question on environment, the Environment Division is defending a Federal land grab relating to the Red River. The Bureau of Land Management has deemed that the Red Riverbed extends more than a mile into dry land in direct contradiction to the Supreme Court's ruling that said the boundaries follow the course of the stream. Are you all evaluating whether this legal action serves the public interest of justice, and if the Bureau of Land Management wishes to compensate Native American tribes with land, would it not be better to take the case to Congress rather than private citizens, Mr. Wood?

Mr. WOOD. Congressman, thank you for that question. I am familiar with the case, the Aderholt v. BLM case. I cannot speak to specifics about ongoing litigation that our Division is handling, but I can assure you that we are taking a close look at the matter.

Mr. FARENTHOLD. I see that my time has expired. Now I recognized the gentleman from Georgia, Mr. Johnson.

Mr. JOHNSON of Georgia. Thank you, Mr. Chairman. Mr. Readler, the Trump administration has reportedly issued an order instructing agencies to refuse to respond to Democratic Congressional inquiries or information requests. Is that correct?

Mr. READLER. Well, thank you for the question. I think that the terms of any order would speak for itself in terms of what the President has issued. Our policy, at the Department, is certainly, with respect to letters, that are issued from Congress—and I see those pretty regularly—that we do attempt to respond to all letters issued by Congress. Otherwise, with respect to oversight responsibilities, we certainly comply with requests from the chairman, and then take other matters under advisement.

Mr. JOHNSON of Georgia. So you are saying that the Civil Division of the Justice Department will be responding to Democratic ranking members' of Committees, Subcommittees, requests for information including documents?

Mr. READLER. Well, no. Those are issues that we take under advisement at the Department—

Mr. JOHNSON of Georgia. Those would be covered under the order issued by the Trump administration not to respond.

Mr. READLER. Well, the Department of Justice, of course, sets the legal position of the United States, and we will take all of those requests under advisement, and we will consider those against the backdrop of governmental law and the principles articulated by the administration.

Mr. JOHNSON of Georgia. Will you respond to questions for the record from Democratic members of this Subcommittee as part of the record for this hearing?

Mr. READLER. I am not sure I understand the question. Yes, I am certainly here to address the questions I can address. But, I obviously cannot comment on pending cases or pending requests.

Mr. JOHNSON of Georgia. Earlier today, former FBI Director, James Comey, testified before the Senate Intelligence Committee that President Trump demanded his loyalty, telling him, "I need loyalty. I expect loyalty." Have you pledged your loyalty to President Trump through communications or otherwise?

Mr. READLER. Like the other members of the Department, we have all sworn allegiance to the Constitution to uphold the Constitution, and that is our guiding principle in terms of cases in addition to interpreting and applying the law and the facts as they take us in any specific case.

Mr. JOHNSON of Georgia. So you have not been asked to swear your allegiance to President Trump?

Mr. READLER. Again, I am not—no. The answer is we uphold the Constitution.

Mr. JOHNSON of Georgia. Well, thank you. The Civil Division is responsible for all civil, immigration litigation including the Muslim Travel Ban. Is that correct?

Mr. READLER. The Civil Division was chiefly responsible for defending the challenges to the executive orders given by the President including the executive orders that address travel issues. And I would really like to commend my colleagues, especially the career colleagues, at the Department of Justice who worked extremely hard in defending these cases under challenging circumstances, given the pace of those cases and the number of cases that have been filed. Those specific cases, of course, now are all pending litigation; there are two matters before the Supreme Court, and I, of course, cannot comment on any specific pending case.

Mr. JOHNSON of Georgia. Well, gosh, I was going to find out whether or not you agreed that the orders that were issued by the President are indeed travel bans.

Mr. READLER. Well, the——

Mr. JOHNSON of Georgia. Is that true?

Mr. READLER. The Department has taken a very consistent position are lawful exercises to the President's executive and constitutional powers.

Mr. JOHNSON of Georgia. You do not want to go near the travel ban language?

Mr. READLER. Well, the executive order, I think, speaks for itself.

Mr. JOHNSON of Georgia. Has the President's manifestations on Twitter about the orders being Muslim or actually travel bans, has that hurt the Department's ability to prosecute its appeal?

Mr. READLER. Well, again, I cannot comment on pending cases. We have two cases pending in the Supreme Court where we have vigorously defended the executive orders as lawful exercises of the President's constitutional and statutory authority, including authority granted the President by this body and a host of immigration laws.

Mr. JOHNSON of Georgia. Thank you, Mr. Wood. President Trump recently announced that the United States will withdraw from the Paris Agreement, stating that the United States would be exposed to "massive legal liability if we stay in." Leading environmental law experts strongly disagree with this statement, however. UCLA law professor James Salzman notes that President Trump's statement is "not true" because there is "no liability mechanism under the Paris Agreement." While Columbia law professor, Michael Berger, adds that the United States may be more exposed to lawsuits as a result to withdrawing from the Paris Agreement. Do you, Mr. Wood, agree with President Trump?

Mr. WOOD. Thank you, Congressman. We have a very significant role in the Division in defending the administration's actions including its actions pursuant to its America First Energy Policy, and we are actually engaged in those cases. Any questions with respect to the International Paris Accord, I would refer you to the State Department who is primarily responsible for those issues, but thank you for the question.

Mr. JOHNSON of Georgia. Well, let me ask you this. Are you concerned that withdrawing from the agreement may result in increased liability for inaction as President Trump has warned?

Mr. WOOD. Well, thank you for the question. I think the President's statement stands for itself, and we will continue to vigorously defend all actions of the client agencies who were honored to serve to the extent those come up in court. Thank you.

Mr. JOHNSON of Georgia. President Trump has referred to the international scientific consensus that climate change is real and caused by human activity as an "expensive hoax" that was created by and for the Chinese, in order to make U.S. manufacturing non-competitive. Is that a statement that you agree with?

Mr. WOOD. Well, I would refer you to the EPA, for the administration's current position on climate change. Our responsibility at the Environment Division is to defend the lawful actions of our client agencies. That includes those actions in the regulatory context

under the Clean Air Act, as well as the enforcement of the Clean Air laws, which we continue to vigorously do.

Mr. JOHNSON of Georgia. Well, I take it you are not going to share your personal views on these issues.

Mr. WOOD. Thank you, sir. My personal views are not really relevant to my responsibility to enforce the law.

Mr. JOHNSON of Georgia. Well, you are saying you are going to determine that my questions are not relevant, and so therefore, not answer them. Is that something that the administration has instructed you all to do?

Mr. FARENTHOLD. The gentleman's time has expired. We will let Mr. Wood answer the question, and then we will move on.

Mr. WOOD. Thank you, Congressman. I respect you and your question. I think it is an important issue. I do not diminish the issue whatsoever. I just would simply say, with respect to the administration's position, that is put forth by EPA and others. My responsibility as the head of the Environment Division at DOJ is to enforce the laws including the Clean Air Act and to defend the lawful actions of our client agencies. But I do respect you and the position that others have on that issue. Thank you.

Mr. JOHNSON of Georgia. Thank you, sir.

Mr. FARENTHOLD. Thank you, Mr. Johnson. We will now recognize the second best dressed man on the panel today, the gentleman from Texas, Mr. Ratcliffe.

Mr. RATCLIFFE. Thank you, Mr. Chairman. I thank the witnesses for being here today. I think these are really important issues that we are talking about, because I and the vast majority of the constituents that I represent are of the opinion that there have been a number of instances over the last 8 years where the prior administration, the Obama administration, appeared to put politics above the rule of law. There were a variety of cases where we saw the Obama administration appear, in fact, to expressively subvert the will and the intent of Congress and the American people.

One of those instances that comes to mind was Operation Choke Point where we saw that administration target banks that did business with certain disfavored retailers like pay day lenders and payment processors and disfavored industries like gun sellers and coal producers. More broadly, we also saw the targeting of conservative groups by the IRS merely because of their political beliefs. Now, those are just a few instances, but I will tell you that I am optimistic going forward that we have an opportunity to turn the page and restore accountability and put the rule of law back above politics. I say that because we saw an example of it just this week when the Trump administration announced its decision to halt these settlement slush funds that is to prohibit the practice of the Obama administration Department of Justice of systematically subverting Congress's spending power by requiring settling parties to donate money to various activist groups.

Mr. Wood, I want to start with you because you stated in your written testimony we all know that ENRD plays an important role in enforcing our Nation's environmental laws, the Clean Water Act, the Clean Air Act. Knowing that these laws and corresponding regulations could hurt jobs, for instance, in mining and manufacturing, Congress specifically included in Section 321A of the Clean

Air Act a requirement that the EPA conduct continuing evaluations of potential loss or shifts of employment that could result. I am sure that you are aware, and maybe some of my colleagues have already covered this, but there are cases pending in the Fourth Circuit where the Murray Energy Corporation sued the EPA under the Obama administration, asserting that the EPA's refusal to complete that job impact analysis irreparably harmed Murray Energy. The lower court agreed with Murray, noting that it would be an abuse of discretion for the EPA to refuse to conduct that evaluation for the impact that it might have on regulations for the coal industry.

In recent arguments before the Fourth Circuit, I understand that the Department of Justice focused largely on procedural issues arguing that Murray lacks standing in urging that the case be dismissed, but the DOJ also recently filed a compliance plan with the District court, which indicated how the EPA would comply with the law. And I will tell you I was heartened when I saw the compliance plan, because at least in that sense it represented an effort on the part of this administration that was not evident under the prior administration, particularly because this effort, to me, seems consistent with the statements made by Administrator Pruitt and Attorney General Sessions on this issue as well.

So, my question to you is this: if the Fourth Circuit agrees with the Department of Justice argument that Murray does not have standing, is the administration still committed to conducting the job's impact analysis requirement under the Clean Air Act?

Mr. WOOD. Thank you, Congressman. I am aware of the letter. I appreciate receiving the letter. As has been mentioned a few times on this panel today, we cannot speak to specific issues in pending litigation. I am aware of the filing that you mentioned, which was required under the District court's order, and I would refer any questions specifically related to EPA's plans to the EPA. I am proud of the work our lawyers are doing in all of our full range of cases. We take a close look at the law and the facts to make sure every position we are taking is well-grounded, and we will continue to do that. And I will commit to keep the Committee informed as to any developments that we can share with you about that case.

Mr. RATCLIFFE. Well, I appreciate the comments regarding pending litigation, but quite frankly, we would rather this not be pending litigation, because we would hope that you will be willing to comply with the job impact analysis required by law, but let me move on then. 321A of the Clean Air Act uses the term "shall," yet this language is being interpreted as a "discretionary duty." Can you answer for me whether there is additional language that, as a member of Congress, we could include to clarify that this job loss analysis is required and is not a discretionary duty?

Mr. WOOD. Thank you, Congressman, for that comment. I cannot comment on specifics related to the pending case, as we have said, but I welcome that input, and we will be sure to keep this Committee informed on the case as it progresses.

Mr. RATCLIFFE. Then I will yield back, Mr. Chairman.

Mr. FARENTHOLD. Thank you, Mr. Ratcliffe. We will now recognize the gentleman from Illinois for 5 minutes.

Mr. SCHNEIDER. Thank you, Mr. Chairman, and thank you to all of you for being here today, and more importantly, thanks for the work you, and I am going to extend it to the many people working in your Department's do, for our Nation every day.

Mr. Wood, I would like to start with you. The materials that you submitted to the Subcommittee for this afternoon's hearing state that the mission includes "promoting national security in military preparedness." In 2015, the Department of Defense released a report on the national security implications of climate change, finding that climate change will aggravate problems, such as poverty, social tension, environmental degradation, ineffectual leadership, and a weak political institution that threatens stability in a number of countries. During its confirmation hearing, Secretary of Defense, James Mattis, similarly observed that climate change is a challenge that requires a broader, whole of government response, and he went on to say that he would ensure that the Department of Defense plays its appropriate role within such a response by addressing national security aspects.

So, my questions for you are what is your take of the assessments of the Department of Defense under both now the Obama and Trump administrations that climate change is a national security threat, and how will that or should that affect the work that you are doing in your Department?

