FEDERAL BUREAU OF INVESTIGATION
FOI/PA DELETED PAGE INFORMATION SHEET
FOIPA Request No.: 1399934-000
Civil Action No.: 18-cv-1766

Total Withheld Page(s) = 181

Bates Page Reference	Reason for Withholding (i.e., exemptions with coded rationale, duplicate, sealed by order of court, etc.)
18-cv-01766-9 – 18-cv-01766-11	(b)(6)-1, (b)(7)(C)-1
18-cv-01766-14 – 18-cv-01766-17	(b)(6)-1, (b)(7)(C)-1
18-cv-01766-20 – 18-cv-01766-40	Direct Referral to Department of Justice/ Office of Inspector General
18-cv-01766-369 – 18-cv-01766-521	Direct Referral to Department of Justice/ Office of Inspector General

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X   Deleted Page(s)      X
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X   For this Page        X
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DATE 04-05-2018 BY [redacted] NSICG

INSD CASE OPENING FORM

b6 -1
b7C -1

DATE OPENED: _____ *Critical Case #:* _____

FULL INQUIRY *BUFILE#:* 263D-HQ- [redacted]

FBI INVESTIGATION *CASE SUPERVISOR:* A/UC [redacted]

b6 -1
b7C -1

NON-DELEGATED

DATE REPORTED: 3/14/2018 *DATE OF EVENT:* _____

COMPLAINANT/SOURCE: Director's Office

EMPLOYEE: MCCABE, ANDREW G. [redacted]

b6 -1
b7C -1

DIVISION: 00 ***NOTIFICATION?*** **No**

ALLEGATION: released sensitive information to the Wall Street Journal and lacked candor not under oath and under oath when questioned about it in violation of Offense Codes 4.10 (Unauthorized Disclosure - Sensitive Information); 2.5 (Lack of Candor/Lying - No Oath); and 2.6 (Lack of Candor/Lying - Under Oath).

VIOLATION CODES: 2.5, 2.6, 4.10

O & A TO:
A/UC [redacted]
03/14/2018
[redacted]

b6 -1
b7C -1

FBI 18-cv-01766-1

UC IPU [redacted] 03/14/2018
SC IIS Hinckley
A/UC IIU or IPU [redacted]

b6 -1
b7C -1

O&A to IIU (2.5, 2.6, 2.10)
03/14/2018 [redacted]

263D-HQ-[redacted]-1
263-HQ-0[redacted]

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HEREIN IS UNCLASSIFIED
DATE 04-05-2018 BY [redacted] NSICG

[redacted] (INSD) (FBI) b6 -1 b7C -1

b6 -1
b7C -1

From: HINCKLEY, SCOTT M. (INSD) (FBI)
Sent: Wednesday, March 14, 2018 2:55 PM
To: [redacted] (DO) (FBI)
Cc: [redacted] (INSD) (FBI [redacted] INSD) (FBI)
Subject: RE: new case --- UNCLASSIFIED

b6 -1
b7C -1

SentinelCaseId: NON-RECORD

OIG/DOJ Review: _____ Date: _____
FBI INVEST: _____ OIG/DOJ INVEST: I
03/14/2018 per OPR-FBI

Classification: UNCLASSIFIED
==========

Copy. File jacket being prepared. Thanks.

Scott M. Hinckley
Inspection Division
Chief - Internal Investigations Section
[redacted]

b6 -1
b7C -1

From [redacted] (DO) (FBI)
Sent: Wednesday, March 14, 2018 12:16 PM
To: HINCKLEY, SCOTT M. (INSD) (FBI) [redacted] (DO) (FBI) [redacted]
Subject: new case --- UNCLASSIFIED

b6 -1
b7C -1

Classification: UNCLASSIFIED
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Scott,

As discussed, please open a new 263 number based on the OIG's report, dated February 2018, titled "A Report of Investigation of Certain Allegations Relating to Former FBI Deputy Director Andrew McCabe." The report alleges that Deputy Director McCabe lacked candor under oath and not under oath when questioned regarding disclosures to the Wall Street Journal, in violation of FBI Offense Codes 2.6 and 2.5. Additionally, the report alleges that Deputy Director McCabe released sensitive information to the Wall Street Journal, in violation of FBI Offense Code 4.10.

OPR received the OIG report on February 28, 2018.

Thank you.

[redacted]

b6 -1
b7C -1

[redacted]

Unit Chief, AU-II
Office of Professional Responsibility
Office [redacted]
Samsung: [redacted]

b6 -1
b7C -1

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Classification: UNCLASSIFIED

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Classification: UNCLASSIFIED

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 04-05-2018 BY [redacted] NSICG

b6 -1
b7C -1

14:57:30.4 CURRENT INFORMATION [redacted]

NAME: MR ANDREW G MCCABE EMPLOYEE ID: [redacted] SEX: M
SSN: [redacted]
ADJ. EOD: 07/07/1996 ADJ. AGENT EOD: 07/07/1996 DOB: [redacted]

b6 -1
b7C -1

OFFICE: 0015 DEPUTY DIRECTOR SQUAD:
RA :
TITLE : SUPVY SPECIAL AGENT-DEPUTY DIR FBI
ORG TITLE : DEP DIR

PSTN NUMBER: 400141 SERIES : 1811 LAST GRADE CHANGE: 09/27/2009
SALARY : 187,000.00 GRADE STEP : ES-0-0
LOC/LEO PAY: LOC/LEO PCT : CMSA: WA FILE NUM : [redacted]
ADJ SALARY : 187,000.00 PRD : 0 SRTN: SUPV: 2 CLEARANCE : TOP SECRET

b6 -1
b7C -1

EXTENSION: [redacted] ROOM: [redacted] WORK PHONE: [redacted] BLDG: JEH

b6 -1
b7C -1

military ϕ

DMS

PF1 HSTY	PF2 RATING	PF3 WRK SCD	PF4 EDUC	PF5 SKILL	PF6 INSERV	PF7 MLTY	PF8 LANG	PF9 TRAING	PF10 TRNSFR
PF11 PROP	PF12 MISC	PF13 RETIR	PF14 ADDR	PF15 DATES	PF16 INSURE	PF17 LEAV	PF18 PRL	PF19	PF20 EXIT

CMS related

4AÛ 02,001

INSPECTION . VISION
Internal Investigations Section

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DATE 04-05-2018 BY [redacted] NSICG

b6 -1
b7C -1

COMPLAINT # [redacted] **UNCLASSIFIED**

Date Received 03/15/2017 **Handled** 03/16/2017 **RESTRICTED** ☐

Referred By DIVISION **Reporting Division** 00

ASSIGNED TO [redacted] **Div Aware Date** 02/21/2017

b6 -1
b7C -1

Complaint Document

Type E-MAIL

Date 03/09/2017 **Untimely Reporting** ☐

File Name [redacted] pdf

OIG Number(s)

(R)
2017 [redacted])

b6 -1
b7C -1

Occurrence Location **Occurrence Date**

City WASHINGTON

State DISTRICT OF COLUMBIA

Country USA

Identified Person(s)

SUBJECT - UNKNOWN
WITNESS - [redacted] (Assistant Director)
WITNESS [redacted] (Assistant Director)
WITNESS - [redacted] (Citizen)
WITNESS - ANDREW G MCCABE (Deputy Director)

b6 -2
b7C -2

Categories for Tracking Purposes Only

4.10 - Unauthorized Disclosure - Sensitive Information

b6 -3
b7C -3

Details

OPA EM was electronically contacted by [redacted] regarding a media leak involving a statement overheard in early February 2017, allegedly made by FBI EM. Specifically, the alleged comments were made by DD A. G. McCabe and pertained to General Michael T. Flynn and the POTUS.

Recommended Actions

3/20/2017	[redacted]	FULL INVESTIGATION	O&A to IIU, 4.10. **Approved By** [redacted] **on 03/20/2017**
3/20/2017	[redacted]	FULL INVESTIGATION	O&A to IIU to monitor OIG investigation, 4.10 **Approved By: VDMORGAN on 03/20/2017**
3/20/2017	VDMORGAN	FULL INVESTIGATION	I concur. **Approved By: VDMORGAN on 03/20/2017**

b6 -1
b7C -1

For more details go to:

263D-HQ [redacted]

263-HQ-ZERO Serial [redacted]

b6 -1
b7C -1

General Information:

03/16/2017 [redacted] RESEARCH PACKET: BIO sheetd for DD A.G. McCabe, [redacted] and [redacted]

(Obtained from internet - GOOGLE search): BIO sheet for [redacted] Research.pdf]

03/16/2017 [redacted] STATUS: Complaint packet was provided to MAPA [redacted] for review.

03/20/2017 STATUS: Sent to SSA [redacted] for review.

03/21/2017 NOTE: O&A serialized and forwarded to [redacted]

b6 -2
b7C -2

b6 -1, 2
b7C -1, 2

This document is an internal product of the Internal Investigations Section (IIS), Inspection Division, and should not be disseminated without IIS approval.

FBI 18-cv-01766-6

09:21:23.6 CURRENT INFORMATION [redacted]

NAME: MR ANDREW G MCCABE EMPLOYEE ID: [redacted] SEX: M b6 -1 b7C -1
SSN: [redacted]
ADJ. EOD: 07/07/1996 ADJ. AGENT EOD: 07/07/1996 DOB: [redacted]

OFFICE: 0015 DEPUTY DIRECTOR SQUAD:
RA :
TITLE : SUPVY SPECIAL AGENT-DEPUTY DIR FBI
ORG TITLE : DEP DIR

b6 -1 b7C -1

PSTN NUMBER: 400141 SERIES : 1811 LAST GRADE CHANGE: 09/27/2009
SALARY : 187,000.00 GRADE STEP : ES-0-0 b6 -1 b7C -1
LOC/LEO PAY: LOC/LEO PCT : CMSA: WA FILE NUM : [redacted]
ADJ SALARY : 187,000.00 PRD : 0 SRTN: SUPV: 2 CLEARANCE : TOP SECRET

EXTENSION: [redacted] ROOM: [redacted] WORK PHONE: [redacted] BLDG: JEH b6 -1 b7C -1

PF1 HSTY	PF2 RATING	PF3 WRK SCD	PF4 EDUC	PF5 SKILL	PF6 INSERV	PF7 MLTY	PF8 LANG	PF9 TRAING	PF10 TRNSFR
PF11 PROP	PF12 MISC	PF13 RETIR	PF14 ADDR	PF15 DATES	PF16 INSURE	PF17 LEAV	PF18 PRL	PF19	PF20 EXIT

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263D-HQ-

FBI 18-cv-01766-7

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09:21:30 [redacted]

PERFORMANCE APPRAISAL INFORMATION

ANDREW G MCCABE [redacted]

b6 -1
b7C -1

b6 -1
b7C -1

b6 -1
b7C -1

ANDREW G MCCABE [redacted] [redacted]

	UNIT	ACT	ACTION	EFF	GRADE	TITLE	NFC PP
1	[redacted]						
2							
3							
4							
5							
6	0017	542	CONV TO SES CAR	09/27/2009	ES 00	SUPVY SPECIAL AGENT	20
7	0017	849	INDIV CASH AWAR	09/30/2009	ES 00	SUPVY SPECIAL AGENT	22
8	4420	721	REASSIGNMENT	06/06/2010	ES 00	SUPVY SPECIAL AGENT	12
9	4420	903	CHG IN NON-CPDF	11/18/2010	ES 00	SUPVY SPECIAL AGENT	23
10	4420	879	SES PERFORMANCE	12/15/2010	ES 00	SUPVY SPECIAL AGENT	25
11	4420	721	REASSIGNMENT	04/10/2011	ES 00	SUPVY SPECIAL AGENT-	11
12	1300	721	REASSIGNMENT	06/05/2011	ES 00	SUPVY SPECIAL AGENT-	12
13	1300	890	MISC PAY ADJ	06/05/2011	ES 00	SUPVY SPECIAL AGENT-	20
14	1300	879	SES PERFORMANCE	12/02/2011	ES 00	SUPVY SPECIAL AGENT-	24
15	1300	721	REASSIGNMENT	06/17/2012	ES 00	SUPVY SPECIAL AGENT-	13
16	1300	890	MISC PAY ADJ	06/17/2012	ES 00	SUPVY SPECIAL AGENT-	14

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ENTER THE NUMBER FOR DETAILED INFORMATION OR 'PF3' TO QUIT: ..

F3=EXIT F7=BKWD F8=FWD F12=CANCEL

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b6 -1
b7c -1

ANDREW G MCCABE

	UNIT	ACT	ACTION	EFF	GRADE	TITLE	NFC PP
1	1300	879	SES PERFORMANCE	12/02/2012	ES 00	SUPVY SPECIAL AGENT-	25
2	1300	903	CHG IN NON-CPDF	08/25/2013	ES 00	SUPVY SPECIAL AGENT-	17
3	0017	721	REASSIGNMENT	11/17/2013	ES 00	SUPVY SPECIAL AGENT-	23
4	0017	890	MISC PAY ADJ	11/17/2013	ES 00	SUPVY SPECIAL AGENT-	23
5	0017	890	MISC PAY ADJ	01/26/2014	ES 00	SUPVY SPECIAL AGENT-	3
6	0017	879	SES PERFORMANCE	02/23/2014	ES 00	SUPVY SPECIAL AGENT-	4
7	3920	721	REASSIGNMENT	08/10/2014	ES 00	SUPVY SPECIAL AGENT-	16
8	3920	002	CORRECTION	08/10/2014	ES 00	SUPVY SPECIAL AGENT-	21
9	3920	878	PRESIDENTIAL RA	12/04/2014	ES 00	SUPVY SPECIAL AGENT-	26
10	0040	721	REASSIGNMENT	09/06/2015	ES 00	ASSOCIATE DEPUTY DIR	18
11	0040	890	MISC PAY ADJ	09/06/2015	ES 00	ASSOCIATE DEPUTY DIR	18
12	0040	890	MISC PAY ADJ	01/10/2016	ES 00	ASSOCIATE DEPUTY DIR	1
13	0015	721	REASSIGNMENT	02/07/2016	ES 00	SUPVY SPECIAL AGENT-	3
14	0015	879	SES PERFORMANCE	11/13/2016	ES 00	SUPVY SPECIAL AGENT-	23
15	0015	890	MISC PAY ADJ	01/08/2017	ES 00	SUPVY SPECIAL AGENT-	1
16							

ENTER THE NUMBER FOR DETAILED INFORMATION OR 'PF3' TO QUIT: ..
F3=EXIT F7=BKWD F12=CANCEL
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INSPECTION DIVISION
INTERNAL INVESTIGATIONS SECTION
ROUTING SLIP

INSD Front Office (Room [redacted]

- ☐ AD Nancy McNamara
- ☐ Sec. [redacted]
- ☐ DAD Ronald Twersky
- ☐ Sec. [redacted]

b6 -1
b7C -1

Internal Investigations Section (Room [redacted]

- ☐ SC Scott M. Hinckley

b6 -1
b7C -1

Initial Processing Unit (Room [redacted]

- ☐ UC [redacted]
- ☐ SSA [redacted]
- ☐ SMAPA [redacted]
- ☐ MAPA [redacted]
- ☐ MAPA [redacted]
- ☐ CRS [redacted]
- ☐ CRS [redacted]
- ☐ CRS [redacted]

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Internal Investigations Unit (Room [redacted]

- ☐ UC [redacted]
- ☐ CRA [redacted]
- ☐ SSA [redacted]
- ☐ SSA [redacted]
- ☐ SSA [redacted]
- ☐ SSA [redacted]
- ☐ SSA [redacted]
- ☐ MAPA [redacted]
- ☐ SSA [redacted]
- ☐ SSA [redacted]
- ☐ SSA [redacted]

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(1) ☒

Office of Inspector General (Room [redacted]

- ☐ ASAC Jim M. Kirdar

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Office of Professional Responsibility [redacted]

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Adjudication I

- ☐ UC [redacted]

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Adjudication II [redacted]

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Comments:

CASE FILE READY FOR OPR. [redacted]

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- ☐ For Signature
- ☒ For Action
- ☐ For Comment
- ☐ For Information Only

(Revised 12/21/2016)

From: SSA [redacted]
Room [redacted] Ext.: [redacted]
Internal Investigations Section
Inspection Division

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2621-HQ- [redacted] -3

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Picked up from
INSD on
3/14/18

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OVERSIGHT OF THE STATE DEPARTMENT

HEARING

BEFORE THE

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTEENTH CONGRESS

SECOND SESSION

JULY 7, 2016

Serial No. 114–67

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263D- HQ- [redacted] -U

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b7C -1

FBI 18-cv-01766-41

OVERSIGHT OF THE STATE DEPARTMENT

HEARING

BEFORE THE

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTEENTH CONGRESS

SECOND SESSION

JULY 7, 2016

Serial No. 114–67

Printed for the use of the Committee on Oversight and Government Reform

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WILLIAM MARX, *Clerk*

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OVERSIGHT OF THE STATE DEPARTMENT

Thursday, July 7, 2016

HOUSE OF REPRESENTATIVES,
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,
WASHINGTON, D.C.

The committee met, pursuant to call, at 10:04 a.m., in Room 2154, Rayburn House Office Building, Hon. Jason Chaffetz [chairman of the committee] presiding.

Present: Representatives Chaffetz, Mica, Duncan, Jordan, Walberg, Amash, Gosar, DesJarlais, Gowdy, Farenthold, Lummis, Massie, Meadows, DeSantis, Mulvaney, Buck, Walker, Blum, Hice, Russell, Carter, Grothman, Hurd, Palmer, Cummings, Maloney, Norton, Clay, Lynch, Cooper, Connolly, Cartwright, Duckworth, Kelly, Lawrence, Lieu, Watson Coleman, Plaskett, DeSaulnier, Boyle, Welch, and Lujan Grisham.

Chairman CHAFFETZ. The Committee on Oversight and Government Reform will come to order.

Without objection, the chair is authorized to declare a recess at any time.

I want to thank Director Comey for being here and doing so on short notice. I have the greatest admiration for the FBI. My grandfather was a career FBI agent.

I have got to tell you, I am here because we are mystified and confused by the fact pattern that you laid out and the conclusions that you reached. It seems that there are two standards, and there is no consequence for these types of activities and dealing in a careless way with classified information. It seems to a lot of us that the average Joe, the average American, that if they had done what you laid out in your statement, that they'd be in handcuffs and they might be on their way to jail, and they probably should, and I think there is a legitimate concern that there is a double standard. If your name isn't Clinton or you're not part of the powerful elite, that Lady Justice will act differently. It is a concern that Lady Justice will take off that blindfold and come to a different conclusion.

Hillary Clinton created this mess. It wasn't Republicans. It wasn't anybody else. She made a very conscious decision. On the very day that she started her Senate confirmation, she set up and got a domain name and set up a system to avoid and bypass the safety, security, and the protocol of the State Department.

Classified information is classified for a reason. It is classified because if it were to get out into the public, there are nefarious actors, nation-states, others that want to do harm to this country, and there are people who put their lives on the line protecting and serving our country, and when those communications are not se-

FBI 18-cv-01766-45

cure, it puts their lives at jeopardy. This classified information is entrusted to very few, but there is such a duty and an obligation to protect that, to fall on your sword to protect that, and yet there doesn't seem to be any consequence.

You know, I was talking to Trey Gowdy, and he made a really good point with us yesterday. Mr. Gowdy said, you know, in your statement, Mr. Director, you mentioned that there was no precedent for this, but we believe that you have set a precedent, and it's a dangerous one. The precedent is if you sloppily deal with classified information, if you are cavalier about it—and it wasn't just an innocent mistake; this went on for years—that there is going to be no consequence.

We are a different nation in the United States of America. We are self-critical. Most nations would never do this, but we do it in the spirit of making ourselves better. There will be all kinds of accusations about political this and political that. I have defended your integrity every step of the way. You are the definitive voice. I stand by that, but I am mystified, and I am confused, because you listen to your fact pattern and come to the conclusion that there is no consequence, I don't know how to explain that. We will have constituents ask us. They'll get mad. They will pound the—you know, they're frustrated. They have seen this happen time and time again. I don't know how to explain it, and I hope that, through this hearing, we can stick to the facts and understand this, because there does seem to be two standards. There does seem to be no consequence, and I want to understand that, and I want to be able to explain that to the person that's sitting at home, and that is why we are here.

And so I yield back.

I now recognize the ranking member, Mr. Cummings.

Mr. CUMMINGS. Director Comey, thank you for being here today. I want to begin by commending you and the public servants at the FBI for the independent investigation you conducted. You had a thankless task. No matter what recommendation you made, you were sure to be criticized. There is no question that you were extremely thorough. In fact, some may even say you went too far in your investigation. But, of course, that was your job; that is your job.

Secretary Clinton has acknowledged that she made a mistake in using a personal email account, and you explained on Tuesday that she and her colleagues at the State Department were extremely careless with their emails, but after conducting this exhaustive review, you determined that no reasonable prosecutor would bring a case based on this evidence, and you and the career staff recommended against prosecution. Based on the previous cases you examined, if prosecutors had gone forward, they would have been holding the Secretary to a different standard from everyone else.

Amazingly—amazingly—some Republicans who were praising you just days ago for your independence, for your integrity, and your honesty instantly turned against you because your recommendation conflicted with the predetermined outcome they wanted. In their eyes, you had one job and one job only: to prosecute Hillary Clinton.

But you refused to do so, so now you are being summoned here to answer for your alleged transgressions, and in a sense, Mr. Director, you are on trial.

Contrary to the claims of your critics, there is absolutely no evidence that you made your recommendation for political reasons, no evidence that you were bribed or coerced or influenced, no evidence that you came to your conclusion based upon anything but the facts and the law. I firmly believe that your decision was not based on convenience but on conviction.

Today, House Republicans are doing what they always do, using taxpayers' money to continue investigating claims that have already been debunked just to keep them in the headlines one more day. When they hear a political siren, they rush toward it over and over again, even if the evidence is not there. Exhibit A, Majority Leader Kevin McCarthy, who admitted on national television that Republicans established the Benghazi Select Committee to bring down Secretary Clinton's poll numbers. I didn't say that; McCarthy said it. The fact was confirmed by a Republican staffer on that committee who reported that he was fired in part for not going along with the hyper focus on Secretary Clinton.

I give House Republicans credit. They certainly are not shy about what they are doing. They have turned political investigations into an art form.

If our concerns here today are with the proper treatment of classified information, then we should start with the review of our previous hearing on General David Petraeus, who pled guilty last year to intentionally and knowingly compromising highly classified information. The problem is, Mr. Director, we never had that hearing. This committee ignored that breach of national security because it did not match the political goals of the House Republicans.

If our concerns today were with finally addressing a broken classification system in which security levels are arbitrarily changed up and down, that would have been a legitimate goal, that would have been a valuable addition to reforming and improving our government. After all, we are the Government Reform Committee.

We could have held hearings here on Zika, the Zika virus, preventing gun massacres like the one in Orlando, or a host of other topics that could actually save people's lives, but that is not why we are here. That is not why our chairman called this emergency hearing 48 hours after you made your recommendation.

Everyone knows what this committee is doing. Honestly, I would not be surprised—and I say this with all seriousness—I would not be surprised if, tomorrow, Republicans set up a new committee to spend $7 million plus on why the FBI failed to prosecute Hillary Clinton.

Director Comey, let me conclude with this request. Even with all that I have said, I believe that there is a critical role for you today. I have listened carefully to the coverage on this issue, and I have heard people say as recently as this morning, 3 hours ago, that they were mystified by your decision. As a matter of fact, the chairman repeated it a minute ago. And so there is a perceived gap between the things you said on Tuesday and your recommendation. There is a gap, Mr. Director. So, in this moment—and this is a critical moment—I beg you to fill the gap, because when the gap is not

filled by you, it will be filled by others. Share with us, the American people, your process and your thinking; explain how you examined the evidence, the law, and the precedents; describe in clear terms how you and your team, career professionals, arrived at this decision. If you can do that today, if you can do that, that could go a long way toward people understanding your decision.

Finally, I want to make it clear that I condemn these completely unwarranted political attacks against you. They have attacked you personally. They have attacked your integrity. They have impugned your professionalism. And they have even suggested that you were somehow bought and paid for because you made your recommendation based upon the law and the facts.

I know you are used to working in the world of politics, but these attacks have been beyond the pale. So you do not deserve this. Your family does not deserve it. And the highly skilled and dedicated agents of the FBI do not deserve it.

I honor your professionalism and your service to our country. And, again, even if it takes till hell freezes over, I beg you to close the gap, tell us what happened between what you found and your decision so that not only the members of this panel and this Congress will understand but so that Americans will understand. And if you do that, if you do that, then it will be all worth it today.

With that, I yield back.

Mr. MICA. Mr. Chairman——

Chairman CHAFFETZ. I think—hold on one second, with your indulgence.

To the ranking member, of which I have the greatest respect, you asked for a hearing on General Petraeus and how that was dealt with; you got it. We will have one in this Oversight Committee. And the record will reflect that, in the Judiciary Committee, I repeatedly questioned Attorney General Holder, I repeatedly questioned the FBI Director about the disposition of that case, probably more than any Member in the House or Senate. And if you want a hearing, we will do that.

Mr. CUMMINGS. Will the gentlemen yield?

Chairman CHAFFETZ. Yes.

Mr. CUMMINGS. Thank you.

Chairman CHAFFETZ. Number two, you complained that we haven't done a hearing on Zika. The Oversight and Government Reform Committee, I believe, was the very first committee to actually do a hearing on Zika. That was chaired by Mr. Mica, and I am proud of the fact that we did a Zika hearing, and we did it first.

Mr. CUMMINGS. Will the gentleman yield?

Chairman CHAFFETZ. Sure.

Mr. CUMMINGS. Can we have another one, because the problem is still there——

Chairman CHAFFETZ. Absolutely.

Mr. CUMMINGS. —big time.

Chairman CHAFFETZ. Absolutely.

Mr. MICA. Mr. Chairman, I would ask for a unanimous consent request that we put the date of the hearing in the record at this time that I chaired—thank you—on Zika.

Chairman CHAFFETZ. Absolutely.

[The information follows:]

The Subcommittee on Transportation and Public Assets held a hearing on February 24, 2016, titled, "The Zika Virus: Coordination of a Multi- Agency Response."

Chairman CHAFFETZ. And the ranking member knows that we have held multiple hearings on the criminal justice and criminal justice reform. You asked for it. You are passionate about it. And we did do that as well. So to suggest we haven't addressed some of those issues, I think, is inaccurate.

Mr. CUMMINGS. I don't think I did that, Mr. Chairman, but, again, as late as yesterday, with the problem in Minnesota with an African American man being killed, I would like to have some hearings still on the criminal justice system. Thank you.

Chairman CHAFFETZ. Thank you.

Mr. CUMMINGS. Thank you very much.

Chairman CHAFFETZ. Without objection. I am going to work with you on that——

Mr. CUMMINGS. Thank you.

Chairman CHAFFETZ. —as I have every step of the way.

Mr. CUMMINGS. Thank you, Mr. Chairman. I appreciate it.

Chairman CHAFFETZ. Without objection, the chair is authorized to declare a recess at any time. We will hold the record open for 5 legislative days for any members who would like to submit a written statement.

We will now recognize our distinguished witness for our first panel. I am pleased to welcome the Honorable James Comey, the Director of the Federal Bureau of Investigations.

We welcome Director Comey, and thank you for being here.

Pursuant to committee rules, all witnesses are to be sworn before they testify. If you will please rise and raise and right hand.

Do you solemnly swear or affirm that the testimony you are about to give is the truth, the whole truth, and nothing but the truth.

Mr. COMEY. I do.

Chairman CHAFFETZ. Thank you.

Let the record reflect that the witness answered in the affirmative.

Mr. Comey, the floor is yours. You can take as long or as short as you would like. If you have any written statement that you would like to submit afterwards, we are happy to do that as well, and it will be made part of the record. The time is now yours.

Director Comey, you are recognized.

STATEMENT OF THE HONORABLE JAMES COMEY

Mr. COMEY. Thank you, Mr. Chairman, Mr. Cummings, members of the committee. I am proud to be here today representing the people of the FBI, who did this investigation, as they do all their work, in a competent, honest, and independent way. I believe this investigation was conducted consistent with the highest traditions of the FBI. Our folks did it in an apolitical and professional way, including our recommendation as to the appropriate resolution of this case.

As I said in my statement on Tuesday, I expected there would be significant public debate about this recommendation, and I am a big fan of transparency, so I welcome the conversation we are

going to have here today. And I do think a whole lot of folks have questions about, so why did we reach the conclusion we did, and what was our thinking? And I hope very much to get an opportunity to address that and to explain it. And I hope, at the end of day, people can disagree, can agree, but they will at least understand that the decision was made and the recommendation was made the way you would want it to be: by people who didn't give a hoot about politics but who cared about, what are the facts, what is the law, and how have similar people, all people, been treated in the past?

Maybe I could just say a few words at the beginning that would help frame how we think about this. There are two things that matter in a criminal investigation of a subject: What did the person do? And when they did that thing, what were they thinking?

When you look at the hundred years plus of the Justice Department's investigation and prosecution of the mishandling of classified information, those two questions are obviously present: What did the person do? Did they mishandle classified information? And when they did it, did they know they were doing something that was unlawful? That has been the characteristic of every charged criminal case involving the mishandling of classified information. I am happy to go through the cases in particular.

In our system of law, there's a thing called mens rea. It's important to know what you did, but when you did it, this Latin phrase "mens rea" means, what were you thinking? And we don't want to put people in jail unless we prove that they knew they were doing something they shouldn't do. That is the characteristic of all the prosecutions involving mishandling of classified information.

There is a statute that was passed in 1917 that, on its face, makes it a crime, a felony, for someone to engage in gross negligence. So that would appear to say: Well, maybe in that circumstance, you don't need to prove they knew they were doing something that was unlawful; maybe it's enough to prove that they were just really, really careless, beyond a reasonable doubt.

At the time Congress passed that statute in 1917, there was a lot of concern in the House and the Senate about whether that was going to violate the American tradition of requiring that, before you're going to lock somebody up, you prove they knew they were doing something wrong, and so there was a lot of concern about it. The statute was passed. As best I can tell, the Department of Justice has used it once in the 99 years since, reflecting that same concern. I know, from 30 years with the Department of Justice, they have grave concerns about whether it's appropriate to prosecute somebody for gross negligence, which is why they've done it once that I know of in a case involving espionage.

And so when I look at the facts we gathered here, as I said, I see evidence of great carelessness, but I do not see evidence that is sufficient to establish that Secretary Clinton or those with whom she was corresponding both talked about classified information on email and knew, when they did it, they were doing something that was against the law, right?

So, given that assessment of the facts and my understanding of the law, my conclusion was and remains no reasonable prosecutor would bring this case. No reasonable prosecutor would bring the

second case in a hundred years focused on gross negligence. And so I know that's been a source of some confusion for folks. That's just the way it is. I know the Department of Justice. I know no reasonable prosecutor would bring this case. I know a lot of my former friends are out there saying they would. I wonder where they were the last 40 years, because I'd like to see the cases they brought on gross negligence. Nobody would; nobody did.

So my judgment was the appropriate resolution of this case was not with a criminal prosecution. As I said, folks can disagree about that, but I hope they know that view, not just my view but of my team, was honestly held, fairly investigated, and communicated with unusual transparency, because we know folks care about it.

So I look forward to this conversation. I look forward to answering as many questions as I possibly can. I'll stay as long as you need me to stay, because I believe transparency matters tremendously. And I thank you for the opportunity.

Chairman CHAFFETZ. Thank you, Director. I'm going to recognize myself here.

Physically, where were Hillary Clinton's servers?

Mr. COMEY. The operational server was in the basement of her home in New York. The reason I'm answering it that way is because sometimes, after they were decommissioned, they were moved to other facilities, storage facilities, but the live device was always in the basement.

Chairman CHAFFETZ. Was that an authorized or unauthorized location?

Mr. COMEY. It was an unauthorized location for the transmitting of classified information.

Chairman CHAFFETZ. Is it reasonable or unreasonable to expect Hillary Clinton would receive and send classified information?

Mr. COMEY. As Secretary of State? Reasonable that the Secretary of State would encounter classified information in the course of the Secretary's work.

Chairman CHAFFETZ. Via email?

Mr. COMEY. Sure, depending upon the nature of the system. To communicate classified information, it would have to be a classified-rated email system.

Chairman CHAFFETZ. But you did find more than 100 emails that were classified that had gone through that server, correct?

Mr. COMEY. Right. Through an unclassified server, correct.

Chairman CHAFFETZ. Yes. So Hillary Clinton did come to possess documents and materials containing classified information via email on these unsecured servers, correct?

Mr. COMEY. That is correct.

Chairman CHAFFETZ. Did Hillary Clinton lie?

Mr. COMEY. To the FBI? We have no basis to conclude she lied to the FBI.

Chairman CHAFFETZ. Did she lie to the public?

Mr. COMEY. That's a question I'm not qualified to answer. I can speak about what she said to the FBI.

Chairman CHAFFETZ. Did Hillary Clinton lie under oath?

Mr. COMEY. To the—not to the FBI, not in the case we were working.

Chairman CHAFFETZ. Did you review the documents where Congressman Jim Jordan asked her specifically, and she said, quote, "There was nothing marked classified on my emails, either sent or received," end quote?

Mr. COMEY. I don't remember reviewing that particular testimony. I'm aware of that being said, though.

Chairman CHAFFETZ. Did the FBI investigate her statements under oath on this topic?

Mr. COMEY. Not to my knowledge. I don't think there has been a referral from Congress.

Chairman CHAFFETZ. Do you need a referral from Congress to investigate her statements under oath?

Mr. COMEY. Sure do.

Chairman CHAFFETZ. You'll have one. You'll have one in the next few hours.

Did Hillary Clinton break the law?

Mr. COMEY. In connection with her use of the email server, my judgment is that she did not.

Chairman CHAFFETZ. Did you—you're just not able to prosecute it, or did Hillary Clinton break the law?

Mr. COMEY. Well, I don't want to give an overly lawyerly answer, but the question I always look at is, is there evidence that would establish beyond a reasonable doubt that somebody engaged in conduct that violated a criminal statute? And my judgment here is there is not.

Chairman CHAFFETZ. The FBI does background checks. If Hillary Clinton applied for the job at the FBI, would the FBI give Hillary Clinton a security clearance?

Mr. COMEY. I don't want to answer a hypothetical. The FBI has a robust process in which we adjudicate the suitability of people for employment in the Bureau.

Chairman CHAFFETZ. Given the fact pattern you laid out less than 48 hours ago, would a person who had dealt with classified information like that, would that person be granted a security clearance at the FBI?

Mr. COMEY. It would be a very important consideration in the suitability determination.

Chairman CHAFFETZ. You're kind of making my point, Director. The point being, because I injected the word "Hillary Clinton," you gave me a different answer, but if I came up to you and said that this person was extremely careless with classified information; the exposure to hostile actors; had used—despite warnings—created unnecessary burdens and exposure; if they said that they had one device and you found out that they had multiple devices; if there had been email chains with somebody like Jake Sullivan asking for classification changes, you're telling me that the FBI would grant a security clearance to that person?

Mr. COMEY. I'm not—I hope I'm giving a consistent—I'm not saying what the answer would be. I'm saying that would be an important consideration in a suitability determination for anybody.

Chairman CHAFFETZ. And just—personally, I just think that sounds like a bit of a political answer, because I can't imagine that the FBI would grant a security clearance to somebody with that fact pattern. Do you agree or disagree with that?

Mr. COMEY. I'll say what I said before: again, it's very hard to answer in a hypothetical. I'll repeat it. It would be a very important consideration in a suitability determination.

Chairman CHAFFETZ. Did Hillary Clinton do anything wrong?

Mr. COMEY. What do you mean by "wrong"?

Chairman CHAFFETZ. I think it's self-evident.

Mr. COMEY. Well, I'm a lawyer. I'm an investigator. And I'm—I hope—a normal human being.

Chairman CHAFFETZ. Do you really believe there should be no consequence for Hillary Clinton in how she dealt with this?

Mr. COMEY. Well, I didn't say—I hope folks remember what I said on Tuesday. I didn't say there's no consequence for someone who violates the rules regarding the handling of classified information. There are often very severe consequences in the FBI involving their employment, involving their pay, involving their clearances. That's what I said on Tuesday. And I hope folks walk away understanding that, just because someone's not prosecuted for mishandling classified information, that doesn't mean, if you work in the FBI, there aren't consequences for it.

Chairman CHAFFETZ. So if Hillary Clinton or if anybody had worked at the FBI, under this fact pattern, what would you do to that person?

Mr. COMEY. There would be a security review and an adjudication of their suitability, and a range of discipline could be imposed from termination to reprimand and, in between, suspensions, loss of clearance. So you could be walked out or you could—depending upon the nature of the facts, you could be reprimanded, but there is a robust process to handle that.

Chairman CHAFFETZ. I've gone past my time.

I yield back.

I now recognize the ranking member, Mr. Cummings.

Mr. CUMMINGS. Thank you very much.

Director Comey—and I want to thank you very much for being here today, especially on such short notice. You and your staff should be commended for the thorough and dedicated review you conducted. Unfortunately, some of my colleagues are now attacking you personally because your final recommendation conflicted with their preconceived political outcome in this case.

Some have tried to argue that this case is far worse than the case of General David Petraeus, who was convicted in 2015 of knowingly and intentionally compromising highly classified information. In fact, one very vocal politician we all know said this, and I quote: "If she isn't indicted, the only reason is because the Democrats are protecting her. She is being protected 100 percent, because you look at David—General Petraeus, you look at all the other people that did a fraction of what she did, but she has much worse judgment than he had, and she's getting away with it, and it's unfair to him," end of quote.

Director Comey, you were the Director of the FBI when General Petraeus pled guilty. Is that right?

Mr. COMEY. Yes.

Mr. CUMMINGS. If I understand that case correctly, General Petraeus kept highly classified information in eight personal notebooks at his private residence. Is that correct?

Mr. COMEY. That is correct.

Mr. CUMMINGS. According to the filings in that case, this notebook included the identities of covert officers. They also included war strategy, intelligence capabilities, diplomatic discussions, quotes and deliberative discussions from high-level National Security Council meetings and discussions with the President. General Petraeus shared his information with his lover and then biographer. He was caught on audiotape telling her, and I quote, "I mean, they are highly classified, some of them. They don't have it on—on it, but, I mean, there's code word stuff in there," end of quote.

Director Comey, what did General Petraeus mean when he said he intentionally shared, quote, "code word" information with her? What does that mean?

Mr. COMEY. The Petraeus case, to my mind, illustrates perfectly the kind of cases the Department of Justice is willing to prosecute. Even there, they prosecuted him for a misdemeanor. In that case, you had vast quantities of highly classified information, including special—sensitive compartmented information—that's the reference to code words—a vast quantity of it, not only shared with someone without authority to have it, but we found it in a search warrant hidden under the insulation in his attic, and then he lied to us about it during the investigation.

So you have obstruction of justice. You have intentional misconduct and a vast quantity of information. He admitted he knew that was the wrong thing to do. That is a perfect illustration of the kind of cases that get prosecuted. In my mind, it illustrates, importantly, the distinction to this case.

Mr. CUMMINGS. And General Petraeus did not admit to these facts when the FBI investigators first interviewed him. Did he?

Mr. COMEY. No. He lied about it.

Mr. CUMMINGS. But he did admit to these facts in a plea agreement. Is that correct?

Mr. COMEY. Yes.

Mr. CUMMINGS. Here's what the Department filing said about General Petraeus, and I quote: "The acts taken by defendant David Howell Petraeus were in all respects knowing and deliberate and were not committed by mistake, accident, or other innocent reason," end of quote.

Is that an accurate summary, in your view, Director Comey?

Mr. COMEY. Yes. It actually leaves out an important part of the case, which is the obstruction of justice.

Mr. CUMMINGS. Was he charged with obstruction of justice?

Mr. COMEY. No.

Mr. CUMMINGS. And why not?

Mr. COMEY. A decision made by the leadership of the Department of Justice not to insist upon a plea to that felony.

Mr. CUMMINGS. So the question is, do you agree with the claim that General Petraeus, and I quote, "got in trouble for far less," end of quote?

Mr. COMEY. No.

Mr. CUMMINGS. Do you agree with that statement?

Mr. COMEY. No. It's the reverse.

Mr. CUMMINGS. And what do you mean by that?

Mr. COMEY. His conduct, to me, illustrates the categories of behavior that mark the prosecutions that are actually brought: clearly intentional conduct, knew what he was doing was a violation of the law, huge amounts of information that, even if you couldn't prove he knew it, it raises the inference that he did it—right—an effort to obstruct justice. That combination of things makes it worthy of a prosecution, a misdemeanor prosecution but a prosecution nonetheless.

Mr. CUMMINGS. Sitting here today, do you stand by the FBI's recommendation to prosecute General Petraeus?

Mr. COMEY. Oh, yeah.

Mr. CUMMINGS. Do you stand by the FBI's recommendation not to prosecute Hillary Clinton?

Mr. COMEY. Yes.

Mr. CUMMINGS. Director Comey, how many times have you testified before Congress about the General Petraeus case? Do you know?

Mr. COMEY. I don't think I've ever testified—I don't think I've testified about it at all. I don't think so.

Mr. CUMMINGS. With that, I would yield back.

Chairman CHAFFETZ. I have to check the record, but I believe I asked you a question about it at the time, but maybe not.

Mr. COMEY. You could have. That's why I was——

Chairman CHAFFETZ. Yeah, yeah.

Mr. COMEY. —squinching my face. It could have been at a Judiciary Committee hearing I was asked about it.

Chairman CHAFFETZ. Yeah.

We'll now recognize the gentleman from South Carolina, Mr. Gowdy, for 5 minutes.

Mr. GOWDY. Good morning, Director Comey. Secretary Clinton said she never sent or received any classified information over her private email. Was that true?

Mr. COMEY. Our investigation found that there was classified information sent——

Mr. GOWDY. So it was not true?

Mr. COMEY. Right. That's what I said.

Mr. GOWDY. Okay. Well, I'm looking for a little shorter answer so you and I are not here quite as long.

Secretary Clinton said there was nothing marked classified on her emails either sent or received. Was that true?

Mr. COMEY. That's not true. There were a small number of portion markings on, I think, three of the documents.

Mr. GOWDY. Secretary Clinton said: I did not email any classified material to anyone on my email. There is no classified material.

Was that true?

Mr. COMEY. No. There was classified material emailed.

Mr. GOWDY. Secretary Clinton said she used just one device. Was that true?

Mr. COMEY. She used multiple devices during the 4 years of her term as Secretary of State.

Mr. GOWDY. Secretary Clinton said all work-related emails were returned to the State Department. Was that true?

Mr. COMEY. No. We found work-related emails, thousands, that were not returned.

Mr. GOWDY. Secretary Clinton said neither she nor anyone else deleted work-related emails from her personal account. Was that true?

Mr. COMEY. That's a harder one to answer. We found traces of work-related emails on devices or in slack space, whether they were deleted or whether when a server was changed out, something happened to them. There's no doubt that there were work-related emails that were removed electronically from the email system.

Mr. GOWDY. Secretary Clinton said her lawyers read every one of the emails and were overly inclusive. Did her lawyers read the email content individually?

Mr. COMEY. No.

Mr. GOWDY. Well, in the interests of time and because I have a plane to catch tomorrow afternoon, I'm not going to go through any more of the false statements, but I am going to ask you to put on your old hat.

False exculpatory statements, they are used for what?

Mr. COMEY. Well, either for a substantive prosecution or for evidence of intent in a criminal prosecution.

Mr. GOWDY. Exactly. Intent and consciousness of guilt, right? Is that right?

Mr. COMEY. Right.

Mr. GOWDY. Consciousness of guilt and intent.

Mr. COMEY. Uh-huh.

Mr. GOWDY. In your old job, you would prove intent, as you just referenced, by showing the jury evidence of a complex scheme that was designed for the very purpose of concealing the public record, and you would be arguing, in addition to concealment, the destruction that you and I just talked about or certainly the failure to preserve, you would argue all of that under the heading of content—you would also—intent.

You would also be arguing the pervasiveness of the scheme, when it started, when it ended, and the number of emails, whether they were originally classified or up classified. You would argue all of that under the heading of intent.

You would also probably, under common scheme or plan, argue the burn bags of daily calendar entries or the missing daily calendar entries as a common scheme or plan to conceal.

Two days ago, Director, you said a reasonable person in her position should have known a private email was no place to send and receive classified information. You're right. An average person does know not to do that. This is no average person. This is a former First Lady, a former United States Senator, and a former Secretary of State that the President now contends is the most competent, qualified person to be president since Jefferson. He didn't say that in 2008, but he says it now. She affirmatively rejected efforts to give her a State.gov account, she kept these private emails for almost 2 years, and only turned them over to Congress because we found out she had a private email account.

So you have a rogue email system set up before she took the oath of office, thousands of what we now know to be classified emails, some of which were classified at the time, one of her more frequent email comrades was, in fact, hacked, and you don't know whether

or not she was, and this scheme took place over a long period of time and resulted in the destruction of public records, and yet you say there is insufficient evidence of intent. You say she was extremely careless but not intentionally so.

You and I both know intent is really difficult to prove. Very rarely do defendants announce: On this day, I intend to break this criminal code section. Just to put everyone on notice, I am going to break the law on this date.

It never happens that way. You have to do it with circumstantial evidence, or if you're Congress and you realize how difficult it is to prove specific intent, you will formulate a statute that allows for gross negligence.

My time is out, but this is really important. You mentioned there's no precedent for criminal prosecution. My fear is there still isn't. There's nothing to keep a future Secretary of State or President from this exact same email scheme or their staff. And my real fear is this—it's what the chairman touched upon—this double track justice system that is, rightly or wrongly, perceived in this country that if you are a private in the Army and you email yourself classified information, you will be kicked out, but if you are Hillary Clinton and you seek a promotion to Commander in Chief, you will not be.

So what I hope you can do today is help the average—the reasonable person you made reference to, the reasonable person understand why she appears to be treated differently than the rest of us would be.

With that, I would yield back.

Chairman CHAFFETZ. We'll now recognize the gentlewoman from New York, Mrs. Maloney.

Mrs. MALONEY. Director, thank you for your years of public service. You have distinguished yourself as the assistant U.S. attorney for both the Southern District of New York and the Eastern District of Virginia. That's why you were appointed by President Bush to be the Deputy Attorney General at the Department of Justice and why President Obama appointed you as the Director of the FBI in 2013.

Despite your impeccable reputation for independence and integrity, Republicans have turned on you with a vengeance immediately after you announced your recommendation not to pursue criminal charges against Secretary Clinton. Let me give you some examples. Representative Turner said, and I quote: "The investigation by the FBI is steeped in political bias," end quote.

Was your investigation steeped in political bias, yes or no?

Mr. COMEY. No. It was steeped in no kind of bias.

Mrs. MALONEY. Thank you. The Speaker of the House, Paul Ryan, was even more critical. He accused you of not applying the law equally. He said your recommendation shows, and I quote, "the Clintons are living above the law. They're being held to a different set of standards. That is clearly what this looks like," end quote.

How do you respond to his accusations that you held the Clintons to a different set of standards than anyone else? Did you hold them to a different standard or the same standard?

Mr. COMEY. It's just not—it's just not accurate. We try very hard to apply the same standard whether you're rich or poor, white or black, old or young, famous or not known at all.

I just hope folks will take the time to understand the other cases, because there's a lot of confusion out there about what the facts were of the other cases that I understand lead good people, reasonable people, to have questions.

Mrs. MALONEY. Senator Cruz also criticized you. He said that there are, and I quote, "serious concerns about the integrity of Director Comey's decision." He stated that you, quote, you "had rewritten a clearly worded Federal criminal statute."

Did you rewrite the law in any way or rewrite any statute?

Mr. COMEY. No.

Mrs. MALONEY. Now, I hesitate, I truly hesitate to mention the next one, but Donald Trump took these conspiracy theories to a totally new level. He said, and I quote: "It was no accident that charges were not recommended against Hillary the exact same day as President Obama campaigned with her for the first time."

So did you plan the timing of your announcement to help Secretary Clinton's campaign event on Tuesday?

Mr. COMEY. No. The timing was entirely my own. Nobody knew I was going to do it, including the press. I'm very proud of the way the FBI—nobody leaked that. We didn't coordinate it, didn't tell. Just not a consideration.

Mrs. MALONEY. Thank you. Mr. Trump also claimed that Secretary Clinton bribed the Attorney General with an extension of her job and I guess this somehow affected your decision.

I know it's a ridiculous question, but I have to ask it. Did you make your decision because of some kind of bribe to the Attorney General?

Mr. COMEY. No.

Mrs. MALONEY. I tell you, are you surprised, as I am, by the intensity of the attacks from the GOP on you after having made a decision, a thoughtful decision, an independent decision with the professional staff of the FBI?

Mr. COMEY. I'm not surprised by the intense interest and debate. I predicted it. I think it's important that we talk about these things. They inevitably become focused on individual people. That's okay. We'll just continue to have the conversation.

Mrs. MALONEY. I believe that what we're seeing today is that if the GOP does not like the results of an investigation or how it turns out—and we saw they originally were lauding you—the minute you made your announcement, they're now attacking you, the same people. And now I predict they'll be calling for more hearings, more investigations, all at the expense of the taxpayer, and they do this instead of working on what the American people really care about. They want Congress to focus on jobs, the environment, Homeland Security, the security of our Nation, affordable childcare, affordable college educations, and an economy that works and helps all people.

I thank you for performing your job with distinction and the long history of your whole profession of integrity and independence. And thank you very much. My time has expired.

Chairman CHAFFETZ. I thank the gentlewoman.

We'll now recognize the gentleman from Ohio, Mr. Jordan, for 5 minutes.

Mr. JORDAN. Thank you, Mr. Chairman.

Director, thank you for being with us. On Tuesday, you said any reasonable person in Secretary Clinton's position should have known that an unclassified system was no place for these conversations. You said on Tuesday some of her emails bore classified markings, and you also said on Tuesday there were potential violations of the appropriate statutes.

Now, I know a bunch of prosecutors back home would look at that fact pattern, look at that evidence, you even referenced in your opening statement, some of your prosecutor—friends in the prosecution business have been on TV and said they would have looked at that same evidence and they would have taken it to a grand jury, but on Tuesday, you said and, today, in your opening statement, you said no reasonable prosecutor would bring such a case. And then in your statement Tuesday, you cite factors that helped you make that decision and make that statement, and one of the factors you said was consider the context of a person's actions.

Now, typically, when I hear "context" in the course of a criminal investigation, it's from the defense side, not the prosecution side; it's at the end of the case, after there's been a trial and a guilty verdict; and it's during the sentencing phase, mitigating circumstances. That's the context we typically think about, but you said it on the front end. You said "consider the context of the person's actions," and so I'm curious, what does "consider the context" mean? Because a lot of Americans are thinking just what the chairman talked about in his opening statement, that there are two standards, one for we the people and one for the politically connected. A lot of folks I get the privilege of representing back in Ohio think that when you said "consider the context," they think that's what Mr. Gowdy just talked about, the fact that she's a former First Lady, former Secretary of State, former Senator, major party's nominee for the highest office in the land, and, oh, by the way, her husband just met with the individual you work with at an airport in Arizona 5 days ago.

So you said none of that influenced your decision, but tell us what "consider the context" means.

Mr. COMEY. Yeah. Thank you, Mr. Jordan. What I was trying to capture is the fact that the exercise of prosecutorial discretion is always a judgment call, it is in every single case, and among the things you consider are, what was this person's background? What was the circumstances of the offense? Were they drunk? Were they inflamed by passion? Was it somebody who had a sufficient level of education and training and experience that we can infer certain things from that, to consider the entire circumstances of the person's offense conduct and background? I did not mean to consider political context.

Mr. JORDAN. Okay. The entire circumstances, and Mr. Gowdy just talked about this scheme, remember what she did, right? She sets up this unique server arrangement. She alone controls it. On that server, on that email system are her personal emails, her work-related emails, Clinton Foundation information, and, now we know, classified information. This gets discovered. We find out this

arrangement exists. Then what happens? Her lawyers, her legal team decides which ones we get and which ones they get to keep. They made the sort on front end. And then we found out the ones that they kept and didn't give to us, didn't give to the American people, didn't give to Congress, the ones they kept, they destroyed them. And you don't have to take my word. I'll take what you said on Tuesday. They deleted all emails that they did not return to the State Department, and the lawyers cleaned their devices in such a way as to preclude complete forensic recovery. Now, that sounds like a fancy way of saying they hid the evidence, right? And you just told Mr. Gowdy thousands of emails fell into those categories. Now, that seems to me to provide some context to what took place here.

Did Secretary Clinton's legal team—excuse me. Let me ask it this way. Did Secretary Clinton know her legal team deleted those emails that they kept from us?

Mr. COMEY. I don't believe so.

Mr. JORDAN. Did Secretary Clinton approve those emails being deleted?

Mr. COMEY. I don't think there was any specific instruction or conversation between the Secretary and her lawyers about that.

Mr. JORDAN. Did you ask that question?

Mr. COMEY. Yes.

Mr. JORDAN. Did Secretary Clinton know that her lawyers cleaned devices in such a way as to preclude complete forensic recovery?

Mr. COMEY. I don't believe that she did.

Mr. JORDAN. Did you ask that question?

Mr. COMEY. Yes.

Mr. JORDAN. Do you see how someone could view the context of what she did? Set up a private system. She alone controlled it. She kept everything on it. We now know from Ms. Abedin's deposition that they did it for that very reason, so no one could see what was there, based on the deposition Ms. Abedin gave. And then when they got caught, they deleted what they had and they scrubbed their devices.

Is that part of the context in evaluating this decision?

Mr. COMEY. Sure. Sure. And understand what inferences can be drawn from that collection of facts, of course.

Mr. JORDAN. All right.

Mr. Chairman, I yield back.

Chairman CHAFFETZ. I thank the gentleman.

I'll now recognize the gentlewoman from the District of Columbia, Ms. Norton, for 5 minutes.

Ms. NORTON. Thank you, Mr. Chairman.

Director Comey, I appreciate your conduct of this investigation in a nonpartisan way, in keeping with the sterling reputation, which has led Presidents of both parties to appoint you to highly placed law enforcement positions in our Federal Government.

I want to say for the record that this hearing, where you call the prosecutor—and Mr. Comey stands in the place of the prosecutor, because the Attorney General has accepted entirely the FBI's recommendations—where you call the prosecutor to give account for the decision to prosecute or not a particular individual raises seri-

ous questions of separation of powers. And, particularly, when you're questioning the prosecutor's decision with respect to the decision to prosecute or not a particular individual, it raises serious bill of attainder constitutional questions.

These hearings are so often accusatory that they yield no guidance as to how to conduct business in the future, and that's the way it looks. It looks as though that is how this hearing is going.

Now, of course, now, everyone understands in the abstract why it is important for security reasons to use official government mail—or email rather than private accounts—private email if security matters are involved. Now, that's a very broad, wide proposition.

Now, there are no rules, so far as I know, requiring Members of Congress to use their—as to how they use their official email accounts, whether involving security or not. The chairman of this committee lists his personal account, for example, on his business card. I'm—no one says that's wrong. I don't know if it's wrong or right, because there's no guidance. Federal agency employees, Members of Congress often have secure information or at least sensitive information that shouldn't be made public. Some of our Members are on the Intelligence Committee or the defense committee or even this committee and may have such matters. Some of these matters may concern national security issues, and—I don't know—if something as sensitive as the itinerary if you're going on a codel as to the route you are taking and where you will be, all of that could be on people's personal emails.

Of course, this is the legislative branch, and I spoke of the separation of powers, and I'm not indicating that there should be a governmentwide sense that is ordained from on high, but there ought to be rules that everybody understands, especially after the Clinton episode, about the use of personal email. So I'd like your insight for guidance as far as other Federal employees are concerned or even Members of Congress and their staff, because I think we could learn from this episode.

So, strictly from a security standpoint, do you believe that Federal employees, staff, even Members of Congress, should attempt guidance on the issue of the use of personal emails versus some official form of communication? What should we learn from the process the Secretary has gone through? I'm sure there will be questions about how there was even confusion, for example, in the State Department, but what should we learn when it comes to our own use of email or the use of Federal employees on this question?

Mr. COMEY. Can I answer, Mr. Chairman?

Chairman CHAFFETZ. Sure.

Mr. COMEY. The most important thing to learn is that an unclassified email system is no case for an email conversation about classified matters. And by that I mean either sending a document as an attachment over unclassified email that is classified or having a conversation about something that is a classified subject on an unclassified email system. That's the focus of the concern. That's the focus of this investigation. That it was also a personal email adds to the concern about the case because of the security vulnerabilities associated with a personal system, but the root of the problem is people using unclassified systems to conduct busi-

ness that is classified. And so all of us should have access to, if we have access to classified information, classified communication systems. The FBI has three levels: unclassified system, a secret system, and a top secret system. You can email on all three, but you need to make sure you don't email on the unclass system, even if that's a government classified system, about matters that are classified. That's the important lesson learned. Everybody ought to be aware of it. Everybody ought to be trained on it. We spend a lot of time training on it in the FBI to make sure folks are sensitive to the need to move a classified discussion, even if it doesn't involve sending a document, to the appropriate forum.

Ms. NORTON. Members of Congress included?

Mr. COMEY. Of course.

Ms. NORTON. Thank you, Mr. Chairman.

Chairman CHAFFETZ. We'll now recognize the gentleman from Florida, Mr. DeSantis, for 5 minutes.

Mr. DESANTIS. Director, and the reason why that's so important is because if top secret information is compromised, that could damage our national security, correct?

Mr. COMEY. Yes, by definition.

Mr. DESANTIS. And American lives are at stake in some instances, correct?

Mr. COMEY. Yes.

Mr. DESANTIS. You mentioned a lot of people were upset that there were no consequences for Secretary Clinton, but in your statement, you did point out that administrative and security consequences would be appropriate if someone demonstrated extreme carelessness for classified information.

So those consequences, that would include potentially termination of Federal employment?

Mr. COMEY. Correct.

Mr. DESANTIS. It could include revocation of security clearance?

Mr. COMEY. Yes.

Mr. DESANTIS. And it could include ineligibility for future employment in national security positions, correct?

Mr. COMEY. It could.

Mr. DESANTIS. Now, would you as the FBI Director allow someone in the employ of your agency to work in a national security capacity if that person had demonstrated extreme carelessness in handling top secret info?

Mr. COMEY. The best answer to that is we would look very closely at that in a suitability determination. It's hard to answer in the abstract "yes" in all cases, "no" in all cases, but it would be a very important suitability scrub.

Mr. DESANTIS. So there would be instances where someone could be extremely careless but still maintain confidence? I mean, we have a lot of people who are very competent in this country who would love to work for your agency, but yet it would be—potentially you would allow somebody to be extremely careless and continue on?

Mr. COMEY. That's the trouble with answering a hypothetical. I could imagine if it was a long time ago, and it was a small amount of conduct or something. That's why it's hard to say other than it would be a very important part of the——

Mr. DESANTIS. Let's just put it this way. Would being extremely careless in handling top secret information expose an employee of the FBI to potential termination?

Mr. COMEY. Yes.

Mr. DESANTIS. Why shouldn't U.S. officials use mobile devices when traveling to foreign countries, especially if they're discussing classified or sensitive information?

Mr. COMEY. Because the mobile device will transmit its signal across networks that are likely controlled or at least accessed by that hostile power.

Mr. DESANTIS. And that's the guidance that the FBI gives all officials when they're traveling overseas. That's still good guidance, correct?

Mr. COMEY. That's good guidance.

Mr. DESANTIS. How did top secret information end up on the private server? Because your statement addressed Secretary Clinton. You did not address any of her aides in your statement. Attorney General Lynch exonerated everybody. That information just didn't get there on its own, so how did it get there? Were you able to determine that?

Mr. COMEY. Yes. By people talking about a top secret subject in an email communication.

Mr. DESANTIS. So it was——

Mr. COMEY. It's not about forwarding a top secret document; it's about having a conversation about a matter that is top secret.

Mr. DESANTIS. And those were things that were originated by Secretary Clinton's aides and then sent to her, which would obviously be in her server, but it was also included Secretary Clinton originating those emails, correct?

Mr. COMEY. That's correct. In most circumstances, it initiated with aides starting a conversation. In the one involving top secret information, Secretary Clinton, though, also not only received but also sent emails that talked about the same subject.

Mr. DESANTIS. And of that top secret information that you found, would somebody who was sophisticated in those matters, should it have been obvious to them that that was very sensitive information?

Mr. COMEY. Yes.

Mr. DESANTIS. So I guess my issue about knowledge of what you're doing is in order for Secretary Clinton to have access to top secret/SCI information, didn't she have to sign a form with the State Department acknowledging her duties and responsibilities under the law to safeguard this information?

Mr. COMEY. Yes. Anybody who gets access to SCI, sensitive compartmented information, would sign what's called a read-in form that lays that out. I'm sure Members of Congress have seen the same thing.

Mr. DESANTIS. And it stresses in that document and other training people would get that there are certain requirements to handling certain levels of information. For example, a top secret document, that can't even be on your secret system at the FBI, correct?

Mr. COMEY. Correct.

Mr. DESANTIS. So you have to follow certain guidelines. And I guess my question is, is she's a very sophisticated person. She did execute that document, correct?

Mr. COMEY. Yes.

Mr. DESANTIS. And her aides who were getting the classified information, they executed similar documents to get a security clearance, correct?

Mr. COMEY. I believe so.

Mr. DESANTIS. And she knowingly clearly set up her own private server in order to—well, actually, let me ask you that. Was the reason she set up her own private server, in your judgment, because she wanted to shield communications from Congress and from the public?

Mr. COMEY. I can't say that. Our best information is that she set it up as a matter of convenience. It was an already existing system that her husband had, and she decided to have a domain on that system.

Mr. DESANTIS. So the question is, is very sophisticated—this is information that clearly anybody who had knowledge of security information would know that it would be classified—but I'm having a little bit of trouble to see, how would you not then know that that was something that was inappropriate to do?

Mr. COMEY. Well, I just want to take one of your assumptions about sophistication. I don't think that our investigation established that she was actually particularly sophisticated with respect to classified information and the levels and the treatment, and so far as we can tell——

Mr. DESANTIS. Isn't she an original classification authority, though?

Mr. COMEY. Yes, sir. Yes, sir.

Mr. DESANTIS. Good grief. Well, I appreciate you coming. And I yield back the balance of my time.

Chairman CHAFFETZ. I thank the gentleman. I ask unanimous consent to enter into the record two documents that Mr. DeSantis referred to. One is the Sensitive Compartmented Information Nondisclosure Agreement. The other one is the Classified Information Nondisclosure Agreement. Both signed by Hillary Rodham Clinton. Without objection, so ordered.

Chairman CHAFFETZ. I now recognize the gentleman from Missouri, Mr. Clay, for 5 minutes.

Mr. CLAY. Thank you, Mr. Chairman. And thank you, Director Comey, for being here today and for the professionals whom you lead at the FBI. Two years ago after my urgent request to then-former Attorney General Eric Holder for an expedited Justice Department investigation into the tragic death of Michael Brown in Ferguson, Missouri, I witnessed firsthand the diligence, professionalism, and absolute integrity of your investigators. And I have no doubt that was the case in this matter as well. I did not think it was possible for the majority to exceed their unprecedented arrogant abuse of official channels and Federal funds that we have witnessed over the past 2 years as they have engaged in a partisan political witch hunt at taxpayer expense against Secretary Clinton.

But I was wrong. This proceeding is just a sequel to that very bad act. And the taxpayers will get the bill. It is a new low, and

it violates both House rules and the rules of this committee. So with apologies to you and the FBI for this blatantly partisan proceeding, let me return to the facts of this case as you have clearly outlined them.

First question: Did Secretary Clinton or any member of her staff intentionally violate Federal law?

Mr. COMEY. We did not develop clear evidence of that.

Mr. CLAY. Did Secretary Clinton or any member of her staff attempt to obstruct your investigation?

Mr. COMEY. We did not develop evidence of that.

Mr. CLAY. In your opinion, do the mistakes Secretary Clinton has already apologized for and expressed regret for rise to a level that would be worthy of Federal prosecution?

Mr. COMEY. As I said Tuesday, our judgment, not just mine, but the team's judgment at the FBI, is that the Justice Department would not bring such a case. No Justice Department under any—whether Republican or Democrat administration.

Mr. CLAY. Thank you for that response. I know the FBI pays particular attention to groups by training agents and local law enforcement officers and participating in local hate crime working groups. Is that right?

Mr. COMEY. Yes, sir.

Mr. CLAY. Some of these organizations seem relatively harmless. But others appear to be very dangerous and growing. Some even promote genocide in their postings and rhetoric online. In your experience, how dangerous are these groups and have they incited violence in the past?

Mr. COMEY. I think too hard to answer, Congressman, in the abstract. There are some groups that are dangerous. There are some groups that are exercising important protection—protected speech under the First Amendment.

Mr. CLAY. Okay. Let me ask a more direct question. A gentleman named Andrew Anglin is the editor of a Web site called The Daily Stormer that is dedicated to the supremacy of the white race as well as attacking Jews, Muslims, and others. The Web site features numerous posts with the hashtag "white genocide" to protest what they contend is an effort to eliminate the white race. Are you familiar with this movement?

Mr. COMEY. I'm not.

Mr. CLAY. Okay. Well, this hashtag has been promoted all over social media by a growing number of white supremacists. For example, one Nazi sympathizer tweeted repeatedly using the handle @whitegenocidetm. Are you concerned as some groups are increasing their followers in this way, particularly if some of those followers in this way, particularly if some of those followers could become violent?

Mr. COMEY. I don't know the particular enough to comment, Congressman. We are always concerned when people go beyond protected speech, which we do not investigate, to moving towards acts of violence. And so our duty is to figure out when have people walked outside the First Amendment protection and are looking to kill folks or hurt folks. But I don't know enough to comment on the particular.

Mr. CLAY. I see. Well, one of my biggest concerns is that certain public figures are actually promoting these dangerous groups even further. And as you may know, one of our most vocal candidates for President retweeted @whitegenocidetm. Three weeks later, he did it again. Two days after that, he retweeted a different user whose image also included the term "white genocide," and that's not even all of them. Director Comey, don't these actions make it easier for these racist groups to recruit even more supporters?

Mr. COMEY. I don't think I'm in a position to answer that in an intelligent way sitting here.

Mr. CLAY. Well, I appreciate you trying. And thank you, Mr. Director, for your exceptional and principled service to our country. I yield back.

Chairman CHAFFETZ. Thank you. We'll now recognize the gentlewoman from Wyoming, Mrs. Lummis, for 5 minutes.

Mrs. LUMMIS. Welcome, Director. And thank you so much for being here. My phone has been ringing off the hook in my Washington office, in my Wyoming office, from constituents who don't understand how this conclusion was reached. So I appreciate your being here to help walk us through it. And here's the issue that the people that are calling me from Wyoming are having. They have access to this statute. It's Title 18 U.S. Code 1924. And I'm going to read you this statute. It says, "Whoever being an officer, employee, contractor, or consultant to the United States and by virtue of his office employment, position, or contract becomes possessed of documents or materials containing classified information of the United States knowingly removes such documents or materials without authority and with the intent to retain such documents or materials at an unauthorized location shall be fined under this title or imprisoned for not more than one year or both."

Armed with that information, they're wondering how Hillary Clinton, who is also an attorney, and attorneys are frequently held to a higher standard of knowledge of the law, how this could not have come to her attention. She was the Secretary of State. Of course, the Secretary of State is going to become possessed of classified materials. Of course she was an attorney. She practiced with a prominent Arkansas law firm, the Rose Law Firm. She knew from her White House days with her husband, the President, that classified materials can be very dangerous if they get into the wrong hands.

She had to have known about this statute because she had to have been briefed when she took over the job as the Secretary of State. So how, given that body of knowledge and experience, could this have happened in a way that could have potentially provided access by hackers to confidential information?

Mr. COMEY. No, it's a good question, a reasonable question. The protection we have as Americans is that the government in general, and in that statute in particular, has to prove before they can prosecute any of us, that we did this thing that's forbidden by the law, and that when we did it, we knew we were doing something that was unlawful. We don't have to know the code number, but that we knew we were doing something that was unlawful. That's the protection we have. And it's one I've worked for very hard. When I was in the private sector, I did a lot of work with the

Chamber of Commerce to stop the criminalization of negligence in the United States.

Mrs. LUMMIS. May I interrupt and suggest that this statute says "knowingly removes such documents or materials without authority and with the intent to retain such documents or materials at an unauthorized location." The intent here in the statute is to retain the documents at an unauthorized location. It's not intent to pass them on to a terrorist, or to someone out in Internetland. It's just the intent to retain the documents or materials at an unauthorized location.

Mr. COMEY. It's more than that, though. You'd have to show that and prove criminal intent, both by law, that's the way the judge would instruct a jury, and practice at the Department of Justice. They have reserved that statute, even though it's just a misdemeanor, for people who clearly knew they were breaking the law. And that's the challenge. So should have known, must have known, had to know, does not get you there. You must prove beyond a reasonable doubt that they knew they were engaged in something that was unlawful.

Mrs. LUMMIS. Okay. Then——

Mr. COMEY. That's the challenge.

Mrs. LUMMIS. Then may I turn to her attorneys. Did all of Secretary Clinton's attorneys have the requisite clearances at the time they received all of her emails, especially those that were classified at the time they were sent?

Mr. COMEY. No.

Mrs. LUMMIS. They destroyed, as has been noted, 30,000 emails of Secretary Clinton's. Do you have 100 percent confidence that none of the 30,000 emails destroyed by Secretary Clinton's attorneys was marked as classified?

Mr. COMEY. I don't have 100 percent confidence. I'm reasonably confident some of them were classified. There were only three in the entire batch we found that bore any markings that indicated they were classified. So that's less likely. But surely, it's a reasonable assumption that some of the ones they deleted contained classified information.

Mr. BLUM. Thank you, Director. Thank you, Mr. Chairman. I yield back.

Chairman CHAFFETZ. I now recognize the gentleman from Massachusetts, Mr. Lynch, for 5 minutes.

Mr. LYNCH. Thank you, Mr. Chairman. Thank you, Director Comey, for appearing here to help the committee with its work. Director Comey, Secretary Clinton's certainly not the only Secretary of State to use a personal email account with information later identified as being classified. I just want to show you. This is a book that was written by former Secretary of State Colin Powell. And in his book, he says, "To complement the official State Department computer in my office, I installed a laptop computer and on a private line. My personal email account on a laptop allowed me direct access to anyone online. So I started shooting emails to my principal assistants, to individual ambassadors, and increasingly, to my foreign minister colleagues who like me were trying to bring their ministries into the one 186,000 miles per second world." Were

you aware of this, that Secretary Colin Powell actually had a private server as well?

Mr. COMEY. Not a private server. I think he used a commercial email account for State Department business.

Mr. LYNCH. Private line, unprotected.

Mr. COMEY. Correct. Not a State Department email system.

Mr. LYNCH. Right. Right. He went rogue, so to speak. Right?

Mr. COMEY. I don't know whether I'd say that.

Mr. LYNCH. Yeah. All right. Okay. I'm not going to put words in your mouth. But do you think this was careless for him to do that, just to start—you know, get his own—he got his own system. He installed a laptop computer on a private line. "My personal email account was on a laptop and allowed me direct access to anyone, anyone online." That's his own statement. I'm just trying to compare Secretaries of State, because Secretary Powell's never been here. As a matter of fact, when we asked him for his emails, unlike the 55,000 that we received from Secretary Clinton, he said, "I don't have any to turn over." This is a quote. This was on ABC's This Week. He explained, "I don't have anything to turn over. I didn't keep a cache of them. I did not print them off. I do not have thousands of pages somewhere on my personal files." But he was Secretary of State, and he operated, you know, on a private system. Were you aware of that?

Mr. COMEY. Not at the time 15 years ago. But I am now.

Mr. LYNCH. Yeah. Okay. So recently—well, back in October 2015, the State Department sent Secretary Powell a letter requesting that he contact his email provider, AOL, to determine whether any of his emails are still on the unclassified systems. Are you aware of that ongoing investigation?

Mr. COMEY. I don't know of an investigation. I am——

Mr. LYNCH. Well, that request for information from former Secretary Powell.

Mr. COMEY. Yes, I am.

Mr. LYNCH. You're aware of that. Are you surprised that he has never responded?

Mr. COMEY. I don't know enough to comment. I don't know exactly what conversation he had with the State Department.

Mr. LYNCH. All right. I'm trying to look at the—you know, where we have a lot of comparisons in other cases. And there seems, like all the cases where prosecutions have gone forward, the subject of the investigation has demonstrated a clear intent to deliver classified information to a person or persons who were unauthorized to receive that. So if you look at the, you know, PFC Bradley Manning, now Chelsea Manning, that was a court martial. But he demonstrated a clear intent to publish that information, which was classified. Julian Assange, the WikiLeaks editor, I guess, and publisher.

Again, a wide and deliberate attempt to publish classified information. General Petraeus, which we talked about earlier today, shared information with his biographer. And Jeffrey Sterling sending stuff to The New York Times. Former CIA officer Kiriakou, who was interested in writing a book, so he hung on to his information. And even former Director of the CIA, John Deutch, who retained classified information on a couple of servers, one in Belmont, Mas-

sachusetts, and one in Bethesda, Maryland. And that was after he became a private citizen.

So in all those cases, there's a clear intent. As you said before, you look at what people did and what they were thinking when they did that. And I would just ask you: Is there a clear distinction between what those people did and what Secretary Clinton did in her case?

Mr. COMEY. In my view, yes. The Deutch case illustrates it perfectly. And he took huge amount of documents, almost all at the TS/SCI level, had them in hard copy at his house, had them on an unclassed system connected to the Internet, attempted to destroy some of them when he got caught. Admitted: I knew I wasn't supposed to be doing this. So you have clear intent, huge amounts of documents, obstruction of justice, those are the kinds of cases that get prosecuted. That's what I said when—I meant it when I said it. In my experience, which is three decades, no reasonable prosecutor would bring this case. I know that frustrates people. But that's the way the law is. And that's the way the practice is at the Department of Justice.

Mr. LYNCH. Thank you for your testimony and for your service. I yield back.

Chairman CHAFFETZ. Thank you gentleman.

We'll now go to the gentleman from North Carolina, Mr. Meadows, for 5 minutes.

Mr. MEADOWS. Thank you, Mr. Chairman. Director Comey, thank you. There has been much said today about criticizing you and your service. And I want to go on record that even though many of my constituents would love for me to criticize your service because of the conclusion you reached, never have I, nor will I, criticize your service. And we appreciate your service to this country and the integrity. So I'm going to focus on the things that you said, not the conclusion that you drew.

And Congressman Trey Gowdy and I talked a little bit about this, but on February 4, 2016, Secretary Clinton, during a presidential debate said, "I never sent or received any classified material. They are retroactively classifying it," closed quote. And so in your statement on July 5, you said that there were indeed 110 emails, 52 email chains, which there was classified information on it at the time it was sent or received. So those two statements, both of them cannot be true. Is that correct? Your statement and her statement?

Mr. COMEY. Yeah. It's not accurate to say that she did not send or receive——

Mr. MEADOWS. So she did not tell the truth during that presidential debate that she never sent or received classified information, and it was retroactively classified?

Mr. COMEY. Yeah. I don't think that's a question I should be answering what was in her head——

Mr. MEADOWS. Well, either your statement's not true or hers is not true. Both of them cannot be true. So is your statement true?

Mr. COMEY. That I can speak to. My——

Mr. MEADOWS. Okay. Your statement is true. So the American people will have to judge with her statement not being true. So let me go on to another one. On October 22 she said, "There was noth-

ing marked classified on emails either sent or received." And in your statement you said, "A very small number of emails contained classified information bore markings indicating the presence of classified information at the time." So she makes a statement that says there was no markings. You make a statement that there was. So her statement was not true.

Mr. COMEY. Well, that one actually I have a little bit of insight into her statement, because we asked her about that. There were three documents that bore portion markings where you're obligated, when something is classified, to put a marking on that paragraph.

Mr. MEADOWS. Right.

Mr. COMEY. And there were three that bore C in parens, which means that's confidential classified——

Mr. MEADOWS. So a reasonable person who has been a Senator, a Secretary of State, a First Lady, wouldn't a reasonable person know that that was a classified marking as a Secretary of State?

Mr. COMEY. Yeah.

Mr. MEADOWS. A reasonable person. That's all I'm asking.

Mr. COMEY. Yeah. Before this investigation I probably would have said yes. I'm not so sure. I don't find it incredible——

Mr. MEADOWS. Director Comey, come on. I mean, I've only been here a few years, and I understand the importance of those markings. So you're suggesting that a long length of time that she had no idea what a classified marking would be? That's your sworn testimony today?

Mr. COMEY. No, no, not that she would have no idea what a classified marking would be. But it's an interesting question as to whether she—this question about sophistication came up earlier. Whether she was actually sophisticated enough to understand what a C in parens mean.

Mr. MEADOWS. So you're saying this former Secretary of State is not sophisticated enough to understand a classified marking.

Mr. COMEY. No. That's not what I'm saying.

Mr. MEADOWS. That's a huge statement.

Mr. COMEY. That's not what I'm saying. You asked me did I assume that someone would know. Probably before this investigation, I would have. I'm not so sure of that answer any longer. I think it's possible, possible, that she didn't understand what a C meant when she saw it in the body of an email like that.

Mr. MEADOWS. After years in the Senate, and Secretary of State? I mean, that's hard for me and the American people to believe, Director Comey. And I'm not questioning your analysis of it, but wouldn't a reasonable person think that someone who has the highest job of handling classified information understand that?

Mr. COMEY. I think that's a conclusion a reasonable person would draw. It may not be accurate.

Mr. MEADOWS. So in that, let me go a little bit further. Because that last quote actually came on October 22, 2015, under sworn testimony before the Benghazi Committee. So if she gave sworn testimony that a reasonable person would suggest was not truthful, isn't it a logical assumption that she may have misled Congress, and we need to look at that further?

Mr. COMEY. Well, the reasonable person test is not what you look at for perjury or false statements. But like I said, I can understand why people would ask that question.

Mr. MEADOWS. All right. So let me, in the last little portion of this, in your 3–1/2 hour interview on Saturday, did she contradict some of these public statements in private? Because you said she didn't lie to the FBI. But it's apparent that she lied to the American people. So did she change her statements in that sworn testimony with you last Saturday?

Mr. COMEY. I haven't gone through that to parse that. I have——

Mr. MEADOWS. Can you do that and get back to this committee? Because it's important, I think, to the American people and to transparency.

Mr. COMEY. I'm sure. And as the chairman and I have talked about, I'm sure the committee's going to want to see documents in our investigation and whatnot, and we'll work to give you whatever we can possibly give you under our law. But I haven't done that analysis at this point.

Mr. MEADOWS. Will you, and get that back to us?

Chairman CHAFFETZ. The gentleman's time has expired. And we'll now recognize the gentleman from Tennessee, Mr. Cooper, for 5 minutes.

Mr. COOPER. Thank you, Mr. Chairman. And thank you, Director Comey. I hate to see one of America's most distinguished public servants pilloried before this committee. We're all highly partisan here. We're good back seat drivers. We're all today apparently armchair prosecutors. And you stated the truth when you said that you didn't know of anyone who would bring a case like this. And some of the prosecutors have had decades to do that. I hope that this committee's effort is not intended to intimidate you or the FBI or law enforcement in general, or government employees.

And I'm thankful at this moment that you have such a lifetime record of speaking truth to power. Because that's very important. It's also very important that apparently you're a lifelong Republican. You're just here to do your job, to state the facts. I think the key issue here is whether, in fact, there's a double standard, where some Americans are being treated differently than others. And I think I can rely on my Republican colleagues to make sure that Hillary Clinton's treated no better than anybody else. There should be some attention given to make sure that she's not treated any worse than anybody else.

I think we all know that we wouldn't be having this hearing, especially on an emergency basis, unless she were running for President. My colleague from Massachusetts has just pointed out that previous Secretaries of State are not being called on the carpet, whether that be Condoleezza Rice or Colin Powell or others.

But I think the grossest double standard here today is the fact that all the members of this committee, every Member of Congress, is not subject to the same law that Secretary Clinton was subject to. And as lawmakers, that means that we have exempted ourselves from the standard of other Federal employees. My colleague from D.C., Ms. Norton, referred to this. Why did we exempt ourselves from the same rules? Apparently our chairman lists his pri-

vate email account on his business card. We all have access to classified information.

So I would like to challenge my Republican colleagues here today. Let's work together and introduce legislation to make the same laws apply to us as apply to the executive branch and to Secretary Clinton. I would be happy to join in such legislation to make sure that we're not being hypocritical on this panel, that we're holding ourselves to the same standards as Secretary Clinton, and not trying to accuse her of things that we may be guilty of ourselves.

I bet my colleagues would be the first to complain if, for example, emails were retroactively classified. That's a situation that most people in public service would object to pretty strongly. How did you know at the time if you had no idea? So I think it's very important if we want as Congress to have the trust of the American people to not be hypocritical, to uphold the same standards that we want to see upheld by others, and I'm just thankful at this moment in our history that we have someone like you who's in charge of the FBI. Because too many things are highly politicized. And the last thing we should do is criminalize our political system.

I didn't see any of my Republican colleagues complain when former Governor Bob McDonald was exonerated by an 8–0 vote at the Supreme Court for having done certain things that I think most Americans would find highly objectionable. But our court, on a bipartisan, unanimous basis, exonerated him just a week or two ago.

So I think this is a moment for committee members to reflect, to take a deep breath, to calm down and realize exactly what you said, that no reasonable prosecutor would have brought this case. And thank you for stating that so clearly and publicly. I yield back the balance of my time.

Mr. CUMMINGS. Will the gentleman yield?

Mr. COMEY. I yield to the ranking member.

Mr. CUMMINGS. Mr. Director, let me ask you this: First of all, I associate myself with everything the gentleman just said. You were talking about some markings a little bit earlier. Is that right? Can you describe what those markings are like? Markings on documents. I think you said there were three documents with certain markings on them——

Mr. COMEY. Yeah.

Mr. CUMMINGS. —that indicated classified. Go ahead.

Mr. COMEY. Yeah, there were three emails that down in the body of the email, in the three different emails, there were paragraphs that, at the beginning of the paragraph, had a parenthesis, a capital C, and then a parenthesis. And that is a portion marking to indicate that——

Mr. CUMMINGS. That paragraph.

Mr. COMEY. —that paragraph is classified at the confidential level, which is the lowest level of classification.

Mr. CUMMINGS. And so out of the 30,000 documents, you found these three markings? Is that what you're saying?

Mr. COMEY. Three emails for C markings down in the body. None of the emails had headers, which is at the top of a document that

says it's classified. Three had within the body the portion marking for C.

Mr. CUMMINGS. Thank you.

Chairman CHAFFETZ. Thank the gentleman. I now recognize the gentleman from Tennessee, Mr. Duncan, for 5 minutes.

Mr. DUNCAN. Thank you, Mr. Chairman. Mr. Meadows mentioned one instance in which Secretary Clinton said that she did not mail any classified material to anyone. Actually, she said that several other times. But it is accurate, Director Comey, that you found at least 110 instances of when she had emailed classified material?

Mr. COMEY. 110 that she either received or sent.

Mr. DUNCAN. Right. And it also is accurate that, quote, "Clinton's lawyers cleaned their devices in such a way as to preclude complete forensic recovery"?

Mr. COMEY. Correct.

Mr. DUNCAN. And also when she said—when Secretary Clinton said that nothing she sent was marked classified, and you said, in your press conference, "but even if information is not marked classified in an email, particularly are participants who know or should know that the subject matter's classified are still obligated to protect it." Do you feel that Secretary Clinton knew, or should have known, that she was obligated to protect classified information?

Mr. COMEY. Yes.

Mr. DUNCAN. With her legal background and her long experience in government. Also, she said at one point that she has directed all emails, work-related emails, to be forwarded to the State Department. Is it also accurate that you discovered thousands of other emails that were work-related other than the 30,000 that she submitted?

Mr. COMEY. Correct.

Mr. DUNCAN. Before I came to Congress, I spent several years as a criminal court judge. I presided over several hundred felony criminal cases. And I can assure you that I saw many cases where the evidence of criminal intent was flimsier than the evidence in this case. But do you realize that great numbers of people across this country felt that you presented such an incriminating case against Secretary Clinton in your press conference that they were very surprised or even shocked when you reached the conclusion to let her off? You doubt that great numbers feel that way?

Mr. COMEY. No. I think so. And I understand the question. And I wanted to be as transparent as possible. We went at this very hard to see if we could make a case. And I wanted the American people to see what I honestly believed about the whole thing.

Mr. DUNCAN. Well, do you understand, as the chairman said earlier, that great numbers of people feel now that there's a one standard of justice for the Clintons and another for regular people?

Mr. COMEY. Yeah, I've heard that a lot. It's not true, but I've heard it a lot.

Mr. DUNCAN. Well, even the ranking member who was here, who, of course as we understand, had to defend Secretary Clinton as strongly as possible, he almost begged you to explain the gap between the incriminating case that you presented and the conclusion

that was reached. Did that surprise you that he felt so strongly that there was this big gap?

Mr. COMEY. No. Not at all. These—it's a complicated matter. It involves understanding how the Department of Justice works across decades, house prosecutorial discretion is exercised. I get that folks see disconnection, especially when they see a statute that says "gross negligence." Well, the Director just said she was extremely careless. So how is that not prosecutable? So it takes an understanding of what's one on over the last 99 years. What's the precedent? How do we treat these cases. I totally get people's questions. And I think they're in good faith.

Mr. DUNCAN. We talked about gross negligence here. And you said that Secretary Clinton was extremely careless with this classified material, and how dangerous it could be, how threatening, even to people's lives that it could be to disclose classified material. Do you agree that there is a very thin line between gross negligence and extreme carelessness? And would you explain to me what you consider to be that difference?

Mr. COMEY. Sure, Judge—Congressman. As a former judge, you know there isn't actually a great definition in the law of gross negligence. Some courts interpret it as close to willful, which means you know you're doing something wrong. Others drop it lower. My term extremely careless is—I'm trying to be kind of an ordinary person. That's a commonsense way of describing it sure looks real careless to me. The question of whether that amounts to gross negligence, frankly, is really not at the center of this, because when I look at the history of the prosecutions and see it's been one case brought on a gross negligence theory, I know from 30 years, there's no way anybody at the Department of Justice is bringing a case against John Doe or Hillary Clinton for the second time in 100 years based on those facts.

Mr. DUNCAN. You ended your statement to Congressman Cooper a while ago saying once again that no reasonable prosecutor could have brought this case. Yet you also mentioned earlier today that you'd seen several of your friends and other prosecutors who've said publicly, many across this country, that they would have been glad to prosecute this case.

Mr. COMEY. I smile because they're friends. And I haven't talked to them. And I want to say: Guys, so where were you over the last 40 years? Where were these cases? They just have not been brought. For reasons that I said earlier, it's a good thing that the Department of Justice worries about prosecuting people for being careless. I don't like it. As a citizen I want people to show they knew they were breaking the law, and then we'll put you in jail.

Mr. DUNCAN. Of course, you know many people have been prosecuted for gross negligence by the Federal Government, by the FBI.

Chairman CHAFFETZ. The gentleman's time has expired.

Mr. DUNCAN. Thank you.

Chairman CHAFFETZ. We'll now recognize the gentleman from Virginia, Mr. Connolly, for 5 minutes.

Mr. CONNOLLY. Thank you. And welcome, Director Comey. And although our politics are different, I gather you're a Republican. Is that correct?

Mr. COMEY. I have been a registered Republican for most of my adult life. I'm not registered any longer.

Mr. CONNOLLY. We don't register by party in Virginia. But many have suspected my politics as being Democratic. And I thank you for your integrity. As my colleague said, and I said in my opening statement, your career has been characterized as speaking truth to power. And you're doing it again today. Just to set the context, Director Comey, not that you're unaware of this.

Today's hearing is political theatre. There's not even the pretense of trying to get at the truth. This is a desperate attempt under an extraordinary set of circumstances, an emergency hearing. I don't know what the emergency is other than one side is about to nominate somebody who is a pathological narcissist who, you know, is talking about banning Muslims and Mexicans crossing the border who are all rapists and women who are pigs and terrified at the prospect of the consequences of that in the election. So let's grab onto whatever we can to discredit or try to discredit the other nominee, punitive nominee. And you took away their only hope.

And so the theater today is actually trying to discredit you. Subtlety in some cases. My friend from South Carolina uses big words like "exculpatory." And kind of goes through what a prosecutor would do. The insinuation being you didn't do your job. My friend from Wyoming is apparently flooded with citizens in her home State who are reading the statute that governs classification. Lot of time on their hands back there, I guess. But, yeah, this is all designed to discredit your finding. Now, the FBI interviewed Secretary Clinton. Is that correct?

Mr. COMEY. Yes.

Mr. CONNOLLY. Did she lie to the FBI in that interview?

Mr. COMEY. I have no basis for concluding that she was untruthful with us.

Mr. CONNOLLY. And is it a crime to lie to the FBI?

Mr. COMEY. Yes, it is.

Mr. CONNOLLY. David Petraeus did lie to the FBI.

Mr. COMEY. Yes.

Mr. CONNOLLY. And he prosecuted for that—well, could have been.

Mr. COMEY. Could have been, was not for that——

Mr. CONNOLLY. Right. That's always a judgment call.

Mr. COMEY. Correct.

Mr. CONNOLLY. Was she evasive?

Mr. COMEY. I don't think the agents assessed she was evasive.

Mr. CONNOLLY. How many emails are we talking about, total universe, that were examined by your team?

Mr. COMEY. Tens of thousands.

Mr. CONNOLLY. Tens of thousands. And how many are in a questionable category that maybe could have, should have been looked at more carefully because there could be some element of classification? Apparently, my friend from North Carolina assumes we're all intimately familiar with the fact that if a C appears, it means a classification, though there seems to be some dispute about that because the State Department, as I understand it, has actually said some of those were improperly marked and shouldn't have had the C. Are you aware of that?

Mr. COMEY. Yes.

Mr. CONNOLLY. Yes. So could it be that in her 100-trip, 4 years—100 overseas trips to 100 countries as Secretary of State trying to restore U.S. credibility that had been destroyed in the previous 8 years overseas, and tens of thousands of email communications, not including phone calls and classified conversations in SCIFs and the like, that maybe the small percentage of emails, she didn't pay as much attention to them as maybe in retrospect one would hope she would have. Is that a fair conclusion? Could that be a fair conclusion?

Mr. COMEY. I don't usually deal in maybes. It's possible.

Mr. CONNOLLY. Well, you do deal in distinguishing between willful and inadvertent.

Mr. COMEY. Sure.

Mr. CONNOLLY. And in this case, you concluded it has to be in the latter category. It wasn't willful.

Mr. COMEY. We concluded there was not adequate evidence of willful conduct.

Mr. CONNOLLY. Right. So there's no obfuscation here, unlike the Petraeus case. And there's no evasion. There's no lying. There's no willful intent to compromise classified material, despite the insinuations of my friends on the other side of the aisle. And the only hope left in this political theatre is to discredit you and your team in the hopes that, therefore, you won't have credibility and we can revisit this monstrous crime of using a private server, that server being the server of the former President of the United States that maybe Mrs. Clinton thought would be more secure than the leaky system at the State Department. I yield back.

Chairman CHAFFETZ. We now recognize the gentleman from Texas, Mr. Hurd, for 5 minutes.

Mr. HURD. Thank you, Mr. Chairman. Mr. Chairman, I'm offended. I'm offended by my friends on the other side of the political aisle saying this is political theatre. This is not political theatre. For me, this is serious. I spent 9–1/2 years as an undercover officer in the CIA. I was the guy in the back alleys collecting intelligence, passing it to lawmakers. I've seen my friends killed. I've seen assets put themselves in harm's way. And this is about protecting information, the most sensitive information the American government has. And I wish my colleagues would take this a little bit more seriously.

Mr. Comey, Director Comey, excuse me, SAP, Special Access Program. You alluded to earlier that includes SCI information. Does SCI information include HUMINT and SIGINT?

Mr. COMEY. Yes.

Mr. HURD. HUMINT and SIGINT. Human intelligence information collected from people that are putting themselves in harm's way to give us information to drive foreign policy. Signals intelligence. Some of the most sensitive things to understand; what Al Qaeda is doing; what ISIS is doing. So the former Secretary of State had an unauthorized server, those are your words, in her basement, correct?

Mr. COMEY. Correct.

Mr. HURD. Who was protecting that information? Who was protecting that server?

Mr. COMEY. Well, not much. There was a number of different people who were assigned as administrators of the server.

Mr. HURD. And at least seven email chains, or eight that was classified as TS/SCI.

Mr. COMEY. Correct.

Mr. HURD. So the former Secretary of State, one of the President's most important advisors on foreign policy and national security, had a server in her basement that had information that was collected from our most sensitive assets, and it was not protected by anyone? And that's not a crime? That's outrageous. People are concerned. What does it take for someone to misuse classified information and get in trouble for it?

Mr. COMEY. Well, it takes mishandling it and criminal intent.

Mr. HURD. And so an unauthorized server in the basement is not mishandling?

Mr. COMEY. Well, no, there is evidence of mishandling here. This whole investigation at the end focused on is there sufficient evidence of intent.

Mr. HURD. Was this unanimous opinion within the FBI on your decision?

Mr. COMEY. Well, the whole FBI wasn't involved, but the team of agents, investigators, analysts, technologists, yes.

Mr. HURD. Did you take into any consideration the impact that this precedence can set on our ability to collect intelligence overseas?

Mr. COMEY. Yes. My primary concern is the impact on what other employees might think in the Federal Government.

Mr. HURD. And you don't think this sends a message to other employees that if a former Secretary of State can have an unauthorized server in their basement that transmits top secret information, that that's not a problem?

Mr. COMEY. Oh, I worry very much about that. That's why I talked about that in my statement, because an FBI employee might face severe discipline. And I want them to understand that those consequences are still going to be there.

Mr. HURD. Director Comey, do you have a server in your basement?

Mr. COMEY. I do not.

Mr. HURD. Does anybody in the FBI have a server in their basement or in their house?

Mr. COMEY. I don't know.

Mr. HURD. Do you think it's likely?

Mr. COMEY. I think it's unlikely.

Mr. HURD. I would think so, too. I would think so, too. Because I've always been proud to serve alongside the men and women that you represent. So there was no dissenting opinion when you made this decision. It's your job to be involved in counterintelligence as well?

Mr. COMEY. Yes.

Mr. HURD. So that means protecting our secrets from foreign adversaries collecting them. Is that correct?

Mr. COMEY. Correct.

Mr. HURD. Did this activity you investigated make America's secrets vulnerable to hostile elements?

Mr. COMEY. Yes.

Mr. HURD. Do you think that pattern of behavior would continue?

Mr. COMEY. I'm sorry?

Mr. HURD. Do you think that pattern of behavior would continue?

Mr. COMEY. Would continue?

Mr. HURD. By our former Secretary of State.

Mr. COMEY. I'm not following you. You mean if we hadn't—if this had not come to light, you mean?

Mr. HURD. Right now, based on what we see, do you think there's going to be other elements within the Federal Government that think it's okay to have an unauthorized server in their basement?

Mr. COMEY. Well, they better not. That's one of the reasons I'm talking about——

Mr. HURD. So, but what is the ramifications of them doing that? You know, how is there going to be any consequences levered if it's not being levered here? Because, indeed, you're setting a precedent.

Mr. COMEY. Yeah. The precedent—I want people to understand, again, I only am responsible for the FBI, that there will be discipline from termination to reprimand and everything in between for people who mishandle classified information.

Mr. HURD. Director Comey, I'm not a lawyer, and so I may misstate this. Is there such a thing as the case of first impression? And why was this not possibly one of those?

Mr. COMEY. There is such a thing, which just means the first time you do something. The reason this isn't one of those is that's just not fair. That would be treating somebody differently because of their celebrity status, or because of some other factor doesn't matter. We have to treat people—the bedrock of our system of justice, we treat people fairly. We treat them the same based on their——

Mr. HURD. And that person mishandling the most sensitive information that this government can collect is not fair—it's not fair to punish someone who did that?

Mr. COMEY. Not on these facts. It would be fair—if that person worked for me, it would be fair to have a robust disciplinary proceeding. It's not fair to prosecute that person on these facts.

Mr. HURD. Mr. Chairman, I yield back the time I do not have.

Chairman CHAFFETZ. Thank the gentleman. We'll now recognize the gentleman from Pennsylvania, Mr. Cartwright, for 5 minutes.

Mr. CARTWRIGHT. Thank you, Mr. Chairman. And I'd like to open by acknowledging my colleague from North Carolina, Mr. Meadows, here he comes back in the room, for acknowledging your integrity, Director Comey. I think bipartisan sentiments like that are few and far between around here. And I appreciate Congressman Meadows' remark. You are a man of integrity, Director Comey. It's troubling to me that that remark from Congressman Meadows is not unanimous at this point. It used to be. Just weeks ago, our chairman, Representative Chaffetz, stated on national TV that Republicans, quote, "Believe in James Comey," unquote. He said this, and I quote, "I do think that in all of the government, he is a man of integrity and honesty. His finger's on the pulse of this. Nothing

happens without him. And I think he is going to be the definitive person to make a determination or a recommendation."

But just hours after your actual recommendation came out, Chairman Chaffetz went on TV and accused you of making a, quote, "political calculation." And then our Speaker of the House, weeks ago, referring to you, Director Comey, said, "I do believe that his integrity is unequalled. So you're integrity—it was unanimous about your integrity before you came to your conclusion. But after, not so much. That's troubling. And I want to give you a chance, Director Comey, how do you respond to that? How important to you is maintaining your integrity before the Nation?

Mr. COMEY. I think the only two things I have in life that matter are the love of my family and friends and my integrity. So I care deeply about both.

Mr. CARTWRIGHT. All right. Now, Director Comey, you discussed your team a little bit. And they deserve a lot of credit for all of the hard work and effort that went into this investigation. And I think you just said that they were unanimous. That everyone who looked at this agreed that no reasonable prosecutor would bring a case. Am I correct in that?

Mr. COMEY. Yes.

Mr. CARTWRIGHT. How many people were on this team?

Mr. COMEY. It changed at various times, but somewhere between 15 and 20, and then we used a lot of other FBI folks to help from time to time.

Mr. CARTWRIGHT. And how many hours were spent on this investigation?

Mr. COMEY. We haven't counted yet. They—I said to them they moved—they put 3 years of work into 12 calendar months.

Mr. CARTWRIGHT. And how many pages of documents did the FBI review in this investigation?

Mr. COMEY. Thousands and thousands and thousands.

Mr. CARTWRIGHT. And the agents doing the document review, were they qualified or were they unqualified?

Mr. COMEY. They were an all-star team. They are a great group of folks.

Mr. CARTWRIGHT. How about Secretary Clinton? Did she agree to be interviewed?

Mr. COMEY. Yes.

Mr. CARTWRIGHT. Come in voluntarily without the need of a subpoena?

Mr. COMEY. Yes.

Mr. CARTWRIGHT. Was she interviewed?

Mr. COMEY. Yes.

Mr. CARTWRIGHT. Was she interviewed by experienced critical veteran agents and law enforcement officers, or by some kind of credulous gullible newbies doing their on-the-job training, Director?

Mr. COMEY. She was interviewed by the kind of folks the American people would want doing the interview. Real pros.

Mr. CARTWRIGHT. All right. You were asked about markings on a few documents. I have the manual here, Marking Classified National Security Information. And I don't think you were given a full chance to talk about those three documents with the little Cs on

them. Were they properly documented? Were they properly marked according to the manual?

Mr. COMEY. No.

Mr. CARTWRIGHT. According to the manual, and I ask unanimous consent to enter this into the record, Mr. Chairman.

Chairman CHAFFETZ. Without objection, so ordered.

Mr. CARTWRIGHT. According to the manual, if you're going to classify something, there has to be a header on the document, right?

Mr. COMEY. Correct.

Mr. CARTWRIGHT. Was there header on the three documents that we've discussed today that had the little C in the text someplace?

Mr. COMEY. No. They were three emails. The C was in the body, in the text. But there was no header on the email or in the text.

Mr. CARTWRIGHT. So if Secretary Clinton really were an expert at what's classified and what's not classified, and were following the manual, the absence of a header would tell her immediately that those three documents were not classified. Am I correct in that?

Mr. COMEY. That would be a reasonable inference.

Mr. CARTWRIGHT. All right. I thank you for your testimony, Director. I yield back.

Chairman CHAFFETZ. I thank the gentleman. We'll now recognize the gentleman from Colorado, Mr. Buck, for 5 minutes.

Mr. BUCK. Good morning, Director Comey.

Mr. COMEY. Good morning, sir.

Mr. BUCK. Thank you for being here. I also respect your commitment to law and justice and your career. And the first question I want to ask you is this hearing unfair? Has it been unfair to you?

Mr. COMEY. No.

Mr. BUCK. Thank you. One purpose of security procedures for classified information is to prevent hostile nations from obtaining classified information. Is that fair?

Mr. COMEY. Yes.

Mr. BUCK. And did hostile nations obtain classified information from Secretary Clinton's servers?

Mr. COMEY. I don't know. It's possible. But we don't have direct evidence of that. We couldn't find direct evidence.

Mr. BUCK. I want to, without making this a law school class, I want to try to get into intent. There are various levels of intent in the criminal law. Everything from knowingly and willfully doing something all the way down to strict liability. Would you agree with me on that?

Mr. COMEY. Yes.

Mr. BUCK. And in Title 18, most of the criminal laws in Title 18 have the words "knowingly" and "willfully" in them. And that is the standard typically that United States attorneys prosecute under.

Mr. COMEY. Most do. Unlawfully, knowingly, and willfully is our standard formulation for charging a case.

Mr. BUCK. And there are also a variety of others between the knowingly and willfully standard and the strict liability standard. And many, like environmental crimes, have a much lower standard

because of the toxic materials that are at risk of harming individuals. Is that fair?

Mr. COMEY. That's correct.

Mr. BUCK. Okay. Let's talk about this particular statute, 18 U.S.C. 1924. I take it we could all agree—or you and I can agree on a couple of the elements. She, Secretary Clinton, was an employee of the United States.

Mr. COMEY. Correct.

Mr. BUCK. And as the result of that employment, she received classified information.

Mr. COMEY. Correct.

Mr. BUCK. And there's no doubt about those two elements. Now, I don't know whether the next element is one element or two, but it talks about knowingly removes such materials without authority, and with the intent to retain such material at an unauthorized location. So I'm going to treat those as two separate parts of the intent element.

First of all, do you see the word "willfully" anywhere in the statute?

Mr. COMEY. I don't.

Mr. BUCK. Okay. And that would indicate to you that there is a lower threshold for intent?

Mr. COMEY. No, it wouldn't.

Mr. BUCK. Why?

Mr. COMEY. Because we often, as I understand the Justice Department's practice and judicial practice, will impute to any criminal statute at that level with a knowingly also requirement that you know that you're involved in criminal activity of some sort. A general mens rea requirement.

Mr. BUCK. And you would apply that same standard to environmental crimes?

Mr. COMEY. No. If it specifically says it's a negligence-based crime, I don't think a judge would impute that.

Mr. BUCK. But Congress specifically omitted the word "willfully" from this statute. And yet you are implying the world "willfully" in the statue. Is that fair?

Mr. COMEY. That's fair.

Mr. BUCK. Okay. So what the statute does say is knowingly removes such materials without authority. Is it fair that she knew that she didn't have authority to have this server in her basement?

Mr. COMEY. Yes. That's true.

Mr. BUCK. And she knew that she was receiving materials, classified information, in the emails that she received on her BlackBerry and other devices?

Mr. COMEY. I can't answer—I'm hesitating as a prosecutor because it's always—to what level of proof? I do not believe there's evidence beyond a reasonable doubt that she knew she was receiving classified information in violation of the requirements.

Mr. BUCK. But that's not my question. My question, in fairness, is did she know that she was receiving information on the servers at her location?

Mr. COMEY. Oh, I'm sorry. Of course. Yes. She knew she was using her email system.

Mr. BUCK. And as Secretary of State, she also knew that she would be receiving classified information.

Mr. COMEY. Yes. In general.

Mr. BUCK. Okay. And did she then have the intent to retain such material at an unauthorized location? She retained the material that she received as Secretary of State at her server in her basement and that was unauthorized?

Mr. COMEY. You're asking me did she have the—and I'm going to ask you the burden of proof question in a second. But did she have the intent to retain classified information on the server, or just to retain any information on the server?

Mr. BUCK. Well, we've already established that she knew, as Secretary of State, that she was going to receive classified information in her emails. And so did she retain such information that she received as Secretary of State on her servers in her basement?

Mr. COMEY. She did, in fact. There is, in my view, not evidence beyond certainly probable cause. There's not evidence beyond a reasonable doubt that she knew she was receiving classified information, or that she intended to retain it on her server. There's evidence of that. But when I said there's not clear evidence of intent, that's what I meant. I could not, even if the Department of Justice would bring that case, I could not prove beyond a reasonable doubt those two elements.

Mr. BUCK. Thank you very much.

Chairman CHAFFETZ. Thank the gentleman. We'll now go to the gentlewoman from Illinois, Ms. Duckworth, for 5 minutes.

Ms. DUCKWORTH. Thank you, Mr. Chairman. When I first entered Congress 3 years ago, like many freshman members, I, unlike many freshman members, I actually sought out this committee. I wanted to be on this committee because I wanted to tackle the challenges of good government, like working to eliminate improper payments or prevent wasteful programs, duplication. Before I joined Congress, I had the privilege of serving in the Army for 23 years. And I, you know, and as I tackled those challenges and in the challenges of helping reduce veterans' homelessness, I witnessed firsthand the real-world importance of improving and streamlining government operations. How even the best policies in the world will not work without proper implementation.

And so when it comes to implementing true and lasting reforms that will make sure the electronic records and other records and the history of our great Nation are preserved for future generations, I've done my best to approach this goal seriously. I'm focused on making sure that our Nation sustains a long-term commitment to modernizing our Federal records keeping system, from improving the laws governing what needs to be collected, to ensuring our civil servants across government have the necessary tools to achieve what should be nonpartisan and a shared goal.

With respect to examining the tough lessons learned from numerous recordkeeping incidents that our committee has dealt with, which transcend any one agency or any single administration, my mission is clear: Make sure that we here in Congress move beyond partisan politics and engage in the serious hard work of ensuring that the laws written in an era of pen and paper are overhauled to meet the digital challenges of the 21st century.

Director Comey, the Office of Management and Budget and the National Archives and Records Administration released a memorandum known as the Managing Government Records Directive in 2012. And this directive states, and I quote, "By December 31, 2016, Federal agencies will manage both permanent and temporary email records in an accessible electronic format. Federal agencies must manage all email records in an electronic format. Email records must be retained in an appropriate electronic system that supports records management and litigation requirements which may include preservation-in-place models, including the capability to identify, retrieve, and retain the records as long as they are needed."

As a Director of a Bureau who deals with sensitive information on a daily basis, do you believe that this directive is necessary and attainable for agencies across the board within that 4-year timeframe from August 2012 to December 2016.

Mr. COMEY. I don't know enough to say both. I can say it's certainly necessary. I don't know whether it's achievable.

Ms. DUCKWORTH. Okay. Are you familiar with the Capstone Approach? That's the Federal—it's approach that says that Federal agencies should save all emails for select senior level employees, and that the emails of other employees would be archived for a temporary period set by the agency so that senior employees' emails are kept forever and those by other lower level employees are actually archived for a short period, a shorter period.

Mr. COMEY. I'm aware generally. I know what applies to me and when I was Deputy Attorney General in the Bush Administration.

Ms. DUCKWORTH. Yes. In fact, I understand that the FBI is currently actively using this approach, according to the agency's senior agency official for records—Office for Records Management fiscal year 2015 annual report. My understanding is the Capstone Approach is aimed at streamlining the recordkeeping process for emails and reducing the volume of records that an agency has to maintain. Nearly all agencies will be required to comprehensively modernize their approach to managing Federal records in the near future. As the head of a component agency, Director Comey, within the Department of Justice, which appears to be a leader in adopting the innovative Capstone Approach across the agency, would you agree that with respect to instituting foundational reforms that will strengthen records preservation, the Capstone Approach used by DOJ should be accelerated and wrote out across the Federal Government?

Mr. COMEY. I think we're doing it in a pretty good way. I don't know—I'm not an expert enough to say whether everybody should do it the way we do it, honestly.

Ms. DUCKWORTH. Are you satisfied with the way that you're doing it?

Mr. COMEY. I am, but I don't want to sound overconfident, because I'm sure there's a way we can do it better. But I think we're doing it in a pretty good way.

Ms. DUCKWORTH. Do you have any one person within the FBI that continually reviews the—your records keeping? And also do they report directly to you? As well as is there periodic review of how you're implementing this process?

Mr. COMEY. Yes. We have an entire division devoted to records management. That assistant director reports up to the deputy director, who reports to me. We have—it's an enormous operation, as you might imagine, requiring constant training. And so that's what I mean when I say I think we're doing it in a pretty good way. And we have record-marking tools, we prompt with dialogue boxes requiring employees to make a decision what's the nature of this record you're creating now and where should it be stored. So I think we're doing it in a pretty good way. That's why I say that.

Ms. DUCKWORTH. Have you seen that in any of the other agencies that you have interacted with, or have you had a chance, an occasion to look at what some of the other agencies are doing with their sensitive and classified information? Are they following the same technique as you're doing in the FBI?

Mr. COMEY. I don't know enough to say, I personally.

Ms. DUCKWORTH. Okay.

I am out of time, but thank you.

Mr. COMEY. Okay

Chairman CHAFFETZ. I thank the gentlewoman.

We'll now recognize the gentleman from Michigan, Mr. Walberg, for 5 minutes.

Mr. WALBERG. I thank the chairman.

And thank you, Director Comey, for being here.

Mr. Chairman, thank you for holding this hearing.

And, Director Comey, for making it very clear that you believe we've done this respectfully, with good intention. And I wish some of my colleagues that had instructed us on our intent were here. They have a great ability to understand intent better than, I guess, the Director of the FBI.

But it is an intent that's important here, that we understand we are Oversight and Government Reform Committee. And if indeed the tools aren't there to make sure that our country is secure and that officials at the highest levels in our land don't have the understanding on what it takes to keep our country secure, that we do the necessary government reform to put laws in place that will be effective and will meet the needs of distinguished agencies and important agencies like the FBI.

So thank you, Mr. Chairman, for doing this hearing. It's our responsibility to do oversight and reform as necessary.

Going back, Director Comey, to paraphrase the Espionage Act, people in the Seventh District of Michigan understand it from this perspective and common sense, what it says, that whoever being entrusted with information related to national defense, through gross negligence permits the information to be removed from its proper place in violation of their trust, shall be fined or imprisoned under the statute.

There doesn't seem to be a double standard there. It doesn't express intent. You've explained your understanding of why intent is needed, and we may agree or disagree on that, but the general public looking at that statute says it's pretty clear.

The question I would ask, Director Comey, what's your definition of extremely careless, if you could go through that?

Mr. COMEY. I intended it as a commonsense term. It's kind of one those kind of you know it when you see it sort of things. Somebody

who is—should know better, someone who is demonstrating a lack of care that strikes me as—there's ordinary accidents and then there's just real sloppiness. So I think of that as kind of real sloppiness.

Mr. WALBERG. So you stated that you had found 110 emails on Secretary Clinton's server that were classified at the time they were sent or received, yet Secretary Clinton has insisted for over a year publicly that she never sent or received any classified emails.

The question I have from that, would it be difficult for any Cabinet-level official, and specifically any Cabinet official, let alone one who is a former White House resident or U.S. senator, to determine if information is classified?

Mr. COMEY. Would it be difficult for them to——

Mr. WALBERG. Would it be difficult?

Mr. COMEY. That's hard to answer in the abstract. We're trying to find the context in which they're hearing it or seeing it. Obviously, if it's marked, which is why we require markings, it's easy. It's just too hard to answer, because there are so many other situations you might encounter it.

Mr. WALBERG. But with the training that we receive and certainly a Secretary of State would receive or someone who lives in the White House, that goes a little above and beyond just the commonsense individual out there trying to determine. Knowing that classified information will be brought and to remove to an unauthorized site ought to cause a bit of pause there, shouldn't it?

Mr. COMEY. Yeah. And if you're a government official, you should be attentive to it——

Mr. WALBERG. Absolutely.

Mr. COMEY. —because you know that the matters you deal with could involve sensitive information. So sure.

Mr. WALBERG. So Secretary Clinton's revised statement that she never knowingly sent or received any classified information is probably also untrue?

Mr. COMEY. Yeah. I don't want to comment on people's public statements. We did not find evidence sufficient to establish that she knew she was sending classified information beyond a reasonable doubt to meet that—the intent standard. But like I said, I understand why people are confused by the whole discussion, I get that. But you know what would be a double standard? If she were prosecuted for gross negligence.

Mr. WALBERG. But your statement on Tuesday said there is evidence to support a conclusion that any reasonable person in Secretary Clinton's position should have known that an unclassified system was no place for that conversation.

Mr. COMEY. I stand by that.

Mr. WALBERG. And that's very clear.

Mr. COMEY. That's the definition of carelessness, of negligence.

Mr. WALBERG. Which happened——

Mr. COMEY. Oh, yeah.

Mr. WALBERG. —as a result of our Secretary of State's—former Secretary of State's decisions.

Mr. COMEY. Yes.

Mr. WALBERG. Is it your statement, then, before this committee that Secretary Clinton should have known not to send classified material, and yet she did?

Mr. COMEY. Well, certainly she should have known not to send classified information. As I said, that's the definition of negligent. I think she was extremely careless, I think she was negligent. That, I could establish. What we can't establish is that she acted with the necessary criminal intent.

Mr. WALBERG. Do you believe that since the Department of Justice hasn't used the statute Congress passed, it's invalid?

Mr. COMEY. No, I think they're worried that it's invalid, that it will be challenged on constitutional grounds, which is why they've used it extraordinarily sparingly in the decades.

Mr. WALBERG. Thank you. I yield back.

Chairman CHAFFETZ. I thank the gentleman.

We'll now go to—we'll now recognize Mr. Lieu of California for 5 minutes.

Mr. LIEU. Thank you, Mr. Chair.

As I read some of my Republican colleagues' press statements, and as I sit here today, I am reminded of that quote from "Macbeth": "full of sound and fury, signifying nothing."

I've heard some sound and fury today from members of the committee, and the reason they largely signify nothing is because of two fundamental truths that are self-evident. The first of which, none of the members of this committee can be objective on this issue. I can't be objective. I've endorsed Hillary Clinton for President, as have the Democratic members of this committee. My Republican colleagues can't be objective. They oppose Hillary Clinton for President.

Which is why we have you. You are a nonpartisan, career public servant that has served our Nation with distinction and honor. And not only can you be objective, it is your job to be objective, to apply the law fairly and equally regardless of politics.

I think it would be important for the American people to get a fuller appreciation of your public service. So let me ask you, before you were FBI Director, how many years did you serve as a Federal prosecutor?

Mr. COMEY. I think 15.

Mr. LIEU. For a period of time, you were at Columbia Law School as a scholar and you specialized in national security law. Is that correct?

Mr. COMEY. Sometimes I fantasize I still am.

Mr. LIEU. All right. Thank you.

When you served in the Republican administration of President George W. Bush, you were then the second-highest ranking member of the Department of Justice. Is that right?

Mr. COMEY. Yes. President Bush appointed me to be U.S. Attorney in Manhattan and then the number two in the Department of Justice.

Mr. LIEU. When you were confirmed for the FBI Director position, the vote was 93–1. Is that correct?

Mr. COMEY. That's correct.

Mr. LIEU. With that strong bipartisan support, it's not surprising that Senator Grassley, a Republican, said during your confirma-

tion, and I quote: "Director Comey has a reputation for applying the law fairly and equally regardless of politics."

In this case, did you apply the law fairly and equally regardless of politics?

Mr. COMEY. Yes.

Mr. LIEU. Did you get any political interfere reasons from the White House?

Mr. COMEY. None.

Mr. LIEU. Did you get any political interference from the Hillary Clinton campaign?

Mr. COMEY. None.

Mr. LIEU. One of the reasons you're appointed to a fixed term of 10 years, a very long term, is to help insulate you from politics. Isn't that right?

Mr. COMEY. That's correct.

Mr. LIEU. The second fundamental truth today about this hearing is that none of the members of this committee have any idea what we're talking about, because we have not reviewed the evidence personally in this case.

When I served on Active Duty in the U.S. Air Force in the 1990s, one of my duties was a prosecutor. One of the first things I learned as a prosecutor is it is unprofessional and wrong to make allegations based on evidence that one has not reviewed.

So let me ask you, has any member of this committee, to the best of your knowledge, reviewed the 30,000 emails at issue in this case?

Mr. COMEY. I don't know. Not to my knowledge.

Mr. LIEU. Has any member of this committee sat through the multiple witness interviews that the FBI conducted in this case?

Mr. COMEY. No. That I know. No.

Mr. LIEU. Has any member of this committee received any special information about the files that you kept or other FBI agents kept on this case?

Mr. COMEY. Not to my knowledge.

Mr. LIEU. Now let's do a little bit of math here. One percent of 30,000 emails would be 300 emails. Is that right?

Mr. COMEY. I think that's right.

Mr. LIEU. Thirty emails would be one-tenth of 1 percent, and three emails would be 1 one hundredth of 1 percent of 30,000, right?

Mr. COMEY. I think that's right.

Mr. LIEU. Okay. So of those three emails, 1 one hundredth of 1 percent of 30,000, they bore these tiny little classified markings, which is, as you described, a C with parentheses, correct?

Mr. COMEY. Correct.

Mr. LIEU. It is certainly possible that a busy person who has sent and received over 30,000 emails just might miss this marking of a C with parentheses. It is possible, correct?

Mr. COMEY. Correct.

Mr. LIEU. Okay. So let me now just conclude by stating what some of my colleagues have, which is, there is just the strongest whiff of hypocrisy going on here. The American public might be interested in knowing that all Members of Congress receive security clearances just for being a Member of Congress. We get to have pri-

vate email servers, we get to have private email accounts, we can use multiple devices, we can take devices overseas.

And really at the end of the day, when the American people look at this hearing, they need to ask themselves this question: Do they trust the biased, partisan politicians on this committee who are making statements based on evidence we have not reviewed, or do they trust the distinguished FBI Director? I would trust the FBI Director.

I yield back.

Chairman CHAFFETZ. Thank you.

We'll now recognize the gentleman from Florida, Mr. Mica, for 5 minutes.

Mr. MICA. Thank you, Mr. Chairman.

Director, how long did you investigate this matter?

Mr. COMEY. Just about a year.

Mr. MICA. A year. And do you believe you conducted a legitimate investigation?

Mr. COMEY. Yes, sir.

Mr. MICA. And it was a legitimate subject that was something that you should look into, you had that responsibility. Is that correct?

Mr. COMEY. Yes.

Mr. MICA. We have a responsibility to hear from you on the action that you took. This weekend—well, tomorrow we'll go back to our districts, and we have to explain people, I'll be at a couple of cafes where I see folks, in meetings, and they're going to ask a lot of questions about what took place.

Have you seen the Broadway production "Hamilton"?

Mr. COMEY. Not yet. I'm hoping to.

Mr. MICA. I haven't either, but I understand it won the choreography Tony Award. I think you and others know that.

The problem I have in explaining to my constituents is what's come down, it almost looks like choreography. Let me just go over it real quickly with you.

Last Tuesday, not this week, 1 week ago, former President Clinton meets with the Attorney General in Phoenix. The next Friday, last Friday, Mrs. Lynch, the AG, says she is going to defer to the FBI on whatever you came up with. On Saturday morning, I saw the vans pull up, this is this past Saturday, and you questioned Secretary Clinton for 3 hours. Is that—I guess that's correct?

Mr. COMEY. Yeah. Three and a half.

Mr. MICA. Okay. And then on Tuesday morning, the morning after July Fourth, we watched in our office, I had my interns, I said, "Come in, we've got the FBI Director, let's hear what he has to say," we're all kind of startled, and you basically said you were going to recommend not to prosecute, correct?

Mr. COMEY. Uh-huh. Yes, sir.

Mr. MICA. And then Tuesday, well, we had President Obama and Secretary Clinton arrive in Charlotte at 2 o'clock, and shortly thereafter we had the Attorney General is closing the case.

This is rapid fire. I mean, now, my folks think that there's something fishy about this. I'm not a conspiracy theorist, but there are a lot of questions on how this came down. I have questions about how this came down.

Did you personally interview the Secretary on Saturday morning?

Mr. COMEY. I didn't personally, no.

Mr. MICA. And how many agents did?

Mr. COMEY. I think we had five or six in the room.

Mr. MICA. Did you talk to all of those agents after the interview?

Mr. COMEY. I did not speak to all of them, no.

Mr. MICA. Did she testify or talk to them under oath?

Mr. COMEY. No.

Mr. MICA. She did not. Well, that's a problem. But——

Mr. COMEY. It's still a crime to lie to us.

Mr. MICA. I know it is. Do you have a transcript of that—that——

Mr. COMEY. No. We don't record our——

Mr. MICA. Do you have a 302, I guess it's called, analysis?

Mr. COMEY. I do. I don't have it with me, but I do.

Mr. MICA. Did you read it?

Mr. COMEY. Yes.

Mr. MICA. You did. Can we get a copy of it since the case is closed?

Mr. COMEY. I don't know the answer to that.

Mr. MICA. I would like a copy of it provided to the committee.

I would like also for the last 30 days, any communications between you or any agent or any person in the FBI with the Attorney General or those in authority in the Department of Justice on this matter. Could you provide us with that?

Mr. COMEY. We'll provide you with whatever we can under the law and under our policy. It would actually be easy in my case.

Mr. MICA. You see, the problem that I have, though, is I have to go back and report to people what took place.

Mr. COMEY. Sure.

Mr. MICA. Now, did you write the statement that you gave on Tuesday?

Mr. COMEY. Yes.

Mr. MICA. You did. And did you write—and you said you didn't talk to all of the agents. But all of the agents, did they meet with you? And then is that the group that said that we all vote to not recommend prosecution?

Mr. COMEY. Well, yeah, I did not meet with all of the agents. I've met with—I guess I've met—I've with all of them at various times.

Mr. MICA. But we're getting the word that it was, like, unanimous out of every—out of FBI that we don't prosecute.

Mr. COMEY. What's your question, Congressman?

Mr. MICA. Well, again, I want to know who counseled you. You read their summary, okay. She was not under oath. And it appears—I mean, members have cited here where she lied or misled to Congress, which will lead now to the next step of our possibly giving you a referral on this matter. You're aware of that?

Mr. COMEY. Yes. Someone mentioned that earlier.

Mr. MICA. And that probably will happen.

Thank you for shedding some light on what took place.

Mr. COMEY. Can I, Mr. Chairman——

Chairman CHAFFETZ. Sure. Go ahead.

Mr. COMEY. —can I respond just very briefly?

I hope what you'll tell the folks in the cafe is: Look me in the eye and listen to what I'm about to say. I did not coordinate that with anyone. The White House, the Department of Justice, nobody outside the FBI family had any idea what I was about to say. I say that under oath. I stand by that. There was no coordination. There was an insinuation in what you were saying that I don't mean to get strong in responding, but I want to make sure I was definitive about that.

Thank you, sir.

Chairman CHAFFETZ. Thank you.

We'll now recognize the gentlewoman from the Virgin Islands, Ms. Plaskett, for 5 minutes.

Ms. PLASKETT. Thank you, Mr. Chairman.

And thank you all for being here.

Director Comey, I would rather be here talking with you about the FBI's investigations and their resources to those individuals who are acting under color of law who have apparently committed egregious violations in the killings that we've seen in the recent days.

But instead, Mr. Chairman, I'm sitting here and I've listened patiently as a number of individuals have gone on national TV and made accusations against Director Comey, both directly and indirectly, because he recommended against prosecution based upon facts.

I've listened just very recently here in this hearing as my esteemed colleague from Florida tries to insinuate the condensation of an investigation into 1 week that actually occurred over a much, much longer period of time, and using that condensation and conspiracy theory to say that there's some orchestration. And that they have accused Mr. Director Comey of basing his decision on political considerations rather than facts. I've heard chuckles and laughter here in this hearing, and I don't think there's anything to be smiling or laughing about.

Because I want to say something to those individuals who are chuckling and laughing and making attacks on Director Comey for doing his job: You have no idea who you're talking about. Your accusations are completely off base, utterly offensive to us as American people.

I know this because I've had the honor of working for Director Comey during my own service at the Department of Justice. From 2002 to 2004, I served as senior counsel to the deputy attorney general. I worked with both the deputy attorney general, Larry Thompson, and Deputy Attorney General Jim Comey when he became deputy as a staff attorney. And I know from my own experiences that Director Comey is a man of impeccable integrity.

There are very few times when you as an attorney or as an individual can work with individuals or a gentleman who is completely that, someone who is above the fray. Anyone who suggests or implies that he made his recommendations on anything but the facts simply does not know James Comey.

We've used the term "no reasonable prosecutor." Well, I know that James Comey doesn't act as what a reasonable prosecutor would do, because he is the unyielding prosecutor, he is the pros-

ecutor who does what is politically not expedient for himself, his staff, but for the law.

And I'm not the only person in this hearing, in this committee, who has worked with Director Comey or for him. Representative Gowdy himself also commended Director Comey, and he said this, and I quote: "I used to work with him. I think Comey is doing exactly what you want. He's doing a serious investigation behind closed doors, away from the media's attention, and I'm going to trust him until I see a reason not to."

Representative Gowdy referred to Director Comey as honorable and apolitical. He said this is exactly what you want in law enforcement. Well, it's exactly what you want in law enforcement until the decision is not the decision that you want.

Director Comey, Chairman Chaffetz, as it was said by one of my colleagues, went on television and accused you of making, quote, "a political calculation." He said that your recommendation was nothing more than, quote, "a political determination in the end."

I'm going to ask you, how do you respond to that? Were your actions in any way, shape, or form governed by political consideration?

Mr. COMEY. No, not in any way.

Ms. PLASKETT. And did anyone with Secretary Clinton's campaign or the administration influence your recommendation for political reasons?

Mr. COMEY. No. They didn't influence it in any way.

Ms. PLASKETT. I'm going to take you at your word, because I know, and those who will go through the record of your long tenure as a career prosecutor and they'll look at examples, will see that you have taken decisions that have not been that which your supervisors, which the President, which others have wanted you to take.

As a Federal prosecutor who believed that the facts must come above politics, I'm thankful that we have you. And, Director Comey, I want to thank you for your service to our country, and you have our support.

We would like to see as much documents. And I'm grateful that you want to keep the transparency so that the American public can understand the difference between what they hear in the media and the elements of a crime necessary for criminal prosecution.

Thank you.

Chairman CHAFFETZ. I thank the gentlewoman.

We'll now recognize the gentleman from Texas, Mr. Farenthold, for 5 minutes.

Mr. FARENTHOLD. Thank you very much, Director Comey.

I want to talk a little bit about cybersecurity. The State Department's inspector general report detailed instances of multiple attacks on Secretary Clinton's computer as well as her replying to suspicious email from the personal account of the Undersecretary of State.

Director, you said that hostile actors successfully gained access to the commercial email accounts of people Secretary Clinton regularly communicated with. In the case of the Romanian hacker, Guccifer, accessing Sidney Blumenthal's account. And, you know, that's been public for some time.

During your investigation, were there other people in the State Department or that regularly communicated with Secretary Clinton that you can confirm were successfully hacked?

Mr. COMEY. Yes.

Mr. FARENTHOLD. And were these folks that regularly communicated with the Secretary?

Mr. COMEY. Yes.

Mr. FARENTHOLD. And were you able to conclude definitively that the attempted hacks referenced in the IG report were not successful?

Mr. COMEY. We were not able to conclude that they were successful. I think that's the best way to say it.

Mr. FARENTHOLD. All right. So while you said that given the nature of Clinton's server, you would be unlikely to see evidence one way or the other of whether or not it had been successfully hacked, how many unsuccessful attempts did you uncover? Did you find any there?

Mr. COMEY. There were unsuccessful attempts. I don't know the number off the top of my head.

Mr. FARENTHOLD. Do you have an idea, were they from foreign governments? Where did they come from?

Mr. COMEY. I want to be careful what I say in an open setting, and so I—we can give you that information, but I don't want to give any foreign governments knowledge of what I know. So there——

Mr. FARENTHOLD. All right. But would you be so far as to say they probably weren't American high school students fooling around?

Mr. COMEY. Correct. It was not limited to——

Mr. FARENTHOLD. All right.

Mr. COMEY. —criminal activity.

Mr. FARENTHOLD. During your investigation, did you or anyone in the FBI interview the hacker Guccifer?

Mr. COMEY. Yes.

Mr. FARENTHOLD. And he claimed he gained access to Sid Blumenthal's email account and traced him back to Clinton's private server. Can you confirm that Guccifer never gained access to her server?

Mr. COMEY. Yeah, he did not. He admitted that was a lie.

Mr. FARENTHOLD. All right. Well, at least that's good to hear.

All right. Section 793 of Title 18 of the United States Code makes it a crime to allow classified information to be stolen through gross negligence. Were you to discover that hostile actors had actually gotten into Secretary Clinton's email, would that have changed your recommendation with respect to prosecuting her?

Mr. COMEY. Unlikely, although we didn't consider that question, because we didn't have those facts.

Mr. FARENTHOLD. All right. I want to go back to the question of intent real quick for just a second. I'm a recovering attorney, it's been decades since I actually practiced law, but you kept referring to she had to know it was illegal to have the requisite criminal intent. I was always taught in law school, and I don't know where this changed, that ignorance of the law was no excuse. If I'm driving along at 45 miles an hour and didn't see the 35-mile-an-hour

speed limit, I was still intentionally speeding even though I didn't know it.

Now, I might not have had the requisite criminal intent if maybe my accelerator were jammed or something like that, but even though I didn't know the law was 35, I was driving 45, I'm going to get a ticket and I'm probably going to be prosecuted for that.

So how can you say ignorance of the law is an excuse in Mrs. Clinton's case?

Mr. COMEY. Well, the comparison to petty offenses, I don't think is useful. But the question of ignorance of the law is no excuse. But here's the distinction. You have to have general criminal intent. You don't need to know what particular statute you're violating, but you must be aware of the generally wrongful nature of your conduct. That's what——

Mr. FARENTHOLD. Now, so Congress, when they enacted that statute, said gross negligence.

Mr. COMEY. Yep.

Mr. FARENTHOLD. That doesn't say intent. So what are we going to have to enact to get you guys to prosecute something based on negligence or gross negligence? So are we going to have to add, "And, oh, by the way, we don't mean you—we really do mean you don't have to have intent there"?

Mr. COMEY. Well, that's a conversation for you all to have with the Department of Justice, but it would have to be something more than the statute enacted in 1917, because for 99 years they've been very worried about its constitutionality.

Mr. FARENTHOLD. All right. Well, I think that's something this committee and Congress as a whole, the Judiciary Committee that Mr. Chaffetz and I also sit on, will be looking at it.

And I was on television this morning, and I just want to relay a question that I received from a caller into that television commercial, and it's just real simple. Why should any person follow the law if our leaders don't?

And we can argue about intent or not, but you laid out the fact that she basically broke the law but you couldn't prove intent. Maybe I'm putting words in your mouth, but I do want to know why any person should follow the law if our leaders don't have to. Maybe that's rhetorical, but I'll give you an opportunity to comment on that.

Mr. COMEY. Yeah. That's a question I'm no more qualified to answer than any American citizen. It's an important question.

In terms of my work in my world, my folks would not be—one of my employees would not be prosecuted for this. They would face consequences for this. So the notion that it's either prosecute or you walk around, you know, smiling all day long is just not true for those people who work for the government. The broader question is one for a democracy to answer, it's not for me.

Mr. FARENTHOLD. And I guess the ultimate decision as to whether or not Mrs. Clinton works in government or not is not in—is in everybody's hands.

Chairman CHAFFETZ. I thank the gentleman.

Mr. FARENTHOLD. Yield back.

Chairman CHAFFETZ. We'll now recognize the gentleman from Pennsylvania, Mr. Boyle, for 5 minutes.

Mr. BOYLE. Thank you, Mr. Chairman.

And thank you, Director Comey, for appearing, especially on such short notice.

I want to share with you actually something a friend of mine was expressing when watching your press conference 48 hours ago, and this is someone who's not in any way political; in fact, probably typical of most American citizens today in being depressed about the remarkable level of cynicism we have in our government, but specifically those of us who are in government make decisions first and foremost because of the party hat we wear and not necessarily based on the facts and the evidence.

And he texted me after watching your 15-minute presentation: Oh, it's nice to see a real pro. You can tell that he would make the decision based on the facts and the evidence and not what party he wears.

I think that's so important if we're ever going to get to a place in this country where we restore some of the faith that we had in government. If you looked at the poll numbers from the 1940s and 1950s and you look at faith in government among the American public, and you look at those numbers today, the numbers today are anemic, they're nowhere near the levels that they were decades ago.

So for that, I want to say thank you. And I think that many citizens have the same impression.

When I first met you a couple years ago at a weekend session in Colonial Williamsburg, you might remember that we had a discussion about my biggest concern, frankly, facing the security of the American people, and that is the possibility of a lone wolf terrorist, someone becoming self-radicalized and acting based on that. We had an exchange that I'll keep private, but I think I can characterize that you share my concern.

I'm just thinking, for the last 2–1/2 hours that we've been here, we've had the FBI Director, asking questions on this matter, when, frankly, I would have much rather your time spent dealing with the potential of lone wolf terrorists and other coordinated attacks that we face.

But since this is the Oversight and Government Reform Committee, trying to find something that we can now take and possibly use in a systemic way, not just the celebrity of Secretary Clinton and the fact, because it involves her, let's face it, that's the reason why we're here, but I want to try to take something out of this very expensive and long investigation and try to use it in a productive way toward reforming government that possibly we can get something good out of it.

So toward that end, I'm really concerned about this issue of up-classification, because it seems as if, and I was not aware of this until the investigation, there is quite a strong discrepancy between not just former Secretary Clinton, but even former Secretary Powell, what he thinks should be classified, and then what is classified after the fact. And I think you—if I'm right, there were some 2,000 emails that were up-classified? I was wondering if you could speak to that.

Mr. COMEY. Yeah. It actually was not a concept I was real familiar with before this. It's the notion that something might not have

been classified at the time, but that in hindsight, as a government agency considers releasing it, they raise the classification level to protect it because it would—it's a candid assessment of a foreign leader or something like that.

I think it is largely a State Department thing, because their diplomats will often be conversing in an unclassified way, that when they look at releasing it in response to a FOIA request, they think it ought to be protected in some fashion.

But, honestly, I kind of pushed those to the side.

Mr. BOYLE. Right.

Mr. COMEY. The important thing here was what was classified at the time, that's what matters.

Mr. BOYLE. Right. And that for a law enforcement official matters. But I'm just wondering if you could share with us any of your impressions about a system that exists where there is such gray area and discrepancy in what is classified and what's not, and if you or your agents had any suggestions for us, either in Government Reform, or I happen to be on the Foreign Affairs Committee that has oversight of State Department.

Do you believe that this is a matter that we should take up where there is such discrepancy on what's classified, what's not classified? I think of one example. Ambassador Ross put something in a book that wasn't classified, and then it was up-classified after the book came out. But what good does that do us as a country in terms of trying to protect the intelligence of the United States.

Mr. COMEY. Yeah. I'm not an expert in this up-classification business, but I do suspect it would be a fertile ground for trying to figure out whether there are ways to do it in a more predictable, reliable way.

Mr. BOYLE. Yeah. Well, thank you again for your service.

And I yield back my time.

Chairman CHAFFETZ. I thank the gentleman.

We'll now recognize the gentleman from Georgia, Mr. Hice, for 5 minutes.

Mr. HICE. Director Comey, your statement on Tuesday clearly showed that Secretary Clinton not only was extremely careless in handling classified information, but that also any reasonable person should have known better, and that also, in doing so, she put our national security at risk with her reckless behavior.

So it seems to me that the American people are only left, based on your assessment, with just a few options. Either Secretary Clinton herself is not a reasonable person, or she is someone who purposefully, willfully exhibited disregard for the law, or she is someone who sees herself as above the law.

And to muddy the water even further, after listening to you lay out the facts of the investigation, much of what you said directly contradicted her in previous statements that she had made.

I think it's all this compiled, putting the—connecting the dots that so many American people are irate, that after all of this there was not a recommendation for Secretary Clinton to be prosecuted.

Now, I do greatly appreciate the fact that you came out with much more information on this than you would have in other cases, and I think that was the right the thing to do. Undeniably, this is not a typical case. This is something of great public interest, obvi-

ously the subject of the investigation, former Secretary of State, former senator, and all those things that we have talked about, former first lady, and so forth.

And in addition to this, her husband, who happens to be the former President of the United States, is meeting privately with the Attorney General right before all of this interview takes place. Obviously, this is very suspicious, just the optics of it all. And at the same time that you're coming out, or more or less the same time that you are announcing the decision, Secretary Clinton is flying around in Air Force One with the President doing a campaign event.

I mean, there's nothing about this case that's ordinary, there's nothing about the subject that's ordinary.

So let me ask you this, Director: Did Secretary Clinton in fact, comply with the Department's policies or the Federal Records Act?

Mr. COMEY. I don't think so. I know you have the State inspector general here, who's more of an expert on all the Department's policies, but at least in some respects, no.

Mr. HICE. So keeping the servers at home and all these types of things, obviously, is not in compliance with the Department's policies?

Mr. COMEY. Yes. And I've read the inspector general's report on that. That's part of the reason I can answer that part with some confidence.

Mr. HICE. Okay. And yet she said publicly that she fully complied. So there again is another issue.

If you had the same set of facts but a different subject, a different individual involved, say, just an average, ordinary State Department employee or an anonymous contractor, what would have been the outcome?

Mr. COMEY. I'm highly confident there would be no criminal prosecution no matter who it was. There would be some range of discipline. They might get fired, they might lose their clearance, they might get suspended for 30 days. There would be some discipline, maybe just a reprimand, I doubt it, I think it would be higher on the discipline spectrum, but some sort of discipline.

Mr. HICE. So is it your opinion that there should likewise be some discipline in this case?

Mr. COMEY. That's not for me to say. I can talk about what would happen if it was a government employee under my responsibility.

Mr. HICE. Well, then, what you're laying out is that there is a double standard. For someone else, a different subject, an anonymous contractor or someone at the State Department, there would absolutely be discipline, but because of who the subject is, you're not willing to say there should be discipline. So there's—again, this whole issue, this is what the American people are so upset about.

Let me say that, when you stated that no reasonable prosecutor would pursue this case, is that because the subject of this investigation was unique?

Mr. COMEY. No. Huh-uh. There's no double standard there. And there's no double standard, either, in the sense that if it was John Doe, a former government employee, you'd be in the same boat. We wouldn't have any reach on the guy. He wouldn't be prosecuted.

Mr. HICE. But he would have some discipline?

Mr. COMEY. Well, not if he had left government service.

Mr. HICE. Had they lied about having servers, had they lied about sending and receiving classified emails, had they lied about not deleting those emails to the public, had they lied about not having any marked classified, the statements are clearly documented, and you're saying that an average person would experience discipline, by your own words, but Secretary Clinton does not deserve to be disciplined?

Mr. GOWDY. [Presiding.] The gentleman's time has expired, but the Director may answer if he wants to.

Mr. COMEY. An average employee still in government service would be subject to a disciplinary process. Now, if they'd left, you'd be in the same boat.

Mr. GOWDY. The gentleman from Georgia yields back.

The chair will now recognize the gentleman from Vermont, Mr. Welch.

Mr. WELCH. Thank you very much, Mr. Chairman.

Thank you, Director Comey.

The prosecutor has really awesome power. The power to prosecute is the power to destroy and it has to be used with restraint. You obviously know that. You're being asked to—you had to exercise that responsibility in the context of a very contested Presidential campaign, enormous political pressure.

You had to do it once before. And I go back to that evening of March 10, 2004, when the question was whether a surveillance program authorized after 9/11 by President Bush was going to continue despite the fact that the Justice Department had come to an independent legal conclusion that it actually violated our constitutional rights.

That's a tough call, because America was insecure, the President was asserting his authority as Commander in Chief to take an action that was intended to protect the American people, but you and others in the Justice Department felt that, whatever that justification was, the Constitution came first and you were going to defend it.

And as I understand it, you were on your way home and had to divert your drivers to go back to the hospital to be at the bedside of a very sick at that time Attorney General, and you had to stand in the way of the White House chief of staff and the White House counsel.

I'm not sure that was a popular decision or one that you could have confidently thought would be a career booster, but I want to thank you for that.

Fast forward, we've got this situation of a highly contested political campaign. And there is substantive concern it's legitimate by Democrats and Republicans for independent political reasons, but you had to make a call that was based upon your view of the law, not your view of how it would affect the outcome of who would be the next Commander in Chief.

Others have asked this for you, but I think I'm close to the end. I want to give you a chance to just answer, I think, the bottom line questions here. Had you, after your thorough investigation, found evidence that suggested that criminal conduct occurred, is there

anything, anything or anyone, that could have held you back from deciding to prosecute?

Mr. COMEY. No. I mean, I don't have the power to decide prosecution, but I'd have worked very hard to make sure that a righteous case was prosecuted.

Mr. WELCH. And you would have make that recommendation to the Attorney General?

Mr. COMEY. Yes.

Mr. WELCH. Was there any interference, implicit or explicit, from the President of the United States or anyone acting on his behalf to influence the outcome of your investigation and the recommendation that you made?

Mr. COMEY. No.

Mr. WELCH. Was there anyone in the Hillary Clinton campaign or Hillary Clinton herself who did anything, directly or indirectly, to attempt to influence the conclusion that you made to recommend no prosecution?

Mr. COMEY. No.

Mr. WELCH. At this moment, after having been through several hours of questioning, is there anything in the questions you've heard that would cause you to change the decision that you made?

Mr. COMEY. No. I don't—you know, I don't love this, but it's really important to do, and I understand the questions and concerns. I just want the American people to know, we really did this the right way. You can disagree with us, but you cannot fairly say we did it in any kind of political way. We don't carry water for anybody. We're trying to do what the right thing is.

Mr. WELCH. Well, I very much appreciate that, and I very much appreciate that it takes strong people of independent judgment to make certain that we continue to be a Nation of laws.

Mr. Chairman, just one final thing, and I'll yield to Mr. Cummings. We've got a political debate where a lot of these issues that are going to be—that have been raised are going to be fought in the campaign, and we've got Secretary Clinton who's going to have to defend what she did. She's acknowledged it's a mistake. We've got that great constitutional scholar, Mr. Trump, who's going to be making his case about why this was wrong. But that's politics, that's not really having anything to do with the independence of prosecutorial discretion.

Thank you, Director Comey.

And I yield whatever additional time I have to Mr. Cummings.

Chairman CHAFFETZ. I think the gentleman's going to yield back. I've spoken with Mr. Cummings.

We'll now recognize the gentleman from Kentucky, Mr. Massie, for 5 minutes.

Mr. MASSIE. Thank you, Mr. Chairman.

And thank you, Director Comey, for showing up and your willingness to be transparent and answer a lot of unanswered questions.

A few hours before this hearing started I went onto social media and asked people to submit questions, and I've got over 500 questions, and I don't think I'll get to ask them all in these 5 minutes, but I'm sure you'll be willing to answer them.

One of the common things that I came in here to ask, but I realized it's not the right question now, is what's the difference be-

tween extremely careless and gross negligence. But in the process of this hearing, what I'm hearing you say is, that's not what we—that's not what your reluctance is based on, it's not based on—the reluctance to prosecute, by the way. Your reluctance to recommend a prosecution or an indictment is not based on parsing those words, it's based on your concern for this statute, with this statute, is that correct, from your opening statement?

Mr. COMEY. It's broader than that, actually, the statute, and it fits within a framework of fairness and also my understanding of what the Department of Justice has prosecuted over the last 50 years.

Mr. MASSIE. So when you say a reasonable prosecutor wouldn't take this case, it's not because you don't think she made—that she lied in public or that maybe she was negligent, it's because you have concern with the prosecutorial history of the statute?

Mr. COMEY. And not just that statute, but also 1924, which is the misdemeanor. I also don't see cases that were prosecuted on facts like these. So both, both 793 and 1924.

Mr. MASSIE. But you did find one prosecution. And has it been overturned by the Supreme Court?

Mr. COMEY. No. There was one time it was charged in an espionage case, and the guy ended up pleading guilty to a different offense, so it was never adjudicated.

Mr. MASSIE. So, you know, so that your concern is with the negligence threshold, that you think it requires mens rea, or knowing the crime. But in all 50 States isn't there a negligent homicide statute and aren't people prosecuted for that all the time, and doesn't the Supreme Court and all the courts below that uphold those prosecutions, just on the basis of negligence?

Mr. COMEY. I don't know whether all 50 States. I think negligent homicide and manslaughter statutes are relatively common.

Mr. MASSIE. Okay. So but don't all 50 States have something like that, and aren't those sustained in the upper courts, those convictions?

Mr. COMEY. I don't know whether all 50 States have something like that. But, again, I think it's very common and I think those are sustained.

Mr. MASSIE. So don't we have a history of—you know, you implied that the American judicial system doesn't have a history of convicting somebody for negligence, but don't we in other domains of justice?

Mr. COMEY. We do. I know the Federal system best. There are very few in the Federal system. They're mostly, as we talked about earlier, in the environmental and Food and Drug Administration area.

Mr. MASSIE. Okay. Thank you.

Now, I want to ask another question that's come up here. You've basically related to us that this information, this top secret or classified information, got into these email chains because of conversations people were having, they were relating what they heard before in other settings. Is that correct?

Mr. COMEY. No. Maybe in some cases, but it was people having an email conversation about a classified subject.

Mr. MASSIE. Okay. So they were having an email conversation, but how in this email conversation did this bore marking show up? Like, if they're not sophisticated enough, as you said before, even Hillary Clinton wasn't sophisticated enough to recognize a bore marking, the C with the parentheses for confidential or classified, how did—if they weren't that sophisticated, how did they recreate that bore marking in their emails when they were having these discussions?

Mr. COMEY. Yeah. Somebody—a lot of what ended up on Secretary Clinton's server were stuff that had been forwarded up a chain and gets to her from her staff, a lot of that forwarding, and then she comments sometimes on it.

Someone down in the chain, in typing a paragraph that summarized something, put a portion marking, C—paren, C paren, on that paragraph.

Mr. MASSIE. Can you—doesn't it take a lot of intent to take a classified document from a setting that's, you know, authorized and secure to one that's not? Wouldn't it require intent for somebody to recreate that classification marking in an unsecure setting?

Mr. COMEY. I don't know. It's possible, but also I could——

Mr. MASSIE. I mean, did they accidentally type open parentheses, C, close parentheses, and indent the paragraph?

Mr. COMEY. Oh, no. You wouldn't accidentally type that.

Mr. MASSIE. Right. Someone——

Mr. COMEY. Right.

Mr. MASSIE. Someone down the chain——

Mr. COMEY. Okay.

Mr. MASSIE. So this is my question, is someone down the chain being investigated? Because they had the intent, clearly, if they had the sophistication, which Hillary Clinton, you insinuate, may have lacked, if they had the sophistication to know what this bore marking was, they had the—had to have the intent to recreate it or the intent to cut, copy, paste from a secure system to an unsecure system. Wouldn't that be correct?

Mr. COMEY. Potentially, but we're not—there's not an open criminal investigation of that person way down the chain at the State Department.

Mr. MASSIE. Shouldn't there be?

Mr. COMEY. A criminal investigation?

Mr. MASSIE. An investigation if there's intent, which is what you—I mean, and I think you may be reasonable in requiring that threshold, but don't we treat everybody the same, whether it's at the top of the chain or the bottom of the chain?

Mr. COMEY. Sure. You want to if the conduct is the same. But we did not criminally investigate whoever started that chain and put the C on those paragraphs, we didn't.

Mr. MASSIE. Okay. I would suggest maybe you might want to do that.

And I will yield back to the chairman.

Chairman CHAFFETZ. I thank the gentleman.

We'll now recognize the gentlewoman from Michigan, Mrs. Lawrence, for 5 minutes.

Mrs. LAWRENCE. Director Comey, how many years have you been the Director?

Mr. COMEY. Two—well, 3 years. I know the exact date count, I think, at this point.

Mrs. LAWRENCE. Okay. So how many cases have you investigated, approximately, that you had to render a decision?

Mr. COMEY. The Bureau investigates tens of thousands of cases. The Director only gets involved in a very small number of them.

Mrs. LAWRENCE. So about how many?

Mr. COMEY. I think I've been deeply involved in probably 10 to 20.

Mrs. LAWRENCE. Have you ever been called before Congress on any of those other decisions?

Mr. COMEY. No, this is the first time.

Mrs. LAWRENCE. Thank you.

There are some Republicans who support you. Not surprisingly, they're the ones who actually know you.

And I have a letter here and I would like to enter into the record from Richard Painter, Mr. Chair. He was President Bush's chief ethics lawyer. And may it be entered into the record?

Chairman CHAFFETZ. She's asking unanimous consent. Without objection, so ordered.

Mrs. LAWRENCE. Mr. Painter refers to Mr. Comey as a man of, and I quote, a man of the utmost integrity, who calls the shots as he saw them without regard to political affiliation or friendship.

He states, and I quote: Throughout the FBI investigation of Secretary Clinton's email server, I have been convinced that the Director would supervise the investigation with being impartial and strict adherence to the law, as well as prosecutorial precedent.

He also adds: Although I'm aware of very few prosecutions for carelessness in handling classified information as opposed to intentional disclosure, I knew that the Director would recommend prosecution in any and all circumstances where it was warranted. I cannot think of someone better suited to handle such a politically sensitive investigation.

Finally, and I quote: I urge all Members of the United States Congress to stop from inferring in specific decisions, particularly those involving political allies or opponents. During my tenure in the White House, there were very unfortunate allegation that powerful senators sought politically motivating firing of a United States Attorney. Whether or not such allegations were true, it is imperative, and I'm still quoting, that members of the Senate or the House never again conduct themselves in a manner where such interference could be suspected.

And I want to be on the record, I wholeheartedly agree with Mr. Painter.

Director, you have demonstrated yourself, you sat here and answered the questions. And I would never oppose to finding the answers to any situation that is directly related to Federal agencies which we on this committee are responsible for. But I want to be clear that Congress has no business—no business—interfering with these types of decisions that are coming in this—in your responsibility.

These type of attacks are not only inappropriate, but they're dangerous. They're dangerous because they could have a chilling effect on the future investigations.

And I asked that question, how long have you been in this position and how many times have you made decisions and yet were not pulled in 24 hours before this committee? How many times? And then we say it's not political.

And you have said repeatedly, regardless of who it was, you conducted the investigation as required under your responsibility. And here you have Republicans who are saying you are an honorable man, and till this day, I have not heard any complaints of your judgment.

So I sit here today as a Member of Congress on the record that the slippery slope that we're seeing today in this hearing, I want every Member to be cautious of what we're saying, that in America when we have investigations, that we will allow our own elected Congress and Senate to make this a political agenda to attack, but only if it's in their agenda. This goes for Democrats and Republicans. We are not here to do that.

Thank you, and I yield back my time.

Chairman CHAFFETZ. I thank the gentlewoman.

We'll now recognize the gentleman from Iowa, Mr. Blum.

Mr. BLUM. Thank you, Mr. Chairman.

Thank you, Director Comey, for being here today, and thanks for hanging in there till every last question is answered.

I'm not a lawyer. That's the good news. I'm a career businessman. I've spent most of my career operating in the high-tech industry. And today I've heard words such as common sense, reasonable person, carelessness, judgment, or lack thereof. I like these words. I understand these words. I think the average American does as well. So I'd like to focus on that.

Last Tuesday, Director Comey, you said, and I quote: "None of these emails should have been on any kind of an unclassified system, but their presence is especially concerning because all these emails were housed on unclassified personal servers not even supported by full-time security staff, like those found at agencies of the United States Government, or even with a commercial email service such as Gmail."

Director Comey, my small Iowa business doesn't even use Gmail for our email, because it's not secure enough. I know some security experts in the industry. I checked with them. The going rate to hack into somebody's Gmail account, $129. For corporate emails, they can be hacked for $500 or less. If you want to hack into an IP address, it's around $100. And I'm sure the FBI could probably do it cheaper. This is the going rate.

Director Comey, are you implying in that statement that the private email servers of Secretary Clinton's were perhaps less secure than a Gmail account that is used for free by a billion people around this planet?

Mr. COMEY. Yes. And I'm not looking to pick on Gmail. Their security is actually pretty good. The weakness is in the individual users.

But, yes, Gmail has full-time security staff and thinks about patching and logging and protecting their systems in a way that was not the case here.

Mr. BLUM. I'd like to ask you, what kind of judgment—we talked a lot about judgment today—does this decision to potentially ex-

pose to hackers classified information on an email service that's less secure than Gmail—your words—what does that suggest to you? What type of judgment does that suggest to you?

Mr. COMEY. It suggests the kind of carelessness that I talked about.

Mr. BLUM. In August of last year, Secretary Clinton was asked by Ed Henry of Fox News whether she had wiped her entire server, meaning did she delete all the emails on her server. Her response: "You mean with a cloth?"

March of 2015, during a press conference, Secretary Clinton assured us her private email server was secure, saying the server was on private property guarded by the Secret Service.

Now, this would be laughable if it wasn't so serious. I know, you know, my constituents in eastern Iowa know you don't need to be a cat burglar to hack into an email server and you don't need a cloth to wipe a server clean. One would think that a former United States senator, one would think that a former secretary of state would know this as well. Would you agree with that statement?

Mr. COMEY. You would think, although as I said before, one of the things I've learned in this case is that the Secretary may not have been as sophisticated as people assume. She didn't have a computer in her office at the State Department, for example. So I don't think—so I would assume the same thing about someone who had been a senator and a high-ranking official. I'm not sure it's a fair assumption in this case.

Mr. BLUM. In your opinion, Director Comey, did Secretary Clinton know that a server could, in fact, be wiped clean electronically and not with a cloth?

Mr. COMEY. Well, I assume that—I don't know.

Mr. BLUM. Would you assume she knows that?

Mr. COMEY. I would assume that it was a facetious comment about a cloth, but I don't know. I don't know in particular on that one.

Mr. BLUM. Would you also assume, Director, that Secretary Clinton knew that a server could be wiped clean electronically, that it could be hacked electronically, not physically, you don't need a cat burglar to hack a server? Would you assume—would it be reasonable to assume she knows that?

Mr. COMEY. To some level it would be reasonable, to some level of understanding.

Mr. BLUM. Then, once again, for someone who knew these things, or we assume to some level she knew these things, what kind of judgment does the decision to expose classified material on personal servers suggest to you, what type of judgment?

Mr. COMEY. Well, again, it's not my place to assess judgment. I talk in terms of a state of mind, negligence in particular. I think there was carelessness here, and in some circumstances extreme carelessness.

Mr. BLUM. Was her server hacked?

Mr. COMEY. I don't know. I can't prove that it was hacked.

Mr. BLUM. So that answer says to me it could have been hacked.

Mr. COMEY. Sure. Yeah.

Mr. BLUM. And if it was hacked, potentially damaging material damaging to American secrets, damaging to American lives, could have been hacked. Could have been exposed, correct?

Mr. COMEY. Yeah.

Mr. BLUM. Lives could have been put at risk if that server was indeed hacked?

Mr. COMEY. I'm not prepared to say yes as to that last piece. That would require me going into in a way I can't here the nature of the classified information. But there's no doubt that it would have potentially exposed the information that was classified. The information was classified because it could damage the United States of America.

Mr. BLUM. So it could have happened. The FBI just isn't aware?

Mr. COMEY. Correct.

Mr. BLUM. Thank you very much. Thank you for being here. I yield back the time I do not have.

Chairman CHAFFETZ. Thank the gentleman. I now recognize the gentlelady from New Jersey, Mrs. Watson Coleman, for 5 minutes.

Mrs. WATSON COLEMAN. Thank you. And thank you, Director. I've got a number of questions. So I'm going to, like, zip through these.

Mr. COMEY. Okay.

Mrs. WATSON COLEMAN. This is a question I'm going to ask and you, and may not even have the answer to it because you may not have known this. This is about the classification marking issue that you've been asked about earlier. According to the State Department, which addressed this issue yesterday, a spokesman said that the call sheets appear to bear classified markings. But this was actually a mistake. To quote, "Generally speaking, there's a standard process for developing call sheets for the Secretary of State. Call sheets are often marked, but it's not untypical at all for them to be marked at the confidential level prior to a decision by the Secretary that he or she will make that call. Oftentimes, once it is clear the Secretary intends to make a call, the Department will then consider the call sheet SBU, sensitive but unclassified, or unclassified altogether and then mark it appropriately, and then prepare it for the Secretary's use and actually marking the call."

"The classifications of a call sheet, therefore, is not necessarily fixed in time and staffers in the Secretary's office who are involved in preparing and finalizing these call sheets, they understand that. Given this context, it appears that markings in the appropriate—in the documents raised in the media reports were no longer necessary or appropriate at the time. They were sent as an actual email. Those markings were human error. They didn't need to be there." Did you know this?

Mr. COMEY. No.

Mrs. WATSON COLEMAN. Thank you, Mr. Director. Can you tell me, based upon your information, has there been, and is there any evidence that our national security has been breached or at risk as a result of these emails, and their being on this server? Is there any evidence?

Mr. COMEY. There's no direct evidence of an intrusion.

Mrs. WATSON COLEMAN. Thank you very much. I have to tell you that while I think that this should conclude this discussion, I know

we're going to hear this issue ad nauseam. But I am concerned about another issue that I think really is resonating with the people in this country.

And that issue has to do with experiences that we had just the last 2 days. Mr. Director, I want to bring this up for your consideration, because I want to ask you what can the FBI do—FBI do in this issue? This morning we woke up to another graphic and deeply disturbing video that actually brought me to tears when my staff played it for me wherein a Minnesota woman's boyfriend was—has been shot as her young child set in the back seat after apparently telling the officer he was licensed to carry a weapon, he had it on him, and was going to reach for his identification.

Just the other day there was an incident in Baton Rouge involving a Mr. Alton Sterling, an African American man who was shot while pinned to the ground by police officers in Baton Rouge. An interaction tape by two bystanders with cell phones captured this.

So I think that we have got an issue here. An issue of real national security. And I want to ask you, Mr. Director, do we have an opportunity to direct our time and resources in your department to those issues? Is it not important that we say their names to remind people of the loss of a Tamir Rice, to an Eric Garner, to an Alton Sterling, to a John Crawford, III, to a Michael Brown, to a Walter Scott, and even a Sandra Bland? Deaths in the hands of police custody, or by police happening. Are these not happening at an alarming rate? And is this not a legitimate space for the FBI to be working in?

Mr. COMEY. Yes, is the emphatic answer. Those are incredibly important matters. As you know, the FBI spends a lot of time on them because they—they're very, very important. We have an investigation open on the Baton Rouge case. I was briefed this morning on the Minnesota case. And I would expect we'll be involved in that as well. It's an important part of our work.

Mrs. WATSON COLEMAN. Do you feel that you have the sufficient resources from the legal imperative to the funding to address these cases and what seems to be a disturbing pattern in our country today?

Mr. COMEY. I'm a bad bureaucrat, but I believe I have sufficient resources and we are applying them against those situations. Because I believe the individual cases matter enormously, but also, the people's confidence in law enforcement is one of the bedrocks of this great country of ours. So I have the resources, and we're applying them.

Mrs. WATSON COLEMAN. And, in addition, we believe that our law enforcement is, by and large, of high integrity and has the desire to keep us protected and safe. But when we find out that there are these occasions, and when there's an indication that there's a pattern that is taking place in this country, we have a responsibility to ensure that everyone in this country is safe. And simply because you're a black man or a black woman does not make you a target. Thank you. I yield back my time.

Chairman CHAFFETZ. Thank the gentlewoman. We'll now recognize the gentleman from North Carolina, Mr. Walker.

Mr. WALKER. Thank you, Mr. Chairman. Thank you, Director Comey, for being here. A few things in this town that people agree

on both sides of the aisle. And one is your reputation. Reminded the passage in James, "Swift to hear, slow to speak, slow to wrath." I am a little disappointed in some of the things that I've heard from my colleagues about some of the attacks on your character and your integrity. I haven't heard those, and I hope that we have not experienced that. I also struggle with the change of heart that we're hearing today. Because I have a list of elected officials who have questioned your investigation, even attacked it. In fact, the former President Clinton said this is a gain. In fact, just last Friday, Ms. Wasserman Schultz, Congresswoman Wasserman Schultz said Secretary Clinton is not the target of this investigation or whatever you want to call it. My question to you today is do you feel like this has been a Republican witch hunt? This hearing.

Mr. COMEY. No.

Mr. WALKER. Okay. Thank you for——

Mr. COMEY. No, I said at the beginning I understand people's questions and interest. And I'm a huge fan of transparency. I think that's what makes our democracy great.

Mr. WALKER. I think those are one of the reasons of why you are so respected. To me, this hearing is about understanding and disseminating the facts, how you saw them, and how the American public sees them. And specifically, in the areas of where there was wrongdoing admitted under your investigation, where there was obviously breaking the law. But also some coverups. Did Congress ask you to pursue this investigation?

Mr. COMEY. No. It was a referral from the inspector general of the intelligence community.

Mr. WALKER. So it wasn't Republicans either. Was it?

Mr. COMEY. No.

Mr. WALKER. How did you go about collecting the evidence?

Mr. COMEY. We used the tools that we normally use in a criminal investigation.

Mr. WALKER. Did or do you receive a congressional referral for all the information that you collected?

Mr. COMEY. Not to my knowledge.

Mr. WALKER. Well, then one of the things that I'm struggling with, or that I would like to know specifically is, under oath, Ms. Clinton made these three comments that we now know are untrue in the Benghazi hearing. Number one, she's turned over all her work-related emails; number two, telling the committee that her attorneys went through every single email; and then finally, and probably the one that continues to stick the most, there was, and I quote, "Nothing marked classified on my emails," end quote. Now, earlier, when the chairman questioned you about this, you said something about needing a congressional referral recommendation. My question is, something of this magnitude, why or can you help me understand, why didn't it rise to your investigation, or someone bringing that to your knowledge as far as saying this is a problem, here she is, again, Secretary Clinton lying under oath, specifically about our investigation?

Mr. COMEY. Well, we, out of respect for the legislative branch being a separate branch, we do not commence investigations that focus on activities before Congress without Congress asking us to get involved. That's a longstanding practice of the Department of

Justice and the FBI. So we don't watch on TV and say: We ought to investigate that. You know, Joe Smith said this in front of the committee. It requires the committee to say: We think we have an issue here. Would you all take a look at it.

Mr. WALKER. But with all due respect, if you had the Secretary Clinton, who is under oath speaking about your very investigation, and you talked about your wonderful staff, and certainly have no reason to deny that, why wouldn't that rise to the level of suspicion? Here she is saying this under oath. I mean, lying under oath is a crime. Is it not?

Mr. COMEY. Yes.

Mr. WALKER. And what's the penalty on that? That's considered perjury, right?

Mr. COMEY. Perjury. It's a felony. I forget the exact—it's potentially years in prison.

Mr. WALKER. But I don't understand. Would you help me understand why somebody wouldn't have tipped you off that she's talking about the very specific case under oath that you're investigating.

Mr. COMEY. Well, there's a difference between us being aware of testimony and us opening a criminal investigation for potential perjury. Again, it's not this case in particular, but all cases. We don't do that without a committee saying we think there was an issue in testimony given in this separate branch of the government.

Mr. WALKER. You also mentioned earlier, and it's been quoted several times that no reasonable prosecutor would move forward with some of the facts. Is there any room at all that somebody would differ a little bit on the opinion? I know that former United States Attorney General Michael Mukasey said would the illegal server disqualify her from ever holding any Federal office? So there are some people of high esteem that may differ, obviously not privy to the exact facts, but can you make any room—you said no reasonable person. Do you understand why the American people, or would you understand why other people may say that she has stepped across the line or broken enough law here that you would come to a different conclusion?