Mr. WOOD. Thank you, Congressman. As I mentioned earlier with respect to a similar question, our role at the Environment and Natural Resources Division is to defend the lawful actions of our client agencies and to enforce the laws, including the Clean Air Act, which we are continuing to do. With respect to any issues related to the administration's position on international issues or on climate change, I refer you to the State Department and to the EPA.

Mr. SCHNEIDER. But if I can, to the extent that the law and regulations are requiring actions of our government and pursuing, there is a difference perhaps of positions from the White House and the Department of Defense, how will that affect what you are trying to do?

Mr. WOOD. So our responsibility is to look at the law, look at the facts, look at the actions that our client agencies take in light of what the statutes that Congress has passed would require, and where the actions of the agencies are lawful and appropriate, to defend those vigorously in court, and that is what we are doing. I would note that the current administration, with the President's directive on an America First Energy Policy, is taking a fresh look, doing a review, or reconsideration in some cases, of previous regulations. Those kinds of reviews happen in the beginnings of virtually every administration. And the work of our lawyers right now includes assisting with those efforts to ensure that the agencies have the appropriate time to do a thoughtful review consistent with the Administrative Procedures Act and to ensure that they, to the extent that they make changes in positions, that those are vigorously defended in court, and we are honored to be able to work with our client agencies on those endeavors.

Mr. SCHNEIDER. Thank you, and I will just say to the extent that the laws were drafted with the intention of ensuring the sustain-

ability of our environment and to ensure national security, I look forward to you enforcing them or defending them as best as possible. Mr. Readler, if I can turn to you. You asked for a budgeting increase to add more lawyers. What would those lawyers be doing?

Mr. READLER. We have a request for 20 additional lawyers in our Office of Immigration litigation. That is the office that handles both district court and appellate court that help to enforce the immigration laws of the United States working with DHS and other Federal partners.

Mr. SCHNEIDER. Okay. Recent reports have talked about the administration unable to fill senior roles, and 93 U.S. attorney vacancies nationwide, are you having a challenge bringing on lawyers? Do you see it being difficult to bringing lawyers on, those additional lawyers you are talking about?

Mr. READLER. I am not sure which specific lawyers you are referring to. U.S. attorneys are not hired through the Civil Division, so that would not be something we have oversight over, but we have some new lawyers joining us in the next few weeks.

Mr. SCHNEIDER. And as far as recruiting, has it been a challenge finding lawyers willing to come to the administration in the current environment?

Mr. READLER. I am not aware of challenges that we have for recruiting. As the political leadership, we are not directly involved with recruiting. There are a lot of rules with respect to hiring that we are expected to adhere to, but my general sense is that when their openings, there are many lawyers who are interested in working at the Justice Department and, specifically, in the Civil Division.

Mr. SCHNEIDER. Great, and as my time is about to expire, I will yield back.

Mr. FARENTHOLD. Thank you very much, and if the Ranking Member will indulge me for two quick questions, I wanted to follow up. Mr. Readler, you said you requested additional funding for lawyers to handle immigration cases. I assume you need more judges because there is a backlog. Or, I am sorry, more lawyers because there is a backlog. Even with more lawyers, is there not backlog also for shortage of judges to adjudicate these issues?

Mr. READLER. Yes, well, with respect to the Civil Division specifically, our lawyers handle the immigration cases really at the end of that process when cases are appealed from the Order of Immigration appeals to the Federal courts of appeals. But on the front end of that process with the Executive Office of Immigration Review, my understanding is that there is some backlog there, and that there have been separate requests to add judges to expedite that process or move those cases ahead, which would then, on the backend, create additional work for the Civil Division to handle appeals.

Mr. FARENTHOLD. Is your shortage of lawyers creating delays in adjudicating these cases as well where you are having to ask for continuances and things because of lawyer workload?

Mr. READLER. I think currently we are doing a pretty good job of staying on top of those cases. We have about, on average, 7,000 appeals per year, but our capacity would increase, and we would

be able to handle additional cases obviously with additional funding.

Mr. FARENTHOLD. Thank you. I appreciate your indulgence. We will now recognize gentlelady from Washington for her line of questioning.

Ms. JAYAPAL. Thank you so much, Mr. Chairman. I am sorry I missed some of this hearing, but I did read the testimony, and I appreciate you all being here. I wanted to focus a little bit of attention on environmental regulation and specifically direct some questions to you, Mr. Wood. The Environment and Natural Resource Division is responsible for litigating environmental and natural resource cases on behalf of the United States including those that arise under the Clean Air Act, the Clean Water Act, and other environmental protective statutes, but I wanted to ask you, prior to your current position, you worked as a lobbyist for energy companies while also advising the Trump campaign. Is that correct?

Mr. WOOD. Thank you for your questions. I am very proud of the work that I have done as a private practice attorney, and I was, yes, a volunteer, as many lawyers do, for campaigns across the country. I exercised my First Amendment and constitutional right to volunteer for a campaign.

Ms. JAYAPAL. Absolutely. But you were a lobbyist for energy companies as well, is that correct?

Mr. WOOD. I was a registered lobbyist, yes. Thank you.

Ms. JAYAPAL. Thank you. And in that capacity, you represented Southern Company, a utility company that generates a third of its power from coal, is that correct?

Mr. WOOD. I am not sure of the specific reference that you make there to the statistic, but I did work on behalf of Southern Company and a variety of other clients.

Ms. JAYAPAL. And in 2016, you referred to the Clean Power Plan and other environmental protections as, these are your words, "contentious environmental rules that were the disappointment of many in the regulated community." Is that accurate?

Mr. WOOD. I am not sure where that quote comes from, but it sounds like something I may have said.

Ms. JAYAPAL. And do you believe that the purpose of environmental protections is to please regulated entities?

Mr. WOOD. No, and I do not think that is the context in how I would have meant that quote. And clearly, in the capacity as the Assistant Attorney General, my constitutional and statutory duty is to vigorously enforce the laws. And I think, as my written testimony and my statement here today shows, we are actively and vigorously doing that across a full spectrum of our statutes, including the Clean Air Act and Clean Water Act and every other environmental and natural resources law. We have over 6,000 cases, matters, and appeals that are being well-handled by our team of over 400 career attorneys, and it has been an honor to work with them on that.

Ms. JAYAPAL. That is good to hear, because it does concern some of us that the person that is the head of the EPA has actually sued the agency multiple times around these environmental regulations. So, should environmental projects that are contentious, using your

word, solely because they are unsupported by a regulated agency still be enforced? I just wanted to clarify that.

Mr. WOOD. Clearly, we enforce every lawful regulation and statute on the books. And we take that obligation very seriously. I do as well, and we will continue to do so in this administration.

Ms. JAYAPAL. Mr. Wood, I respect very much your work, and so please do not take this the wrong way, but there are some who have suggested that the appointment of a former coal lobbyist as the acting Assistant Attorney General of the Environment and Natural Resources Division is a form of political patronage by the Trump administration in return for millions of dollars in campaign contributions by coal executives and companies to the Trump campaign. And I wanted to give you chance to respond to that and tell us what you might say in response to many of my constituents who are writing to me about that specific issue.

Mr. WOOD. Thank you. I am very proud of the work I did in the private sector as an attorney representing great clients and had the opportunity to work on behalf of those clients, and my work is a matter of public record with respect to the filings that I have made, and those would reflect that much of my work was not in the area of coal, but more so in the area of nuclear. The only other thing that I would mention in that regard is that upon my arrival at the Department of Justice, I worked with the ethics officials there and was provided an ethics opinion regarding my recusal obligations. As I mentioned, we have 6,000 matters, cases, or appeals; a very small number of those involve issues for which I would have had some involvement previously, and I am recused from those. And I have abided by that ethics letter and will continue to do so, but thank you for your question.

Ms. JAYAPAL. Thank you. I appreciate that. I have just a few minutes left, so let me ask one more question. Under the Obama administration, the ENRD prosecuted several coal companies for violating environmental laws. For example, in 2015, Duke Energy pleaded guilty to nine criminal violations of the Clean Water Act for a massive coal ash spill. Your predecessor, John Cruden, stated that this massive spill, and these are his words, "was a crime, and it was the result of repeated failures by Duke Energy subsidiaries to exercise control over coal ash facilities." Will you and the ENRD prosecute similar violations of the Clean Water Act and other environmental laws so that we can be assured that communities in rural areas, urban areas, across the country, can be protected against things like coal ash spills?

Mr. WOOD. Congressman, thank you for that question. I cannot speak to any specific case, but you have my assurance that the ENRD continues to vigorously enforce the Clean Water and Clean Air laws of the United States. We will continue to do so, and I think my written testimony accounts for several recent examples in just the past few months where we are doing exactly that. But thank you for your question.

Ms. JAYAPAL. I appreciate that, and I tell you that communities across the country including in places like Flint, Michigan and rural communities that are suffering with toxic, toxic situations and death in many of their communities, will be counting on you and your leadership to make sure that we continue to take this ex-

tremely seriously and prosecute violations of the law. Thank you. I yield back.

Mr. FARENTHOLD. Thank you very much. The House has votes scheduled for 4:00. That is an hour and a half from now. We are now an hour and a half into this two-panel hearing, so we are kind of at the halfway point where we probably need to bring our second panel in. As much as I would like to do a second round of questioning with our distinguished panel, I do not think time will permit it. That being said, I would request that our witnesses entertain questions for the record that we will, most likely, submit to you, and if anybody has questions for the record, if you could get them to the staff within the next 5 legislative days. We will pass those along to you, and if would you all agree to answer those questions? And we got affirmative from everybody on the panel.

So, with that being said, that will conclude our first panel. I want to thank you all for being here and for your testimony, and you are excused. We will now call the second panel for today's hearing, and we will give the staff time to set up, give everyone time to get settled, give me time to freshen up, and we will get going again here in about 4 minutes.

[Recess.]

Mr. FARENTHOLD. The Committee will come back to order. Have to bang here. I will begin by swearing in our second panel of witnesses before introducing them. If you all will please rise.

Do you swear that the testimony that you are about to give before this Committee is the truth, the whole truth, and nothing but the truth, so help you God?

Let the record reflect that all the witnesses answered in the affirmative, and you all may be seated. Thank you very much. We have got another great panel of witnesses as we continue our oversight in this Subcommittee.

We will start with Mr. Hans von Spakovsky. I am going to call you Hans. Even though I have met you several times, but your name is a mouthful even for somebody who has a radio background like I do. Hans is a senior fellow in the Center for Legal and Judicial Studies at the Heritage Foundation. He was a commissioner for the Federal Election Commission for 2 years, and prior to that, he was a career counsel to the assistant attorney general for Civil Rights at the U.S. Department of Justice. He is a former, in-house counsel and also served in private practice. He is a 1981 graduate from MIT in a 1984 graduate from the Vanderbilt University School of Law where my daughter is now attending. Go 'Dores. He published many articles, studies, and reports for the Heritage Foundation, National Review, Fox News, Wall Street Journal, and numerous other publications and is a co-author on two books on election integrity and the U.S. Justice Department. Welcome, sir.

Ms. Cleta Mitchell is a partner and political law attorney in the Washington, D.C. office of Foley and Lardner, LLP, and a member of the firm's political law practice. Mrs. Mitchell practices before the Federal Elections Commissions, the Ethics Committee of the U.S. House and Senate, and similar State and local enforcement bodies and agencies and represents numerous candidates, campaigns, and members of Congress, as well as State and national political party committees. Prior to joining Foley and Lardner, Ms.

Mitchell served as a member of the Oklahoma House of Representatives where she chaired the Appropriations and Budget Committee. She also served on the Executive Committee on the National Conference of State Legislators. As a University Texas graduate, it pains me to tell you she earned her bachelor's degree with honors and J.D. from the University of Oklahoma.

Andrew Grossman is a partner in the Washington, D.C. office of the law firm of Baker and Hostetler where he practices appellate and constitutional law. He is also an adjunct scholar of the Cato Institute, a think tank, and writes frequently on the law and legal policy. He was previously a fellow in the Meese Center for Legal and Judicial Studies at the Heritage Foundation. Mr. Grossman earned his bachelor's degree from Dartmouth College and his master's degree in public administration from the University of Pennsylvania and a J.D. from George Mason University School of Law, where he graduated magna cum laude. Congratulations and welcome.