Mr. COMEY. Sure. I respect different opinions. My only point is, and I said earlier I smile because those folks are my friends. I've worked with them for a long time. None of those guys in my position, I believe, knowing what I know, would think about it differently. But I also respect that they have a different view from the outside.

Mr. WALKER. Thank you, Mr. Chairman. Yield back.

Chairman CHAFFETZ. I thank the gentleman. I now recognize the gentleman from California, Mr. DeSaulnier.

Mr. DESAULNIER. Thank you, Mr. Chairman. Director, I just want to thank you as others have and I know you don't need this, but I think the American people clearly need to hear it. And you've done a wonderful job today. But there are moments in my political life and as an American I despair for the future of this country. Not often. But in those moments comes an individual like yourself either by providence or good fortune or by the framework of the U.S. Constitution, and I really believe you have served this country and all Americans well, irrespective of their party affiliation.

So really two questions. Two lines of questions, I should say. One is, and another colleague has brought this up. But you mentioned in just previous testimony about the bedrock and the importance of public confidence in public safety institutions, yours and all. So I just want to give you an opportunity, I think you have responded to this multiple times, but give you a little more opportunity, because I think it's important for the American public to know that the system isn't rigged, that there are people such as yourself, and the 15 individuals who worked on this case and others that do their job and believe in the Constitution of the United States. And if you have any further comments about comments that would say that the system's rigged and Americans should give up on the system?

Mr. COMEY. No, I—one of reasons I welcome this opportunity to have this conversation is I was raised by great parents who taught me you can't care what other people think about you. Actually, in my business, I have to and deeply do, that people have confidence, that the system's not fixed against black people, for rich people, for powerful people. It's very, very important that the American people understand that there really are people that you pay for with your tax dollars who don't give a rip about Democrats or Republicans or this or that, who care about finding out what is true.

And I am lucky to lead an organization that is that way to its core. I get a 10-year term to ensure that I stay outside of politics. But in a way, it's easy. I lead an organization that is resolutely apolitical. We are tough, aggressive people. If we can make a case, we'll make a case. We do not care what the person's stripes are or what their bank account looks like.

And I worry very much when people doubt that. It's the reason I did the press conference I did 2 days ago. I care about the FBI's reputation. I care about the Justice Department. I care about the whole system deeply. And so I decided I'm going to do something no Director's ever done before. I'm not going to tell the Attorney General or anybody else what I'm going to say, or even that I'm going to say it. They didn't know, nor did the media know, until I walked out what I was going to talk about.

And then I offered extraordinary transparency, which I'm sure confused and bugged a lot of people. It's essential in this democracy that people see as much as they can so they can make their judgment. Again, you may—they may conclude I'm an idiot. I should reason differently. But what I hope they will not conclude is that I am a dishonest person.

I am here trying to do the right thing in the right way. And I lead 36,000 people who have that as their spine. That's what I want them to know. I don't care that people agree or disagree. That's what's wonderful about our democracy. But at its core, you need to know there are good people trying to do the right thing all day long. And you pay for them, and we'll never forget that.

Mr. DESAULNIER. I appreciate that. And within the context of these are human institutions, pretty clear to me as a nonlawyer that you got a bright line in terms of your decision about pursuing prosecution. But you did spend an extended period of time talking about what I think I take from you as being fairly objective analysis of what was careless in terms of handling of it, either ascribed

to the former Secretary of State or to the Department. And you said, and I quote, during your comments, "While not the focus of our investigation, we also developed evidence that the security culture of the State Department in general and respect to the use of unclassified email systems in particular was generally lacking in the kind of care for classified information found elsewhere in the government." That's accurate. Isn't it?

Mr. COMEY. Yes, sir.

Mr. DESAULNIER. So struggling with this, and this is in the context of this hearing, Oversight and State Department, and this committee, as to how do we go from here and be clearer about how the State Department, we'll talk about this with the IG, and some of the comments that former Secretary Powell has made, including that the absurdity of the retroactive classification. And now we have 1,000 of these emails from Secretary Clinton that's out in the public and are being spread even further.

So there are other people involved. Sitting there, how does this committee go forward to make sure that the State Department can still function in the way it does with human beings and have conversations that are both transparent but also national security? What are the things we need to do to make sure that this doesn't happen again?

Mr. COMEY. Well, I think a good start—I think the reason the chairman has the IG from the State Department here is to start that conversation. The IG knows deeply the culture of a Department, and is far better equipped than I to say you ought to focus here, you ought to focus there to make it better. So I think that's place to start.

Mr. DESAULNIER. Thank you, Mr. Director. I yield back.

Chairman CHAFFETZ. Thank you. We'll now recognize the gentleman from Tennessee, Mr. DesJarlais, for 5 minutes.

Mr. DESJARLAIS. Director Comey, thank you for appearing so quickly on short notice. I think it's really important that you're here. Because of the way you laid out the case on Tuesday, there is a perception that you felt one way and then came to another conclusion. I, like many of my colleagues, put a post up back in my district and let them know you were coming. And in less than 24 hours, I had 750 questions sent to ask you.

So, again, thank you for being here. But a common theme, just to summarize, a lot of those concerns were that in this case, Clinton was above the law. That there was a double standard. And a lot of that was based on the way you presented your findings. Now, your team, you said you did not personally interview her on Saturday but your team did for about 3–1/2 hours, correct?

Mr. COMEY. Yes.

Mr. DESJARLAIS. Okay. Do you know in reading the review or the summary, did they ask Hillary Clinton about her comment that she had never sent or received classified information over private email?

Mr. COMEY. I think so. But I can't—I can't remember specifically.

Mr. DESJARLAIS. Okay.

Mr. COMEY. It's a very long 302. I'd have to check.

Mr. DESJARLAIS. And we'll get access to that. Do you know if they asked her when she said that there was nothing marked classified on my email sent or received?

Mr. COMEY. Same answer. I'm not sure.

Mr. DESJARLAIS. Okay. And so the same answer then when she said, "I did not email any classified material to anyone on my email. There is no classified material." You don't know whether they asked her that?

Mr. COMEY. I don't know whether they asked her that question. The entire interview was going—was focused on so what did you know, what did you see, what is this document. That kind of thing.

Mr. DESJARLAIS. Do you know if they asked her whether she stands by the fact that she said she just used one device and that was for her convenience?

Mr. COMEY. I don't know. I know they established from talking to her she used many devices during here 4 years. So I don't know whether they asked her specifically about that statement.

Mr. DESJARLAIS. Okay. I guess my——

Mr. COMEY. That's easy to check, though.

Mr. DESJARLAIS. I guess my point is, you're trying to get inside the head of Hillary Clinton in this investigation and know whether there was intent. And so we all know what she told the people. That's been well-documented. She said that she did not do those things, that she did not send or receive classified emails, that she used one server and one device for her convenience, and since then, I think even in your statement you recognize that those were not correct. Is that fair?

Mr. COMEY. I really don't want to get in the business of trying to parse and judge her public statements. And so I think I've tried to avoid doing that sitting here.

Mr. DESJARLAIS. Why do you feel that's important?

Mr. COMEY. Because what matters to me is what did she say to the FBI. That's obviously first and foremost for us.

Mr. DESJARLAIS. Right. Honest people don't need to lie. Is that right?

Mr. COMEY. Honest people don't need to lie? I hope not.

Mr. DESJARLAIS. Okay. Well, in this case, for some reason, she felt the need to misrepresent what she had done with this server all throughout the investigation. And you guys, after a year, brought her in on Saturday. And in 3–1/2 hours, came out with the conclusion that she shouldn't be prosecuted because there was no intent. Is that right?

Mr. COMEY. No.

Mr. DESJARLAIS. Okay. So I don't want to put words in your mouth, but is it fair to say that your interpretation of Hillary Clinton's handling of top secret information and classified documents was extremely careless?

Mr. COMEY. Yes.

Mr. DESJARLAIS. And is it fair to say that you said that you went on to define "extremely careless" that Hillary Clinton's handling of top secret information was sloppy or represented sloppiness?

Mr. COMEY. Yeah. That's another way of trying to express the same concept.

Mr. DESJARLAIS. Okay. And then just a few minutes ago, you also stated that you now believe that Hillary Clinton is not nearly as sophisticated as people thought. Is that correct?

Mr. COMEY. Yeah. I think that's fair, actually. No, not as people thought, but as people would assume about somebody with that background. I'm sorry. I should be clear about this. Technically sophisticated. I'm not opining in other kinds of sophistication.

Mr. DESJARLAIS. All right. In the last minute, Director, I want to talk a little bit about precedent. Because I think my colleague, Trey Gowdy, made a great point that there still is really no precedence in terms of punishment for this type of behavior. Are you familiar with Brian Nishimura's case?

Mr. COMEY. Yes.

Mr. DESJARLAIS. Okay. He's a Naval Reservist for those who don't know. And he was prosecuted. What is the difference between his case and Hillary Clinton's case in terms of extremely carelessness and gross negligence, because we're dealing with statute 793, section (f), where it does not require intent. Is that correct?

Mr. COMEY. I'm sorry. 793(f) is the gross negligence standard.

Mr. DESJARLAIS. Right. And is that why Brian Nishimura was punished?

Mr. COMEY. No. Nishimura was prosecuted under the misdemeanor statue 1924 on facts that are very different. If you want me to go through them, I'll go through them, but very different that——

Mr. DESJARLAIS. Okay. I think that there's been a review of this case, and they're very similar. And that's why people feel that there's a double standard.

Mr. COMEY. What they're reading in the media is not a complete accounting of the facts in that case.

Mr. DESJARLAIS. Well, would you agree, then, with Representative Gowdy that there still is really no precedence for punishing someone like Hillary Clinton and she could really go in—potentially be elected President and do this again without fear of being punished?

Mr. COMEY. I don't think I'm qualified to answer that question.

Mr. DESJARLAIS. My time's expired. Thank you for your time.

Chairman CHAFFETZ. Thank the gentleman. I now recognize the gentlewoman from New Mexico, Ms. Lujan Grisham.

Ms. LUJAN GRISHAM. Thank you, Mr. Chairman. I've had the benefit of when you're last, or nearly last to really have both the benefit and then the question, the kinds of statements and the dialogue back and forth. And where I am settled at this point in time is in a couple of places. But particularly, I don't think there's any member in this committee or, quite frankly, any Member in Congress who doesn't both want and expect that the FBI and the Department of Justice to be and to operate in a fair, unbiased, highly independent manner. Otherwise, you can't appropriately uphold or enforce Federal law. And while we have all—this has been stated in a couple of different ways, I'm going to see if we can't—I want to get direct answers.

So, Mr. Comey, is there any evidence, given that that's the standard that we all want, desire, and expect, to suggest that Hillary Clinton was not charged by the Department of Justice due to inap-

propriate political influence, or due to her current or previous public positions?

Mr. COMEY. Zero. And if there is such evidence, I'd love folks to show it to me.

Ms. LUJAN GRISHAM. In that regard, was there a double standard?

Mr. COMEY. No. In fact, I think my entire goal was to avoid a double standard, to avoid what sometimes prosecutors call celebrity hunting and doing something for a famous person that you would never do for an ordinary Joe or Jane.

Ms. LUJAN GRISHAM. Thank you. And I really appreciate that you're here today, and explaining the process in great detail, frankly, and I've—this committee works at getting specific detail about a variety of reviews, investigations, policies, concepts throughout Federal Government. And I think I can say that this committee often finds that we don't get very much clarity or specific responses to the majority of questions that we ask. So I really appreciate that. And that in explaining that what led the FBI to conclude that Hillary Clinton should not be charged.

Saying that, however, I'm still concerned, frankly, that the use of this hearing and some of the public statements made by elected officials accusing the Department of Justice of using a double standard without any evidence at all to support that statement, leaning on accusations of such, in fact, jeopardizes the very thing that we want the most, which is an apolitical and independent Department of Justice. And we have every right to ask these tough questions.

And to be clear that the process that you use for everyone, including elected officials, works. And that there's a responsibility not to substitute your own political preferences to the outcome of an independent and apolitical Department of Justice investigation on any level, whether it involves Hillary Clinton or anybody else. Do you agree with that general statement?

Mr. COMEY. Yes.

Ms. LUJAN GRISHAM. For me, that's a really important ethical line that I believe should never be crossed. I worry that some of what we did today could be, frankly, interpreted as violating that very standard. And for that, I certainly want the American people and my constituents who are watching to understand that very important line, and to be sure that our responsibility is better served making sure that we do have, in fact, an independent body whose aim it is to bring about truth and justice and uphold the Federal law. And, sir, based on everything that you've said today, I don't see any reason to disagree with your statements, your assessments, or the explanation of that process.

With the little time I do have left, I do want to say that given that some of the classified material that we have both debated and talked about today can be classified later or up-classified, or that other agencies have different determinations of what constitutes classified and not. I do think that's a process that warrants refining. And if something can come out of this hearing about making sure that we do something better in the future for everyone, not just appointed or elected officials, that that ought to be something that we do.

I'm often confused by some of the things that are clearly told to us in a classified briefing that appear to be different or already out in the public in some way. And I'm not sure who's making those decisions. I honor my responsibility to the highest degree, but I think that's a process that could use some significant refining, and that's my only suggestion, sir. Thank you for being here today.

Mr. COMEY. Thank you.

Chairman CHAFFETZ. Thank the gentlewoman. We'll now recognize the gentleman from Georgia, Mr. Carter, for 5 minutes.

Mr. CARTER. Thank you, Mr. Chairman. And, Director Comey, thank you for being here today. I appreciate it. I'm over here. And I'm going to be real quick and try to be succinct. I want to clarify some things that you said. And, look, I don't want to go over everything that everybody's been through today. I mean, we've had some great questions here that have asked you about you said this, she said that. Representative Gowdy made a great case of, you know, this is what she said under oath and publicly, and yet you dispute that and say, No, this is the case. But, look, I've just got a couple of questions. Okay? First of all, did I understand you correctly that your decision—that this decision was made within 3–1/2 hours of an interview and that was all?

Mr. COMEY. No. We investigated for a year.

Mr. CARTER. But you interviewed her for 3–1/2 hours last week and then came to the conclusion?

Mr. COMEY. Correct. We interviewed her on Saturday for 3–1/2 hours. The last step of a yearlong investigation.

Mr. CARTER. Now, as I understand it, Hillary Clinton has testified that the servers that she used were always safe and secure. Yet you refute that and say, No, that is not the case at all. Were they ever secure? Were the servers that she were using, were they ever secure?

Mr. COMEY. Well, the challenge, security's not binary. It's just degrees of security. It was less security than, one, at the State Department, or, as I said, even one at a private commercial provider, like a Gmail.

Mr. CARTER. Well, let me ask you this: She's got staff and she's got people around her. Did they know she was doing this? Did they know that she was using these other devices? Did anybody ever bring it to her attention and say, Hey, you're not supposed to be doing that?

Mr. COMEY. I think a lot of people around the Secretary understood she have was using a private personal email setup.

Mr. CARTER. Then why didn't they say something? Don't they have a responsibility as well?

Mr. COMEY. That's an important question that goes to the culture of the State Department that's worth asking.

Mr. CARTER. I mean, look, we all surround ourselves with good people and we depend on them to help us. I don't understand—should they be held responsible for that, for not bring that to someone's attention? If I see someone who's breaking—who's not following protocol, is it my responsibility to report them?

Mr. COMEY. Yes.

Mr. CARTER. Well——

Mr. COMEY. Especially when it comes to security matters. You have an obligation to report a security violation that you may witness, whether it's involving you or one of your co-workers. But this is about so——

Mr. CARTER. What about Bryan Pagliano? Did he ever know? Do you know if he knew that she was not following proper protocol here?

Mr. COMEY. He helped set it up.

Mr. CARTER. He helped set it up. So obviously he knew.

Mr. COMEY. Yeah. Obviously, he knew that——

Mr. CARTER. Okay. Is anything going to be done to him? Any prosecution or any discipline, any——

Mr. COMEY. I don't know about discipline, but there's not going to be a prosecution of him.

Chairman CHAFFETZ. Will the gentleman yield?

Mr. CARTER. I yield.

Chairman CHAFFETZ. My understanding, Director, is that you offered him immunity. Why did you offer him immunity, and what did you get for it?

Mr. COMEY. Yeah. That I have to—I'm not sure what I can talk about in open setting about that.

Chairman CHAFFETZ. Well, he's not going to be prosecuted. So——

Mr. COMEY. Right. But I want to be careful. I'm doing this 24 hours after the investigation closed. I want to be thoughtful because we're, as you know, big about the law, that I'm following the law about what I can disclose about that. So I'll have to get back to you on that one. I don't want to answer that off the cuff.

Mr. CARTER. Director Comey, I am not a lawyer. I'm not an investigator. I'm a pharmacist. But I'm a citizen. And citizens are upset. I watched, with great interest, last—earlier this week when you laid out your case. And I'm telling you, you laid it out, bam, bam, bam. Here's what she did wrong, wrong, wrong, wrong. And then all of a sudden, you used the word "however." And it was like you could hear a gasp throughout the country of people saying, Oh, here we go again. Do you regret presenting it in a way like that?

Mr. COMEY. No. And I'm highly—I think I didn't use the word "however." I try never to use that in speaking. But I did lay it out, I thought, in the way that made sense and that I hoped was maximum transparency for people.

Mr. CARTER. I'm sorry, but that's the point. It didn't make sense. The way you were laying it out it would have made sense and the way that the questions have been asked here and we've made all these points of where she was—obviously told lies under oath, that it would have been, Okay, we finally got one here.

Mr. COMEY. I think it made sense. I just hope folks go back maybe with a cup of tea and open their minds and read my statement again carefully. But again, if you disagree, that's okay. But——

Mr. CARTER. But when we—look, I've only been here 18 months. And I want to tell you, this inside-the-beltway mentality, no wonder people don't trust us.

Mr. COMEY. I have—I know who you're talking about. I have no kind of inside-the-beltway mentality.

Mr. CARTER. But this is an example of what I'm talking about here. It just as a nonlawyer, as a noninvestigator, it would appear to me you have got a hell of a case.

Mr. COMEY. Yeah. And I'm telling you we don't. And I hope people take the time to understand why.

Mr. CARTER. Mr. Chairman, I yield back.

Chairman CHAFFETZ. Thank the gentleman. I will now recognize the gentleman from Arizona, Mr. Gosar. Oh, let's go ahead and go to the gentleman from South Carolina, Mr. Mulvaney, first.

Mr. MULVANEY. Thank the gentleman. Director Comey, earlier today you heard a long list of statements that Mrs. Clinton has made previously, both to the public and to Congress that were not factually accurate. I think you went down the whole long list. When she met with you folks on Saturday last week, I take it she didn't say the same things at that interview?

Mr. COMEY. I'm not equipped sitting here without the 302 in front of me to answer in that broad——

Mr. MULVANEY. But it's your testimony——

Mr. COMEY. I have no basis that—we do not have a basis for concluding she lied to the FBI.

Mr. MULVANEY. Gotcha. Did anybody ask her on Saturday why she told you all one thing and told us another?

Mr. COMEY. I don't know as I sit here. I mean, I'll figure that out——

Mr. MULVANEY. Would that have been of interest to you in helping to establish intent?

Mr. COMEY. It could have been, sure.

Mr. MULVANEY. More importantly, I think, did anybody ask her why she set up the email system as she did in the first place?

Mr. COMEY. Yes.

Mr. MULVANEY. And the answer was convenience?

Mr. COMEY. Yeah. It was already there. It was a system her husband had. And so she just jumped onto it.

Mr. MULVANEY. Were you aware that just earlier this week, her assistant actually said it was for an entirely different reason? It was to keep emails from being accessible, and that it was for concealment purposes? And Huma Abedin was asked in her deposition why it was set up. And it was said to keep her personal emails from being accessible. The question, to whom. To anybody. Were you aware of that testimony?

Mr. COMEY. Generally, yes.

Mr. MULVANEY. Okay. So here's sort of the summary I take from what we've done today, which is that over the course of the entire system, what she did, she intentionally set up a system. According to your testimony, your findings, she was careless regarding its technical security. I think you've said that even a basic free account, a Gmail account had better security than she had. And she did that, according to her own staffer's sworn deposition for the purpose of preventing access to those emails. As a result of this, she exposed top secret information to potential hack by foreign actors. You've seen the emails, we have not. I think you've said earlier that the emails could be of the sort that would put national security at risk, and I think we had testimony earlier that got you acknowledge that it might even put our agents overseas at risk.

Mr. COMEY. Yeah. I don't think I agree with that. But it's still important.

Mr. MULVANEY. Okay. All right. She kept all of that secret until after she left the State Department. She lied about it, or at least made untrue statements about it after it finally came to light. She, thereafter, ordered the destruction of evidence, evidence that was destroyed so thoroughly that you folks could not do an adequate recovery. Yet she receives no criminal penalty. So I guess this is my question to you: Are we to assume, as we sit here today, that if the next President of the United States does the exact same thing, on the day he or she is sworn into office, sets up a private email service for the purpose of concealing information from the public or from anybody, that as a result of that, potentially exposes national security level information to our enemies, lies about it, and then destroys the evidence during an investigation, that there will be no criminal charges if you're the FBI Director against that person?

Mr. COMEY. That's not a question the FBI Director should answer. I mean——

Mr. MULVANEY. No, I'm asking if she does the exact same thing as President as she's done today, your result will be the exact same as it was 48 hours ago. There will be no criminal findings, right?

Mr. COMEY. If the facts were exactly the same?

Mr. MULVANEY. Right.

Mr. COMEY. And the law was exactly the same?

Mr. MULVANEY. Right.

Mr. COMEY. Yeah. The result would be the same.

Mr. MULVANEY. And I guess under the theory that if the law is to be equally applied to everybody, that if a White House staffer does the exact same thing for the exact same purpose and exposes the exact same risks, that there will be no criminal action against that person. There could be, as you've mentioned, administrative penalties. There are no administrative penalties, as I understand it, by the way, against the President. Correct?

Mr. COMEY. I don't think so. But I'm not a——

Mr. MULVANEY. I don't think there are either. I don't think you can take away the President's top security clearance. And I'm pretty sure you can't fire the President because we've tried. Not only would a staffer not have any criminal charges brought against him, but I suppose a summer intern could do the exact same thing under the theory that we're going to apply the law equally regardless of who the people are. My question to you is this: And it's not a legal question. I guess it's a commonsense, ordinary question that folks are asking me. From a national security standpoint, somebody who used to lecture on that, does that bother you?

Mr. COMEY. The mishandling of classified information bothers me no matter what circumstance it occurs in. Because it has national security implications.

Mr. MULVANEY. Does it bother you that the precedent that you are setting today may well lead to a circumstance where our top secret information continues to be exposed to our potential enemies?

Mr. COMEY. No, in this sense. The precedent that I'm setting today is my absolute best effort to treat people fairly without regard to who they are. If that continues to be the record of the FBI

and the Justice Department, that's what it should be. The rest of the implications in your question are beyond that. They're important, but they're not for the FBI to answer. We should aspire to be apolitical, facts and the law, treat Joe the same as Sally as Secretary so-and-so. That's my goal.

Mr. MULVANEY. If you had come to a different decision—by the way, I tend to agree with everything you've just said. If you had come to a different decision, do you think that would have a different precedential value that would keep our information more safe?

Mr. COMEY. If we decided to recommend criminal charges here?

Mr. MULVANEY. Yes, sir.

Mr. COMEY. I don't know. That's a good question. I don't know. I could argue it both ways. I guess I'm a lawyer, I can argue everything both ways. But I could argue that both ways.

Mr. MULVANEY. Thank you, Director Comey. Thank you, Mr. Chairman.

Chairman CHAFFETZ. Thank the gentleman. Now recognize the gentleman from Arizona, Mr. Gosar, for 5 minutes.

Mr. GOSAR. Thank you, Mr. Chairman. Thank you, Mr. Comey, for being here. My colleague alluded to Bryan Pagliano, the IT adviser. And were you made aware of the deal of immunity with him?

Mr. COMEY. I am aware.

Mr. GOSAR. Now that Attorney General Lynch has stated that there will be no charges, there's many that suspect that he failed to answer questions in his congressional deposition, that he had something to hide. Why did your investigators at the DOJ decide it was necessary to offer Mr. Pagliano immunity?

Mr. COMEY. As I said in response to the earlier question, I need to be more thoughtful about what I say about an immunity deal in public. It may be totally fine. I just don't want to screw up because we're doing this so quickly. In general, I can answer, because I've done it many times as a prosecutor. You make a grant of immunity in order to get information that you don't think you could get otherwise.

Mr. GOSAR. But you know that there may be something there in hindsight, right? You're looking ahead because of the pertinent information this person possesses.

Mr. COMEY. Right. You believe they have relevant information to the investigation.

Mr. GOSAR. So did the investigators draft an interview report known as a 302 with Mr. Pagliano?

Mr. COMEY. Yes.

Mr. GOSAR. Given the importance of this case, will you commit to voluntarily disclosing the 302s for review of Bryan Pagliano and other witnesses interviewed as part of your investigation?

Mr. COMEY. I'll commit to giving you everything I can possibly give you under the law, and to doing it as quickly as possible. That said, that means I got to go back and sort it out. For example, the 302 of Secretary Clinton is classified at the TS/SCI level. So we got to sort through all that. But we'll do it quickly.

Mr. GOSAR. Yeah. I know you've done this, because you've done this for Lois Lerner and other cases. So we would expect that.

Now, Director Comey, Hillary Clinton testified before Congress and told the American people multiple times that she never emailed any classified information to anyone on her private email servers. Your investigation revealed 110 of Clinton's emails, and 52 email chains confined classified information. Clinton told the American people, and I quote, "The laws and regulations in effect when I was Secretary of State allowed me to use my email for work. This is undisputed," end of quote. Your investigation revealed that that also wasn't true.

Clinton claimed she turned over all her work-related emails. Your investigation revealed that this wasn't also true. Clinton claimed that there was no security breaches and her private servers had numerous safeguards. Your investigation revealed eight email chains on Clinton's private servers containing top secret information. And that is was possible, quote, "hostile actors gained access to sensitive information." Further, multiple people she emailed with regularity were hacked by hostile actors and her private servers were less secure than a Gmail account, making a security breach all the more likely.

Director Comey, it's a Federal crime, as you know, to mishandle classified information in a grossly negligent way. And you stated Clinton and her colleagues were extremely careless. Clinton has publicly stated she was well aware of the classification requirements, yet she broke the law anyway. Multiple people have been prosecuted for less. And there is a growing trend of abuses in senior level employees. The only difference between her and others is her total resistance to acknowledge her irresponsible behavior that jeopardized our national security and the American people.

I think you should have recommended Clinton be prosecuted under section 793 or section 1024 of Title 18. If not, who? If not now, when? Your recommendation deprived the American people of the opportunity for justice in this matter. There shouldn't be double standards for the Clintons, and they shouldn't be above the law. With that, I'm going to yield the rest of my time to the gentleman from South Carolina, Mr. Gowdy.

Mr. GOWDY. Thank you, Dr. Gosar. Director Comey, I want to go back to the issue of intent for just a second. We can disagree on whether or not it's an element of the offense. Let's assume, for the sake of argument, that you're right and I'm wrong, and that it is an element of the offense. Secretary Clinton said that she was, quote, "Well aware of classification requirements." Those are her words, not mine and not yours. So if she were, quote, "well aware of classification requirements," how did that impact your analysis of her intent. Because I've heard you this morning describe her as being less than sophisticated. She disagrees with that.

Mr. COMEY. Well, I was talking about technical sophistication. The question is—I would hope everybody who works in the government is aware of classification requirements. The question then is if you mishandle classified information, when you did that thing, did you know you were doing something that was unlawful. That's the intent question.

Mr. GOWDY. Well, you and I are going to have to get together some other time and discuss all the people we prosecuted who were unaware that they were breaking the law. There are lots of really

dumb defendants out there who don't know that what they're doing is against the law. But let's go with what you say.

Mr. COMEY. I disagree. You may have prosecuted a lot of those folks. I did not prosecute a lot of those folks——

Mr. GOWDY. Well, I was a gutter prosecutor and you were a white collar prosecutor. Trust me. There are lots of people who don't know you can't kill other people. Let me ask you this: On the issue of intent, you say it was convenience. Okay? You're a really smart lawyer. If it were convenience, Director, she wouldn't have waited 2 years to return the documents. And she wouldn't have deleted them 4 years after they were created. So you can't really believe that her intent was convenience when she never turned them over until Congress started asking for them. Could you?

Mr. COMEY. You know, my focus, and I hope I made this clear.My focus was on what was the thinking around the classified information. I mean, it's relevant why the system was set up and the thinking there. But she didn't—I don't understand her to be saying—well, I think I've said it already. But that's my focus.

Mr. GOWDY. So I know I'm out of time, but it just strikes me you are reading a specific intent element into a gross negligence statute. Not even general intent.

Chairman CHAFFETZ. The gentleman's time——

Mr. GOWDY. A specific intent——

Chairman CHAFFETZ. The gentleman's time has expired.

Mr. COMEY. Sorry.

Chairman CHAFFETZ. The Director can answer.

Mr. COMEY. I enjoy talking with him. The question you got to ask is so why is it that the Department of Justice, since 1917, has not used that gross negligence statute but charging it once in an espionage case. And whether their decision was smart or not, that is the record of fairness. And so you have to decide, do I treat this person against that record? And if I do, is that a fair thing to do, even if you're not worried about the constitutionality of it? And my judgment is no reasonable prosecutor would do that. That would be celebrity hunting. That would be treating this person differently than John Doe.

Chairman CHAFFETZ. Director, I want to follow up on that. Why did you do what you did? You know, my interpretation of what the FBI is supposed to be doing is come to a determination of the facts. And then turn it over to a prosecutor. You were a prosecutor. But you're not a prosecutor now.

Mr. COMEY. Right.

Chairman CHAFFETZ. It is unprecedented that an FBI Director gave the type of press conference that he did and took a position that an unreasonable prosecutor would only take this case forward. Why did you do that?

Mr. COMEY. Yeah. It's a great question. The—everything I did would have been done privately in the normal course. We have great conversations between the FBI and prosecutors. We make recommendations. We argue back and forth. What I decided to do was offer transparency to the American people about the whys of that what I was going to do because I thought that was very, very important for their confidence in the system of justice. And within that, their confidence in the FBI. And I was very concerned if I

didn't show that transparency, that in that lack of transparency people could say, Gees. What's going on here? Something—you know, something seems squirrely here. And so I said I will do something unprecedented because I think this is an unprecedented situation.

Now, the next Director who is criminally investigating one of the two candidates for President may find him or herself bound by my precedent. Okay. So if that happens in the next 100 years they'll have to deal with what I did. So I decided it was worth doing.

Chairman CHAFFETZ. Mr. Cummings.

Mr. CUMMINGS. Mr. Director, I have just one question. You know, I've been sitting here listening to this. And I really—this is something that bothered me in the Lois Lerner case, and it bothers me in this case. And I'm just wondering your opinion. Mrs. Lawrence had talked about this, the chilling effect of your having to come here and justify your decisions. And I know that you've been really nice, and you just explained why you did what you did, and I'm glad you're doing it. But, you know, do you at all, and, I mean, taking off—I'm just talking about here you've got people making decisions and then being pulled here in the Congress to then say, okay, to be questioned about the decisions. At what point—or do you even think about it becoming a chilling effect? Because most people, you know, when their decision's made, don't get this kind of opportunity, as you well know. There are no statements. You know, they either get indicted or they're not.

So I noted you see this as a special case. And I wonder whether you agree with Mrs. Lawrence that we may be just going down a slippery slope. That's all I want to ask.

Mr. COMEY. And my honest answer is I don't think so. As I—when I talked to the chairman, I agreed to come because I think the American people care deeply about this. There's all kind of folks watching this at home or being told, Well, lots of other cases were prosecuted and she wasn't. I want them to know that's not true.And so I want to have this conversation. And I actually welcome the opportunity. Look, it's a pain. I've had to go to the bathroom for about an hour, but it is really——

Chairman CHAFFETZ. Don't worry. We're halfway done. So——

Mr. COMEY. It is really important to do. Because this is an unprecedented situation. Transparency is the absolute best thing for me and for democracy.

And I realize, Mr. Chairman, my folks told me I screwed up one fact that I should fix. I was misremembering. In the Petraeus case, we didn't find the notebooks in the attic, we found it in his desk. So I wanted to make sure I was fair to him about that.

But I really don't think so. I don't think it has a chilling effect. Again, if there's another presidential candidate being investigated by the FBI, maybe they'll be bound by this. Lord willing, it's not going to happen again. Certainly I have 2,619 days left in this job. I won't happen on my term. But if does, I won't be chilled.

Chairman CHAFFETZ. Thank the gentleman. If we need a humanitarian break, just give me the cue, but——

Mr. COMEY. No. I feel like we're almost done, though.

Chairman CHAFFETZ. We're on the right trajectory, yes.

But we would like to recognize the gentleman from Alabama, Mr. Palmer, for 5 minutes.

Mr. PALMER. Thank you, Mr. Chairman. Director Comey, your statement on Tuesday indicated that Secretary Clinton and her colleagues send and received emails marked classified on an unsecured private email server that may or may not have been hacked by a foreign power. Are you aware that teenage hackers hacked the personal email accounts of CIA Director John Brennan, the Director of U.S. National Intelligence, James Clapper, and FBI Deputy Director Mark Giuliano?

Mr. COMEY. I am intensely aware. They didn't hack in the way we normally think of it, but that they, by trickery, got access to their accounts.

Mr. PALMER. The point I want to make is that these were personal—commercially protected personal email accounts that contained no classified information. Yet Mrs. Clinton used her personal email, not a commercial account, on a server in her basement without even this basic protection, and transmitted classified information through that account. If teenagers in England were able to hack the personal email accounts of the Director of the CIA, the Director of U.S. National Intelligence, and the Deputy Director Of the FBI, does it concern you that sophisticated hackers or hackers working for foreign interests never attempted—I mean, does it seem reasonable that they never attempted, or were never successful in hacking Mrs. Clinton's personal email accounts or one of her devices?

Mr. COMEY. No. It concerns me a great deal. And that's why we spent so much time to see if we could figure out—see fingerprints of that.

Mr. PALMER. Well, you said in your statement regarding your recommendation not to prosecute, "To be clear, this is not to suggest that in similar circumstances, a person who engaged in this activity would face no consequences. To the contrary, these individuals are often subject to security or administrative sanctions, but that is not what we're deciding here." Do you stand by that?

Mr. COMEY. Yes.

Mr. PALMER. Okay. I thought you would. You also said you could not prove intent. I don't want to—I want to touch on a couple things here. One, a reasonable person would not have compromised classified information by keeping that information on inadequately secure private devices. In other words, such a person would be viewed as unreasonable and unsuitable for any position in our government that included any responsibility for handling and protecting classified information. Would you agree?

Mr. COMEY. I would agree it would be negligent. I can't prejudge a suitability determination, but it would definitely be stared at very hard.

Mr. PALMER. Well, let me tell you why I bring this up. I sat here next to Mr. Hurd, who served our country valiantly. Put his life on the line. And I don't know if you could sense the passion and intensity of his questions, because he knows people whose lives are on the line right now. And in regard to his questions, if someone, a U.S. intelligence agent had their mission compromised, or worse, had been killed or injured or captured because of the carelessness

of someone responsible for protecting classified information, would intent matter at that point?

Mr. COMEY. In deciding whether to prosecute the person? Of course. But—yeah. That's the answer. Of course it would. It would—the matter would be deadly serious. But the legal standards would be the same.

Mr. PALMER. Well, what we're dealing with in this hearing is not the lack of due diligence in handling routine government data or information, but the lack of due diligence by Secretary Clinton and her carelessness in handling classified information that could have compromised American national security, and as Mr. Hurd pointed out, the missions and personal safety of our intelligence agents. That troubles me greatly.

And I think the issue here—and I do respect you. I have spoken in your defense many times, at this point, to my detriment. But I do believe that your answers are honest and factual. But based on your answers regarding Mrs. Clinton's use of the email, and based on what we know, it seems to me that she is stunningly incompetent in her understanding of the basic technology of email, and stunningly incompetent in handling classified information. I mean, you should never associate the Secretary of State and classified information with the word "careless." It doesn't matter. I mean, we have to exercise the utmost due diligence. All of us in this committee do in handling this. You do in prosecuting cases. And I see that in what you're trying to do.

I just think we need to leave here with this understanding, that there's more to this story than we know. If a foreign hacker got into this, I can assure you that they know what was in those emails that were deleted. They read them all. They know what is in the emails that we never received.

Mr. Chairman, I yield back.

Chairman CHAFFETZ. I thank the gentleman. We'll now go to the gentleman from Wisconsin, Mr. Grothman, for 5 minutes.

Mr. GROTHMAN. Thank you. Thanks for coming on over to the Rayburn Building. As I understand it, your testimony today, is that you have not brought criminal charges against Hillary Clinton, in part, because you feel you can't prove guilt beyond a reasonable doubt, and in part, because she didn't understand the laws with regard to emails and servers and that sort of thing.

Question for you. When she erased these emails—or no, I digress for a second. You, however, did say that if somebody did this under you there would be consequences. If somebody did exactly what Mrs. Clinton did, but was one of your lieutenants or you think one of the lieutenants under the CIA or some other agency that deals with top secret documents, what would you do to those underlings?

Mr. COMEY. I would make sure that they were adjudicated through a security disciplinary proceeding to figure out what are all the circumstances and then what punishment, discipline is appropriate. That could range from being terminated, to being reprimanded, and then a whole spectrum in between, suspension, loss of clearance. It's a bunch of different options.

Mr. GROTHMAN. Okay. But tomorrow, say one of your top two or three lieutenants you find out that they've had this separate server out there and they're keeping secret documents, you know, flipping

them around. Do you think they should be fired? Not criminally charged, but fired?

Mr. COMEY. Yeah. I don't think it's appropriate to say. I think it should go—we have a very robust process. There ought to be a very intense suitability review of that person. Maybe there's something we're missing that would mitigate the punishment we would impose. But it would have to do through our system.

Mr. GROTHMAN. Okay. Next question. Just for the listening audience here, at first when I hear about erasing emails, I think it's like, you know, on my own phone where I might erase an auto insurance solicitation. The erasures here, however, were not just Mrs. Clinton pressing delete. Were they? There was a much greater effort made to make sure that these emails would never be recovered. Do you want to comment on what was done to erase the emails?

Mr. COMEY. I think what you're referring to is after her lawyers—her lawyers say, although I'm not able to verify this, there were 60,000 or so left at the end of 2014. They went through them in a way I described in my statement 2 days ago. And then they produced the ones that were work-related, and then they erased from their system the ones that were not work-related. That was done using technical tools basically to remove them from the servers to wipe them way.

Mr. GROTHMAN. Okay. So in other words, the effort was not just Mrs. Clinton or somebody went delete, delete, delete. They went above and beyond that so that your top technical efforts could not—technical experts could not get back at these emails, correct?

Mr. COMEY. Right. Not fully. We were able to by going——

Mr. GROTHMAN. You recovered a few.

Mr. COMEY. Yeah. We could go through the lawyers' laptops and see some traces, but not fully—not fully recover them.

Mr. GROTHMAN. Okay. Now, the information that I have, and you can correct me if I'm wrong, implies that these erasures were done in December of 2014 after the Benghazi scandal broke, after there were questions about the Clinton Foundation. Did you ever come across why she allowed these emails to sit out there, even for years after she stopped being Secretary of State but all of a sudden as these other scandals began to bubble up she felt, or her lawyers felt, that she had to erase them?

Mr. COMEY. Yeah. I think the way the process worked is she had emails that were just on her system. She actually had deleted some, I think, over time, as an ordinary user would. And then the State Department contacted her and other former Secretaries and said, We have a gap in our records. We need you to look and see if you have emails and give them back. She then tasked her lawyers to engage in this review process of that 60-some thousand and make that cut. And then was asked by her lawyers at the end, Do you want us to keep the personal emails? And she said, I have no use for them anymore. It's then that they issued the direction that the technical people delete them.

Mr. GROTHMAN. Do you think Mrs. Clinton knew that the technical people were erasing these emails so that even your top technical experts could recover them?

Mr. COMEY. Based on my sense now of her technical sophistication, I don't think so.

Mr. GROTHMAN. You don't think the lawyers told her that that's what they were doing, erasing all these emails that everybody on this committee wanted to look at?

Mr. COMEY. Yeah. And I'm sure we've asked this and——

Mr. GROTHMAN. What type of lawyer wouldn't tell their client they were doing that? But——

Mr. COMEY. I don't think—I think our evidence—our investigation is they did not, that they asked her, Do you want to keep them, and they said no, and they said, Wipe them away.

Mr. GROTHMAN. Okay. Now, as I understand it, the goal was just to erase personal emails, but you've recovered emails that wouldn't be considered personal emails at all.

Mr. COMEY. Correct.

Mr. GROTHMAN. Okay. I know that you didn't recover them, but based upon the emails that you recovered, presumably her lawyers or somebody was going well beyond personal emails, is it possible we'll never be able to recover emails that dealt with the Clinton Foundation or dealt with the Benghazi scandal? Is it possible, because of what her lawyers did, that they were erasing things that were incriminating, maybe involving items that you yourself were not particularly investigating, but that these have now been destroyed forever?

Mr. COMEY. I guess it's possible. As I said in my statement on Tuesday, we did not find evidence to indicate that they did the erasure to conceal things of any sort. But it's possible, as I said on Tuesday, that there are work-related emails that were in the batch that were deleted.

Mr. GROTHMAN. I'm sorry. When you go to this length to make sure you can never recover the emails that are erased, wouldn't you think the intent is to make sure nobody ever looks at them again? Why would—otherwise, would you just go——

Chairman CHAFFETZ. I thank the gentleman. We'll give the Director time if he wants to respond.

Mr. COMEY. Sure. You know, I guess it's a bit circular. You delete because you want to delete, but that—what I mean is we didn't find any evidence of evil intent, an intent to obstruct justice there.

Mr. GROTHMAN. You wouldn't have been able to——

Chairman CHAFFETZ. I thank——

Mr. GROTHMAN. —because you don't know what was deleted, but——

Chairman CHAFFETZ. I thank the gentleman.

We'll now recognize Mr. Russell of Oklahoma for 5 minutes.

Mr. RUSSELL. Thank you, Mr. Chairman.

Director Comey, thank you for your long service and your long suffering. I think we're toward the end of the line here.

I want to state for the record with regard to national security, I sleep a little easier at night knowing that you're at the helm of the FBI. Thank you for your dedicated service and your integrity.

Mr. COMEY. Thank you.

Mr. RUSSELL. You have stated in your statement and also multiple times here that there should be consequences for the mishandling of state secrets. If I held a top secret/SCI in the Bureau—

and I did hold one when I was in the United States Army, in a career of service, I've handled classified information here—but if I held that in the FBI and you discovered that I mishandled state secrets on a private server in my basement, would I be trusted by the Bureau to further handle top secret/SCI information?

Mr. COMEY. Maybe not. You would go immediately through a security process to review whether you should continue working for us, and if you do, what clearances you should retain.

Mr. RUSSELL. If I violated the handling of state secrets in the FBI, would you consider me the best suitable candidate for promotion and higher responsibility?

Mr. COMEY. It would be a serious concern, and we would stare at it very hard in a suitability review.

Mr. RUSSELL. Although you have recommended to the Department of Justice that no criminal charges be brought to bear, are you recommending to the Department of Justice that there be no consequences for the mishandling of state secrets?

Mr. COMEY. No. My recommendation was solely with respect to criminal charges.

Mr. RUSSELL. What would you recommend?

Mr. COMEY. I don't think it's for me to recommend.

Mr. RUSSELL. But you do—you've been very open and even stated why you felt that these were unique sets of circumstances that called for greater transparency. You do make recommendations routinely, as you've stated here today. We're talking top secret/SCI information that's been mishandled. You would take a dim view to that if I were an agent. What consequence—this is what the American people feel exasperated about. There seems to be no consequence.

So in a case like this, if it's not going to be criminal charges recommended, what are the American people to do to hold their officials accountable if maybe they shouldn't be trusted for further promotion and higher responsibility?

Mr. COMEY. And what I meant earlier is that's not a question that the American people should put to the FBI Director. I can answer about the things within my remit, but that—I understand the question, but it's not one for me to answer in my role.

Mr. RUSSELL. Well, I hope it's one that the American people answer in the future, because we do have a choice about those that would mishandle information. And while we're all fallible human beings and we all make mistakes, in a case like this, I mean, for decades of my service in the Army infantry and handling top secret/SCI information and then as a Member of Congress, I mean, we know those responsibilities.

Is it your view and others that have interviewed Mrs. Clinton that she would not have known what those responsibilities were?

Mr. COMEY. No, I think, in a way, you would expect she understood the importance of protecting classified information.

Mr. RUSSELL. Well, I would agree with that. And there has been a breach, and I think that the American people demand a consequence, that they demand an accountability. And I think it's important, to uphold the form of our republican government, that we have a consequence.

And with that, thank you for your appearance here today.

And I would like to yield the remainder of my time to Chairman Chaffetz.

Chairman CHAFFETZ. Thank you. I think, if you yield back, through mutual agreement, Mr. Cummings and I have agreed that I do have about a dozen or so quick follow-up questions. You've been most generous with your time, but I would like to get through these last bit.

Mr. COMEY. Okay.

Chairman CHAFFETZ. And, again, we'll do so with equal time.

How did the Department of Justice—or how did the FBI view the incident in which Hillary Clinton instructed Jake Sullivan to take the markings off of a document that was to be sent to her?

Mr. COMEY. Yeah. We looked at that pretty closely. There was some problem with their secure fax machine. And there's an email in which she says, in substance, take the headers off of it and send it as a nonpaper.

As we've dug into that more deeply, we've come to learn that, at least there's one view of it that is reasonable, that a nonpaper in State Department parlance means a document that contains things we could pass to another government. So essentially, take out anything that's classified and send it to me.

Now, it turned out that didn't happen, because we actually found that the classified fax was then sent, but that's our best understanding of what that was about.

Chairman CHAFFETZ. So this was a classified fax?

Mr. COMEY. Correct.

Chairman CHAFFETZ. So Hillary Clinton sends to Jake Sullivan—let me go back. Jake Sullivan says: They say they had issues sending secure fax. They're working on it. Hillary Clinton sends to Jake Sullivan: If they can't, turn into nonpaper with no identifying heading and send nonsecure.

Mr. COMEY. Yeah.

Chairman CHAFFETZ. So you're telling me it's a classified piece of information, she's taking off the header, and she's instructing them to send it in a nonsecure format.

Mr. COMEY. Right.

Chairman CHAFFETZ. Is that not intent?

Mr. COMEY. Well, that actually caught my attention when I first saw it. And what she explained to us in her interview was, and other witnesses did as well, is what she meant by that is make it into a nonclassified document, that's a what a nonpaper is in their world, and send it to us, because I just—I don't need the classified stuff, I just need the——

Chairman CHAFFETZ. Then why take off the heading? If it's going to be turned into a nonclassified document, why take off the heading?

Mr. COMEY. I assume because it would be nonclassified anymore, so you wouldn't have a classified header on it, I think is what she said during her interview.

Chairman CHAFFETZ. So she wanted to be technically correct? Is that what you're saying? This is your——

Mr. COMEY. No. I think what she said during the interview is: I was telling him, in essence, send me an unclassified document, take the header off, turn it into a nonpaper. Which is a term I'd

never heard before, but I'm told by people I credit that in diplomatic circles, that means something we could pass to another government.

Chairman CHAFFETZ. You are very generous in your accepting of that.

Let me ask you, Director, did any uncleared individuals receive any classified information over Hillary Clinton's server?

Mr. COMEY. Did any uncleared people receive classified information? I don't think any of the correspondents on the classified emails were uncleared people. These were all people with clearances working, doing State Department business on the unclass system.

Chairman CHAFFETZ. Did Mr. Pagliano have the requisite security clearance?

Mr. COMEY. As I sit here today, I can't remember. He was not a participant on the classified email exchanges, though.

Chairman CHAFFETZ. He was running the server. He set up the server.

Mr. COMEY. That's a different question. Well, I'm sorry. I misunderstood your question, then.

Yeah. There's no doubt that uncleared people had access to the server, because even after Pagliano, there were others who maintained the server who were private sector folks.

Chairman CHAFFETZ. So there are hundreds of classified documents on these servers. How many people without a security clearance had access to that server?

Mr. COMEY. I don't know the exact number as I sit here. It's probably more than 2, less than 10.

Chairman CHAFFETZ. And I appreciate your willingness to follow up with this.

Did Secretary Clinton's attorneys have the security clearances needed?

Mr. COMEY. They did not.

Chairman CHAFFETZ. Does that concern you?

Mr. COMEY. Oh, yeah. Sure.

Chairman CHAFFETZ. Is there any consequence to an attorney rifling through Secretary Clinton's, Hillary Clinton's emails without a security clearance?

Mr. COMEY. Well, not necessarily criminal consequences, but there's a great deal of concern about an uncleared person, not subject to the requirements we talked about in the read-in documents, potentially having access. That's why it's very, very important for us to recover everything we can back from attorneys.

Chairman CHAFFETZ. So what's the consequence? I mean, here Hillary Clinton gave direction to her attorneys without a security clearance to go through documents that were classified.

Mr. COMEY. I think that's what happened in fact. Whether that was the direction is a question I can't answer sitting here.

Chairman CHAFFETZ. You're parsing that one a little bit for me.

Mr. COMEY. No, no. You were just asking me. I don't—I don't know——

Chairman CHAFFETZ. What's the consequence? They don't work for the government. We can't fire them.

Mr. COMEY. Right.

Chairman CHAFFETZ. So is there no criminal prosecution of those attorneys? Should they lose their bar license? What's the consequence to them?

Mr. COMEY. Well, if they acted with criminal intent or acted with some mal-intent.

Chairman CHAFFETZ. What you're telling us is it doesn't matter if you have a security clearance or not, because I may be innocent enough, hey, I'm just an attorney, I like the Secretary, I'm trying to help Hillary Clinton, I'm not trying to give it to the Chinese or the Russians, I'm just trying to help her. So there's no intent? It doesn't matter if these people have security clearances?

Mr. COMEY. Of course it matters. That's why I said——

Chairman CHAFFETZ. But there's no consequence, Director. There's no consequence.

Mr. COMEY. Well, I don't know what consequence you'd have in mind. Very——

Chairman CHAFFETZ. Prosecute them.

Mr. COMEY. An attorney for receiving from his client information that ends up being classified?

Chairman CHAFFETZ. I asked you at the very beginning, does Hillary Clinton—is there a reasonable expectation that Hillary Clinton would send and receive hourly, if not daily, classified information? That's reasonable to think that the Secretary of State would get classified information at every moment. She is not the head of Fish and Wildlife.

So the idea that she would turn over her emails, her system, her server to, what it sounds like, up to 10 people without security clearances, and there's no consequence. So why not do it again?

Mr. COMEY. Well, that's a question I don't think you should put to me. You're asking—I'm talking about my criminal investigation.

Chairman CHAFFETZ. But how can that—there's no intent there? Does she not understand that these people don't have security clearances?

Mr. COMEY. Surely she understands at least some of them don't have security clearances.

Chairman CHAFFETZ. So she understands they don't have security clearances and it's reasonable to think she's going to be getting classified information. Is that not intent, to provide a noncleared person access to classified information?

Mr. COMEY. You're mixing it up, though. I don't think it's reasonable to assume—mixing me up, sorry, it's not your fault—that someone who is maintaining your server is reading your emails. In fact, I don't think that's the case here.

There's a separate thing, which is when she's engaging counsel to comply with the State Department's requests, are her lawyers then exposed to information that may be on there that's classified.

Chairman CHAFFETZ. Did they see any classified information? Did Hillary Clinton's attorneys, without security clearances, see classified information?

Mr. COMEY. As I sit here, I don't know the answer to that.

Chairman CHAFFETZ. It has to be yes, Director. You came across 110, and they said they went through all of them.

Mr. COMEY. Well, they didn't read them all, they just looked at headers.

Chairman CHAFFETZ. So their excuse is, "We saw the emails, but we didn't read them"?

Mr. COMEY. No, I think I said this in my statement on Tuesday, they sorted the emails by using headers and search terms to try and find work-related emails. We read them all.

Chairman CHAFFETZ. I know that you read them all. Do you think it's reasonable or unreasonable to think that her attorneys, under her direction, did or did not read those emails? Because there were—let me go back to this. Yes or no, were there or were there not classified emails that her, that Hillary Clinton's attorneys read?

Mr. COMEY. I don't know whether they read them at the time.

Chairman CHAFFETZ. Did Hillary Clinton give noncleared people access to classified information?

Mr. COMEY. Yes. Yes.

Chairman CHAFFETZ. What do you think her intent was?

Mr. COMEY. I think then it was to get good legal representation and to make the production to the State Department. I think it would be a very tall order in that circumstance, I don't see the evidence there to make a case that she was acting with criminal intent in her engagement with her lawyers.

Chairman CHAFFETZ. And I guess I read criminal intent as the idea that you allow somebody without a security clearance access to classified information. Everybody knows that, Director. Everybody knows that.

I've gone way past my time. Let me recognize Mr. Cummings for an equal amount of time.

Mr. CUMMINGS. Director, thank you for your patience.

I want to clear up some things. I want to make sure I understand exactly what you testified to on the issue of whether Secretary Clinton sent or received emails that were marked as classified.

On Tuesday, you stated, and I quote: "Only a very small number of the emails containing classified information bore markings"—and I emphasize, bore markings—"indicating the presence of classified information," end of quote. Republicans have pounced on this statement as evidence that Secretary Clinton lied. But today we learned some significant new facts, and I hope the press listens to this.

First, you clarified that you were talking about only 3 emails out of 30,000 your office reviewed. Is that right?

Mr. COMEY. Three, yes.

Mr. CUMMINGS. Three out of 30,000. Is that right?

Mr. COMEY. Yes. At least 30,000.

Mr. CUMMINGS. At least 30,000.

Second, you confirmed that these three emails were not properly marked as classified at the time based on Federal guidelines and manuals, they did not have a classification header, they did not list the original classifier, the agency, office of origin, reason for classification, or date for declassification. Instead, these emails included only a single, quote, "C," parenthesis, end parenthesis, and then end of quotation mark, for confidential on one paragraph lower down in the text. Is that right?

Mr. COMEY. Correct.

Mr. CUMMINGS. Third, you testified that based on these facts, it would have been a, quote, "reasonable inference" for Secretary Clinton to, quote, "immediately," end of quote, conclude that these emails were not, in fact, classified. So that was also critical new information.

But there's one more critical fact, that these emails were not in fact—and that is this, Director, and to the press—these emails were not, in fact, classified. The State Department explained to us yesterday, they reported that these emails are not classified and that including the little C on these emails was a result of a human error. The bottom line is that those little C's should not have been on those documents because they were not in fact classified.

When Representative Watson Coleman asked you a few minutes ago about this, you testified that you had not been informed. And I understand that, I'm not beating up on you, I promise you. But can you tell us why, Director Comey, because I want—you know, because the Republicans are pouncing and saying that the Secretary lied, and so I want to make sure that we're clear on this.

Can you tell us why, Director Comey, did you consult—and we're just curious—did you consult with the State Department about these 3 emails out of the more than 30,000, or did this just not come up? What happened there?

Mr. COMEY. Yeah. I'm not remembering for sure while I'm here. I'm highly confident we consulted with them and got their view on it. I don't know about what happened yesterday, maybe that their view has changed or they found things out that we didn't know. But I'm highly confident we consulted with them about it.

Mr. CUMMINGS. So this is totally different than what we understood yesterday. Today we learned that these emails were not in fact classified. They should not have been included—they should have not included those stray markings, they were not properly marked as classified, and the Director of the FBI believes it was reasonable for Secretary Clinton to assume that these documents were not classified.

Chairman, you raised a question about whether Secretary Clinton's attorneys had security clearances. It's my understanding that they did. We can double-check that, but that is my understanding. We'll double-check that.

Going on, let me move to the next topic. You explained on Tuesday that you were providing, quote, "an update on the FBI's investigation of Secretary Clinton's use of a personal email system during her time as Secretary of State." You explained that you received a referral on this matter from the inspector general of the intelligence community on July 6, 2016. Is that right.

Mr. COMEY. Yes.

Mr. CUMMINGS. Today, tens of thousands of Secretary Clinton's emails are publicly available on the State Department's Web site. And our staff have been reviewing the emails that were retroactively determined to include classified information.

Based on this review, it appears that these emails included more than 1,000 individuals who sent or received the information that is now redacted as classified. Let me make that clear. About 1,000 people sent or received the same information that was contained in

Secretary Clinton's emails and retroactively classified. Were you aware of that?

Mr. COMEY. No. The number doesn't surprise me, though.

Mr. CUMMINGS. Why not?

Mr. COMEY. Because this was—they were doing the business of the State Department on this email system. So I don't know how many thousands of people work at the State Department, but it doesn't surprise me there would be lots of people on these chains.

Mr. CUMMINGS. And would you agree that we need—that something needs to be done with regard to this classification stuff, because things are classified, then they're not classified, then they are retroactively classified. I mean, does that go into your consideration when looking at a case like this?

Mr. COMEY. Yeah. I don't pay much attention to the up-classified stuff, because we're focused on intent. So if someone classifies it later, it's impossible that you formed intent around that, because it wasn't classified at the time. I know that's a process. I wasn't familiar with it before this investigation, but I don't spend a lot of time focused on it in the course of a criminal investigation.

Mr. CUMMINGS. I understand. We also reviewed who these people are, and they include a host of very experienced career diplomats with many years of experience. So let me ask you this. When you received this referral from the inspector general about Secretary Clinton's emails, did you also receive any referrals for any of the other 1,000 people who sent and received those emails? Did you?

Mr. COMEY. No.

Mr. CUMMINGS. I understand——

Mr. COMEY. Well, I should stop there. Within the scope of our investigation was a group of people closer to the Secretary. We looked at their conduct. I forget what the number is, four or five of them. But then the hundreds of others who may have been on the chains were not the subjects of the investigation.

Mr. CUMMINGS. Okay. I think I have 30 more seconds.

I understand that Secretary Clinton is the only one running for President, but it does not make sense that she was singled out for a referral to the FBI. Do you agree with that?

Mr. COMEY. No, I don't—I don't think I agree with that.

Mr. CUMMINGS. Okay. So you—so you—let's go back to Colin Powell. Do you think you ought to look at his situation? Or Condoleezza Rice?

Mr. COMEY. Well, there's been no referral on them. I know only sort of at a superficial level their circumstances. This case strikes me as very different from those and not an inappropriate referral from the inspector general.

Mr. CUMMINGS. Very well.

Chairman CHAFFETZ. I thank the gentleman.

Who was Hillary Clinton emailing that was hacked?

Mr. COMEY. Yeah. I don't want to say in an open forum. We can get you that information, but I don't want to—again, I don't want to give any hostile adversaries insight into who—what we figured out.

Chairman CHAFFETZ. Fair enough.

Mr. COMEY. So I know the names.

Chairman CHAFFETZ. Understood.

Mr. COMEY. Yeah.

Chairman CHAFFETZ. Was there any evidence of Hillary Clinton attempting to avoid compliance with the Freedom of Information Act?

Mr. COMEY. That was not the subject of our criminal investigation, so I can't answer that sitting here.

Chairman CHAFFETZ. It's a violation of law, is it not?

Mr. COMEY. Yes. My understanding is there are civil statutes that apply to that. I don't know of——

Chairman CHAFFETZ. Let's put the boundaries on this a little bit, what you didn't look at. You didn't look at whether or not there was an intention or the reality of noncompliance with the Freedom of Information Act?

Mr. COMEY. Correct.

Chairman CHAFFETZ. You did not look at testimony that Hillary Clinton gave in the United States Congress, both the House and the Senate?

Mr. COMEY. To see whether it was perjurious in some respect?

Chairman CHAFFETZ. Yes.

Mr. COMEY. No, we did not.

Chairman CHAFFETZ. Did you review and look at those transcripts as to the intent of your recommendation?

Mr. COMEY. I'm sure my folks did. I did not.

Chairman CHAFFETZ. So—okay. And this is an important point, because I think those of us in Congress, knowing that you got a criminal referral from an inspector general, thought that you were also looking at whether or not Hillary Clinton had provided false testimony, which is a crime, to the Congress, but you didn't look at that.

Mr. COMEY. Correct. As I said, I'm confident my folks looked at the substance of the statements trying to understand the circumstances around the entire situation.

Chairman CHAFFETZ. Can you confirm that? I just want to make——

Mr. COMEY. Yeah, we'll confirm that. And also, again, maybe I'm missing this, but I don't think we got a referral from congressional committees, a perjury referral.

Chairman CHAFFETZ. No. It was the inspector general that initiated this.

Mr. COMEY. Yeah.

Chairman CHAFFETZ. Did the—the fact that Hillary Clinton refused to be interviewed by the inspector general, what did that say to you about intent?

Mr. COMEY. Not, at least for our criminal investigation, not particularly germane.

Chairman CHAFFETZ. Are you familiar—you're familiar—there's a Web site. I mean, lots of government agencies have Web sites. The State Department has a Web site, state.gov, and they have a YouTube site. Videos that are uploaded to a YouTube site, would those be considered Federal records?

Mr. COMEY. I don't know.

Chairman CHAFFETZ. So they're paid for by Federal dollars, they're maintained by Federal employees. Would that not be a Federal record?

Mr. COMEY. Yeah, I just don't know. I'm sure there's an expert who could answer that in 2 seconds, but I'm not that expert.

Chairman CHAFFETZ. Okay. We've kept you here a long time. I want to follow up on that.

Is the FBI still investigating Hillary Clinton's aides?

Mr. COMEY. No is the answer. The Department of Justice declined on all of those who were subjects communicating with her through that email system.

Chairman CHAFFETZ. What recommendations did you make about her aides?

Mr. COMEY. Same. Same. We didn't recommend that anybody be prosecuted on those facts.

Chairman CHAFFETZ. And if you can help us understand who precisely had been ruled out for prosecution, that would be——

Mr. COMEY. Sure.

Chairman CHAFFETZ. Did you look at the Clinton Foundation?

Mr. COMEY. I'm not going to comment on the existence or nonexistence of any other investigations.

Chairman CHAFFETZ. Was the Clinton Foundation tied into this investigation?

Mr. COMEY. I'm not going to answer that.

Chairman CHAFFETZ. The server that was set up in her home was originally set up by, you said, former President Bill Clinton.

Mr. COMEY. Correct.

Chairman CHAFFETZ. Do you know who paid for that?

Mr. COMEY. I don't, sitting here.

Chairman CHAFFETZ. Okay. I'll allow some equal time now for my colleague and friend, Mr. Cummings.

Mr. CUMMINGS. I'm going to yield 2 minutes to—of my 3.43—to Mr. Lynch.

Mr. LYNCH. Thank you, Mr. Director. We're talking about hacking. And so on this committee we're very much interested in cybersecurity and we review a lot of the major hacks that are going on. So just recently, and I would say in the last 18 months, we've had a major hack, February of 2016, at the Department of Homeland Security and the FBI. We had a hacking group, the SITE Intelligence Group, reported that a group called Crackers With Attitude had hacked 9,000 employees' data from the Department of Homeland Security, including names, email addresses, locations, telephone numbers; also 20,000 FBI workers.

We had another hack—direct evidence, obviously, of those—another hack at OPM of 4.2 million current and former Federal Government employees. Their information had been stolen, including Social Security numbers, which were not redacted.

We had IRS in May 2015, millions—no, I'm sorry, 200,000 attempted and 100,000 were successful. We had—the State Department announced a breach of its computer systems after an infiltration forced the agency to temporarily shut down its classification system. We had the United States Postal Service, 800,000 postal employees, 2.9 million customers.

The White House, The Washington Post reported back in—this is back in 2014—that the White House computer was hacked. The National Oceanic and Atmospheric Administration. I'm on another committee for Financial Service. We had Verizon. UCLA Health

Systems, thousands and thousands and thousands of employees. Anthem HealthCare. Sony Pictures. Staples. Home Depot. JPMorgan. It gets into the millions. Community Health Systems. Target. TJX.

So all these we have direct evidence, millions and millions and millions of people, their accounts being hacked. Any direct evidence that Hillary Clinton's emails were hacked?

Mr. COMEY. No.

Mr. LYNCH. Okay. I have no further questions. I yield back.

Mr. CUMMINGS. Mr. Director, we are about at the end. I'm going to do a concluding statement and then I think the chairman will.

I want to, first of all, I want to go back to something that Mrs. Watson Coleman said a little earlier. As an African American man in this country, 66 years old, moving towards the twilight of my life, we cannot allow Black men to continue to be slaughtered.

This morning I woke up to my wife literally crying watching the tape of this guy, Alton Sterling, in Baton Rouge. And then she looked at the one, Philando Castile, near Minneapolis. And I hope you watched them. There's something wrong with this picture.

And don't get me wrong. I am all for, I've supported police, I am a lawyer, and I know how important police are, and I know there's so many great folks.

But, Mr. Director, if you do nothing else in your 2,000-plus days left, you have got to help us get ahold of this issue. It is so painful, I can't even begin to tell you.

And so I don't want—I've been fortunate in my life. I've been very fortunate that I have not been harmed by the police. But I've been stopped 50 million times.

Now, with regard to this hearing, I want to thank you again. You know, as I listened to you, you said something that I will never forget, and for some reason it gave me a chill. You said there are two things that are most important to me, two things. You said: My family and my reputation. My family and my reputation.

And I don't know whether your family's watching this, but I hope that they are as proud of you as I am, because you are the epitome of what a public servant is all about, sacrificing over and over and over again, trying to do the right thing, sometimes coming under ridicule, but yet still doing the right thing. And so I hope that they are proud of you.

The second thing is that no matter what has happened in this hearing, I hope that you know that your reputation is still intact.

And so I conclude by summarizing that I think some of our—of some of our key findings today. First, the Director testified that his entire team of 15 to 20 FBI investigators unanimously agreed on the recommendation not to prosecute Secretary Clinton.

Second, Director Comey made crystal clear that Republican claims and some of the talking heads' claims of bias are completely false. He testified that he would treat John Doe the same way he would treat Hillary Clinton, that he was very forceful on that point.

Third, on the claim that Secretary Clinton sent or received emails that were marked as classified, that claim has now been significantly undercut. Those documents were not classified and those markings were not proper.

Finally, Republicans have repeatedly cried foul about a double standard when it comes to Secretary Clinton's emails, but Director Comey testified that the real double standard would have been to prosecute her with this completely inadequate evidence.

Again, Director, I thank you, but I thank somebody else. I thank—and having practiced law for many years and having dealt with the FBI on many cases, I want to thank the people who work with you. Because it's not just—it's not just—this is not just about you.

Mr. COMEY. No.

Mr. CUMMINGS. This is not just about Secretary Clinton. When we are addressing you, there are a whole cadre of people who give their blood, their sweat, and their tears to protect us as Americans. And I just want to thank them, because sometimes I think they are forgotten, unseen, unnoticed, unappreciated, and unapplauded. But today I applaud them and I thank you.

Thank you very much, and I yield back.

Chairman CHAFFETZ. And I thank the gentleman.

And I concur with the idea that every FBI agent I have ever met has just been above reproach, and they make us proud. And they work hard, they put their lives on the line, they serve overseas, they serve domestically. Can't thank them enough for what they do, and I hope that is part of the message that we carry back.

I cannot thank you personally enough, you on a personal level, for your accessibility, your ability to get on the phone with me the same day that you make your announcement, and then in rapid fire when I said to you, "What day is best, we're going to have to do this, so which day is best for you?" and you said Thursday, and here we are and doing it. I can't thank you enough.

I wish all of the government employees would have that attitude and approach, I really do, and I can't thank you enough. I look forward to working with you and your staff as we move forward in getting this documentation, things that you can't share publicly, and others.

It is the intention of the committee to—I had told Mr. Cummings here that we would come back after votes. Votes have been pushed back now a bit. So what I'd like to do is to go into recess for 5 minutes and then we will start with our second panel.

The committee stands in recess till 5 minutes from now.

Thank you again, Director Comey.

[Recess.]

Chairman CHAFFETZ. The Oversight and Government Reform Committee will reconvene and we will now recognize our second panel of witnesses.

I'm pleased to welcome the Honorable Steve Linick, inspector general of the United States Department of State.

Mr. Linick, it is our understanding that you are accompanied by Ms. Jennifer Costello, assistant inspector general for the Office of Evaluations and Special Projects, whose expertise may be needed during questioning. So we will also ask that she be sworn in during this time too.

We also welcome the Honorable Charles McCullough, III, inspector general of the intelligence community at the Office of the Director of National Intelligence.

OVERSIGHT OF THE FEDERAL BUREAU OF INVESTIGATION

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTEENTH CONGRESS

SECOND SESSION

SEPTEMBER 28, 2016

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Material submitted by the Honorable Darrell E. Issa, a Representative in Congress from the State of California, and Member Committee on the Judiciary. This material is available at the Committee and can also be accessed at:

http://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=105390

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OVERSIGHT OF THE FEDERAL BUREAU OF INVESTIGATION

WEDNESDAY, SEPTEMBER 28, 2016

HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
Washington, DC.

The Committee met, pursuant to call, at 9:04 a.m., in Room 2154, Rayburn House Office Building, the Honorable Bob Goodlatte (Chairman of the Committee) presiding.

Present: Representatives Goodlatte, Sensenbrenner, Smith, Chabot, Issa, King, Franks, Gohmert, Jordan, Chaffetz, Marino, Gowdy, Labrador, Farenthold, Collins, DeSantis, Walters, Ratcliffe, Trott, Bishop, Conyers, Nadler, Lofgren, Jackson Lee, Cohen, Johnson, Chu, Deutch, DelBene, Jeffries, Cicilline, and Peters.

Staff Present: (Majority) Shelley Husband, Chief of Staff & General Counsel; Branden Ritchie, Deputy Chief of Staff & Chief Counsel; Zach Somers, Parliamentarian & General Counsel; Caroline Lynch, Chief Counsel, Subcommittee on Crime, Terrorism, Homeland Security, and Investigations; Ryan Breitenbach, Counsel, Subcommittee on Crime, Terrorism, Homeland Security, and Investigations; (Minority) Perry Apelbaum, Staff Director & Chief Counsel; Danielle Brown, Parliamentarian & Chief Legislative Counsel; Aaron Hiller, Chief Oversight Counsel; Joe Graupensperger, Chief Counsel, Subcommittee on Crime, Terrorism, Homeland Security, and Investigations; and Veronica Eligan, Professional Staff Member.

Mr. GOODLATTE. Good morning. The Judiciary Committee will come to order.

And, without objection, the Chair is authorized to declare a recess of the Committee at any time.

We welcome everyone to this morning's hearing on "Oversight of the Federal Bureau of Investigation."

Before I begin this hearing, I want to take a few minutes to recognize the chief counsel of the Subcommittee on Crime, Terrorism, Homeland Security, and Investigations, Caroline Lynch. After 15 years working on Capitol Hill, Caroline has decided to move back to her home State of Arizona to be close to her family and to pursue the next steps in her career. Needless to say, we are very sad to see Caroline go.

During her time in Washington, D.C., Caroline worked for Representative John Shadegg, both in his personal office and as chief counsel of the House Republican Policy Committee. In 2006, Caro-

FBI 18-cv-01766-139

line came to work for the House Judiciary Committee, and in 2008, she became chief counsel of the Judiciary Committee's Crime Subcommittee.

At the Committee, Caroline has had an enormous impact on the reform of our criminal and national security laws. Few people in Washington have done as much to promote the safety of our communities. Caroline has overseen the drafting, negotiation, and passage of critical legislation regarding the Foreign Intelligence Surveillance Act, the Electronic Communications Privacy Act, and the most sweeping set of reforms to government surveillance practices in nearly 40 years, the USA Freedom Act, among many other priority legislative initiatives.

Anyone who has met Caroline knows she is immensely intelligent, hardworking, loyal, and a discerning chief counsel. And, of course, those people she has negotiated with have found her to be a skillful and formidable but fair advocate. Her team at the Subcommittee know her to be a determined leader and a steadfast friend. I have appreciated Caroline's deep knowledge of criminal laws, the strength of her convictions, and her courage to speak the truth in a place where it is rarely convenient to do so.

We wish Caroline well in her new endeavors, and I thank her for her years of dedicated service to this Committee, the U.S. House of Representatives, and the American people.

[Applause.]

Mr. GOODLATTE. And I know the Ranking Member, Mr. Conyers, would like to say a few words as well.

Mr. CONYERS. Thank you very much, Chairman Goodlatte.

This is indeed a unique moment in our history, and on behalf of the Democratic staff and Democratic Members of the Committee, I want to recognize Caroline Lynch for her hard work and her dedication for the past 10 years.

As chief crime counsel for the Republicans during this time, she worked collegially with her Democratic colleagues on a broad range of criminal justice issues. The Crime Subcommittee is legislatively the busiest Subcommittee, to me, in all of Congress, and every crime-related bill that has been enacted during her time here has had the benefit of her expertise.

There are many examples of this, but I will cite her role in helping Members find common ground on section 215 of the PATRIOT Act so that we could enact important reforms in the USA Freedom Act. This important law will both safeguard our national security and our civil liberties, and it set a precedent for how we can proceed on such issues in the future. Her work on this legislation was essential to its ultimate success.

We will miss her insight on these issues as well as her friendship and her friendliness as she leaves the Committee for other endeavors in her home State of Arizona.

We wish you all the best.

[Applause.]

Mr. GOODLATTE. I think you would agree with me in saying that, while her work is not quite done today and the rest of the week, she has also been very critical to the bipartisan work that we have been doing here the past few years, culminating in 11 bills so far passing out of this Committee dealing with criminal justice reform.

And we thank you for the contribution you have made for that. And that work has been, indeed, very bipartisan, so we thank you all.

We now welcome Director Comey to your fourth appearance before the House Judiciary Committee since your confirmation as the seventh Director of the FBI. Needless to say, the past year since our last oversight hearing has been challenging for the FBI on a number of fronts that we hope to review with you today.

I want to begin by commending the men and women of the FBI and the NYPD and the New Jersey Police Department for their swift action in identifying and apprehending Ahmad Khan Rahami, whose cold and cowardly acts of terrorism last week injured 29 American citizens.

This was the latest in a string of attacks stretching back to the 2013 Boston Marathon bombing and continuing through the terror attacks in San Bernardino, Orlando, and Minneapolis. They all share one common thread—namely, radical Islam.

This Administration, however, including the FBI, has coined this cancer with the euphemism of "countering violent extremism." If the FBI and the rest of our national security apparatus continues its myopia about focusing on ethereal issues of extremism, their mission to protect the American people will always be one of following up on terrorism's aftermath.

I look forward to hearing from you about how the FBI is working to proactively combat radical Islamic terrorism and put an end to this string of violence.

While terrorism is a malignancy which must be purged, other events at home have called into question the confidence that Americans have historically held in a blind and impartial justice system.

Former Secretary of State Hillary Clinton and the FBI's investigation into her seemingly criminal conduct is a case in point. It seems clear that former Secretary of State Hillary Clinton committed multiple felonies involving the passing of classified information through her private email server. The FBI, however, declined to refer the case for prosecution on some very questionable bases.

This past Friday afternoon, the FBI released additional investigative documents from the Clinton investigation which demonstrate, among other things, that more than 100 of the emails on Secretary Clinton's private server contained classified information and that emails required to be preserved under Federal law were, in fact, destroyed.

Even more alarming, we have recently learned that President Obama used a pseudonym to communicate with Secretary Clinton on her email server. Why is this relevant? As Secretary Clinton's top aide, Huma Abedin claimed, when informed by the FBI of the existence of an email between her boss and the President, "How is that not classified?"

Armed with knowledge of the President's now-known-to-be-false claim that he only learned of Clinton's private email account "at the same time everybody else learned it, through news reports," did the FBI review why the President was also sending classified information over unsecure means. In effect, this President and the former Secretary of State improperly transmitted communications

through nonsecure channels, placing our Nation's secrets in harm's way.

Secretary Clinton's decision to play fast and loose with our national security concerned not simply her daughter's wedding planning or yoga routines but, instead, quoting you, Director Comey, "Seven email chains concerned matters that were classified at the Top Secret/Special Access Program level when they were sent and received." Top Secret/Special Access Programs contain some of the most sensitive secret information maintained by our government. This is a truly remarkable fact. Were anyone of lesser notoriety than Hillary Clinton guilty of doing this, that person would already be in jail.

For Americans unsure what a special access program, or SAP, is, it is the kind of information that a war-planner would use to defeat an enemy or even clandestine intelligence operations. The Wall Street Journal explained that an SAP usually refers to highly covert technology programs often involving weaponry. Knowledge of these programs is usually restricted to small groups of people on a need-to-know basis.

For those wondering whether this kind of information on an unsecure server is a problem, you need read no further than the Huffington Post, which reported Hillary Clinton's private email server, containing tens of thousands of messages from her tenure as Secretary of State, was the subject of hacking attempts from China, South Korea, and Germany after she stepped down in 2016.

To conclude, let me ask everyone to engage in a thought experiment. One of this Nation's signature accomplishments in the war on terror was the raid on Abbottabad, Pakistan, on May 2, 2011, that resulted in the killing of Osama bin Laden. That operation, which was conducted by an elite team of U.S. Navy special operators, was, of course, highly classified.

Now, imagine, if you will, that classified information relating to the raid was passed through a nonsecure email server and was accessed by Nations or individuals hostile to the United States. Rather than a highly successful covert operation, we might have had a team of dead U.S. servicemen.

Hillary Clinton chose to send and receive Top Secret information over a personal, unsecure computer server housed in her various homes and once reportedly placed in a bathroom closet. These actions, without a doubt, opened these communications to hostile interception by our enemies and those who wish America harm.

These facts, and not the imagined history I have asked you to contemplate, were the basis of the investigation by the FBI. And these are the facts that you, Director Comey, chose to hold unworthy of a recommendation to prosecute, saying that no reasonable prosecutor would bring such a case.

We, as Congress and the American people, are troubled how such gross negligence is not punished and why there seems to be a different standard for the politically well-connected, particularly if your name is Clinton.

Mr. Director, I look forward to your testimony today.

At this time, I am pleased to recognize the Ranking Member of the Committee, the gentleman from Michigan, Mr. Conyers, for his opening statement.

Mr. CONYERS. Thank you, Chairman Goodlatte.

Welcome again, Director Comey, for your appearance here today.

The FBI's mission is a complex undertaking: to protect the United States from terrorism, to enforce our criminal laws, and to lead the Nation's law enforcement community.

That mission ought to mirror our own priorities in this Committee. In the past few days, for example, we have witnessed near-fatal terrorist attacks in Minnesota, New York, and New Jersey. These attacks underscore the growing fear that individuals can be moved to violence at home by the propaganda of ISIS and other terrorist groups abroad even though they have no direct connection to those organizations.

To me, this threat is dire. We should be doing all we can within our communities and within our constitutional framework to mitigate the danger. But will our majority here in the House use their time today to discuss these attacks? I suspect that they will not be in their focus in this campaign season.

In Charlotte, in Tulsa, in Dallas, right here in Washington, and in other cities across this country, our citizens demand answers to questions about race and policing and the use of lethal force by law enforcement. Our police are under siege, often underresourced, and, in some cases, hard-pressed to build trust with the communities they serve.

Director Comey, your continued work to foster lines of communication between police officers and the general public is commendable—and necessary if we are to keep our citizens safe from harm.

But will my colleagues discuss this pressing issue with the Director of the FBI, whose leadership in the law enforcement community is paramount? I hope so. I am also afraid the focus may be elsewhere.

The FBI is the lead agency in the investigation of cyber-based terrorism, computer intrusions, online sexual exploitation, and major cyber fraud. We have known for some years about the persistent cyber threat to our critical infrastructure. Now we hear reports of a new cyber threat to the very basis of our democratic process.

Twice this summer, Director Comey, I wrote to you with my fellow Ranking Members to ask you to look into reports that Russian state actors are working to undermine our election process.

Without objection, Mr. Chairman, I ask that both these letters be placed in the record.

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

[The information referred to follows:]

Congress of the United States
Washington, DC 20515

July 25, 2016

The Honorable James B. Comey
Director of the Federal Bureau of Investigation
FBI Headquarters
935 Pennsylvania Avenue NW
Washington, D.C. 20535

The Honorable Ashton B. Carter
Secretary of Defense
U.S. Department of Defense
1300 Defense Pentagon
Washington, D.C. 20301

The Honorable John F. Kerry
Secretary of State
U.S. Department of State
2201 C Street NW
Washington, D.C. 20520

The Honorable James R. Clapper
Director of National Intelligence
Office of the Director of National Intelligence
Washington, D.C. 20511

Dear Director Comey, Secretaries Kerry and Carter, and General Clapper:

As senior Members of national-security committees in Congress, we are deeply troubled by reports of a Russia-supported hacking of Democratic National Committee data, and we applaud the FBI's quick action launching an investigation. We request that the Administration brief members of Congress on this situation as soon as possible in unclassified or classified settings as needed.

We see two separate issues at play here, both of which deserve the focus of investigators and Congressional overseers.

First, the DNC hack was plainly cyber-crime. More and more, America's adversaries are employing cyber-theft and cyber-terrorism as tactics to threaten our security. We need to understand fully the extent of the hack and work to determine who was responsible. We need to assess whose personal information was compromised by the attack and ensure those individuals have what they need to prevent any further damage. We need to determine what vulnerabilities allowed this attack to succeed, and provide information to the public about how to guard against future attacks of this nature.

Second—and perhaps more important—the timing and content of the theft, targeting one of our two major political parties, makes clear that this cyber-attack amounts to more than a public embarrassment or harmless mischief. If reports of Russia's involvement are confirmed, the only reasonable conclusion is that leaders in Russia are stealing and disseminating information in an effort to sway an election in the United States.

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Honorable James B. Comey
Honorable John F. Kerry
Honorable Ashton B. Carter
Honorable James R. Clapper
Page Two
July 25, 2016

This is an action right out of President Putin's playbook. In recent years, Russia has influenced elections, infiltrated political parties across Europe, and stoked divisive politics in the hope of fracturing Western unity. It doesn't stretch the imagination that Mr. Putin would now try his hand at manipulating the course of American democracy—leaking information through a syndicate that has repeated anti-Semitic insinuations, endangered lives, and threatened American security by recklessly releasing stolen information. That scenario should sound the alarm for people across this country.

That's why we also ask that the FBI collaborate with the Departments of State and Defense and the Intelligence Community to obtain a complete picture of Russia's involvement and its leaders intentions. Nearly a half century ago, a break-in at the DNC headquarters eventually led to the end of a Presidency. For a foreign government to engage in the same sort of behavior cannot be tolerated. Russia doesn't get to put its thumb on the scale in our elections. In the days ahead, we need to send a clear message to Russia's leaders and all who mean us harm: we will not allow the Kremlin or any other foreign power to dictate the terms of political debate in this country.

With the clock ticking down to our election, we ask for quick action on this matter. The American people deserve to go to the polls in November confident that Russian subterfuge has had no role in setting the agenda for our country's future.

Sincerely,

ELIOT L. ENGEL
Ranking Member
House Foreign Affairs Committee

JOHN CONYERS, JR.
Ranking Member
House Judiciary Committee

BENNIE G. THOMPSON
Ranking Member
House Homeland Security Committee

Congress of the United States
Washington, DC 20515

August 30, 2016

The Honorable James Comey
Director
Federal Bureau of Investigation
935 Pennsylvania Avenue NW
Washington, D.C. 20530

Dear Mr. Director:

Based on multiple press reports, it appears that the Federal Bureau of Investigation (FBI) is investigating whether Russia executed cyber attacks against the Democratic National Committee (DNC) and the Democratic Congressional Campaign Committee (DCCC) that resulted in the illegal hacking of a wide range of emails and other documents.[1]

We are writing to request that the FBI assess whether connections between Trump campaign officials and Russian interests may have contributed to these attacks in order to interfere with the U.S. presidential election.

Serious questions have been raised about overt and covert actions by Trump campaign officials on behalf of Russian interests. It is critical for the American public to know whether those actions may have directly caused or indirectly motivated attacks against Democratic institutions and our fundamental election process.

On July 22, 2016, just days before the Democratic convention, approximately 20,000 pages of illegally hacked documents were leaked by WikiLeaks in an apparent attempt to influence the U.S. presidential election in favor of Donald Trump.[2] According to one press report:

> The FBI suspects that Russian government hackers breached the networks of the Democratic National Committee and stole emails that were posted to the anti-secrecy site

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[1] *See, e.g.*, *FBI Investigating Whether Russians Hacked Democratic Party's Emails to Help Donald Trump*, Los Angeles Times (July 25, 2016) (online at www.latimes.com/nation/la-na-pol-fbi-hack-dnc-russia-20160725-snap-story.html). *See also Growing Evidence Suggests Recent Hacks the Work of Russian-Backed Cyber Militias*, Fox News (Aug. 20, 2016) (online at www.foxnews.com/politics/2016/08/20/growing-evidence-suggest-recent-hacks-work-russian-backed-cyber-militias.html).

[2] *WikiLeaks Releases Thousands of Documents About Clinton and Internal Deliberations*, Washington Post (July 22, 2016) (online at www.washingtonpost.com/news/post-politics/wp/2016/07/22/on-eve-of-democratic-convention-wikileaks-releases-thousands-of-documents-about-clinton-the-campaign-and-internal-deliberations/).

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WikiLeaks on Friday. It's an operation that several U.S. officials now suspect was a deliberate attempt to influence the presidential election in favor of Donald Trump, according to five individuals familiar with the investigation of the breach.[3]

Donald Trump has repeatedly praised Russian President Vladimir Putin, stating that "he's doing a great job,"[4] "I'd get along very well with Vladimir Putin,"[5] and "It is always a great honor to be so nicely complimented by a man so highly respected."[6] Donald Trump's business interests in Russia have also been widely reported.[7]

Donald Trump has proposed shocking policy positions that would greatly benefit Russia, including breaking from longstanding U.S. commitments to our NATO allies to combat Russian aggression[8] and weakening sanctions and recognizing Russia's annexation of Crimea.[9]

Of direct concern, however, are Donald Trump's comments encouraging Russian hacking and his top aides' previously undisclosed connections to Russian officials and interests.

On July 27, 2016—the third day of the Democratic convention—Donald Trump urged Russia to hack Secretary Hillary Clinton's emails.[10]

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[3] *FBI Suspects Russia Hacked DNC; U.S. Officials Say it Was to Elect Donald Trump*, Daily Beast (July 25, 2016) (online at www.thedailybeast.com/articles/2016/07/25/fbi-suspects-russia-hacked-dnc-u-s-officials-say-it-was-to-elect-donald-trump.html).

[4] *Larry King Live*, CNN (Oct. 15, 2007) (online at www.cnn.com/TRANSCRIPTS/0710/15/lkl.01.html).

[5] *Donald Trump: "I'd Get Along Very Well With Vladimir Putin,"* CBS News (July 30, 2015) (online at www.cbsnews.com/news/donald-trump-id-get-along-very-well-with-vladimir-putin/).

[6] *Trump Says "Great Honor" to Get Compliments from "Highly Respected" Putin*, ABC News (Dec. 17, 2015) (online at http://abcnews.go.com/Politics/trump-great-honor-compliments-highly-respected-putin/story?id=35829618).

[7] *Inside Donald Trump's Financial Ties to Russia and His Unusual Flattery of Vladimir Putin*, Washington Post (June 17, 2016) (online at www.washingtonpost.com/politics/inside-trumps-financial-ties-to-russia-and-his-unusual-flattery-of-vladimir-putin/2016/06/17/dbdcaac8-31a6-11e6-8ff7-7b6c1998b7a0_story.html?postshare=1821472042965377&tid=ss_mail).

[8] *Trump Takes Heat from NATO Officials for Interview Comments*, Fox News (July 21, 2016) (online at www.foxnews.com/politics/2016/07/21/trump-takes-heat-from-nato-officials-for-interview-comments.html).

[9] *This Week with George Stephanopoulos*, ABC News (July 31, 2016) (online at http://abcnews.go.com/Politics/week-transcript-donald-trump-vice-president-joe-biden/story?id=41020870).

[10] *Trump Urges Russia to Hack Clinton's Email*, Politico (July 27, 2016) (online at www.politico.com/story/2016/07/trump-putin-no-relationship-226282).

Less than two weeks later, on August 8, 2016, Roger Stone, a Donald Trump confidante, revealed that he has communicated with WikiLeaks founder Julian Assange about the upcoming release of additional illegally-hacked Democratic documents. Mr. Stone made these statements during a Republican campaign event while answering a question about a potential "October surprise."[11]

It is unclear whether U.S. law enforcement authorities have interviewed Mr. Stone about his communications with Mr. Assange or about his knowledge of how WikiLeaks obtained the illegally-hacked documents.

In addition, on July 7, 2016, one of Donald Trump's foreign policy advisers, Carter Page, traveled to Moscow to give a speech that was harshly critical of the United States and its "hypocritical focus on ideas such as democratization, inequality, corruption and regime change."[12] Mr. Page had touted his extensive dealings with Russian energy giant Gazprom, claiming that he had been an adviser "on key transactions for Gazprom."[13] After Donald Trump named Mr. Page as his foreign policy adviser in March, Mr. Page explained that "his business has suffered directly from the U.S. economic sanctions imposed after Russia's escalating involvement in the Ukraine."[14]

Mr. Page appears to enjoy high-level access to Russian officials that are currently under sanctions imposed by the United States government. According to one press report:

> After the Obama administration added Rosneft Chairman Igor Sechin to its sanctions list in 2014, limiting Sechin's ability to travel to the United States or do business with U.S. firms, Page praised the former deputy prime minister, considered one of Putin's closest allies over the past 25 years. "Sechin has done more to advance U.S.-Russian relations than any individual in or out of government from either side of the Atlantic over the past decade," Page wrote.[15]

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[11] *Trump Ally Claims He "Communicated With" WikiLeaks Founder*, Washington Examiner (Aug. 9, 2016) (online at www.washingtonexaminer.com/trump-ally-claims-he-communicated-with-wikileaks-founder/article/2598931).

[12] *Trump's Russia Adviser Criticizes U.S. for "Hypocritical Focus on Democratization,"* Washington Post (July 7, 2016) (online at www.washingtonpost.com/world/europe/trumps-russia-adviser-criticizes-us-for-hypocritical-focus-on-democratization/2016/07/07/804a3d60-4380-11e6-a76d-3550dba926ac_story.html).

[13] *Biography of Carter Page, CFA*, Global Energy Capital LLC (accessed Aug. 22, 2016) (online at www.globalenergycap.com/management/).

[14] *Trump's New Russia Adviser Has Deep Ties to Kremlin's Gazprom*, Bloomberg (Mar. 30, 2016) (online at www.bloomberg.com/politics/articles/2016-03-30/trump-russia-adviser-carter-page-interview).

[15] *Trump Adviser's Public Comments, Ties to Moscow Stir Unease in Both Parties*, Washington Post (Aug. 5, 2016) (online at www.washingtonpost.com/business/economy/trump-advisers-public-comments-ties-to-moscow-stir-unease-in-both-parties/2016/08/05/2e8722fa-5815-11e6-9aee-8075993d73a2_story.html).

It is unclear whether U.S. law enforcement authorities have interviewed Mr. Page about whether he met with Mr. Sechin or other individuals on the U.S. sanctions list during his trip to Moscow or on other occasions.

Another top adviser to Donald Trump, Lt. Gen. Michael Flynn, traveled to Moscow in December 2015 and joined Vladimir Putin at the head table during a dinner honoring the Kremlin-backed media network RT. During the event, General Flynn gave a speech that was highly critical of the United States, stating, "The United States can't sit there and say, 'Russia, you're bad.'"[16] The following week, President Putin praised Donald Trump as "an outstanding and talented personality."[17] General Flynn declined to answer media inquiries about whether he traveled to Moscow on Donald Trump's behalf.[18]

Most recently, Donald Trump's campaign chairman, Paul Manafort, resigned after failing to disclose his role in assisting a pro-Russian party in Ukraine. Mr. Manafort reportedly had "wooed investments from oligarchs linked to Putin and advised the now-toppled pro-Russian Ukrainian president Viktor Yanukovych."[19] According to one press account:

> Donald Trump's campaign chairman helped a pro-Russian governing party in Ukraine secretly route at least $2.2 million in payments to two prominent Washington lobbying firms in 2012, and did so in a way that effectively obscured the foreign political party's efforts to influence U.S. policy. ... Under federal law, U.S. lobbyists must declare publicly if they represent foreign leaders or their political parties and provide detailed reports about their actions to the Justice Department. A violation is a felony and can result in up to five years in prison and a fine of up to $250,000.[20]

Rick Gates, a top strategist in Donald Trump's campaign, reportedly worked with Mr. Manafort on this effort, "helping steer the advocacy work done by a pro-Yanukovych nonprofit," including "downplaying the necessity of a congressional resolution meant to pressure the

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[16] *Trump Embraces Ex-Top Obama Intel Official*, Daily Beast (Mar. 9, 2016) (online at www.thedailybeast.com/articles/2016/03/09/donald-trump-embraces-top-obama-intel-official.html).

[17] *Putin Praises "Bright and Talented" Trump*, CNN (Dec. 17, 2015) (online at www.cnn.com/2015/12/17/politics/russia-putin-trump/).

[18] *Trump Embraces Ex-Top Obama Intel Official*, Daily Beast (Mar. 9, 2016) (online at www.thedailybeast.com/articles/2016/03/09/donald-trump-embraces-top-obama-intel-official.html).

[19] *Trump Adviser's Public Comments, Ties to Moscow Stir Unease in Both Parties*, Washington Post (Aug. 5, 2016) (online at www.washingtonpost.com/business/economy/trump-advisers-public-comments-ties-to-moscow-stir-unease-in-both-parties/2016/08/05/2e8722fa-5815-11e6-9aee-8075993d73a2_story.html).

[20] *Manafort Tied to Undisclosed Foreign Lobbying*, Associated Press (Aug. 17, 2016) (online at http://bigstory.ap.org/article/c01989a47ee5421593ba1b301ec07813/ap-sources-manafort-tied-undisclosed-foreign-lobbying).

Ukrainian leader to release an imprisoned political rival."[21] Although Mr. Manafort has resigned from his position, it appears that Mr. Gates continues to be a top adviser to Mr. Trump.

It is unclear whether U.S. law enforcement authorities have interviewed Mr. Manafort or Mr. Page about their failure to disclose this information, but several prominent Members of Mr. Trump's party have expressed grave concerns.

For example, Republican Adam Kinzinger of Illinois called for an investigation into Donald Trump's "chief adviser, what his association with the Russians are." More broadly, Rep. Kinzinger criticized "this affection in the campaign for Russia and Vladimir Putin," and he questioned how and why a reference to Russian offensive weapons was mysteriously removed from the Republican Party's platform, noting that "it just happened."[22]

Similarly, Eliot Cohen, who served as a counselor at the State Department under the George W. Bush Administration, warned: "Foreign governments sometimes express preferences about who should be elected; that's already problematic. But to do something in the nature of dirty tricks would be a very, very serious problem."[23]

Finally, House Speaker Paul Ryan's spokesman stated: "Russia is a global menace led by a devious thug. Putin should stay out of this election."[24]

We do not know if Donald Trump's public statements or the connections of his campaign officials to Russian interests directly or indirectly led to the cyber attacks against Democratic party organizations, but there is widespread agreement that the United States should take all steps possible to prevent Russia from interfering in our electoral process and prosecute to the full extent of the law anyone involved in such a scheme.

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[21] *Id.*

[22] *GOP Congressman Warns Trump: Russia Not an Ally*, CNN (Aug. 6, 2016) (online at www.cnn.com/videos/tv/2016/08/15/gop-congressman-rep-adam-kinzinger-reacts-to-trumps-isis-plan-the-lead.cnn); *Rep. Kinzinger Calls for Investigation Into Manafort-Russian Ties*, Politico (Aug. 6, 2016) (online at www.politico.com/story/2016/08/gop-rep-calls-for-investigation-into-manafort-russian-ties-227090). *See also Donald Trump Campaign Chairman Paul Manafort Resigns*, CNN (Aug. 20, 2016) (online at www.cnn.com/2016/08/19/politics/donald-trump-campaign-chairman-paul-manafort-resigns/index.html) (citing Rep. Sean Duffy of Wisconsin, stating, "I want to know what money he got from a pro-Russian organization in the Ukraine.").

[23] *Trump Invites Russia to Meddle in the U.S. Presidential Race with Clinton's Emails*, Washington Post (July 27, 2016) (online at www.washingtonpost.com/politics/trump-invites-russia-to-meddle-in-the-us-presidential-race-with-clintons-emails/2016/07/27/a85d799e-5414-11e6-b7de-dfe509430c39_story.html?tid=a_inl).

[24] *Speaker Paul Ryan Calls on "Global Menace" Russia to "Stay Out of This Election;" The Call Came After Donald Trump Encouraged Russian Hackers to Target Hillary Clinton*, CNN (July 27, 2016) (online at http://time.com/4426783/paul-ryan-republicans-donald-trump-russia/).

The Honorable James Comey
Page 6

Thank you for your consideration of this request.

Sincerely,

Elijah E. Cummings
Ranking Member
Committee on Oversight and
Government Reform

John Conyers, Jr.
Ranking Member
Committee on the Judiciary

Eliot L. Engel
Ranking Member
Committee on Foreign Affairs

Bennie G. Thompson
Ranking Member
Committee on Homeland Security

cc: The Honorable Jason Chaffetz
The Honorable Bob Goodlatte
The Honorable Edward R. Royce
The Honorable Michael T. McCaul

Mr. CONYERS. Thank you.

It is now the clear consensus of the intelligence community that the Russian Government was behind the hack of the Democratic National Committee and not, as some suggested, somebody sitting on their bed that weighs 400 pounds.

On Friday, we learned from one report that the United States intelligence officials are seeking to determine whether an American businessman identified by Donald Trump as one of his foreign policy advisers has opened up private communications with senior Russian officials, including talks about the possible lifting of economic sanctions if the Republican nominee becomes President.

The report cites to an unnamed "senior U.S. law enforcement official," which I presume means someone in your orbit, Mr. Director.

Without objection, I ask that this article, Mr. Chairman, be placed into the record as well.

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

[The information referred to follows:]

U.S. intel officials probe ties between Trump adviser and Kremlin

Michael Isikoff
Chief Investigative Correspondent
September 23, 2016

U.S. intelligence officials are seeking to determine whether an American businessman identified by Donald Trump as one of his foreign policy advisers has opened up private communications with senior Russian officials — including talks about the possible lifting of economic sanctions if the Republican nominee becomes president, according to multiple sources who have been briefed on the issue.

The activities of Trump adviser Carter Page, who has extensive business interests in Russia, have been discussed with senior members of Congress during recent briefings about suspected efforts by Moscow to influence the presidential election, the sources said. After one of those briefings, Senate minority leader Harry Reid wrote FBI Director James Comey, citing reports of meetings between a Trump adviser (a reference to Page) and "high ranking sanctioned individuals" in Moscow over the summer as evidence of "significant and disturbing ties" between the Trump campaign and the Kremlin that needed to be investigated by the bureau.

Some of those briefed were "taken aback" when they learned about Page's contacts in Moscow, viewing them as a possible back channel to the Russians that could undercut U.S. foreign policy, said a congressional source familiar with the briefings but who asked for anonymity due to the sensitivity of the subject. The source added that U.S. officials in the briefings indicated that intelligence reports about the adviser's talks with senior Russian officials close to President Vladimir Putin were being "actively monitored and investigated."

A senior U.S. law enforcement official did not dispute that characterization when asked for comment by Yahoo News. "It's on our radar screen," said the official about Page's contacts with Russian officials. "It's being looked at."

Page is a former Merrill Lynch investment banker in Moscow who now runs a New York consulting firm, Global Energy Capital, located around the corner from Trump Tower, that specializes in oil and gas deals in Russia and other Central Asian countries. He declined repeated requests to comment for this story.

Trump first mentioned Page's name when asked to identify his "foreign policy team" during an interview with the Washington Post editorial team last March. Describing him then only as a "PhD," Trump named Page as among five advisers "that we are dealing with." But his precise

role in the campaign remains unclear; Trump spokeswoman Hope Hicks last month called him an "informal foreign adviser" who "does not speak for Mr. Trump or the campaign." Asked this week by Yahoo News, Trump campaign spokesman Jason Miller said Page "has no role" and added: "We are not aware of any of his activities, past or present." Miller did not respond when asked why Trump had previously described Page as one of his advisers.

The questions about Page come amid mounting concerns within the U.S. intelligence community about Russian cyberattacks on the Democratic National Committee and state election databases in Arizona and Illinois. In a rare public talk this week, former undersecretary of defense for intelligence Mike Vickers said that the Russian cyberattacks constituted meddling in the U.S. election and were "beyond the pale." Also, this week, two senior Democrats — Sen. Dianne Feinstein, ranking minority member on the Senate Intelligence Committee, and Rep. Adam Schiff, ranking minority member on the House Intelligence Committee — released a joint statement that went further then what U.S. officials had publicly said about the matter.

"Based on briefings we have received, we have concluded that the Russian intelligence agencies are making a serious and concerted effort to influence the U.S. election," they said. "At the least, this effort is intended to sow doubt about the security of our election and may well be intended to influence the outcomes of the election." They added that "orders for the Russian intelligence agencies to conduct such actions could come only from very senior levels of the Russian government."

Page came to the attention of officials at the U.S. Embassy in Moscow several years ago when he showed up in the Russian capital during several business trips and made provocative public comments critical of U.S. policy and sympathetic to Putin. "He was pretty much a brazen apologist for anything Moscow did," said one U.S. official who served in Russia at the time.

He hasn't been shy about expressing those views in the U.S. as well. Last March, shorty after he was named by Trump as one of his advisers, Page told Bloomberg News he had been an adviser to, and investor in, Gazprom, the Russian state-owned gas company. He then blamed Obama administration sanctions — imposed as a response to the Russian annexation of Crimea — for driving down the company's stock. "So many people who I know and have worked with have been so adversely affected by the sanctions policy," Page said in the interview. "There's a lot of excitement in terms of the possibilities for creating a better situation."

Page showed up again in Moscow in early July, just two weeks before the Republican National Convention formally nominated Trump for president, and once again criticized U.S. policy. Speaking at a commencement address for the New Economic School, an institution funded in part by major Russian oligarchs close to Putin, Page asserted that "Washington and other West capitals" had impeded progress in Russia "through their often hypocritical focus on ideas such as democratization, inequality, corruption and regime change."

At the time, Page declined to say whether he was meeting with Russian officials during his trip, according to a Reuters report.

But U.S. officials have since received intelligence reports that during that same three-day trip, Page met with Igor Sechin, a longtime Putin associate and former Russian deputy prime minister who is now the executive chairman of Rosneft, Russian's leading oil company, a well-placed Western intelligence source tells Yahoo News. That meeting, if confirmed, is viewed as especially problematic by U.S. officials because the Treasury Department in August 2014 named Sechin to a list of Russian officials and businessmen sanctioned over Russia's "illegitimate and unlawful actions in the Ukraine." (The Treasury announcement described Sechin as "utterly loyal to Vladimir Putin — a key component to his current standing." At their alleged meeting, Sechin raised the issue of the lifting of sanctions with Page, the Western intelligence source said.

U.S. intelligence agencies have also received reports that Page met with another top Putin aide while in Moscow — Igor Diveykin. A former Russian security official, Diveykin now serves as deputy chief for internal policy and is believed by U.S. officials to have responsibility for intelligence collected by Russian agencies about the U.S. election, the Western intelligence source said.

Mr. CONYERS. Thank you.

Let me be clear. If true, this allegation represents a danger to our national security and a clear violation of Federal law, which expressly prohibits this type of back-channel negotiation.

And I am not alone in describing the nature of this threat. Speaker Ryan himself has said that "Russia is a global menace led by a devious thug. Putin should stay out of this election," end quotation.

But will our majority join us and press you on this problem today, Director Comey? Instead, I believe that the focus of this hearing will be more of the same: an attack on you and your team at the Department of Justice for declining to recommend criminal charges against Secretary Hillary Clinton.

In recent weeks, this line of attack has been remarkable only for its lack of substance. Your critics dwell in character assassination and procedural minutia, like the proper scope of immunity agreements and your decision to protect the identities of individuals wholly unrelated to the investigation. They want to investigate the investigation, Director Comey, and I consider that an unfortunate waste of this Committee's time.

With so many actual problems confronting this Nation and so many of those challenges within your jurisdiction and ours, you would think my colleagues would set their priorities differently. I hope that they do and they listen to our conversation today.

I thank the Chairman, and I yield back.

Mr. GOODLATTE. Thank you, Mr. Conyers.

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

We welcome our distinguished witness. And if you would please rise, I will begin by swearing you in.

Do you solemnly swear that the testimony that you are about to give will be the truth, the whole truth, and nothing but the truth, so help you God?

Thank you.

Let the record reflect that the witness answered in the affirmative.

FBI Director James Comey is a graduate of the College of William and Mary and the University of Chicago Law School. Following law school, Director Comey served as an assistant United States attorney for both the Southern District of New York and the Eastern District of Virginia. He returned to New York to become the U.S. attorney for the Southern District of New York. And, in 2003, he served as the Deputy Attorney General at the Department of Justice.

Director Comey, we look forward to your testimony. Your written statement will be entered into the record in its entirety, and we ask that you summarize your testimony in 5 minutes. You may begin. Welcome.

TESTIMONY OF THE HONORABLE JAMES B. COMEY, DIRECTOR, FEDERAL BUREAU OF INVESTIGATION

Mr. COMEY. Thank you, Mr. Chairman, Mr. Conyers, the Members of the Judiciary Committee. It is good to be back before you,

as the Chairman said, for the fourth time. I have six more to go, and I look forward to our conversations each time.

I know that this morning there will be questions about the email investigation, and I am happy to answer those to the absolute best of my ability. In July, when we closed this case, I promised unusual transparency, and I think we have delivered on that promise in, frankly, an unprecedented way. And I will do my absolute best to continue to be transparent in every way possible.

But what I thought I would do, because I know we will talk about that quite a bit, I want to just focus on some of the other things the FBI has been doing just in the last couple of weeks. And my objective is to make clear to you and to the American people the quality of the people who have chosen to do this with their lives, to do something that is not about money, it is not about the living, it is about the life that they make.

And I just picked four different examples of things we have been working on that illustrate the quality of the folks, the scope of the work, which is extraordinary, and the importance of partnerships, because it is true that the FBI does nothing alone.

So just to tick off four from four different parts of our organization, obviously, as the Chair and Mr. Conyers both mentioned, in the last couple weeks, our folks in the New York area have been working in an extraordinary way with their partners at Federal, State, and local organizations of all kinds to bring to justice very quickly the bomber in the New Jersey and New York attacks.

That work was done in a way, frankly, that would have been hard to imagine 15 years ago in a time of turf battles and worries about my jurisdiction, your jurisdiction. They showed you how it should be done, how it must be done. And I think we should all be very proud of them.

Second, within the last week, a hacker from Kosovo, who worked for the so-called Islamic State in hacking in and taking the identifies and personal information of American military employees and then giving it to the Islamic State so they could target these people, was sentenced to 20 years in jail for that hacking. His name is Ardit Ferizi.

Our great folks, together with lots of partners around the world, found this Kosovar in Malaysia, and our Malaysian partners arrested him, brought him back to Virginia, where he was just sentenced to 20 years for his hacking on behalf of the Islamic State. Terrific work by our cyber investigators.

And, obviously, as you know, we are doing an awful lot of work through our counterintelligence investigators to understand just what mischief is Russia up to in connection with our election. That is work that goes on all day every day, about which I am limited in terms of answering questions. But I wanted you to know that is a part of our work we don't talk about an awful lot but it is at the core of the FBI.

And the last one I want to mention is, 2 weeks ago, a 6-year-old girl was kidnapped off her front lawn in eastern North Carolina in a stranger kidnapping. And all of law enforcement in North Carolina surged on that case. We rolled our Child Abduction Rapid Deployment Team, which is a capability we have built around the country to help in just these kinds of situations. These are agents

and analysts who are expert at doing what has to be done in that golden 24 hours you have to try and save a child.

And so we rolled those resources, we worked with our partners at State and local levels in North Carolina, and overnight we found that little girl. We found that little girl chained by her neck to a tree in the woods, alive, thank God, and she was rescued.

The picture that they showed me that morning of that little girl with wide eyes and her long hair around her shoulders but still a thick chain around her neck connecting her to that tree is one I will never be able to get out of my own head, because it is both terrible and wonderful. It is terrible because of what happened to this little girl; it is wonderful because, together, we found her and saved her.

So I called the sheriff in North Carolina, I called our key team members who worked on that to thank them. And they told me that they were relieved and exhausted and that they are all hardened investigators but they stood that early morning in the command center and cried together because it almost never ends this way.

So I said to the sheriff and to our people, I wish we didn't live in a world where little girls were kidnapped off of their front lawns, where we had to do this kind of work, but, unfortunately, we live in that world. And because we do, I am so glad that those people and the rest of the people that work for the FBI are in that world, because we are safer, we are better because they have chosen to do this with their lives.

The best part of my job is the people I get to watch, to see their work, to admire their work, to support their work in any way that I can. They are doing extraordinary work for the American people across an incredible array of responsibilities. I know you know that, and we are very grateful for the support you give to the men and women of the FBI. And I look forward to our conversation about their work, Mr. Chairman.

Thank you.

[The prepared statement of Mr. Comey follows:]

Department of Justice

STATEMENT OF
JAMES B. COMEY
DIRECTOR
FEDERAL BUREAU OF INVESTIGATION

BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

FOR A HEARING CONCERNING
OVERSIGHT OF THE FEDERAL BUREAU OF INVESTIGATION

PRESENTED
SEPTEMBER 28, 2016

Statement of
James B. Comey
Director
Federal Bureau of Investigation

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

For a Hearing Concerning
Oversight of the FBI

September 28, 2016

Good morning Chairman Goodlatte, Ranking Member Conyers, and members of the committee. Thank you for this opportunity to discuss the FBI's programs and priorities for the coming year. On behalf of the men and women of the FBI, let me begin by thanking you for your ongoing support of the Bureau. We pledge to be the best possible stewards of the authorities and the funding you have provided for us, and to use them to maximum effect to carry out our mission.

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

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

National Security

Counterterrorism

Preventing terrorist attacks remains the FBI's top priority. Threats of terrorism against the United States remains persistent and acute. The dangers posed by foreign fighters, including those recruited from the U.S., traveling to join the Islamic State of Iraq and the Levant (ISIL) and from homegrown violent extremists are extremely dynamic. The tragic events we witnessed last week in New York and New Jersey and last June in Orlando are a somber reminder that the challenges we face are not just foreign in nature – they also come from within our own borders. Our work is very difficult; we are looking for needles in a nationwide haystack, but we are also called upon to

figure out which pieces of hay might someday become needles. That is hard work and the particular challenge of identifying homegrown violent extremists.

Threats of terrorism remain our highest priority and create the most serious challenges for the FBI, the U.S. Intelligence Community, and our foreign, state, and local allies. ISIL is relentless and ruthless in its pursuits to terrorize individuals in Syria and Iraq, including Westerners. We continue to identify individuals who seek to join the ranks of foreign fighters traveling in support of ISIL, and also homegrown violent extremists who may aspire to attack the United States from within. In addition, we are confronting an explosion of terrorist propaganda and training materials available via the Internet and social media. As a result of online recruitment and indoctrination, foreign terrorist organizations are no longer dependent on finding ways to get terrorist operatives into the U.S. to recruit and carry out acts. Terrorists in ungoverned spaces—both physical and cyber—readily disseminate poisoned propaganda and training materials to attract easily influenced individuals around the world to their cause. They encourage these individuals to travel, but if they cannot travel, they motivate them to act at home. This is a significant change and transformation from the terrorist threat our nation faced a decade ago.

ISIL's widespread reach through the Internet and social media is alarming as the group has proven dangerously competent at employing such tools for its nefarious strategy. ISIL uses high-quality, traditional media platforms, as well as widespread social media campaigns to propagate its extremist ideology. Recently released propaganda has included various English language publications circulated via social media.

Social media also helps groups such as ISIL to spot and assess potential recruits. With the widespread horizontal distribution of social media, terrorists can identify vulnerable persons of all ages in the United States—spot, assess, recruit, and radicalize—either to travel or to conduct a homeland attack. The foreign terrorist now has direct access into the United States like never before.

Unlike other groups, ISIL has constructed a narrative that touches on all facets of life from career opportunities to family life to a sense of community. The message isn't tailored solely to those who are overtly expressing symptoms of radicalization. It is seen by many who click through the Internet every day, receive social media push notifications, and participate in social networks. Ultimately, many of these individuals are seeking a sense of belonging. Echoing other terrorist groups, ISIL has advocated for lone offender attacks in Western countries. Recent ISIL videos and propaganda specifically advocate for attacks against soldiers, law enforcement, and intelligence community personnel. Several incidents have occurred in the United States, Canada, and Europe that indicate this "call to arms" has resonated among ISIL supporters and sympathizers.

Investigating and prosecuting ISIL offenders is a core responsibility and priority of the Department of Justice and the FBI. The Department has worked hard to stay ahead of changing national security threats and changing technology. The benefits of our increasingly digital lives,

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however, have been accompanied by new dangers, and we have been forced to consider how criminals and terrorists might use advances in technology to their advantage.
For instance, some of these conversations among ISIL supporters and sympathizers occur in publicly accessed social networking sites, but others take place via private messaging platforms. These encrypted direct messaging platforms are tremendously problematic when used by terrorist plotters. Similarly, we are seeing more and more cases where we believe significant evidence resides on a phone, a tablet, or a laptop evidence that may be the difference between an offender being convicted or acquitted. The more we as a society rely on electronic devices to communicate and store information, the more likely it is that information that was once found in filing cabinets, letters, and photo albums will now be stored only in electronic form. If we cannot access this evidence, it will have ongoing, significant effects on our ability to identify, stop, and prosecute these offenders.

We have always respected the fundamental right of people to engage in private communications, regardless of the medium or technology. Whether it is instant messages, texts, or old- fashioned letters, citizens have the right to communicate with one another in private without unauthorized government surveillance not simply because the Constitution demands it, but because the free flow of information is vital to a thriving democracy.

The FBI is using all lawful investigative techniques and methods to combat these terrorist threats to the United States, including both physical and electronic surveillance. Physical surveillance is a critical and essential tool in detecting, disrupting, and preventing acts of terrorism, as well as gathering intelligence on those who are capable of doing harm to the nation. Along with our domestic and foreign partners, we are collecting and analyzing intelligence about the ongoing threat posed by foreign terrorist organizations and homegrown violent extremists. We continue to encourage information sharing; in partnership with our many federal, state, local, and tribal agencies assigned to Joint Terrorism Task Forces around the country, we remain vigilant to ensure the safety of the American public.

Be assured, the FBI continues to pursue increased efficiencies and information sharing processes as well as pursue technological and other methods to help stay ahead of threats to the homeland. However, when changes in technology hinder law enforcement's ability to exercise investigative tools and follow critical leads, we may not be able to identify and stop terrorists who are using social media to recruit, plan, and execute an attack in our country. Ultimately, we must ensure both the fundamental right of people to engage in private communications as well as the protection of the public.

Going Dark

While some of the contacts between groups like ISIL and potential recruits occur in publicly accessible social networking sites, others take place via encrypted private messaging platforms. This real and growing gap, which the FBI refers to as "Going Dark," is an area of continuing focus for the FBI; we believe it must be addressed, since the resulting risks are grave both in both traditional criminal matters as well as in national security matters.

The United States government actively communicates with private companies to ensure they understand the public safety and national security risks that result from malicious actors' use of their encrypted products and services. Though the Administration has decided not to seek a legislative remedy at this time, we will continue the conversations we are having with private industry, State, local, and tribal law enforcement, our foreign partners, and the American people. The FBI thanks the committee members for their engagement on this crucial issue.

Intelligence

Integrating intelligence and operations is part of the broader intelligence transformation the FBI has undertaken in the last decade. We are making progress, but have more work to do. We have taken two steps to improve this integration. First, we have established an Intelligence Branch within the FBI headed by an Executive Assistant Director ("EAD"). The EAD looks across the entire enterprise and drives integration. Second, we now have Special Agents and new Intelligence Analysts at the FBI Academy engaged in practical training exercises and taking core courses together. As a result, they are better prepared to work well together in the field. Our goal every day is to get better at using, collecting and sharing intelligence to better understand and defeat our adversaries.

The FBI cannot be content to just work with what is directly in front of us. We must also be able to understand the threats we face at home and abroad and how those threats may be connected. Towards that end, the FBI gathers intelligence, consistent with our authorities, to help us understand and prioritize identified threats and to determine where there are gaps in what we know about these threats. We then seek to fill those gaps and learn as much as we can about the threats we are addressing and others on the threat landscape. We do this for national security and criminal threats, on both a national and local field office level. We then compare the national and local perspectives to organize threats into priority for each of the FBI's 56 field offices. By categorizing threats in this way, we strive to place the greatest focus on the gravest threats we face. This gives us a better assessment of what the dangers are, what's being done about them, and where we should prioritize our resources.

Counterintelligence

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

We remain focused on the growing scope of the insider threat—that is, when trusted employees and contractors use their legitimate access to information to steal secrets for the benefit of

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another company or country. This threat has been exacerbated in recent years as businesses have become more global and increasingly exposed to foreign intelligence organizations.

To combat this threat, the FBI's Counterintelligence Division has undertaken several initiatives. We directed the development, deployment, and operation of the Hybrid Threat Center (HTC) to support Department of Commerce Entity List investigations. The HTC is the first of its kind in the FBI; it has been well-received in the U.S. Intelligence Community, multiple FBI divisions, and the private sector.

The Counterintelligence and Cyber Divisions have also partnered to create the Cyber-Counterintelligence Coordination Section. This goal of this section is to effectively identify, pursue, and defeat hostile intelligence services that use cyber means to penetrate or disrupt U.S. government entities or economic interests by increasing collaboration, coordination, and interaction between the divisions. Finally, the Counterintelligence Division and the Office of Public Affairs collaborated to conduct a joint media campaign regarding the threat of economic espionage. As a result of this collaboration, the FBI publicly released a threat awareness video called *The Company Man: Protecting America's Secrets*. This video is available on the FBI's public website and has been shown more than 1,300 times across the United States by the Counterintelligence Division's Strategic Partnership Coordinators to raise awareness and generate referrals from the private sector. The video was also uploaded to YouTube in July 2015 and has received over 97,000 views since then.

Cyber

We face sophisticated cyber threats from state-sponsored hackers, hackers for hire, organized cyber syndicates, and terrorists. On a daily basis, cyber actors seek our state and trade secrets, our technology, and our ideas—things of incredible value to all of us and of great importance to the conduct of our government business and our national security. These threats seek to strike our critical infrastructure and to harm our economy.

The pervasiveness of the cyber threat is such that the FBI and other intelligence, military, homeland security, and law enforcement agencies across the government view cyber security and cyber-attacks as a top priority. Within the FBI, we are targeting the most dangerous malicious cyber activity: high-level intrusions by state-sponsored hackers and global cyber syndicates, and the most prolific botnets. We need to be able to move from reacting to such attacks after the fact to operationally preventing such attacks. That is a significant challenge, but one we embrace. As the committee is well aware, the frequency and impact of cyber-attacks on our nation's private sector and government networks have increased dramatically in the past decade and are expected to continue to grow.

We continue to see an increase in the scale and scope of reporting on malicious cyber activity that can be measured by the amount of corporate data stolen or deleted, personally identifiable information compromised, or remediation costs incurred by U.S. victims. For example, as the committee is aware, the Office of Personnel Management (OPM) discovered last year that a number of its systems were compromised. These systems included those that contain information

related to the background investigations of current, former, and prospective federal government employees and contractors, as well as other individuals for whom a federal background investigation was conducted. The FBI is continuing to investigate this matter with our interagency partners to investigate this matter.

Another growing threat to businesses and individuals alike is Ransomware. Last year alone there was a reported loss of more than $24 million. The FBI works closely with the private sector so that companies may make informed decisions in response to malware attacks. Companies can prevent and mitigate malware infection by utilizing appropriate back-up and malware detection and prevention systems, and training employees to be skeptical of emails, attachments, and websites they don't recognize. The FBI does not condone payment of ransom, as such a payment does not guarantee a victim will regain access to their data, will not be targeted again, and may inadvertently encourage continued criminal activity.

The FBI is engaged in a myriad of efforts to combat cyber threats, from efforts focused on threat identification and sharing inside and outside of government, to our internal emphasis on developing and retaining new talent and changing the way we operate to evolve with the cyber threat. We take all potential threats to public and private sector systems seriously and will continue to investigate and hold accountable those who pose a threat in cyberspace.

Criminal

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

Public Corruption

Public corruption is the FBI's top criminal priority. The threat—which involves the corruption of local, state, and federally elected, appointed, or contracted officials—strikes at the heart of government, eroding public confidence and undermining the strength of our democracy. It affects how well U.S. borders are secured and neighborhoods are protected, how verdicts are handed down in court, and how well public infrastructure such as schools and roads are built. The FBI is uniquely situated to address this issue, with our ability to conduct undercover operations, perform electronic surveillance, and run complex cases. However, partnerships are critical and we work closely with federal, state, local, and tribal authorities in pursuing these cases.

One key focus is border corruption. The federal government protects 7,000 miles of U.S. land border and 95,000 miles of shoreline. Every day, more than a million visitors enter the country through one of the 327 official Ports of Entry along the Mexican and Canadian borders, as well as through seaports and international airports. Any corruption at the border enables a wide range of illegal activities along these borders, potentially placing the entire nation at risk by letting drugs, guns, money, and weapons of mass destruction slip into the country, along with criminals,

terrorists, and spies. FBI-led Border Corruption Task Forces are the cornerstone of our efforts to root out this kind of corruption. Located in nearly two dozen cities along our borders, these task forces generally consist of representatives from the FBI; the Department of Homeland Security Office of Inspector General; Customs and Border Protection Internal Affairs; Transportation Security Administration; Drug Enforcement Administration; Bureau of Alcohol, Tobacco, Firearms, and Explosives; U.S. Immigration and Customs Enforcement-Office of Professional Responsibility; and state and local law enforcement. Another focus concerns election crime. Although individual states have primary responsibility for conducting fair and impartial elections, the FBI becomes involved when paramount federal interests are affected or electoral abuse occurs.

Civil Rights

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

We need to do a better job of tracking and reporting hate crime and "color of law" violations to fully understand what is happening in our communities and how to stop it. We cannot address issues about use of force and officer-involved shootings or why violent crime is up in some cities if we don't know the circumstances. Some jurisdictions fail to report hate crime statistics, while others claim there are no hate crimes in their community—a fact that would be welcome if true. We must continue to impress upon our state and local counterparts in every jurisdiction the need to track and report hate crimes.. And we need the information they report to be accurate, to be timely and to be accessible to everybody or it doesn't do much good. On the part of the FBI, we are pushing for a more modern system of collecting data on officer-involved incidents and violent crime at all levels. It's a large undertaking; it will take a few years to ensure that all of the databases functional, but we are going to get there.

Health Care Fraud

We have witnessed an increase in health care fraud in recent years, including Medicare/Medicaid fraud, pharmaceutical fraud, and illegal medical billing practices. Health care spending currently makes up about 18 percent of our nation's total economy. These large sums present an attractive target for criminals. Health care fraud is not a victimless crime. Every person who pays for health care benefits, every business that pays higher insurance costs to cover their employees, and every taxpayer who funds Medicare is a victim. Schemes can also cause actual patient harm, including subjecting patients to unnecessary treatment or providing substandard services and supplies. As health care spending continues to rise, the FBI will use every tool we have to ensure our health care dollars are used appropriately and not to line the pockets of criminals.

The FBI currently has 2,783 pending health care fraud investigations. Over 70 percent of these investigations involve government sponsored health care programs to include Medicare, Medicaid, and TriCare, as well as other U.S. government funded programs. As part of our collaboration efforts, the FBI maintains investigative and intelligence sharing partnerships with government agencies such as other Department of Justice components, Department of Health and Human Services, the Food and Drug Administration, the Drug Enforcement Administration, State Medicaid Fraud Control Units, and other state, local, and tribal agencies. On the private side, the FBI conducts significant information sharing and coordination efforts with private insurance partners, such as the National Health Care Anti-Fraud Association, the National Insurance Crime Bureau, and private insurance investigative units. The FBI is also actively involved in the Health Care Fraud Prevention Partnership, an effort to exchange facts and information between the public and private sectors in order to reduce the prevalence of health care fraud.

Violent Crime

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

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

Despite these efforts, there is something deeply disturbing happening all across America. The latest Uniform Crime Reporting statistics gathered from the *Preliminary Semiannual Uniform Crime Report, January-June, 2015*, show that the number of violent crimes in the nation increased by 1.7 percent during the first six months of 2015 as compared with figures reported for the same time in 2014, and this year we are also seeing an uptick of homicides in some cities. The police chiefs in these cities report that the increase is almost entirely among young men of color, at crime scenes in neighborhoods where multiple guns are recovered. There are a number of theories about what could be causing this disturbing increase in murders in our nation's cities

and the FBI is working with our federal, state, and local partners to uncover the root causes of violence and tackle it at its infancy.

Transnational Organized Crime

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

Crimes Against Children

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

The FBI also has several programs in place to educate both parents and children about the dangers posed by predators and to recover missing and endangered children should they be taken. Through our Child Abduction Rapid Deployment Teams, Innocence Lost National Initiative, Innocent Images National Initiative, annual Operation Cross Country, Office for Victim Assistance, 71 Child Exploitation Task Forces, and numerous community outreach programs, the FBI and its partners are working to keep our children safe from harm.

Operation Cross Country, a nationwide law enforcement action focusing on underage victims of prostitution, completed its ninth iteration during the first full week of October. Over 300 operational teams from over 500 agencies across 135 cities and 53 FBI Field Offices were instrumental in recovering child victims of all races and arresting pimps and customers. Ninety victim specialists, in coordination with local law enforcement victim advocates and non-governmental organizations, provided services to child and adult victims.

Indian Country

There are 567 federally recognized tribes in the United States, with the FBI and the Bureau of Indian Affairs having concurrent jurisdiction for felony-level crimes on over 200 reservations.

According to the 2010 Census, there are nearly five million people living on over 56 million acres of Indian reservations and other tribal lands. Criminal jurisdiction in these areas of our country is a complex maze of tribal, state, federal, or concurrent jurisdiction.

The FBI's Indian Country program currently has 124 special agents in 34 FBI field offices primarily working Indian Country crime matters. The number of agents, the vast territory, the egregious nature of crime being investigated, and the high frequency of the violent crime handled by these agents makes their responsibility exceedingly arduous. The FBI has 15 Safe Trails Task Forces that investigate violent crime, drug offenses, and gangs in Indian Country, and we continue to address the emerging threat from fraud and other white-collar crimes committed against tribal gaming facilities.

Sexual assault and child sexual assault are two of the FBI's investigative priorities in Indian Country. Statistics indicate that American Indians and Alaska Natives suffer violent crime at greater rates than other Americans. Approximately 75 percent of all FBI Indian Country matters involve death investigations, physical and/or sexual assault of a child, or aggravated assaults. At any given time, approximately 30 percent of the FBI's Indian Country investigations are based on allegations of sexual abuse of a child.

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

FBI Laboratory

The FBI Laboratory is one of the largest and most comprehensive forensic laboratories in the world. Operating out of a state-of-the-art facility in Quantico, Virginia, laboratory personnel travel the world on assignment, using science and technology to protect the nation and support law enforcement, intelligence, military, and forensic science partners. The Lab's many services include providing expert testimony, mapping crime scenes, and conducting forensic exams of physical and hazardous evidence. Lab personnel possess expertise in many areas of forensics supporting law enforcement and intelligence purposes, including explosives, trace evidence, documents, chemistry, cryptography, DNA, facial reconstruction, fingerprints, firearms, and WMD.

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

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

The National Institute of Justice (NIJ) and the FBI have formed a partnership to address one of the most difficult and complex issues facing our nation's criminal justice system: unsubmitted sexual assault kits (SAKs). The FBI is the testing laboratory for the SAKs that law enforcement agencies and public forensic laboratories nationwide submit for DNA analysis. The NIJ coordinates the submission of kits to the FBI, and is responsible for the collection and analysis of the SAK data. The goal of the project is to better understand the issues concerning the handling of SAKs for both law enforcement and forensic laboratories and to suggest ways to improve the collection and processing of quality DNA evidence.

Additionally, the Laboratory Division maintains a capability to provide forensic support for significant shooting investigations. The Laboratory Shooting Reconstruction Team provides support to FBI field offices by bringing together expertise from various Laboratory components to provide enhanced technical support to document complex shooting crime scenes. Services are scene and situation dependent and may include mapping of the shooting scene in two or three dimensions, scene documentation through photography, including aerial and oblique imagery, 360 degree photography and videography, trajectory reconstruction, and the analysis of gunshot residue and shot patterns. Significant investigations supported by this team in recent years include the shootings in Chattanooga, the Charleston church shooting, the shootings at the Census Bureau and NSA, the shooting death of a Pennsylvania State Trooper, the Metcalf Power Plant shooting in San Francisco, and the Boston Bombing/Watertown Boat scene.

Information Technology

The Information and Technology Branch provides information technology to the FBI enterprise in an environment that is consistent with intelligence and law enforcement capabilities, and ensures reliability and accessibility by members at every location at any moment in time. Through its many projects and initiatives, it is expanding its information technology (IT) product offerings to better serve the operational needs of the agents and analysts and raising the level of services provided throughout the enterprise and with its counterparts in the law enforcement arena and Intelligence Community.

FBI special agents and analysts need the best technological tools available to be responsive to the advanced and evolving threats that face our nation. Enterprise information technology must be designed so that it provides information to operational employees rather than forcing employees to conform to the tools available. IT equipment must be reliable and accessible, as close to where

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the work is performed as possible. By doing so, the FBI will decrease the time between information collection and dissemination.

Special agents and intelligence analysts are most effective when their individual investigative and intelligence work and collected information is connected to the efforts of thousands of other agents and analysts. We have developed software that makes that possible by connecting cases to intelligence, threats, sources, and evidence with our enterprise case and threat management systems. Similarly, we have provided our agents and analysts with advanced data discovery, analytics, exploitation, and visualization capabilities through tools integration and software development. In addition, we have enterprise business applications that address administrative, legal compliance, internal training standards, investigative and intelligence needs, and information sharing services. These tools allow for better data sharing with our law enforcement partners and allow FBI agents and analysts to share FBI intelligence products with our Intelligence Community partners around the world.

Conclusion

Finally, the strength of any organization is its people. The threats we face as a nation have never been greater or more diverse and the expectations placed on the Bureau have never been higher. Our fellow citizens look to us to protect the United States from all of those threats and the men and women of the Bureau continue to meet and exceed those expectations, every day. I want to thank them for their dedication and their service.

Chairman Goodlatte, Ranking Member Conyers, and members of the committee, thank you again for this opportunity to discuss the FBI's programs and priorities. Mr. Chairman, we are grateful for the leadership that you and this committee have provided to the FBI. We would not be in the position we are today without your support. Your support of our workforce, our technology, and our infrastructure make a difference every day at FBI offices in the United States and around the world, and we thank you for that support. I look forward to answering any questions you may have.

Mr. GOODLATTE. Thank you, Director Comey.

We will now begin questioning under the 5-minute rule, and I will begin my recognizing myself.

You testified that the FBI did not investigate the veracity of Secretary Clinton's testimony to the Select Benghazi Committee under oath. We referred the matter to the United States attorney for the District of Columbia.

Is the FBI now investigating the veracity of Secretary Clinton's testimony to the Select Benghazi Committee?

Mr. COMEY. Thank you, Mr. Chairman.

The Department has the referral—I think there were two separate referrals—has the referrals. Now it is pending, and so I am not going to comment on a pending matter at this point. But the matter has been received by the Department of Justice. They have the letters from the Committee.

Mr. GOODLATTE. And you cannot tell us whether or not you are indeed investigating?

Mr. COMEY. I can't.

Mr. GOODLATTE. When do you expect that you will be able to tell us more about this pending matter before the FBI?

Mr. COMEY. I don't know, sir.

Mr. GOODLATTE. Paul Combetta with Platte River Networks posted to Reddit asking how to "strip out a VIP's (VERY VIP) email address from a bunch of archived email." He went on, "The issue is that these emails involve the private email address of someone you'd recognize, and we're trying to replace it with a placeholder address as to not expose it."

This clearly demonstrates actions taken to destroy evidence by those operating Secretary Clinton's private server and by her staff. Certainly, Combetta did not take it upon himself to destroy evidence but had been instructed to do so by Secretary Clinton or her staff.

So my first question to you is, was the FBI aware of this Reddit post prior to offering Mr. Combetta immunity on May 3, 2016?

Mr. COMEY. I am not sure. I know that our team looked at it. I don't know whether they knew about it before then or not.

Mr. GOODLATTE. Isn't this information evidence of obstruction of justice and a violation of Mr. Combetta's immunity deal?

Mr. COMEY. Not necessarily, no.

Mr. GOODLATTE. Why not?

Mr. COMEY. It depends on what his intention was, why he wanted to do it. And I think our team concluded that what he was trying to do was, when they produced emails, not have the actual address but have some name or placeholder instead of the actual dotcom address in the "from" line.

Mr. GOODLATTE. Last week, the American people learned that Cheryl Mills, Secretary Clinton's longtime confidant and former State Department chief of staff, and Heather Samuelson, counsel to Secretary Clinton in the State Department, were granted immunity for production of their laptops. Why were they not targets of the FBI's criminal investigation?

Mr. COMEY. Well, a target is someone on whom you have sufficient evidence to indict. A subject is someone whose conduct at some point during the investigation falls within the scope of the in-

vestigation. So, certainly, with respect to Ms. Mills, at least initially, because she was an email correspondent, she was a subject of the investigation.

Mr. GOODLATTE. Did the FBI find classified information on either of their computers?

Mr. COMEY. I think there were some emails still on the computer that were recovered that were classified, is my recollection.

Mr. GOODLATTE. Isn't that a crime?

Mr. COMEY. Is what a crime, sir?

Mr. GOODLATTE. Having classified information on computers that are outside of the server system of the Department of State unsecured.

Mr. COMEY. No. It is certainly something—without knowing more, you couldn't conclude whether it was a crime. You would have to know what were the circumstances, what was the intention around that. But it is certainly something—it is the reason we conducted a yearlong investigation to understand where emails had gone on an unclassified system that contained classified information.

Mr. GOODLATTE. And what did you determine with regard to the emails found on her computer?

Mr. COMEY. I hope I am getting this right, and my troops will correct me if I am wrong, but they were duplicates of emails that had been produced, because the emails had been used to sort before a production.

Mr. GOODLATTE. Now, both Cheryl Mills and Heather Samuelson were granted immunity for production of these computers, these laptops. Why were they then allowed to sit in on the interview with Secretary Clinton?

Mr. COMEY. Right. The Department of Justice reached a letter agreement with the two lawyers to give them what is called act-of-production immunity, meaning nothing that is found on the laptop they turn over will be used against them directly, which is a fairly normal tool in investigations.

They were—Ms. Mills, in particular, was a member of Secretary Clinton's legal team. And so Secretary Clinton decides which of her lawyers come to voluntary interviews with the FBI.

Mr. GOODLATTE. Is it usual to allow a witness or potential witness in a subsequent prosecution, had one been undertaken, to be present in the room when the FBI interviews another witness and potential target of an investigation?

Mr. COMEY. The FBI has no ability to exclude or include any lawyer that a subject being interviewed chooses to have there.

Mr. GOODLATTE. Even if the lawyer is a witness in the case? Can you cite any other instance in which a witness to a criminal investigation, who has already been interviewed by the FBI, has been allowed to accompany and serve as legal counsel to the target of that investigation?

Mr. COMEY. I can't from personal experience. It wouldn't surprise me if it happened.

The FBI has no ability to decide who comes to an interview in a voluntary interview context. If it was a judicial proceeding, a judge could police who could be there. And, obviously, lawyers are governed by canons of ethics to decide what matters they can be

involved in. But it doesn't fall to us to say: You can be in, you can't be in.

Mr. GOODLATTE. But wouldn't you agree that it is a conflict of interest for them to serve as attorneys for Secretary Clinton in this matter, having been interviewed by the FBI as witnesses?

Mr. COMEY. That is a question a lawyer has to answer for him- or herself.

Mr. GOODLATTE. You are a lawyer, Director Comey. What is your opinion of that?

Mr. COMEY. Oh, I don't want to offer an opinion on that, but that is something a lawyer has to decide for themselves, I assume, with counsel and consulting our canons of ethics, what matters you can be involved in and what you can't.

But, again, the Bureau's role in conducting a voluntary interview is to interview the subject. Who they bring is up to them.

Mr. GOODLATTE. How can you trust the veracity of Secretary Clinton's answers, knowing that witnesses previously interviewed by the FBI were allowed to participate in the interview?

Mr. COMEY. We assess the answers based on what is said and all the other evidence we have gathered.

Mr. GOODLATTE. In——

Mr. COMEY. It doesn't matter——

Mr. GOODLATTE [continuing]. Consultation with her "attorneys," who are also witnesses to what was previously done earlier and may, in fact, have, themselves, violated the law, for which they requested and were granted immunity.

Mr. COMEY. Again, the answer is—excuse me—the answer is the same. We make the assessment based on what the witness says and the other evidence we have gathered in the case. Who is sitting there, to me, is not particularly germane.

Mr. GOODLATTE. Thank you. My time has expired.

The Chair recognizes the gentleman from Michigan, Mr. Conyers, for his questions.

Mr. CONYERS. Thank you.

Thank you so much.

Director James Comey, twice this past week, the city of Charlotte, North Carolina, has been shaken by the shooting deaths of Black men. It is only one city out of many in this country looking for answers about the use of force by police. We on this Committee are looking for answers too.

You are a vocal advocate for better collection of information about violent encounters between police and civilian. Has the FBI's ability to collect this information improved in the year since we have last discussed it? And why are these statistics so important to our current discussion on the use of force by police?

Mr. COMEY. Thank you, Mr. Conyers.

We are having passionate, important conversations in this country about police use of force in connection with encounters with civilians, especially with African-Americans.

Mr. CONYERS. Yes.

Mr. COMEY. All of those conversations are uninformed today. They are all driven by anecdote. Because, as a country, we simply don't have the information to know: Do we have an epidemic of violence directed by law enforcement against Black folks? Do we have

an epidemic involving brown folks? White folks? We just don't know. And in the absence of that data, we are driven entirely by anecdote, and that is a very bad place to be.

I don't know whether there is an epidemic of violence. My instincts tell me there isn't, but I don't know. I can't tell you whether shootings involving people of any different color are up or down or sideways, and nor can anybody else in this country. And so, to discuss the most important things that are going on in this country, we need information. And the government should collect it. I can't think of something that is more inherently governmental than the need to use deadly force in an encounter during law enforcement work.

Mr. CONYERS. Yeah.

Mr. COMEY. And so what has changed in the last year, which is really good news, is that everybody in leadership in law enforcement in the United States has agreed with this, and they have agreed the FBI will build and maintain a database where we collect important information about all such encounters involving the use of deadly force. That will allow us to know what is going on in this country so we can have a thoughtful conversation and resist being ruled by individual anecdotes.

That is why it matters so much.

We are making progress. We will have this done—I would like to have it done in the next year. Certainly in the next 2 years this database will be up and running, because everybody gets why it matters so much.

Mr. CONYERS. Thank you.

On August 30, I wrote to you regarding Donald Trump's extensive connections to the Russian Government. The letter cites to a number of troubling reports, some that suggest mere conflicts of interest, others that might suggest evidence of a crime.

Last Friday, we read a new report suggesting that Mr. Trump's foreign policy adviser has been meeting with high-ranking, sanctioned officials in Moscow to discuss lifting economic sanctions if Mr. Donald Trump becomes President. The same report quotes, "a senior United States law enforcement official," who says that this relationship is being, "actively monitored and investigated."

Is the FBI investigating the activities of Mr. Trump or any adviser to the Trump campaign with respect to any line of communication between the campaign and the Russian Government?

Mr. COMEY. I can't say, sir. As I said in response to a different question from the Chairman, we don't confirm or deny investigations.

Mr. CONYERS. Well, more generally, then, is it lawful for a private citizen to enter into official government negotiations with a foreign nation?

Mr. COMEY. I don't think it is appropriate for me to answer that hypothetical.

Mr. CONYERS. Uh-huh. Well, in my view, our research shows that it is not. The Logan Act, 18 U.S.C., section 953, prohibits this conduct, in my view.

Does Mr. Trump currently receive intelligence briefings from the FBI?

Mr. COMEY. Both candidates and their running mates are offered on a regular basis briefings from the entire intelligence community. Some portion of the first briefing included an FBI segment, so yes.

Mr. CONYERS. Does his staff attend those meetings as well?

Mr. COMEY. No, just the candidate and the Vice Presidential candidate.

Mr. CONYERS. Uh-huh.

And, finally, if a member of either——

Mr. COMEY. Okay, no, I am wrong. I am sorry. I have to correct what I said.

Each was allowed to bring two people. And, as I recall, Mr. Trump did bring two individuals with clearances to the briefing. Secretary Clinton did not.

I am sorry. I misstated that.

Mr. CONYERS. All right.

Finally, if a member of either campaign were engaged in secret, back-channel communications with a foreign adversary, could that line of communication pose a threat to national security?

Mr. COMEY. Mr. Conyers, I don't think it is appropriate, given that I am not commenting on whether we have an investigation, to answer hypotheticals that might make it look like I am commenting on whether we have an investigation. So I would prefer not to answer that, sir.

Mr. CONYERS. Well, thank you for being here today.

And I thank the Chairman and yield back.

Mr. GOODLATTE. The Chair thanks the gentleman, recognizes the gentleman from Wisconsin, Mr. Sensenbrenner, for 5 minutes.

Mr. SENSENBRENNER. Thank you, Mr. Chairman.

Director Comey, welcome.

Who authorized granting Cheryl Mills immunity?

Mr. COMEY. I am sorry?

Mr. SENSENBRENNER. Who authorized granting Cheryl Mills immunity?

Mr. COMEY. It was a decision made by the Department of Justice. I don't know at what level inside. In our investigations, any kind of immunity comes from the prosecutors, not the investigators.

Mr. SENSENBRENNER. Okay. Did she request immunity?

Mr. COMEY. I don't know for sure what the negotiations involved. I believe her lawyer asked for act-of-production immunity with respect to the production of her laptop. That is my understanding. But, again, the FBI wasn't part of those conversations.

Mr. SENSENBRENNER. Now, it has been a matter of public record that Secretary Clinton brought nine people into the room where two FBI agents were questioning her. Is that normal practice?

Mr. COMEY. I don't know if there is a normal practice. I have done interviews with a big crowd and some with just the subject. It is unusual to have that large a number, but it is not unprecedented, in my experience.

Mr. SENSENBRENNER. Now, Cheryl Mills, you know, also stated that she was an attorney. I am very concerned that when a fact witness represents a client who might be the target of an investigation there is a conflict of interest.

And, you know, rather than letting Ms. Mills make a determination, would the FBI be willing to refer the matter of a fact witness, Ms. Mills in this case, representing a target, Secretary Clinton in this case, to the appropriate bar association for investigation?

Mr. COMEY. That is not a role for the FBI. Even though I happen to be a lawyer, we are not lawyers; we are investigators.

Mr. SENSENBRENNER. Okay.

Mr. COMEY. So that is a question for the legal part of the Department of Justice.

Mr. SENSENBRENNER. Okay.

Why did Ms. Mills request immunity? Was she hiding something or was she afraid that something would incriminate her that was on her laptop?

Mr. COMEY. I don't know. I am sure that is a conversation she and her lawyer had and then her lawyer had with lawyers at the Department. I just don't know.

Mr. SENSENBRENNER. Uh-huh. Well, you know, there was an op-ed by Professor Jonathan Turley that appeared in the media that said that there are a lot of good cases scuttled by granting immunity. And there was lots of immunity that was granted here.

Doesn't it concern you, as an investigator, that your chiefs in the Justice Department decided to become an immunity-producing machine for many people who would have been very key witnesses should there have been a prosecution?

Mr. COMEY. I don't think of it that way. It doesn't strike me there was a lot of immunity issued in this case. I know it is a complicated subject, but there is all different kinds of immunity. There are probably three different kinds that featured in this case. Fairly typical in a complex, white-collar case, especially, as you try and work your way up toward your subject. So my overall reaction is this looks like ordinary investigative process to me.

Mr. SENSENBRENNER. Well, the target was not an ordinary target. I think we all know that. And since you announced that there would be no prosecution of Secretary Clinton in July, there have been several very material issues that are troubling, and would this not require a reopening of the investigation to solve those issues?

Mr. COMEY. I haven't seen anything that would come near to that kind of situation.

Mr. SENSENBRENNER. Oh——

Mr. COMEY. I know there are lots of questions, lots of controversy. I am very proud of the way this was done.

Mr. SENSENBRENNER. Well, you know, come on now. With all, you know, due respect, since you made this announcement, there have been many more issues that came out that were not on the table prior to your announcement that the investigation against Secretary Clinton had been dropped.

And, you know, I think the American public is entitled to answers on this, particularly since we have to know, you know, the extent of the classified information which ended up being in the private email server.

You know, all of us on this Committee have got security clearances of some kind or another, you know, and I am kind of worried that, you know, if I got some classified information and went back

to my office and used an unsecured server to send it to somebody who may also have had classified information, I would be in big trouble. And I should be in big trouble if I did something like that.

There seems to be different strokes for different folks on this. And that is what Americans are concerned about, particularly when we are looking to elect someone to the highest office of the land and the leader of the free world.

I don't think your answers are satisfactory at all, Mr. Comey. I do have a great deal of respect for you, but I think that there is a heavy hand coming from someplace else.

And, with that, I yield back.

Mr. GOODLATTE. The Chair thanks the gentleman, recognizes the gentleman from New York, Mr. Nadler, for 5 minutes.

Mr. NADLER. Thank you, Mr. Chairman.

First, let me express my admiration and thanks to the FBI for the professional manner and excellent work they did in the bombings that occurred in New York about a block out of my district to apprehend the suspect within, what, 48 hours. And through everything, it was a very good indication of teamwork and of professionalism, and I congratulate you on that.

Secondly, let me say that I think that the mud that is being thrown from the other side of this table here continually, only because of the ongoing Presidential election, in the case in which the FBI decided there was nothing to prosecute, it is over—we all know nobody would even be talking about it if one weren't—if Hillary Clinton weren't a Presidential candidate. This is pure political maneuvering.

But let me talk about a case that may pose a current national security threat to the United States and ask you a few questions about that.

In his earlier remarks, Mr. Conyers referenced an August 30 letter from the Ranking Members of a number of House Committees. That letter asked whether the FBI was investigating troubling connections between Trump campaign officials and Russian interests and whether they contributed to the illegal hacking of the Democratic National Committee and the Democratic National Campaign Committee.

You are familiar with that letter, I take it.

Mr. COMEY. Yes, I am familiar with the letter.

Mr. NADLER. I would like to ask you a few questions.

The letter said this: "On August 8, 2016, Roger Stone, a Donald Trump confidant, revealed that he has communicated with WikiLeaks founder Julian Assange about the upcoming release of additional illegally hacked Democratic documents. Mr. Stone made these statements during a Republican campaign event while answering a question about a potential October surprise."

Obviously, if someone is stating publicly that he is in direct communication with the organization that obtained these illegally hacked documents, I assume the FBI would want to talk to that person.

Has the FBI interviewed Roger Stone about his communications with Julian Assange or his knowledge of how WikiLeaks got these illegally obtained documents?

Mr. COMEY. I can't comment on that.

Mr. NADLER. Mr. Stone stated that he has knowledge about upcoming leaks of additional illegally hacked documents. Has the FBI asked him about those communications?

Mr. COMEY. I also can't comment on that.

Mr. NADLER. Because it is an ongoing investigation?

Mr. COMEY. I don't want to confirm whether there is or is not an investigation. That is why—that is the way I answered Mr. Conyers' questions as well.

Mr. NADLER. Director Comey, the FBI acknowledged in private—in public statements and testimony that it—acknowledged that it was investigating Secretary Clinton's use of a private email server, and that was while the investigation was still ongoing. Now you can't comment on whether there is an investigation.

Is there a different standard for Secretary Clinton and Donald Trump? If not, what is the consistent standard?

Mr. COMEY. No. Our standard is we do not confirm or deny the existence of investigations. There is an exception for that: when there is a need for the public to be reassured; when it is obvious it is apparent, given our activities, public activities, that the investigation is ongoing. But our overwhelming rule is we do not comment except in certain exceptional circumstances.

Mr. NADLER. Aren't there exceptional circumstances when close officials to a candidate of a major political party for the United States says publicly that he is in communication with foreign officials and anticipates further illegal activity?

Mr. COMEY. I don't think so.

Mr. NADLER. Mr. Trump's campaign chairman, Paul Manafort, resigned after failing to disclose his role in assisting a pro-Russian party in Ukraine. The Associated Press reported, "Donald Trump's campaign chairman helped a pro-Russian party in Ukraine secretly route $2.2 million in payments to two prominent Washington lobbying firms in 2012, and did so in a way that effectively obscured the foreign political party's efforts to influence U.S. policy."

Has the FBI interviewed Mr. Manafort about his failure to disclose his work for this foreign government, as Federal law requires?

Mr. COMEY. I have to give you the same answer, Mr. Nadler.

Mr. NADLER. Has the FBI interviewed Rick Gates, who reportedly still works for the Trump campaign, about his involvement in this scheme?

Mr. COMEY. Same answer, sir.

Mr. NADLER. Same answer.

Director Comey, after you investigated Secretary Clinton, you made a decision to explain publicly who you interviewed and why. You also disclosed documents, including notes from this interview—from those interviews.

Why shouldn't the American people have the same level of information about your investigation of those associated with Mr. Trump?

Mr. COMEY. Well, I am not confirming that we are investigating people associated with Mr. Trump.

In the matter of the email investigation, it was our judgment—my judgment and the rest of the FBI's judgment that those were exceptional circumstances where the public needed transparency.

Mr. NADLER. Okay.

My final question is the following. You investigated Secretary Clinton's emails and so forth, everything we have been talking about. You concluded, I believe quite properly, there was nothing to prosecute. And you have announced, in my opinion quite properly, that you had investigated it and there was nothing there—or there was nothing to prosecute. That was proper.

But having announced—when a prosecutorial agency announces that "we have investigated so-and-so and we have decided to prosecute because" or "we have investigated so-and-so and we have decided not to prosecute because," why is it appropriate for that prosecutorial agency to go further and say, "Even though we decided not to prosecute, we still think this person did this, that, or the other thing and it was proper or improper"? Why is it proper for a prosecutorial agency to characterize your opinion of the propriety of the actions of someone who you have announced that you have decided did nothing criminal and shouldn't be prosecuted?

Mr. COMEY. That is a very hard decision. That is why it is the exception to the rule. You do risk damaging someone who isn't convicted.

The judgment I made in this case is, given the unusual—in fact, I hope unprecedented—nature of this investigation, that it was appropriate to offer that transparency. Not an easy call. I really wrestled with it, but I think, on balance, it was the right call.

Mr. NADLER. Let me just say before my time expires that I think—and I am just talking for myself—that that was highly inappropriate; that, having determined that there was nothing to prosecute and having announced that quite properly, for a prosecuting agency, the Department of Justice, to comment with comments that will be looked upon as authoritative that what she did was right or wrong or good or bad is not the appropriate role of a prosecuting agency and risks, not in this case perhaps, but risks—and I talk really now because of the future.

I don't want to see that happen again with regard to anybody, because it puts anybody who did not commit a crime, who you or the Justice Department or whoever has determined did not commit a crime or there is no evidence sufficient to prosecute, puts them at the mercy of the opinion of an individual or individuals within the prosecuting agency. And that is just not right under our system.

I yield back.

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

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

Mr. SMITH. Thank you, Mr. Chairman.

Director Comey, thank you for those examples of the FBI's good work in your opening statement. I think we all appreciate what the FBI has done.

My first question is this: Would you reopen the Clinton investigation if you discovered new information that was both relevant and substantial?

Mr. COMEY. It is hard for me to answer in the abstract. We would certainly look at any new and substantial information.

Mr. SMITH. Yeah. Let's impersonalize it—in general, if you discovered new information that was substantial and relevant, you would reopen an investigation, would you not?

Mr. COMEY. Again, even in general, I don't think we can answer that in the abstract. What we can say is, if people—any investigation, if people have new and substantial information, we would like to see it so we can make an evaluation.

Mr. SMITH. Okay. Let me give you some examples and mention several new developments that I think have occurred and ask you if you have become aware of them.

The first example is what the Chairman mentioned a while ago. An employee at a company that managed former Secretary Clinton's private email server said, "I need to strip out a VIP's (VERY VIP) email address from a bunch of archived emails. Basically, they don't want the VIP's email address exposed to anyone."

I assume you are aware of that.

Mr. COMEY. I am aware of that.

Mr. SMITH. Okay.

The same employee called a new retention policy designed to delete emails after 60 days a, "Hillary cover-up operation." And you saw that, did you not?

Mr. COMEY. Say the last—I am sorry, Mr. Smith, I couldn't hear the last——

Mr. SMITH. The same employee called the new retention policy designed to delete emails after 60 days a "Hillary cover-up operation." You saw that?

Mr. COMEY. I don't know that particular language.

Mr. SMITH. Okay. We will get you the source, but you can take my word for it that that is what he said.

Mr. COMEY. I will.

Mr. SMITH. Another example: A former Clinton Foundation employee, who also managed the Clinton server, destroyed devices used by former Secretary Clinton by smashing them with a hammer. You are aware of that?

Mr. COMEY. Yes.

Mr. SMITH. Okay.

Two employees of the company that managed former Secretary Clinton's server recently pled the Fifth Amendment to Congress to avoid self-incrimination. And you are aware of that?

Mr. COMEY. Yes.

Mr. SMITH. Okay.

And then, lastly, 15,000 more work-related emails were discovered, though there had been an attempt to wrongly delete them. And you are aware of that?

Mr. COMEY. I think we discovered them.

Mr. SMITH. Right.

To me, Director Comey, what I cited are not the actions of innocent people. There is a distinct possibility that Mrs. Clinton or her staff directed others to destroy evidence in a government investigation, which, of course, is against the law. So I would urge you to reopen your investigation.

Do you want to comment on that?

Mr. COMEY. I don't.

Mr. SMITH. Okay. I know you can't tell us whether you have or have not, but I believe I have given evidence of new information that is relevant and substantial that would justify reopening the investigation.

My next question is this: I know you granted immunity to a number of individuals, but if you had new information that is relevant and substantial, you would be able to investigate them further, wouldn't you?

Mr. COMEY. Not to quibble, the FBI doesn't grant immunity to anybody. The Department of Justice is able to grant very different kinds of immunity. If new and substantial evidence develops either that a witness lied under a grant of use immunity or under any kind of immunity, of course the Department of Justice can pursue it.

Mr. SMITH. Okay.

Mr. COMEY. Nobody gets lifetime immunity.

Mr. SMITH. Right. Okay. Thank you, Director Comey.

Last question is this: As Chairman of the Science Committee, I issued the FBI a subpoena on September 19, 2016. The due date for a response was 2 days ago, September 26. Bureau staff has still not provided the requested information and documents.

Yesterday, we pointed out to them that the Science Committee has jurisdiction over the National Institute of Standards and Technology, which sets standards for the Federal Information Security Modernization Act of 2014.

I trust you intend to comply with the subpoena.

Mr. COMEY. I intend to continue the conversations we have been having about the subpoena.

Mr. SMITH. Yeah.

Mr. COMEY. As you know, we have made a lot of documents available to at least six Committees, and the question of whether we should make them additional—available to another Committee is something that we are struggling with but talking to your folks about.

Mr. SMITH. Okay. To me, there is no struggle. If we have clear jurisdiction, which we can demonstrate, it, I think, obligates you to comply with the subpoena.

Mr. COMEY. Yes, sir. We are not trying to be disrespectful. We are just not sure we see the jurisdictional issue the way that your folks do. But we are continuing to talk about it.

Mr. SMITH. Okay. Thank you, Director Comey.

Mr. ISSA. Would the gentleman yield?

Mr. SMITH. I will yield to the gentleman from California.

Mr. ISSA. Thank you.

The Chairman of the full Committee had asked something earlier, and I just want to point out and ask that it be placed in the record—according to the Maryland Code of Ethics 19301.11, it specifically prohibits a former or current government officer or employee from acting as a counsel to someone that they represented in government. And I would like that to be placed in the record.

In light of the fact that the Maryland Bar has——

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

[The information referred to follows:]

Rule 1.11 Special Conflicts of Interest for Former and Current Government Officers and Employees

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

(1) is subject to Rule 1.9(c); and

(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) is subject to Rules 1.7 and 1.9; and

(2) shall not:

(i) participate in a matter in which the lawyer participated personally and substantially while in private practice or non-governmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or

(ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(e) As used in this Rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

Mr. ISSA. In light of the fact the Maryland Bar has this prohibition, would that have changed your view of allowing her in and saying you had no authority?

Mr. COMEY. I am not qualified nor am I going to answer questions about legal ethics in this forum. The FBI has no basis to exclude somebody from an interview who the subject of the interview says is on their legal team.

Mr. SMITH. Okay. Thank you, Director Comey.

Thank you, Mr. Chairman. I yield back.

Mr. GOODLATTE. The Chair thanks the gentleman, recognizes the gentlewoman from California, Ms. Lofgren, for 5 minutes.

Ms. LOFGREN. Thank you, Mr. Chairman.

And thank you, Director Comey, for once again appearing before this Committee, as you appear before so many Committees here in the House. Sometimes I wonder how you get any work done at all, that you are called up here so frequently.

You know, there has been a lot of focus on the private email that Secretary Clinton used, just as her predecessor, Colin Powell, used. So far as I am aware from the public comments, there is no forensic evidence that there was a breach of that server, although theoretically you could intrude and not leave evidence.

But there has been very little focus on the breach at the State Department email system. Now, it has been reported in the press that this breach of the State Department email system was one of the largest ever of a Federal system and was accomplished by, according to the press, either China or Russia.

I am wondering if you are able to give us any insight into whether it was, in fact, the Russians who hacked into the State Department email system or whether that is still under investigation.

Mr. COMEY. Not in this open forum, I can't.

Ms. LOFGREN. All right. I am hoping that we can get some insight in an appropriate classified setting on that.

Now, we have watched with some concern—and I know you are also concerned—about the Russian intrusion into our election system. It has been reported to us that the Russians hacked into the Democratic National Committee database. They also hacked into the Democratic Congressional Campaign Committee. And it seems that they are making an effort to influence the outcome of this election. We have been warned that the information stolen might not just be released but also be altered and forged and then released, in an effort to impact the election here in the United States.

Yesterday, there were press reports—and I don't know if they are accurate, and I am interested if you are able to tell us—that the Russians have also hacked the telephones of Democratic staffers and that there was a request for Democratic staffers to bring their cell phones into the FBI to have them mirrored.

Can you tell us anything about that?

Mr. COMEY. I can't at this point. What I can say in response to the first part of your question, any hacking is something we take very seriously. Any hacking in connection with this Nation's election system is something we take extraordinarily seriously, the whole of government. So it is something the FBI is spending a lot of time on right now to try and understand. So what are they up to and what does it involve and what is the scope of it to equip the

President to decide upon the appropriate response. And so that is one of reasons I have to be very careful about what I say about it. That work is ongoing. I should make clear to folks when we talk about our election system, there has been a lot of press reporting about attempts to intrude into voter registration databases. Those are connected to the Internet. That is very different than the electoral mechanism in this country, which is not.

Ms. LOFGREN. We had actually a hearing, and I had the chance to talk to Alex Padilla, who is the Secretary of State in California. Number one, they encrypt their database. And number two, even if you were to steal it, there is backups that you couldn't steal. So they can't really manipulate that. But you could cause a lot of damage. I mean, you could create chaos on Election Day that would—and you could target that chaos to areas where voters had a tendency to vote for one candidate over another in an attempt to influence the outcome. So it is not a benign situation certainly, and one that we want to worry about.

I want to just quickly touch on a concern I have also on cyber on rule 41, and how the FBI is interpreting that. I am concerned that the change, as understood by the FBI, would allow for one warrant for multiple computers, but would include allowing the FBI to access victims' computers in order to clean them up. Cybersecurity experts that I have been in touch with have raised very strong concerns about that provision, especially using malware's own signaling system to disable the malware. The cyber experts who have talked to me and expressed concern believe that that ultimately could actually trigger attacks. And, so, I am wondering if you have any comments on how the FBI intends to use rule 41 *vis* malware on victims' computers?

Mr. COMEY. Yeah. Thank you.

Mr. GOODLATTE. Time of gentlewoman has expired. The witness will be permitted to answer the question.

Mr. COMEY. Thank you, Mr. Chairman. I am not an expert, but one of the challenges we face, especially in dealing with these huge criminal botnets, which have harvested and connected lots of innocent peoples' computers is how do we execute a search warrant to try and figure out where the bad guys are, and get them away from those innocent people? And the challenge we have been facing is to go to every single jurisdiction and get a warrant would take, literally, years. And so we are trying to figure out can we use rule 41 to have one judge issue that order and give us that authority.

Ms. LOFGREN. Mr. Chairman, I know my time has expired. I would just like to close by expressing the hope that the FBI might seek the guidance of some of the computer experts at our national labs on this very question of triggering malware attacks. And I yield back.

Mr. GOODLATTE. The point is well taken. The Chair recognizes the gentleman from Ohio, Mr. Chabot, for 5 minutes.

Mr. CHABOT. Thank you, Mr. Chairman. Director Comey, Chairman Goodlatte, in his introduction of you, mentioned that you are a graduate of the College of William and Mary. And as you may well know, I am a graduate of William and Mary as well.

Anyway, you may remember that our alma mater is very proud of something called the honor code. And I checked out the wording

of the honor code to make sure that I was correct on it. And I will tell you exactly what it says. It says, "As a member of the William and Mary community, I pledge on my honor not to lie, cheat, or steal, either in my academic or in my personal life." Well, one of the people whose behavior you investigated, Hillary Clinton, didn't have the good fortune to attend the College of William and Mary. But she did attend Wellesley. And I wondered whether they had an honor code. And I found out, I looked it up, they do, and they did. And here is what it says, "As a Wellesley College student, I will act with honesty, integrity, and respect. In making this commitment, I am accountable to the community and dedicate myself to a life of honor." Let me repeat part of that again. "I will act with honesty."

Now, I am sure the young women attending Wellesley today, and those that have attend it in the past, are proud that one of their own could be the next President of the United States. But a majority of the American people have come to the conclusion that Hillary Clinton is not honest and cannot be trusted. It is about two to one who say that she is dishonest. In the latest Quinnipiac poll, for example, the question being: Would you say that Hillary Clinton is honest or not, 65 percent said no. And only 32 percent said yes, she is honest. You know, Republicans and Democrats. Not surprisingly, were overwhelmingly one way or the other. But Independents, 80 percent of them said nope, she is not honest. And only 19 percent of them said she is.

So Director Comey, since you and your people were the ones who investigated Hillary Clinton's email scandal, I would just like to ask a couple of questions. First, Hillary Clinton claimed over and over that none of the emails that she sent contained classified information. Was she truthful when she said that?

Mr. COMEY. As I said when I testified in July, there were—I am forgetting now after 2½ months the exact number, but there were 80 or so emails that contained classified information.

Mr. CHABOT. Okay. So she said they didn't contain classified information and they did. So that sounds like not being truthful. Not trying to put words in your mouth. But I think that is what that means.

Hillary Clinton then came up with a fallback position saying: Well, none of the emails I sent were marked classified. But that wasn't true either. Was it?

Mr. COMEY. There were three—as I recall, three emails that bore within the body of the text a portion marking that indicated they were classified confidential.

Mr. CHABOT. And again, not putting words in your mouth, but I think that means that no, she didn't tell the truth in that particular instance.

Hillary Clinton said she decided to use a personal email server system for convenience. And that she would only have to carry around one BlackBerry. Was she being truthful when she said she just used one device?