Mr. Robert Weissman is the president of Public Citizen, the Washington, D.C. public interest advocacy organization. He is a Chair of the Coalition for Sensible Safeguards, an alliance of more than 100 consumer small business, labor, scientific, research, faith, community, health, and environmental organizations united to protect health, safety, consumer, and environmental standards. Mr. Weissman has published extensively on issues related to corporate accountability. He is a graduate of Harvard College and the Harvard Law School.

Each of the witnesses' statements, as with the first panel, will be entered into with record in its entirety. I ask all to summarize your testimony to fall within the 5 minutes that will be indicated on the clock in front of you. When it goes yellow, just like when you are driving, you speed up. No. You have just got 1 minute left to conclude your testimony. When it is red, please wrap it up as quickly as possible. So, Hans, we will start with you.

STATEMENTS OF HANS VON SPAKOVSKY, MANAGER OF ELECTION LAW REFORM INITIATIVE, SENIOR LEGAL FELLOW, HERITAGE FOUNDATION; CLETA MITCHELL, PARTNER, FOLEY AND LARDNER LLP; ANDREW GROSSMAN, PARTNER, BAKER & HOSTETLER LLP; AND ROBERT WEISSMAN, PRESIDENT, PUBLIC CITIZEN

STATEMENT OF HANS VON SPAKOVSKY

Mr. VON SPAKOVSKY. Thank you, Mr. Chairman. The duty of the Civil Division is to defend the government, including its client agencies. Now, rule 1.3 of the Rules of Professional Conduct of lawyers in the District of Columbia also requires a lawyer to "represent a client zealously and diligently within the bounds of the law." Most importantly, lawyers may not intentionally "prejudice or damage a client during the course of a professional relationship." Thus, Civil Division lawyers have a professional obligation and an ethical duty to defend the actions of Federal agencies unless there are absolutely no circumstances, under which they can be defended, a situation that occurs only rarely.

Yet, in a recent case involving the U.S. Election Assistance Commission, Division lawyers violated that professional duty. In a lawsuit involving the Federal Voter Registration Form, Civil Division lawyers took the side of the plaintiffs and refused to defend the agency. EAC Chair Christy McCormick sent a letter to former Attorney General Loretta Lynch and Judge Richard Leon, who was assigned to the case, expressing her “grave concerns regarding the potential conflict of interest and failure of the Department of Justice to provide” the EAC with proper representation.

The Civil Division’s erroneous claim that it could not defend the EAC were belied by the fact that Judge Leon ruled in favor of the EAC in his February 23, 2016 order, denying a requested temporary restraining order. In his order, Judge Leon commented on the misbehavior of DOJ, noting that the Division had taken “the extraordinary step of consenting to plaintiff’s request, not for a TRO, but for a preliminary injunction.” He ruled for the EAC despite DOJ’s failure to defend the Commission. In fact, at the hearing, which I attended, Judge Leon said that he had never seen such behavior by a government lawyer in his entire experience as a lawyer or a judge.

There was also evidence in the case of a serious conflict of interest because of lawyers from the Civil Rights Division taking over the decision making regarding the main issue in the case, thus usurping the policymaking function of an independent, bipartisan Commission. The Civil Division was apparently so worried about this conflict becoming public that it asked for the deposition of Commissioner McCormick to be sealed. None of the lawyers involved in this violation of their professional obligations have been investigated or disciplined in any way.

Second issue and this has been mentioned by the Chairman. One of the little-known costs for taxpayers is the Judgment Fund housed at the U.S. Treasury Department, a permanent, indefinite appropriation. This is used to aid judgments against the U.S. when it loses lawsuits, but it is also used to pay amounts negotiated by the Department of Justice, such as the Civil Division and the Environment Division to settle claims.

Now, the Treasury Department does send a yearly report to Congress, and it maintains a webpage, but the information provided is so limited that it is not sufficient to identify what the government did wrong and who is benefitting from these government payments. No copy of the complaint judgment against the government or settlement agreement is made available. All of this information could be easily supplied by the Justice Department’s various Divisions to the Treasury Department and made available for the public and members of Congress. The public deserve to know all the details of this, and this is the kind of transparency that we need.

A third issue, an important issue in the International Refugee Assistance Project v. Trump case being handled by the Civil Division, is the issuance of injunctions by Federal district courts with limited geographic jurisdiction that apply nationwide or globally to unidentified aliens who are not even parties to a suit. All of this violates a U.S. Supreme Court decision, which the Civil Division, I do not think, has been asserting forcefully enough in all of its cases, including U.S. v. Mendoza. The key in that case was the

usual role of collateral estoppel that applies to private parties does not apply to the government. That means that the government has the ability to apply the executive order to individuals who are not actual parties to the litigation.

One other thing that the Congress should consider: that is the chaos caused by having cohorts all over the country issue potentially conflicting and duplicative decisions on the same issue. I think you should consider passing a law that says that any lawsuit contesting an executive order issued by the President has to be filed in the District of Columbia Federal district court. This would prevent different cases and different decisions from coming all over the court, and there are precedents for this kind of action. Thank you.

[Mr. von Spakovsky's written statement is available at the Committee or on the Committee Repository at: <http://docs.house.gov/meetings/JU/JU05/20170608/106076/HHRG-115-JU05-Wstate-vonSpakovskyH-20170608.pdf>]

Mr. FARENTHOLD. Thank you very much. Ms. Mitchell, you are recognized for 5 minutes.

STATEMENT OF CLETA MITCHELL

Ms. MITCHELL. Thank you, Mr. Chairman, members of the Committee, and thank you for the opportunity to appear here today. I am appearing here today in my capacity as counsel to a number of organizations who were targeted by the IRS during the IRS targeting scandal, and subsequently, in my capacity as counsel to one of the groups which filed a suit against the IRS because of the targeting scandal.

There are multiple cases that have been filed by different litigants that arose from the IRS targeting scandal, and all of those cases are defended by the Tax Division of the Department of Justice. And I am here to talk about our experiences in three areas with respect to the attorneys in the Department of Justice Tax Division.

In a word, the DOJ tax attorneys have done, and continue to do, everything in their power to stall, delay, and block the orderly proceedings of these civil cases and to throw every monkey wrench they can invent, devise, or imagine to keep these plaintiffs from discovering the truth and the facts that resulted in the intentional delay of the normal processing of hundreds of applications for exempt status by citizens groups, solely because of their names and missions. The DOJ tax attorneys argue at every turn that none of these plaintiffs are entitled to any relief, but it is not that that I find so objectionable.

What I find objectionable are three things that I am going to turn to now: the first is that I believe that it is the responsibility of the tax attorneys in the Department of Justice for the fact that the Lois Learner emails were lost. At the time that our lawsuit was filed in 2013, and under the Federal laws of civil procedure under several Federal statutes, and also the Committee on Oversight and Government Reform issued two subpoenas to preserve those documents/materials relevant to the IRS investigation, which were also under a litigation hold, resulting from our lawsuit. And yet, imagine our surprise in June of 2014 when we learned, through the

media, that supposedly Lois Learner's emails were lost. We immediately sent a letter, which is attached to my testimony, to the Department of Justice tax attorneys and said we would like to immediately go to court, or ask them to allow us to collectively, jointly have an independent forensics expert team go into the IRS to see about recovering, locating, and retrieving these supposedly lost emails.

They fought us at every step. They refused to agree to any kind of cooperative effort. We filed a motion for expedited discovery. They argued through the summer and ultimately prevailed, and no independent expert was appointed or allowed access to the servers, the backups, and et cetera.

And what we learned, subsequently, is that, at the very time they were objecting to allowing access to those servers, the servers were erased at the very time. And it also is absolutely clear that they took no steps when the lawsuits were initially filed to do what normal litigants do, which is to ensure that your clients are not doing anything to lose any documents, materials, or evidence. They even objected to the fact that we called it evidence, so I believe that that falls squarely at their feet.

And since that time and separately from that, I have attached a copy from the order of the Sixth Circuit of the court of appeals in which the court castigated the Justice Department attorneys, the trial court, castigated the Justice Department attorneys and said that their behavior, with regard to discovery, constituted studied obstructionism. It is very rare for an appellate court to call out the attorneys in a case, and in particular, to call out the government attorneys, but that is what the Sixth Circuit court did. These lawyers in the Department of Justice, Tax Division should not be allowed to continue to engage in this misconduct.

The trial court in Cincinnati said that what the IRS had done was being perpetuated by what their attorneys were doing, and they have applied different legal theories completely, taking the same legal theory and applying it in one manner in one of the cases and in another manner in other cases, on whatever suits their purposes to try to obstruct and keep these lawsuits from coming to a conclusion.

So, I would argue that it is time for Congress to do something and that the administration should do something to bring these long, pending lawsuits to a conclusion, which will only happen if the Department of Justice attorneys in the Tax Division stop obfuscating, stalling, and doing everything they can to keep it from happening. Thank you.

[Ms. Mitchell's written statement is available at the Committee or on the Committee Repository at: <http://docs.house.gov/meetings/JU/JU05/20170608/106076/HHRG-115-JU05-Wstate-MitchellC-20170608.pdf>]

Mr. FARENTHOLD. Thank you very much. Mr. Grossman, you are up for 5 minutes.

STATEMENT OF ANDREW GROSSMAN

Mr. GROSSMAN. Thank you, Mr. Chairman, and thank you for holding this hearing today and inviting me to testify. My statement will focus on two issues concerning the Department's use of settle-

ments to resolve litigation: one is the sue and settle phenomenon, and the other, which I will turn to first, is the Department's new policy announced yesterday morning generally prohibiting so-called slush funds.

The new policy is to be commended. As the Subcommittee is all too aware, the previous administration believed that it could circumvent Congress's control of the purse by entering into settlements that required defendants to pay money not to the Treasury, but to third party organizations. These organizations, including activist groups, were not parties to these lawsuits; they were not victims; and the money they received was not compensation or restitution or attorney fees. This was pure, programmatic spending that requires Congressional appropriation. The previous administration's lawyers believed—incorrectly, in my view—that they could skirt that requirement by diverting funds from entering the Treasury. The Attorney General's new policy puts an end to that sleight of hand. It bars the Department from “entering into any agreement on behalf of the United States in settlement of Federal claims or charges that directs or provides for a payment or loan to any non-governmental person or entity that is not a party to the dispute, excepting restitution and attorney fees and payments expressly authorized by statute.” So, we should commend the Attorney General's action, but I will identify two respects in which it may fall short.

The first concerns a particular type of slush fund settlement that draws money directly from the Treasury through the Judgement Fund Act to make payments to third party organizations for programmatic activities. Now, if requiring settling defendants to make payments to activist organizations intrudes on this body's appropriations power, then taking the money directly out of the Treasury to pay for programs that have never been authorized or appropriated is an even more serious violation. Now, the poster child for this kind of abuse, as you all know, is the Keepseagle settlement that was recently the subject of a split decision of the D.C. circuit. I will not discuss the case because the Subcommittee is well aware of it, but I will note that the Attorney General's new policy statement, at least as it is written, appears to be ambiguous on abuse of the judgement fund to make payments to third party organizations.

I understand that there may be disagreement within the Department over whether such settlements should be allowed or not, although Mr. Readler's statement on the previous panel seems to suggest otherwise. I think this Subcommittee and the American people deserve to know with greater clarity what the Department's position is on this important issue and whether the Department believes that undertaking such payments is consistent with the governing statutory authority as well as constitutional authority. And I think they also deserve an answer to the Committee Chairman's letter regarding whether the Department will act to claw back the extra Keepseagle settlement money for the benefit of taxpayers before it goes out the door.

The second shortcoming of the new policy is that it ultimately does not bind an administration that does not wish to be bound. In my view, the Constitution and statutory law already prohibit

these kinds of settlements, but when everyone gets bought off, there is no adversary to oppose an unlawful settlement. A simple fix is required, a simple statutory fix. Judges should not be allowed to approve these kinds of settlements, and the Judgement Fund Act should be amended to make crystal clear that it does not authorize payments to third party organizations. This is required to prevent the gaming of our judicial system to circumvent Congress's power of the purse.