Mr. COMEY. She used, during her tenure as Secretary of State, multiple devices. Not at the same time, but sequentially.

Mr. CHABOT. Okay. Again, I am going to take that as she said one and it was more. So, therefore, not honest. And in fact, some

of the devices were destroyed with a hammer, as has already been mentioned. Is that the type of behavior that you would expect from someone who is being fully cooperative with an investigation, destroying devices containing potential evidence with a hammer?

Mr. COMEY. Well, we uncovered no evidence that devices were destroyed during the pendency of our investigation. And so why people destroy devices when there is no investigation is a question I am not able to answer.

Mr. CHABOT. Okay. Thank you. Mr. Director, a little less than 2 months ago, Hillary Clinton, in talking about her emails, claimed that you said "that my answers were truthful." PolitiFact, by the way, gave this claim a Pants on Fire rating. Did you say that she was telling the truth with respect to her email claims?

Mr. COMEY. I did not. I never say that about anybody. Our business is never to decide whether someone—whether we believe someone. Our business is always to decide what evidence do we have that would convince us not to believe that person. It is an odd way to look at the world, but it is how investigators look at the world.

Mr. CHABOT. Thank you. Director Comey, it must have been, and I am almost out of time, but it must have been very awkward for you, you are tasked with investigating a person who could be the next President of the United States, and the current President of the United States has already prejudged the case and telegraphed to you and the entire Justice Department that he, your boss, has come to the conclusion that there is not even a smidgen of corruption, his own words, before you have even completed your investigation. You were aware that he had said that, weren't you?

Mr. COMEY. Yes, I saw those reported in the press.

Mr. CHABOT. Okay. And finally, it just seems to me here that there was clearly a double standard going on. Like, for example, if anybody else had done this, like a soldier or a serviceman who did virtually the same thing, they would have been prosecuted and were, but not Hillary Clinton. And that is a double standard, and that is not the way it is supposed to work in America. And I am out of time. I yield back.

Mr. COMEY. I disagree with that characterization, but——

Mr. GOODLATTE. The gentleman is permitted to respond.

Mr. COMEY. I don't think so. I actually think if I—if we were to recommend she be prosecuted, that would be a double standard because Mary and Joe at the FBI or some other place, if they did this, would not be prosecuted. They would be disciplined. They'd be in big trouble. In the FBI, if you did this, you would not be prosecuted. That wouldn't be fair.

Mr. CHABOT. I will give you the benefit of the doubt because you are an alumni of William and Mary.

Mr. COMEY. Okay.

Mr. GOODLATTE. The time of the gentleman has expired. The Chair recognizes the gentlewoman from Texas, Ms. Jackson Lee, for 5 minutes.

Ms. JACKSON LEE. Chairman, thank you so very much. Many Americans have come to trust Hillary Clinton as a dedicated committed public servant. But I believe it is important as we address these questions, let me make one or two points. My colleagues have

already made it, and I look forward maybe to coming back to Washington to dealing with the potential Russian intrusion on the election system. I am not asking you, Director, at this time. And also the issue of connecting the dots as we deal with terrorism across America. But I do want to acknowledge Eric Williams, an outstanding detailee to this Judiciary Committee, and thank him for his service. And I want to thank the SAC in Houston, Mr. Turner, for helping us in the shooting that occurred in Houston, as you well know, that gave us a great deal of fear and scare just a couple of days ago.

But, Director Comey, my Republican colleagues have questioned, second-guessed, and attacked you and your team of career FBI agents. They disagree with the results of your investigation. They want you to prosecute, or to ask the DOJ to prosecute Secretary Clinton regardless of the facts. So they have engaged in an almost daily ritual of holding hearings, desperately trying to tear down your investigation and your recommendations. I believe you testified previously that your recommendation in that case was unanimous, and your investigation was carried out by what you called an all star team of career agents and prosecutors. Is that right?

Mr. COMEY. Yes. These were some of our very best. And sometimes, because I am lucky enough to be the person who represents the FBI, people think it is my conclusion. Sure it is my conclusion, but I am reporting what the team thought and their supervisors and their supervisors. As I said, this was—as painful as it is for people sometimes, this was not a close call.

Ms. JACKSON LEE. Let me continue. You have written that the case itself was not a cliff hanger. Is that right?

Mr. COMEY. Correct. Correct.

Ms. JACKSON LEE. Recently, Republicans have attacked the decision to provide limited immunity to individuals during the investigation. For example, when Congressman Chaffetz learned about this, he stated, "No wonder they couldn't prosecute a case. They were handing out immunity deals like candy." I understand that the FBI does not make the final call on immunity agreements. That was the DOJ. You made that clear. So his statement was just wrong. But did you consult closely with DOJ before these immunity agreements were concluded by giving—by having facts?

Mr. COMEY. Right. Our job is to tell them what facts we would like to get access to. The prosecutor's job is figure out how to do that. And so they negotiate—I think there were five limited immunity agreements of different kinds that they negotiated.

Ms. JACKSON LEE. Did you or anyone at the FBI ever object to these decisions to grant immunity? Did you think they made sense?

Mr. COMEY. No. It was fairly ordinary stuff.

Ms. JACKSON LEE. Was the FBI or DOJ handing out immunity agreements like candy?

Mr. COMEY. That is not how I saw it. I didn't see it——

Ms. JACKSON LEE. Congressman Gowdy, a good friend, also objected to granting immunity to Bryan Pagliano and Mr. Combetta at Platte River Networks. He quoted: "These are the two people that FBI decides to give immunity to, Bryan and the guy at Platte River, if it happened." Those are the two that you would want to prosecute. So you are giving immunity to the trigger people, and

everybody goes free." Do you agree with this assessment? Did the FBI screw up here and let everyone go free because of these limited immunity deals?

Mr. COMEY. No, I don't think so. The goal in an investigation like this is to work up. And if people have information that their lawyers are telling you that you are not going to get without some limited form of immunity and they are lower down, you try to get that information to see if you can make a case against your subjects.

Ms. JACKSON LEE. Congressman Gowdy also said this about the FBI: "I have been underwhelmed by an agency that I once had tremendous respect for." Let me just say, sitting on this Judiciary Committee for many, many years, going through a number of investigations, I have never been proud of an agency that has always been there when vulnerable people are hurting, and when there is a need for great work. But my question to you is: What is your response to that, Director Comey? Do you believe these criticisms are fair?

Mr. COMEY. I think questions are fair. I think criticism is healthy and fair. I think reasonable people can disagree about whether I should have announced it and how I should have done it. What is not fair is any implication that the Bureau acted in any way other than independently, competently, and honestly here. That is just not true. I knew this was going to be controversial. I knew there would be all kinds of rocks thrown. But this organization and the people who did this are honest, independent people. We do not carry water for one side or the other. That is hard for people to see because so much of our country we see things through sides. We are not on anybody's side. This was done exactly the way you would want it to be done. That said, questions are fair. Feedback is fair.

Ms. JACKSON LEE. Absolutely. But the foot soldiers, we use that term in the civil rights movement, your agents on the ground, you take issue with whether or not they were compromised or they were adhering to somebody else's message. Is that what you are saying?

Mr. COMEY. Absolutely. You can call us wrong, but don't call us weasels. We are not weasels. We are honest people. And we did this in that way, whether you disagree or agree with the result, this was done the way you would want it to be done.

Ms. JACKSON LEE. You were able to learn that Mr. Pagliano and Mr. Combetta—you learned what they had to say. And if anyone provided statements to the FBI had actually provided evidence that Secretary Clinton has committed a crime, would you then have recommended prosecution to the DOJ?

Mr. COMEY. Oh, yeah. If the case was there, very aggressively.

Ms. JACKSON LEE. Are you sure you wouldn't have been a little nervous about doing so, a little intimidated?

Mr. COMEY. No. I really don't care.

Ms. JACKSON LEE. You don't look like it. You are kind of tall, and that——

Mr. COMEY. I have a 10-year term. That is the beauty of this—while there is a lot of challenging things about this job, one of the great things is I have a certain amount of job security. And so no.

Either way, we would have done what the facts told us should be done.

Ms. JACKSON LEE. So are you now second-guessing your decision regarding Hillary Clinton?

Mr. COMEY. No.

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

Ms. JACKSON LEE. Mr. Chairman, I want to thank the Director and ask my colleagues to give the respect that this agency in this instance deserves. Thank you so very much for your service. I yield back.

Mr. GOODLATTE. The Chair thanks the gentlewoman. The Chair recognizes the gentleman from California, Mr. Issa, for 5 minutes.

Mr. ISSA. Thank you, Mr. Chairman. Director, I have got a lot of concerns. But one of them refers to Reddit. At the time that the Department of Justice at your behest or your involvement gave Paul Combetta immunity, did you do so knowing about all of the posts he had on Reddit, and capturing all of those posts and correspondence where he was asking how to wipe, or completely erase on behalf of a very VIP, so to speak?

Mr. COMEY. I am not sure sitting here. My recollection is, and I will check this and fix it if I am wrong, that we had some awareness of the Reddit posts. I don't know whether our folks had read them all or not. We had a pretty good understanding of what we thought he had done. But that is my best recollection.

Mr. ISSA. Okay. In the last week, en masse, he has been deleting them from Reddit posts. Is that consistent with preserving evidence? And I say that because there is still an ongoing interest by Congress. And only in spite of Reddit's own senior, what they call, flack team trying to hide it, only because a few people caught it do we even know about it. And this and other Committees are interested in getting the backups that may exist on these deletions. You know, I guess my question to you is, is he destroying evidence relevant to Congressional inquiries? And I will answer it for you. Yes. He is. And what are you going to do about it?

Mr. COMEY. That is not something I can comment on.

Mr. ISSA. Well, let me go into something that concerns this body in a very specific way. As a former Chairman issuing subpoenas, I issued a subpoena, and additionally, I issued preserve letters in addition to that. Now-Chairman Chaffetz issued what are effectively preserve letters. Some of them were directly to Hillary Rodham Clinton while she was still Secretary. Others, the subpoena in 2013, was to Secretary Kerry. These individuals destroyed documents pursuant—or took it out of Federal custody pursuant to our subpoena and our discovery. As a result, they committed crimes. My question to you is, when I was a Chairman and I wanted to grant immunity to somebody, I had to notice the Department of Justice, and you were consulted. Isn't that correct?

Mr. COMEY. In a particular matter?

Mr. ISSA. In any matter.

Mr. COMEY. I don't know whether the FBI is consulted in that circumstance.

Mr. ISSA. Okay. For the record, yes. The Department of Justice does not grant immunity without checking with Federal law enforcement to see whether it will impact any ongoing investigation.

That is the reason we have a requirement to give notice. When the reverse was occurring, you were granting—handing out like candy, according to some, immunity, did you or, to your knowledge, Department of Justice confer with Chairman Goodlatte, Chairman Chaffetz, Chairman Smith or any of the other Chairmen who had ongoing subpoenas and investigations?

Mr. COMEY. Not to my knowledge.

Mr. ISSA. So isn't there a double standard that when you granted immunity to these five individuals, you took them out of the reach of prosecution for crimes committed related to destruction of documents, or withholding or other crimes pursuant to Congressional subpoenas?

Mr. COMEY. I don't think anybody was given transactional immunity.

Mr. ISSA. Oh, really? Now, we have are not allowed to make your immunities public, but I am going to take the privilege of making one part of it public. I read them. You gave immunity from destruction to both of those attorneys. Not just turning the documents over, specifically destruction. You did the same thing with these other two individuals, Bryan and Paul Combetta. You gave them immunity from destruction.

Mr. COMEY. Yeah. I don't think—well, again, I could always be wrong, but I don't have them in front of me either——

Mr. ISSA. Well, because you don't let us take them out of the SCIF, it is a little hard for us too. But the fact is when you read them——

Mr. COMEY. Can I finish my answer? I am pretty sure that what was granted was use immunity in the case of those two people, coextensive with 18 U.S.C. 6001, which means no statement you make can be used against you directly or indirectly. Transactional immunity is sometimes given also by prosecutors, says you will not be prosecuted in any event for this set of facts. I don't think there was any transactional immunity.

Mr. ISSA. But when I read for both of the attorneys that immunity was granted, it, in both cases, said destruction, in addition to the turning over. Why was that—why would you believe that was necessary, or do you believe that would be necessary? You wanted the document. You wanted the physical evidence. Why did you have to give them immunity from destruction of materials? And because my time is expiring, when you look into it and hopefully get back to this Committee, I would like to know, does that immunity apply only to destruction on the computers delivered so that other destructions by Cheryl Mills could still be prosecuted?

Mr. COMEY. Yeah. Again, my recollection is no transactional immunity was given. Protection of statements was given to the Combetta guy and Mr. Pagliano.

Mr. ISSA. Thank you, Mr. Chairman.

Mr. GOODLATTE. The Chair thanks the gentlemen. The Chair recognizes the gentleman from Tennessee, Mr. Cohen.

Mr. ISSA. Mr. Chairman, I would ask unanimous consent, quickly, that a group of documents be included, and I will summarize them. They are basically the letters and subpoenas that led up to the destruction of documents that were previously held for preser-

vation. Additionally, the blog posts from Reddit. If those could all be placed in the record.

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

Mr. ISSA. Thank you, Mr. Chairman.

Mr. GOODLATTE. The gentleman from Tennessee is recognized.

Mr. COHEN. Thank you, sir. Director Comey, would you consider the FBI's most important job presently fighting terrorism and threats to the homeland?

Mr. COMEY. Yes. That is our top priority.

Mr. COHEN. How much time do you think the FBI and you have spent responding to congressional inquiries, and on this particular email investigation? Could you give me an idea how many man months or years have been expended on responding to the different Committees that have called you in time after time after time, and repetitiously accused you of doing politics rather than being an FBI Director?

Mr. COMEY. I can't. I don't have any sense.

Mr. COHEN. Could it be—would it be months of cumulative man hours, or would it be years of cumulative man hours?

Mr. COMEY. You know, I don't know. A lot of folks have done a lot of work to try and provide the kind of transparency that we promised. It has been a lot by a lot of people. I just don't have a sense of the——

Mr. COHEN. How many hours have you spent before Congress on this?

Mr. COMEY. Testimony? Four hours and 40 minutes without a bathroom break, I want to note for the record. And whatever today is. Those would be the two main appearances. I was asked questions at Senate Homeland yesterday about this, and then House Homeland in July, I think. I am guessing 10 hours or so.

Mr. COHEN. And you prepared for this, though. I mean, the 10 hours is just like the iceberg?

Mr. COMEY. Oh, sure. Yeah.

Mr. COHEN. Could your time and the FBI's time better be used fighting terroristic threats here in America?

Mr. COMEY. You know, we are still doing it all. So no one should think that we have taken a day off because we are also doing oversight. We do both.

Mr. COHEN. In the case in New York where Mr. Rahami tried to detonate some bombs, did detonate a bomb, his father had accused him of being a terrorist at one time. And he had stabbed his brother and was in jail. Did the FBI interview him when he was in jail about his possible terrorist tendencies and his trips to Pakistan or Afghanistan?

Mr. COMEY. I will answer that. I am trying to be very circumspect at how I answer questions about the case, because the guy is alive and is entitled to a fair trial. And if I don't do anything that would allow him to argue, he lost the ability to have a fair trial. The answer is we did not interview him when he was in jail in 2014.

***Note:** The material referred to is not printed in this hearing record but is on file with the Committee, and can also be accessed at:

http://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=105390

Mr. COHEN. And why would that be? You interviewed the father, I believe. You might have talked to the brother. You might have talked to a friend. The best evidence was him. He is in jail. You didn't have to—you know. Why did they not go and talk to him?

Mr. COMEY. You know, sitting here, I don't want to answer that question yet. I have commissioned, as I do in all of these cases, a deep look back. We are trying to make the case now. We will go back very carefully, try to understand what decisions the agents made who investigated that and why, and whether there is learning from that. So I don't want to answer it just now, because I would be speculating a bit.

Mr. COHEN. Thank you, sir. Some people have suggested you made a political calculation in your recommendation dealing with Secretary Clinton and the emails. Did you make a political calculation in coming to your ultimate decision?

Mr. COMEY. None.

Mr. COHEN. Some said that on national television, that Secretary Clinton's emails were destroyed after a directive from the Clinton campaign. You announced your decision, you stated publicly, "We found no evidence that Secretary Clinton's emails were intentionally deleted in efforts to conceal them." Is that not correct?

Mr. COMEY. That is correct.

Mr. COHEN. Others have said they lost confidence in the investigation and questioned the genuine effort in which it was carried out. Did the FBI make a genuine effort to carry out a thorough investigation?

Mr. COMEY. Oh, yes. Very much.

Mr. COHEN. And did you take some hits from the position you took when you announced your decision?

Mr. COMEY. A few. A few. Yeah.

Mr. COHEN. Difficult.

Mr. COMEY. Difficult, but I just thought it was the right thing to do. I am not loving this. But I think it is important that I come and answer questions about it. As long as people have questions, I will try to answer them.

Mr. COHEN. You are not loving this? Do you need a bathroom break?

Mr. COMEY. No, no, I am good.

Mr. COHEN. Setting a record?

Mr. COMEY. I will let you know at 4:40. How I am doing?

Mr. COHEN. Thank you, sir. At FBI buildings, we know what they shouldn't be named. And you know my position on that. And I hope you keep that well in mind. You are a credit to the FBI. You are a credit to government service, and to your alma mater. And I yield back the balance of my time.

Mr. GOODLATTE. The Chair thanks the gentleman and recognizes the gentleman from Iowa, Mr. King, for 5 minutes.

Mr. KING. Thank you, Mr. Chairman. I thank you, Director, for your testimony here before this Committee. Again, I was listening in the exchange between yourself and Mr. Issa. I would just like to confirm that you were confirming that Mr. Combetta made the Reddit posts?

Mr. COMEY. I don't know whether I am confirming it. I think he did, is my understanding. But, yeah, that is my understanding. I

think he did. I haven't dug into that myself. I have been focused on a lot of other stuff as we have talked about. But I think that is right.

Mr. KING. I certainly can accept that. And I would like to just go back to the interview with Hillary Clinton and how that all came about on that July 2 date. But first, I am looking at the dates of the conditional immunity documents that I have reviewed. And I see that Mr. Pagliano had one dated December 22, and another one dated December 28. Can you tell me what brought about that second agreement, why the first one wasn't adequate, and if there was an interview with Mr. Pagliano in between those dates? So December 22 and 28 of 2015?

Mr. COMEY. I think what it is, and Mr. Gowdy and Mr. Marino will recognize this term, the first one is what we call a queen-for-a-day agreement, which was to govern an interview, so limited use immunity for an interview. And then I believe the second one is the agreement for use immunity in connection with the investigation. So it is sort of a tryout for him to get interviewed, for the prosecutors and investigators to poke at him. And then the second one is the agreement they reached. I think that is right.

Mr. KING. And to the extent of if we are going to go any further, we will go off of the December 28 agreement. That would be how I would understand that.

Mr. COMEY. Well, I think they are both important to him and his lawyer. But the first is an intermediate step to the second.

Mr. KING. Okay. Thank you. Then were you aware of the President's statement on October 9, 2015 when he reported that Hillary Clinton would not have endangered national security?

Mr. COMEY. Obviously, I don't know the dates, but I remember public reporting on a statement like that.

Mr. KING. And the following October, and I will state it, the report I have is October 9. Then again, on April 10, 2016, it was reported that the President had said that Hillary Clinton was careless, but not intentionally endangering national security. Were you aware of that statement as well?

Mr. COMEY. Yes.

Mr. KING. And then I would like you, if you could characterize the interview, sometime around, I believe, May 16 it was reported that you said you intended to interview Hillary Clinton personally?

Mr. COMEY. I never said that because I never intended that. And I am sure I didn't say that publicly.

Mr. KING. Were you aware of the report that that was your public statement?

Mr. COMEY. Yes. I think I read it and smiled about it. People imagine the FBI Director does things that the FBI Director doesn't do.

Mr. KING. In fact, and I am not disputing your answer, I am just simply, for the record, this is a record that is dated September 28, 2016, Buffalo News, that has your picture on it, and takes us back to—that is when it was printed, excuse me. Takes us back to a document May 16, 2016, has a picture of you on the front of it, and I will ask to introduce it into the record, it says, "FBI Director James Comey told reporters that he would personally interview

Hillary Clinton 'in coming days.'" And I would ask unanimous consent to introduce this article into the record.

Mr. GOODLATTE. Without objection, it will be made a part of the reported.

[The information referred to follows:]

Wednesday September 28, 2016
The Buffalo News.com 1.3

Opinion

FBI Director James Comey told reporters that he would personally interview Hillary Clinton "in coming days." [illegible]

Handling of Clinton probe tarnishes FBI

By [illegible]

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Mr. KING. Thank you, Mr. Chairman. And not as a matter of indictment, I don't dispute your word on this, it is what the public expectation was hanging out there is my real point. And then with that public expectation, I think the public was surprised to learn about who was or wasn't in that room. Can you tell us who was in the room involved in either listening to or conducting the interview of Hillary Clinton on that date of July 2, 2016?

Mr. COMEY. I can't tell you for sure. I can give you a general sense. The witness and her legal team. And then on our side of the table, our agents, prosecutors from the Department of Justice. I don't know if any of our analysts were in there or not. But sort of our team, their team.

Mr. KING. And how many of your team? How many FBI investigators?

Mr. COMEY. I don't know for sure, sitting here. I think we probably had eight to 10 people on our side, prosecutors and agents. That is a knowable fact. I just don't know it sitting here.

Mr. KING. Prosecutors. Did Loretta Lynch have her people in there?

Mr. COMEY. If you mean Department of Justice lawyers, yes. Sure.

Mr. KING. So how many Department of Justice lawyers would have been there?

Mr. COMEY. I don't know for sure. Again, I think it was probably about eight people; probably about four lawyers, about four from the FBI. But again, I could be wrong.

Mr. KING. Okay. So around four investigators, around four potential prosecutors from the DOJ, a couple of attorneys for Hillary Clinton, Hillary Clinton herself. That would set the scene fairly closely?

Mr. COMEY. I think Secretary Clinton's team was bigger than that. I don't know the exact number.

Mr. KING. Okay. And then, when you received the counsel as to the recommendation you were to make to Loretta Lynch, I am going to just go through this quickly, you didn't review a video tape, an audio tape, or a transcript. So you would have had to rely upon the briefings from the people that were in the room who would have been your investigative team?

Mr. COMEY. Yes. The agents who conducted the interview, yes.

Mr. KING. And they were briefing off of notes that they had taken, which are now in the SCIF, but redacted?

Mr. COMEY. Right. They write them up in what is called an FBI 302.

Mr. KING. And so Loretta Lynch had her people in the room, and they would have had access to your investigators in the room. And out of that came a piece of advice to you that she had already said she was going to hand that responsibility over to you as Director of the FBI as to making the recommendation, which turned out to be the decision on whether or not to indict Hillary Clinton?

Mr. GOODLATTE. The time of the gentleman has expired. The Director will answer the question.

Mr. COMEY. I am not sure I am following it entirely. There was no advice to me from the Attorney General or any of the lawyers working for her. My team formulated a recommendation that was

communicated to me. And the FBI reached its conclusion as to what to do uncoordinated from the Department of Justice.

Mr. KING. Even though Justice was in the room with your investigators? And I would make that final comment and I yield back. Thank you, Chairman.

Mr. COMEY. Sure. Sure.

Mr. GOODLATTE. The Chair thanks the gentleman. The Chair recognizes the gentleman from Georgia, Mr. Johnson, for 5 minutes.

Mr. JOHNSON. Thank you, Mr. Chairman. Russian hacking into the databases of the Democratic National Committee and the Democratic Congressional Campaign Committee, as well as Russian hacks into the voter registration systems of Illinois and Arizona, serve as ominous warnings to the American people about the risks that our electoral processes face in this modern era. Unfortunately, Trump Republicans in the House are as obsessed with Hillary Clinton's damn emails as Trump has been about President Obama's birth certificate. Just like The Donald closed his birth certificate investigation after 5 years of fruitless investigation, however, I predict that the Trump Republicans will, at some point, close this email persecution. The American people are sick of it. The attention of the American public is increasingly focused on the security of this Nation's election infrastructure. On Monday, the Ranking Members of the House and Senate Intelligence Committees, Senator Dianne Feinstein and Congressman Adam Schiff, issued a joint statement setting forth the current status of this investigation. It said this: "Based on briefings we have received, we have concluded that the Russian intelligence agencies are making a serious and concerted effort to influence the U.S. Election." They work closely with intelligence community individuals to be able to put that statement out to the American public.

Director Comey, I don't want to ask you about any classified information, but is their statement accurate?

Mr. COMEY. I don't—I can't comment on that in this forum. As I said in my opening, we are investigating to try to understand exactly what mischief the Russians might be up to in connection with our political institutions and the election system more broadly. But I don't want to comment on that at this point.

Mr. JOHNSON. Free and fair elections are the linchpin of our society. A compromise or disruption of our election process is something that this Congress certainly should be looking into. Would you agree with that?

Mr. COMEY. I can't speak, sir, to what Congress should be looking into. But the FBI is looking into this very, very hard for the reasons you say. We take this extraordinarily seriously.

Mr. JOHNSON. Thank you. In June, the FBI cyber division issued a flash alert to State officials warning that hackers were attempting to penetrate their election systems. The title of the flash alert was, "Targeting Activity Against State Board of Election Systems." The alert disclosed that the FBI is currently investigating cyber attacks against at least two States. Later in June the FBI warned officials in Arizona about Russian assaults on their election system, and hackers also attacked the election system in Illinois, where they were able to download the data of at least 200,000, or up to 200,000 voters. In August, the Department of Homeland Security

convened a conference call warning State election officials and offering to provide Federal cyber security experts to help scan for vulnerabilities. And yesterday it was announced that at least 18 states have already requested election cybersecurity help to defend their election systems.

Director Comey, since these flash alerts and warnings went out over this summer, I would appreciate you letting us know whether or not there have been any additional attacks on State operations or databases since June.

Mr. COMEY. There have been a variety of scanning activities, which is a preamble for potential intrusion activities, as well as some attempted intrusions at voter registration databases beyond those we knew about in July and August. We are urging the States just to make sure that their dead bolts are thrown and their locks are on, and to get the best information they can from DHS just to make sure their systems are secure. And again, these are the voter registration systems. This is very different than the vote system in the United States, which is very, very hard for someone to hack into, because it is so clunky and dispersed. It is Mary and Fred putting a machine under the basketball hoop at the gym. Those things are not connected to the Internet. But the voter registration systems are. So we urge the States to make sure you have the most current information and your systems are tight. Because there is no doubt that some bad actors have been poking around.

Mr. JOHNSON. All right. With that, I will yield back the balance of my time. And thank you, sir.

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

Mr. GOHMERT. Thank you, Mr. Chairman. And Director Comey, thanks for being here. I was a bit astounded when you said the FBI is unable to control who a witness, coming in voluntarily, brings in to an interview. I have seen a lot of FBI agents tell people who could come into an interview and who could not. And in this case, and I am sure you have heard some of the questions raised by smart lawyers around the country about providing immunity to people like Cheryl Mills in return for her presenting a laptop that you had every authority to get a subpoena, and if you had brought a request for a search warrant, based on what we now know, I would have had no problem signing that warrant so you could go get it anywhere you want. And in fact, I have talked to former U.S. attorneys, A.U.S.A.s, who have said if an FBI agent came in and recommended that we gave immunity to a witness to get her laptop that we could get with a subpoena or warrant, then I would ask the FBI not to ever allow this agent on a case.

Can you explain succinctly why you chose to give immunity without a proffer of what was on the laptop, give immunity to Cheryl Mills while she was an important witness, and you could have gotten her laptop with a warrant or subpoena?

Mr. COMEY. Sure. I will give it my best shot. Immunity we are talking about here, and the details really matter, that we are talking about, is act of production immunity, which says we want you to give us a thing. We won't use anything we find on that thing directly against you. All right? It is a fairly——

Mr. GOHMERT. Well, and I understand that, and I understood that from reading the immunity deal. And that is what is so shocking because she was working directly with Hillary Clinton. And, therefore, it is expected since the evidence indicates she was pretty well copied on so many of the emails that Hillary Clinton was using, that pretty much anything in there would have been useable against her. And you cleaned the slate before you ever knew.

Now, some of the immunities you give, the last paragraph mentions a proffer. Was there a proffer of what the witness would say before the immunity deals were given to those that got those immunities?

Mr. COMEY. Can I answer first, though, your question about what I think it made sense to have active production immunity for Cheryl Mills' laptop?

Mr. GOHMERT. I would rather—my time is so limited. Please.

Mr. COMEY. It is an important question, and I think there is a reasonable answer, but I will give it another time. I think in at least one of the cases, and I am mixing up the guys, but with Mr. Combetta, maybe also with Mr. Pagliano—no. I got that reversed.

Mr. GOHMERT. It is yes or no. Did you have a proffer from them as to what they would say before you gave them immunity?

Mr. COMEY. I believe there was a proffer session governed by what I just referred to is called a queen-for-a-day agreement, with at least one of them to try and understand what they would say. But——

Mr. GOHMERT. Because the deals that I have seen back 30 years ago before I went to the bench, the FBI would say you—and the DOJ. Of course, we know FBI can't give immunity. It has to come from DOJ, just like it is not the FBI's job to say what a reasonable prosecutor should do or not do. You give them the evidence and then you let them decide. But a proffer is made saying this is what my client will say. Then the DOJ decides, based on that proffer, here is the plea we will offer, here is the immunity we will offer. And if your client deviates from that proffer, the deal is off.

You got really nothing substantial. It is as if you went into the investigation determined to give immunity to people instead of getting a warrant. You gave immunity to people that you would need to make a case if a case were going to be made. And I know we have people across the aisle that are saying: Well, it is only because she is a Presidential candidate. It happens to be, in my case, I wouldn't care whether she was a Presidential candidate or not. What is important to maintaining a civilization with justice and fairness is a little righteousness where people are treated fairly across the board, and it does not appear that in this case, it comports with anything that FBI agents, with centuries of experience, have told me they have never seen anything like this.

So one other thing, I know this happened before your watch, but under Director Mueller, Kim Jensen, who prepared 700 pages of training material for those who would go undercover and try to embed with al-Qaeda, it was wiped out because CARE and some of the people that were unindicted co-conspirators named in your Holy Land Foundation trial, they said: We don't like them. They do not allow agents to know what Kim Jensen put in that 700

pages that was so accurate, so good about Islam, that we could imbed people in al-Qaeda and they wouldn't suspect them.

I would encourage you to start training your FBI agents so whether they are in San Bernardino, Orlando, New Jersey, wherever, they can talk to a radicalized Islamist and determine whether they are radicalized. Without Kim Jensen's type material, you will never be able to spot them again, and we will keep having people die.

Thank you. My time has expired.

Mr. GOODLATTE. The time of the gentleman has expired. The Director is permitted to respond if he chooses to do so.

Mr. COMEY. I don't think I have anything at this point.

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

Ms. CHU. Thank you. Director Comey, during this Committee's oversight hearing last year, I asked you about the cases of Sherry Chen and Xi Xiaoxing, both U.S. citizens who were arrested by the FBI, accused of different crimes related to economic espionage for China, only to have those charges dropped without explanation.

Since you last testified before the Committee, both cases have been closed. Now, I know that you may not be personally familiar with the individuals' cases, or may not be inclined to comment on the facts of these cases to the Committee today. However, would you be willing to provide a written explanation, or possibly a summary of the investigations to clarify how and why the FBI handled the cases the way they did?

Mr. COMEY. I don't want to commit to that sitting here. We would certainly consider what we can supply consistent with things like the Privacy Act. But we will certainly consider it. I am familiar with the cases. I remember your questions about it last year. And so we will take a look at what we can share with you. We can't obviously do it in an open forum, in any event.

Ms. CHU. I understand that. But I appreciate the consideration.

Now I would like to address a different topic. Director Comey, your agency recently introduced an online initiative aimed at promoting education and awareness about violent extremism called Don't Be a Puppet. This program was designed to serve as a tool for teachers and students to prevent young people from being drawn toward violent extremism.

However, national education groups, faith groups, and community organizations have raised serious concerns about the way in which the program presents the problem of violent extremism. Particularly troublesome is the Web site's charge that teachers and students should look for warning signs that a person may be on a slippery slope of violent extremism, and to report activity that may or may not be indicative of radicalization.

For instance, the Web site encourages students and teachers to report when others use unusual language or talk about travelling to suspicious places. The user of the Web site, however, is left to draw inferences about what constitutes a suspicious place, or what language is unusual enough to be reported to a trusted authority. For example, a trip to France or Germany, which hosts many far-right extremist groups may not sound suspicious to many users.

But a trip to Saudi Arabia or Iraq, home to various Muslims' holy sites, possibly would.

So on August 9, the American Federation of Teachers led a number of national groups in a letter written to you. And, Mr. Chair, I would like to submit this for the record.

[The information referred to follows:]

Press Release

Civil Rights Leaders Express Outrage over FBI Student Profiling Program

For Release:
Thursday, August 11, 2016.

Contact:
Richard A. Fowler
202/393-6355; Cell: 202/412-7745
rfowler@aft.org

WASHINGTON—On Wednesday, the American Federation of Teachers, civil and human rights organizations, faith leaders and community groups came together to issue a letter to the FBI condemning its Don't Be a Puppet program. In an attempt to educate students and their families about violent extremism, this program does the opposite; it promotes bigotry and hatred, and doubles-down on the problematic law-enforcement strategy of profiling.

"Public schools should be safe havens that embrace all students and families, regardless of citizenship and national origin. They should instill civic pride, not fear and suspicion," said the AFT and other organizations in the two-page letter sent to FBI Director James Comey. "As educators and advocates, we have worked hard to provide safe, welcoming places of learning, free from harassment and discrimination, where all our children feel safe, welcomed and valued. The strength of the American public school system lies in its diversity and inclusion."

The letter, which was signed by 19 organizations, including the League of United Latin American Citizens and AASA, The School Superintendents Association, also highlights why programs like Don't Be a Puppet create fertile ground for bullying and hateful rhetoric: "The harmful effects of such

a campaign cannot be overstated. Racial profiling is marginalizing and will take an emotional and psychological toll on innocent children. A generation of children is growing up living in fear due to the current hateful rhetoric in the public arena targeted at their families and communities. Efforts like Don't Be a Puppet will only exacerbate the bullying and profiling of Middle Eastern and Muslim students by creating a culture of animosity and distrust."

Click here (//www.aft.org/sites/default/files/ltr_dont_be_a_puppet_aug2016.pdf) to view the letter sent to the FBI.

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The AFT represents 1.6 million pre-K through 12th-grade teachers; paraprofessionals and other school-related personnel; higher education faculty and professional staff; federal, state and local government employees; nurses and healthcare workers; and early childhood educators.

Press Release (/press/releases)
New York Times columns (/press/nyt)
Blog (http://www.aft.org/blog/262)
Speeches (/press/speeches)
Media Kits (/press/media-kits)

Ms. CHU. And among the many concerns they raise is the potential for such initiatives to exacerbate the profiling and bullying of students of Middle Eastern background that—and what they—over and above what they already experience. So how do you respond to the concerns expressed by the American Federation of Teachers about the impact of the FBI's Don't Be a Puppet Program, and the effect it may have on schools in immigrant communities?

Mr. COMEY. Well, thank you for that. I am glad they shared their feedback. Boy, I hope either before or after the feedback they go on and actually go through the Don't Be a Puppet. Because I have done it. I honestly can't understand the concerns. It is a very commonsense thing. One of our big challenges is how—if a kid starts to go sideways toward violence, the people closest to him are going to see something likely. How do we get folks to a place where they are sensitized to make commonsense judgments that this person may be headed in a very dangerous direction? It is never going to be perfect. But I actually think a lot of thought went into this, including faith groups, all kinds of civic groups, to make sure we got something that was good commonsense education for kids and for teachers. And so I am a little bit at a loss. Maybe we ought to meet with them and they can show me which parts of it they actually think are problematic. But I think it is a pretty darn good piece of work, is my overall reaction.

Ms. CHU. So, Director Comey, you have gone to the Web site and looked at it. So what, then, would you consider to be a place that sounds suspicious or what would you consider to be an unusual language that somebody is speaking so much so that a student should report them to the authorities?

Mr. COMEY. I think what it says is speaking—using unusual language, not speaking Pashto or French or German. I think it means speaking in an unusual way about things. And suspicious place, Syria leaps to my mind. If someone is talking to classmates about thinking about traveling to Syria, the classmates ought to be sensitized to that. The teacher ought to be sensitized to it, so we can try and intervene with that kid before we have to lock them up for most of their life.

Ms. CHU. But do you have evidence to show that this program is actually countering recruiting efforts by violent extremists?

Mr. COMEY. I don't. But it sure makes a lot of sense to me. And it seems, again, a commonsense way to equip kids to resist the siren song that comes from radical Islamists or skinhead groups or hate groups of different kinds. So, look, it is not—I am sure it is not perfect, because nothing in life is. We would welcome feedback. But the general idea makes a lot of sense to me.

Ms. CHU. I yield back.

Mr. GOODLATTE. The Chair recognizes the gentleman from Ohio, Mr. Jordan, for 5 minutes.

Mr. JORDAN. Thank you, Mr. Chairman. Director, in your opening comments, you said this was an unusual case. I would say that is the understatement of the year. Husband of the subject meets with the attorney general 3 days before Secretary Clinton is interviewed by the FBI. Nine people get to sit in with Secretary Clinton during that interview. One of those was her chief of staff, Cheryl Mills, who was a subject of the investigation. Five people get some

kind of immunity. Five people get some kind of immunity, and yet no one is prosecuted. Three of those people who get immunity take the Fifth in front of Congress, and one of them doesn't even both to show up whenhe is subpoenaed, supposed to have been at that very chair you are sitting at. And, of course, the Attorney General announces that she is going to follow your recommendations even though she doesn't know what those recommendations are, the only time she has ever done that.

So, of course, this was unusual. We have never seen anything like this. Which sort of brings me to the posts. I would like to put up the posts that some have talked about which is the posts on Mr. Combetta on Reddit. And you said earlier that you don't know if you examined this during your investigation. So let's examine it now. "I need to strip out a VIP's address from a bunch of archived email. Basically they don't want the VIP's email address exposed to anyone."

Now, Director, when I hear the term "strip out email address," I think of somebody is trying to hide something, somebody is trying to cover up something, and it sort of raises an important question from these two sentences. Who is the "they" who wants something hid, and who is the VIP who also wants something hid? Director Comey, is it likely the VIP—well, it is not just a VIP. It is a very, very important person, according to Mr. Combetta. Is it likely that that person is Secretary Clinton?

Mr. COMEY. Yes. Sure.

Mr. JORDAN. Okay. And is it also likely that the "they" refers to her, Secretary Clinton's staff, and, specifically, Cheryl Mills.

Mr. COMEY. I don't know that. Either her lawyers or some staff that had tasked him with the production.

Mr. JORDAN. So one other thing that is important on that, if we could but that back up, one other thing that is important is the date. The date at the top says July 24, 2014. So whenever I see a date, and I am sure you do the same thing, I always look at what is happening about that same timeframe, what may have happened directly before that and maybe directly after that.

So I went back to your reports that you guys had given to us. The first report back last month, August 18, 2016, page 15. Well, on page 15 it says, "During the summer of 2014, the State Department indicated to Cheryl Mills a request for Clinton's work-related emails would be forthcoming. State Department gives Cheryl Mills a heads-up that she has got to go round up all of Secretary Clinton's email. On that same page, it says, "The House Select Committee on Benghazi had reached an agreement with the State Department regarding production of documents on July 23, 2014," just the day before, so I find kind of interesting. Then from your report that we got just last week, "After reviewing several documents dated in and around July 23, 2014, Paul Combetta had a conversation with Cheryl Mills, and after reviewing it July 24," there is that date again, "2014 email from Bryan Pagliano, Paul Combetta explained Cheryl Mills was concerned Clinton's then-current email address would be disclosed publicly."

So it sure looks to me like it is Secretary Clinton, as you said. But also that it is Cheryl Mills and Bryan Pagliano who are urging Mr. Combetta to cover this stuff up. You agree?

Mr. COMEY. From what you read, it sure sounds like they are trying to figure out a way to strip out the actual email address from what they produce.

Mr. JORDAN. Well, they are actually trying to strip it all out, .pst file and everything. Here is the takeaway in my mind. Mills gets a heads-up, Cheryl Mills gets a heads-up, in mid-summer of 2014; July 23, the day before Mr. Combetta's Reddit post, the Benghazi and the State Department reach an agreement on production of documents. Cheryl Mills has a conversation with Paul Combetta. He goes on Reddit then and tries to figure out how he can get rid of all this email, even though he is not successful then. He has to do it later down the road with BleachBit. And then the clincher. The clincher. Just last week, he is going online and trying to delete these Reddit posts. He is trying to cover up his tracks. He is trying to cover up the coverup.

So I guess the question, as someone was asking earlier, in light of all this, are you thinking about reopening the investigation?

Mr. COMEY. I may have misunderstood what you said during the question. I don't understand that to be talking about deleting the emails. I understand it to be talking about removing from the "from" line the actual email address. And, but anyhow, maybe I misunderstood you. But the answer——

Mr. JORDAN. Well, the same guy later BleachBit—took BleachBit and did delete emails.

Mr. COMEY. Sure. Yeah.

Mr. JORDAN. So my question is, the guy you gave immunity to, the guy who took the Fifth in front of us, is online trying to figure out how to remove email addresses, change evidence, later uses BleachBit, that guy who won't testify in front of Congress, and he has correspondence with Cheryl Mills, Cheryl Mills, a subject of the investigation, Cheryl Mills who also got some kind of immunity agreement, Cheryl Mills who walked out of certain—walked out for part of the questions during the interview with the FBI. Seems to me that is pretty compelling, and the timelineis pretty compelling as well.

Mr. COMEY. I am not following. Compelling of what? There is no doubt that Combetta was involved in deleting emails.

Mr. JORDAN. After conversations with Cheryl Mills.

Mr. COMEY. He had the "oh s-h-i-t" moment, as he told us. And that is why it was very important for us to interview this guy to find out who told you to do that, why did you do that. That is why he was given use immunity.

Mr. JORDAN. Did you know about the Reddit posts when you interviewed him?

Mr. COMEY. As I said earlier, I think we did. I think our investigators did. I am not positive as I sit here.

Mr. JORDAN. Mr. Chairman, I mean, the guy is trying to cover up the Reddit posts where he is trying to figure out how he can cover up the email addresses. And I find that compelling, particularly in light of the fact that just the day before, he is talking with Cheryl Mills, and the State Department is on notice that the Benghazi Committee wants these very documents. I find that compelling. But obviously the FBI didn't. And this is just one more, one

more, on that list of things that make this case highly unusual. I yield back.

Mr. GOODLATTE. The Director is permitted to respond if he chooses to do so.

Mr. COMEY. No, I don't think so.

Mr. GOODLATTE. The Chair recognizes the gentleman from Florida, Mr. Deutch, for 5 minutes.

Mr. DEUTCH. Thank you, Mr. Chairman. Director Comey, the FBI is tasked with very serious responsibilities. You are on the front lines trying to prevent terrorist attacks. You are investigating public corruption. And as I told your agents on a recent visit to your Miami field office, I am grateful to you and your agents, all of the women and men of the FBI, for your dedication to the—and commitment to the pursuit of justice. We are most grateful.

Now, one critical responsibility of the FBI is to investigate when American citizens violate Federal laws involving improper contacts with foreign governments. And, Director Comey, if an American national goes outside government channels to negotiate with a foreign government on behalf of the United States, that is a very serious crime, one that would violate the Logan Act, which, as you know, is the law that prohibits unauthorized people from negotiating with foreign governments in the place of the United States Government.

Director Comey, would the FBI take allegations of Logan Act violations seriously? Is that within your jurisdiction?

Mr. COMEY. Yes. It is within our jurisdiction.

Mr. DEUTCH. And if you had credible evidence that someone had violated the Logan Act, would the FBI investigate that alleged violation of law?

Mr. COMEY. I think we have done many Logan Act investigations over the years. And we certainly will in the future.

Mr. DEUTCH. And am I correct in assuming that you are familiar with publicly quoted comments from various intelligence sources that have said that Russia has targeted the United States with a legal State-directed hacking?

Mr. COMEY. I am aware of the published reports.

Mr. DEUTCH. If an American citizen, Director Comey, conducted meetings with a Russian individual who has been sanctioned by the United States about potential weakening of U.S. sanctions policy in violation of the Logan Act, would the FBI investigate?

Mr. COMEY. I don't think it is appropriate to answer that. That gets too close to confirming or denying whether we have an investigation. Seems too close to real life. So I am not going to comment.

Mr. DEUTCH. Okay. But there are—you have investigated Logan Act violations. It is something that is clearly within your jurisdiction.

I appreciate, Director Comey, your confirming that the FBI would treat these potential violations of law both seriously and urgently, because everything that I just outlined that you said the FBI would investigate has apparently happened already. Public reports suggest that the Logan Act may have been violated by Carter Page, one of the men Donald Trump signaled out as the top foreign policy adviser.

So now the campaign appears eager to revise Mr. Page's role given the attention rightly being given to his illicit negotiations

with a sanctioned Russian official. I read reports from Yahoo News from last week that law enforcement may already be looking into this issue. And I assume we all agree that the allegations are very serious. Russia, a Nation that hacks America, a Nation that continues to enable Assad, the Assad regime, to slaughter the Syrian people, a Nation that threatens and violates the territorial integrity of its neighbors and our European allies.

It is a dangerous violation of Federal law if Donald Trump's adviser, Carter Page, is engaging in freelance negotiations with Russia. And here is what we know. In March, Donald Trump named Carter Page as a foreign policy adviser. In July, Mr. Page traveled to Moscow to give a speech that was harshly critical of the United States. And during that trip, Mr. Page is reported to have also met with a Russian official named Igor Sechin, a member of Vladimir Putin's inner circle and the president of the petroleum company, Rosneft, who was sanctioned by the United States under executive order 13361, prohibiting him from traveling to the United States or conducting business with U.S. firms.

So Mr. Sechin has a clear and personal interest in lifting U.S. sanctions against him and other top Russian officials put in place by President Obama after Russia's military action in Ukraine. Now, if these two men met to discuss sanctions policy, or a lifting of sanctions under a potential Trump administration, this would be enormously concerning.

Just last week the press reported that U.S. intelligence officials are seeking to determine whether an American businessman identified by Donald Trump as one of his foreign policy advisers has opened up private communications with senior Russian officials, including talks about possible lifting of sanctions.

Mr. Comey, it is illegal if Trump's adviser met with Russians who have been sanctioned by the United States about lifting these sanctions. And I am grateful for your reassurances this morning that the FBI would investigate potential violations of the Logan Act by any individual who engages in unauthorized negotiations with a foreign government. I remind my colleagues that Donald Trump invited Russia to hack the United States. I remind my colleagues that Donald Trump suggested breaking America's longstanding commitment to our NATO allies and weakening U.S. sanctions against Russia. Is there a connection between these reckless and dangerous policy proposals, and the potential violation of the Logan Act by Donald Trump's Russia adviser?

Mr. Comey, we appreciate very much the FBI's vigilance in pursuing justice. And, Mr. Chairman, I yield back.

Mr. GOODLATTE. The gentleman is permitted to respond if you choose to.

So the Chair now recognizes the gentleman from Pennsylvania, Mr. Marino, for 5 minutes.

Mr. MARINO. Thank you, Chairman.

Thank you, Director, for being here. I think we have worked on a couple of cases together in our districts.

Mr. COMEY. Yes.

Mr. MARINO. Would you clarify something for me on act-of-production immunity? Does act-of-production immunity go beyond this scenario that I am going to state?

You ask for a computer from a witness. You give that witness act-of-production immunity that, in my interpretation, is that the agent who has that now in his or her hands, the witness is immune from the agent getting on the stand and saying that person—this is that person's computer because they gave it to me.

Does it go beyond that? Or was there additional immunity for Ms. Mills stating that anything on that computer cannot be used against her?

Mr. COMEY. As I recall it, Congressman, the act-of-production immunity for Ms. Mills was: You give us this computer; we will not use—we, the Justice Department—anything we find on the computer directly against you in connection with investigation or prosecution for mishandling of classified information. I think that is how they defined it.

Mr. MARINO. But that goes beyond act of production. Doesn't act of production simply state that I am the agent, I can't get on the stand and say that belongs to that individual because they simply gave it to me? It sounds like more, additional immunity was given that says: And what is on this we cannot hold against you.

Mr. COMEY. Well, I think of it as—I still think of it as an act-of-production immunity. From my experience, that is what I would characterize that agreement.

And I guess you are right, there could be a more limited form of act-of-production immunity which simply says: Your fact of giving us this object will not be used against you directly.

Mr. MARINO. Yeah.

Mr. COMEY. I would have to think through whether it can be parsed that way. But I think I take your point.

Mr. MARINO. So that is why I am saying additional immunity was given. And I don't think it was warranted at that point.

Let me ask you this. We have both empaneled many grand juries, investigative grand juries. Why not empanel an investigative grand jury whereby you have reasonable suspicion that a crime may have been committed, and then you have the ability to get warrants, subpoenas, get this information, subpoena witnesses before the grand jury under oath, and if they take the Fifth—if it is not the target, if they take the Fifth and say, "I am not going to talk to them," you can give them, whether it is use immunity—the AG can give them that, and you had that authority. And then transactional has to come from the judge.

And if they refuse to testify then, then you can say, fine, we are going to take you before a judge, hold you in contempt, and then you are going to sit in jail until you answer our questions.

Wouldn't that have been much simpler and more effective than the way this has gone about? I know that I have done it many, many times. And sometimes we find a situation where there isn't enough evidence, and most of the time we find there is enough evidence.

Mr. COMEY. Yeah. No, it is a reasonable question. And I don't want to talk about grand jury in connection with this case or any other case——

Mr. MARINO. That is why I posed it the way I did.

Mr. COMEY. Right. From our training, we know we are never supposed to talk about grand jury——

Mr. MARINO. Yes.

Mr. COMEY [continuing]. Publicly, but I can answer more generally than that.

Anytime you are talking about the prospect of subpoenaing a computer from a lawyer that involves the lawyer's practice of law, you know you are getting into a big megillah.

Mr. MARINO. Okay, please let me interrupt you.

Mr. COMEY. Sure.

Mr. MARINO. I understand that clearly. Why did you not decide to go to an investigative grand jury? It would have been cleaner, it would have been much simpler, and you would have had more authority to make these witnesses testify—not the target, but the witness testify.

That seems the way to go, Director. We have done it thousands of times. This just was too convoluted.

Mr. COMEY. Yeah, again, I need to steer clear of talking about grand jury use in a particular matter. In general, in my experience, you can often do things faster with informal agreements, especially when you are interacting with lawyers.

In this particular investigation, the investigative team really wanted to get access to the laptops that were used to sort these emails.

Mr. MARINO. Okay. When was——

Mr. COMEY. Those are lawyers' laptops. That is a very complicated thing. I think they were able to navigate it pretty well to get us access.

Mr. MARINO. The media says that Ms. Clinton repeated—the media says—41 times that I do not recall or I do not remember or variations of that. Is that a fact or——

Mr. COMEY. I don't know. I have not—I have not counted. I have read the 302, obviously.

Mr. MARINO. Wouldn't that have been taken into consideration?

Mr. COMEY. I am sorry?

Mr. MARINO. Wouldn't that selective memory be taken into consideration?

Mr. COMEY. Sure. The nature and quality of a subject's memory is always a factor.

Mr. MARINO. All right. My time has expired. Thank you, sir.

Mr. GOODLATTE. The Chair recognizes the gentlewoman from Washington State, Ms. DelBene, for 5 minutes.

Ms. DELBENE. Thank you, Mr. Chair.

And thank you, Director Comey, for spending all this time with us today.

In 2010, the White House set up the Vulnerabilities Equities Process, the VEP, and implemented it in 2014 so it could give the government a process for determining whether, how, and when to disclose vulnerabilities to technology companies so that they would be able to address those vulnerabilities and patch them.

And in a couple situations I know there was disclosure from the FBI. In April of this year, the FBI informed Apple of a security flaw in older versions of iOS and OS X, its first vulnerability disclosure to Apple under the Vulnerabilities Equities Process.

In May of this year, the FBI's Cyber Division warned the private sector about a fake USB device charger that can log the keystrokes

of certain wireless keyboards. And that was 15 months after the FBI discovered the vulnerability.

In the warning, the FBI stated, "If placed strategically in an office or other location where individuals might use wireless devices, a malicious cyber actor could potentially harvest personally identifiable information, intellectual property, trade secrets, passwords, or other sensitive information."

Other instances of the FBI using the VEP are scarce, and, indeed, there have been reports that it is rare for the FBI to use this process. And so I wanted to, you know, ask you why this is and what is your view of the process.

Mr. COMEY. Thank you for that question.

The process seems to me to be a reasonable process to, in a structured fashion, bring everybody who might have an optic on this in the government together to talk about how do we think about disclosing a particular vulnerability to the private sector against the equities that may be at stake in terms of national security in particular.

And so I think it makes sense to have such a process. The FBI participates in it when we come across a vulnerability that we know the vulnerability and it falls within the VEP's jurisdiction.

I don't know the particulars of the case. You said there was a 15-month delay in disclosing a particular vulnerability. I don't know enough to react to that. I probably wouldn't react in an open forum, in any event. But that is my overall reaction.

Ms. DELBENE. And does every vulnerability discovered go through this process, in terms of understanding whether or not you would disclose?

Mr. COMEY. I think there is a definition of what falls under the process. You have to know the vulnerability. So we have to have knowledge of, so what is it that allows it, the vulnerability, to be exploited. We didn't, for example, in the San Bernardino case. We bought access, but we didn't know the vulnerability, what was behind it.

But I forget the definition, as I sit here, of which vulnerabilities have to be considered.

Ms. DELBENE. And so is there another process that you might use that is different from the VEP when you are looking at——

Mr. COMEY. I don't know of one.

Ms. DELBENE [continuing]. Vulnerabilities and whether or not they——

Mr. COMEY. Before the VEP, I know our folks would routinely have—make disclosure to private entities, but I don't think there is a—I don't know of a process outside of VEP.

Ms. DELBENE. But you are not sure if in every situation the VEP is used whenever you discover a vulnerability?

Mr. COMEY. It sounds like a circular answer, but if it is a—and, obviously, I didn't read the VEP before coming here today. We could get smart on it very quickly and have somebody talk to you about it.

But if it falls under the definition of things that have to be discussed at the VEP, of course we do. I just can't remember what that definition is exactly.

Ms. DELBENE. Okay. I am trying to understand, if a vulnerability is discovered, if there is always a standard process that you would go through to understand whether or not that information would be disclosed, and if that process is the VEP. That is the——

Mr. COMEY. Yeah, that is a great question. I don't know the answer to that, whether there is a set of vulnerabilities that would fall outside of the VEP process. And if that is the case, how do we deal with it? I don't know, sitting here.

Ms. DELBENE. Thanks. If you have other feedback on that, I would appreciate it at another time.

Mr. COMEY. Okay.

Ms. DELBENE. In August, you said that stakeholders needed to take some time to collect information on the "going dark" issue and come back afterward to have an adult conversation. And I agree with you.

And so I wondered if you would agree that there is room for us to work together on ways to help law enforcement that don't include mandating a backdoor?

Mr. COMEY. Totally. I keep reading that I am an advocate of backdoors, I want to mandate backdoors. I am not. I have never advocated we have to have backdoors. We have to figure out how we can solve this problem together. And it has to be everybody who cares about it coming together to talk about it.

I don't know exactly what the answer is, frankly. I can see the problem, which I think is my job, is to tell people the tools you are counting on us to use to keep you safe, they are less and less effective. That is a big problem. But what to do and how to do it is a really complicated thing, and I think everybody has to participate.

Ms. DELBENE. Thank you. Thank you so much for that.

And I yield back, Mr. Chair.

Mr. GOODLATTE. The Chair thanks the gentlewoman, recognizes the gentleman from South Carolina, Mr. Gowdy, for 5 minutes.

Mr. GOWDY. Well, thank you, Mr. Chairman.

I want to start by acknowledging progress. I think it is important that we do so. This morning, we have had nine straight Democrats talk to the FBI about emails without asking for immunity. That is a record.

And I suspect the reason that they have not asked for immunity from Director Comey is they would say they have done nothing wrong. I find that interesting, because that is exactly what Heather Samuelson and Cheryl Mills' attorneys said. In fact, they said it just a few days ago, and I will quote it: "The FBI considered my clients to be witnesses and nothing more."

And then Ms. Mills and Ms. Samuelson's attorneys said this. I think this is the most interesting part. "The Justice Department assured us my clients did nothing wrong."

Well, Mr. Chairman, if you are assuring subjects or targets or witnesses, whatever you want to call them, that they have done nothing wrong, it does beg the question, what are you seeking and receiving immunity from? I mean, if you have done nothing wrong—laptops don't go to the Bureau of Prisons, Mr. Chairman; people do. So the immunity was not for the laptop. The immunity was for Cheryl Mills.

And if the Department of Justice says you have done nothing wrong, it does beg the question of why you are seeking or receiving immunity. And it could be, Mr. Chairman, it could be for the classified information that was the genesis of the investigation. It could be for the destruction of Federal records which came from that initial investigation. Or it could be both.

Mr. Comey, I want to ask you this: Did the Bureau interview everyone who originated an email that ultimately went to Secretary Clinton that contained classified information?

Mr. COMEY. I don't think so. Nearly everyone, but not everyone.

Mr. GOWDY. Well, you and I had a discussion the last time about intent. You and I see the statute differently. My opinion doesn't matter; yours does. You are the head of the Bureau. But, in my judgment, you read an element into the statute that does not appear on the face of the statute. And then we had a discussion about intent.

So why would you not interview the originator of the email to, number one, determine whether or not that originator had a conversation with the Secretary herself?

Mr. COMEY. There are a handful of people who the team decided it wasn't a smart use of resources to track down. One was a civilian in Japan, as I recall, who had forwarded something that somehow got classified as it went up. And the other were a group of low-level State Department people deployed around the world who had written things that ended up being classified.

Nearly everyone was interviewed, but there was a small group that the team decided it isn't worth the resources.

Mr. GOWDY. Well, to that extent, if you interviewed the overwhelming majority of the originators of the email, will you make those 302s available to Congress? Because I counted this morning 30-something 302s that we do not have.

Mr. COMEY. Okay. I will go back and check. My goal is maximum transparency, consistent with our obligations under the law. I will check on that.

Mr. GOWDY. Well—and I appreciate it, for this reason: Intent is awfully hard to prove. Very rarely do defendants announce ahead of time, "I intend to commit this crime on this date. Go ahead and check the code section. I am going to do it." That rarely happens.

So you have to prove it by circumstantial evidence, such as whether or not the person intended to set up an email system outside the State Department; such as whether or not the person knew or should have known that his or her job involved handling classified information; whether or not the person was truthful about the use of multiple devices; whether or not the person knew that a frequent emailer to her had been hacked; and whether she took any remedial steps after being put on notice that your email or someone who has been emailing with you prolifically had been hacked; and whether or not—and I think you would agree with this, Director.

False exculpatory statements are gold in a courtroom. I would rather have a false exculpatory statement than a confession. I would rather have someone lie about something and it be provable that that is a lie, such as that I neither sent nor received classified

information; such as that I turned over all of my work-related emails. All of that, to me, goes to the issue of intent.

So I got two more questions. Then I am going to be out of time.

For those who may have to prosecute these cases in the future, what would she have had to do to warrant your recommendation of a prosecution? If all of that was not enough—because all of that is what she did. If all of that is not enough, I mean, surely you cannot be arguing that you have to have an intent to harm the United States to be subject to this prosecution. I mean, that is treason. That is not a violation of this statute.

Mr. COMEY. No. I think we would have to be able to prove beyond a reasonable doubt a general awareness of the unlawfulness of your conduct, you knew you were doing something you shouldn't do. And then—obviously, that is on the face of the statute itself. Then you need to consider, so who else has been prosecuted and in what circumstances, because it is all about prosecutorial judgment.

But those two things would be the key questions: Can you prove that the person knew they were doing something they shouldn't do, a general criminal intent, general mens rea?

Mr. GOWDY. But the way to prove——

Mr. COMEY. And have you treated other people similarly?

Mr. GOWDY. The way to prove that is whether or not someone took steps to conceal or destroy what they had done. That is the best evidence you have that they knew it was wrong, that they lied about it.

Mr. COMEY. It is very good evidence. You always want to look at what the subject said about their conduct.

Mr. GOWDY. Well, there is a lot. There is a lot. If you saw her initial press conference, it all falls under the heading of "false, exculpatory statement."

I am out of time, Mr. Chairman, but the Director did—you started off by giving us examples of things the Bureau has done. And every one of us who has worked with the FBI, that is the FBI that I know. The one that went and saved that girl in North Carolina, that is the FBI that I know.

What concerns me, Director, is when you have five immunity agreements and no prosecution; when you are allowing witnesses who happen to be lawyers, who happen to be targets, to sit in on an interview. That is not the FBI that I used to work with.

So I have been really careful to not criticize you. In fact, I said it again this morning. They wanted to know was he gotten to, did somebody corrupt him. No, I just disagree with you. But it is really important to me that the FBI be respected. And you have to help us understand, because it looks to me like some things were done differently that I don't recall being done back when I used to work with them.

And, with that, I would yield back to the Chairman.

Mr. COMEY. Can I respond to that?

Mr. GOODLATTE. Yes, you may.

Mr. COMEY. I hope someday when this political craziness is over you will look back again on this, because this is the FBI you know and love. This was done by pros in the right way. That is the part I have no patience for. Sorry, sir.

Mr. GOODLATTE. The Chair recognizes the gentleman from Rhode Island, Mr. Cicilline, for 5 minutes.

Mr. CICILLINE. Thank you, Mr. Chairman.

And thank you, Director Comey, for your extraordinary service to our country. And please convey to the professionals at the FBI my gratitude for their exemplary service to the people of this country. And, particularly, I want to acknowledge the extraordinary, prompt, and effective response to the recent bombings in New Jersey and New York. It is just another example of this extraordinary agency and your extraordinary leadership.

Director Comey, many of us have expressed a concern about the growing incidence of gun violence in this country. And we expressed condolences and concern of following the recent mass shootings in Burlington, Washington, where five people lost their lives. We shared the same sentiments after incidents in Aurora and Newtown and Charleston. But as more Americans lose their lives to senseless gun violence, this Congress has been absolutely silent and inactive on this issue.

So I would like to really turn to you and your career in public service, both as a U.S. attorney and now as the FBI Director, with so much experience in dealing with the consequences of gun violence, and ask you to kind of share with us what you think might be some things Congress could do to help reduce gun violence in this country.

If I recall correctly, in 2013, during your confirmation hearings, you at least alluded to your support for universal background checks, bans on illegal trafficking of guns, assault weapons, and high-capacity magazines.

So I am wondering what you think would be effective for us to do to help reduce the incidence of gun violence in this country.

Mr. COMEY. Thank you, Congressman.

And you are exactly right. We just spend a lot of time thinking, investigating, and mourning the deaths in mass shootings. I think it is really important, though, the Bureau not be in the policy business, and be in the enforcement business. And so I am going to respectfully avoid your question, honestly, because I think we should not be in the place of—we should be a factual input to you. We should not be suggesting particular laws with respect to guns or anything else.

Mr. CICILLINE. So let me ask you, Director, about a very specific enforcement challenge.

I introduced a piece of legislation called the Unlawful Gun Buyer Alert Act to get at this issue of a default process. This is where people buy a gun, they purchase a gun, but they are not permitted to buy one under law, but the 3-day time period has elapsed. And, between 2010 and 2014, 15,729 sales to prohibited persons occurred. That means people who were not lawfully permitted to buy guns got a gun 15,000 times.

So my legislation would require that when that happens that local law enforcement is notified. They can then make a decision, should we go prosecute this person who is now in possession of a gun illegally, should we, you know, execute a search warrant, but they would at least be put on notice, in your community, a person

who should not have a gun bought one, so they can take some action.

Would that make sense in terms of your enforcement responsibilities?

Mr. COMEY. It might. I know ATF is notified in those circumstances——

Mr. CICILLINE. Which, of course, is a very different set of priorities for ATF; do they go and actually execute a warrant and charge somebody. But there are State and local prohibitions on that that could be acted upon. So would it also make sense to notify local law enforcement?

Mr. COMEY. It might. I would want to think through and ask ATF how do they think through the deconfliction issues that might arise there, but it is a reasonable think to look at.

Mr. CICILLINE. Now, the second—my next question, Director, is: There has been recent discussion about implementing stop-and-frisk in cities to address crime even at the national level. And, although the data shows that this disproportionately targets people of color—and just to give you some context, in 2011, when stop-and-frisk activity reached an all-time high in New York City, police stopped 685,000 people; 53 percent of those individuals were Black, 34 percent were Latino, and 9 percent were White. More than half were ages 14 to 24 years old. And of the 685,000 people that were stopped and frisked, 88 percent were neither arrested nor received any sort of citation.

Do you believe this stop-and-frisk policy is an effective tactic to address crime in our Nation's cities? What would a Federal implementation look like that Mr. Trump has called for? And how can Congress minimize racial profiling and discriminatory, ineffective techniques like stop-and-frisk and, instead, promote activities that build trust and confidence between the police and the community?

Mr. COMEY. I don't know what a Federal program would look like, because we are not in the policing business; we are investigative agencies at the Federal level. But the Terry stop—the "stop-and-frisk" is not a term we use in the Federal system—the Terry stop, which is the stop of an individual based on reasonable suspicion that they are engaged in a criminal activity, is a very important law enforcement tool.

To my mind, its effectiveness depends upon the conversation after the stop. When it is done well, someone is stopped, then they are told, "I stopped you because we have a report of a guy with a gray sweatshirt who matches you. That is why I stopped you, sir. I am sorry." Or, "I stopped you because I saw you do this behavior."

Because the danger is what is an effective law enforcement technique can become a source of estrangement for a community, and you need the help of the community. So it is an important tool when used right, and what makes the difference between right and wrong is what is the nature of the conversation with the person you stopped.

Mr. CICILLINE. Thank you. Very good.

Mr. Chairman, I would just like to finally associate myself with the remarks with Congressman Deutch regarding the Logan Act violations and the remarks of many of my colleagues regarding the attempts by the Russians to interfere with our democracy and elec-

toral process, and take great comfort in the Director's commitment to continue to understand this as an important responsibility of the agency to protect the integrity of our democracy.

And, with that, I yield back.

Mr. GOODLATTE. The Chair thanks the gentleman.

The Chair recognizes the gentleman from Utah, Mr. Chaffetz. And as I do, I want to thank him for making, as Chairman of the Oversight and Government Reform Committee, this very nice hearing room available to us while the Judiciary Committee hearing room is under renovation.

So the gentleman is recognized for 5 minutes, with my thanks.

Mr. CHAFFETZ. Well, and I appreciate the extra 5 minutes of questioning for doing so. So thank you very much.

Director, thank you for your accessibility. You have been very readily available, and we do appreciate that.

This investigation started because the inspector general found classified information in a nonsecure setting and the FBI went to a law firm and found this information. They seized at least one computer and at least one thumb drive.

Did you need an immunity agreement to get those?

Mr. COMEY. It was not—I don't think there was—in fact, I am certain there was no immunity agreement used in connection with that.

Mr. CHAFFETZ. So did it really take the FBI a full year to figure out that Cheryl Mills and Heather Samuelson also had computers with classified information on it?

Mr. COMEY. No. It took us to that point in the investigation to insist that we try to get them.

Mr. CHAFFETZ. Were you getting them because they had classified information or because there was some other information you wanted?

Mr. COMEY. No. We thought those were the tools, as we understood it, that had been used to sort the emails. And the investigative team very much wanted to understand, if they could, whether there was an electronic——

Mr. CHAFFETZ. Well——

Mr. COMEY [continuing]. Tale of how that had been done. Because the big, big issue was what did they delete, what did they keep, and——

Mr. CHAFFETZ. But why did you need an immunity agreement? Why didn't they just cooperate and hand them over? The law firm did, didn't they?

Mr. COMEY. Well, yes. That is a question really I can't answer. That is between a lawyer and her client and the Justice Department lawyers. For whatever reason, her lawyer thought it was in her interest to get an act-of-production immunity agreement with the Department of Justice.

Mr. CHAFFETZ. The FBI interviewed David Kendall's partner but did not interview David Kendall. Why didn't you interview David Kendall?

Mr. COMEY. I don't remember. I don't remember that decision.

Mr. CHAFFETZ. Going back to this Reddit post, this was put up on July 24 of 2014. You believe this to be associated with Mr. Combetta, correct?

Mr. COMEY. Yes, I think that is right.

Mr. CHAFFETZ. This is the one that Mr. Jordan put up about the need to strip out a "VIP's (VERY VIP) email address from a bunch of archived emails." He is referring to a Federal record, isn't he?

Mr. COMEY. I don't know exactly which records he is referring to.

Mr. CHAFFETZ. How is this not a conscious effort to alter Federal records? I mean, the proximity to the date is just stunning.

Mr. COMEY. I am sorry, what is the question?

Mr. CHAFFETZ. How is this not a conscious effort to alter a Federal record?

Mr. COMEY. Well, depending upon what the record was and exactly what he was trying to do and whether there would be disclosure to the people they were producing it to saying, we changed this for privacy purposes. I just don't know, sitting here.

Mr. CHAFFETZ. These are documents that were under subpoena. These Federal records were under subpoena. They were under a preservation order. Did Mr. Combetta destroy documents?

Mr. COMEY. I don't know whether that was true in July of 2014, they were under a subpoena.

Mr. CHAFFETZ. Did he ultimately destroy Federal records, Mr. Combetta?

Mr. COMEY. Oh. I have no reason to believe he destroyed Federal records.

Mr. CHAFFETZ. He used BleachBit, did he not?

Mr. COMEY. Yeah, the question is what was already produced before he used the BleachBit. The reason he wanted immunity was he had done the BleachBit business after there was publicity about the demand from Congress for the records. That is a potential——

Mr. CHAFFETZ. And not just publicity. There was a subpoena.

Mr. COMEY. Right. That is potentially——

Mr. CHAFFETZ. And there was communication from Cheryl Mills that there was a preservation order, correct?

Mr. COMEY. Yes.

Mr. CHAFFETZ. And he did indeed use BleachBit on these records.

Mr. COMEY. Sure. That is why the guy wouldn't talk to us without immunity.

Mr. CHAFFETZ. And so when he got immunity, what did you learn?

Mr. COMEY. We learned that no one had directed him to do that, that he had done it——

Mr. CHAFFETZ. You really think that he just did this by himself?

Mr. COMEY. I think his account—again, I never affirmatively believe anybody except my wife. But the question is do I have evidence to disbelieve him, and I don't. His account is credible, that he was told to do it in 2014, screwed up and didn't do it, panicked when he realized he hadn't, and then raced back in and did it after Congress asked for the records and The New York Times wrote about them. That was his, "Oh, s-h-i-t," moment.

Mr. CHAFFETZ. But he——

Mr. COMEY. And that was credible. Again, I don't believe people, but we did not have evidence to disbelieve that and establish someone told him to do that—no email, no phone call, nothing.

The hope was, if he had been told to do that, that would be a great piece of evidence; if we give him immunity, maybe he will tell

us so-and-so told me to, so-and-so asked me to, and then we are working up the chain.

Mr. CHAFFETZ. But he did indeed destroy Federal records, and he was told at some point to do this, correct? Who told him to do that initially? When he was supposed to do it in December and he didn't do it, who told him to do that?

Mr. COMEY. One of Secretary Clinton's staff members. I mean, I can't remember, sitting here. We know that. One of her lawyers; it might have been Cheryl Mills. Someone on the team said, "We don't need those emails anymore. Get rid of the archived file."

Mr. CHAFFETZ. This is what is unbelievable about this, because there is classified information, there is—there are Federal records that were indeed destroyed. And that is just the fact pattern.

Here is the other thing that I would draw to your attention that is new. September 15 of this year, I issued a subpoena from the Oversight and Government Reform Committee on these Reddit posts. Four days later, they were destroyed—or taken down. They were deleted. I would hope the FBI would take that into consideration. Again, we are trying, under a properly issued subpoena, to get to this information.

Let's go to Heather Mills real quick. How does the—in the 2016 interview with Cheryl Mills, she says, quote, Mills did not learn—in the interview report that you—the interview summary from the FBI—Mills did not learn Clinton use using a private email server until after Clinton's tenure.

Also, you have this interview with Mr. Pagliano, who said he approached—quote, Pagliano then approached Cheryl Mills in her office and relayed a State Department employee's concerns regarding Federal records retention and the use of a private server. Pagliano remembers Mills replying that former Secretaries of State had done similar things, to include Colin Powell.

It goes, then, on to a page 10, and this is what I don't understand. The FBI writes, Clinton's immediate aides, to include Mills, Abedin, Sullivan, and a redacted name, told the FBI they were unaware of the existence of a private server until after Clinton's tenure at State or when it become public knowledge.

But if you look back at the email from Heather Mills, if you go back to 2010—this is to Justin Cooper, okay? Mills to Cooper, who does not—he works for Clinton; he doesn't work for the State Department. "FYI, HRC email coming back. Is server okay?" Cooper writes back, "You are funny. We are on the same server."

She knew there was a server. When there is a problem with Hillary Rodham Clinton's emails, what did they do? She called the person who has no background in this, who is not a State Department employee, no security clearance, and then tells the FBI, "Well, I never knew about that," but there is direct evidence that contradicts this.

How do you come to that conclusion and write that in the summary statement, that she had no knowledge of this?

Mr. COMEY. That is a question?

Mr. CHAFFETZ. Yes.

Mr. GOODLATTE. The time of the gentleman has expired, but the Director will answer the question.

Mr. COMEY. I don't remember exactly, sitting here. All—having done many investigations myself, there is always conflicting recollections of fact, some of which are central, some of which are peripheral. I don't remember, sitting here, about that one.

Mr. GOODLATTE. The Chair recognizes the gentleman from Florida, Mr. DeSantis, for 5 minutes.

Mr. DESANTIS. Director Comey, violent crime is up in this country, isn't it?

Mr. COMEY. Our UCR stats we just released show a rise in homicide and other violent crime in 2015.

Mr. DESANTIS. Violent crime, I think, was about 4 percent, but the homicides were up 10 percent. Is that correct?

Mr. COMEY. Ten-point-eight percent.

Mr. DESANTIS. And that is a pretty startling, concerning increase. Do you agree?

Mr. COMEY. Yes. It is concerning.

Mr. DESANTIS. Now, I don't know if you have data in 2016, but is your sense that 2016 is going to look closer to 2015, is there any indication that the rate is going to go back down?

Mr. COMEY. No. We continue to see spikes in some big cities in a way we can't quite make sense of. There is no doubt that some 15 to 30 cities are continuing to experience a spike. Whether that will drive the whole number up, I don't know.

Mr. DESANTIS. Now, the FBI has now assumed control of the Dahir Adan, the Minnesota stabbing terrorist investigation. Is that confirmed, that that was a terrorist attack, at this point?

Mr. COMEY. We are still working on it. It does look like, at least in part, he was motivated by some sort of inspiration from radical Islamic groups. Which groups and how we are not sure of yet.

Mr. DESANTIS. But he was praising Allah, was asking at least one of the potential victims whether they were Muslim, and I know ISIS did take responsibility for it, correct?

Mr. COMEY. They claim responsibility. That isn't dispositive for us, because they will claim responsibility for any savagery they can get their name on. But we are going through his entire electronic record and history of all of his associations to try and understand that.

Mr. DESANTIS. Now, there was a report from the House Homeland Security last year that said that Minnesota was actually the number-one source for ISIS fighters in the United States. One, do you acknowledge that that—or do you agree that that is true? And, if so, why is Minnesota churning out so many jihadists?

Mr. COMEY. I don't know for sure whether that is true, but it sounds about right. We have very few ISIL fighters from the United States, even over the last 2 years.

There have been a number of Somali-American-heritage young men who have gone to fight with Al Shabaab in Somalia and with ISIL. I suspect the reason is that is one of the few areas in the United States where we have a large concentration that is susceptible to that recruiting.

The great thing about America is everybody is kind of dispersed. That is one of the areas where there is an immigrant Muslim community that seems to be susceptible for some reason—in small

measure. Again, we are talk about eight people, I think the number is. But that is my reaction to that.

Mr. DESANTIS. Well, what is the FBI doing to deal with the problem? You have an insular community that may make this problem more significant, so how is the FBI combating that?

Mr. COMEY. Oh, in a bunch of difference ways. With lots of partners to make sure we know the folks in the—especially the Somali-American community in Minneapolis. The U.S. attorney there has done a great job of——

Mr. DESANTIS. Have they been helpful with the FBI?

Mr. COMEY. Very. Very. Because they don't want their sons or daughters involved in this craziness any more than anybody else does.

Mr. DESANTIS. Now, with Paul Combetta, I am just trying to figure out what happened here. He never said that he remembered anything from that March 25 phone conversation with the Clinton people. Of course, that was days before he BleachBit'd the emails. He never said he had any factual knowledge of anything that happened on that call. Is that his basic statement? As I read the 302s, he didn't really provide any information.

Mr. COMEY. I can't remember for sure. It would be in the 302. You have probably seen it more recently than I have.

Mr. DESANTIS. Well, I saw one 302 said that he pled the Fifth. Obviously, he was given immunity. Another said that there was an invocation of attorney-client privilege at one time in one of the other summaries.

So I am just trying to figure out, you know, what happened with Combetta, why was he not able to provide information. He had immunity. This was something that was much more fresh in his mind than previous conversations with Clinton people would have been. And yet you said he was credible. To me, feigning ignorance, that is not credible given the timeline, where you have The New York Times saying that this server existed, the House immediately sends a subpoena, he has this conversation, and then, lo and behold, a few days later, all the emails are BleachBit'd.

Mr. COMEY. Well, he told us that, with immunity, that no one directed him to do it, instructed him to do it. We developed no evidence to contradict that.

Again, we are never in the business of believing people; the question is always what evidence do we have that establishes disbelief. We don't have any contrary evidence. His account is uncontradicted by hard facts.

Mr. DESANTIS. Well, it is—he is in a situation where he has—these things are now under a subpoena, and he has conversations with people who they potentially could implicate, and then he takes this action. So I guess the question is, is it more reasonable to think that he just would have said, "Oh, you know what? I just need to all of a sudden BleachBit this stuff," without any direction at all? I just find that to be something that is difficult to square.

Let me ask you this. In September, you sent a memo to your employees at the FBI basically defending the way the Bureau handled this investigation. Why did you send that?

Mr. COMEY. It was about how we were doing transparency, because there was all kinds of business about whether we were trying

to hide stuff by putting it out on a Friday, and I wanted to equip our workforce with transparency about how we were doing our productions to Congress so they could answer questions from their family and friends.

Mr. DESANTIS. But you——

Mr. COMEY. I want them to know we are conducting ourselves the way they would want us to.

Mr. DESANTIS. And you have—because you mentioned former agents and people in the community. I mean, this has provoked some controversy within the ranks of current and former agents?

Mr. COMEY. Not within the FBI. Again, who knows what people don't tell the Director, but I should have—I should have asked Mr. Gohmert.

If there are agents in the FBI who are concerned or confused about this, please contact me. We will get you the transparency you need to see that your brothers and sisters did this the way you would want them to.

Mr. DESANTIS. All right. I am out of time, but I will say just, when I was in the military—you had said no one would be prosecuted. I mean, maybe that was just for civilian, but I can tell you that people, if you had compromised Top Secret information, there would have been a court marshal in your future.

And I yield back.

Mr. GOODLATTE. Would the Director care to respond to that?

Mr. COMEY. No. Fine.

Mr. GOODLATTE. That is a direct comparison to the finding of yourself, that, as you stated in your news conference, that no prosecutor would prosecute somebody under similar circumstances.

Mr. COMEY. I understood Mr. DeSantis to be expressing a personal opinion. I accept that at face value. I just haven't seen the cases that show me on the public record that that is true. But I accept his good faith.

Mr. GOODLATTE. The Chair recognizes the gentleman from Texas, Mr. Ratcliffe, for 5 minutes.

Mr. RATCLIFFE. Thank you, Mr. Chairman.

Director, did you make the decision not to recommend criminal charges relating to classified information before or after Hillary Clinton was interviewed by the FBI on July the 2nd?

Mr. COMEY. After.

Mr. RATCLIFFE. Okay. Then I am going to need your help in trying to understand how that is possible. I think there are a lot of prosecutors or former prosecutors that are shaking our heads at how that could be the case.

Because if there was ever any real possibility that Hillary Clinton might be charged for something that she admitted to on July the 2nd, why would two of the central witnesses in a potential prosecution against her be allowed to sit in the same room to hear the testimony?

And I have heard your earlier answers to that. You said that, well, it was because the interview was voluntary and they were her lawyers. But I think you are skirting the real issue there, Director.

First of all, the fact that it was voluntary, it didn't have to be, right? You could have empaneled an investigative grand jury, she could have been subpoenaed. And I know you have said that you

can't comment on that, and I don't really care about the decision about whether or not there should have been a grand jury here, but since you didn't have one, it goes to the issue at hand about whether or not this interview should have ever taken place.

With due respect to the answers that you have given, the FBI and the Department of Justice absolutely control whether or not an interview is going to take place with other witnesses in the room. Because the simple truth is that under the circumstances as you have described those interviews never take place. If there was ever any possibility that something Hillary Clinton might have said on July 2 could have possibly resulted in criminal charges that might possibly have resulted in a trial against her relating to this classified information, well, then, to use your words, Director, I don't think that there is any reasonable prosecutor out there who would have allowed two immunized witnesses central to the prosecution proving the case against her to sit in the room with the interview, the FBI interview, of the subject of that investigation.

And if I heard you earlier today, in your long career, I heard you say that you have never had that circumstance. Is that—did I hear you correctly?

Mr. COMEY. That is correct, but——

Mr. RATCLIFFE. Okay. And I never have either, and I have never met a prosecutor that has ever had that.

So, to me, the only way that an interview takes place with the two central witnesses and the subject of the investigation is if the decision has already been made that all three people in that room are not going to be charged.

Mr. COMEY. Can I respond?

Mr. RATCLIFFE. Yes. Please.