Let me now turn quickly to the sue and settle issue. The Subcommittee is certainly familiar with the problem, and so I will not cover old ground. We all know that agencies in the previous administration used collusive settlements to advance regulatory agendas and to evade accountability. I can report that, so far, we have not witnessed any of this kind of abuse by the Trump administration. In fact, EPA administrator Scott Pruitt has declared that his agency, which was one of the worst offenders under the Obama administration, will not enter into settlements that set the agency's agenda, but EPA is only one agency, and I am disappointed to say that the Department of Justice has so far been relatively silent on this issue. The proper policy for the Department is not a mystery, because it is the one that was actually identified on the previous panel by Mr. Wood. That is the policy that was adopted in 1986 by Ed Meese, Ronald Reagan's Attorney General. The policy is straightforward: do not enter into settlements or consent decrees that convert discretionary authority into mandatory duty or that require the expenditure of unappropriated funds. If the Trump administration is serious about accountability, it should officially reaffirm the Meese policy.

Action by Congress is also appropriate. As I explained in my written testimony, the Sunshine for Regulatory Decrees and Settlement Act, H.R. 469, adopts a thoughtful and comprehensive approach to this issue. More broadly, Congress should consider its use aspirational and unrealistic statutory deadlines combined with broad citizen suit provisions. As a matter of good public policy, a deadline that Congress does not expect an agency to meet is one that ought not to be on the books, and as a matter of constitutional principle, Congress should be the one enforcing rulemaking deadlines through its oversight and appropriations powers. Again, I thank the Committee for the opportunity to offer these remarks, and I look forward to your questions.

[Mr. Grossman's written statement is available at the Committee or on the Committee Repository at: <http://docs.house.gov/meetings/JU/JU05/20170608/106076/HHRG-115-JU05-Wstate-GrossmanA-20170608.pdf>]

Mr. FARENTHOLD. Thank you very much. Mr. Weissman, you are up for 5 minutes, sir.

STATEMENT OF ROBERT WEISSMAN

Mr. WEISSMAN. Thank you very much, Mr. Chairman, Mr. Johnson, for the opportunity to be here today. I wanted to speak broadly to issues about corporate accountability at the Justice Department including both criminal and civil enforcement with a focus on issues related to Wall Street crimes and wrongdoing.

In 2008, as we all know, Wall Street crashed our economy, and we are living with the after effects of that. Strikingly, though, the Wall Street banks in the financial sector, generally, were able to escape accountability for the widespread wrongdoing that occurred. There were effectively no criminal prosecutions by the Department of Justice and no criminal prosecutions either of the largest banks or the executives at those banks who are responsible for devastating harm across the economy. We found out eventually that the Department of Justice officials thought those institutions were too big to fail, too big to jail as well, too big to prosecute.

Later in the Obama administration, there were a series of civil settlements reached with the banks, and those did obtain significant sums of money, but they were poorly executed. Those settlements did not disclose the underlying wrongdoing that the banks were alleged to have committed in some circumstances and gave, really, no basis for assessing whether the settlements reached correlated in any way with the impact and damage that the banks had had on the economy.

There was a related problem that goes back far before the Obama administration that we saw especially in the financial sector but more broadly as relates to corporate wrongdoers, which is the extraordinary use of deferred and non-prosecution agreements against corporate violators, as well as limited criminal accountability for corporate executives. It became the norm for corporations that broke the law to escape the requirement to plead guilty or to be convicted, instead entering into deferred or non-prosecution agreements that effectively amount to nothing more than a promise to not break the law in the future, which is a promise with no meaning whatsoever, since they are already obligated to not break the law in the future. As I discuss in my testimony, perhaps the most egregious instance involved HSBC for a massive money laundering scheme for which they were able to escape any kind of criminal liability.

At the end of the Obama administration, in response to public criticism around these issues, we saw some, slight change. Importantly, we saw the issuance of the Yates Memorandum with a focus on trying to prosecute executives of corporations that engaged in wrongdoing. We saw some notable criminal prosecutions involving Mass E Energy and its executive Don Blankenship, The Peanut Corporation of America, and a couple other notable examples. We also saw in the last day of the administration the settlement with Volkswagen, which both obtained substantial compensation, launched indictments against a number of executives and managers, and required the company to plead guilty to criminal wrongdoing. So, we saw some progress in this area at the end of the administration.

Unfortunately, in the early days of the Trump administration, signs are that things are going to reverse. Just recently, the Department of Justice entered into a non-prosecution agreement with City Group in another money laundering case. This is the City Group's subsidiary in Mexico for what the Justice Department called vast criminal wrongdoing, but again, no criminal prosecution, no criminal plea. It is a worrisome sign of a return to those old days. We have seen astounding revolving door set of nomina-

tions for key positions in the Justice Department from the solicitor general on down. And we have seen, just earlier this week, a move to deny justice for victims of corporate wrongdoing through Attorney General Session's newly announced policy to prohibit settlement payments to third parties. If you look at the actuality of those settlements, they are designed to ensure full compensation, full restitution, for victims who often cannot be compensated directly. And I think this was an unfortunate move, which I worrisomely may be a harbinger of more gentle treatment for large corporations.

Corporate crime and violence inflicts far more damage on society whether measured by dollars, injuries, or lives than street crime, as horrible as street crime is. And it is absolutely vital that the Department of Justice take corporate crime and wrongdoing seriously, prosecute it fully, and also engage in aggressive civil enforcement. I think the early signs of the Trump administration are troubling about whether it intends to do just that.

[Mr. Weissman's written statement is available at the Committee or on the Committee Repository at: <http://docs.house.gov/meetings/JU/JU05/20170608/106076/HHRG-115-JU05-Wstate-WeissmanR-20170608.pdf>]

Mr. FARENTHOLD. Thank you very much, and we will begin some questioning, and since there is nobody else on my side, I will kick it off. Mr. Spakovsky, and I did get that right, I have a couple of questions for you. What is the scope of the duty of the DOJ to defend? When can they say yes? When can they say no to defending a government agency, and what is appropriate there?

Mr. VON SPAKOVSKY. The longtime policy of the Justice Department, and it does not matter what administration is in the White House, the view has always been that it has a duty to defend all laws passed by Congress, even if the present administration might not like them, and also to defend all actions of agencies in the current administration, past administration, with the only exception being, for example, when it comes to Congress, laws that infringe on the constitutional authority of the President. And with regard to agency actions, only if there is absolutely no reasonable way of defending the agency's action and that almost never happens.

Mr. FARENTHOLD. Well, we have seen some issues where the Justice Department has not done that. Should the agencies be able to go out and get outside counsel to do that? What is the solution to that problem?

Mr. VON SPAKOVSKY. Well, that is a problem. The case, for example, that I mentioned in my testimony, in fact, when the Justice Department, in essence, told the U.S. Elections Assistance Commission that they would not defend them, the Chairwoman of that Commission asked for permission to hire their own independent counsel to defend them, and the Justice Department has a say so over that, because the EAC has no independent litigating authority, said no. This was so disconcerting to Judge Leon that when the State of Kansas and the public interest legal foundation, which is a public interest legal, came in to intervene and say, "well, if the Justice Department will not do its duty, we will defend the EAC." The judge did what is kind of unusual; he allowed them to intervene, and they actually defended the Federal agency. It was the most bizarre situation I have ever seen.

Mr. FARENTHOLD. We saw a similar situation here in Congress. Should the Justice Department be required to enforce things like contempt of Congress or a subpoena for a Congressional committee?

Mr. VON SPAKOVSKY. I certainly think they should, yes.

Mr. FARENTHOLD. Ms. Mitchell, would you like to weigh in on that?

Ms. MITCHELL. Yes, I would. I think that Congress should take steps to establish a procedure whereby it does not have to go to the Executive Branch. I think there is a serious separation of powers issue when the legislative branch of government is dependent upon the executive branch to enforce a subpoena issued by the legislative branch of government. I think there are ways that the House and Senate could establish a rule and procedure through some of the ways that it has established litigation procedures in other areas. But I definitely think that this is a huge problem, and I think the Article 1 power of Congress is an issue when you have the Department of Justice refusing to enforce a Congressional subpoena, but imagine that this became particularly acute when you had the situation where the Congressional subpoena was issued to the Department of Justice.

Mr. FARENTHOLD. And you talked a little bit about DOJ and servers getting erased and tapes getting lost. If that had happened in a civil suit between private parties, it would be a huge spoliation claim, so why is the government different there?

Ms. MITCHELL. It should not be different, and I think that is one of the things that is really problematic with the Department of Justice and the Civil Division, particularly the tax attorneys. That is where I have had my experience, and I think that, you know, you have had trial courts and you have had the circuit courts both admonishing that the DOJ attorneys telling them to stop being so recalcitrant. If it were anybody else, these lawyers could be, themselves, personally subject to sanctions, and the party is entitled to damages. And it is just breathtaking to me that the fact of the matter is those attorneys in the Tax Division should have taken immediate steps in May of 2013. They really should have taken them sooner, but in May of 2013, when all of these lawsuits were filed, they should have immediately taken steps to ensure that nothing happened to any backups, any servers, any emails, any documents, and they did not do it.

Mr. FARENTHOLD. And now I have two quick questions for Mr. Weissman. Did you hear the Chairman's opening statement quoting from the New York Times' expose on the DOJ abusing the judgment fund to pay off allies over the vigorous objections of career prosecutors, and does that report trouble you?

Mr. WEISSMAN. I am sorry, Mr. Chair. I have to say I am most familiar with the Judgement Fund issue. I am more familiar with the issues related where the government is prosecuting the case as the plaintiff in the case against corporate defense.

Mr. FARENTHOLD. All right, and just on a related topic, would it trouble you if the DOJ reworded donation terms in settlements to ensure groups of particular ideological stripes were ineligible for donations?

Mr. WEISSMAN. If groups based on their ideology were ineligible?

Mr. FARENTHOLD. Right.

Mr. WEISSMAN. Sure, that would be troubling.

Mr. FARENTHOLD. Thank you. I see my time is expired. Would you like to go? Or Mr. Conyers? I will leave it up to you two to decide which one goes first. We will go to the Ranking Member of the full Committee, Mr. Conyers.

Mr. CONYERS. Thank you, and excuse my departures from time to time that are unavoidable. I wanted to start off with Public Citizen's witness. The New York Times indicated yesterday that officials across the government receive special waivers to disregard ethics rules. Did you happen to see that?

Mr. WEISSMAN. I did see that, yes.

Mr. CONYERS. And it offers additional evidence that lobbyists and industry executives have an unusual ability to shape policies benefiting their former clients and companies. So, that sounds astounding to me. Can you help me feel more comfortable with this report?

Mr. WEISSMAN. No, I think your concerns are well-justified, and that report actually is only a glimpse of the overall problem. The New York Times story was talking about the issue of waivers that have been issued after some considerable pressure that the administration had made available the waivers it has granted. There were not as many as we expected outside the White House. There were several extremely troubling examples from the White House. The reason the problem is worse than the New York Times story indicated is that it only related to the waivers. The bigger issue is the revolving door question, which I think is pervasive in the number of appointments that the Trump administration has made and is particularly the case at the Justice Department including in the example of the new nominee to run the Department of Environment and Natural Resources Division whose prior practice involved defending BP in the Gulf oil disaster to replace the acting, who as we heard earlier, who worked as a lobbyist for coal companies. That is emblematic of what is going on in the Justice Department and really throughout the government right now.

Mr. CONYERS. This becomes an incredibly important hearing, which I hope this Subcommittee and its leaders will continue to press on even after this hearing. I think we have not stumbled on, but we have revealed a lot of things that most people including members of the House do not know are going on. And I appreciate this panel very, very much. Mr. Weissman, Public Citizen, was the financial crisis caused by fraudulently securitized mortgage investment packages, caused in some way by the Department of Justice?

Mr. WEISSMAN. That was one of the main causes. The Department of Justice was not a facilitator of that. I would say of massive regulatory failure was, on the backend, I think, since there was really massive crime and wrongdoing associated with those activities, we should have seen the Department prosecuting people and corporations, and we did not.

Mr. CONYERS. What explains the dearth of the prosecutions of those involved in these fraudulent activities?

Mr. WEISSMAN. That is a hard question to answer, you know. I think one of the problems, actually, is exactly the same revolving door story that we see playing out on a worse scale now. We had high-level officials in the Obama Justice Department also come

from the corporate defense bar, and I think they were very sympathetic to their former clients, or companies that might have been their former clients.