Mr. COMEY. I know in our political lives sometimes people casually accuse each other of being dishonest, but if colleagues of ours believe I am lying about when I made this decision, please urge them to contact me privately so we can have a conversation about this.

All I can do is to tell you again, the decision was made after that, because I didn't know what was going to happen in that interview. She would maybe lie during the interview in a way we could prove—let me finish.

I would also urge you to tell me what tools we have as prosecutors and investigators to kick out of an interview someone that the subject says is their lawyer.

Mr. RATCLIFFE. That is not my point. The interview never should have taken place if you were going to allow the central witnesses that you needed to prove the case to sit there and listen to the testimony that the subject was going to give. It never happens. It has never happened to you, and it has never happened to me or any other prosecutor that I have met.

And you know you have defended the people that were involved in this of being great, but if it has never happened, I wonder why this is a case of first precedent with respect to that practice that you and I have never seen in our careers.

Mr. COMEY. You and I don't control the universe of what has happened. I suspect it is very unusual.

A key fact, though, that maybe is leading to some confusion here is we had already concluded we didn't have a prosecutable case against Heather Samuelson or Cheryl Mills at that point. If they were targets of our investigation, maybe we would have canceled the interview, but, frankly, our focus was on the subject. The subject at that point was Hillary Clinton.

Mr. RATCLIFFE. All right. Let me move on.

According to the FBI's own documents, Paul Combetta, in his first interview on February the 18th told FBI agents that he had no knowledge about the preservation order for the Clinton emails, correct?

Mr. COMEY. I don't know the dates of that, but I am sure it is in the 302.

Mr. RATCLIFFE. Okay.

But then 2½ months later, on May the 3rd, his second interview, he made a 180-degree turn, and he admitted that, in fact, he was aware of the preservation order and he was aware of the fact that that meant that he shouldn't disturb the Clinton emails, correct?

Mr. COMEY. Yep.

Mr. RATCLIFFE. Okay. Well, then I need your help again here, because when I was at the Department of Justice, your reward for lying to Federal agents was an 18 U.S.C. 1001 charge or potential obstruction-of-justice charge; it wasn't immunity.

Mr. COMEY. Depends on where you are trying to go with the investigation. If it is a low-level guy and you are trying move up in the chain, you might think about it differently.

Mr. RATCLIFFE. But he lied to an FBI agent. You don't think that is important?

Mr. COMEY. Oh, it is very important. It happens all the time, unfortunately. It is very, very important. Sometimes you prosecute that person and end their cooperation; sometimes you try and sign them up.

Mr. RATCLIFFE. But if they lie to an FBI agent after they are given immunity, they have violated the terms of their immunity agreement.

Mr. COMEY. Oh, sure, after, after the agreement.

Mr. RATCLIFFE. And so that is my point. He shouldn't have immunity anymore.

Mr. COMEY. Oh, I am sorry. I may have misunderstood you. He lied to us before he came clean under the immunity agreement and admitted that he had deleted the emails.

Mr. RATCLIFFE. No, not according to the FBI's documents. He had the immunity agreement in December of 2015. These interviews took place in February and March and May of this year, 2016.

Mr. COMEY. Combetta?

Mr. RATCLIFFE. Combetta.

Mr. COMEY. Okay. Then I am—then I am confused and misremembering, but I don't think that is right.

Mr. RATCLIFFE. Okay. Well, let me—my time has expired, but I have one last question, and I think that it is important.

At this point, based on everything, do you think that any laws were broken by Hillary Clinton or her lawyers?

Mr. COMEY. Do I think that any laws were broken?

Mr. RATCLIFFE. Yeah.

Mr. COMEY. I don't think there is evidence to establish that.

Mr. RATCLIFFE. Okay. Well, I think you are making my point when you say there is no evidence to establish that. Maybe not in the way she handled classified information, but with respect to obstruction of justice—and you have a pen here—I just want to make the sure the record is clear about the evidence that you didn't have, that you can't use to prove. So this comes from the FBI's own report.

It says that the FBI didn't have the Clintons' personal Apple server used for Hillary Clinton work emails. That was never located, so the FBI could never examine it. An Apple MacBook laptop and thumb drive that contained Hillary Clinton's email archives was lost, so the FBI never examined that. Two BlackBerry devices provided to the FBI didn't have SIM cards or SD data cards. Thirteen Hillary Clinton personal mobile devices were lost, discarded, or destroyed with a hammer, so the FBI clearly didn't examine those. Various server backups were deleted over time, so the FBI didn't examine that.

After the State Department and my colleague Mr. Gowdy here notified Ms. Clinton that her records would be sought by the Benghazi Committee, copies of her emails on the laptops of both of her lawyers, Cheryl Mills and Heather Samuelson, were wiped clean with BleachBit, so the FBI didn't review that. After those emails were subpoenaed, Hillary Clinton's email archive was also permanently deleted from the Platte River Network with BleachBit, so the FBI didn't review that. And also after the subpoena, backups of the Platte River server were manually deleted.

Now, Director, hopefully that list is substantially accurate, because it comes from your own documents. My question to you is this: Any one of those in that very, very long list, to me, says obstruction of justice. Collectively, they scream obstruction of justice. And to ignore them, I think, really allows not just reasonable prosecutors but reasonable people to believe that maybe the decision on this was made a long time ago not to prosecute Hillary Clinton.

And, with that, I yield back.

Mr. GOODLATTE. Director, do you care to respond?

Mr. COMEY. Just very briefly. To ignore that which we don't have—we are in a fact-based world, so we make evaluations based on the evidence we are able to gather using the tools that we have. So it is hard for me to react to these things that you don't have. So that is my—that is my reaction to it.

Mr. GOODLATTE. The Chair recognizes the gentleman from Texas, Mr. Farenthold, for 5 minutes.

Mr. FARENTHOLD. Thank you very much.

Director Comey, thank you for being here. I know this is—there are a lot of things you would probably much rather be doing than sitting on the hot seat, so to speak.

And here is where I am coming from on this. You have been asked a lot of questions today about the Clinton investigation. And what I am hearing from folks back in Texas—and I am just going to take a big-picture view of this—is this stuff just simply doesn't pass the smell test on a lot of areas.

You just had my colleague from Texas, Mr. Ratcliffe, list a long list of things that you all didn't have in the investigation. You have been asked earlier today, well, you know, would you reopen the investigation, what would it take to get you to reopen the investigation.

We have had five people given immunity, which, basically, we got nothing, when, you know, perhaps a plea agreement or something else might have worked. You have your interpretation in your previous testimony before Congress that section 793(f) required intent, when, in fact, the standard is gross negligence.

And it is just a long list of things that just have people scratching their heads, going, "If this were to happen to me, I would be in a world of hurt, probably in jail." And how do you respond to people who are saying that this is not how an average American would be treated, this is only how Hillary Clinton would be treated?

Mr. COMEY. Yeah. Look, I have heard that a lot, and my response is: Demand—when people tell you that, that others have been treated differently, demand from a trustworthy source the details of those cases. Because I am a very aggressive investigator, I was a very aggressive prosecutor. I have gone back through 40 years of cases, and I am telling you under oath that to prosecute on these facts would be a double standard, because Jane and Joe Smith would not be prosecuted on these facts.

Now, you would be in trouble. That is the other thing I have had to explain to the FBI workforce. You use an unclassified email system to do our business, and in the course of doing our business—talk about classified topics—you will be in big trouble at the FBI, I am highly confident of that. I am also highly confident, in fact certain, you would not be prosecuted. That is what folks tend to lump together.

So I care deeply about what people think about the justice system and that it not have two standards. It does not, and this demonstrates it.

Mr. FARENTHOLD. But you look at General Petraeus and his handling of classified information. You look at—and I will go back to what you are saying——

Mr. COMEY. But when you look at it, demand to know the facts. I don't want to dump on General Petraeus because the case is over, but I would be happy to go through how very different that circumstance is than this circumstance.

Mr. FARENTHOLD. And you talk about you tell your FBI agents, if you do what we are investigating here with material from the FBI, you would be in a world of trouble. I would assume that could potentially be fired.

Is Hillary Clinton in—she didn't get in any trouble at the State Department. The only trouble she has got now is trying to explain it to the American people.

Mr. COMEY. Right. She is not a government employee, so the normal range of discipline that would be applied to FBI employees if they did do something similar doesn't apply. And I gather—I think that is some of the reason for people's confusion, lumping these two together, and their frustration, but it is what it is.

And all I can tell people is: Demand the facts. When people tell you, oh, so-and-so has been treated differently, demand the facts on that.

Mr. FARENTHOLD. All right. Let's just do a hypothetical. Let's say somebody here in Congress were to email my personal email some classified information, and I am on my—I get it on my phone. It comes to my cell phone too. My personal email comes to my personal cell phone. I look at it and go, "Wow, that probably shouldn't be on there," and don't do anything.

I mean, to me, that is being grossly negligent with classified information, and I should—and that is a violation of 793(f). And that is exactly what Hillary Clinton did, I think.

I mean, at what point do you get to intent? The classified information was on an unsecured server, you knew it was there, and you didn't do anything about it. To me, that is gross negligence, period. I would think I would be prosecuted for that.

Mr. COMEY. Yeah. I am confident that you wouldn't. But we just have to agree to disagree.

Mr. FARENTHOLD. All right. If I ever get in trouble——

Mr. COMEY. Don't do it.

Mr. FARENTHOLD.—I am going to save this clip.

Mr. COMEY. Don't do it. I guess I can't control Congress. If you work for us, don't do it.

Mr. FARENTHOLD. No, I have absolutely no intention of doing it.

So, again, I just want to say, don't get frustrated when we continue to ask these questions. Because we are not badgering you because we want to badger you; we are talking to you because the American people are upset about this and don't think it was handled appropriately. And that is the basis, at least, of my questioning. And I thank you for appearing here.

Mr. COMEY. And I totally understand that, that I think there are lots of questions people have, which is why I have worked so hard to try and be transparent. There has never been this kind of transparency in a criminal case ever, but because I understand the questions and the importance of it, I have tried.

But I hope people will separate two things: questions about facts and judgment, from questions and accusations about integrity. As I said before, you can call us wrong, you can call me a fool. You cannot call us weasels. Okay? That is just not fair.

And I hope we haven't gotten to a place in American public life where everything has to be torn down on an integrity basis just to disagree. You can disagree with this. There is just not a fair basis for saying that we did it in any way that wasn't honest and independent. That is when I get a little worked up. Sorry.

Mr. FARENTHOLD. I am out of time. I——

Mr. GOODLATTE. The Chair recognizes the gentleman from Michigan, Mr. Bishop, for 5 minutes.

Mr. BISHOP. Thank you.

Thank you, Director Comey, and I appreciate your testimony here today.

Just in followup to all this discussion regarding the Clinton investigation, specifically with regard to the interview of Secretary Clinton, I am holding in my hand a memorandum from Deputy Attorney General James Cole. It is dated May 12, 2014. This memo-

randum was issued to you and others on the policy concerning electronic recording of statements.

Are you familiar with this memorandum?

Mr. COMEY. Yes. Uh-huh.

Mr. BISHOP. The policy establishes a presumption that the FBI will electronically record statements made by individuals in their custody. Now, I know that Secretary Clinton was not technically in custody, but the policy also encourages agents and prosecutors to consider electronic recording in investigative or other circumstances where that presumption does not exist.

The policy also encourages agents and prosecutors to consult with each other in such circumstances. And given the magnitude of what we have been talking about today and the huge public interest and demand for information with regard to the public trust, I think this is specifically important to this discussion.

Now, you are aware of this policy, correct?

Mr. COMEY. Right, that applies to people that are in handcuffs.

Mr. BISHOP. But not—it also applies to—the policy also encourages agents and prosecutors to consider electronic recording in investigative matter—in other matters where that presumption does not exist, does——

Mr. COMEY. Sure.

Mr. BISHOP [continuing]. It not?

Mr. COMEY. The FBI doesn't do it, but, sure, I understand that they encouraged us to talk about it.

Mr. BISHOP. So the agents, then, did not consider to conduct the interview in a recorded situation then?

Mr. COMEY. We do not record noncustodial interviews. Now, maybe someday folks will urge us to change that policy, but we don't. And we sure wouldn't want to change it in one particular case.

Mr. BISHOP. Well, that is the policy. I am just reading the policy that is issued by the Deputy Attorney General, James Cole, that—it was to you and to others in the Department of Justice—that establishes the policy. So if you don't do it, I assume that you are doing it against the policy of the Department of Justice.

Mr. COMEY. No. That policy only governs custodial interrogations, so people who have been locked up. We do not—and it is not inconsistent with Department of Justice policy—record noncustodial, that is, voluntary interviews, where someone is not in our custody.

Mr. BISHOP. Well, I am reading this differently then, because it does say that there is an exception, that it is within your discretion to record such——

Mr. COMEY. Well, sure, you could. And I don't know, maybe some other Federal investigative agencies do. The FBI's practice is we do not record noncustodial interviews.

Mr. BISHOP. Okay. Thank you, Director.

I want to pivot, if I can, and build off Representative DeSantis' questions with regard to the refugees attempting to enter the United States and specifically with regard to Syrian refugees.

I am wondering if you can tell me—we have talked about this process and the fact that we do not have a process in place that we can rely upon. You have indicated before when you testified and

I asked the question that we just simply don't have enough information to ensure that we have the information that we need to ensure that these people are not a threat to our country.

Can you expand upon that now after a year? Can you tell me whether or not we have more information, more capabilities to vet these refugees?

And I say this because, in my district in Michigan, in this fiscal year, Michigan has taken the fourth most refugees of all States, 4,178. And we are the—we have taken the third most for Iraq, the second most from Syria. Michigan has absorbed an enormous number of refugees, and I think you can understand our concern with regard to the fact that we don't have information necessary to identify whether or not they are a threat.

Can you assuage my concern and the concerns of my constituents that we have a system in place that we can vet these individuals and they don't pose a threat to our country?

Mr. COMEY. I can assuage in part and restate my concern in part.

Our process inside the United States Government has gotten much better at making sure we touch all possible sources of information about a refugee. The interview process has gotten more robust. So we have gotten our act together in that respect.

The challenge remains, especially with respect to folks coming from Syria, we are unlikely to have anything in our holdings. That is, with people coming from Iraq, the United States Government was there for a very long period of time, we had biometrics, we had source information. We are unlikely to have that kind of picture about someone coming from Syria, and that is the piece I just wanted folks to be aware of.

Mr. BISHOP. Has anything changed in your vetting process? Have you updated it? Do you have any concerns with an increased terrorist activity in the last 6 months, including New York, New Jersey, and Minneapolis.

Has anything changed in the vetting process? Can you be confident that foreign fighters or other refugees entering the country are not planning future attacks on our country?

Mr. COMEY. Well, as I said, over the last year, since I was last before you, the vetting process has gotten more effective in the ways I described.

I am in the business where I can't ever say there is no risk associated with someone. So we wake up every day, in the FBI, worrying about who might have gotten through in any form or fashion into the United States or who might be getting inspired while they are here. So I can't ever give a blanket assurance.

Mr. BISHOP. Director, I respect your opinion. And this is not a policy question. I am asking you based on your personal opinion as a law enforcement officer that we rely upon to keep this country safe. Is there anything that you would do to ensure, as you said, that our country is safe with regard to this refugee process?

Mr. COMEY. Anything that I would do?

Mr. BISHOP. Anything that you would do, any recommendations you have for Congress, for this country, that would ensure our safety?

Mr. COMEY. Yeah, I shy away from assurances of safety, given the nature of the threats we face. I do think that there may be opportunities to do more in the social media space, with refugees in particular. And I talked to Jeh Johnson yesterday about it. I know this is a work in progress.

So much of people's lives, even if we don't have it in our holdings, may be in digital dust that they have left in different places. Are we harvesting that dust on people who want to come into this country in the best way? And I think there may be ground for improvement there.

Mr. BISHOP. Thank you, Director.

And I will yield back. But, Mr. Chairman, I would ask unanimous consent to enter the memorandum that I referenced earlier dated May 12, 2014, into the record.

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

[The information referred to follows:]

U.S. Department of Justice

Executive Office for United States Attorneys

Office of the Director

Room 2261, RFK Main Justice Building
950 Pennsylvania Avenue, NW
Washington, DC 20530

(202)

MEMORANDUM: Sent via Electronic Mail

DATE: MAY 1 2 2014

TO: ALL UNITED STATES ATTORNEYS
ALL FIRST ASSISTANT UNITED STATES ATTORNEYS
ALL CRIMINAL CHIEFS
ALL APPELLATE CHIEFS

FROM: Monty Wilkinson
Director

SUBJECT: New Department Policy Concerning Electronic Recording of Statements

CONTACT: Andrew Goldsmith
National Criminal Discovery Coordinator
Office of the Deputy Attorney General
Phone: (202) 514 -5705
Email: Andrew.Goldsmith@usdoj.gov

David L. Smith
Counsel for Legal Initiatives
Phone: (202) 252-1326
Email: David.L.Smith2@usdoj.gov

Attached is a Memorandum from the Deputy Attorney General, outlining a new Department of Justice policy with respect to the electronic recording of statements. The policy establishes a presumption in favor of electronically recording custodial interviews, with certain exceptions, and encourages agents and prosecutors to consider taping outside of custodial interrogations. The policy will go into effect on Friday, July 11, 2014. Please distribute the Deputy Attorney General's Memorandum to all prosecutors in your office.

This policy resulted from the collaborative and lengthy efforts of a working group comprised of several United States Attorneys and representatives from the Office of the Deputy Attorney General, EOUSA, the Criminal Division, and the National Security Division, as well as the General Counsel, or their representatives, from the Federal Bureau of Investigation, the Bureau of Alcohol, Tobacco, Firearms and Explosives, the Drug Enforcement Administration, and the United States Marshals Service.

Earlier today during a conference call with all United States Attorneys, the Deputy Attorney General discussed the background of the policy and explained its basic terms. The policy will be the subject of training provided by the Office of Legal Education, including 2014 LearnDOJ training videos.

Attachment

cc: All United States Attorneys' Secretaries

U. S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

May 12, 2014

MEMORANDUM FOR THE ASSOCIATE ATTORNEY GENERAL AND
THE ASSISTANT ATTORNEYS GENERAL FOR THE
CRIMINAL DIVISION
NATIONAL SECURITY DIVISION
CIVIL RIGHTS DIVISION
ANTITRUST DIVISION
ENVIRONMENT AND NATURAL RESOURCES DIVISION
TAX DIVISION
CIVIL DIVISION

DIRECTOR, FEDERAL BUREAU OF INVESTIGATION
ADMINISTRATOR, DRUG ENFORCEMENT ADMINISTRATION
DIRECTOR, UNITED STATES MARSHALS SERVICE
DIRECTOR, BUREAU OF ALCOHOL, TOBACCO,
FIREARMS AND EXPLOSIVES
DIRECTOR, BUREAU OF PRISONS

ALL UNITED STATES ATTORNEYS

FROM: James M. Cole
Deputy Attorney General

SUBJECT: Policy Concerning Electronic Recording of Statements

This policy establishes a presumption that the Federal Bureau of Investigation (FBI), the Drug Enforcement Administration (DEA), the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), and the United States Marshals Service (USMS) will electronically record statements made by individuals in their custody in the circumstances set forth below.

This policy also encourages agents and prosecutors to consider electronic recording in investigative or other circumstances where the presumption does not apply. The policy encourages agents and prosecutors to consult with each other in such circumstances.

This policy is solely for internal Department of Justice guidance. It is not intended to, does not, and may not be relied upon to create any rights or benefits, substantive or procedural,

enforceable at law or in equity in any matter, civil or criminal, by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person, nor does it place any limitation on otherwise lawful investigative and litigative prerogatives of the Department of Justice.

I. **Presumption of Recording.** There is a presumption that the custodial statement of an individual in a place of detention with suitable recording equipment, following arrest but prior to initial appearance, will be electronically recorded, subject to the exceptions defined below. Such custodial interviews will be recorded without the need for supervisory approval.

a. Electronic recording. This policy strongly encourages the use of video recording to satisfy the presumption. When video recording equipment considered suitable under agency policy is not available, audio recording may be utilized.

b. Custodial interviews. The presumption applies only to interviews of persons in FBI, DEA, ATF or USMS custody. Interviews in non-custodial settings are excluded from the presumption.

c. Place of detention. A place of detention is any structure where persons are held in connection with federal criminal charges where those persons can be interviewed. This includes not only federal facilities, but also any state, local, or tribal law enforcement facility, office, correctional or detention facility, jail, police or sheriff's station, holding cell, or other structure used for such purpose. Recording under this policy is not required while a person is waiting for transportation, or is en route, to a place of detention.

d. Suitable recording equipment. The presumption is limited to a place of detention that has suitable recording equipment. With respect to a place of detention owned or controlled by FBI, DEA, ATF, or USMS, suitable recording equipment means:

(i) an electronic recording device deemed suitable by the agency for the recording of interviews that,

(ii) is reasonably designed to capture electronically the entirety of the interview.

Each agency will draft its own policy governing placement, maintenance and upkeep of such equipment, as well as requirements for preservation and transfer of recorded content.
With respect to an interview by FBI, DEA, ATF, or USMS in a place of detention they do not own or control, but which has recording equipment, FBI, DEA, ATF, or USMS will each determine on a case by case basis whether that recording equipment meets or is equivalent to that agency's own requirements or is otherwise suitable for use in recording interviews for purposes of this policy.

e. Timing. The presumption applies to persons in custody in a place of detention with suitable recording equipment following arrest but who have not yet made an initial appearance before a judicial officer under Federal Rule of Criminal Procedure 5.

f. Scope of offenses. The presumption applies to interviews in connection with all federal crimes.

g. Scope of recording. Electronic recording will begin as soon as the subject enters the interview area or room and will continue until the interview is completed.

h. Recording may be overt or covert. Recording under this policy may be covert or overt. Covert recording constitutes consensual monitoring, which is allowed by federal law. *See* 18 U.S.C. § 2511(2)(c). Covert recording in fulfilling the requirement of this policy may be carried out without constraint by the procedures and approval requirements prescribed by other Department policies for consensual monitoring.

II. Exceptions to the Presumption. A decision not to record any interview that would otherwise presumptively be recorded under this policy must be documented by the agent as soon as practicable. Such documentation shall be made available to the United States Attorney and should be reviewed in connection with a periodic assessment of this policy by the United States Attorney and the Special Agent in Charge or their designees.

a. Refusal by interviewee. If the interviewee is informed that the interview will be recorded and indicates that he or she is willing to give a statement but only if it is not electronically recorded, then a recording need not take place.

b. Public Safety and National Security Exception. Recording is not prohibited in any of the circumstances covered by this exception and the decision whether or not to record should wherever possible be the subject of consultation between the agent and the prosecutor. There is no presumption of electronic recording where questioning is done for the purpose of gathering public safety information under *New York v. Quarles*. The presumption of recording likewise does not apply to those limited circumstances where questioning is undertaken to gather national security-related intelligence or questioning concerning intelligence, sources, or methods, the public disclosure of which would cause damage to national security.

c. Recording is not reasonably practicable. Circumstances may prevent, or render not reasonably practicable, the electronic recording of an interview that would otherwise be presumptively recorded. Such circumstances may include equipment malfunction, an unexpected need to move the interview, or a need for multiple interviews in a limited timeframe exceeding the available number of recording devices.

d. Residual exception. The presumption in favor of recording may be overcome where the Special Agent in Charge and the United States Attorney, or their designees, agree that a significant and articulable law enforcement purpose requires setting it aside. This exception is to be used sparingly.

III. Extraterritoriality. The presumption does not apply outside of the United States. However, recording may be appropriate outside the United States where it is not otherwise precluded or made infeasible by law, regulation, treaty, policy, or practical concerns such as the suitability of recording equipment. The decision whether to record an interview – whether the subject is in foreign custody, U.S. custody, or not in custody – outside the United States should be the subject of consultation between the agent and the prosecutor, in addition to other applicable requirements and authorities.

IV. Administrative Issues.

a. Training. Field offices of each agency shall, in connection with the implementation of this policy, collaborate with the local U.S. Attorney's Office to provide district-wide joint training for agents and prosecutors on best practices associated with electronic recording of interviews.

b. Assignment of responsibilities. The investigative agencies will bear the cost of acquiring and maintaining, in places of detention they control where custodial interviews occur, recording equipment in sufficient numbers to meet expected needs for the recording of such interviews. Agencies will pay for electronic copies of recordings for distribution pre-indictment. Post-indictment, the United States Attorneys' offices will pay for transcripts of recordings, as necessary.

V. Effective Date. This policy shall take effect on July 11, 2014.

Mr. GOODLATTE. The Chair recognizes the gentleman from Georgia, Mr. Collins, for 5 minutes.

Mr. COLLINS. Thank you, Mr. Chairman.

Director Comey, I appreciate you being here. You are, I believe, forthright, much more so than, you said, in any other criminal case we have had. But I am also still in the military. I am still in the Air Force Reserve. I went to my drill back in July. I was hit by an amazing amount of questions from different servicemembers on this issue of how does the former Secretary of State get to do this and yet we have members of the military who are prosecuted all the time.

Your statements earlier were fairly startling when you said, I don't know of anybody else that has been classified as this. Just since 2009, Department of Justice has prosecuted at least seven people under the Espionage Act, all for very similar cases.

Now, you said go look at the facts. Well, we are looking at the facts in these cases. The interesting one—and, you know, you said that, in looking back at your investigation, mishandling or removal of classified information, we cannot find a case that would support bringing criminal charges on these facts. All right. Well, it didn't take nothing but a simple legal search to find a Marine that fall in it. Now, I guess their name is not Jane or Joe, so they did get prosecuted. Okay?

And this is the issue under 18 U.S.C. 793(f), gross negligence. This is what the Marine did. They took classified information that was put into a gym bag, cleaned out, washed, and took. All right? Simple mishandling. The court of appeals actually upheld this case, and this is what they said, that the purpose of Federal espionage statutes is to protect classified documents from unauthorized procedures, such as removal from proper place of custody, which would mean how you deal with this. Regardless of means of removal, it was apparent gross negligence and was a proximate cause of the document's removal.

United States v. McGinnis, said it is clear the Congress' intent is to create a hierarchy of defenses against national security, ranging from classic spying to merely losing classified materials through gross negligence or the mishandling of.

It was sort of also ironic for me that when I had to go back in July and this past month when I went back, I had to do my annual information assurance training. They went through everything that we have to do with handling classified information. I had been in a war zone, I have been in—this is just common knowledge among most everybody in the world. Obviously not to the Secretary.

How can you then explain to me this Marine's mistake in taking classified documents or mishandling them is more severe than the Secretary of State, who sent and received classified emails on a regular basis, including those that were originally classified, not those that were classified later but were originally classified?

Mr. COMEY. I am familiar with the case, and I am quite certain it is not a 793(f) case. It was prosecuted——

Mr. COLLINS. His conviction was under 793(f).

Mr. COMEY. Yeah, I don't think—I mean, I will go back and check again. I would urge you to too. I am pretty sure it is not under the gross negligence prong of 793(f). But it is a Uniform

Court of Military Justice prosecution, not by the Department of Justice. Am I remembering correctly?

Mr. COLLINS. This was from and is appealed out in the U.S. Court of Appeals for the Armed Forces of the United States.

Mr. COMEY. Okay. But, regardless, I think even—I don't think this is under the same provision, but even there, that is a case involving someone who actually stole classified information, hard copies.

What people need to remember—and I don't say this to make little of it. I think it is a very serious matter. What happened here is the Secretary used an unclassified email system, her personal system, to conduct her business.

Mr. COLLINS. And let's just stop right there. That, in and of itself—and I understand it's an uncomfortable—we have been through a lot—you have been through a lot of questions. I apologize. But let's just come back to the basics here.

We are trying to parse that I didn't have such as Sandy Berger or all these others who have been prosecuted, they took a hard copy. In today's society, and even understanding if you go through any information assurance class, anything else, they tell you it cannot be on a personal laptop. In fact, there was another chief petty officer who had classified information on a personal computer. It went back and forth to a war zone. That is not physical documents.

It's on a—to parse words like that is why the American people are fed up. They are fed up with the IRS Commissioner when he does it. They are fed up here. I am not attacking your—I think you are one of the more upright people I met. I think you just blew it. I think the Attorney General blew it. I shared this with her.

And I think when we come to this thing, there is no other way that you can say that there is no others that resemble this. As a lawyer, you are taught all the time to take facts and put them—they might not be exact, but they fit under the law. You can't—I mean, so I guess maybe I am going to change the question, because we are going to go down a dead end. You are going to say it wasn't and——

Mr. COMEY. Congressman, can I respond——

Mr. COLLINS. So let me ask you this. I want to change questions.

Do you honestly believe that a lady, a woman of vast intelligence, who was the First Lady of the United States, who was a Senator who had access to classified information all of the Members here do, who was Secretary of State who had even further classification ability even beyond what we have here, do you believe that in this case, honestly, she was not grossly negligent or criminal in her acts?

Mr. COMEY. First of all, I don't believe anyone other than my wife. My question is what evidence do I have to establish that state of mind. And I don't believe I have evidence to establish it beyond a reasonable doubt.

Mr. COLLINS. Then, really, what we are saying here is this, is she is—this is in essence what you are saying. You said I can't prove it, and I understand. There are a lot of out folks out there in the law that, you know, they come to us all the time. I am an attorney as well. And they come to us and say, it is not what we know, it is not what we think, it is what we can prove. I get it.

But here is the problem with this. And this is the person who is asking to lead this country. If she can hide behind this and blatantly get approval from the FBI through an investigation, which has been covered here thoroughly, then I just do not understand. She is either the most arrogant, which probably so, or the most insanely naive person we have ever met.

Because when I actually show evidences of basically the same thing, which you can take fact and correlate to law, this is why the Armed Forces right now have the new term called the Clinton defense. "I didn't know. I didn't mean to." It is the Clinton defense.

With questions like this, Director, we have given the ability now to where nobody takes this seriously. And this is why people are upset. When it was originally classified, she can tell all the stories she wants. She can have the backup from you that no prosecutor—which is, again, amazing to me, that a law enforcement would tell the prosecutor—because how many times I have been on both sides of this where the law enforcement agent says I am not sure we have a case here, but when the prosecutor looks at it, the prosecutor says, yeah, there is a case here.

I don't really, frankly—no offense—care what—if I am prosecuting, what the law enforcement officer—if I can see the case and I can make it, that is my job, not yours. And yet now we have a whole system that has been turned upsidedown, not because I don't believe your honesty of your people, but I believe you blew it because you, frankly, didn't have the whole situation into effect where the FBI would look political.

And, unfortunately, that is all you have become in this. And it is a sad thing. Because you all do great work, you have done great work, and you will do great work. But I think it is time to start—we just bring down the curtain. There is a wizard behind the thing, Ms. Hillary Clinton, who is playing all of us. Because she is not that naive. She is not stupid. She knew what she was doing, because she was simply too bored. If she, God forbid, gets into 1600 Pennsylvania Avenue and just gets bored with the process, then God help us all.

Mr. Chairman, I yield back.

Mr. COMEY. Mr. Chairman, there are only two——

Mr. GOODLATTE. The Director is permitted to respond.

Mr. COMEY. Yeah, two pieces of that I need to respond to.

First, you said hiding behind something. This case was investigated by a group of professionals. So if I blew it, they blew it too. Career FBI agents, the very best we have, were put on this case, and career analysts. We are a team. No one hid behind anything.

American citizens should insist that we bring criminal charges if we are able to investigate and produce evidence beyond reasonable doubt to charge somebody. That should be true whether you are investigating me or you or Joe Smith on the street. That is the way this case was done. It is about evidence.

And the rest of it I will let go.

Mr. COLLINS. Mr. Chairman, I will—and I apologize—I am not—this is the problem, though. When you take it as a whole—it has been said up here this is a unique case. You talk about it being a unique case. Director, this is a unique because I truly—and I don't think you convince hardly anybody except your own group that—

I don't think you ever said they couldn't blow it. They blew it. Anybody else would have been prosecuted under this, in my humble opinion.

Mr. COMEY. You are just wrong.

Mr. COLLINS. You say no.

Mr. COMEY. You are just wrong. We will just have to agree to disagree.

Mr. COLLINS. Well, unfortunately, there is a lot to disagree on this.

Thank you, Mr. Chairman.

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

The gentleman from Idaho, Mr. Labrador, is recognized for 5 minutes.

Mr. LABRADOR. Thank you, Mr. Chairman.

And, Director Comey, I have always appreciated your testimony before this Committee, and I respect the work that you do for the FBI.

When you made your recommendations to the Department of Justice to not prosecute Hillary Clinton, I actually disagreed with your decision, but I appreciated your candor in explaining to the American people and to us those recommendations.

Since that decision, I continue to view you as honorable and a strong leader for the critical Federal agency. In fact, I did 20 townhall meetings over the recess, and I was lambasted at every one of them, in fact I think I lost votes, because I defended your integrity at every one of those townhall meetings and I told them why, even though I disagreed with your conclusions, I thought you came to it from an honorable place.

However, as more information has come to light, I question the thoroughness—and I am not questioning your integrity, but the thoroughness and the scope of the FBI's investigation.

In the past week, we have learned of the grants of immunity to several key witnesses in the Clinton investigation, including Hillary Clinton's former chief of staff and one of the individuals responsible for setting up her server.

I am really disappointed by this revelation and confused as to why these immunity grants were necessary and appropriate, given the circumstances. It appears to me that the FBI was, very early in this investigation, too willing to strike deals and ensure that top officials could never be prosecuted for their role in what we now know was a massive breach of national security protocol.

We have a duty to ensure that our FBI is still in the business of investigating criminal activity. So at what point in the investigation was Cheryl Mills offered immunity?

Mr. COMEY. Cheryl Mills was never offered immunity. Not to quibble, but she was given letter immunity to govern——

Mr. LABRADOR. At what point?

Mr. COMEY. June of 2016. So June of this year. So about 11 months into the investigation.

Mr. LABRADOR. So, and to be clear, was she offered immunity for interview and potential testimony or for turning over the laptop as evidence?

Mr. COMEY. Turning over the laptop as evidence. It governed what could be done in terms of using it against her, that laptop.

Mr. LABRADOR. To your knowledge, was Cheryl Mills an uncooperative witness prior to the immunity deal?

Mr. COMEY. I think our assessment was she was cooperative. I forget the month she was interviewed, but she was interviewed fully before that.

Mr. LABRADOR. And she always cooperated?

Mr. COMEY. I think our assessment was—again, this is the odd way I look at the world—we had no reason to believe she was being uncooperative.

Mr. LABRADOR. So could this investigation have been completed without these grants of immunity in place?

Mr. COMEY. In my view, it couldn't be concluded professionally without doing our best to figure out what was on those laptops. So getting the laptops was very important to me and to the investigative team.

Mr. LABRADOR. So in your vast experience as an investigator, as a DOJ attorney, now as an FBI Director, how many times have you allowed a person who is a material witness to a crime you are investigating to act as the lawyer in that same investigation?

Mr. COMEY. Well, "to let" is what I am stumbling on. The FBI has no power to stop someone in a voluntary——

Mr. LABRADOR. No, no, no, no. You are speaking—let's just be honest. You allowed, the FBI allowed Cheryl Mills to act as the attorney in a case that she was a material witness. How many times have you——

Mr. COMEY. In the same sense that I am "allowing" you to question me——

Mr. LABRADOR. How many times have you——

Mr. COMEY.—I can't stop you from questioning me.

Mr. LABRADOR. How many times have you done that prior?

Mr. COMEY. I have not had an experience where the subject of the interview was represented by a lawyer who was also a witness in the investigation.

Mr. LABRADOR. Okay. So you have never had that experience.

Mr. COMEY. Not in my experience.

Mr. LABRADOR. You prosecuted terrorists and mobsters, right?

Mr. COMEY. Correct.

Mr. LABRADOR. And during your time in Justice, how many times did you allow a lawyer who was a material witness to the case that you were prosecuting to also act as the subject of—as the attorney to the subject of that investigation?

Mr. COMEY. As I said, I don't think I have encountered this situation where a witness—a lawyer for the subject of the investigation was also a witness to the investigation. I don't——

Mr. LABRADOR. So this was highly unusual, to have——

Mr. COMEY. In my experience, yes.

Mr. LABRADOR. Okay.

In your answer to Chairman Chaffetz, you indicated that you had no reason to disbelieve Paul Combetta when he told you that he erased the hard drive on his own. Is that correct?

Mr. COMEY. Correct.

Mr. LABRADOR. However, in the exchange on Reddit, he said, "I need to strip out a VIP's email address from a bunch of archived

emails. Basically, they don't want the VIP's email address exposed to anyone."

Those two statements are not consistent. How can you say that he was truthful when he told you nobody told him to act this way but yet you saw this Reddit account that says where "they" told him that he needed to act in this way?

Mr. COMEY. I think the assessment of the investigative team is those are two very—about two different subjects. One is a year before about—in the summer of 2014 about how to produce emails and whether there was a way to remove or mask the actual email address, the HRC, whatever it is, dot-com. And the other is about actually deleting the content of those emails sitting on the server.

Mr. LABRADOR. It seems like in your investigation you found, time after time, evidence of destruction, evidence of breaking iPhones and other phones, all these different things, but yet you find that there is no evidence of intent.

And I am a little bit confused as to your interpretation of 18 U.S.C. 793(f). On the one hand, you have said that Secretary Clinton couldn't be charged because her conduct was extremely careless but not grossly negligent, correct?

Mr. COMEY. That is not exactly what I said.

Mr. LABRADOR. That is what you said today. But you have also said——

Mr. COMEY. I don't remember saying that.

Mr. LABRADOR [continuing]. There was no evidence of her intent to harm the United States.

But you will agree that a person can act with gross negligence or even act knowingly without possessing some additional specific intent. So which is it? Is it a lack of gross negligence that she had or a lack of intent?

Mr. COMEY. In terms of my overall judgment about whether the case was worthy of prosecution, it is the lack of evidence to meet what I understand to be the elements of the crime, one; and, two, a consideration of what would be fair with respect to how other people have been treated. Those two things together tell me—and nothing has happened that has changed my view on this—that no reasonable prosecutor would bring such a case.

The specific-intent question, yes, I agree that specific intent to harm the United States is a different thing than a gross negligence or a willfulness.

Mr. LABRADOR. So just one last question. You have talked about Mary and Joe. And Mary and Joe would be disciplined at the FBI if they did what Hillary Clinton did. If Mary and Joe came to you and asked for a promotion immediately after being disciplined, would you give them that promotion?

Mr. COMEY. Tough to answer that hypothetical. It would depend upon the nature of the conduct and what discipline had been imposed.

Mr. LABRADOR. And what if they ever asked for a promotion that would give them management and control of cybersecurity of your agency and the secrets of your agency after they had done these things? Would you give them that promotion?

Mr. COMEY. That is a question that I don't want to answer.

Mr. LABRADOR. All right.

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

The Chair recognizes the gentlewoman from California, Mrs. Walters, for 5 minutes.

Mrs. WALTERS. Hi, Director Comey.

Despite the absence of an intent mens rea standard in 18 U.S.C. section 793(f), you have said that there has never been a prosecution without evidence of intent. Thus, the standard has been read into the statute despite the specific language enacted. What exactly are the legal precedents that justify reading intent into the statute?

Mr. COMEY. Well, my understanding of 793(f) is governed by a couple things—three things, really: one, the legislative history from 1917, which I have read, and the one case that was prosecuted in the case. And those two things combined tell me that, when Congress enacted 793(f), they were very worried about the "gross negligence" language and actually put in legislative history we understand it to be something very close to "willfulness."

Then the next 100 years of treatment of that actually tell me that the Department of Justice for a century has had that same reservation, because they have only used it once. And that was in a case involving an FBI agent who was—in an espionage context.

So those things together inform my judgment of it.

Mrs. WALTERS. Okay.

Considering the importance of protecting classified information for national security purposes, a lot of people disagree that an intent standard should be read into that statute. What specific language would you recommend we enact to ensure gross negligence is the actual standard for the statute, not intent?

Mr. COMEY. I don't think that is something the Bureau ought to give advice on. It is a good question, as to what the standard should be. I could imagine Federal employees being very concerned about how you draw the line for criminal liability. But I don't think that is something we ought to advise on, the legislation.

Mrs. WALTERS. Okay.

Should we enact a mens rea standard for extreme carelessness for the statute?

Mr. COMEY. Same answer, I think, is appropriate.

Mrs. WALTERS. Should we enact a civil fine?

Mr. COMEY. A civil fine for mishandling classified information?

Mrs. WALTERS. Uh-huh.

Mr. COMEY. I don't know, actually, because it is already subject to discipline, which is suspension or loss of clearance or loss of job, which is a big monetary impact to the people disciplined. So I don't know whether it is necessary.

Mrs. WALTERS. Okay.

I want to change subjects——

Mr. COMEY. Okay.

Mrs. WALTERS [continuing]. For my next question. As you know, the number of criminal background checks for noncriminal purposes, such as for employment decisions, continues to increase annually.

I don't expect that you have this information on hand; however, would you be willing to provide the Committee and my staff with the number of criminal history record checks for fingerprint-based

background checks that the FBI has conducted over each of the past 5 years?

And what are your thoughts regarding whether the FBI has the capacity to process the increasing number of background check requests?

Mr. COMEY. I am sure we can get you that number, because I am sure we track it. So I will make sure my staff follows up with you.

Mrs. WALTERS. Okay.

Mr. COMEY. I do believe we have the resources. Where we have been strained is on the background checks for firearms purchases. The other background check processes we run, my overall sense is we have enough troops to do that. We are able to—we charge a fee for those, and I think we are able to generate the resources we need.

Mrs. WALTERS. Okay. Thank you.

I yield back my time.

Mr. ISSA. Could the gentlelady yield to me?

Mrs. WALTERS. Sure. I would be happy to yield to you, Mr. Issa.

Mr. ISSA. Thank you.

Director, some time ago, you appeared before this Committee, and you told us that you had exhausted all of the capability to unlock the San Bernardino iPhone, the 5C. Did that turn out to be true?

Mr. COMEY. It is still true.

Mr. ISSA. That you had exhausted all of your capability?

Mr. COMEY. That the FBI had, yes.

Mr. ISSA. So shouldn't we be concerned from a cyber standpoint that you couldn't unlock a phone that, in fact, an Israeli company came forward and unlocked for you and basically a Cambridge professor or student for 90 bucks has shown also to be able to unlock and mirror or duplicate the memory?

I mean, and this is purely a question of—you apparently do not have the resources to do that which others can do. Isn't that correct?

Mr. COMEY. I am sure that is true in a whole bunch of respects, but, first, I have to correct you. I am not confirming—you said an Israeli company? I am not confirming——

Mr. ISSA. Well, okay. A contractor for you, reported to be, for a million dollars, unlocked the phone. So I would ask you to confirm, the phone got unlocked, right?

Mr. COMEY. Yes, it did.

Mr. ISSA. Okay. So the technology could be created outside of ordering a company to essentially, you know, reengineer their software for you, correct?

Mr. COMEY. In this particular case, yes.

Mr. ISSA. Okay. And so you lack that capability. How can this Committee know that you are in the process of developing that sort of technology, the equivalent of the Cambridge $90 technology?

Mr. COMEY. How can the Committee know?

Mr. ISSA. Yeah. I mean, in other words, where are the assurances that you are going to get robust enough?

We have an encryption working group that was formed between multiple Committees to no small extent because of your action of

going to a magistrate and getting an order because you lacked that capability and were trying a new technique of ordering a company to go invent for you.

The question is, how do we know that won't happen again, that you will go to the court, ask for something when, in fact, the technology exists or could exist to do it in some other way, a technology that you should have at your disposal, or at least some Federal agency should, like the NSA?

Mr. COMEY. Well, first of all, it could well happen again, which is why I think it is great that people are talking about what we might do about this problem.

It is an interesting question as to whether we ought to invest in us having the ability to hack into people's devices, whether that is the best solution. It doesn't strike me as the best solution. But we are—and I have asked for more money in the 2017 budget—trying to invest in building those capabilities so when we really need to be able to get into a device we can.

It is not scaleable, and I am not sure it would be thrilling to companies like Apple to know we are investing money to try and figure out how to hack into their stuff.

Mr. ISSA. Well, isn't it true that we have clandestine organizations who have the mandate to do just that, to look around the world and to be able to find information that people don't know you can find, keep it secret, get it out there?

And my question to you is, shouldn't we, instead of giving you the money, simply continue to leverage other agencies who already have that mandate and then ask you to ask them to be your conduit for that when you have an appropriate need?

Mr. COMEY. That is a reasonable question. It may be part of the solution. Real challenges in using those kinds of techniques in the bulk of our work, because it becomes public and exposed. But that has to be an important part of the conversation.

Mr. ISSA. Thank you.

I yield back.

Mr. GOODLATTE. The Chair recognizes the gentleman from Arizona, Mr. Franks, for 5 minutes.

Mr. FRANKS. Thank you, Mr. Chairman.

And thank you for being here, Director Comey.

Director Comey, I—the last thing I want to do is to lecture you on anything related to the law, because I think you have given your whole life to that effort.

And I guess, in the face of so many things already having been said here and asked, that all I can do is to try to sort of reassociate this in a reference of why there is a rule of law. You know, we had that little unpleasantness in the late 1770's with England over this rule of law, because we realized there is really only two main ways to govern, and that is by the rule of men or the rule of law. And sometimes it is important for all of us just to kind of reconnect what this whole enterprise of America is all about. And I, again, don't seek to lecture you in that regard.

And I know—and you have to forgive me for being a Republican partisan here, because I am very biased in this case. But I know that when you interviewed Mrs. Clinton you were up against someone that really should have an earned doctorate of duplicity and

deception hanging on her wall. I don't know that you probably could have interviewed a more gifting prevaricator. So I know you were up against the best.

But, having said that, when I read the law here that I know so many have already referenced—I think maybe that is the best way for me to do that. 18 U.S.C. 1924 provides that any Federal official who "becomes possessed of documents or materials containing classified information of the United States and knowingly removes such documents or materials without authority and with the intent to retain such documents or materials at an unauthorized location shall be fined under this title or imprisoned for not more than 1 year or both."

Now, I didn't miss one word there. It does not require—that section does not require an intent to profit. It doesn't require harm to the United States or otherwise to act in any manner disloyal to the United States. It only requires intent to retain classified documents at an unauthorized location.

And I believe, sir, in all sincerity to you, person to person, I belive that some of your comments reflected that that is what occurred. And, over the last several months, I believe that is the case.

And so I have to—it is my job to ask you again why the simple clarity of that law was not applied in this case. Because the implications here are so profound. For your children and mine, for this country, they are so profound.

And, again, I don't envy your job, but I want to give you the remainder of the time to help me understand why a law like this that any law school graduate—if we can't apply this one in this case, how in God's name can we apply it in any case in the world? Why is it even written?

So I am going to stop there and ask your forbearance and just go for it.

Mr. COMEY. Sure. No, it is a reasonable question.

That is the—18 U.S.C. 1924 is the misdemeanor mishandling statue that is the basis on which most people have been prosecuted for mishandling classified information have been prosecuted. It is not a strict liability statute. I was one of the people, when I was in the private sector, who argued against strict liability criminal statues. It requires, in the view of the Department of Justice and over long practice, proof of some criminal intent, not specific intent to harm the United States but a general awareness that you are doing that is unlawful. So you have to prove criminal intent.

So there are two problems in this case. One is developing the evidence to prove beyond a reasonable doubt that Secretary Clinton acted with that criminal intent. And, second, even if you could do that, which you can't, looking at the history of other cases, what would be the right thing to do here? Has anybody ever been prosecuted on anything near these facts?

And, again, I keep telling the folks at home, when people tell you lots of people have been prosecuted for this, please demand the details of those cases. Because I have been through them all.

So that combination of what the statute requires and the history of prosecutions told me—and, again, people can take a different view, and it is reasonable to disagree—that no reasonable prosecutor would bring that case. That, in a nutshell, is what it is.

Mr. FRANKS. Well, you said it was a reasonable question. That was a reasonable answer. But I can't find that in the statute.

Thank you, sir.

Mr. GOODLATTE. The Chair recognizes the gentleman from Louisiana, Mr. Richmond, for 5 minutes.

Mr. RICHMOND. Thank you, Mr. Chairman.

Director Comey—and I am going down a completely different path. Our law enforcement in this country have a consistent enemy in a group called sovereign citizens. And what I have seen in my district, we lost two officers in St. John Parrish about 4 years ago, and we just lost another three officers in Baton Rouge, with another couple injured.

In the case in St. John Parrish, we actually had the perpetrators on the radar in north Louisiana, and, at some point, they moved to south Louisiana in my district and we lost contact. So, when St. John Parrish deputies went to their trailer park, they had no idea what they were walking into, and they walked into an ambush with AR-15s and AK-47s, and the unimaginable happened.

So, through NCCIC and other things, are you all focused on making sure—and I think there are about 100,000 of them. But are you all focused on making sure that our law enforcement has the best information when dealing with, whether it is sovereign citizens or terrorist cells or other bad actors, that that information gets to the locals so they are not surprised and ambushed?

Mr. COMEY. Well, we sure are. And I don't know the circumstances of that case, but I will find out the circumstances.

In two respects, we want, obviously, people to know when someone is wanted. But, more than that, we have a known or suspected terrorist file that should have information in that about people we are worried about so that if an officeris making a stop or going up to execute a search warrant and they run that address of that person, they will get a hit on what we call the KST file.

So that is our objective. And if there are ways to make it better, we want to.

Mr. RICHMOND. Now, let's switch lanes a little bit, because this is one of—I think an issue when we start talking about criminal justice reform and we start talking about the FBI. In my community and communities of color and with elected officials, there seems to be two standards: one for low-level elected officials and then one for other people.

So I guess the facts I will give you of some of our cases—and you tell me if it sounds inconsistent with your knowledge of the law and your protocol, but nonprofit organizations where elected officials have either been on boards or had some affiliation with, when those funds are used in a manner that benefits them personally, they have been prosecuted. And I mean for amounts that range from anywhere from $2,000 upwards to $100,000.

Your interpretation of the law, that if nonprofit funds are used to benefit a person and not the organization, that that is a theft of funds—because I believe that those are a lot of the charges that I have seen in my community. Would you agree with that?

Director COMEY. Sure, it could be. And I know from personal experience, having done these cases, that is often—that is at the center of a case involving a corrupt official.

Mr. RICHMOND. Now, let's take elected official out and just take any foundation director or board director or executive director who would use the funds of a nonprofit to pay personal debts or bills or just takes money. You would agree that that would constitute a violation of the law, criminal statute?

Mr. COMEY. Potentially. On the Federal side, potentially of wire fraud, mail fraud, or a tax charge, potentially.

Mr. RICHMOND. The other thing that I would say is that, in our community, we feel that it is selective prosecution; that if you are rich, you have another standard; that if you are an African-American, you have another standard.

And there are a number of cases that I will give you off-line, but it appears that—and my concern is the authority of your agents to decide that a person is bad and then take them through holy hell to try to get to the ultimate conclusion that the agent made, and they don't let the facts get in their way. And at the end of the day, you have businesspeople who spend hundreds of thousands of dollars to protect their reputation and to fight a charge that they ultimately win, but now they are broke, they are defeated, because, when it comes out, it says the United States of America versus you.

So I would just ask you to create a mindset within the Department that they understand the consequences of leaks to the press, charges, and what happens if—when those charges are really not substantiated, you still break a person. And I think that you all have a responsibility to be very careful with the awesome power that you all are given.

And, with that, Mr. Chairman, I thank back—I would yield back.

Mr. GOODLATTE. The Chair thanks the gentleman.

The Director is welcome to respond.

Mr. COMEY. I very much agree with what you said, Congressman, at the end of that. The power to investigate is the power to ruin. Obviously, charging people can also be ruinous. So it is when we have to be extraordinarily prudent in exercising fair, open-minded, and careful. So I very much agree with that.

Mr. GOODLATTE. The Chair recognizes the gentleman from Michigan, Mr. Trott, for 5 minutes.

Mr. TROTT. Thank you, Mr. Chairman.

And thank you, Director, for being here. And thank you for your service to our country.

When you made your statement at the press conference on July 5, you said, "I have not coordinate or reviewed this statement in any way with the Department of Justice or any part of government. They do not know what I am about to say."

I have no reason to question your integrity, but is there any chance that someone working in your office or as part of this investigation knew what you were going to decide and recommend and maybe told one of the Attorney General's staff what was about to happen on July 5?

Mr. COMEY. Anything is possible. I would—I think I would be willing to bet my life that didn't happen——

Mr. TROTT. Okay.

Mr. COMEY [continuing]. Just because I know my folks.

Mr. TROTT. So here is why I ask. The facts give me pause. The investigation started in July of 2015. Many of us in Congress, in-

cluding myself, suggested that the Attorney General should recuse herself because of her friendship with the Clintons and because of her desire to continue on as Attorney General in a Clinton administration.

Then she had the fortuitous meeting on the airplane with former President Clinton on June 30. Then on July 2, give or take, she came out and said, you know, I have created an appearance of impropriety, and so I am going to just follow whatever the FBI Director's recommendation is.

And then, 3 days later, you had your press conference. And in your press conference, you said, "In our system of justice, the prosecutors make the decisions about what charges are appropriate based on the evidence." That is not what happened in this case. Ultimately, you made the decision. Isn't that what happened?

Mr. COMEY. Well, I made public my recommendation. The decision to decline the case was made at the Justice Department.

Mr. TROTT. But before you had that press conference, you knew, based on the Attorney General's public comments that she was going to follow whatever you recommended. So, ultimately, you made the decision in this case as to whether or not charges should be filed against Secretary Clinton. Isn't that the reality of what happened?

Mr. COMEY. I think that is a fair characterization. The only thing I would add to that is I think she said—I don't remember exactly—that she would defer to the FBI and the career prosecutors at the Department of Justice.

But, look, I knew that once I made public the FBI's view that this wasn't a prosecutable case that there was virtually zero chance that the Department of Justice was going to go in a different direction. But part of my decision was based on my prediction that there was no way the Department of Justice would prosecute on these facts in any event.

So I think your characterization is fair, but I just wanted to add that color to it.

Mr. TROTT. But you can see how some of us would look at the dates and the facts leading up to your press conference and think, okay, for a year we have been suggesting she is not the appropriate person to make the ultimate decision as to whether charges should be filed; she won't recuse herself. And then 3 days before you come out with your recommendation, which she has already said she is going to follow, she basically decides to recuse herself. Those facts give me pause.

Mr. COMEY. I get why folks would ask about that, but I actually think it is—there are two dates that matter. But I think what generated that was the controversy around her meeting with President Clinton, not the interview with Secretary Clinton.

Mr. TROTT. That is a whole other discussion.

So let's talk about Cheryl Mills. So you have said earlier today that it really wasn't up to you to weigh in on whether there was a conflict for Ms. Mills to act as Secretary Clinton's lawyer in the interview.

But, again, you are kind of taking your attorney hat on and off whenever it is convenient. You decided that at the beginning of that interview it wasn't appropriate for you to weigh in as a lawyer

suggesting there was a conflict. But then again, your recommendation is, ultimately, as a lawyer, what is being done in this case. Do you see little bit of inconsistency there or no?

Mr. COMEY. No, I see the point about the—look, I would rather not have an attorney hat on at any time. I put it on because I thought that was what was necessary at the conclusion of this investigation. But I stand by that. The agents of the FBI, it is not to them to try and kick out someone's lawyer.

Mr. TROTT. Well, what would have happened if you had said, Ms. Mills, because of the history here, you can't be in this interview?

Mr. COMEY. I don't know. I don't know.

Mr. TROTT. Could you have said that to her?

Mr. COMEY. I guess you could. It would be well outside our normal role.

Mr. TROTT. So, a number of times today, you have said there really is no double standard. And so now I am just asking you as a citizen and not even in your capacity as Director of FBI, can you sort of see why a lot of Americans are bothered by a perceived double standard?

Because if any of the gentlemen sitting behind you this morning, who I assume are with the Department, had done some of the things Ms. Clinton did and told some of the lies that she told, you said in your statement that this is not to suggest under similar circumstances there wouldn't be consequences. In fact, there would be—they would be subjected to administrative sanctions.

And now we have an election going on where she is seeking a pretty big promotion. So maybe your point is she wouldn't be charged under similar facts, but can you sort of see why so many people are bothered by the facts in this case, given that really nothing happened to her and now she is running for President of the United States? I mean, just, can you see the optics on that are troubling?

Mr. COMEY. Oh, I totally get that. That is one of the reasons I am trying to answer as many questions as I can, because I get that question.

But, again, folks need to realize, in the FBI, if you did this, you would be in huge trouble. I am certain of that. You would be disciplined in some serious way. You might be fired. I am also certain you would not be prosecuted criminally on these facts.

Mr. TROTT. And you have said that, and I appreciate it.

Let me just ask one quick question, because I am out of time. But Mr. Bishop started to talk about this, and his district is affected, as well, in Michigan. But my district in southeast Michigan has the third-largest settlement of Syrian refugees of any city in the country, behind San Diego and Chicago. That is Troy, Michigan.

And you said last fall in front of a Homeland Security Committee hearing that you really didn't have the data to properly vet the Syrian refugees that are trying to come in, and you said that again this morning.

But, you know, last weekend, I am at a grocery store and a Starbucks, and two different constituents walked up to me and said, "Can't you stop the President's resettlement of Syrian refugees into Troy, Michigan? We are all afraid." And they are based

on, largely, your comment that we don't have the database to really vet these folks.

Anything I can tell the folks back in Michigan that we are doing, other than—all I say now is we just have to wait for a new President, because this President has increased the number of refugees by 60 and 30 percent year over year the last 2 years, we just have to wait for a new President. I would like to be able to say the FBI is doing something different than they were doing last year when you made those comments.

Mr. COMEY. Well, as I said earlier, they can know that we are—if there is a whiff about this person somewhere in the U.S. Government's vast holdings, we will find it. And the second thing they can know is, if we get a whiff about somebody once they are in, we are going to cover that in a pretty tight way.

What I can't promise people is that if—I can't query what is not in our holdings. That is the only reservation I offer to people.

Mr. TROTT. Thank you, sir.

I yield back.

Mr. GOODLATTE. Well, Director Comey, during questioning earlier, there was a dispute that arose over the contents of one or more of the immunity letters that were issued, particularly with regard to the issue of whether or not it contained immunity for destroying documents, emails.

The individual who was questioning you about that was former Chairman Issa of the Oversight and Government Reform Committee, and I want him to be able to clarify. Because we have contacted the Department of Justice and asked them to read the immunity letters to us.

So the gentleman is recognized briefly.

Mr. ISSA. Thank you, Mr. Chairman. And I will try to be very brief.

Under the immunity agreement with one or more individuals—we will use Cheryl Mills as, clearly, one of the individuals—she negotiated a very, very good deal from what we can discover. She did not just receive immunity related to the production of the drive, computer, and the contents but, in fact, received immunity under 18 U.S.C. 793(e) and (f), 1924 U.S.C.—18 U.S.C. 1924, and the so-called David Petraeus portion, 18 U.S.C. 2071. And I will focus on 2071. Her immunity is against any and all taking, destruction—or even obstruction, the way we read it—of documents, classified or unclassified.

Now, the only question I have for you is—and I know you are going to put this to Justice and we may have to ask them separately—for the purposes of what you needed as an investigator, because you were the person that wanted access to the computer, does that deal make any sense, to, in return for things which she could have objected to as an attorney and held back but which had no known proffer of leading to some criminal indictment of somebody else, she received complete immunity, as we read it, from obstruction or destruction of documents, classified and unclassified. And that is based on a re-review of the immunity agreement.

Mr. COMEY. You know, I think this is—you are right, this is a question best addressed to Justice. But I think you are misunderstanding it.

As I understand it, this was a promise in writing from the Department of Justice: If you give us the laptops, we will not use anything on the laptops directly against you in a prosecution for that list of offenses. It is not immunity for those offenses if there is some other evidence.

Now, that said, I am not exactly sure why her lawyer asked for it, because, by that point in the investigation, we didn't have a case on her to begin with.

Mr. ISSA. Well, I understand that. But based on the Reddit discovery and others, the "they asked me to do it"—and you said so yourself, it was probably Cheryl Mills, the "they." You have an immune witness who has to tell you who they were. If the "they were" told me to delete, and that is Cheryl Mills, then, in fact, you have evidence from an immune witness of a crime perpetrated by Cheryl Mills, the ordering of the destruction of any document, classified or unclassified, which, clearly, she seems to have done.

Mr. COMEY. Then she wouldn't be protected from that. If we developed evidence that she had obstructed justice in some fashion—all she is protected from is we can't use as evidence something that is on the laptop she gave us——

Mr. ISSA. Right. So the information put into the record today, which included these Reddit discoveries, show that there is a they who asked to have the destruction of information. Under 18 U.S.C. 2071, if she doesn't have immunity for that order, she could, and by definition should, be charged. Because ordering somebody else to destroy something, as an attorney, well after there were subpoenas in place that were very specific, that is clearly a willful act, isn't it?

Ms. JACKSON LEE. Mr. Chairman, would you yield?

Mr. ISSA. Of course.

Ms. JACKSON LEE. Your line of questioning—well, first, let me show my cards. I believe that Cheryl Mills has an impeccable character, as my line of questioning suggested that Director Comey and his staff have impeccable character.

But, my good friend, there is immunity given—I don't think this applies to Ms. Mills, and I looked at the sections that you are speaking of—if you take local, criminal, and State actions, given to the worst of characters for a variety of reasons. That was not the reason given to Ms. Mills. I am sure that it is a lawyer that was trying to be the most effective counsel to Ms. Mills as possible.

Mr. ISSA. Well, reclaiming my time, the gentlelady's point may be true. I am only speaking to the Director based on things were done that should not have been done. We now have evidence in front of this Committee, in the record, of people destroying records of activities as late as a few days ago.

So the fact that there still should be an open question, first of all, as to could she be prosecuted, and if in fact the "they have told me to destroy this," under the exact same statute that included David Petraeus, who was no longer on Active Duty, 18 U.S.C. 2071, there is at least a case to be made.

Now, the problem we have is the lawyer negotiated a set of terms which hopefully doesn't mean that she gets a free pass even if she willfully ordered the destruction of documents, which it does appear she did.

And, look, my job is not to be judge, jury, or hangman. My job is to look at what has been presented to us, ask the highest law enforcement officer in the land to, in fact, look into it. Because it does appear as though it is there.

Ms. JACKSON LEE. A brief yield, my good friend.

Mr. ISSA. Of course.

Ms. JACKSON LEE. Certainly, we have an oversight responsibility of the Director. I think he has been very forthright. But none of the actions of destruction can be—I don't think we have anything in evidence that suggests that Ms. Mills contributed to the dictating or directing——

Mr. ISSA. Well, the gentlelady may not have been——

Ms. JACKSON LEE [continuing]. Any destruction.

Mr. ISSA. The gentlelady may not have been here——

Ms. JACKSON LEE. So we can't speculate here.

Mr. ISSA. The gentlelady may not have been here at the time, but the Director himself, when asked who would the "they" would have been in that order to destroy, at least said it probably was or likely could have been Cheryl Mills. We are not saying it is. What we are saying is you have an immune witness.

Mr. GOODLATTE. The gentleman will suspend.

Mr. ISSA. Of course.

Mr. GOODLATTE. The purpose of this was to set the record straight as to what the content of the document was. That has been accomplished. And the debate will continue on——

Ms. JACKSON LEE. Thank you, Mr. Chairman.

Mr. GOODLATTE [continuing]. And continue on outside of this hearing room.

Mr. ISSA. And I would only——

Ms. JACKSON LEE. We can state; we cannot speculate. I yield——

Mr. ISSA. And I would only ask the Director be able to review those document at Justice and follow up with the Committee. It would be very helpful to all of us.

I thank the Chairman.

Mr. GOODLATTE. The Director has answered in the affirmative that he will do that.

Mr. COMEY. Yes, we will follow up.

Mr. GOODLATTE. First of all, I want to thank Director Comey. We didn't make 4 hours and 40 minutes, but we did almost make 4 hours, and I know you have been generous with your time.

However, I will also say that I think a lot of the questions here indicate a great deal of concern about the manner in which this investigation was conducted, how the conclusions were drawn, and the close proximity to that and the meeting of the Attorney General with former President Clinton on a tarmac. At the same time, she then said, "Well, I am going to recuse myself," and then, shortly after that, you took over and announced your conclusions in this case, which are hotly disputed, as you can tell.

The Committee and the Oversight and Government Reform Committee have referred to the United States Attorney for the Eastern District of—for the District of Columbia a referral based upon her testimony before the Select Committee on Benghazi, suggesting that your statement at your press conference and your testimony before the Oversight and Government Reform Committee very

clearly contradicted a number of statements she made under oath before that Committee.

And I want to stress to you how important I think it is that we made that referral for the purpose of making sure that no one is above the law. And in many cases regarding investigations, it is not just the underlying actions that are important, but they are the efforts of people to cover those up through perjury, through obstruction of justice, through destruction of documents.

And so I would ask that this matter be taken very, very seriously as you pursue whatever actions the Department chooses to take, making sure that no one is above the law.

Mr. COMEY. Thank you, sir.

Mr. GOODLATTE. With that, that concludes today's hearing, and I thank our distinguished witness for attending.

Without objection, all Members will have 5 legislative days to submit additional written questions for the witness or additional materials for the record.

And the hearing is adjourned.

[Whereupon, at 12:56 p.m., the Committee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

FBI 18-cv-01766-258

Questions for the Record submitted to the Honorable James B. Comey, Director, Federal Bureau of Investigation*

BOB GOODLATTE, Virginia
CHAIRMAN

F. JAMES SENSENBRENNER, JR., Wisconsin
LAMAR S. SMITH, Texas
STEVE CHABOT, Ohio
DARRELL E. ISSA, California
J. RANDY FORBES, Virginia
STEVE KING, Iowa
TRENT FRANKS, Arizona
LOUIE GOHMERT, Texas
JIM JORDAN, Ohio
TED POE, Texas
JASON CHAFFETZ, Utah
TOM MARINO, Pennsylvania
TREY GOWDY, South Carolina
RAUL R. LABRADOR, Idaho
BLAKE FARENTHOLD, Texas
DOUG COLLINS, Georgia
RON DESANTIS, Florida
MIMI WALTERS, California
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DAVE TROTT, Michigan
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ONE HUNDRED FOURTEENTH CONGRESS

Congress of the United States
House of Representatives

COMMITTEE ON THE JUDICIARY

2138 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6216

(202) 225-3951

http://www.house.gov/judiciary

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November 22, 2016

James Comey
Director
Federal Bureau of Investigation
935 Pennsylvania Avenue, NW
Washington, D.C. 20535-0001

Dear Director Comey,

The Committee on the Judiciary held a hearing on oversight of the Federal Bureau of Investigation on September 28, 2016 in room 2154 of the Rayburn House Office Building. Thank you for your testimony.

Questions for the record have been submitted to the Committee within five legislative days of the hearing. The questions addressed to you are attached. We will appreciate a full and complete response as they will be included in the official hearing record.

Please submit your written answers by Friday, December 23, 2016 to Alley Adcock at alley.adcock@mail.house.gov or 2138 Rayburn House Office Building, Washington, DC, 20515. If you have any further questions or concerns, please contact or at 202-225-3951.

Thank you again for your participation in the hearing.

Sincerely,

Bob Goodlatte
Chairman

Enclosure

Note: The Committee did not receive a response from the witness at the time this hearing record was finalized.

Submitted by Rep. Ted Poe

1. On July 15th 2016, you gave a public press conference which was carried live on numerous news channels in which you spoke in great detail (over 2,300 words to be exact) on how Secretary Clinton violated numerous laws and procedures in her use of a personal email server while working as Secretary of State. During this press conference, you stated: "Although there is evidence of potential violations of the statutes regarding the handling of classified information, our judgment is that no reasonable prosecutor would bring such a case.".

   A) Is such a public statement by you or other high level officials at the FBI typical at the conclusion of an investigation?

   B) Can you provide specific examples of another public statement of this fashion that has been made by the FBI at the conclusion of any other investigation?

2. Per DOJ regulations, in federal cases, the prosecutor's decision to bring criminal charges is governed by the United States Attorney's Manual. USAM 9-27.000, titled "Principles of Federal Prosecution" contains the DOJ's written guidance to prosecutors about decisions to initiate or decline prosecution. Specifically, 9-27.220(A) instructs prosecutors to file criminal charges in all cases where there is a violation of federal law and the evidence is sufficient to obtain a conviction, unless one of three grounds exist:

   i. Lack of a substantial federal interest;
   ii. The defendant is subject to prosecution in another jurisdiction; or
   iii. The existence of adequate non-criminal alternatives to prosecution.

   B) As you stated publically that "no reasonable prosecutor would bring a case" based on the facts of your Clinton investigation, specifically which element of the DOJ grounds for non-prosecution do you contend applies in this situation?

   C) When you, as the Director of the FBI, an investigatory agency, publically stated that "no reasonable prosecutor would bring a case" do you believe that DOJ prosecutors tasked with reviewing the evidence under 9-27.000(A) would be able to adequately do their job to review the evidence you presented them?

   D) What if the attorneys at DOJ believed that there was sufficient evidence to warrant a prosecution, how could they move forward given your public statement saying otherwise?

   E) What do you say to those who argue that this maneuver was done to divert criticism of the decision not to prosecute from DOJ to the FBI?

2. In the FBI "Manual of Investigative Operations and Guidelines" section 1-2, a number of policies and procedures are laid out for how the FBI should behave and conduct criminal investigations. Specifically, section 1-2 (1) states: "The FBI is charged with the duty of investigating violations of the laws of the United States and collective evidence in cases in which the United States is or may be a party in interest". In addition, section 1-2 (3) states: "Results of investigations are furnished to United States Attorneys and/or Department of Justice."

   A) During my review, I found no section in this manual that permits or directs the FBI to publically state that the facts they investigated were not sufficient to warrant prosecution, in fact the manual clearly indicates that these facts should be turned over to either a US Attorney or the DOJ when there is sufficient evidence that a crime occurred. You stated in your public statement that "there is evidence of potential violations of the statutes regarding the handling of classified information". Specifically, in spite of your own admission that there was evidence of a crime, why did you veer from FBI procedures and make a public statement that no prosecution was warranted?

   B) Why did you go outside the scope of the FBI's procedures and unilaterally declare that there should be no prosecution?

   C) What legal standard did you use to determine that "no reasonable prosecutor would bring such a case"?

Submitted by Rep. Mimi Walters

1. Federal law concerning background checks for prospective firearms purchases is different from the criminal history record checks conducted by employers. Does the NICS, "instant check" system, cost more for the FBI to administer when compared to criminal history record checks for employers? What is the feasibility of implementing an employer version of NICS, perhaps funded by user fees, in order to increase the efficiency of the background checks?

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§ 49.1 Purpose.

The regulations in this part are issued in compliance with the requirements imposed by the provisions of section 4(c) of the Antitrust Civil Process Act, as amended (15 U.S.C. 1313(c)). The terms used in this part shall be deemed to have the same meaning as similar terms used in that Act.

§ 49.2 Duties of custodian.

(a) Upon taking physical possession of documentary material, answers to interrogatories, or transcripts of oral testimony delivered pursuant to a civil investigative demand issued under section 3(a) of the Act, the antitrust document custodian designated pursuant to section 4(a) of the Act (subject to the general supervision of the Assistant Attorney General in charge of the Antitrust Division), shall, unless otherwise directed by a court of competent jurisdiction, select, from time to time, from among such documentary material, answers to interrogatories or transcripts of oral testimony, the documentary material, answers to interrogatories or transcripts of oral testimony the copying of which the custodian deems necessary or appropriate for the official use of the Department of Justice, and shall determine, from time to time, the number of copies of any such documentary material, answers to interrogatories or transcripts of oral testimony that are to be reproduced pursuant to the Act.

(b) Copies of documentary material, answers to interrogatories, or transcripts of oral testimony in the physical possession of the custodian pursuant to a civil investigative demand may be reproduced by or under the authority of any officer, employee, or agent of the Department of Justice designated by the custodian. Documentary material for which a civil investigative demand has been issued but which is still in the physical possession of the person upon whom the demand has been served may, by agreement between such person and the custodian, be reproduced by such person, in which case the custodian may require that the copies so produced be duly certified as true copies of the original of the material involved.

[60 FR 44277, Aug. 25, 1995; 60 FR 61290, Nov. 29, 1995]

§ 49.3 Examination of the material.

Documentary material, answers to interrogatories, or transcripts of oral testimony produced pursuant to the Act, while in the custody of the custodian, shall be for the official use of officers, employees, and agents of the Department of Justice in accordance with the Act. Upon reasonable notice to the custodian—

(a) Such documentary material or answers to interrogatories shall be made available for examination by the person who produced such documentary material or answers to interrogatories, or by any duly authorized representative of such person; and

(b) Such transcripts of oral testimony shall be made available for examination by the person who produced such testimony, or by such person's counsel, during regular office hours established for the Department of Justice. Examination of such documentary material, answers to interrogatories, or transcripts of oral testimony at other times may be authorized by the Assistant Attorney General or the custodian.

[60 FR 44277, Aug. 25, 1995; 60 FR 61290, Nov. 29, 1995]

§ 49.4 Deputy custodians.

Deputy custodians may perform such of the duties assigned to the custodian as may be authorized or required by the Assistant Attorney General.

PART 50—STATEMENTS OF POLICY

Sec.

50.2 Release of information by personnel of the Department of Justice relating to criminal and civil proceedings.
50.3 Guidelines for the enforcement of title VI, Civil Rights Act of 1964.
50.5 Notification of Consular Officers upon the arrest of foreign nationals.
50.6 Antitrust Division business review procedure.
50.7 Consent judgments in actions to enjoin discharges of pollutants.
50.8 [Reserved]
50.9 Policy with regard to open judicial proceedings.

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50.10 Policy regarding obtaining information from, or records of, members of the news media; and regarding questioning, arresting, or charging members of the news media.
50.12 Exchange of FBI identification records.
50.14 Guidelines on employee selection procedures.
50.15 Representation of Federal officials and employees by Department of Justice attorneys or by private counsel furnished by the Department in civil, criminal, and congressional proceedings in which Federal employees are sued, subpoenaed, or charged in their individual capacities.
50.16 Representation of Federal employees by private counsel at Federal expense.
50.17 *Ex parte* communications in informal rulemaking proceedings.
50.18 [Reserved]
50.19 Procedures to be followed by government attorneys prior to filing recusal or disqualification motions.
50.20 Participation by the United States in court-annexed arbitration.
50.21 Procedures governing the destruction of contraband drug evidence in the custody of Federal law enforcement authorities.
50.22 Young American Medals Program.
50.23 Policy against entering into final settlement agreements or consent decree that are subject to confidentiality provisions and against seeking or concurring in the sealing of such documents.
50.24 Annuity broker minimum qualifications.
50.25 Assumption of concurrent Federal criminal jurisdiction in certain areas of Indian country.

AUTHORITY: 5 U.S.C. 301; 18 U.S.C. 1162; 28 U.S.C. 509, 510, 516, and 519; 42 U.S.C. 1921 *et seq.*, 1973c; and Pub. L. 107–273, 116 Stat. 1758, 1824.

§ 50.2 Release of information by personnel of the Department of Justice relating to criminal and civil proceedings.

(a) *General.* (1) The availability to news media of information in criminal and civil cases is a matter which has become increasingly a subject of concern in the administration of justice. The purpose of this statement is to formulate specific guidelines for the release of such information by personnel of the Department of Justice.

(2) While the release of information for the purpose of influencing a trial is, of course, always improper, there are valid reasons for making available to the public information about the administration of the law. The task of striking a fair balance between the protection of individuals accused of crime or involved in civil proceedings with the Government and public understandings of the problems of controlling crime and administering government depends largely on the exercise of sound judgment by those responsible for administering the law and by representatives of the press and other media.

(3) Inasmuch as the Department of Justice has generally fulfilled its responsibilities with awareness and understanding of the competing needs in this area, this statement, to a considerable extent, reflects and formalizes the standards to which representatives of the Department have adhered in the past. Nonetheless, it will be helpful in ensuring uniformity of practice to set forth the following guidelines for all personnel of the Department of Justice.

(4) Because of the difficulty and importance of the questions they raise, it is felt that some portions of the matters covered by this statement, such as the authorization to make available Federal conviction records and a description of items seized at the time of arrest, should be the subject of continuing review and consideration by the Department on the basis of experience and suggestions from those within and outside the Department.

(b) *Guidelines to criminal actions.* (1) These guidelines shall apply to the release of information to news media from the time a person is the subject of a criminal investigation until any proceeding resulting from such an investigation has been terminated by trial or otherwise.

(2) At no time shall personnel of the Department of Justice furnish any statement or information for the purpose of influencing the outcome of a defendant's trial, nor shall personnel of the Department furnish any statement or information, which could reasonably be expected to be disseminated by means of public communication, if such a statement or information may reasonably be expected to influence the outcome of a pending or future trial.

(3) Personnel of the Department of Justice, subject to specific limitations

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imposed by law or court rule or order, may make public the following information:

(i) The defendant's name, age, residence, employment, marital status, and similar background information.

(ii) The substance or text of the charge, such as a complaint, indictment, or information.

(iii) The identity of the investigating and/or arresting agency and the length or scope of an investigation.

(iv) The circumstances immediately surrounding an arrest, including the time and place of arrest, resistance, pursuit, possession and use of weapons, and a description of physical items seized at the time of arrest.

Disclosures should include only incontrovertible, factual matters, and should not include subjective observations. In addition, where background information or information relating to the circumstances of an arrest or investigation would be highly prejudicial or where the release thereof would serve no law enforcement function, such information should not be made public.

(4) Personnel of the Department shall not disseminate any information concerning a defendant's prior criminal record.

(5) Because of the particular danger of prejudice resulting from statements in the period approaching and during trial, they ought strenuously to be avoided during that period. Any such statement or release shall be made only on the infrequent occasion when circumstances absolutely demand a disclosure of information and shall include only information which is clearly not prejudicial.

(6) The release of certain types of information generally tends to create dangers of prejudice without serving a significant law enforcement function. Therefore, personnel of the Department should refrain from making available the following:

(i) Observations about a defendant's character.

(ii) Statements, admissions, confessions, or alibis attributable to a defendant, or the refusal or failure of the accused to make a statement.

(iii) Reference to investigative procedures such as fingerprints, polygraph examinations, ballistic tests, or laboratory tests, or to the refusal by the defendant to submit to such tests or examinations.

(iv) Statements concerning the identity, testimony, or credibility of prospective witnesses.

(v) Statements concerning evidence or argument in the case, whether or not it is anticipated that such evidence or argument will be used at trial.

(vi) Any opinion as to the accused's guilt, or the possibility of a plea of guilty to the offense charged, or the possibility of a plea to a lesser offense.

(7) Personnel of the Department of Justice should take no action to encourage or assist news media in photographing or televising a defendant or accused person being held or transported in Federal custody. Departmental representatives should not make available photographs of a defendant unless a law enforcement function is served thereby.

(8) This statement of policy is not intended to restrict the release of information concerning a defendant who is a fugitive from justice.

(9) Since the purpose of this statement is to set forth generally applicable guidelines, there will, of course, be situations in which it will limit the release of information which would not be prejudicial under the particular circumstances. If a representative of the Department believes that in the interest of the fair administration of justice and the law enforcement process information beyond these guidelines should be released, in a particular case, he shall request the permission of the Attorney General or the Deputy Attorney General to do so.

(c) *Guidelines to civil actions.* Personnel of the Department of Justice associated with a civil action shall not during its investigation or litigation make or participate in making an extrajudicial statement, other than a quotation from or reference to public records, which a reasonable person would expect to be disseminated by means of public communication if there is a reasonable likelihood that such dissemination will interfere with a fair trial and which relates to:

(1) Evidence regarding the occurrence or transaction involved.

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(2) The character, credibility, or criminal records of a party, witness, or prospective witness.

(3) The performance or results of any examinations or tests or the refusal or failure of a party to submit to such.

(4) An opinion as to the merits of the claims or defenses of a party, except as required by law or administrative rule.

(5) Any other matter reasonably likely to interfere with a fair trial of the action.

[Order No. 469-71, 36 FR 21028, Nov. 3, 1971, as amended by Order No. 602-75, 40 FR 22119, May 20, 1975]

§ 50.3 Guidelines for the enforcement of title VI, Civil Rights Act of 1964.

(a) Where the heads of agencies having responsibilities under title VI of the Civil Rights Act of 1964 conclude there is noncompliance with regulations issued under that title, several alternative courses of action are open. In each case, the objective should be to secure prompt and full compliance so that needed Federal assistance may commence or continue.

(b) Primary responsibility for prompt and vigorous enforcement of title VI rests with the head of each department and agency administering programs of Federal financial assistance. Title VI itself and relevant Presidential directives preserve in each agency the authority and the duty to select, from among the available sanctions, the methods best designed to secure compliance in individual cases. The decision to terminate or refuse assistance is to be made by the agency head or his designated representative.

(c) This statement is intended to provide procedural guidance to the responsible department and agency officials in exercising their statutory discretion and in selecting, for each noncompliance situation, a course of action that fully conforms to the letter and spirit of section 602 of the Act and to the implementing regulations promulgated thereunder.

I. ALTERNATIVE COURSES OF ACTION

A. ULTIMATE SANCTIONS

The ultimate sanctions under title VI are the refusal to grant an application for assistance and the termination of assistance being rendered. Before these sanctions may be invoked, the Act requires completion of the procedures called for by section 602. That section require the department or agency concerned (1) to determine that compliance cannot be secured by voluntary means, (2) to consider alternative courses of action consistent with achievement of the objectives of the statutes authorizing the particular financial assistance, (3) to afford the applicant an opportunity for a hearing, and (4) to complete the other procedural steps outlined in section 602, including notification to the appropriate committees of the Congress.

In some instances, as outlined below, it is legally permissible temporarily to defer action on an application for assistance, pending initiation and completion of section 602 procedures—including attempts to secure voluntary compliance with title VI. Normally, this course of action is appropriate only with respect to applications for noncontinuing assistance or initial applications for programs of continuing assistance. It is not available where Federal financial assistance is due and payable pursuant to a previously approved application.

Whenever action upon an application is deferred pending the outcome of a hearing and subsequent section 602 procedures, the efforts to secure voluntary compliance and the hearing and such subsequent procedures, if found necessary, should be conducted without delay and completed as soon as possible.

B. AVAILABLE ALTERNATIVES

1. Court Enforcement

Compliance with the nondiscrimination mandate of title VI may often be obtained more promptly by appropriate court action than by hearings and termination of assistance. Possibilities of judicial enforcement include (1) a suit to obtain specific enforcement of assurances, covenants running with federally provided property, statements or compliance or desegregation plans filed pursuant to agency regulations, (2) a suit to enforce compliance with other titles of the 1964 Act, other Civil Rights Acts, or constitutional or statutory provisions requiring nondiscrimination, and (3) initiation of, or intervention or other participation in, a suit for other relief designed to secure compliance.

The possibility of court enforcement should not be rejected without consulting the Department of Justice. Once litigation has been begun, the affected agency should consult with the Department of Justice before taking any further action with respect to the noncomplying party.

2. Administrative Action

A number of effective alternative courses not involving litigation may also be available in many cases. These possibilities include (1) consulting with or seeking assistance from other Federal agencies (such as

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the Contract Compliance Division of the Department of Labor) having authority to enforce nondiscrimination requirements; (2) consulting with or seeking assistance from State or local agencies having such authority; (3) bypassing a recalcitrant central agency applicant in order to obtain assurances from, or to grant assistance to complying local agencies; and (4) bypassing all recalcitrant non-Federal agencies and providing assistance directly to the complying ultimate beneficiaries. The possibility of utilizing such administrative alternatives should be considered at all stages of enforcement and used as appropriate or feasible.

C. INDUCING VOLUNTARY COMPLIANCE

Title VI requires that a concerted effort be made to persuade any noncomplying applicant or recipient voluntarily to comply with title VI. Efforts to secure voluntary compliance should be undertaken at the outset in every noncompliance situation and should be pursued through each stage of enforcement action. Similarly, where an applicant fails to file an adequate assurance or apparently breaches its terms, notice should be promptly given of the nature of the noncompliance problem and of the possible consequences thereof, and an immediate effort made to secure voluntary compliance.

II. PROCEDURES

A. NEW APPLICATIONS

The following procedures are designed to apply in cases of noncompliance involving applications for one-time or noncontinuing assistance and initial applications for new or existing programs of continuing assistance.

1. Where the Requisite Assurance Has Not Been Filed or Is Inadequate on Its Face.

Where the assurance, statement of compliance or plan of desegregation required by agency regulations has not been filed or where, in the judgment of the head of the agency in question, the filed assurance fails on its face to satisfy the regulations, the agency head should defer action on the application pending prompt initiation and completion of section 602 procedures. The applicant should be notified immediately and attempts made to secure voluntary compliance. If such efforts fail, the applicant should promptly be offered a hearing for the purpose of determining whether an adequate assurance has in fact been filed.

If it is found that an adequate assurance has not been filed, and if administrative alternatives are ineffective or inappropriate, and court enforcement is not feasible, section 602 procedures may be completed and assistance finally refused.

2. Where it Appears that the Field Assurance Is Untrue or Is Not Being Honored.

Where an otherwise adequate assurance, statement of compliance, or plan has been filed in connection with an application for assistance, but prior to completion of action on the application the head of the agency in question has reasonable grounds, based on a substantiated complaint, the agency's own investigation, or otherwise, to believe that the representations as to compliance are in some material respect untrue or are not being honored, the agency head may defer action on the application pending prompt initiation and completion of section 602 procedures. The applicant should be notified immediately and attempts made to secure voluntary compliance. If such efforts fail and court enforcement is determined to be ineffective or inadequate, a hearing should be promptly initiated to determine whether, in fact, there is noncompliance.

If noncompliance is found, and if administrative alternatives are ineffective or inappropriate and court enforcement is still not feasible, section 602 procedures may be completed and assistance finally refused.

The above-described deferral and related compliance procedures would normally be appropriate in cases of an application for noncontinuing assistance. In the case of an initial application for a new or existing program of continuing assistance, deferral would often be less appropriate because of the opportunity to secure full compliance during the life of the assistance program. In those cases in which the agency does not defer action on the application, the applicant should be given prompt notice of the asserted noncompliance; funds should be paid out for short periods only, with no long-term commitment of assistance given; and the applicant advised that acceptance of the funds carries an enforceable obligation of nondiscrimination and the risk of invocation of severe sanctions, if noncompliance in fact is found.

B. REQUESTS FOR CONTINUATION OR RENEWAL OF ASSISTANCE

The following procedures are designed to apply in cases of noncompliance involving all submissions seeking continuation or renewal under programs of continuing assistance.

In cases in which commitments for Federal financial assistance have been made prior to the effective date of title VI regulations and funds have not been fully disbursed, or in which there is provision for future periodic payments to continue the program or activity for which a present recipient has previously applied and qualified, or in which assistance is given without formal application pursuant to statutory direction or authorization, the responsible agency may nonetheless

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require an assurance, statement of compliance, or plan in connection with disbursement or further funds. However, once a particular program grant or loan has been made or an application for a certain type of assistance for a specific or indefinite period has been approved, no funds due and payable pursuant to that grant, loan, or application, may normally be deferred or withheld without first completing the procedures prescribed in section 602.

Accordingly, where the assurance, statement of compliance, or plan required by agency regulations has not been filed or where, in the judgment of the head of the agency in question, the filed assurance fails on its face to satisfy the regulations, or there is reasonable cause to believe it untrue or not being honored, the agency head should, if efforts to secure voluntary compliance are unsuccessful, promptly institute a hearing to determine whether an adequate assurance has in fact been filed, or whether, in fact, there is noncompliance, as the case may be. There should ordinarily be no deferral of action on the submission or withholding of funds in this class of cases, although the limitation of the payout of funds to short periods may appropriately be ordered. If noncompliance is found, and if administrative alternatives are ineffective or inappropriate and court enforcement is not feasible, section 602 procedures may be completed and assistance terminated.

C. SHORT-TERM PROGRAMS

Special procedures may sometimes be required where there is noncompliance with title VI regulations in connection with a program of such short total duration that all assistance funds will have to be paid out before the agency's usual administrative procedures can be completed and where deferral in accordance with these guidelines would be tantamount to a final refusal to grant assistance.

In such a case, the agency head may, although otherwise following these guidelines, suspend normal agency procedures and institute expedited administrative proceedings to determine whether the regulations have been violated. He should simultaneously refer the matter to the Department of Justice for consideration of possible court enforcement, including interim injunctive relief. Deferral of action on an application is appropriate, in accordance with these guidelines, for a reasonable period of time, provided such action is consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with the action taken. As in other cases, where noncompliance is found in the hearing proceeding, and if administrative alternatives are ineffective or inappropriate and court enforcement is not feasible, section 602 procedures may be completed and assistance finally refused.

III. PROCEDURES IN CASES OF SUBGRANTEES

In situations in which applications for Federal assistance are approved by some agency other than the Federal granting agency, the same rules and procedures would apply. Thus, the Federal Agency should instruct the approving agency—typically a State agency—to defer approval or refuse to grant funds, in individual cases in which such action would be taken by the original granting agency itself under the above procedures. Provision should be made for appropriate notice of such action to the Federal agency which retains responsibility for compliance with section 602 procedures.

IV. EXCEPTIONAL CIRCUMSTANCES

The Attorney General should be consulted in individual cases in which the head of an agency believes that the objectives of title VI will be best achieved by proceeding other than as provided in these guidelines.

V. COORDINATION

While primary responsibility for enforcement of title VI rests directly with the head of each agency, in order to assure coordination of title VI enforcement and consistency among agencies, the Department of Justice should be notified in advance of applications on which action is to be deferred, hearings to be scheduled, and refusals and terminations of assistance or other enforcement actions or procedures to be undertaken. The Department also should be kept advised of the progress and results of hearings and other enforcement actions.

[31 FR 5292, Apr. 2, 1966]

§ 50.5 Notification of Consular Officers upon the arrest of foreign nationals.

(a) This statement is designed to establish a uniform procedure for consular notification where nationals of foreign countries are arrested by officers of this Department on charges of criminal violations. It conforms to practice under international law and in particular implements obligations undertaken by the United States pursuant to treaties with respect to the arrest and detention of foreign nationals. Some of the treaties obligate the United States to notify the consular officer only upon the demand or request of the arrested foreign national. On the other hand, some of the treaties require notifying the consul of the arrest of a foreign national whether or not

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the arrested person requests such notification.

(1) In every case in which a foreign national is arrested the arresting officer shall inform the foreign national that his consul will be advised of his arrest unless he does not wish such notification to be given. If the foreign national does not wish to have his consul notified, the arresting officer shall also inform him that in the event there is a treaty in force between the United States and his country which requires such notification, his consul must be notified regardless of his wishes and, if such is the case, he will be advised of such notification by the U.S. Attorney.

(2) In all cases (including those where the foreign national has stated that he does not wish his consul to be notified) the local office of the Federal Bureau of Investigation or the local Marshal's office, as the case may be, shall inform the nearest U.S. Attorney of the arrest and of the arrested person's wishes regarding consular notification.

(3) The U.S. Attorney shall then notify the appropriate consul except where he has been informed that the foreign national does not desire such notification to be made. However, if there is a treaty provision in effect which requires notification of consul, without reference to a demand or request of the arrested national, the consul shall be notified even if the arrested person has asked that he not be notified. In such case, the U.S. Attorney shall advise the foreign national that his consul has been notified and inform him that notification was necessary because of the treaty obligation.

(b) The procedure prescribed by this statement shall not apply to cases involving arrests made by the Immigration and Naturalization Service in administrative expulsion or exclusion proceedings, since that Service has heretofore established procedures for the direct notification of the appropriate consular officer upon such arrest. With respect to arrests made by the Service for violations of the criminal provisions of the immigration laws, the U.S. Marshal, upon delivery of the foreign national into his custody, shall be responsible for informing the U.S. Attorney of the arrest in accordance with numbered paragraph 2 of this statement.

[Order No. 375–67, 32 FR 1040, Jan. 28, 1967]

§50.6 Antitrust Division business review procedure.

Although the Department of Justice is not authorized to give advisory opinions to private parties, for several decades the Antitrust Division has been willing in certain circumstances to review proposed business conduct and state its enforcement intentions. This originated with a "railroad release" procedure under which the Division would forego the initiation of criminal antitrust proceedings. The procedure was subsequently expanded to encompass a "merger clearance" procedure under which the Division would state its present enforcement intention with respect to a merger or acquisition; and the Department issued a written statement entitled "Business Review Procedure." That statement has been revised several times.

1. A request for a business review letter must be submitted in writing to the Assistant Attorney General, Antitrust Division, Department of Justice, Washington, DC 20530.

2. The Division will consider only requests with respect to proposed business conduct, which may involve either domestic or foreign commerce.

3. The Division may, in its discretion, refuse to consider a request.

4. A business review letter shall have no application to any party which does not join in the request therefor.

5. The requesting parties are under an affirmative obligation to make full and true disclosure with respect to the business conduct for which review is requested. Each request must be accompanied by all relevant data including background information, complete copies of all operative documents and detailed statements of all collateral oral understandings, if any. All parties requesting the review letter must provide the Division with whatever additional information or documents the Division may thereafter request in order to review the matter. Such additional information, if furnished orally, shall be promptly confirmed in writing. In connection with any request for review the Division will also conduct whatever independent investigation it believes is appropriate.

6. No oral clearance, release or other statement purporting to bind the enforcement discretion of the Division may be given. The

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requesting party may rely upon only a written business review letter signed by the Assistant Attorney General in charge of the Antitrust Division or his delegate.

7. (a) If the business conduct for which review is requested is subject to approval by a regulatory agency, a review request may be considered before agency approval has been obtained only where it appears that exceptional and unnecessary burdens might otherwise be imposed on the party or parties requesting review, or where the agency specifically requests that a party or parties request review. However, any business review letter issued in these as in any other circumstances will state only the Department's present enforcement intentions under the antitrust laws. It shall in no way be taken to indicate the Department's views on the legal or factual issues that may be raised before the regulatory agency, or in an appeal from the regulatory agency's decision. In particular, the issuance of such a letter is not to be represented to mean that the Division believes that there are no anticompetitive consequences warranting agency consideration.

(b) The submission of a request for a business review, or its pendency, shall in no way alter any responsibility of any party to comply with the Premerger Notification provisions of the Antitrust Improvements Act of 1976, 15 U.S.C. 18A, and the regulations promulgated thereunder, 16 CFR, part 801.

8. After review of a request submitted hereunder the Division may: state its present enforcement intention with respect to the proposed business conduct; decline to pass on the request; or take such other position or action as it considers appropriate.

9. A business review letter states only the enforcement intention of the Division as of the date of the letter, and the Division remains completely free to bring whatever action or proceeding it subsequently comes to believe is required by the public interest. As to a stated present intention not to bring an action, however, the Division has never exercised its right to bring a criminal action where there has been full and true disclosure at the time of presenting the request.

10. (a) Simultaneously upon notifying the requesting party of and Division action described in paragraph 8, the business review request, and the Division's letter in response shall be indexed and placed in a file available to the public upon request.

(b) On that date or within thirty days after the date upon which the Division takes any action as described in paragraph 8, the information supplied to support the business review request and any other information supplied by the requesting party in connection with the transaction that is the subject of the business review request, shall be indexed and placed in a file with the request and the Division's letter, available to the public upon request. This file shall remain open for one year, after which time it shall be closed and the documents either returned to the requesting party or otherwise disposed of, at the discretion of the Antitrust Division.

(c) Prior to the time the information described in subparagraphs (a) and (b) is indexed and made publicly available in accordance with the terms of that subparagraph, the requesting party may ask the Division to delay making public some or all of such information. However the requesting party must: (1) Specify precisely the documents or parts thereof that he asks not be made public; (2) state the minimum period of time during which nondisclosure is considered necessary; and (3) justify the request for nondisclosure, both as to content and time, by showing good cause therefor, including a showing that disclosure would have a detrimental effect upon the requesting party's operations or relationships with actual or potential customers, employees, suppliers (including suppliers of credit), stockholders, or competitors. The Department of Justice, in its discretion, shall make the final determination as to whether good cause for nondisclosure has been shown.

(d) Nothing contained in subparagraphs (a), (b) and (c) shall limit the Division's right, in its discretion, to issue a press release describing generally the identity of the requesting party or parties and the nature of action taken by the Division upon the request.

(e) This paragraph reflects a policy determination by the Justice Department and is subject to any limitations on public disclosure arising from statutory restrictions, Executive Order, or the national interest.

11. Any requesting party may withdraw a request for review at any time. The Division remains free, however, to submit such comments to such requesting party as it deems appropriate. Failure to take action after receipt of documents or information whether submitted pursuant to this procedure or otherwise, does not in any way limit or stop the Division from taking such action at such time thereafter as it deems appropriate. The Division reserves the right to retain documents submitted to it under this procedure or otherwise and to use them for all governmental purposes.

[42 FR 11831, Mar. 1, 1977]

§ 50.7 Consent judgments in actions to enjoin discharges of pollutants.

(a) It is hereby established as the policy of the Department of Justice to consent to a proposed judgment in an action to enjoin discharges of pollutants into the environment only after or on condition that an opportunity is afforded persons (natural or corporate)

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who are not named as parties to the action to comment on the proposed judgment prior to its entry by the court.

(b) To effectuate this policy, each proposed judgment which is within the scope of paragraph (a) of this section shall be lodged with the court as early as feasible but at least 30 days before the judgment is entered by the court. Prior to entry of the judgment, or some earlier specified date, the Department of Justice will receive and consider, and file with the court, any written comments, views or allegations relating to the proposed judgment. The Department shall reserve the right (1) to withdraw or withhold its consent to the proposed judgment if the comments, views and allegations concerning the judgment disclose facts or considerations which indicate that the proposed judgment is inappropriate, improper or inadequate and (2) to oppose an attempt by any person to intervene in the action.

(c) The Assistant Attorney General in charge of the Land and Natural Resources Division may establish procedures for implementing this policy. Where it is clear that the public interest in the policy hereby established is not compromised, the Assistant Attorney General may permit an exception to this policy in a specific case where extraordinary circumstances require a period shorter than 30 days or a procedure other than stated herein.

[Order No. 529-73, 38 FR 19029, July 17, 1973]

§ 50.8 [Reserved]

§ 50.9 Policy with regard to open judicial proceedings.

Because of the vital public interest in open judicial proceedings, the Government has a general overriding affirmative duty to oppose their closure. There is, moreover, a strong presumption against closing proceedings or portions thereof, and the Department of Justice foresees very few cases in which closure would be warranted. The Government should take a position on any motion to close a judicial proceeding, and should ordinarily oppose closure; it should move for or consent to closed proceedings only when closure is plainly essential to the interests of justice. In furtherance of the Department's concern for the right of the public to attend judicial proceedings and the Department's obligation to the fair administration of justice, the following guidelines shall be adhered to by all attorneys for the United States.

(a) These guidelines apply to all federal trials, pre- and post-trial evidentiary proceedings, arraignments, bond hearings, plea proceedings, sentencing proceedings, or portions thereof, except as indicated in paragraph (e) of this section.

(b) A Government attorney has a compelling duty to protect the societal interest in open proceedings.

(c) A Government attorney shall not move for or consent to closure of a proceeding covered by these guidelines unless:

(1) No reasonable alternative exists for protecting the interests at stake;

(2) Closure is clearly likely to prevent the harm sought to be avoided;

(3) The degree of closure is minimized to the greatest extent possible;

(4) The public is given adequate notice of the proposed closure; and, in addition, the motion for closure is made on the record, except where the disclosure of the details of the motion papers would clearly defeat the reason for closure specified under paragraph (c)(6) of this section;

(5) Transcripts of the closed proceedings will be unsealed as soon as the interests requiring closure no longer obtain; and

(6) Failure to close the proceedings will produce;

(i) A substantial likelihood of denial of the right of any person to a fair trial; or

(ii) A substantial likelihood of imminent danger to the safety of parties, witnesses, or other persons; or

(iii) A substantial likelihood that ongoing investigations will be seriously jeopardized.

(d) A government attorney shall not move for or consent to the closure of any proceeding, civil or criminal, except with the express authorization of:

(1) The Deputy Attorney General, or,

(2) The Associate Attorney General, if the Division seeking authorization is under the supervision of the Associate Attorney General.

(e) These guidelines do not apply to:

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(1) The closure of part of a judicial proceeding where necessary to protect national security information or classified documents; or

(2) *In camera* inspection, consideration or sealing of documents, including documents provided to the Government under a promise of confidentiality, where permitted by statute, rule of evidence or privilege; or

(3) Grand jury proceedings or proceedings ancillary thereto; or

(4) Conferences traditionally held at the bench or in chambers during the course of an open proceeding; or

(5) The closure of judicial proceedings pursuant to 18 U.S.C. 3509 (d) and (e) for the protection of child victims or child witnesses.

(f) Because of the vital public interest in open judicial proceedings, the records of any proceeding closed pursuant to this section, and still sealed 60 days after termination of the proceeding, shall be reviewed to determine if the reasons for closure are still applicable. If they are not, an appropriate motion will be made to have the records unsealed. If the reasons for closure are still applicable after 60 days, this review is to be repeated every 60 days until such time as the records are unsealed. Compliance with this section will be monitored by the Criminal Division.

(g) The principles set forth in this section are intended to provide guidance to attorneys for the Government and are not intended to create or recognize any legally enforceable right in any person.

[Order No. 914–80, 45 FR 69214, Oct. 20, 1980, as amended by Order No. 1031–83, 48 FR 49509, Oct. 26, 1983; Order No. 1115–85, 50 FR 51677, Dec. 19, 1985; Order No. 1507–91, 56 FR 32327, July 16, 1991]

§ 50.10 Policy regarding obtaining information from, or records of, members of the news media; and regarding questioning, arresting, or charging members of the news media.

(a) *Statement of principles.* (1) Because freedom of the press can be no broader than the freedom of members of the news media to investigate and report the news, the Department's policy is intended to provide protection to members of the news media from certain law enforcement tools, whether criminal or civil, that might unreasonably impair newsgathering activities. The policy is not intended to extend special protections to members of the news media who are subjects or targets of criminal investigations for conduct not based on, or within the scope of, newsgathering activities.

(2) In determining whether to seek information from, or records of, members of the news media, the approach in every instance must be to strike the proper balance among several vital interests: Protecting national security, ensuring public safety, promoting effective law enforcement and the fair administration of justice, and safeguarding the essential role of the free press in fostering government accountability and an open society.

(3) The Department views the use of certain law enforcement tools, including subpoenas, court orders issued pursuant to 18 U.S.C. 2703(d) or 3123, and search warrants to seek information from, or records of, non-consenting members of the news media as extraordinary measures, not standard investigatory practices. In particular, subpoenas or court orders issued pursuant to 18 U.S.C. 2703(d) or 3123 may be used, after authorization by the Attorney General, or by another senior official in accordance with the exceptions set forth in paragraph (c)(3) of this section, only to obtain information from, or records of, members of the news media when the information sought is essential to a successful investigation, prosecution, or litigation; after all reasonable alternative attempts have been made to obtain the information from alternative sources; and after negotiations with the affected member of the news media have been pursued and appropriate notice to the affected member of the news media has been provided, unless the Attorney General determines that, for compelling reasons, such negotiations or notice would pose a clear and substantial threat to the integrity of the investigation, risk grave harm to national security, or present an imminent risk of death or serious bodily harm.

(4) When the Attorney General has authorized the use of a subpoena, court order issued pursuant to 18 U.S.C. 2703(d) or 3123, or warrant to obtain

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from a third party communications records or business records of a member of the news media, the affected member of the news media shall be given reasonable and timely notice of the Attorney General's determination before the use of the subpoena, court order, or warrant, unless the Attorney General determines that, for compelling reasons, such notice would pose a clear and substantial threat to the integrity of the investigation, risk grave harm to national security, or present an imminent risk of death or serious bodily harm.

(b) *Scope.*—(1) *Covered individuals and entities.* (i) The policy governs the use of certain law enforcement tools to obtain information from, or records of, members of the news media.

(ii) The protections of the policy do not extend to any individual or entity where there are reasonable grounds to believe that the individual or entity is—

(A) A foreign power or agent of a foreign power, as those terms are defined in section 101 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801);

(B) A member or affiliate of a foreign terrorist organization designated under section 219(a) of the Immigration and Nationality Act (8 U.S.C. 1189(a));

(C) Designated as a Specially Designated Global Terrorist by the Department of the Treasury under Executive Order 13224 of September 23, 2001 (66 FR 49079);

(D) A specially designated terrorist as that term is defined in 31 CFR 595.311 (or any successor thereto);

(E) A terrorist organization as that term is defined in section 212(a)(3)(B)(vi) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(B)(vi));

(F) Committing or attempting to commit a crime of terrorism, as that offense is described in 18 U.S.C. 2331(5) or 2332b(g)(5);

(G) Committing or attempting the crime of providing material support or resources to terrorists, as that offense is defined in 18 U.S.C. 2339A; or

(H) Aiding, abetting, or conspiring in illegal activity with a person or organization described in paragraphs (b)(1)(ii)(A) through (G) of this section.

(2) *Covered law enforcement tools and records.* (i) The policy governs the use by law enforcement authorities of subpoenas or, in civil matters, other similar compulsory process such as a civil investigative demand (collectively "subpoenas") to obtain information from members of the news media, including documents, testimony, and other materials; and the use by law enforcement authorities of subpoenas, or court orders issued pursuant to 18 U.S.C. 2703(d) ("2703(d) order") or 18 U.S.C. 3123 ("3123 order"), to obtain from third parties "communications records" or "business records" of members of the news media.

(ii) The policy also governs applications for warrants to search the premises or property of members of the news media, pursuant to Federal Rule of Criminal Procedure 41; or to obtain from third-party "communication service providers" the communications records or business records of members of the news media, pursuant to 18 U.S.C. 2703(a) and (b).

(3) *Definitions.* (i)(A) "Communications records" include the contents of electronic communications as well as source and destination information associated with communications, such as email transaction logs and local and long distance telephone connection records, stored or transmitted by a third-party communication service provider with which the member of the news media has a contractual relationship.

(B) Communications records do not include information described in 18 U.S.C. 2703(c)(2)(A), (B), (D), (E), and (F).

(ii) A "communication service provider" is a provider of an electronic communication service or remote computing service as defined, respectively, in 18 U.S.C. 2510(15) and 18 U.S.C. 2711(2).

(iii) (A) "Business records" include work product and other documentary materials, and records of the activities, including the financial transactions, of a member of the news media related to the coverage, investigation, or reporting of news. Business records are limited to those generated or maintained

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by a third party with which the member of the news media has a contractual relationship, and which could provide information about the newsgathering techniques or sources of a member of the news media.

(B) Business records do not include records unrelated to newsgathering activities, such as those related to the purely commercial, financial, administrative, or technical, operations of a news media entity.

(C) Business records do not include records that are created or maintained either by the government or by a contractor on behalf of the government.

(c) *Issuing subpoenas to members of the news media, or using subpoenas or court orders issued pursuant to 18 U.S.C. 2703(d) or 3123 to obtain from third parties communications records or business records of a member of the news media.* (1) Except as set forth in paragraph (c)(3) of this section, members of the Department must obtain the authorization of the Attorney General to issue a subpoena to a member of the news media; or to use a subpoena, 2703(d) order, or 3123 order to obtain from a third party communications records or business records of a member of the news media.

(2) Requests for the authorization of the Attorney General for the issuance of a subpoena to a member of the news media, or to use a subpoena, 2703(d) order, or 3123 order to obtain communications records or business records of a member of the news media, must be personally endorsed by the United States Attorney or Assistant Attorney General responsible for the matter.

(3) *Exceptions to the Attorney General authorization requirement.* (i)(A) A United States Attorney or Assistant Attorney General responsible for the matter may authorize the issuance of a subpoena to a member of the news media (*e.g.*, for documents, video or audio recordings, testimony, or other materials) if the member of the news media expressly agrees to provide the requested information in response to a subpoena. This exception applies, but is not limited, to both published and unpublished materials and aired and unaired recordings.

(B) In the case of an authorization under paragraph (c)(3)(i)(A) of this section, the United States Attorney or Assistant Attorney General responsible for the matter shall provide notice to the Director of the Criminal Division's Office of Enforcement Operations within 10 business days of the authorization of the issuance of the subpoena.

(ii) In light of the intent of this policy to protect freedom of the press, newsgathering activities, and confidential news media sources, authorization of the Attorney General will not be required of members of the Department in the following circumstances:

(A) To issue subpoenas to news media entities for purely commercial, financial, administrative, technical, or other information unrelated to newsgathering activities; or for information or records relating to personnel not involved in newsgathering activities.

(B) To issue subpoenas to members of the news media for information related to public comments, messages, or postings by readers, viewers, customers, or subscribers, over which the member of the news media does not exercise editorial control prior to publication.

(C) To use subpoenas to obtain information from, or to use subpoenas, 2703(d) orders, or 3123 orders to obtain communications records or business records of, members of the news media who may be perpetrators or victims of, or witnesses to, crimes or other events, when such status (as a perpetrator, victim, or witness) is not based on, or within the scope of, newsgathering activities.

(iii) In the circumstances identified in paragraphs (c)(3)(ii)(A) through (C) of this section, the United States Attorney or Assistant Attorney General responsible for the matter must—

(A) Authorize the use of the subpoena or court order;

(B) Consult with the Criminal Division regarding appropriate review and safeguarding protocols; and

(C) Provide a copy of the subpoena or court order to the Director of the Office of Public Affairs and to the Director of the Criminal Division's Office of Enforcement Operations within 10 business days of the authorization.

(4) *Considerations for the Attorney General in determining whether to authorize the issuance of a subpoena to a member of the news media.* (i) In matters in which

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a member of the Department determines that a member of the news media is a subject or target of an investigation relating to an offense committed in the course of, or arising out of, newsgathering activities, the member of the Department requesting Attorney General authorization to issue a subpoena to a member of the news media shall provide all facts necessary for determinations by the Attorney General regarding both whether the member of the news media is a subject or target of the investigation and whether to authorize the issuance of such subpoena. If the Attorney General determines that the member of the news media is a subject or target of an investigation relating to an offense committed in the course of, or arising out of, newsgathering activities, the Attorney General's determination regarding the issuance of the proposed subpoena should take into account the principles reflected in paragraph (a) of this section, but need not take into account the considerations identified in paragraphs (c)(4)(ii) through (viii) of this section.

(ii)(A) In criminal matters, there should be reasonable grounds to believe, based on public information, or information from non-media sources, that a crime has occurred, and that the information sought is essential to a successful investigation or prosecution. The subpoena should not be used to obtain peripheral, nonessential, or speculative information.

(B) In civil matters, there should be reasonable grounds to believe, based on public information or information from non-media sources, that the information sought is essential to the successful completion of the investigation or litigation in a case of substantial importance. The subpoena should not be used to obtain peripheral, nonessential, cumulative, or speculative information.

(iii) The government should have made all reasonable attempts to obtain the information from alternative, non-media sources.

(iv)(A) The government should have pursued negotiations with the affected member of the news media, unless the Attorney General determines that, for compelling reasons, such negotiations would pose a clear and substantial threat to the integrity of the investigation, risk grave harm to national security, or present an imminent risk of death or serious bodily harm. Where the nature of the investigation permits, the government should have explained to the member of the news media the government's needs in a particular investigation or prosecution, as well as its willingness to address the concerns of the member of the news media.

(B) The obligation to pursue negotiations with the affected member of the news media, unless excused by the Attorney General, is not intended to conflict with the requirement that members of the Department secure authorization from the Attorney General to question a member of the news media as required in paragraph (f)(1) of this section. Accordingly, members of the Department do not need to secure authorization from the Attorney General to pursue negotiations.

(v) The proposed subpoena generally should be limited to the verification of published information and to such surrounding circumstances as relate to the accuracy of the published information.

(vi) In investigations or prosecutions of unauthorized disclosures of national defense information or of classified information, where the Director of National Intelligence, after consultation with the relevant Department or agency head(s), certifies to the Attorney General the significance of the harm raised by the unauthorized disclosure and that the information disclosed was properly classified and reaffirms the intelligence community's continued support for the investigation or prosecution, the Attorney General may authorize members of the Department, in such investigations, to issue subpoenas to members of the news media. The certification, which the Attorney General should take into account along with other considerations identified in paragraphs (c)(4)(ii) through (viii) of this section, will be sought not more than 30 days prior to the submission of the approval request to the Attorney General.

(vii) Requests should be treated with care to avoid interference with

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newsgathering activities and to avoid claims of harassment.

(viii) The proposed subpoena should be narrowly drawn. It should be directed at material and relevant information regarding a limited subject matter, should cover a reasonably limited period of time, should avoid requiring production of a large volume of material, and should give reasonable and timely notice of the demand.

(5) *Considerations for the Attorney General in determining whether to authorize the use of a subpoena, 2703(d) order, or 3123 order to obtain from third parties the communications records or business records of a member of the news media.* (i) In matters in which a member of the Department determines that a member of the news media is a subject or target of an investigation relating to an offense committed in the course of, or arising out of, newsgathering activities, the member of the Department requesting Attorney General authorization to use a subpoena, 2703(d) order, or 3123 order to obtain from a third party the communications records or business records of a member of the news media shall provide all facts necessary for determinations by the Attorney General regarding both whether the member of the news media is a subject or target of the investigation and whether to authorize the use of such subpoena or order. If the Attorney General determines that the member of the news media is a subject or target of an investigation relating to an offense committed in the course of, or arising out of, newsgathering activities, the Attorney General's determination regarding the use of the proposed subpoena or order should take into account the principles reflected in paragraph (a) of this section, but need not take into account the considerations identified in paragraphs (c)(5)(ii) through (viii) of this section.

(ii)(A) In criminal matters, there should be reasonable grounds to believe, based on public information, or information from non-media sources, that a crime has been committed, and that the information sought is essential to the successful investigation or prosecution of that crime. The subpoena or court order should not be used to obtain peripheral, nonessential, cumulative, or speculative information.

(B) In civil matters, there should be reasonable grounds to believe, based on public information, or information from non-media sources, that the information sought is essential to the successful completion of the investigation or litigation in a case of substantial importance. The subpoena should not be used to obtain peripheral, nonessential, cumulative, or speculative information.

(iii) The use of a subpoena or court order to obtain from a third party communications records or business records of a member of the news media should be pursued only after the government has made all reasonable attempts to obtain the information from alternative sources.

(iv)(A) The government should have pursued negotiations with the affected member of the news media unless the Attorney General determines that, for compelling reasons, such negotiations would pose a clear and substantial threat to the integrity of the investigation, risk grave harm to national security, or present an imminent risk of death or serious bodily harm.

(B) The obligation to pursue negotiations with the affected member of the news media, unless excused by the Attorney General, is not intended to conflict with the requirement that members of the Department secure authorization from the Attorney General to question a member of the news media as set forth in paragraph (f)(1) of this section. Accordingly, members of the Department do not need to secure authorization from the Attorney General to pursue negotiations.

(v) In investigations or prosecutions of unauthorized disclosures of national defense information or of classified information, where the Director of National Intelligence, after consultation with the relevant Department or agency head(s), certifies to the Attorney General the significance of the harm raised by the unauthorized disclosure and that the information disclosed was properly classified and reaffirms the intelligence community's continued support for the investigation or prosecution, the Attorney General may authorize members of the Department, in

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such investigations, to use subpoenas or court orders issued pursuant to 18 U.S.C. 2703(d) or 3123 to obtain communications records or business records of a member of the news media. The certification, which the Attorney General should take into account along with the other considerations identified in paragraph (c)(5) of this section, will be sought not more than 30 days prior to the submission of the approval request to the Attorney General.

(vi) Requests should be treated with care to avoid interference with newsgathering activities and to avoid claims of harassment.

(vii) The proposed subpoena or court order should be narrowly drawn. It should be directed at material and relevant information regarding a limited subject matter, should cover a reasonably limited period of time, and should avoid requiring production of a large volume of material.

(viii) If appropriate, investigators should propose to use search protocols designed to minimize intrusion into potentially protected materials or newsgathering activities unrelated to the investigation, including but not limited to keyword searches (for electronic searches) and filter teams (reviewing teams separate from the prosecution and investigative teams).

(6) When the Attorney General has authorized the issuance of a subpoena to a member of the news media; or the use of a subpoena, 2703(d) order, or 3123 order to obtain from a third party communications records or business records of a member of the news media, members of the Department must consult with the Criminal Division before moving to compel compliance with any such subpoena or court order.

(d) *Applying for warrants to search the premises, property, communications records, or business records of members of the news media.* (1) Except as set forth in paragraph (d)(4) of this section, members of the Department must obtain the authorization of the Attorney General to apply for a warrant to search the premises, property, communications records, or business records of a member of the news media.

(2) All requests for authorization of the Attorney General to apply for a warrant to search the premises, property, communications records, or business records of a member of the news media must be personally endorsed by the United States Attorney or Assistant Attorney General responsible for the matter.

(3) In determining whether to authorize an application for a warrant to search the premises, property, communications records, or business records of a member of the news media, the Attorney General should take into account the considerations identified in paragraph (c)(5) of this section.

(4) Members of the Department may apply for a warrant to obtain work product materials or other documentary materials of a member of the news media pursuant to the "suspect exception" of the Privacy Protection Act ("PPA suspect exception"), 42 U.S.C. 2000aa(a)(1), (b)(1), when the member of the news media is a subject or target of a criminal investigation for conduct not based on, or within the scope of, newsgathering activities. In such instances, members of the Department must secure authorization from a Deputy Assistant Attorney General for the Criminal Division.

(5) Members of the Department should not be authorized to apply for a warrant to obtain work product materials or other documentary materials of a member of the news media under the PPA suspect exception, 42 U.S.C. 2000aa(a)(1), (b)(1), if the sole purpose is to further the investigation of a person other than the member of the news media.

(6) A Deputy Assistant Attorney General for the Criminal Division may authorize, under an applicable PPA exception, an application for a warrant to search the premises, property, communications records, or business records of an individual other than a member of the news media, but who is reasonably believed to have "a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication." 42 U.S.C. 2000aa(a), (b).

(7) In executing a warrant authorized by the Attorney General or by a Deputy Assistant Attorney General for the Criminal Division investigators should

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use search protocols designed to minimize intrusion into potentially protected materials or newsgathering activities unrelated to the investigation, including but not limited to keyword searches (for electronic searches) and filter teams.

(e) *Notice to affected member of the news media.* (1)(i) In matters in which the Attorney General has both determined that a member of the news media is a subject or target of an investigation relating to an offense committed in the course of, or arising out of, newsgathering activities, and authorized the use of a subpoena, court order, or warrant to obtain from a third party the communications records or business records of a member of the news media pursuant to paragraph (c)(4)(i), (c)(5)(i), or (d)(1) of this section, members of the Department are not required to provide notice of the Attorney General's authorization to the affected member of the news media. The Attorney General nevertheless may direct that notice be provided.

(ii) If the Attorney General does not direct that notice be provided, the United States Attorney or Assistant Attorney General responsible for the matter shall provide to the Attorney General every 90 days an update regarding the status of the investigation, which update shall include an assessment of any harm to the investigation that would be caused by providing notice to the affected member of the news media. The Attorney General shall consider such update in determining whether to direct that notice be provided.

(2)(i) Except as set forth in paragraph (e)(1) of this section, when the Attorney General has authorized the use of a subpoena, court order, or warrant to obtain from a third party communications records or business records of a member of the news media, the affected member of the news media shall be given reasonable and timely notice of the Attorney General's determination before the use of the subpoena, court order, or warrant, unless the Attorney General determines that, for compelling reasons, such notice would pose a clear and substantial threat to the integrity of the investigation, risk grave harm to national security, or present an imminent risk of death or serious bodily harm.

(ii) The mere possibility that notice to the affected member of the news media, and potential judicial review, might delay the investigation is not, on its own, a compelling reason to delay notice.

(3) When the Attorney General has authorized the use of a subpoena, court order, or warrant to obtain communications records or business records of a member of the news media, and the affected member of the news media has not been given notice, pursuant to paragraph (e)(2) of this section, of the Attorney General's determination before the use of the subpoena, court order, or warrant, the United States Attorney or Assistant Attorney General responsible for the matter shall provide to the affected member of the news media notice of the order or warrant as soon as it is determined that such notice will no longer pose a clear and substantial threat to the integrity of the investigation, risk grave harm to national security, or present an imminent risk of death or serious bodily harm. In any event, such notice shall occur within 45 days of the government's receipt of any return made pursuant to the subpoena, court order, or warrant, except that the Attorney General may authorize delay of notice for an additional 45 days if he or she determines that, for compelling reasons, such notice would pose a clear and substantial threat to the integrity of the investigation, risk grave harm to national security, or present an imminent risk of death or serious bodily harm. No further delays may be sought beyond the 90-day period.

(4) The United States Attorney or Assistant Attorney General responsible for the matter shall provide to the Director of the Office of Public Affairs and to the Director of the Criminal Division's Office of Enforcement Operations a copy of any notice to be provided to a member of the news media whose communications records or business records were sought or obtained at least 10 business days before such notice is provided to the affected member of the news media, and immediately after such notice is, in fact, provided to

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the affected member of the news media.

(f) *Questioning, arresting, or charging members of the news media.* (1) No member of the Department shall subject a member of the news media to questioning as to any offense that he or she is suspected of having committed in the course of, or arising out of, newsgathering activities without first providing notice to the Director of the Office of Public Affairs and obtaining the express authorization of the Attorney General. The government need not view the member of the news media as a subject or target of an investigation, or have the intent to prosecute the member of the news media, to trigger the requirement that the Attorney General must authorize such questioning.

(2) No member of the Department shall seek a warrant for an arrest, or conduct an arrest, of a member of the news media for any offense that he or she is suspected of having committed in the course of, or arising out of, newsgathering activities without first providing notice to the Director of the Office of Public Affairs and obtaining the express authorization of the Attorney General.

(3) No member of the Department shall present information to a grand jury seeking a bill of indictment, or file an information, against a member of the news media for any offense that he or she is suspected of having committed in the course of, or arising out of newsgathering activities, without first providing notice to the Director of the Office of Public Affairs and obtaining the express authorization of the Attorney General.

(4) In requesting the Attorney General's authorization to question, to seek an arrest warrant for or to arrest, or to present information to a grand jury seeking an indictment or to file an information against, a member of the news media as provided in paragraphs (f)(1) through (3) of this section, members of the Department shall provide all facts necessary for a determination by the Attorney General.

(5) In determining whether to grant a request for authorization to question, to seek an arrest warrant for or to arrest, or to present information to a grand jury seeking an indictment or to file an information against, a member of the news media, the Attorney General should take into account the considerations reflected in the Statement of Principles in paragraph (a) of this section.

(g) *Exigent circumstances.* (1)(i) A Deputy Assistant Attorney General for the Criminal Division may authorize the use of a subpoena or court order, as described in paragraph (c) of this section, or the questioning, arrest, or charging of a member of the news media, as described in paragraph (f) of this section, if he or she determines that the exigent use of such law enforcement tool or technique is necessary to prevent or mitigate an act of terrorism; other acts that are reasonably likely to cause significant and articulable harm to national security; death; kidnapping; substantial bodily harm; conduct that constitutes a specified offense against a minor (for example, as those terms are defined in section 111 of the Adam Walsh Child Protection and Safety Act of 2006, 42 U.S.C. 16911), or an attempt or conspiracy to commit such a criminal offense; or incapacitation or destruction of critical infrastructure (for example, as defined in section 1016(e) of the USA PATRIOT Act, 42 U.S.C. 5195c(e)).

(ii) A Deputy Assistant Attorney General for the Criminal Division may authorize an application for a warrant, as described in paragraph (d) of this section, if there is reason to believe that the immediate seizure of the materials at issue is necessary to prevent the death of, or serious bodily injury to, a human being, as provided in 42 U.S.C. 2000aa(a)(2) and (b)(2).

(2) Within 10 business days of the approval by a Deputy Assistant Attorney General for the Criminal Division of a request under paragraph (g) of this section, the United States Attorney or Assistant Attorney General responsible for the matter shall provide to the Attorney General and to the Director of the Office of Public Affairs a statement containing the information that would have been provided in a request for prior authorization.

(h) *Safeguarding.* Any information or records obtained from members of the

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news media or from third parties pursuant to this policy shall be closely held so as to prevent disclosure of the information to unauthorized persons or for improper purposes. Members of the Department should consult the United States Attorneys' Manual for specific guidance regarding the safeguarding of information or records obtained from members of the news media or from third parties pursuant to this policy.

(i) *Failure to comply with policy.* Failure to obtain the prior approval of the Attorney General, as required by this policy, may constitute grounds for an administrative reprimand or other appropriate disciplinary action.

(j) *General provision.* This policy is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

[AG Order No. 3486–2015, 80 FR 2820, Jan. 21, 2015]

§ 50.12 Exchange of FBI identification records.

(a) The Federal Bureau of Investigation, hereinafter referred to as the FBI, is authorized to expend funds for the exchange of identification records with officials of federally chartered or insured banking institutions to promote or maintain the security of those institutions and, if authorized by state statute and approved by the Director of the FBI, acting on behalf of the Attorney General, with officials of state and local governments for purposes of employment and licensing, pursuant to section 201 of Public Law 92–544, 86 Stat. 1115. Also, pursuant to 15 U.S.C. 78q, 7 U.S.C. 21 (b)(4)(E), and 42 U.S.C. 2169, respectively, such records can be exchanged with certain segments of the securities industry, with registered futures associations, and with nuclear power plants. The records also may be exchanged in other instances as authorized by federal law.

(b) The FBI Director is authorized by 28 CFR 0.85(j) to approve procedures relating to the exchange of identification records. Under this authority, effective September 6, 1990, the FBI Criminal Justice Information Services (CJIS) Division has made all data on identification records available for such purposes. Records obtained under this authority may be used solely for the purpose requested and cannot be disseminated outside the receiving departments, related agencies, or other authorized entities. Officials at the governmental institutions and other entities authorized to submit fingerprints and receive FBI identification records under this authority must notify the individuals fingerprinted that the fingerprints will be used to check the criminal history records of the FBI. The officials making the determination of suitability for licensing or employment shall provide the applicants the opportunity to complete, or challenge the accuracy of, the information contained in the FBI identification record. These officials also must advise the applicants that procedures for obtaining a change, correction, or updating of an FBI identification record are set forth in 28 CFR 16.34. Officials making such determinations should not deny the license or employment based on information in the record until the applicant has been afforded a reasonable time to correct or complete the record, or has declined to do so. A statement incorporating these use-and-challenge requirements will be placed on all records disseminated under this program. This policy is intended to ensure that all relevant criminal record information is made available to provide for the public safety and, further, to protect the interests of the prospective employee/licensee who may be affected by the information or lack of information in an identification record.

[Order No. 2258–99, 64 FR 52229, Sept. 28, 1999]

§ 50.14 Guidelines on employee selection procedures.

The guidelines set forth below are intended as a statement of policy of the Department of Justice and will be applied by the Department in exercising its responsibilities under Federal law relating to equal employment opportunity.

UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURES (1978)

NOTE: These guidelines are issued jointly by four agencies. Separate official adoptions

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follow the guidelines in this part IV as follows: Civil Service Commission, Department of Justice, Equal Employment Opportunity Commission, Department of Labor.

For official citation see section 18 of these guidelines.

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GENERAL PRINCIPLES

SECTION 1. *Statement of purpose*—A. *Need for uniformity—Issuing agencies.* The Federal government's need for a uniform set of principles on the question of the use of tests and other selection procedures has long been recognized. The Equal Employment Opportunity Commission, the Civil Service Commission, the Department of Labor, and the Department of Justice jointly have adopted these uniform guidelines to meet that need, and to apply the same principles to the Federal Government as are applied to other employers.

B. *Purpose of guidelines.* These guidelines incorporate a single set of principles which are designed to assist employers, labor organizations, employment agencies, and licensing and certification boards to comply with requirements of Federal law prohibiting employment practices which discriminate on grounds of race, color, religion, sex, and national origin. They are designed to provide a framework for determining the proper use of tests and other selection procedures. These guidelines do not require a user to conduct validity studies of selection procedures where no adverse impact results. However, all users are encouraged to use selection procedures which are valid, especially users operating under merit principles.

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C. *Relation to prior guidelines.* These guidelines are based upon and supersede previously issued guidelines on employee selection procedures. These guidelines have been built upon court decisions, the previously issued guidelines of the agencies, and the practical experience of the agencies, as well as the standards of the psychological profession. These guidelines are intended to be consistent with existing law.

SEC. 2. *Scope*—A. *Application of guidelines.* These guidelines will be applied by the Equal Employment Opportunity Commission in the enforcement of title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972 (hereinafter "Title VII"); by the Department of Labor, and the contract compliance agencies until the transfer of authority contemplated by the President's Reorganization Plan No. 1 of 1978, in the administration and enforcement of Executive Order 11246, as amended by Executive Order 11375 (hereinafter "Executive Order 11246"); by the Civil Service Commission and other Federal agencies subject to section 717 of title VII; by the Civil Service Commission in exercising its responsibilities toward State and local governments under section 208(b)(1) of the Intergovernmental-Personnel Act; by the Department of Justice in exercising its responsibilities under Federal law; by the Office of Revenue Sharing of the Department of the Treasury under the State and Local Fiscal Assistance Act of 1972, as amended; and by any other Federal agency which adopts them.

B. *Employment decisions.* These guidelines apply to tests and other selection procedures which are used as a basis for any employment decision. Employment decisions include but are not limited to hiring, promotion, demotion, membership (for example, in a labor organization), referral, retention, and licensing and certification, to the extent that licensing and certification may be covered by Federal equal employment opportunity law. Other selection decisions, such as selection for training or transfer, may also be considered employment decisions if they lead to any of the decisions listed above.

C. *Selection procedures.* These guidelines apply only to selection procedures which are used as a basis for making employment decisions. For example, the use of recruiting procedures designed to attract members of a particular race, sex, or ethnic group, which were previously denied employment opportunities or which are currently underutilized, may be necessary to bring an employer into compliance with Federal law, and is frequently an essential element of any effective affirmative action program; but recruitment practices are not considered by these guidelines to be selection procedures. Similarly, these guidelines do not pertain to the question of the lawfulness of a seniority system within the meaning of section 703(h), Executive Order 11246 or other provisions of Federal law or regulation, except to the extent that such systems utilize selection procedures to determine qualifications or abilities to perform the job. Nothing in these guidelines is intended or should be interpreted as discouraging the use of a selection procedure for the purpose of determining qualifications or for the purpose of selection on the basis of relative qualifications, if the selection procedure had been validated in accord with these guidelines for each such purpose for which it is to be used.

D. *Limitations.* These guidelines apply only to persons subject to title VII, Executive Order 11246, or other equal employment opportunity requirements of Federal law. These guidelines do not apply to responsibilities under the Age Discrimination in Employment Act of 1967, as amended, not to discriminate on the basis of age, or under sections 501, 503, and 504 of the Rehabilitation Act of 1973, not to discriminate on the basis of handicap.

E. *Indian preference not affected.* These guidelines do not restrict any obligation imposed or right granted by Federal law to users to extend a preference in employment to Indians living on or near an Indian reservation in connection with employment opportunities on or near an Indian reservation.

SEC. 3. *Discrimination defined: Relationship between use of selection procedures and discrimination*—A. *Procedure having adverse impact constitutes discrimination unless justified.* The use of any selection procedure which has an adverse impact on the hiring, promotion, or other employment or membership opportunities of members of any race, sex, or ethnic group will be considered to be discriminatory and inconsistent with these guidelines, unless the procedure has been validated in accordance with these guidelines, or the provisions of section 6 below are satisfied.

B. *Consideration of suitable alternative selection procedures.* Where two or more selection procedures are available which serve the user's legitimate interest in efficient and trustworthy workmanship, and which are substantially equally valid for a given purpose, the user should use the procedure which has been demonstrated to have the lesser adverse impact. Accordingly, whenever a validity study is called for by these guidelines, the user should include, as a part of the validity study, an investigation of suitable alternative selection procedures and suitable alternative methods of using the selection procedure which have as little adverse impact as possible, to determine the appropriateness of using or validating them in accord with these guidelines. If a user has made a reasonable effort to become aware of such alternative procedures and validity has been demonstrated in accord with these

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guidelines, the use of the test or other selection procedure may continue until such time as it should reasonably be reviewed for currency. Whenever the user is shown an alternative selection procedure with evidence of less adverse impact and substantial evidence of validity for the same job in similar circumstances, the user should investigate it to determine the appropriateness of using or validating it in accord with these guidelines. This subsection is not intended to preclude the combination of procedures into a significantly more valid procedure, if the use of such a combination has been shown to be in compliance with the guidelines.

SEC. 4. *Information on impact*—A. *Records concerning impact.* Each user should maintain and have available for inspection records or other information which will disclose the impact which its tests and other selection procedures have upon employment opportunities of persons by identifiable race, sex, or ethnic group as set forth in paragraph B below in order to determine compliance with these guidelines. Where there are large numbers of applicants and procedures are administered frequently, such information may be retained on a sample basis, provided that the sample is appropriate in terms of the applicant population and adequate in size.

B. *Applicable race, sex, and ethnic groups for recordkeeping.* The records called for by this section are to be maintained by sex, and the following races and ethnic groups: Blacks (Negroes), American Indians (including Alaskan Natives), Asians (including Pacific Islanders), Hispanic (including persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish origin or culture regardless of race), whites (Caucasians) other than Hispanic, and totals. The race, sex, and ethnic classifications called for by this section are consistent with the Equal Employment Opportunity Standard Form 100, Employer Information Report EEO–1 series of reports. The user should adopt safeguards to insure that the records required by this paragraph are used for appropriate purposes such as determining adverse impact, or (where required) for developing and monitoring affirmative action programs, and that such records are not used improperly. See sections 4E and 17(4), below.

C. *Evaluation of selection rates. The "bottom line."* If the information called for by sections 4A and B above shows that the total selection process for a job has an adverse impact, the individual components of the selection process should be evaluated for adverse impact. If this information shows that the total selection process does not have an adverse impact, the Federal enforcement agencies, in the exercise of their administrative and prosecutorial discretion, in usual circumstances, will not expect a user to evaluate the individual components for adverse impact, or to validate such individual components, and will not take enforcement action based upon adverse impact of any component of that process, including the separate parts of a multipart selection procedure or any separate procedure that is used as an alternative method of selection. However, in the following circumstances the Federal enforcement agencies will expect a user to evaluate the individual components for adverse impact and may, where appropriate, take enforcement action with respect to the individual components: (1) Where the selection procedure is a significant factor in the continuation of patterns of assignments of incumbent employees caused by prior discriminatory employment practices, (2) where the weight of court decisions or administrative interpretations hold that a specific procedure (such as height or weight requirements or no-arrest records) is not job related in the same or similar circumstances. In unusual circumstances, other than those listed in (1) and (2) above, the Federal enforcement agencies may request a user to evaluate the individual components for adverse impact and may, where appropriate, take enforcement action with respect to the individual component.

D. *Adverse impact and the "four-fifths rule."* A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact. Smaller differences in selection rate may nevertheless constitute adverse impact, where they are significant in both statistical and practical terms or where a user's actions have discouraged applicants disproportionately on grounds of race, sex, or ethnic group. Greater differences in selection rate may not constitute adverse impact where the differences are based on small numbers and are not statistically significant, or where special recruiting or other programs cause the pool of minority or female candidates to be atypical of the normal pool of applicants from that group. Where the user's evidence concerning the impact of a selection procedure indicates adverse impact but is based upon numbers which are too small to be reliable, evidence concerning the impact of the procedure over a longer period of time and/or evidence concerning the impact which the selection procedure had when used in the same manner in similar circumstances elsewhere may be considered in determining adverse impact. Where the user has not maintained data on adverse impact as required by the documentation section of applicable guidelines, the Federal enforcement agencies may draw an inference of adverse impact of the selection process from the failure of the user to

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maintain such data, if the user has an underutilization of a group in the job category, as compared to the group's representation in the relevant labor market or, in the case of jobs filled from within, the applicable work force.

E. *Consideration of user's equal employment opportunity posture.* In carrying out their obligations, the Federal enforcement agencies will consider the general posture of the user with respect to equal employment opportunity for the job or group of jobs in question. Where a user has adopted an affirmative action program, the Federal enforcement agencies will consider the provisions of that program, including the goals and timetables which the user has adopted and the progress which the user has made in carrying out that program and in meeting the goals and timetables. While such affirmative action programs may in design and execution be race, color, sex, or ethnic conscious, selection procedures under such programs should be based upon the ability or relative ability to do the work.

SEC. 5. *General standards for validity studies*—A. *Acceptable types of validity studies.* For the purposes of satisfying these guidelines, users may rely upon criterion-related validity studies, content validity studies or construct validity studies, in accordance with the standards set forth in the technical standards of these guidelines, section 14 below. New strategies for showing the validity of selection procedures will be evaluated as they become accepted by the psychological profession.

B. *Criterion-related, content, and construct validity.* Evidence of the validity of a test or other selection procedure by a criterion-related validity study should consist of empirical data demonstrating that the selection procedure is predictive of or significantly correlated with important elements of job performance. See section 14B below. Evidence of the validity of a test or other selection procedure by a content validity study should consist of data showing that the content of the selection procedure is representative of important aspects of performance on the job for which the candidates are to be evaluated. See section 14C below. Evidence of the validity of a test or other selection procedure through a construct validity study should consist of data showing that the procedure measures the degree to which candidates have identifiable characteristics which have been determined to be important in successful performance in the job for which the candidates are to be evaluated. See section 14D below.

C. *Guidelines are consistent with professional standards.* The provisions of these guidelines relating to validation of selection procedures are intended to be consistent with generally accepted professional standards for evaluating standardized tests and other selection procedures, such as those described in the Standards for Educational and Psychological Tests prepared by a joint committee of the American Psychological Association, the American Educational Research Association, and the National Council on Measurement in Education (American Psychological Association, Washington, DC, 1974) (hereinafter "A.P.A. Standards") and standard textbooks and journals in the field of personnel selection.

D. *Need for documentation of validity.* For any selection procedure which is part of a selection process which has an adverse impact and which selection procedure has an adverse impact, each user should maintain and have available such documentation as is described in section 15 below.

E. *Accuracy and standardization.* Validity studies should be carried out under conditions which assure insofar as possible the adequacy and accuracy of the research and the report. Selection procedures should be administered and scored under standardized conditions.

F. *Caution against selection on basis of knowledges, skills, or ability learned in brief orientation period.* In general, users should avoid making employment decisions on the basis of measures of knowledges, skills, or abilities which are normally learned in a brief orientation period, and which have an adverse impact.

G. *Method of use of selection procedures.* The evidence of both the validity and utility of a selection procedure should support the method the user chooses for operational use of the procedure, if that method of use has a greater adverse impact than another method of use. Evidence which may be sufficient to support the use of a selection procedure on a pass/fail (screening) basis may be insufficient to support the use of the same procedure on a ranking basis under these guidelines. Thus, if a user decides to use a selection procedure on a ranking basis, and that method of use has a greater adverse impact than use on an appropriate pass/fail basis (see section 5H below), the user should have sufficient evidence of validity and utility to support the use on a ranking basis. See sections 3B, 14B (5) and (6), and 14C (8) and (9).

H. *Cutoff scores.* Where cutoff scores are used, they should normally be set so as to be reasonable and consistent with normal expectations of acceptable proficiency within the work force. Where applicants are ranked on the basis of properly validated selection procedures and those applicants scoring below a higher cutoff score than appropriate in light of such expectations have little or no chance of being selected for employment, the higher cutoff score may be appropriate, but the degree of adverse impact should be considered.

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I. *Use of selection procedures for higher level jobs.* If job progression structures are so established that employees will probably, within a reasonable period of time and in a majority of cases, progress to a higher level, it may be considered that the applicants are being evaluated for a job or jobs at the higher level. However, where job progression is not so nearly automatic, or the time span is such that higher level jobs or employees' potential may be expected to change in significant ways, it should be considered that applicants are being evaluated for a job at or near the entry level. A "reasonable period of time" will vary for different jobs and employment situations but will seldom be more than 5 years. Use of selection procedures to evaluate applicants for a higher level job would not be appropriate:

(1) If the majority of those remaining employed do not progress to the higher level job;

(2) If there is a reason to doubt that the higher level job will continue to require essentially similar skills during the progression period; or

(3) If the selection procedures measure knowledges, skills, or abilities required for advancement which would be expected to develop principally from the training or experience on the job.

J. *Interim use of selection procedures.* Users may continue the use of a selection procedure which is not at the moment fully supported by the required evidence of validity, provided: (1) The user has available substantial evidence of validity, and (2) the user has in progress, when technically feasible, a study which is designed to produce the additional evidence required by these guidelines within a reasonable time. If such a study is not technically feasible, see section 6B. If the study does not demonstrate validity, this provision of these guidelines for interim use shall not constitute a defense in any action, nor shall it relieve the user of any obligations arising under Federal law.

K. *Review of validity studies for currency.* Whenever validity has been shown in accord with these guidelines for the use of a particular selection procedure for a job or group of jobs, additional studies need not be performed until such time as the validity study is subject to review as provided in section 3B above. There are no absolutes in the area of determining the currency of a validity study. All circumstances concerning the study, including the validation strategy used, and changes in the relevant labor market and the job should be considered in the determination of when a validity study is outdated.

SEC. 6. *Use of selection procedures which have not been validated*—A. *Use of alternate selection procedures to eliminate adverse impact.* A user may choose to utilize alternative selection procedures in order to eliminate adverse impact or as part of an affirmative action program. See section 13 below. Such alternative procedures should eliminate the adverse impact in the total selection process, should be lawful and should be as job related as possible.

B. *Where validity studies cannot or need not be performed.* There are circumstances in which a user cannot or need not utilize the validation techniques contemplated by these guidelines. In such circumstances, the user should utilize selection procedures which are as job related as possible and which will minimize or eliminate adverse impact, as set forth below.

(1) *Where informal or unscored procedures are used.* When an informal or unscored selection procedure which has an adverse impact is utilized, the user should eliminate the adverse impact, or modify the procedure to one which is a formal, scored or quantified measure or combination of measures and then validate the procedure in accord with these guidelines, or otherwise justify continued use of the procedure in accord with Federal law.

(2) *Where formal and scored procedures are used.* When a formal and scored selection procedure is used which has an adverse impact, the validation techniques contemplated by these guidelines usually should be followed if technically feasible. Where the user cannot or need not follow the validation techniques anticipated by these guidelines, the user should either modify the procedure to eliminate adverse impact or otherwise justify continued use of the procedure in accord with Federal law.

SEC. 7. *Use of other validity studies*—A. *Validity studies not conducted by the user.* Users may, under certain circumstances, support the use of selection procedures by validity studies conducted by other users or conducted by test publishers or distributors and described in test manuals. While publishers of selection procedures have a professional obligation to provide evidence of validity which meets generally accepted professional standards (see section 5C above), users are cautioned that they are responsible for compliance with these guidelines. Accordingly, users seeking to obtain selection procedures from publishers and distributors should be careful to determine that, in the event the user becomes subject to the validity requirements of these guidelines, the necessary information to support validity has been determined and will be made available to the user.

B. *Use of criterion-related validity evidence from other sources.* Criterion-related validity studies conducted by one test user, or described in test manuals and the professional literature, will be considered acceptable for use by another user when the following requirements are met:

(1) *Validity evidence.* Evidence from the available studies meeting the standards of

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section 14B below clearly demonstrates that the selection procedure is valid;

(2) *Job similarity.* The incumbents in the user's job and the incumbents in the job or group of jobs on which the validity study was conducted perform substantially the same major work behaviors, as shown by appropriate job analyses both on the job or group of jobs on which the validity study was performed and on the job for which the selection procedure is to be used; and

(3) *Fairness evidence.* The studies include a study of test fairness for each race, sex, and ethnic group which constitutes a significant factor in the borrowing user's relevant labor market for the job or jobs in question. If the studies under consideration satisfy (1) and (2) above but do not contain an investigation of test fairness, and it is not technically feasible for the borrowing user to conduct an internal study of test fairness, the borrowing user may utilize the study until studies conducted elsewhere meeting the requirements of these guidelines show test unfairness, or until such time as it becomes technically feasible to conduct an internal study of test fairness and the results of that study can be acted upon. Users obtaining selection procedures from publishers should consider, as one factor in the decision to purchase a particular selection procedure, the availability of evidence concerning test fairness.

C. *Validity evidence from multiunit study.* if validity evidence from a study covering more than one unit within an organization satisfies the requirements of section 14B below, evidence of validity specific to each unit will not be required unless there are variables which are likely to affect validity significantly.

D. *Other significant variables.* If there are variables in the other studies which are likely to affect validity significantly, the user may not rely upon such studies, but will be expected either to conduct an internal validity study or to comply with section 6 above.

SEC. 8. *Cooperative studies*—A. *Encouragement of cooperative studies.* The agencies issuing these guidelines encourage employers, labor organizations, and employment agencies to cooperate in research, development, search for lawful alternatives, and validity studies in order to achieve procedures which are consistent with these guidelines.

B. *Standards for use of cooperative studies.* If validity evidence from a cooperative study satisfies the requirements of section 14 below, evidence of validity specific to each user will not be required unless there are variables in the user's situation which are likely to affect validity significantly.

SEC. 9. *No assumption of validity*—A. *Unacceptable substitutes for evidence of validity.* Under no circumstances will the general reputation of a test or other selection procedures, its author or its publisher, or casual reports of it's validity be accepted in lieu of evidence of validity. Specifically ruled out are: Assumptions of validity based on a procedure's name or descriptive labels; all forms of promotional literature; data bearing on the frequency of a procedure's usage; testimonial statements and credentials of sellers, users, or consultants; and other nonempirical or anecdotal accounts of selection practices or selection outcomes.

B. *Encouragement of professional supervision.* Professional supervision of selection activities is encouraged but is not a substitute for documented evidence of validity. The enforcement agencies will take into account the fact that a thorough job analysis was conducted and that careful development and use of a selection procedure in accordance with professional standards enhance the probability that the selection procedure is valid for the job.

SEC. 10. *Employment agencies and employment services* A. *Where selection procedures are devised by agency.* An employment agency, including private employment agencies and State employment agencies, which agrees to a request by an employer or labor organization to devise and utilize a selection procedure should follow the standards in these guidelines for determining adverse impact. If adverse impact exists the agency should comply with these guidelines. An employment agency is not relieved of its obligation herein because the user did not request such validation or has requested the use of some lesser standard of validation than is provided in these guidelines. The use of an employment agency does not relieve an employer or labor organization or other user of its responsibilities under Federal law to provide equal employment opportunity or its obligations as a user under these guidelines.

B. *Where selection procedures are devised elsewhere.* Where an employment agency or service is requested to administer a selection procedure which has been devised elsewhere and to make referrals pursuant to the results, the employment agency or service should maintain and have available evidence of the impact of the selection and referral procedures which it administers. If adverse impact results the agency or service should comply with these guidelines. If the agency or service seeks to comply with these guidelines by reliance upon validity studies or other data in the possession of the employer, it should obtain and have available such information.

SEC. 11. *Disparate treatment.* The principles of disparate or unequal treatment must be distinguished from the concepts of validation. A selection procedure—even though validated against job performance in accordance with these guidelines—cannot be imposed upon members of a race, sex, or ethnic group where other employees, applicants, or members have not been subjected to that standard. Disparate treatment occurs where

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members of a race, sex, or ethnic group have been denied the same employment, promotion, membership, or other employment opportunities as have been available to other employees or applicants. Those employees or applicants who have been denied equal treatment, because of prior discriminatory practices or policies, must at least be afforded the same opportunities as had existed for other employees or applicants during the period of discrimination. Thus, the persons who were in the class of persons discriminated against during the period the user followed the discriminatory practices should be allowed the opportunity to qualify under less stringent selection procedures previously followed, unless the user demonstrates that the increased standards are required by business necessity. This section does not prohibit a user who has not previously followed merit standards from adopting merit standards which are in compliance with these guidelines; nor does it preclude a user who has previously used invalid or unvalidated selection procedures from developing and using procedures which are in accord with these guidelines.

SEC. 12. *Retesting of applicants.* Users should provide a reasonable opportunity for retesting and reconsideration. Where examinations are administered periodically with public notice, such reasonable opportunity exists, unless persons who have previously been tested are precluded from retesting. The user may however take reasonable steps to preserve the security of its procedures.

SEC. 13. *Affirmative action*—A. *Affirmative action obligations.* The use of selection procedures which have been validated pursuant to these guidelines does not relieve users of any obligations they may have to undertake affirmative action to assure equal employment opportunity. Nothing in these guidelines is intended to preclude the use of lawful selection procedures which assist in remedying the effects of prior discriminatory practices, or the achievement of affirmative action objectives.

B. *Encouragement of voluntary affirmative action programs.* These guidelines are also intended to encourage the adoption and implementation of voluntary affirmative action programs by users who have no obligation under Federal law to adopt them; but are not intended to impose any new obligations in that regard. The agencies issuing and endorsing these guidelines endorse for all private employers and reaffirm for all governmental employers the Equal Employment Opportunity Coordinating Council's "Policy Statement on Affirmative Action Programs for State and Local Government Agencies" (41 FR 38814, September 13, 1976). That policy statement is attached hereto as appendix, section 17.

TECHNICAL STANDARDS

SEC. 14. *Technical standards for validity studies.* The following minimum standards, as applicable, should be met in conducting a validity study. Nothing in these guidelines is intended to preclude the development and use of other professionally acceptable techniques with respect to validation of selection procedures. Where it is not technically feasible for a user to conduct a validity study, the user has the obligation otherwise to comply with these guidelines. See sections 6 and 7 above.

A. *Validity studies should be based on review of information about the job.* Any validity study should be based upon a review of information about the job for which the selection procedure is to be used. The review should include a job analysis except as provided in section 14B(3) below with respect to criterion-related validity. Any method of job analysis may be used if it provides the information required for the specific validation strategy used.

B. *Technical standards for criterion-related validity studies*—(1) *Technical feasibility.* Users choosing to validate a selection procedure by a criterion-related validity strategy should determine whether it is technically feasible (as defined in section 16) to conduct such a study in the particular employment context. The determination of the number of persons necessary to permit the conduct of a meaningful criterion-related study should be made by the user on the basis of all relevant information concerning the selection procedure, the potential sample and the employment situation. Where appropriate, jobs with substantially the same major work behaviors may be grouped together for validity studies, in order to obtain an adequate sample. These guidelines do not require a user to hire or promote persons for the purpose of making it possible to conduct a criterion-related study.

(2) *Analysis of the job.* There should be a review of job information to determine measures of work behavior(s) or performance that are relevant to the job or group of jobs in question. These measures or criteria are relevant to the extent that they represent critical or important job duties, work behaviors or work outcomes as developed from the review of job information. The possibility of bias should be considered both in selection of the criterion measures and their application. In view of the possibility of bias in subjective evaluations, supervisory rating techniques and instructions to raters should be carefully developed. All criterion measures and the methods for gathering data need to be examined for freedom from factors which would unfairly alter scores of members of any group. The relevance of criteria and their freedom from bias are of particular

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concern when there are significant differences in measures of job performance for different groups.

(3) *Criterion measures.* Proper safeguards should be taken to insure that scores on selection procedures do not enter into any judgments of employee adequacy that are to be used as criterion measures. Whatever criteria are used should represent important or critical work behavior(s) or work outcomes. Certain criteria may be used without a full job analysis if the user can show the importance of the criteria to the particular employment context. These criteria include but are not limited to production rate, error rate, tardiness, absenteeism, and length of service. A standardized rating of overall work performance may be used where a study of the job shows that it is an appropriate criterion. Where performance in training is used as a criterion, success in training should be properly measured and the relevance of the training should be shown either through a comparison of the content of the training program with the critical or important work behavior(s) of the job(s), or through a demonstration of the relationship between measures of performance in training and measures of job performance. Measures of relative success in training include but are not limited to instructor evaluations, performance samples, or tests. Criterion measures consisting of paper and pencil tests will be closely reviewed for job relevance.

(4) *Representativeness of the sample.* Whether the study is predictive or concurrent, the sample subjects should insofar as feasible be representative of the candidates normally available in the relevant labor market for the job or group of jobs in question, and should insofar as feasible include the races, sexes, and ethnic groups normally available in the relevant job market. In determining the representativeness of the sample in a concurrent validity study, the user should take into account the extent to which the specific knowledges or skills which are the primary focus of the test are those which employees learn on the job.

Where samples are combined or compared, attention should be given to see that such samples are comparable in terms of the actual job they perform, the length of time on the job where time on the job is likely to affect performance, and other relevant factors likely to affect validity differences; or that these factors are included in the design of the study and their effects identified.

(5) *Statistical relationships.* The degree of relationship between selection procedure scores and criterion measures should be examined and computed, using professionally acceptable statistical procedures. Generally, a selection procedure is considered related to the criterion, for the purposes of these guidelines, when the relationship between performance on the procedure and performance on the criterion measure is statistically significant at the 0.05 level of significance, which means that it is sufficiently high as to have a probability of no more than one (1) in twenty (20) to have occurred by chance. Absence of a statistically significant relationship between a selection procedure and job performance should not necessarily discourage other investigations of the validity of that selection procedure.

(6) *Operational use of selection procedures.* Users should evaluate each selection procedure to assure that it is appropriate for operational use, including establishment of cutoff scores or rank ordering. Generally, if other factors remain the same, the greater the magnitude of the relationship (e.g., correlation coefficient) between performance on a selection procedure and one or more criteria of performance on the job, and the greater the importance and number of aspects of job performance covered by the criteria, the more likely it is that the procedure will be appropriate for use. Reliance upon a selection procedure which is significantly related to a criterion measure, but which is based upon a study involving a large number of subjects and has a low correlation coefficient will be subject to close review if it has a large adverse impact. Sole reliance upon a single selection instrument which is related to only one of many job duties or aspects of job performance will also be subject to close review. The appropriateness of a selection procedure is best evaluated in each particular situation and there are no minimum correlation coefficients applicable to all employment situations. In determining whether a selection procedure is appropriate for operational use the following considerations should also be taken into account: The degree of adverse impact of the procedure, the availability of other selection procedures of greater or substantially equal validity.

(7) *Overstatement of validity findings.* Users should avoid reliance upon techniques which tend to overestimate validity findings as a result of capitalization on chance unless an appropriate safeguard is taken. Reliance upon a few selection procedures or criteria of successful job performance when many selection procedures or criteria of performance have been studied, or the use of optimal statistical weights for selection procedures computed in one sample, are techniques which tend to inflate validity estimates as a result of chance. Use of a large sample is one safeguard: Cross-validation is another.

(8) *Fairness.* This section generally calls for studies of unfairness where technically feasible. The concept of fairness or unfairness of selection procedures is a developing concept. In addition, fairness studies generally require substantial numbers of employees in the job or group of jobs being studied. For

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these reasons, the Federal enforcement agencies recognize that the obligation to conduct studies of fairness imposed by the guidelines generally will be upon users or groups of users with a large number of persons in a job class, or test developers; and that small users utilizing their own selection procedures will generally not be obligated to conduct such studies because it will be technically infeasible for them to do so.

(a) *Unfairness defined.* When members of one race, sex, or ethnic group characteristically obtain lower scores on a selection procedure than members of another group, and the differences in scores are not reflected in differences in a measure of job performance, use of the selection procedure may unfairly deny opportunities to members of the group that obtains the lower scores.

(b) *Investigation of fairness.* Where a selection procedure results in an adverse impact on a race, sex, or ethnic group identified in accordance with the classifications set forth in section 4 above and that group is a significant factor in the relevant labor market, the user generally should investigate the possible existence of unfairness for that group if it is technically feasible to do so. The greater the severity of the adverse impact on a group, the greater the need to investigate the possible existence of unfairness. Where the weight of evidence from other studies shows that the selection procedure predicts fairly for the group in question and for the same or similar jobs, such evidence may be relied on in connection with the selection procedure at issue.

(c) *General considerations in fairness investigations.* Users conducting a study of fairness should review the A.P.A. Standards regarding investigation of possible bias in testing. An investigation of fairness of a selection procedure depends on both evidence of validity and the manner in which the selection procedure is to be used in a particular employment context. Fairness of a selection procedure cannot necessarily be specified in advance without investigating these factors. Investigation of fairness of a selection procedure in samples where the range of scores on selection procedures or criterion measures is severely restricted for any subgroup sample (as compared to other subgroup samples) may produce misleading evidence of unfairness. That factor should accordingly be taken into account in conducting such studies and before reliance is placed on the results.

(d) *When unfairness is shown.* If unfairness is demonstrated through a showing that members of a particular group perform better or poorer on the job than their scores on the selection procedure would indicate through comparison with how members of other groups perform, the user may either revise or replace the selection instrument in accordance with these guidelines, or may continue to use the selection instrument operationally with appropriate revisions in its use to assure compatibility between the probability of successful job performance and the probability of being selected.

(e) *Technical feasibility of fairness studies.* In addition to the general conditions needed for technical feasibility for the conduct of a criterion related study (see section 16, below) an investigation of fairness requires the following:

(i) An adequate sample of persons in each group available for the study to achieve findings of statistical significance. Guidelines do not require a user to hire or promote persons on the basis of group classifications for the purpose of making it possible to conduct a study of fairness; but the user has the obligation otherwise to comply with these guidelines.

(ii) The samples for each group should be comparable in terms of the actual job they perform, length of time on the job where time on the job is likely to affect performance, and other relevant factors likely to affect validity differences; or such factors should be included in the design of the study and their effects identified.

(f) *Continued use of selection procedures when fairness studies not feasible.* If a study of fairness should otherwise be performed, but is not technically feasible, a selection procedure may be used which has otherwise met the validity standards of these guidelines, unless the technical infeasibility resulted from discriminatory employment practices which are demonstrated by facts other than past failure to conform with requirements for validation of selection procedures. However, when it becomes technically feasible for the user to perform a study of fairness and such a study is otherwise called for, the user should conduct the study of fairness.

C. *Technical standards for content validity studies*—(1) *Appropriateness of content validity studies.* Users choosing to validate a selection procedure by a content validity strategy should determine whether it is appropriate to conduct such a study in the particular employment context. A selection procedure can be supported by a content validity strategy to the extent that it is a representative sample of the content of the job. Selection procedures which purport to measure knowledges, skills, or abilities may in certain circumstances be justified by content validity, although they may not be representative samples, if the knowledge, skill, or ability measured by the selection procedure can be operationally defined as provided in section 14C(4) below, and if that knowledge, skill, or ability is a necessary prerequisite to successful job performance.

A selection procedure based upon inferences about mental processes cannot be supported solely or primarily on the basis of content validity. Thus, a content strategy is

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not appropriate for demonstrating the validity of selection procedures which purport to measure traits or constructs, such as intelligence, aptitude, personality, commonsense, judgment, leadership, and spatial ability. Content validity is also not an appropriate strategy when the selection procedure involves knowledges, skills, or abilities which an employee will be expected to learn on the job.

(2) *Job analysis for content validity.* There should be a job analysis which includes an analysis of the important work behavior(s) required for successful performance and their relative importance and, if the behavior results in work product(s), an analysis of the work product(s). Any job analysis should focus on the work behavior(s) and the tasks associated with them. If work behavior(s) are not observable, the job analysis should identify and analyze those aspects of the behavior(s) that can be observed and the observed work products. The work behavior(s) selected for measurement should be critical work behavior(s) and/or important work behavior(s) constituting most of the job.

(3) *Development of selection procedures.* A selection procedure designed to measure the work behavior may be developed specifically from the job and job analysis in question, or may have been previously developed by the user, or by other users or by a test publisher.

(4) *Standards for demonstrating content validity.* To demonstrate the content validity of a selection procedure, a user should show that the behavior(s) demonstrated in the selection procedure are a representative sample of the behavior(s) of the job in question or that the selection procedure provides a representative sample of the work product of the job. In the case of a selection procedure measuring a knowledge, skill, or ability, the knowledge, skill, or ability being measured should be operationally defined. In the case of a selection procedure measuring a knowledge, the knowledge being measured should be operationally defined as that body of learned information which is used in and is a necessary prerequisite for observable aspects of work behavior of the job. In the case of skills or abilities, the skill or ability being measured should be operationally defined in terms of observable aspects of work behavior of the job. For any selection procedure measuring a knowledge, skill, or ability the user should show that (a) the selection procedure measures and is a representative sample of that knowledge, skill, or ability; and (b) that knowledge, skill, or ability is used in and is a necessary prerequisite to performance of critical or important work behavior(s). In addition, to be content valid, a selection procedure measuring a skill or ability should either closely approximate an observable work behavior, or its product should closely approximate an observable work product. If a test purports to sample a work behavior or to provide a sample of a work product, the manner and setting of the selection procedure and its level and complexity should closely approximate the work situation. The closer the content and the context of the selection procedure are to work samples or work behaviors, the stronger is the basis for showing content validity. As the content of the selection procedure less resembles a work behavior, or the setting and manner of the administration of the selection procedure less resemble the work situation, or the result less resembles a work product, the less likely the selection procedure is to be content valid, and the greater the need for other evidence of validity.

(5) *Reliability.* The reliability of selection procedures justified on the basis of content validity should be a matter of concern to the user. Whenever it is feasible, appropriate statistical estimates should be made of the reliability of the selection procedure.

(6) *Prior training or experience.* A requirement for or evaluation of specific prior training or experience based on content validity, including a specification of level or amount of training or experience, should be justified on the basis of the relationship between the content of the training or experience and the content of the job for which the training or experience is to be required or evaluated. The critical consideration is the resemblance between the specific behaviors, products, knowledges, skills, or abilities in the experience or training and the specific behaviors, products, knowledges, skills, or abilities required on the job, whether or not there is close resemblance between the experience or training as a whole and the job as a whole.

(7) *Content validity of training success.* Where a measure of success in a training program is used as a selection procedure and the content of a training program is justified on the basis of content validity, the use should be justified on the relationship between the content of the training program and the content of the job.

(8) *Operational use.* A selection procedure which is supported on the basis of content validity may be used for a job if it represents a critical work behavior (i.e., a behavior which is necessary for performance of the job) or work behaviors which constitute most of the important parts of the job.

(9) *Ranking based on content validity studies.* If a user can show, by a job analysis or otherwise, that a higher score on a content valid selection procedure is likely to result in better job performance, the results may be used to rank persons who score above minimum levels. Where a selection procedure supported solely or primarily by content validity is used to rank job candidates, the selection procedure should measure those aspects of performance which differentiate among levels of job performance.

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D. *Technical standards for construct validity studies*—(1) *Appropriateness of construct validity studies.* Construct validity is a more complex strategy than either criterion-related or content validity. Construct validation is a relatively new and developing procedure in the employment field, and there is at present a lack of substantial literature extending the concept to employment practices. The user should be aware that the effort to obtain sufficient empirical support for construct validity is both an extensive and arduous effort involving a series of research studies, which include criterion related validity studies and which may include content validity studies. Users choosing to justify use of a selection procedure by this strategy should therefore take particular care to assure that the validity study meets the standards set forth below.

(2) *Job analysis for construct validity studies.* There should be a job analysis. This job analysis should show the work behavior(s) required for successful performance of the job, or the groups of jobs being studied, the critical or important work behavior(s) in the job or group of jobs being studied, and an identification of the construct(s) believed to underlie successful performance of these critical or important work behaviors in the job or jobs in question. Each construct should be named and defined, so as to distinguish it from other constructs. If a group of jobs is being studied the jobs should have in common one or more critical or important work behaviors at a comparable level of complexity.

(3) *Relationship to the job.* A selection procedure should then be identified or developed which measures the construct identified in accord with paragraph (2) above. The user should show by empirical evidence that the selection procedure is validly related to the construct and that the construct is validly related to the performance of critical or important work behavior(s). The relationship between the construct as measured by the selection procedure and the related work behavior(s) should be supported by empirical evidence from one or more criterion-related studies involving the job or jobs in question which satisfy the provisions of section 14B above.