Mr. CONYERS. So, this had gone on before the present administration?

Mr. WEISSMAN. This is a problem that goes back as long as I know, actually, but I think we are seeing the worse we have seen in the Trump administration.

Mr. CONYERS. I will yield back the balance of my time, and I may send you some questions or comments that I would like to check your reaction to them. I thank the entire panel for their helpfulness.

Mr. FARENTHOLD. Thank you, Mr. Conyers. We will now recognize the gentleman from Georgia, the Ranking Member of the Subcommittee, Mr. Johnson.

Mr. JOHNSON of Georgia. Thank you, Mr. Chairman. Mr. von Spakovsky—

Mr. VON SPAKOVSKY. The Chief Justice of the Supreme Court also stumbled over it, so do not be embarrassed.

Mr. FARENTHOLD. I would just go with Hans. Trust me on this.

Mr. JOHNSON of Georgia. I want to meet the challenge and get it right, but Mr. von Spakovsky, as a member of the Federal Elections Commission, you were accused of politicizing your position, or being unacceptably partisan, and it was alleged that you consistently used your position to disenfranchise poor and minority voters. And it is also alleged that as an official of the Justice Department that you advocated for the Department to apply the Voting Rights Act of 1965 in a “race neutral manner.” And throughout your career, it has been alleged that you have an obsession with the phantom and now debunked notion of so-called mass voter fraud all with the aim of suppressing Democratic Party voters. What do you say about these allegations, and what is the Heritage Foundation’s position in so far as the Russian attempts to influence the recent presidential election?

Mr. VON SPAKOVSKY. Well, I am happy to answer those questions, Mr. Chairman, although they are not quite on the topics of today. I will tell you that those claims that you made about me are defamatory, libelous lies, and if you would like, I would be happy to send you a copy of the 2013 Report of the Department of Justice Inspector General where he took a look at the cases that we handled at the Justice Department when I was there and the conclusion of the Inspector General against those accusations that you have just made was that there was no evidence whatsoever that any of the cases that we handled were done in a political or partisan manner. And that is in the IG report. You do not have to take my opinion for it.

As to voter fraud, yes, that is an issue I work on. On that issue, I would be happy to send you a copy of the report that the Heritage Foundation has recently put together of close to 500 cases from across the country, 800 individuals convicted of voter fraud. I think that is something that we should all be concerned about when it comes to the integrity of the election process.

Mr. JOHNSON of Georgia. Okay, and the Heritage Foundation studies on the Russian involvement in the recent presidential elections, are there any underway this far?

Mr. VON SPAKOVSKY. Well, I would cite to you the interview given by J. Johnson, the Secretary of Homeland Security during the Obama administration.

Mr. JOHNSON of Georgia. No, I am talking about the Heritage Foundation.

Mr. VON SPAKOVSKY. Yeah, well, I am telling you that our view agrees with that of J. Johnson who said that, one week after the November election, that there was no evidence of any kind that the Russians had hacked into the voting process, the ballot counting process, or any of the actual voting administration process, and I agree with that.

Mr. JOHNSON of Georgia. Thank you, sir. Ms. Mitchell, is it not true that no organization was ever denied tax exempt status under the admittedly flawed criteria used by the IRS to process social welfare organizations for compliance with 501C4?

Ms. MITCHELL. Congressman, I actually do not think that that is a true statement. I think that there are several organizations that were denied their tax exempt status.

Mr. JOHNSON of Georgia. All right, and Mr. Grossman, in your written testimony, you state that the Justice Department should readopt the Meese memo, which restricts the use of settlement policy to circumvent Federal statutes such as the Administrative Procedure Act. Are you aware that the Meese memo was iconified in 1991?

Mr. GROSSMAN. Yes.

Mr. JOHNSON of Georgia. Thank you. Last but not least, Mr. Weissman. In your written testimony, you state that the recent Wells Fargo scandal where the bank fraudulently transferred millions of accounts raises both public and private enforcement questions. What effect does Wells Fargo's use of forced arbitration clauses in its consumer agreements have on the public's ability to hold the bank accountable for its misconduct?

Mr. WEISSMAN. Well, as you know, Mr. Johnson, this is a problem that is not unique to Wells Fargo. It is pervasive in the financial sector. The extraordinary misconduct of Wells Fargo though does throw into relief both the scale of its problem, its impact, and how absurd it is that corporations are permitted to force victims into arbitration rather than into civil courts.

In this case, because victims have been forced under arbitration, they were disinclined to bring lawsuits in the first place, therefore, unable to join in a class or engage in mass discovery that probably would have uncovered this problem earlier. With the problem now well known, Wells Fargo is still defending itself from the grounds that victims should seek compensation and remedy not in the courts and not through class action mechanism, but through arbitration tribunals. That is to say, Wells Fargo is saying that victims who did not agree to have accounts created for them should be constrained by forced arbitration provisions and contracts related to other accounts they opened, not regarding these phantom accounts, which by definition, they never contracted for. And, nonetheless,

Wells Fargo is making this claim and given the state of the law, it remains to be determined whether or not they will prevail on it.

Mr. JOHNSON of Georgia. Well, they take that position because forced arbitration usually results in a decision in favor of the corporate interest. Is that correct?

Mr. WEISSMAN. That is right. These are tribunals that are stacked in favor of large corporations who were the repeat players and often have some influence over choosing who the arbitrators themselves are. They frequently make it impossible. The provisions of these contracts frequently make it impossible to join together as a class. Discovery is limited, and often the results remain secret so the public does not get the benefit of an open judicial system.

Mr. JOHNSON of Georgia. Certainly, no record created, no right to appeal, no precedent or reliance on precedent in the decision making. No reliability for the consumer other than the fact that the deck is stacked against them.

Mr. GROSSMAN. Exactly so. We refer to them as rip off clauses or get-out-of-jail-free cards for large corporations.

Mr. JOHNSON of Georgia. Thank you. With that, I yield back.

Mr. FARENTHOLD. Thank you very much, and as we have been through our round of questionings, and Mr. Conyers, I believe has gotten you all agree to respond to any questions for the record, I think it gives us an opportunity to conclude today's hearing, and I want to thank you for—

Mr. CONYERS. Mr. Chairman, may I have a unanimous consent to put in to the record the New York Times article dated June 7th: "Lobbyists Were Granted Ethics Waivers in Trump Administration?"

Mr. FARENTHOLD. Without objection, so ordered.

[This material is available at the Committee or on the Committee Repository at: <http://docs.house.gov/meetings/JU/JU05/20170608/106076/HHRG-115-JU05-20170608-SD002.pdf>]

Mr. FARENTHOLD. Again, I say thank you to our witnesses for attending. I enjoyed hearing your testimony and found it to be very helpful. Without objection, all members will have 5 legislative days to submit additional, written questions for the witnesses or additional material for the record. With that, we are adjourned.

[Whereupon, at 3:16 p.m., the Subcommittee was adjourned.]

COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL AND
ANTITRUST LAW

QUESTIONS FOR THE RECORD TO
CHAD READLER
ACTING ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION
U.S. DEPARTMENT OF JUSTICE

Questions submitted for the Record from Subcommittee Chairman Marino

1. The Attorney General's memo says that the third-party payment ban covers "all" cases litigated by DOJ and includes "cy pres" provisions. Just to be absolutely certain, does this include cases in which DOJ is the defendant and a judgment is paid out of the Judgment Fund?

RESPONSE: The June 5, 2017, Attorney General memorandum prohibits "any agreement on behalf of the United States in settlement of federal claims or charges, including agreements settling civil litigation, accepting plea agreements, or deferring or declining prosecution in a criminal matter, that directs or provides for a payment or loan to any non-governmental person or entity that is not a party to the dispute." The policy sets forth three limited exceptions, but none of those exceptions relates to whether the Government is a defendant.

2. Certain state attorneys general are investigating whether false claims submitted to asbestos trusts violate state laws, including state false claims acts. For example, the Utah Attorney General has filed a legal action under the Utah False Claims Act based on the theory that Utah's Medicaid program may have been defrauded as a result of false claims submitted to asbestos trusts. The federal government could also examine whether Medicare has been defrauded as a result of similar false claims under the federal False Claims Act. Would you consider a parallel federal investigation?

RESPONSE: It is our understanding that although, the State of Utah has not yet filed a state False Claims Act suit, it recently filed an action in state court to enforce Civil Investigative Demands for documents from four asbestos trusts that allegedly made improper payments to claimants. See *Utah v. Armstrong World Indus. Asbestos Personal Injury Settlement Trust*, No. 170901496 (3d Dist. Ct. Mar. 7, 2017). In this enforcement action, Utah has argued that improper payments by these private trusts could implicate the state's False Claims Act because (1) if the trust funds are depleted, states would bear the high cost of asbestos-related medical conditions, and (2) Medicare and Medicaid beneficiaries who receive funds from the trust may not be reimbursing those healthcare programs. The asbestos trusts have moved to dismiss the enforcement action, and that motion is pending. We will

continue to monitor this matter to determine whether there is any appropriate action for the Department of Justice to undertake.

Questions submitted for the Record from Judiciary Ranking Member John Conyers, Jr.

1. Would you recommend any changes to the False Claim Act, including its qui tam provisions, to make it an even more effective tool for the Civil Division?

RESPONSE: The False Claims Act is a powerful tool in the Department's efforts to combat fraud on the Treasury. The Department believes the act is operating to protect taxpayer funds, and we do not currently recommend any changes to the False Claims Act.

2. You mention in your prepared statement the work your Division does with respect to defending Bivens lawsuits against law enforcement officers. Would your defense work be made easier if there was a federal counterpart to section 1983 of title 42 of the United States Code?

RESPONSE: The Civil Division does not, in the abstract, see any benefit to a federal counterpart to 42 U.S.C. § 1983, though our precise views would depend on the content of such a statute. Under current law, *Bivens* lawsuits provide a judicially created damages remedy implied directly under the Constitution, but the existence of a *Bivens* cause of action has been circumscribed by Supreme Court precedent and *Bivens* claims are subject to significant limitations and powerful defenses. The federal courts have limited these causes of action to certain specific contexts in which viable claims can be brought against federal officials. Claims falling outside of these contexts require the courts to consider and weigh the costs and benefits of allowing a damages action to proceed. Court precedent also focuses the claims in these cases on the defendant federal officials who were personally involved in the challenged conduct, thus eliminating respondeat superior liability. And each party bears its own attorneys' fees in *Bivens* cases. A federal counterpart to Section 1983 could potentially undermine these limitations on *Bivens* cases and would likely increase the filing of potentially meritless claims against federal officials. Such a result would not reduce the overall burdens of *Bivens* litigation.

3. How important is private enforcement of the Telephone Consumer Protection Act?

RESPONSE: Congress enacted the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, in large measure to address consumer "outrage[] over the proliferation of intrusive, nuisance calls to their homes from telemarketers." 47 U.S.C. § 227 note, finding (6). Congress chose to permit private lawsuits to enforce some of the TCPA's provisions, 47 U.S.C. § 227(b)(3), (c)(5), civil actions and forfeiture penalties by the Federal Communications Commission ("FCC"), and actions by state Attorneys General § 227(g)(1).

Congress determined that private enforcement of the TCPA is important for at least three reasons. First, telemarketers and others engaged in abusive practices are aware that any consumer may bring a private case against them seeking statutory damages. In Congress's view, although complaint submissions can help government officials prioritize enforcement efforts, federal resources do not allow for the investigation of every consumer complaint. Second, Congress concluded, based on its findings concerning automated calls, nuisance and privacy concerns, see 47 U.S.C. § 227 note, finding (12), that the TCPA's private right of action allows consumers to vindicate rights and seek compensation for injury. Third, Congress found that private consumer actions provide government enforcement officials with information and evidence on large-scale violators who may warrant government enforcement actions. As Congress recognized, discovery in private suits can lead to documents that make government investigations and enforcement actions more efficient and focused because private-party lawsuits and settlements can help establish that defendants were on notice that their telemarketing behavior was illegal. See *United States v. Dish Network LLC*, __ F. Supp. 3d __, No. 09-3073, 2017 WL 2427297, at *40 (C.D. Ill. June 5, 2017) (handled by the Civil Division).

Questions submitted for the Record from Subcommittee Ranking Member Cicilline

1. The New York Times reported that "officials across the government" have received "special waivers to disregard ethics rules." According to The New York Times, these waivers "offer additional evidence that lobbyists and industry executives who can now shape policies benefiting their former clients and companies have been allowed to work in the Trump administration, even with the president's vow to 'drain the swamp' of influence peddling." Have you received an ethics waiver? If so, please describe the nature of the waiver and how it affects your role at the Civil Division.

RESPONSE: I have received ethics waivers to work on three sets of cases. First, I received an Ethics Pledge waiver and an authorization under 5 C.F.R. § 2635.502 to work on *American Insurance Ass'n and National Ass'n of Mutual Companies v. HUD* (D.D.C.). I sought this waiver and this authorization because I previously represented Nationwide Mutual Insurance Company, which although not a plaintiff in its own right is one of over 300 members of the American Insurance Association, one of two plaintiffs in this litigation. My previous representation of Nationwide was not in connection with this case. Second, I received an authorization under 5 C.F.R. § 2635.502 to work on *PHH Corp. v. Consumer Financial Protection Bureau*. I sought this authorization because I previously represented the Chamber of Commerce, which participated in this case as an amicus, not a party. I have been advised that no Ethics Pledge waiver was required since the Chamber of Commerce is not a party to the litigation. Finally, I received two authorizations under 5 C.F.R. § 2635.502 to work on cases challenging the President's Executive Order on Terrorist Entry, colloquially referred to as the Travel Ban cases. I sought the first authorization because of the participation of my former firm as counsel for an amicus participant. I sought the second authorization in connection with certain cases in which the plaintiffs have

sought documents from the President's campaign organization, Donald J. Trump for President, Inc., which is a former client. My ethics advisors informed me that no Ethics Pledge waiver was required for either of these matters.

2. The White House has also released ethics waivers for any attorney who practiced at the Jones Day law firm to "participate in communications and meetings where Jones Day represents the President, his campaign, the transition, or political entities supporting the President." - As a former attorney at Jones Day, did you participate in communications and meetings where Jones Day represents the President, his campaign, the transition, or political entities supporting the President? If so, please describe whether you continue to be involved in this type of activity, the scope of the activity, whether this activity occurs or has occurred during your capacity as Acting Assistant Attorney General, and how it affects your role at the Justice Department.

RESPONSE: I have not participated in any such communications or meetings.

3. The Civil Division is responsible for defending President Trump in lawsuits relating to the President's alleged violation of the Constitution's restriction on accepting foreign gifts, or emoluments. Should the Department use government resources to defend President Trump in a case that solely concerns his private business interests?

RESPONSE: By statute, the Department of Justice is responsible for the conduct of litigation in which an officer of the United States is a party. 28 U.S.C. § 516 provides: "Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party . . . is reserved to officers of the Department of Justice, under the direction of the Attorney General." That is, unless otherwise authorized by law, "only attorneys of the Department of Justice under the supervision of the Attorney General may represent the United States or its agencies or officers in litigation." United States Attorneys' Manual 4-1.100. The various suits filed against the President concerning his alleged violation of the Foreign Emoluments Clause of the Constitution are brought against him in his official capacity as President. Although the suit implicates the President's private business interests, the lawsuits put at issue whether the President, as a holder of an "Office of Profit or Trust," is in compliance with the Foreign Emoluments Clause. The Department of Justice therefore is properly representing the President in his official capacity in this litigation.

Should the Department use government resources to defend President Trump in a case that solely concerns his private business interests?

As discussed above, the Department is representing the President in suits filed against him in his official capacity.

- a. Is there a clear distinction between the interests of the federal government and those of the private interests of the President Trump?

The Department of Justice represents the President only in his official capacity and defends the Office of Presidency in the interest of the United States. The Department does not represent the private business interests of President Trump in these lawsuits.

b. Are you aware of any payments received by the Trump International Hotel or other businesses in which the President has a financial interest from a foreign government or agent of a foreign government?

I have no personal knowledge of such payments.

4. Do you think that the FACT Act would lead to a reduction of fraud, and how would that impact payouts for future asbestos victims?

RESPONSE: Regarding H.R. 906, which amends the bankruptcy code to increase required disclosure, we have no concerns about greater accountability or disclosure requirements for asbestos trusts. The language being considered by the House appears to strike a balance between disclosure of a trust's activities and individual privacy concerns. In some instances, to be sure, statutory disclosure requirements could be helpful in reducing fraud and ensuring a fair resolution for victims. However, we are not able to speculate as to whether the disclosure requirements proposed here would necessarily lead to a reduction of fraud or impact payouts to affected asbestos victims.

5. In 1978, former Attorney General Griffin Bell stated "the President is best served if the Attorney General and the lawyers who assist him are free to exercise their professional judgments," and, "[j]ust as important, they must be perceived by the American people as being free to do so." Do you believe that it is important for the Justice Department to appear independent of the White House and that Justice Department attorneys should exercise their own professional judgment in faithfully enforcing the law?

RESPONSE: Except as otherwise provided by law, the Attorney General and officers of the Department of Justice have authority to conduct all litigation, civil and criminal, to which the United States, its agencies, or departments are parties. 28 U.S.C. § 516. This power should be exercised with wisdom and discretion and used to promote the Government's best interest and prevent injustice. The Attorney General assists the President in exercising his constitutional responsibility under Article II, § 3 of the Constitution to "take Care that the Laws be faithfully executed."

6. A recent report by the Justice Department Office of the Inspector General identified serious concerns relating to the handling of sexual misconduct within the Civil Division in violation of the Department's zero tolerance policy. According to the report, the Civil Division's penalties for substantiated allegations "were nothing more than written reprimands, title changes, and reassignment for cases in which the subject of the allegations were supervisory/senior attorneys." What is your response to the Inspector General's findings? Has the Civil Division implemented any of the Inspector General's recommendations to ensure the consistent enforcement of the Department's zero tolerance policy?

RESPONSE: In the Civil Division's response to the Office of the Inspector General's (OIG) report regarding the Division's handling of sexual misconduct in prior years, the Division acknowledged the OIG's findings and concurred with their four recommendations. Accordingly, to improve the Division's handling of sexual harassment and misconduct allegations and enforce the Department's zero tolerance policy, the Division on its own initiative, as well as in response to the OIG's findings, has taken several steps to address the concerns discussed in the OIG report.

Specifically, the Division has developed a system to electronically track allegations of misconduct made against Division employees; began offering supervisory training that includes a discussion of how supervisors should handle sexual misconduct allegations; reaffirmed the Division's commitment to preventing sexual harassment and misconduct in the workplace to all Civil Division employees and provided the Department's policy and information about how to report such allegations; hired a new Employee and Labor Relations Specialist to help ensure proper reporting of allegations; and started developing a revised awards policy. As a result of these efforts, I believe the overall effectiveness of the Division's employee relations program and handling of sexual misconduct allegations will improve and that the Department's zero tolerance policy will be enforced consistently.

7. The Inspector General also reported that senior attorneys in the Civil Division received performance awards and public recognition despite being under investigation or recent disciplined for sexual misconduct. Do you agree that rewarding sexual misconduct is completely inappropriate and may, as the Inspector General noted, "deter the reporting of future allegations and risks sending employees a message that Civil Division management does not take such complaints seriously"?
8. **RESPONSE:**

- a. What steps have you taken to prevent this from occurring in the future?

Since joining the Division in January 2017, I am not aware of any employees that have received awards or public recognition while being the subject of an ongoing sexual harassment or misconduct investigation. Currently, the Civil Division is developing guidance regarding awards given to and public recognition of an employee who is under investigation or has recently been disciplined for misconduct, including sexual harassment.

- b. Do you plan to report substantiated sexual misconduct cases for criminal investigation where appropriate?

The Division's Human Resources Office will report substantiated sexual misconduct allegations to the front office, headquarters and OIG as appropriate in accordance with the Privacy Act, Department policy, and other applicable rules and regulations

that protect confidentiality, due process, and the integrity of investigation and management inquiries.

COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL AND
ANTITRUST LAW

QUESTIONS FOR THE RECORD TO
JEFFREY H. WOOD
ACTING ASSISTANT ATTORNEY GENERAL
ENVIRONMENT AND NATURAL RESOURCES DIVISION
U.S. DEPARTMENT OF JUSTICE

Questions submitted for the Record from Subcommittee Chairman Marino

1. According to a 2013 report by the Chamber of Commerce, six sue-and-settle regulations under the Clean Air Act and the Clean Water Act impose up to \$101 billion in annual costs. These include the Utility MACT rule and Reconsideration of 2008 Ozone NAAQS. Does DOJ factor the potential cost impacts of its settlements into its decisions over whether and how to craft settlements?

RESPONSE: With regard to the “sue and settle” issue, first, let me say that the focus in our Division is on defending the lawful regulations and actions of our client agencies. Under my watch, there will be no collusion involving any sue and settle actions whatsoever. And, with respect to the policy of the Department of Justice, we will abide by Attorney General Meese’s memorandum that provides guidance for settlements in these kinds of cases.¹ For example, that policy restricts a settlement that would convert a discretionary authority to a mandatory duty for the agency. Whenever settlement agreements are presented for my review and signature, we will look closely to make sure it abides by that policy.

More specifically to your question, I am unable to comment on the particulars of cases such as those addressed in the cited report, which were settled long before my tenure in the Environment and Natural Resources Division (ENRD). I can say, however, that the laws enacted by Congress at issue in a particular case will govern the evaluation of that case, and the applicable law may or may not allow the consideration of cost. Where consideration of cost is permissible, ENRD would not agree to settle a case unless the client federal agency has determined that the terms of the settlement are appropriate and feasible to implement. There is also a frequently recurring context where Congress has set statutory deadlines for certain agency actions and has, separately, authorized “any person” to file a lawsuit when the agency fails to meet those deadlines. Often in these contexts, the agency is left with few defenses, if any, and a frequent outcome is a settlement agreement or a consent decree between the agency and the plaintiff that resolves the lawsuit and establishes specific timeframes under which the agency agrees to take the

¹ Memorandum from Edwin Meese, III, Attorney General, to All Assistant Attorneys General and All United States Attorneys entitled “Department Policy Regarding Consent Decrees and Settlement Agreements” (March 13, 1986) (copy attached). See also 28 C.F.R. 0.160(d).

procedural action. In many of these cases, the “successful” plaintiff is entitled by a separate statute to recover attorneys’ fees. Many have questioned the soundness of such a regime, especially given the sheer number of statutory deadlines. *See, e.g.,* Jacob E. Gersen & Anne Joseph O’Connell, *Deadlines in Administrative Law*, 156 U. Pa. L. Rev. 923, 925 & n.7, 939-42, 979-82 (2008). Usually, in those kinds of cases, the settlement has required some kind of procedural action by the agency (e.g., a decision on whether to issue a proposed rule by a certain date). A cost-benefit analysis would usually await for the substantive rulemaking stage, consistent with any applicable statutes providing for consideration of costs.

Questions submitted for the Record from Judiciary Ranking Member Conyers

1. In your prepared statement, you describe certain “course corrections in key areas within the purview” of your Division. One of these directives pertains to reducing regulatory burdens with regard to energy development. How is this directive compatible with the Administration’s apparent priority to protect clean air and clean water? If the Obama Administration’s Clean Power Plan were implemented, would that have helped to protect clean air and reduce global warming?

RESPONSE: As described in Executive Order 13783, the Administration believes that energy development should be done in a clean and safe manner and in compliance with our nation’s environmental laws. If the EPA, the Department of the Interior, or other agencies revise or rescind regulations relating to energy development, it is ENRD’s job to defend lawful agency actions if they are challenged in court. Further, ENRD will continue to vigorously enforce the nation’s criminal and civil environmental laws against violators in all sectors of the economy, including energy development. On this point, I would refer you to our ENRD website, <https://www.justice.gov/enrd/press-room>, which provides information about several recent enforcement cases, including cases against the energy sector where violations have occurred.

With regard to the Clean Power Plan (CPP), as I stated in my testimony to the Committee, I am recused from the existing CPP litigation. Specific questions related to the benefits associated with the CPP, including potential air quality improvements, are best addressed to EPA. Our client agencies, in this case EPA, develop policies and regulations for the protection of human health and the environment, consistent with federal statutes. ENRD defends the lawful actions of our client agencies and enforces federal environmental laws.

2. What are your views about the Endangered Species Act?

RESPONSE: The Endangered Species Act is a vital statute that provides valuable protection of fish, wildlife, and plant species that are at risk of extinction. As acting head of ENRD at the Department of Justice, my responsibility is to enforce laws like the Endangered Species Act and to defend the lawful actions of our client agencies

who implement it, including the Fish and Wildlife Service and the National Marine Fisheries Service. We are honored to serve these and other client agencies, and while some actions may be reviewed or reconsidered by our client agencies, we will continue to defend their actions to the extent they are challenged in court. Working closely with these and other federal agencies, we also use the criminal provisions of the Endangered Species Act and other wildlife protection statutes, such as the Lacey Act, to prosecute wildlife traffickers as part of the Administration's ongoing efforts to battle the scourge of wildlife trafficking. As recognized in Executive Order 13773, the Administration sees combating wildlife trafficking as an integral component of our broader efforts to dismantle transnational criminal organizations that present a threat to public safety and national security. The Department of Justice, along with the Departments of State and the Interior, co-chairs the 17-member Presidential Task Force on Wildlife Trafficking, which leads and coordinates a whole-of-government approach to addressing the global crisis in wildlife trafficking.

Questions submitted for the Record from Subcommittee Ranking Member Cicilline

1. In your written testimony, you state that your Division will be involved in the property condemnation process necessary to construct the Southwest Border Wall.

RESPONSE: That is correct. The Division's Land Acquisition Section handles, in cooperation with the U.S. Attorneys' Offices, all condemnation matters referred to the Department of Justice by a federal agency.

2. How many miles of Border Wall will need to be built? How many private properties will be needed to be confiscated for this project?

RESPONSE: Any decisions as to whether and how to proceed with construction of a Border Wall, including how many miles will be built and where it will be located, would be made by the Department of Justice's client agencies, including the Department of Homeland Security (DHS), consistent with applicable Congressional authorization. Generally, the United States-Mexico border is approximately 1,986 miles with 382 miles in Arizona, 141 miles in California, 181 miles in New Mexico, and 1,282 miles in Texas. I have been informed that, as it exists today, DHS has completed 654 miles of primary vehicle and pedestrian fencing. Of these 654 miles, 307 miles are located in Arizona, 116 miles in California, 116 miles in New Mexico, and 115 miles in Texas.

I have also been informed that at this early stage of development, DHS does not know how much additional land will be needed to construct a border wall and whether it will need to acquire land through condemnation. It is always DHS' preference to acquire private property through voluntary sale. However, in situations where voluntary acquisition is not possible, DHS may have to consider acquisition through condemnation.

3. How do you anticipate the Division's condemnation activity related to the Border Wall to affect low-income individuals, ranchers, or other persons who live along the border?

RESPONSE: Acquisition of land for federal public works projects is guided by the U.S. Constitution, which requires payment of just compensation based on fair market value. We take this constitutional duty very seriously. The Uniform Relocation Assistance and Real Property Acquisition Policies Act provides further direction for this process, ensuring that the government provides fair market value to all those who have a real property interest in the land being acquired, including residents, tenants, and ranchers. The Act also provides for payment of moving and business expenses as needed to landowners who may be displaced or otherwise affected by the acquisition of land for federal projects.

4. Will the Border Wall impinge on any environmentally sensitive areas or impact any endangered species? If so, will construction of the Border Wall trump these environmental concerns?

RESPONSE: As noted above, any decisions as to whether and how to proceed with construction of a Border Wall, including any necessary assessments of environmental impacts, would be made by the Department of Justice's client agencies, including the Department of Homeland Security. Section 102(b)(1)(C) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. §1103 note) states, "the Secretary of Homeland Security shall consult with the Secretary of the Interior, the Secretary of Agriculture, States, local governments, Indian tribes, and property owners in the United States to minimize the impact on the environment, culture, commerce, and quality of life for the communities and residents located near the sites at which such fencing is to be constructed." In the REAL ID Act of 2005 (Pub. L. No. 109-13), Congress also authorized the Secretary of the Department of Homeland Security to elect to waive otherwise-applicable legal requirements if he/she deems it necessary. ENRD's role is to defend the lawful actions of our client agencies, in this case the Department of Homeland Security.

5. Will the ENRD comply with the National Environmental Policy Act, the Endangered Species Act, and other applicable environmental protection statutes while acquiring privately owned lands for the purpose of constructing the Border Wall?

RESPONSE: Any decisions as to whether the National Environmental Policy Act, the Endangered Species Act, or other environmental protection statutes apply, and how best to comply with these and other statutes while pursuing their priorities and mandates, are made by the Division's client agencies. The Division is responsible for defending lawsuits alleging that a federal agency decision does not comply with the environmental laws, including the National Environmental Policy Act, the Endangered Species Act, and other environmental protection statutes.

The Civil Division and ENRD are also responsible for defending any decisions by our client agencies to waive any such requirements consistent with other applicable law.

Questions submitted for the Record from Congresswoman Jayapal

1. Since 2008, climate scientists in peer-reviewed research have recommended reducing atmospheric CO2 concentrations to 350ppm or less in order to avoid extreme risks of harm to current and future generations and irreversible climate change impacts, like sea level rise and species extinction. Since then, the two degree Celsius level of global warming above the preindustrial global average temperature was selected as a politically achievable target through the United Nations Framework Convention on Climate Change. How are you working within your division and with other agencies to ensure that this goal is met in order to prevent the negative public health and environmental impacts of climate change?

RESPONSE: Climate change is an important issue and I appreciate the significant body of work that is going into understanding the interaction of man-made emissions of greenhouse gases and broader dynamics. At this time, the United States is not subject to any legally binding target set through the United Nations Framework Convention on Climate Change. Our focus is on enforcing and defending the laws of the United States. Our client agencies, such as EPA and the Interior Department, develop policies and regulations for the protection of human health and the environment, consistent with federal statutes. ENRD will continue to vigorously defend the lawful actions of our client agencies and enforce federal environmental laws.

Attachment



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

13 March 1986

MEMORANDUM

TO: All Assistant Attorneys General
All United States Attorneys

FROM: EDWIN MEESE III *aw*
Attorney General

SUBJECT: Department Policy Regarding Consent
Decrees and Settlement Agreements

The following policy is adopted to guide government attorneys involved in the negotiating of consent decrees and settlements. Adopted pursuant to the Attorney General's litigation and settlement authority, these guidelines are designed to ensure that litigation is terminated in a manner consistent with the proper roles of the Executive and the courts. They are to be followed in all cases tried by counsel under the direction of the Attorney General.

I. General Policy on Consent
Decrees and Settlement Agreements

Consent decrees are negotiated agreements that are given judicial imprimatur when entered as an order of the court. Because of their unique status as both contract and judicial act, consent decrees serve as a useful device for ending litigation without trial, providing the plaintiff with an enforceable order, and insulating the defendant from the ramifications of an adverse judgement. In the past, however, executive departments and agencies have, on occasion, misused this device and forfeited the prerogatives of the Executive in order to preempt the exercise of those prerogatives by a subsequent Administration. These errors sometimes have resulted in an unwarranted expansion of the powers of judiciary -- often with the consent of government parties -- at the expense of the executive and legislative branches.

The executive branch and the legislative branch may be unduly hindered by at least three types of provisions that have been found in consent decrees:

1. A department or agency that, by consent decree, has agreed to promulgate regulations, may have relinquished its power to amend those regulations or promulgate new ones without the participation of the court.

2. An agreement entered as a consent decree may divest the department or agency of discretion committed to it by the Constitution or by statute. The exercise of discretion, rather than residing in the Secretary or agency administrator, ultimately becomes subject to court approval or disapproval.

3. A department or agency that has made a commitment in a consent decree to use its best efforts to obtain funding from the legislature may have placed the court in a position to order such distinctly political acts in the course of enforcing the decree.

In Section II these guidelines address each of these concerns and limit authority to enter into consent decrees that would require the Secretary or agency administrator to revise, amend or promulgate regulations; that would require the Secretary or agency administrator to expend funds which Congress has not appropriated, or to seek appropriations from Congress; or that would divest the Secretary or the agency administrator of discretion granted by the Constitution or by statute.

These limitations on entry into consent decrees that might include such provisions are required by the executive's position; that it is constitutionally impermissible for the courts to enter consent decrees containing such provisions where the courts would not have had the power to order such relief had the matter been litigated.

The limitations in Section II.A. of the guidelines are not intended to discourage termination of litigation through negotiated settlements. The Attorney General has plenary authority to settle cases tried under his direction, including authority to enter into settlement agreements on terms that a court could not order if the suit were tried to conclusion. Settlement agreements -- similar in form to consent decrees, but not entered as an order of the court -- remain a perfectly permissible device for the parties and should be strongly encouraged. Section II.B., however, places some restrictions on the substantive provisions which may properly be included in settlement agreements. For example, Section II.B.1. allows a department or agency to agree in a settlement document to revise, amend, or promulgate new regulations, but only so long as the department or agency is not precluded from changing those regulations pursuant to the APA. Similarly, under Section II.B.2. the Secretary or agency administrator may agree to exercise his discretion in a particular manner, but may not divest himself entirely of the power to exercise that discretion as necessary in the future. The guidelines further provide that in certain circumstances where the agreement constrains agency discretion, a settlement agreement should specify that the only sanction for the government's failure to comply with a provision of a settlement agreement shall be the revival of the suit. Revival of the suit as the sole remedy removes the danger of a judicial order

awarding damages or providing specific relief for breach of an undertaking in a settlement agreement.

Finally, it must be recognized that the Attorney General has broad flexibility and discretion in the conduct of litigation to respond to the realities of a particular case. Such flexibility can be exercised by the Attorney General in granting exceptions to this policy.

II. Policy Guidelines on Consent Decrees and Settlement Agreements

A. Consent Decrees

A department or agency should not limit its discretion by consent decree where it would assert that a similar limitation imposed by injunction unduly or improperly constrains executive discretion. In particular, the Department of Justice will not authorize any consent decree limiting department or agency authority in the following manner:

1. The department or agency should not enter into a consent decree that converts into a mandatory duty the otherwise discretionary authority of the Secretary or agency administrator to revise, amend, or promulgate regulations.

2. The department or agency should not enter into a consent decree that either commits the department or agency to expend funds that Congress has not appropriated and that have not been budgeted for the action in question, or commits a department or agency to seek a particular appropriation or budget authorization.

3. The department or agency should not enter into a consent decree that divests the Secretary or agency administrator, or his successors, of discretion committed to him by Congress or the Constitution where such discretionary power was granted to respond to changing circumstances, to make policy or managerial choices, or to protect the rights of third parties.

B. Settlement Agreements

The Department of Justice will not authorize any settlement agreement that limits the discretion of a department or agency in the following manner:

1. The department or agency should not enter into a settlement agreement that interferes with the Secretary or agency administrator's authority to revise, amend, or promulgate regulations through the procedures set forth in the Administrative Procedure Act.

2. The department or agency should not enter into a settlement agreement that commits the Department or agency to

expend funds that Congress has not appropriated and that have not been budgeted for the action in question.

In any settlement agreement in which the Secretary or agency administrator agrees to exercise his discretion in a particular way, where such discretionary power was committed to him by Congress or the Constitution to respond to changing circumstances, to make policy or managerial choices, or to protect the rights of third parties, the sole remedy for the department or agency's failure to comply with those terms of the settlement agreement should be the revival of the suit.

C. Exceptions

The Attorney General does not hereby yield his necessary discretion to deal with the realities of any given case. If special circumstances require any departure from these guidelines, such proposed departure must be submitted for the approval of the Attorney General, the Deputy Attorney General, or the Associate Attorney General at least two weeks before the consent decree is to be entered, or the settlement agreement signed, with a concise statement of the case and of reasons why departure from these guidelines will not tend to undermine their force and is consistent with the constitutional prerogatives of the executive or the legislative branches. Written approval of the Attorney General, the Deputy Attorney General, or the Associate Attorney General will be required to authorize departure from these guidelines.

COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL AND
ANTITRUST LAW

QUESTIONS FOR THE RECORD TO
DAVID A. HUBBERT
ACTING ASSISTANT ATTORNEY GENERAL
TAX DIVISION
U.S. DEPARTMENT OF JUSTICE

Question for the Record from Subcommittee Chairman Marino

The Sixth Circuit, in *U.S. v. NorCal Tea Party Patriots*, issued this opinion: "the government is doing everything it possibly can, to make this as complicated as it possibly can, to last as long as it possibly can, so that by the time there is a result, nobody is going to care except the plaintiffs... I question whether or not the Department of Justice is doing Justice." These are serious allegations from the Court. How has your division in particular responded to these allegations? Will you speak directly with the attorneys involved?

RESPONSE: *NorCal Tea Party Patriots, et al. v. Internal Revenue Service, et al.* (S.D. Ohio - 6th Cir.) is currently pending before the district court. While I cannot discuss the specific pending case, I can tell you that the Department is committed to ensuring that allegations of misconduct are thoroughly investigated and that any substantiated findings of misconduct are properly addressed through the disciplinary process. Every time a court makes a comment on the manner in which the Tax Division has handled a case or the arguments we have made, I review those with the supervisors involved in that case. The Tax Division's attorneys will continue to work to live up to the highest standards of the Department of Justice in representing the interests of the United States and fully and fairly enforcing the tax laws.

COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL AND
ANTITRUST LAW

QUESTIONS FOR THE RECORD TO
CLIFFORD J. WHITE III
DIRECTOR
U.S. TRUSTEE PROGRAM
U.S. DEPARTMENT OF JUSTICE

Questions submitted for the Record from Subcommittee Chairman Marino

Asbestos Trusts

1. Can you further elaborate on the statement you made at the hearing regarding the need for greater accountability for asbestos trusts?

RESPONSE: There is a general lack of transparency in the operation and oversight of post-confirmation trusts, especially asbestos trusts. Among others things, there is a lack of reporting on the operations of such trusts and no clear recourse for stakeholders to challenge the claims review process or the administration of trust operations. The ABI Commission to Study the Reform of Chapter 11, on which I served as a non-voting *ex officio* member, recommended legislative changes to improve the corporate governance and transparency of post-confirmation trusts (although it did not address asbestos trusts specifically).

Bankruptcy courts and the United States Trustees have limited statutory oversight authority following plan confirmation, so the standards and mechanisms of accountability that pertain to chapter 11 debtors do not apply to post-confirmation trusts. For example, the claims process is conducted without court review and generally is not subject to independent investigation. As a general principle, this lack of oversight and accountability may create opportunities for improper, unfair, or unwise conduct that are not easily remedied.

In the case of asbestos trusts, the debtor usually has little incentive to ensure that the claims process is conducted properly because the debtor pays an agreed upon amount of money into the trust that is then used to pay current and future tort victims. The integrity of the claims process does not impact the reorganized debtor, which can carry on its business after discharge of its asbestos liability. By contrast, claimants suffering from asbestos disease, as well as those not yet diagnosed, may be adversely affected because the payment of illegitimate claims may dilute the amount of recoveries available to them.

The potential magnitude of the problem with asbestos trusts was identified in the case of *In re Garlock Sealing Technologies*, 504 B.R. 71 (Bankr. W.D.N.C. 2014). The debtor

corporation challenged the aggregate amount of its asbestos liability for the purpose of formulating a plan of reorganization and establishing a trust in a claims estimation proceeding. *Garlock* is unusual because the debtor challenged its liability and obtained discovery about claims filed in other companies' cases. The debtor compared the claimants' assertions in other bankruptcy cases to their assertions against Garlock in non-bankruptcy state tort actions about which companies exposed them to asbestos. The bankruptcy court ultimately concluded that the asbestos claimants had filed inconsistent claims in a "startling pattern of misrepresentation" of exposure and determined that the debtor was liable for less than one-tenth of the \$1.3 billion that the plaintiffs claimed was owed. The parties ultimately settled for an amount greater than the court's estimation, but still 63 percent less than the claimants' initial valuation.

2. Certain state attorneys general are investigating whether false claims submitted to asbestos trusts violate state laws, including state false claims acts. In fact, the Utah Attorney General has filed a legal action under the Utah False Claims Act based on the theory that Utah's Medicaid program may have been defrauded as a result of false claims submitted to asbestos trusts. The Federal government could also examine whether Medicare has been defrauded as a result of similar false claims under the federal False Claims Act. Would you consider a parallel federal investigation?

RESPONSE: As noted in response to the previous question, we recognize that significant concerns have been raised about the administration of post-confirmation asbestos trusts. Generally, the existence of other federal and state investigations and legal actions is not a bar to USTP civil enforcement of bankruptcy violations in bankruptcy court. In many instances, misconduct that violates bankruptcy law also violates other federal or state laws. We conduct parallel investigations and where appropriate make criminal referrals to the United States Attorney as provided in 28 U.S.C. § 586(a)(3)(F). The USTP also may refer civil enforcement matters to other Department of Justice components and other federal or state agencies if we obtain information that non-bankruptcy laws appear to have been violated.

The USTP lacks statutory authority to conduct an investigation into asbestos trusts because those trusts operate post-confirmation. Our post-confirmation authorities generally pertain only to pre-confirmation matters, like the review of estate professionals' fees, that continue under the jurisdiction of the court after confirmation of a reorganization plan. Notably, by statute, the USTP has even less pre-confirmation authority in asbestos cases than in other chapter 11 cases. For example, under 11 U.S.C. § 524(g)(4)(B)(i), a future claims representative (FCR) is appointed before confirmation in asbestos bankruptcy cases to serve as a fiduciary for those who have not yet been diagnosed, but who later may suffer from asbestos disease. The USTP plays no role in the selection of a FCR, which is in contrast to its authority to appoint other independent persons to serve as fiduciaries in chapter 11 cases.

Credit Counseling

3. The Chairman of the Senate Judiciary Committee wrote to you recently about the need to strengthen pre-bankruptcy credit counseling for financially distressed consumers under the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act. The pre-bankruptcy counseling statute 11 U.S.C. 502(k) explicitly provides that banks and other lenders can be punished if consumers seek to settle debts prior to filing a bankruptcy and the lender does not engage in a debt reduction negotiation. What steps will you take to ensure that this required pre-bankruptcy counseling provides an opportunity for consumer to obtain reduced balance settlements?

RESPONSE: We agree that the debt settlement provisions of 11 U.S.C. § 502(k) provide an important consumer protection. Under USTP regulations governing nonprofit budget and credit counseling agencies, 28 C.F.R. § 58.20(l)(9), any counseling agency that does not provide the service of seeking to settle the client's debts with creditors shall provide the client with contact information for an approved agency that does perform such service. It is important that the USTP review agency compliance on an ongoing basis and ensure that credit counselors provide a meaningful review of non-bankruptcy options, including developing viable repayment plans.

Questions submitted by Judiciary Ranking Member John Conyers, Jr.

1. In your prepared statement, you mention that the number of motions filed by the U.S. Trustee Program to dismiss consumer cases deemed to be abusive "significantly increased" in fiscal year 2016. Please be specific what the numbers were for fiscal years 2015 and 2016, respectively. Does the U.S. Trustee Program encourage Chapter 13 trustees to object to stale proofs of claim?

RESPONSE: The USTP takes a balanced approach to its civil enforcement efforts to redress fraud and abuse in the bankruptcy system. Although a majority of the actions are taken to address debtor violations, the USTP also focuses significant efforts on remedying wrongdoing by creditors and others who seek to exploit debtors.

While motions to dismiss against consumer debtors relating to the means test under 11 U.S.C. § 707(b)(2) were down in FY 2016, actions focusing on more serious conduct, such as the concealment of assets and false oaths, increased. Further, in my prepared statement, I specifically referenced an upturn in the number of actions taken under 11 U.S.C. § 707(b)(3) to dismiss cases that are deemed abusive under a bad faith or totality of the circumstances standard. Between FY 2015 and FY 2016, the USTP saw an increase of 5 percent in such actions (from 673 to 707), with an overall success rate of nearly 98 percent for those motions that were decided during FY 2016.

As to your question about objections to stale debt claims (*i.e.*, claims that are beyond the state statute of limitations and must be withdrawn or denied upon objection), the USTP has actively encouraged trustees to object to such claims. For example, the

Handbook for Chapter 13 Standing Trustees addresses the obligation to object to claims, and trustee training materials issued in 2014 specifically addressed stale debt claims. This topic also has been addressed in communications with the National Association of Chapter Thirteen Trustees (NACTT), including as recently as in a speech delivered by me on July 13, 2017, at the NACTT's annual convention. According to an informal survey conducted by the NACTT, more than one-half of the trustees who responded said they file objections to stale debt claims.

In addition to the efforts of the chapter 13 trustees in individual cases, the USTP has conducted major investigations into stale debt claims practices and taken enforcement action in which we assert that a creditor's knowing filing of a large volume of stale debt claims constitutes an abuse of the bankruptcy process that may be remedied by injunctive and monetary relief. We have sought court adjudication and these matters remain pending.

2. In your prepared statement, you mention that the United States Trustee Program has an initiative directed at attorneys for consumer debtors who engage in professional misconduct. What initiative, if any, does the Program have to deal with the misconduct of attorneys who represent creditors?

RESPONSE: Identifying and remedying improper conduct by debtors' counsel is an important part of the USTP's consumer protection efforts. Failure of counsel to satisfy their obligations under the Bankruptcy Code and Rules is detrimental not only to debtors, but also to trustees, creditors, the courts, and the entire bankruptcy system. The USTP fully utilizes the tools given to us by Congress to address misconduct by consumer debtors' attorneys.

As noted in my testimony, between FY 2015 and FY 2016, the USTP increased the number of actions taken under 11 U.S.C. §§ 329 and 526 pertaining to the conduct of debtors' lawyers and debt relief agencies by more than 30 percent combined. The primary beneficiaries of these actions are the debtors themselves. In fact, the remedy usually provided under section 329 is the disgorgement of fees that were paid by the debtor. The USTP also is active in seeking other legal remedies for misconduct by debtors' attorneys.

Though the USTP has not defined a specific initiative to address improper conduct by creditors' counsel, we do act to address such conduct when identified. For example, the USTP previously entered into a settlement with a multi-state law firm representing mortgage creditors for misconduct related to the filing of proofs of claim and motions for relief from the automatic stay that contained inaccurate arrearage figures. As part of the settlement, the law firm agreed to implement policies and procedures to ensure accurate filings in compliance with the Bankruptcy Code and Rules, including designating a firm partner to execute a verified statement regarding the review performed in each case.

Importantly, for more than a decade, the USTP has given enforcement priority to addressing abuse of the system by creditors. Among other things, we have reached six nationwide settlements against national mortgage servicers for violating the Bankruptcy Code and Rules, and taken other actions against unsecured claimants, including those holding credit card debt. Our actions in bankruptcy court alone have provided more than 100,000 homeowners with well over \$100 million in monetary relief. Other USTP settlements with our federal and state partners have provided billions of dollars in relief to hundreds of thousands of consumers, including homeowners in chapter 13.

- a. If an attorney for a creditor knowingly files a false proof of claim, what does the Program do about that?

RESPONSE: Often, creditor claims are filed by the creditor or their agents, not by their lawyers. If we have evidence that an attorney for a creditor knowingly filed a false claim, we would take appropriate civil action. In addition to enforcement actions in the bankruptcy court, the USTP may refer the attorney to state licensing and disciplinary authorities for violations of state ethical rules, as well as make a criminal referral to the United States Attorney as provided in 28 U.S.C. § 586(a)(3)(F).

- b. What does the Program do about a creditor's attorney who routinely files statutorily time-barred proofs of claim in bankruptcy cases?

RESPONSE: In cases we have investigated, stale debt claims are filed by creditors or their agents, not their lawyers. The focus of our discovery and enforcement actions have been on the creditors in whose name the claims were filed and the debt collectors who filed the claims on behalf of those creditors. As noted in our response to your question 1 above, we are engaged in intensive, ongoing litigation concerning the knowing filing of stale debt claims, so it would not be appropriate to discuss all possible parties who might be subject to sanctions if we prevail on the merits.