(4) *Use of construct validity study without new criterion-related evidence*—(a) *Standards for use.* Until such time as professional literature provides more guidance on the use of construct validity in employment situations, the Federal agencies will accept a claim of construct validity without a criterion-related study which satisfies section 14B above only when the selection procedure has been used elsewhere in a situation in which a criterion related study has been conducted and the use of a criterion-related validity study in this context meets the standards for transportability of criterion related validity studies as set forth above in section 7. However, if a study pertains to a number of jobs having common critical or important work behaviors at a comparable level of complexity, and the evidence satisfies paragraphs 14B (2) and (3) above for those jobs with criterion related validity evidence for those jobs, the selection procedure may be used for all the jobs to which the study pertains. If construct validity is to be generalized to other jobs or groups of jobs not in the group studied, the Federal enforcement agencies will expect at a minimum additional empirical research evidence meeting the standards of paragraphs section 14B (2) and (3) above for the additional jobs or groups of jobs.

(b) *Determination of common work behaviors.* In determining whether two or more jobs have one or more work behavior(s) in common, the user should compare the observed work behavior(s) in each of the jobs and should compare the observed work product(s) in each of the jobs. If neither the observed work behavior(s) in each of the jobs nor the observed work product(s) in each of the jobs are the same, the Federal enforcement agencies will presume that the work behavior(s) in each job are different. If the work behaviors are not observable, then evidence of similarity of work products and any other relevant research evidence will be considered in determining whether the work behavior(s) in the two jobs are the same.

DOCUMENTATION OF IMPACT AND VALIDITY EVIDENCE

SEC. 15. *Documentation of impact and validity evidence*—A. *Required information.* Users of selection procedures other than those users complying with section 15A(1) below should maintain and have available for each job information on adverse impact of the selection process for that job and, where it is determined a selection process has an adverse impact, evidence of validity as set forth below.

(1) *Simplified recordkeeping for users with less than 100 employees.* In order to minimize recordkeeping burdens on employers who employ one hundred (100) or fewer employees, and other users not required to file EEO–1, *et seq.*, reports, such users may satisfy the requirements of this section 15 if they maintain and have available records showing, for each year:

(a) The number of persons hired, promoted, and terminated for each job, by sex, and where appropriate by race and national origin;

(b) The number of applicants for hire and promotion by sex and where appropriate by race and national origin; and

(c) The selection procedures utilized (either standardized or not standardized).

These records should be maintained for each race or national origin group (see section 1 above) constituting more than two

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percent (2%) of the labor force in the relevant labor area. However, it is not necessary to maintain records by race and/or national origin (see section 4 above) if one race or national origin group in the relevant labor area constitutes more than ninety eight percent (98%) of the labor force in the area. If the user has reason to believe that a selection procedure has an adverse impact, the user should maintain any available evidence of validity for that procedure (see sections 7A and 8).

(2) *Information on impact*—(a) *Collection of information on impact.* Users of selection procedures other than those complying with section 15A(1) above should maintain and have available for each job records or other information showing whether the total selection process for that job has an adverse impact on any of the groups for which records are called for by sections 4B above. Adverse impact determinations should be made at least annually for each such group which constitutes at least 2 percent of the labor force in the relevant labor area or 2 percent of the applicable workforce. Where a total selection process for a job has an adverse impact, the user should maintain and have available records or other information showing which components have an adverse impact. Where the total selection process for a job does not have an adverse impact, information need not be maintained for individual components except in circumstances set forth in subsection 15A(2)(b) below. If the determination of adverse impact is made using a procedure other than the "four fifths rule," as defined in the first sentence of section 4D above, a justification, consistent with section 4D above, for the procedure used to determine adverse impact should be available.

(b) *When adverse impact has been eliminated in the total selection process.* Whenever the total selection process for a particular job has had an adverse impact, as defined in section 4 above, in any year, but no longer has an adverse impact, the user should maintain and have available the information on individual components of the selection process required in the preceding paragraph for the period in which there was adverse impact. In addition, the user should continue to collect such information for at least two (2) years after the adverse impact has been eliminated.

(c) *When data insufficient to determine impact.* Where there has been an insufficient number of selections to determine whether there is an adverse impact of the total selection process for a particular job, the user should continue to collect, maintain and have available the information on individual components of the selection process required in section 15(A)(2)(a) above until the information is sufficient to determine that the overall selection process does not have an adverse impact as defined in section 4 above, or until the job has changed substantially.

(3) *Documentation of validity evidence*—(a) *Types of evidence.* Where a total selection process has an adverse impact (see section 4 above) the user should maintain and have available for each component of that process which has an adverse impact, one or more of the following types of documentation evidence:

(i) Documentation evidence showing criterion-related validity of the selection procedure (see section 15B, below).

(ii) Documentation evidence showing content validity of the selection procedure (see section 15C, below).

(iii) Documentation evidence showing construct validity of the selection procedure (see section 15D, below).

(iv) Documentation evidence from other studies showing validity of the selection procedure in the user's facility (see section 15E, below).

(v) Documentation evidence showing why a validity study cannot or need not be performed and why continued use of the procedure is consistent with Federal law.

(b) *Form of report.* This evidence should be compiled in a reasonably complete and organized manner to permit direct evaluation of the validity of the selection procedure. Previously written employer or consultant reports of validity, or reports describing validity studies completed before the issuance of these guidelines are acceptable if they are complete in regard to the documentation requirements contained in this section, or if they satisfied requirements of guidelines which were in effect when the validity study was completed. If they are not complete, the required additional documentation should be appended. If necessary information is not available the report of the validity study may still be used as documentation, but its adequacy will be evaluated in terms of compliance with the requirements of these guidelines.

(c) *Completeness.* In the event that evidence of validity is reviewed by an enforcement agency, the validation reports completed after the effective date of these guidelines are expected to contain the information set forth below. Evidence denoted by use of the word "(Essential)" is considered critical. If information denoted essential is not included, the report will be considered incomplete unless the user affirmatively demonstrates either its unavailability due to circumstances beyond the user's control or special circumstances of the user's study which make the information irrelevant. Evidence not so denoted is desirable but its absence will not be a basis for considering a report incomplete. The user should maintain and have available the information called for under the heading "Source Data" in sections 15B(11) and 15D(11). While it is a necessary

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part of the study, it need not be submitted with the report. All statistical results should be organized and presented in tabular or graphic form to the extent feasible.

B. *Criterion related validity studies.* Reports of criterion-related validity for a selection procedure should include the following information:

(1) *User(s), location(s), and date(s) of study.* Dates and location(s) of the job analysis or review of job information, the date(s) and location(s) of the administration of the selection procedures and collection of criterion data, and the time between collection of data on selection procedures and criterion measures should be provided (Essential). If the study was conducted at several locations, the address of each location, including city and State, should be shown.

(2) *Problem and setting.* An explicit definition of the purpose(s) of the study and the circumstances in which the study was conducted should be provided. A description of existing selection procedures and cutoff scores, if any, should be provided.

(3) *Job analysis or review of job information.* A description of the procedure used to analyze the job or group of jobs, or to review the job information should be provided (Essential). Where a review of job information results in criteria which may be used without a full job analysis (see section 14B(3)), the basis for the selection of these criteria should be reported (Essential). Where a job analysis is required a complete description of the work behavior(s) or work outcome(s), and measures of their criticality or importance should be provided (Essential). The report should describe the basis on which the behavior(s) or outcome(s) were determined to be critical or important, such as the proportion of time spent on the respective behaviors, their level of difficulty, their frequency of performance, the consequences of error, or other appropriate factors (Essential). Where two or more jobs are grouped for a validity study, the information called for in this subsection should be provided for each of the jobs, and the justification for the grouping (see section 14B(1)) should be provided (Essential).

(4) *Job titles and codes.* It is desirable to provide the user's job title(s) for the job(s) in question and the corresponding job title(s) and code(s) from U.S. Employment Service's Dictionary of Occupational Titles.

(5) *Criterion measures.* The bases for the selection of the criterion measures should be provided, together with references to the evidence considered in making the selection of criterion measures (essential). A full description of all criteria on which data were collected and means by which they were observed, recorded, evaluated, and quantified, should be provided (essential). If rating techniques are used as criterion measures, the appraisal form(s) and instructions to the rater(s) should be included as part of the validation evidence, or should be explicitly described and available (essential). All steps taken to insure that criterion measures are free from factors which would unfairly alter the scores of members of any group should be described (essential).

(6) *Sample description.* A description of how the research sample was identified and selected should be included (essential). The race, sex, and ethnic composition of the sample, including those groups set forth in section 4A above, should be described (essential). This description should include the size of each subgroup (essential). A description of how the research sample compares with the relevant labor market or work force, the method by which the relevant labor market or work force was defined, and a discussion of the likely effects on validity of differences between the sample and the relevant labor market or work force, are also desirable. Descriptions of educational levels, length of service, and age are also desirable.

(7) *Description of selection procedures.* Any measure, combination of measures, or procedure studied should be completely and explicitly described or attached (essential). If commercially available selection procedures are studied, they should be described by title, form, and publisher (essential). Reports of reliability estimates and how they were established are desirable.

(8) *Techniques and results.* Methods used in analyzing data should be described (essential). Measures of central tendency (e.g., means) and measures of dispersion (e.g., standard deviations and ranges) for all selection procedures and all criteria should be reported for each race, sex, and ethnic group which constitutes a significant factor in the relevant labor market (essential). The magnitude and direction of all relationships between selection procedures and criterion measures investigated should be reported for each relevant race, sex, and ethnic group and for the total group (essential). Where groups are too small to obtain reliable evidence of the magnitude of the relationship, need not be reported separately. Statements regarding the statistical significance of results should be made (essential). Any statistical adjustments, such as for less than perfect reliability or for restriction of score range in the selection procedure or criterion should be described and explained; and uncorrected correlation coefficients should also be shown (essential). Where the statistical technique categorizes continuous data, such as biserial correlation and the phi coefficient, the categories and the bases on which they were determined should be described and explained (essential). Studies of test fairness should be included where called for by the requirements of section 14B(8) (essential). These studies should include the rationale by which a selection procedure was determined

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to be fair to the group(s) in question. Where test fairness or unfairness has been demonstrated on the basis of other studies, a bibliography of the relevant studies should be included (essential). If the bibliography includes unpublished studies, copies of these studies, or adequate abstracts or summaries, should be attached (essential). Where revisions have been made in a selection procedure to assure compatability between successful job performance and the probability of being selected, the studies underlying such revisions should be included (essential). All statistical results should be organized and presented by relevant race, sex, and ethnic group (essential).

(9) *Alternative procedures investigated.* The selection procedures investigated and available evidence of their impact should be identified (essential). The scope, method, and findings of the investigation, and the conclusions reached in light of the findings, should be fully described (essential).

(10) *Uses and applications.* The methods considered for use of the selection procedure (e.g., as a screening device with a cutoff score, for grouping or ranking, or combined with other procedures in a battery) and available evidence of their impact should be described (essential). This description should include the rationale for choosing the method for operational use, and the evidence of the validity and utility of the procedure as it is to be used (essential). The purpose for which the procedure is to be used (e.g., hiring, transfer, promotion) should be described (essential). If weights are assigned to different parts of the selection procedure, these weights and the validity of the weighted composite should be reported (essential). If the selection procedure is used with a cutoff score, the user should describe the way in which normal expectations of proficiency within the work force were determined and the way in which the cutoff score was determined (essential).

(11) *Source data.* Each user should maintain records showing all pertinent information about individual sample members and raters where they are used, in studies involving the validation of selection procedures. These records should be made available upon request of a compliance agency. In the case of individual sample members these data should include scores on the selection procedure(s), scores on criterion measures, age, sex, race, or ethnic group status, and experience on the specific job on which the validation study was conducted, and may also include such things as education, training, and prior job experience, but should not include names and social security numbers. Records should be maintained which show the ratings given to each sample member by each rater.

(12) *Contact person.* The name, mailing address, and telephone number of the person who may be contacted for further information about the validity study should be provided (essential).

(13) *Accuracy and completeness.* The report should describe the steps taken to assure the accuracy and completeness of the collection, analysis, and report of data and results.

C. *Content validity studies.* Reports of content validity for a selection procedure should include the following information:

(1) *User(s), location(s) and date(s) of study.* Dates and location(s) of the job analysis should be shown (essential).

(2) *Problem and setting.* An explicit definition of the purpose(s) of the study and the circumstances in which the study was conducted should be provided. A description of existing selection procedures and cutoff scores, if any, should be provided.

(3) *Job analysis—Content of the job.* A description of the method used to analyze the job should be provided (essential). The work behavior(s), the associated tasks, and, if the behavior results in a work product, the work products should be completely described (essential). Measures of criticality and/or importance of the work behavior(s) and the method of determining these measures should be provided (essential). Where the job analysis also identified the knowledges, skills, and abilities used in work behavior(s), an operational definition for each knowledge in terms of a body of learned information and for each skill and ability in terms of observable behaviors and outcomes, and the relationship between each knowledge, skill, or ability and each work behavior, as well as the method used to determine this relationship, should be provided (essential). The work situation should be described, including the setting in which work behavior(s) are performed, and where appropriate, the manner in which knowledges, skills, or abilities are used, and the complexity and difficulty of the knowledge, skill, or ability as used in the work behavior(s).

(4) *Selection procedure and its content.* Selection procedures, including those constructed by or for the user, specific training requirements, composites of selection procedures, and any other procedure supported by content validity, should be completely and explicitly described or attached (essential). If commercially available selection procedures are used, they should be described by title, form, and publisher (essential). The behaviors measured or sampled by the selection procedure should be explicitly described (essential). Where the selection procedure purports to measure a knowledge, skill, or ability, evidence that the selection procedure measures and is a representative sample of the knowledge, skill, or ability should be provided (essential).

(5) *Relationship between the selection procedure and the job.* The evidence demonstrating that the selection procedure is a representative work sample, a representative sample of

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the work behavior(s), or a representative sample of a knowledge, skill, or ability as used as a part of a work behavior and necessary for that behavior should be provided (essential). The user should identify the work behavior(s) which each item or part of the selection procedure is intended to sample or measure (essential). Where the selection procedure purports to sample a work behavior or to provide a sample of a work product, a comparison should be provided of the manner, setting, and the level of complexity of the selection procedure with those of the work situation (essential). If any steps were taken to reduce adverse impact on a race, sex, or ethnic group in the content of the procedure or in its administration, these steps should be described. Establishment of time limits, if any, and how these limits are related to the speed with which duties must be performed on the job, should be explained. Measures of central tend- ency (e.g., means) and measures of dispersion (e.g., standard deviations) and estimates of reliability should be reported for all selection procedures if available. Such reports should be made for relevant race, sex, and ethnic subgroups, at least on a statistically reliable sample basis.

(6) *Alternative procedures investigated.* The alternative selection procedures investigated and available evidence of their impact should be identified (essential). The scope, method, and findings of the investigation, and the conclusions reached in light of the findings, should be fully described (essential).

(7) *Uses and applications.* The methods considered for use of the selection procedure (e.g., as a screening device with a cutoff score, for grouping or ranking, or combined with other procedures in a battery) and available evidence of their impact should be described (essential). This description should include the rationale for choosing the method for operational use, and the evidence of the validity and utility of the procedure as it is to be used (essential). The purpose for which the procedure is to be used (e.g., hiring, transfer, promotion) should be described (essential). If the selection procedure is used with a cutoff score, the user should describe the way in which normal expectations of proficiency within the work force were determined and the way in which the cutoff score was determined (essential). In addition, if the selection procedure is to be used for ranking, the user should specify the evidence showing that a higher score on the selection procedure is likely to result in better job performance.

(8) *Contact person.* The name, mailing address, and telephone number of the person who may be contacted for further information about the validity study should be provided (essential).

(9) *Accuracy and completeness.* The report should describe the steps taken to assure the accuracy and completeness of the collection, analysis, and report of data and results.

D. *Construct validity studies.* Reports of construct validity for a selection procedure should include the following information:

(1) *User(s), location(s), and date(s) of study.* Date(s) and location(s) of the job analysis and the gathering of other evidence called for by these guidelines should be provided (essential).

(2) *Problem and setting.* An explicit definition of the purpose(s) of the study and the circumstances in which the study was conducted should be provided. A description of existing selection procedures and cutoff scores, if any, should be provided.

(3) *Construct definition.* A clear definition of the construct(s) which are believed to underlie successful performance of the critical or important work behavior(s) should be provided (essential). This definition should include the levels of construct performance relevant to the job(s) for which the selection procedure is to be used (essential). There should be a summary of the position of the construct in the psychological literature, or in the absence of such a position, a description of the way in which the definition and measurement of the construct was developed and the psychological theory underlying it (essential). Any quantitative data which identify or define the job constructs, such as factor analyses, should be provided (essential).

(4) *Job analysis.* A description of the method used to analyze the job should be provided (essential). A complete description of the work behavior(s) and, to the extent appropriate, work outcomes and measures of their criticality and/or importance should be provided (essential). The report should also describe the basis on which the behavior(s) or outcomes were determined to be important, such as their level of difficulty, their frequency of performance, the consequences of error or other appropriate factors (essential). Where jobs are grouped or compared for the purposes of generalizing validity evidence, the work behavior(s) and work product(s) for each of the jobs should be described, and conclusions concerning the similarity of the jobs in terms of observable work behaviors or work products should be made (essential).

(5) *Job titles and codes.* It is desirable to provide the selection procedure user's job title(s) for the job(s) in question and the corresponding job title(s) and code(s) from the United States Employment Service's dictionary of occupational titles.

(6) *Selection procedure.* The selection procedure used as a measure of the construct should be completely and explicitly described or attached (essential). If commercially available selection procedures are used, they should be identified by title, form

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and publisher (essential). The research evidence of the relationship between the selection procedure and the construct, such as factor structure, should be included (essential). Measures of central tendency, variability and reliability of the selection procedure should be provided (essential). Whenever feasible, these measures should be provided separately for each relevant race, sex and ethnic group.

(7) *Relationship to job performance.* The criterion-related study(ies) and other empirical evidence of the relationship between the construct measured by the selection procedure and the related work behavior(s) for the job or jobs in question should be provided (essential). Documentation of the criterion-related study(ies) should satisfy the provisions of section 15B above or section 15E(1) below, except for studies conducted prior to the effective date of these guidelines (essential). Where a study pertains to a group of jobs, and, on the basis of the study, validity is asserted for a job in the group, the observed work behaviors and the observed work products for each of the jobs should be described (essential). Any other evidence used in determining whether the work behavior(s) in each of the jobs is the same should be fully described (essential).

(8) *Alternative procedures investigated.* The alternative selection procedures investigated and available evidence of their impact should be identified (essential). The scope, method, and findings of the investigation, and the conclusions reached in light of the findings should be fully described (essential).

(9) *Uses and applications.* The methods considered for use of the selection procedure (e.g., as a screening device with a cutoff score, for grouping or ranking, or combined with other procedures in a battery) and available evidence of their impact should be described (essential). This description should include the rationale for choosing the method for operational use, and the evidence of the validity and utility of the procedure as it is to be used (essential). The purpose for which the procedure is to be used (e.g., hiring, transfer, promotion) should be described (essential). If weights are assigned to different parts of the selection procedure, these weights and the validity of the weighted composite should be reported (essential). If the selection procedure is used with a cutoff score, the user should describe the way in which normal expectations of proficiency within the work force were determined and the way in which the cutoff score was determined (essential).

(10) *Accuracy and completeness.* The report should describe the steps taken to assure the accuracy and completeness of the collection, analysis, and report of data and results.

(11) *Source data.* Each user should maintain records showing all pertinent information relating to its study of construct validity.

(12) *Contact person.* The name, mailing address, and telephone number of the individual who may be contacted for further information about the validity study should be provided (essential).

E. *Evidence of validity from other studies.* When validity of a selection procedure is supported by studies not done by the user, the evidence from the original study or studies should be compiled in a manner similar to that required in the appropriate section of this section 15 above. In addition, the following evidence should be supplied:

(1) *Evidence from criterion-related validity studies—a. Job information.* A description of the important job behavior(s) of the user's job and the basis on which the behaviors were determined to be important should be provided (essential). A full description of the basis for determining that these important work behaviors are the same as those of the job in the original study (or studies) should be provided (essential).

b. *Relevance of criteria.* A full description of the basis on which the criteria used in the original studies are determined to be relevant for the user should be provided (essential).

c. *Other variables.* The similarity of important applicant pool or sample characteristics reported in the original studies to those of the user should be described (essential). A description of the comparison between the race, sex and ethnic composition of the user's relevant labor market and the sample in the original validity studies should be provided (essential).

d. *Use of the selection procedure.* A full description should be provided showing that the use to be made of the selection procedure is consistent with the findings of the original validity studies (essential).

e. *Bibliography.* A bibliography of reports of validity of the selection procedure for the job or jobs in question should be provided (essential). Where any of the studies included an investigation of test fairness, the results of this investigation should be provided (essential). Copies of reports published in journals that are not commonly available should be described in detail or attached (essential). Where a user is relying upon unpublished studies, a reasonable effort should be made to obtain these studies. If these unpublished studies are the sole source of validity evidence they should be described in detail or attached (essential). If these studies are not available, the name and address of the source, an adequate abstract or summary of the validity study and data, and a contact person in the source organization should be provided (essential).

(2) *Evidence from content validity studies.* See section 14C(3) and section 15C above.

(3) *Evidence from construct validity studies.* See sections 14D(2) and 15D above.

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F. *Evidence of validity from cooperative studies.* Where a selection procedure has been validated through a cooperative study, evidence that the study satisfies the requirements of sections 7, 8 and 15E should be provided (essential).

G. *Selection for higher level job.* If a selection procedure is used to evaluate candidates for jobs at a higher level than those for which they will initially be employed, the validity evidence should satisfy the documentation provisions of this section 15 for the higher level job or jobs, and in addition, the user should provide: (1) A description of the job progression structure, formal or informal; (2) the data showing how many employees progress to the higher level job and the length of time needed to make this progression; and (3) an identification of any anticipated changes in the higher level job. In addition, if the test measures a knowledge, skill or ability, the user should provide evidence that the knowledge, skill or ability is required for the higher level job and the basis for the conclusion that the knowledge, skill or ability is not expected to develop from the training or experience on the job.

H. *Interim use of selection procedures.* If a selection procedure is being used on an interim basis because the procedure is not fully supported by the required evidence of validity, the user should maintain and have available (1) substantial evidence of validity for the procedure, and (2) a report showing the date on which the study to gather the additional evidence commenced, the estimated completion date of the study, and a description of the data to be collected (essential).

DEFINITIONS

SEC. 16. *Definitions.* The following definitions shall apply throughout these guidelines:

A. *Ability.* A present competence to perform an observable behavior or a behavior which results in an observable product.

B. *Adverse impact.* A substantially different rate of selection in hiring, promotion, or other employment decision which works to the disadvantage of members of a race, sex, or ethnic group. See section 4 of these guidelines.

C. *Compliance with these guidelines.* Use of a selection procedure is in compliance with these guidelines if such use has been validated in accord with these guidelines (as defined below), or if such use does not result in adverse impact on any race, sex, or ethnic group (see section 4, above), or, in unusual circumstances, if use of the procedure is otherwise justified in accord with Federal law. See section 6B, above.

D. *Content validity.* Demonstrated by data showing that the content of a selection procedure is representative of important aspects of performance on the job. See section 5B and section 14C.

E. *Construct validity.* Demonstrated by data showing that the selection procedure measures the degree to which candidates have identifiable characteristics which have been determined to be important for successful job performance. See section 5B and section 14D.

F. *Criterion-related validity.* Demonstrated by empirical data showing that the selection procedure is predictive of or significantly correlated with important elements of work behavior. See sections 5B and 14B.

G. *Employer.* Any employer subject to the provisions of the Civil Rights Act of 1964, as amended, including State or local governments and any Federal agency subject to the provisions of section 717 of the Civil Rights Act of 1964, as amended, and any Federal contractor or subcontractor or federally assisted construction contractor or subcontractor covered by Executive Order 11246, as amended.

H. *Employment agency.* Any employment agency subject to the provisions of the Civil Rights Act of 1964, as amended.

I. *Enforcement action.* For the purposes of section 4 a proceeding by a Federal enforcement agency such as a lawsuit or an administrative proceeding leading to debarment from or withholding, suspension, or termination of Federal Government contracts or the suspension or withholding of Federal Government funds; but not a finding of reasonable cause or a conciliation process or the issuance of right to sue letters under title VII or under Executive Order 11246 where such finding, conciliation, or issuance of notice of right to sue is based upon an individual complaint.

J. *Enforcement agency.* Any agency of the executive branch of the Federal Government which adopts these guidelines for purposes of the enforcement of the equal employment opportunity laws or which has responsibility for securing compliance with them.

K. *Job analysis.* A detailed statement of work behaviors and other information relevant to the job.

L. *Job description.* A general statement of job duties and responsibilities.

M. *Knowledge.* A body of information applied directly to the performance of a function.

N. *Labor organization.* Any labor organization subject to the provisions of the Civil Rights Act of 1964, as amended, and any committee subject thereto controlling apprenticeship or other training.

O. *Observable.* Able to be seen, heard, or otherwise perceived by a person other than the person performing the action.

P. *Race, sex, or ethnic group.* Any group of persons identifiable on the grounds of race, color, religion, sex, or national origin.

Q. *Selection procedure.* Any measure, combination of measures, or procedure used as a basis for any employment decision. Selection

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procedures include the full range of assessment techniques from traditional paper and pencil tests, performance tests, training programs, or probationary periods and physical, educational, and work experience requirements through informal or casual interviews and unscored application forms.

R. *Selection rate.* The proportion of applicants or candidates who are hired, promoted, or otherwise selected.

S. *Should.* The term "should" as used in these guidelines is intended to connote action which is necessary to achieve compliance with the guidelines, while recognizing that there are circumstances where alternative courses of action are open to users.

T. *Skill.* A present, observable competence to perform a learned psychomoter act.

U. *Technical feasibility.* The existence of conditions permitting the conduct of meaningful criterion-related validity studies. These conditions include: (1) An adequate sample of persons available for the study to achieve findings of statistical significance; (2) having or being able to obtain a sufficient range of scores on the selection procedure and job performance measures to produce validity results which can be expected to be representative of the results if the ranges normally expected were utilized; and (3) having or being able to devise unbiased, reliable and relevant measures of job performance or other criteria of employee adequacy. See section 14B(2). With respect to investigation of possible unfairness, the same considerations are applicable to each group for which the study is made. See section 14B(8).

V. *Unfairness of selection procedure.* A condition in which members of one race, sex, or ethnic group characteristically obtain lower scores on a selection procedure than members of another group, and the differences are not reflected in differences in measures of job performance. See section 14B(7).

W. *User.* Any employer, labor organization, employment agency, or licensing or certification board, to the extent it may be covered by Federal equal employment opportunity law, which uses a selection procedure as a basis for any employment decision. Whenever an employer, labor organization, or employment agency is required by law to restrict recruitment for any occupation to those applicants who have met licensing or certification requirements, the licensing or certifying authority to the extent it may be covered by Federal equal employment opportunity law will be considered the user with respect to those licensing or certification requirements. Whenever a State employment agency or service does no more than administer or monitor a procedure as permitted by Department of Labor regulations, and does so without making referrals or taking any other action on the basis of the results, the State employment agency will not be deemed to be a user.

X. *Validated in accord with these guidelines or properly validated.* A demonstration that one or more validity study or studies meeting the standards of these guidelines has been conducted, including investigation and, where appropriate, use of suitable alternative selection procedures as contemplated by section 3B, and has produced evidence of validity sufficient to warrant use of the procedure for the intended purpose under the standards of these guidelines.

Y. *Work behavior.* An activity performed to achieve the objectives of the job. Work behaviors involve observable (physical) components and unobservable (mental) components. A work behavior consists of the performance of one or more tasks. Knowledges, skills, and abilities are not behaviors, although they may be applied in work behaviors.

APPENDIX

17. *Policy statement on affirmative action* (see section 13B). The Equal Employment Opportunity Coordinating Council was established by act of Congress in 1972, and charged with responsibility for developing and implementing agreements and policies designed, among other things, to eliminate conflict and inconsistency among the agencies of the Federal Government responsible for administering Federal law prohibiting discrimination on grounds of race, color, sex, religion, and national origin. This statement is issued as an initial response to the requests of a number of State and local officials for clarification of the Government's policies concerning the role of affirmative action in the overall equal employment opportunity program. While the Coordinating Council's adoption of this statement expresses only the views of the signatory agencies concerning this important subject, the principles set forth below should serve as policy guidance for other Federal agencies as well.

(1) Equal employment opportunity is the law of the land. In the public sector of our society this means that all persons, regardless of race, color, religion, sex, or national origin shall have equal access to positions in the public service limited only by their ability to do the job. There is ample evidence in all sectors of our society that such equal access frequently has been denied to members of certain groups because of their sex, racial, or ethnic characteristics. The remedy for such past and present discrimination is twofold.

On the one hand, vigorous enforcement of the laws against discrimination is essential. But equally, and perhaps even more important are affirmative, voluntary efforts on the part of public employers to assure that positions in the public service are genuinely and equally accessible to qualified persons, without regard to their sex, racial, or ethnic characteristics. Without such efforts equal

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employment opportunity is no more than a wish. The importance of voluntary affirmative action on the part of employers is underscored by title VII of the Civil Rights Act of 1964, Executive Order 11246, and related laws and regulations—all of which emphasize voluntary action to achieve equal employment opportunity.

As with most management objectives, a systematic plan based on sound organizational analysis and problem identification is crucial to the accomplishment of affirmative action objectives. For this reason, the Council urges all State and local governments to develop and implement results oriented affirmative action plans which deal with the problems so identified.

The following paragraphs are intended to assist State and local governments by illustrating the kinds of analyses and activities which may be appropriate for a public employer's voluntary affirmative action plan. This statement does not address remedies imposed after a finding of unlawful discrimination.

(2) Voluntary affirmative action to assure equal employment opportunity is appropriate at any stage of the employment process. The first step in the construction of any affirmative action plan should be an analysis of the employer's work force to determine whether percentages of sex, race, or ethnic groups in individual job classifications are substantially similar to the percentages of those groups available in the relevant job market who possess the basic job-related qualifications.

When substantial disparities are found through such analyses, each element of the overall selection process should be examined to determine which elements operate to exclude persons on the basis of sex, race, or ethnic group. Such elements include, but are not limited to, recruitment, testing, ranking certification, interview, recommendations for selection, hiring, promotion, etc. The examination of each element of the selection process should at a minimum include a determination of its validity in predicting job performance.

(3) When an employer has reason to believe that its selection procedures have the exclusionary effect described in paragraph 2 above, it should initiate affirmative steps to remedy the situation. Such steps, which in design and execution may be race, color, sex, or ethnic "conscious," include, but are not limited to, the following:

(a) The establishment of a long-term goal, and short-range, interim goals and timetables for the specific job classifications, all of which should take into account the availability of basically qualified persons in the relevant job market;

(b) A recruitment program designed to attract qualified members of the group in question;

(c) A systematic effort to organize work and redesign jobs in ways that provide opportunities for persons lacking "journeyman" level knowledge or skills to enter and, with appropriate training, to progress in a career field;

(d) Revamping selection instruments or procedures which have not yet been validated in order to reduce or eliminate exclusionary effects on particular groups in particular job classifications;

(e) The initiation of measures designed to assure that members of the affected group who are qualified to perform the job are included within the pool of persons from which the selecting official makes the selection;

(f) A systematic effort to provide career advancement training, both classroom and on-the-job, to employees locked into dead end jobs; and

(g) The establishment of a system for regularly monitoring the effectiveness of the particular affirmative action program, and procedures for making timely adjustments in this program where effectiveness is not demonstrated.

(4) The goal of any affirmative action plan should be achievement of genuine equal employment opportunity for all qualified persons. Selection under such plans should be based upon the ability of the applicant(s) to do the work. Such plans should not require the selection of the unqualified, or the unneeded, nor should they require the selection of persons on the basis of race, color, sex, religion, or national origin. Moreover, while the Council believes that this statement should serve to assist State and local employers, as well as Federal agencies, it recognizes that affirmative action cannot be viewed as a standardized program which must be accomplished in the same way at all times in all places.

Accordingly, the Council has not attempted to set forth here either the minimum or maximum voluntary steps that employers may take to deal with their respective situations. Rather, the Council recognizes that under applicable authorities, State and local employers have flexibility to formulate affirmative action plans that are best suited to their particular situations. In this manner, the Council believes that affirmative action programs will best serve the goal of equal employment opportunity.

Respectfully submitted,

HAROLD R. TYLER, JR.,
Deputy Attorney General and Chairman of the Equal Employment Coordinating Council.

MICHAEL H. MOSKOW,
Under Secretary of Labor.

ETHEL BENT WALSH,
Acting Chairman, Equal Employment Opportunity Commission.

ROBERT E. HAMPTON,
Chairman, Civil Service Commission.

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ARTHUR E. FLEMMING,
Chairman, Commission on Civil Rights.

Because of its equal employment opportunity responsibilities under the State and Local Government Fiscal Assistance Act of 1972 (the revenue sharing act), the Department of Treasury was invited to participate in the formulation of this policy statement; and it concurs and joins in the adoption of this policy statement.

Done this 26th day of August 1976.

RICHARD ALBRECHT,
General Counsel, Department of the Treasury.

SECTION 18. *Citations.* The official title of these guidelines is "Uniform Guidelines on Employee Selection Procedures (1978)". The Uniform Guidelines on Employee Selection Procedures (1978) are intended to establish a uniform Federal position in the area of prohibiting discrimination in employment practices on grounds of race, color, religion, sex, or national origin. These guidelines have been adopted by the Equal Employment Opportunity Commission, the Department of Labor, the Department of Justice, and the Civil Service Commission.

The official citation is:

"Section ___, Uniform Guidelines on Employee Selection Procedure (1978); 43 FR ___ (August 25, 1978)."

The short form citation is:

"Section ___, U.G.E.S.P. (1978); 43 FR ___ (August 25, 1978)."

When the guidelines are cited in connection with the activities of one of the issuing agencies, a specific citation to the regulations of that agency can be added at the end of the above citation. The specific additional citations are as follows:

Equal Employment Opportunity Commission
29 CFR Part 1607
Department of Labor
Office of Federal Contract Compliance Programs
41 CFR Part 60-3
Department of Justice
28 CFR 50.14
Civil Service Commission
5 CFR 300.103(c)

Normally when citing these guidelines, the section number immediately preceding the title of the guidelines will be from these guidelines series 1-18. If a section number from the codification for an individual agency is needed it can also be added at the end of the agency citation. For example, section 6A of these guidelines could be cited for EEOC as follows: "Section 6A, Uniform Guidelines on Employee Selection Procedures (1978); 43 FR ___, (August 25, 1978); 29 CFR part 1607, section 6A."

ELEANOR HOLMES NORTON,
Chair, Equal Employment Opportunity Commission.

ALAN K. CAMPBELL,
Chairman, Civil Service Commission.

RAY MARSHALL,
Secretary of Labor.

GRIFFIN B. BELL,
Attorney General.

[Order No. 668-76, 41 FR 51735, Nov. 23, 1976, as amended at 43 FR 38295, Aug. 25, 1978]

§50.15 Representation of Federal officials and employees by Department of Justice attorneys or by private counsel furnished by the Department in civil, criminal, and congressional proceedings in which Federal employees are sued, subpoenaed, or charged in their individual capacities.

(a) Under the procedures set forth below, a federal employee (hereby defined to include present and former Federal officials and employees) may be provided representation in civil, criminal and Congressional proceedings in which he is sued, subpoenaed, or charged in his individual capacity, not covered by §15.1 of this chapter, when the actions for which representation is requested reasonably appear to have been performed within the scope of the employee's employment and the Attorney General or his designee determines that providing representation would otherwise be in the interest of the United States. No special form of request for representation is required when it is clear from the proceedings in a case that the employee is being sued solely in his official capacity and only equitable relief is sought. (See USAM 4-13.000)

(1) When an employee believes he is entitled to representation by the Department of Justice in a proceeding, he must submit forthwith a written request for that representation, together with all process and pleadings served upon him, to his immediate supervisor or whomever is designated by the head of his department or agency. Unless the employee's employing federal agency concludes that representation is clearly unwarranted, it shall submit, in a timely manner, to the Civil Division or other appropriate litigating division (Antitrust, Civil Rights, Criminal, Land and Natural Resources or the Tax Division), a statement containing its findings as to whether the employee was acting within the scope of his employment and its recommendation for

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or against providing representation. The statement should be accompanied by all available factual information. In emergency situations the litigating division may initiate conditional representation after a telephone request from the appropriate official of the employing agency. In such cases, the written request and appropriate documentation must be subsequently provided.

(2) Upon receipt of the individual's request for counsel, the litigating division shall determine whether the employee's actions reasonably appear to have been performed within the scope of his employment and whether providing representation would be in the interest of the United States. In circumstances where considerations of professional ethics prohibit direct review of the facts by attorneys of the litigating division (e.g. because of the possible existence of inter-defendant conflicts) the litigating division may delegate the fact-finding aspects of this function to other components of the Department or to a private attorney at federal expenses.

(3) Attorneys employed by any component of the Department of Justice who participate in any process utilized for the purpose of determining whether the Department should provide representation to a federal employee, undertake a full and traditional attorney-client relationship with the employee with respect to application of the attorney-client privilege. If representation is authorized, Justice Department attorneys who represent an employee under this section also undertake a full and traditional attorney-client relationship with the employee with respect to the attorney-client privilege. Any adverse information communicated by the client-employee to an attorney during the course of such attorney-client relationship shall not be disclosed to anyone, either inside or outside the Department, other than attorneys responsible for representation of the employee, unless such disclosure is authorized by the employee. Such adverse information shall continue to be fully protected whether or not representation is provided, and even though representation may be denied or discontinued. The extent, if any, to which attorneys employed by an agency other than the Department of Justice undertake a full and traditional attorney-client relationship with the employee with respect to the attorney-client privilege, either for purposes of determining whether representation should be provided or to assist Justice Department attorneys in representing the employee, shall be determined by the agency employing the attorneys.

(4) Representation generally is not available in federal criminal proceedings. Representation may be provided to a federal employee in connection with a federal criminal proceeding only where the Attorney General or his designee determines that representation is in the interest of the United States and subject to applicable limitations of § 50.16. In determining whether representation in a federal criminal proceeding is in the interest of the United States, the Attorney General or his designee shall consider, among other factors, the relevance of any nonprosecutorial interests of the United States, the importance of the interests implicated, the Department's ability to protect those interests through other means, and the likelihood of a conflict of interest between the Department's prosecutorial and representational responsibilities. If representation is authorized, the Attorney General or his designee also may determine whether representation by Department attorneys, retention of private counsel at federal expense, or reimbursement to the employee of private counsel fees is most appropriate under the circumstances.

(5) Where representation is sought for proceedings other than federal criminal proceedings, but there appears to exist the possibility of a federal criminal investigation or indictment relating to the same subject matter, the litigating division shall contact a designated official in the Criminal, Civil Rights or Tax Division or other prosecutive authority within the Department (hereinafter "prosecuting division") to determine whether the employee is either a subject of a federal criminal investigation or a defendant in a federal criminal case. An employee is the subject of an investigation if, in

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addition to being circumstantially implicated by having the appropriate responsibilities at the appropriate time, there is some evidence of his specific participation in a crime.

(6) If a prosecuting division of the Department indicates that the employee is not the subject of a criminal investigation concerning the act or acts for which he seeks representation, then representation may be provided if otherwise permissible under the provisions of this section. Similarly, if the prosecuting division indicates that there is an ongoing investigation, but into a matter unrelated to that for which representation has been requested, then representation may be provided.

(7) If the prosecuting division indicates that the employee is the subject of a federal criminal investigation concerning the act or acts for which he seeks representation, the litigating division shall inform the employee that no representation by Justice Department attorneys will be provided in that federal criminal proceeding or in any related civil, congressional, or state criminal proceeding. In such a case, however, the litigating division, in its discretion, may provide a private attorney to the employee at federal expense under the procedures of §50.16, or provide reimbursement to employees for private attorney fees incurred in connection with such related civil, congressional, or state criminal proceeding, provided no decision has been made to seek an indictment or file an information against the employee.

(8) In any case where it is determined that Department of Justice attorneys will represent a federal employee, the employee must be notified of his right to retain private counsel at his own expense. If he elects representation by Department of Justice attorneys, the employee and his agency shall be promptly informed:

(i) That in actions where the United States, any agency, or any officer thereof in his official capacity is also named as a defendant, the Department of Justice is required by law to represent the United States and/or such agency or officer and will assert all appropriate legal positions and defenses on behalf of such agency, officer and/or the United States;

(ii) That the Department of Justice will not assert any legal position or defense on behalf of any employee sued in his individual capacity which is deemed not to be in the interest of the United States;

(iii) Where appropriate, that neither the Department of Justice nor any agency of the U.S. Government is obligated to pay or to indemnify the defendant employee for any judgment for money damages which may be rendered against such employee; but that, where authorized, the employee may apply for such indemnification from his employing agency upon the entry of an adverse verdict, judgment, or other monetary award;

(iv) That any appeal by Department of Justice attorneys from an adverse ruling or judgment against the employee may only be taken upon the discretionary approval of the Solicitor General, but the employee-defendant may pursue an appeal at his own expense whenever the Solicitor General declines to authorize an appeal and private counsel is not provided at federal expense under the procedures of §50.16; and

(v) That while no conflict appears to exist at the time representation is tendered which would preclude making all arguments necessary to the adequate defense of the employee, if such conflict should arise in the future the employee will be promptly advised and steps will be taken to resolve the conflict as indicated by paragraph (a) (6), (9) and (10) of this section, and by §50.16.

(9) If a determination not to provide representation is made, the litigating division shall inform the agency and/or the employee of the determination.

(10) If conflicts exist between the legal and factual positions of various employees in the same case which make it inappropriate for a single attorney to represent them all, the employees may be separated into as many compatible groups as is necessary to resolve the conflict problem and each group may be provided with separate representation. Circumstances may make it advisable that private representation be provided to all conflicting groups and that direct Justice Department representation be withheld

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so as not to prejudice particular defendants. In such situations, the procedures of § 50.16 will apply.

(11) Whenever the Solicitor General declines to authorize further appellate review or the Department attorney assigned to represent an employee becomes aware that the representation of the employee could involve the assertion of a position that conflicts with the interests of the United States, the attorney shall fully advise the employee of the decision not to appeal or the nature, extent, and potential consequences of the conflict. The attorney shall also determine, after consultation with his supervisor (and, if appropriate, with the litigating division) whether the assertion of the position or appellate review is necessary to the adequate representation of the employee and

(i) If it is determined that the assertion of the position or appeal is not necessary to the adequate representation of the employee, and if the employee knowingly agrees to forego appeal or to waive the assertion of that position, governmental representation may be provided or continued; or

(ii) If the employee does not consent to forego appeal or waive the assertion of the position, or if it is determined that an appeal or assertion of the position is necessary to the adequate representation of the employee, a Justice Department lawyer may not provide or continue to provide the representation; and

(iii) In appropriate cases arising under paragraph (a)(10)(ii) of this section, a private attorney may be provided at federal expense under the procedures of § 50.16.

(12) Once undertaken, representation of a federal employee under this subsection will continue until either all appropriate proceedings, including applicable appellate procedures approved by the Solicitor General, have ended, or until any of the bases for declining or withdrawing from representation set forth in this section is found to exist, including without limitation the basis that representation is not in the interest of the United States. If representation is discontinued for any reason, the representing Department attorney on the case will seek to withdraw but will take all reasonable steps to avoid prejudice to the employee.

(b) Representation is not available to a federal employee whenever:

(1) The conduct with regard to which the employee desires representation does not reasonably appear to have been performed within the scope of his employment with the federal government;

(2) It is otherwise determined by the Department that it is not in the interest of the United States to provide representation to the employee.

(c)(1) The Department of Justice may indemnify the defendant Department of Justice employee for any verdict, judgment, or other monetary award which is rendered against such employee, provided that the conduct giving rise to the verdict, judgment, or award was taken within the scope of employment and that such indemnification is in the interest of the United States, as determined by the Attorney General or his designee.

(2) The Department of Justice may settle or compromise a personal damages claim against a Department of Justice employee by the payment of available funds, at any time, provided the alleged conduct giving rise to the personal damages claim was taken within the scope of employment and that such settlement or compromise is in the interest of the United States, as determined by the Attorney General or his designee.

(3) Absent exceptional circumstances as determined by the Attorney General or his designee, the Department will not entertain a request either to agree to indemnify or to settle a personal damages claim before entry of an adverse verdict, judgment, or award.

(4) The Department of Justice employee may request indemnification to satisfy a verdict, judgment, or award entered against the employee. The employee shall submit a written request, with appropriate documentation including copies of the verdict, judgment, award, or settlement proposal if on appeal, to the head of his employing component, who shall thereupon submit to the appropriate Assistant Attorney General, in a timely manner, a recommended disposition of the request.

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Where appropriate, the Assistant Attorney General shall seek the views of the U.S. Attorney; in all such cases the Civil Division shall be consulted. The Assistant Attorney General shall forward the request, the employing component's recommendation, and the Assistant Attorney General's recommendation to the Attorney General for decision.

(5) Any payment under this section either to indemnify a Department of Justice employee or to settle a personal damages claim shall be contingent upon the availability of appropriated funds of the employing component of the Department of Justice.

[Order No. 970-82, 47 FR 8172, Feb. 25, 1982, as amended at Order No. 1139-86, 51 FR 27022, July 29, 1986; Order No. 1409-90, 55 FR 13130, Apr. 9, 1990]

§50.16 Representation of Federal employees by private counsel at Federal expense.

(a) Representation by private counsel at federal expense or reimbursement of private counsel fees is subject to the availability of funds and may be provided to a federal employee only in the instances described in §50.15(a) (4), (7), (10), and (11), and in appropriate circumstances, for the purposes set forth in §50.15(a)(2).

(b) To ensure uniformity in retention and reimbursement procedures among the litigating divisions, the Civil Division shall be responsible for establishing procedures for the retention of private counsel and the reimbursement to an employee of private counsel fees, including the setting of fee schedules. In all instances where a litigating division decides to retain private counsel or to provide reimbursement of private counsel fees under this section, the Civil Division shall be consulted before the retention or reimbursement is undertaken.

(c) Where private counsel is provided, the following procedures shall apply:

(1) While the Department of Justice will generally defer to the employee's choice of counsel, the Department must approve in advance any private counsel to be retained under this section. Where national security interests may be involved, the Department of Justice will consult with the agency employing the federal defendant seeking representation.

(2) Federal payments to private counsel for an employee will cease if the private counsel violates any of the terms of the retention agreement or the Department of Justice.

(i) Decides to seek an indictment of, or to file an information against, that employee on a federal criminal charge relating to the conduct concerning which representation was undertaken;

(ii) Determines that the employee's actions do not reasonably appear to have been performed within the scope of his employment;

(iii) Resolves any conflict described herein and tenders representation by Department of Justice attorneys;

(iv) Determines that continued representation is not in the interest of the United States;

(v) Terminates the retainer with the concurrence of the employee-client for any reason.

(d) Where reimbursement is provided for private counsel fees incurred by employees, the following limitations shall apply:

(1) Reimbursement shall be limited to fees incurred for legal work that is determined to be in the interest of the United States. Reimbursement is not available for legal work that advances only the individual interests of the employee.

(2) Reimbursement shall not be provided if at any time the Attorney General or his designee determines that the employee's actions do not reasonably appear to have been performed within the scope of his employment or that representation is no longer in the interest of the United States.

(3) Reimbursement shall not be provided for fees incurred during any period of time for which representation by Department of Justice attorneys was tendered.

(4) Reimbursement shall not be provided if the United States decides to seek an indictment of or to file an information against the employee seeking reimbursement, on a criminal

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charge relating to the conduct concerning which representation was undertaken.

[Order No. 970-82, 47 FR 8174, Feb. 25, 1982, as amended by Order No. 1409-90, 55 FR 13130, Apr. 9, 1990]

§ 50.17 *Ex parte* communications in informal rulemaking proceedings.

In rulemaking proceedings subject only to the procedural requirements of 5 U.S.C. 553:

(a) A general prohibition applicable to all offices, boards, bureaus and divisions of the Department of Justice against the receipt of private, *ex parte* oral or written communications is undesirable, because it would deprive the Department of the flexibility needed to fashion rulemaking procedures appropriate to the issues involved, and would introduce a degree of formality that would, at least in most instances, result in procedures that are unduly complicated, slow, and expensive, and, at the same time, perhaps not conducive to developing all relevant information.

(b) All written communications from outside the Department addressed to the merits of a proposed rule, received after notice of proposed informal rulemaking and in its course by the Department, its offices, boards, and bureaus, and divisions or their personnel participating in the decision, should be placed promptly in a file available for public inspection.

(c) All oral communications from outside the Department of significant information or argument respecting the merits of a proposed rule, received after notice of proposed informal rulemaking and in its course by the Department, its offices, boards, bureaus, and divisions or their personnel participating in the decision, should be summarized in writing and placed promptly in a file available for public inspection.

(d) The Department may properly withhold from the public files information exempt from disclosure under 5 U.S.C. 552.

(e) The Department may conclude that restrictions on *ex parte* communications in particular rulemaking proceedings are necessitated by considerations of fairness or for other reasons.

[Order No. 801-78, 43 FR 43297, Sept. 25, 1978, as amended at Order No. 1409-90, 55 FR 13130, Apr. 9, 1990]

§ 50.18 [Reserved]

§ 50.19 Procedures to be followed by government attorneys prior to filing recusal or disqualification motions.

The determination to seek for any reason the disqualification or recusal of a justice, judge, or magistrate is a most significant and sensitive decision. This is particularly true for government attorneys, who should be guided by uniform procedures in obtaining the requisite authorization for such a motion. This statement is designed to establish a uniform procedure.

(a) No motion to recuse or disqualify a justice, judge, or magistrate (*see, e.g.*, 28 U.S.C. 144, 455) shall be made or supported by any Department of Justice attorney, U.S. Attorney (including Assistant U.S. Attorneys) or agency counsel conducting litigation pursuant to agreement with or authority delegated by the Attorney General, without the prior written approval of the Assistant Attorney General having ultimate supervisory power over the action in which recusal or disqualification is being considered.

(b) Prior to seeking such approval, Justice Department lawyer(s) handling the litigation shall timely seek the recommendations of the U.S. Attorney for the district in which the matter is pending, and the views of the client agencies, if any. Similarly, if agency attorneys are primarily handling any such suit, they shall seek the recommendations of the U.S. Attorney and provide them to the Department of Justice with the request for approval. In actions where the United States Attorneys are primarily handling the litigation in question, they shall seek the recommendation of the client agencies, if any, for submission to the Assistant Attorney General.

(c) In the event that the conduct and pace of the litigation does not allow sufficient time to seek the prior written approval by the Assistant Attorney General, prior oral authorization shall

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be sought and a written record fully reflecting that authorization shall be subsequently prepared and submitted to the Assistant Attorney General.

(d) Assistant Attorneys General may delegate the authority to approve or deny requests made pursuant to this section, but only to Deputy Assistant Attorneys General or an equivalent position.

(e) This policy statement does not create or enlarge any legal obligations upon the Department of Justice in civil or criminal litigation, and it is not intended to create any private rights enforceable by private parties in litigation with the United States.

[Order No. 977-82, 47 FR 22094, May 21, 1982]

§50.20 Participation by the United States in court-annexed arbitration.

(a) *Considerations affecting participation in arbitration.* (1) The Department recognizes and supports the general goals of court-annexed arbitrations, which are to reduce the time and expenses required to dispose of civil litigation. Experimentations with such procedures in appropriate cases can offer both the courts and litigants an opportunity to determine the effectiveness of arbitration as an alternative to traditional civil litigation.

(2) An arbitration system, however, is best suited for the resolution of relatively simple factual issues, not for trying cases that may involve complex issues of liability or other unsettled legal questions. To expand an arbitration system beyond the types of cases for which it is best suited and most competent would risk not only a decrease in the quality of justice available to the parties but unnecessarily higher costs as well.

(3) In particular, litigation involving the United States raises special concerns with respect to court annexed arbitration programs. A mandatory arbitration program potentially implicates the principles of separation of powers, sovereign immunity, and the Attorney General's control over the process of settling litigation.

(b) *General rule consenting to arbitration consistent with the department's regulations.* (1) Subject to the considerations set forth in the following paragraphs and the restrictions set forth in paragraphs (c) and (d), in a case assigned to arbitration or mediation under a local district court rule, the Department of Justice agrees to participate in the arbitration process under the local rule. The attorney for the government responsible for the case should take any appropriate steps in conducting the case to protect the interests of the United States.

(2) Based upon its experience under arbitration programs to date, and the purposes and limitations of court-annexed arbitration, the Department generally endorses inclusion in a district's court-annexed arbitration program of civil actions—

(i) In which the United States or a Department, agency, or official of the United States is a party, and which seek only money damages in an amount not in excess of $100,000, exclusive of interest and costs; and

(ii) Which are brought (A) under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.*, or (B) under the Longshoreman's and Harbor Worker's Compensation Act, 33 U.S.C. 905, or (C) under the Miller Act, 40 U.S.C. 270(b).

(3) In any other case in which settlement authority has been delegated to the U.S. Attorney under the regulations of the Department and the directives of the applicable litigation division and none of the exceptions to such delegation apply, the U.S. Attorney for the district, if he concludes that a settlement of the case upon the terms of the arbitration award would be appropriate, may proceed to settle the case accordingly.

(4) Cases other than those described in paragraph (2) that are not within the delegated settlement authority of the U.S. Attorney for the district ordinarily are not appropriate for an arbitration process because the Department generally will not be able to act favorably or negatively in a short period of time upon a settlement of the case in accordance with the arbitration award. Therefore, this will result in a demand for trial de novo in a substantial proportion of such cases to preserve the interests of the United States.

(5) The Department recommends that any district court's arbitration rule include a provision exempting any case

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from arbitration, sua sponte or on motion of a party, in which the objectives of arbitration would not appear to be realized, because the case involves complex or novel legal issues, or because legal issues predominate over factual issues, or for other good cause.

(c) *Objection to the imposition of penalties or sanctions against the United States for demanding trial de novo.* (1) Under the principle of sovereign immunity, the United States cannot be held liable for costs or sanctions in litigation in the absence of a statutory provision waiving its immunity. In view of the statutory limitations on the costs payable by the United States (28 U.S.C. 2412(a), 2412(b), and 1920), the Department does not consent to provisions in any district's arbitration program providing for the United States or the Department, agency, or official named as a party to the action to pay any sanction for demanding a trial de novo—either as a deposit in advance or as a penalty imposed after the fact—which is based on the arbitrators' fees, the opposing party's attorneys' fees, or any other costs not authorized by statute to be awarded against the United States. This objection applies whether the penalty or sanction is required to be paid to the opposing party, to the clerk of the court, or to the Treasury of the United States.

(2) In any case involving the United States that is designated for arbitration under a program pursuant to which such a penalty or sanction might be imposed against the United States, its officers or agents, the attorney for the government is instructed to take appropriate steps, by motion, notice of objection, or otherwise, to apprise the court of the objection of the United States to the imposition of such a penalty or sanction.

(3) Should such a penalty or sanction actually be required of or imposed on the United States, its officers or agents, the attorney for the government is instructed to:

(i) Advise the appropriate Assistant Attorney General of this development promptly in writing;

(ii) Seek appropriate relief from the district court; and

(iii) If necessary, seek authority for filing an appeal or petition for mandamus.

The Solicitor General, the Assistant Attorneys General, and the U.S. Attorneys are instructed to take all appropriate steps to resist the imposition of such penalties or sanctions against the United States.

(d) *Additional restrictions.* (1) The Assistant Attorneys General, the U.S. Attorneys, and their delegates, have no authority to settle or compromise the interests of the United States in a case pursuant to an arbitration process in any respect that is inconsistent with the limitations upon the delegation of settlement authority under the Department's regulations and the directives of the litigation divisions. See 28 CFR part 0, subpart Y and appendix to subpart Y. The attorney for the government shall demand trial de novo in any case in which:

(i) Settlement of the case on the basis of the amount awarded would not be in the best interests of the United States;

(ii) Approval of a proposed settlement under the Department's regulations in accordance with the arbitration award cannot be obtained within the period allowed by the local rule for rejection of the award; or

(iii) The client agency opposes settlement of the case upon the terms of the settlement award, unless the appropriate official of the Department approves a settlement of the case in accordance with the delegation of settlement authority under the Department's regulations.

(2) Cases sounding in tort and arising under the Constitution of the United States or under a common law theory filed against an employee of the United States in his personal capacity for actions within the scope of his employment which are alleged to have caused injury or loss of property or personal injury or death are not appropriate for arbitration.

(3) Cases for injunctive or declaratory relief are not appropriate for arbitration.

(4) The Department reserves the right to seek any appropriate relief to which its client is entitled, including injunctive relief or a ruling on motions

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for judgment on the pleadings, for summary judgment, or for qualified immunity, or on issues of discovery, before proceeding with the arbitration process.

(5) In view of the provisions of the Federal Rules of Evidence with respect to settlement negotiations, the Department objects to the introduction of the arbitration process or the arbitration award in evidence in any proceeding in which the award has been rejected and the case is tried de novo.

(6) The Department's consent for participation in an arbitration program is not a waiver of sovereign immunity or other defenses of the United States except as expressly stated; nor is it intended to affect jurisdictional limitations (*e.g.*, the Tucker Act).

(e) *Notification of new or revised arbitration rules.* The U.S. Attorney in a district which is considering the adoption of or has adopted a program of court-annexed arbitration including cases involving the United States shall:

(1) Advise the district court of the provisions of this section and the limitations on the delegation of settlement authority to the United States Attorney pursuant to the Department's regulations and the directives of the litigation divisions; and

(2) Forward to the Executive Office for United States Attorneys a notice that such a program is under consideration or has been adopted, or is being revised, together with a copy of the rules or proposed rules, if available, and a recommendation as to whether United States participation in the program as proposed, adopted, or revised, would be advisable, in whole or in part.

[Order No. 1109-85, 50 FR 40524, Oct. 4, 1985]

§50.21 Procedures governing the destruction of contraband drug evidence in the custody of Federal law enforcement authorities.

(a) *General.* The procedures set forth below are intended as a statement of policy of the Department of Justice and will be applied by the Department in exercising its responsibilities under Federal law relating to the destruction of seized contraband drugs.

(b) *Purpose.* This policy implements the authority of the Attorney General under title I, section 1006(c)(3) of the Anti-Drug Abuse Act of 1986, Public Law 99-570 which is codified at 21 U.S.C. 881(f)(2), to direct the destruction, as necessary, of Schedule I and II contraband substances.

(c) *Policy.* This regulation is intended to prevent the warehousing of large quantities of seized contraband drugs which are unnecessary for due process in criminal cases. Such stockpiling of contraband drugs presents inordinate security and storage problems which create additional economic burdens on limited law enforcement resources of the United States.

(d) *Definitions.* As used in this subpart, the following terms shall have the meanings specified:

(1) The term *Contraband drugs* are those controlled substances listed in Schedules I and II of the Controlled Substances Act seized for violation of that Act.

(2) The term *Marijuana* is as defined in 21 U.S.C. 801(15) but does not include, for the purposes of this regulation, the derivatives hashish or hashish oil for purposes of destruction.

(3) The term *Representative sample* means the exemplar for testing and a sample aggregate portion of the whole amount seized sufficient for current criminal evidentiary practice.

(4) The term *Threshold amount* means:

(i) Two kilograms of a mixture or substance containing a detectable amount of heroin;

(ii) Ten kilograms of a mixture or substance containing a detectable amount of—

(A) Coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecognine or their salts have been removed;

(B) Cocaine, its salts, optical and geometric isomers, and salts of isomers;

(C) Ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(D) Any compound, mixture, or preparation which contains any quantity of any of the substances referred to in paragraphs (d)(4)(ii) (A) through (C) of this section;

(iii) Ten kilograms of a mixture or substance described in paragraph (d)(4)(ii)(B) of this section which contains cocaine base;

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(iv) Two hundred grams of powdered phencyclidine (PCP) or two kilograms of a powdered mixture or substance containing a detectable amount of phencyclidine (PCP) or 28.35 grams of a liquid containing a detectable amount of phencyclidine (PCP);

(v) Twenty grams of a mixture or substance containing a detectable amount of Lysergic Acid Diethylamide (LSD);

(vi) Eight hundred grams of a mixture or substance containing a detectable amount of N-phenyl-N[1-(2-phenylethyl)-4-piperidiny] propanamide (commonly known as fentanyl) or two hundred grams of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl propanamide; or

(vii) Twenty kilograms of hashish or two kilograms of hashish oil (21 U.S.C. 841(b)(1)(D), 960(b)(4)).

In the event of any changes to section 401(b)(1) of the Controlled Substances Act (21 U.S.C. 841(b)(1) as amended occurring after the date of these regulations, the threshold amount of any substance therein listed, except marijuana, shall be twice the minimum amount required for the most severe mandatory minimum sentence.

(e) *Procedures.* Responsibilities of the Federal Bureau of Investigation and Drug Enforcement Administration.

When contraband drug substances in excess of the threshold amount or in the case of marijuana a quantity in excess of the representative sample are seized pursuant to a criminal investigation and retained in the custody of the Federal Bureau of Investigation or Drug Enforcement Administration, the Agency having custody shall:

(1) Immediately notify the appropriate U.S. Attorney, Assistant U.S. Attorney, or the responsible state/local prosecutor that the amount of seized contraband drug exceeding the threshold amount and its packaging, will be destroyed after sixty days from the date notice is provided of the seizure, unless the agency providing notice is requested in writing by the authority receiving notice not to destroy the excess contraband drug; and

(2) Assure that appropriate tests of samples of the drug are conducted to determined the chemical nature of the contraband substance and its weight sufficient to serve as evidence before the trial courts of that jurisdiction; and

(3) Photographically depict, and if requested by the appropriate prosecutorial authority, videotape, the contraband drugs as originally packaged or an appropriate display of the seized contraband drugs so as to create evidentiary exhibits for use at trial; and

(4) Isolate and retain the appropriate threshold amounts of contraband drug evidence when an amount greater than the appropriate threshold amount has been seized, or when less than the appropriate threshold amounts of contraband drugs have been seized, the entire amount of the seizure, with the exception of marijuana, for which a representative sample shall be retained; and

(5) Maintain the retained portions of the contraband drugs until the evidence is no longer required for legal proceedings, at which time it may be destroyed, first having obtained consent of the U.S. Attorney, an Assistant U.S. Attorney, or the responsible state/local prosecutor;

(6) Notify the appropriate U.S. Attorney, Assistant U.S. Attorney, or the responsible state/local prosecutor to obtain consent to destroy the retained amount or representative sample whenever the related suspect(s) has been a fugitive from justice for a period of five years. An exemplar sufficient for testing will be retained consistent with this section.

(f) *Procedures.* Responsibilities of the U.S. Attorney or the District Attorney (or equivalent state/local prosecutorial authority). When so notified by the Federal Bureau of Investigation or the Drug Enforcement Administration of an intent to destroy excess contraband drugs, the U.S. Attorney or the District Attorney (or equivalent) may:

(1) Agree to the destruction of the contraband drug evidence in excess of the threshold amount, or for marijuana in excess of the representative sample, prior to the normal sixty-day period. The U.S. Attorney, or the District Attorney (or equivalent) may delegate to his/her assistants authority to enter into such agreement; or

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(2) Request an exception to the destruction policy in writing to the Special Agent in Charge of the responsible division prior to the end of the sixty-day period when retaining only the threshold amount or representative sample will significantly affect any legal proceedings; and

(3) In the event of a denial of the request may appeal the denial to the Assistant Attorney General, Criminal Division. Such authority may not be redelegated. An appeal shall stay the destruction until the appeal is complete.

(g) *Supplementary regulations.* The Federal Bureau of Investigation and the Drug Enforcement Administration are authorized to issue regulations and establish procedures consistent with this section.

[Order No. 1256-88, 53 FR 8453, Mar. 15, 1988, as amended by Order No. 2920-2007, 72 FR 69144, Dec. 7, 2007]

§50.22 Young American Medals Program.

(a) *Scope.* There are hereby established two medals, one to be known as the Young American Medal for Bravery and the other to be known as the Young American Medal for Service.

(b) *Young American Medal for Bravery.* (1)(i) The Young American Medal for Bravery may be awarded to a person—

(A) Who during a given calendar year has exhibited exceptional courage, attended by extraordinary decisiveness, presence of mind, and unusual swiftness of action, regardless of his or her own personal safety, in an effort to save or in saving the life of any person or persons in actual imminent danger;

(B) Who was eighteen years of age or younger at the time of the occurrence; and

(C) Who habitually resides in the United States (including its territories and possessions), but need not be a citizen thereof.

(ii) These conditions must be met at the time of the event.

(2) The act of bravery must have been public in nature and must have been acknowledged by the Governor, Chief Executive Officer of a State, county, municipality, or other political subdivision, or by a civic, educational, or religious institution, group, or society.

(3) No more than two such medals may be awarded in any one calendar year.

(c) *Young American Medal for Service.* (1) The Young American Medal for Service may be awarded to any citizen of the United States eighteen years of age or younger at the time of the occurrence, who has achieved outstanding or unusual recognition for character and service during a given calendar year.

(2) Character attained and service accomplished by a candidate for this medal must have been such as to make his or her achievement worthy of public report. The outstanding and unusual recognition of the candidate's character and service must have been public in nature and must have been acknowledged by the Governor, Chief Executive Officer of a State, county, municipality, or other political subdivision, or by a civic, educational, or religious institution, group, or society.

(3) The recognition of the character and service upon which the award of the Medal for Service is based must have been accorded separately and apart from the Young American Medals program and must not have been accorded for the specific and announced purpose of rendering a candidate eligible, or of adding to a candidate's qualifications, for the award of the Young American Medal for Service.

(4) No more than two such medals may be awarded in any one calendar year.

(d) *Eligibility.* (1) The act or acts of bravery and the recognition for character and service that make a candidate eligible for the respective medals must have occurred during the calendar year for which the award is made.

(2) A candidate may be eligible for both medals in the same year. Moreover, the receipt of either medal in any year will not affect a candidate's eligibility for the award of either or both of the medals in a succeeding year.

(3) Acts of bravery performed and recognition of character and service achieved by persons serving in the Armed Forces, which arise from or out of military duties, shall not make a candidate eligible for either of the

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medals, provided, however, that a person serving in the Armed Forces shall be eligible to receive either or both of the medals if the act of bravery performed or the recognition for character and service achieved is on account of acts and service performed or rendered outside of and apart from military duties.

(e) *Request for information.* (1) A recommendation in favor of a candidate for the award of a Young American Medal for Bravery or for Service must be accompanied by:

(i) A full and complete statement of the candidate's act or acts of bravery or recognized character and service (including the times and places) that supports qualification of the candidate to receive the appropriate medal;

(ii) Statements by witnesses or persons having personal knowledge of the facts surrounding the candidate's act or acts of bravery or recognized character and service, as required by the respective medals;

(iii) A certified copy of the candidate's birth certificate, or, if no birth certificate is available, other authentic evidence of the date and place of the candidate's birth; and

(iv) A biographical sketch of the candidate, including information as to his or her citizenship or habitual residence, as may be required by the respective medals.

(f) *Procedure.* (1)(i) All recommendations and accompanying documents and papers should be submitted to the Governor or Chief Executive Officer of the State, territory, or possession of the United States where the candidate's act or acts of bravery or recognized character and service were demonstrated. In the case of the District of Columbia, the recommendations should be submitted to the Mayor of the District of Columbia.

(ii) If the act or acts of bravery or recognized character and service did not occur within the boundaries of any State, territory, or possession of the United States, the papers should be submitted to the Governor or Chief Executive Officer of the territory or other possession of the United States wherein the candidate habitually maintains his or her residence.

(2) The Governor or Chief Executive Officer, after considering the various recommendations received after the close of the pertinent calendar year, may nominate therefrom no more than two candidates for the Young American Medal for Bravery and no more than two candidates for the Young American Medal for Service. Nominated individuals should have, in the opinion of the appropriate official, shown by the facts and circumstances to be the most worthy and qualified candidates from the jurisdiction to receive consideration for awards of the above-named medals.

(3) Nominations of candidates for either medal must be submitted no later than 120 days after notification that the Department of Justice is seeking nominations under this program for a specific calendar year. Each nomination must contain the necessary documentation establishing eligibility, must be submitted by the Governor or Chief Executive Officer, together with any comments, and should be submitted to the address published in the notice.

(4) Nominations of candidates for medals will be considered only when received from the Governor or Chief Executive Officer of a State, territory, or possession of the United States.

(5) The Young American Medals Committee will select, from nominations properly submitted, those candidates who are shown by the facts and circumstances to be eligible for the award of the medals. The Committee shall make recommendations to the Attorney General based on its evaluation of the nominees. Upon consideration of these recommendations, the Attorney General may select up to the maximum allowable recipients for each medal for the calendar year.

(g) *Presentation.* (1) The Young American Medal for Bravery and the Young American Medal for Service will be presented personally by the President of the United States to the candidates selected. These medals will be presented in the name of the President and the Congress of the United States. Presentation ceremonies shall be held at such times and places selected by the President in consultation with the Attorney General.

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(2) The Young American Medals Committee will officially designate two adults (preferably the parents of the candidate) to accompany each candidate selected to the presentation ceremonies. The candidates and persons designated to accompany them will be furnished transportation and other appropriate allowances.

(3) There shall be presented to each recipient an appropriate Certificate of Commendation stating the circumstances under which the act of bravery was performed or describing the outstanding recognition for character and service, as appropriate for the medal awarded. The Certificate will bear the signature of the President of the United States and the Attorney General of the United States.

(4) There also shall be presented to each recipient of a medal, a miniature replica of the medal awarded in the form of a lapel pin.

(h) *Posthumous awards.* In cases where a medal is awarded posthumously, the Young American Medals Committee will designate the father or mother of the deceased or other suitable person to receive the medal on behalf of the deceased. The decision of the Young American Medals Committee in designating the person to receive the posthumously awarded medal, on behalf of the deceased, shall be final.

(i) *Young American Medals Committee.* The Young American Medals Committee shall be represented by the following:

(1) Director of the FBI, Chairman;

(2) Administrator of the Drug Enforcement Administration, Member;

(3) Director of the U.S. Marshals Service, Member; and

(4) Assistant Attorney General, Office of Justice Programs, Member and Executive Secretary.

(Authority: The United States Department of Justice is authorized under 42 U.S.C. 1921 *et seq.* to promulgate rules and regulations establishing medals, one for bravery and one for service. This authority was enacted by chapter 520 of Pub. L. 81–638 (August 3, 1950).)

[61 FR 49260, Sept. 19, 1996]

§50.23 Policy against entering into final settlement agreements or consent decree that are subject to confidentiality provisions and against seeking or concurring in the sealing of such documents.

(a) It is the policy of the Department of Justice that, in any civil matter in which the Department is representing the interests of the United States or its agencies, it will not enter into final settlement agreements or consent decrees that are subject to confidentiality provisions, nor will it seek or concur in the sealing of such documents. This policy flows from the principle of openness in government and is consistent with the Department's policies regarding openness in judicial proceedings (see 28 CFR 50.9) and the Freedom of Information Act (see Memorandum for Heads of Departments and Agencies from the Attorney General *Re: The Freedom of Information Act (Oct. 4, 1993)).*

(b) There may be rare circumstances that warrant an exception to this general rule. In determining whether an exception is appropriate, any such circumstances must be considered in the context of the public's strong interest in knowing about the conduct of its Government and expenditure of its resources. The existence of such circumstances must be documented as part of the approval process, and any confidentiality provision must be drawn as narrowly as possible. Non-delegable approval authority to determine that an exception justifies use of a confidentiality provision in, or seeking or concurring in the sealing of, a final settlement or consent decree resides with the relevant Assistant Attorney General or United States Attorney, unless authority to approve the settlement itself lies with a more senior Department official, in which case the more senior official will have such approval authority.

(c) Regardless of whether particular information is subject to a confidentiality provision or to seal, statutes and regulations may prohibit its disclosure from Department of Justice files. Thus, before releasing any information, Department attorneys should consult all appropriate statutes and regulations (e.g., 5 U.S.C. 552a (Privacy

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Act); 50 U.S.C. 403–3(c)(6) (concerning intelligence sources and methods), and Execution Order 12958 (concerning national security information). In particular, in matters involving individuals, the Privacy Act regulates disclosure of settlement agreements that have not been made part of the court record.

(d) The principles set forth in this section are intended to provide guidance to attorneys for the Government and are not intended to create or recognize any legally enforceable right in any person.

[Order No. 2270–99, 64 FR 59122, Nov. 2, 1999]

§ 50.24 Annuity broker minimum qualifications.

(a) *Minimum standards.* The Civil Division, United States Department of Justice, shall establish a list of annuity brokers who meet minimum qualifications for providing annuity brokerage services in connection with structured settlements entered by the United States. Those qualifications are as follows:

(1) The broker must have a current license issued by at least one State, the District of Columbia, or a Territory of the United States as a life insurance agent, producer, or broker;

(2) The broker must have a current license or appointment issued by at least one life insurance company to sell its structured settlement annuity contracts or to act as a structured settlement consultant or broker for the company;

(3) The broker must be currently covered by an Errors and Omissions insurance policy, or an equivalent form of insurance;

(4) The broker must never have had a license to be a life insurance agent, producer, or broker revoked, rescinded, or suspended for any reason or for any period of time;

(5) The broker must not have been convicted of a felony; and

(6) The broker must have had substantial experience in each of the past three years in providing structured settlement brokerage services to or on behalf of defendants or their counsel.

(b) *Procedures for inclusion on the list.* (1) An annuity broker who desires to be included on the list must submit a "Declaration" that he or she has reviewed the list of minimum qualifications set forth in paragraph (a) of this section and that he or she meets those minimum qualifications. A sample of the Declaration for annuity brokers to submit is available from the Civil Division's Web site (*http://www.usdoj.gov/civil/home.html*) or by written request to the address in this section. These minimum qualifications must be continually met for a broker who has been included on the list to remain included when the list is updated thereafter. The Declaration must be executed under penalty of perjury in a manner specified in 28 U.S.C. 1746.

(2) Each broker must submit a new Declaration annually to be included on updated lists. For a broker to be included on the initial list to be established by May 1, 2003, the Torts Branch, Civil Division, must receive the broker's Declaration no later than April 24, 2003. If the broker wishes to be included on updated lists, the Torts Branch must receive a new Declaration from the broker between January 1 and April 10 of each successive calendar year. After the Declaration is completed and signed, the original must be mailed to the United States Department of Justice, Civil Division, FTCA Staff, Post Office Box 888, Benjamin Franklin Station, Washington, DC 20044. The Department of Justice will not accept a photocopy or facsimile of the Declaration.

(3) A Declaration will not be accepted by the Department of Justice unless it is complete and has been signed by the individual annuity broker requesting inclusion on the list. A Declaration that is incomplete or has been altered, amended, or changed in any respect from the Declaration at the Civil Division's Web site will not be accepted by the Department of Justice. Such a Declaration will be returned to the annuity broker who submitted it, and the Department of Justice will take no further action on the request for inclusion on the list until the defect in the Declaration has been cured by the annuity broker.

(4) The Department of Justice will retain a complete Declaration signed and filed by an annuity broker requesting to be on the list. Because this rule does

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not require the submission of any additional information, the Department retains discretion to dispose of additional information or documentation provided by an annuity broker.

(5) The Department of Justice will not accept a Declaration submitted by an annuity company or by someone on behalf of another individual or group of individuals. Each individual annuity broker who desires to be included on the list must submit his or her own Declaration.

(6) An annuity broker whose name appears on the list incorrectly may submit a written request that his or her name be corrected. An annuity broker whose name appears on the list may submit a written request that his or her name be removed from the list.

(7) To the extent practicable, a name correction or deletion will appear on the next revision of the list immediately after receipt of the written request for a name correction or deletion. A written request for a name correction or deletion must be mailed to the United States Department of Justice, Civil Division, FTCA Staff, Post Office Box 888, Benjamin Franklin Station, Washington, DC 20044. Facsimiles will not be accepted.

(8) The list of annuity brokers established pursuant to this section will be updated periodically, but not more often than twice every calendar year, beginning in calendar year 2004.

(c) *Disclaimers.* (1) The inclusion of an annuity broker on the list signifies only that the individual declared under penalty of perjury that he or she meets the minimum qualifications required by the Attorney General for providing annuity brokerage services in connection with structured settlements entered into by the United States. Because the decision to include an individual annuity broker on the list is based solely and exclusively on the Declaration submitted by the annuity broker, the appearance of an annuity broker's name on the list does not signify that the annuity broker actually meets those minimum qualifications or is otherwise competent to provide structured settlement brokerage services to the United States. No preferential consideration will be given to an annuity broker appearing on the list except to the extent that United States Attorneys utilize the list pursuant to section 11015(b) of Public Law 107–273.

(2) By submitting a Declaration to the Department of Justice, the individual annuity broker agrees that the Declaration and the list each may be made public in its entirety, and the annuity broker expressly consents to such release and disclosure of the Declaration and list.

[Order No. 2667–2003, 68 FR 18120, Apr. 15, 2003]

§50.25 Assumption of concurrent Federal criminal jurisdiction in certain areas of Indian country.

(a) *Assumption of concurrent Federal criminal jurisdiction.* (1) Under 18 U.S.C. 1162(d), the United States may accept concurrent Federal criminal jurisdiction to prosecute violations of 18 U.S.C. 1152 (the General Crimes, or Indian Country Crimes, Act) and 18 U.S.C. 1153 (the Major Crimes, or Indian Major Crimes, Act) within areas of Indian country in the States of Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin that are subject to State criminal jurisdiction under Public Law 280, 18 U.S.C. 1162(a), if the tribe requests such an assumption of jurisdiction and the Attorney General consents to that request. Once the Attorney General has consented to an Indian tribe's request for assumption of concurrent Federal criminal jurisdiction, the General Crimes and Major Crimes Acts shall apply in the Indian country of the requesting tribe that is located in any of these "mandatory" Public Law 280 States, and criminal jurisdiction over those areas shall be concurrent among the Federal Government, the State government, and (where applicable) the tribal government. Assumption of concurrent Federal criminal jurisdiction under 18 U.S.C. 1162(d) does not require the agreement, consent, or concurrence of any State or local government.

(2) Under 25 U.S.C. 1321(a)(2), the United States may exercise concurrent Federal criminal jurisdiction in other areas of Indian country as to which States have assumed "optional" Public Law 280 criminal jurisdiction under 25 U.S.C. 1321(a), if a tribe so requests and after consultation with and consent by

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the Attorney General. The Department's view is that such concurrent Federal criminal jurisdiction exists under applicable statutes in these areas of Indian country, even if the Federal Government does not formally accept such jurisdiction in response to petitions from individual tribes. This rule therefore does not establish procedures for processing requests from tribes under 25 U.S.C. 1321(a)(2).

(b) *Request requirements.* (1) A tribal request for assumption of concurrent Federal criminal jurisdiction under 18 U.S.C. 1162(d) shall be made by the chief executive official of a federally recognized Indian tribe that occupies Indian country listed in 18 U.S.C. 1162(a). For purposes of this section, a chief executive official may include a tribal chairperson, president, governor, principal chief, or other equivalent position.

(2) The tribal request shall be submitted in writing to the Director of the Office of Tribal Justice at the Department of Justice. The first page of the tribal request shall be clearly marked: "Request for United States Assumption of Concurrent Federal Criminal Jurisdiction." The tribal request shall explain why the assumption of concurrent Federal criminal jurisdiction will improve public safety and criminal law enforcement and reduce crime in the Indian country of the requesting tribe. The tribal request shall also identify each local or State agency that currently has jurisdiction to investigate or prosecute criminal violations in the Indian country of the tribe and shall provide contact information for each such agency.

(c) *Process for handling tribal requests.* (1) Upon receipt of a tribal request, the Office of Tribal Justice shall:

(i) Acknowledge receipt; and

(ii) Open a file.

(2) Within 30 days of receipt of a tribal request, the Office of Tribal Justice shall:

(i) Publish a notice in the FEDERAL REGISTER, seeking comments from the general public;

(ii) Send written notice of the request to the State and local agencies identified by the tribe as having criminal jurisdiction over the tribe's Indian country, with a copy of the notice to the governor of the State in which the agency is located, requesting that any comments be submitted within 45 days of the date of the notice;

(iii) Seek comments from the relevant United States Attorney's Offices, the Federal Bureau of Investigation, and other Department of Justice components that would be affected by consenting to the request; and

(iv) Seek comments from the Department of the Interior (including the Bureau of Indian Affairs), the Department of Homeland Security, other affected Federal departments and agencies, and Federal courts.

(3) As soon as possible but not later than 30 days after receipt of a tribal request, the Office of Tribal Justice shall initiate consultation with the requesting tribe, consistent with applicable Executive Orders and Presidential Memoranda on tribal consultation.

(4) To the extent appropriate and consistent with applicable laws and regulations, including requirements of the Privacy Act of 1974, as amended, 5 U.S.C. 552a, governing personally identifiable information, and with the duty to protect law enforcement sensitive information, the Office of Tribal Justice may share with the requesting tribe any comments from other parties and provide the tribe with an opportunity to respond in writing.

(5) An Indian tribe may submit a request at any time after the effective date of this rule. However, requests received by February 28 of each calendar year will be prioritized for decision by July 31 of the same calendar year, if feasible; and requests received by August 31 of each calendar year will be prioritized for decision by January 31 of the following calendar year, if feasible. The Department will seek to complete its review of prioritized requests within these time frames, recognizing that it may not be possible to do so in each instance.

(d) *Factors.* Factors that will be considered in determining whether or not to consent to a tribe's request for assumption of concurrent Federal criminal jurisdiction include the following:

(1) Whether consenting to the request will improve public safety and criminal law enforcement and reduce crime in

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the Indian country of the requesting tribe.

(2) Whether consenting to the request will increase the availability of law enforcement resources for the requesting tribe, its members, and other residents of the tribe's Indian country.

(3) Whether consenting to the request will improve access to judicial resources for the requesting tribe, its members, and other residents of the tribe's Indian country.

(4) Whether consenting to the request will improve access to detention and correctional resources for the requesting tribe, its members, and other residents of the tribe's Indian country.

(5) Other comments and information received from the relevant United States Attorney's Offices, the Federal Bureau of Investigation, and other Department of Justice components that would be affected by consenting to the request.

(6) Other comments and information received from the Department of the Interior (including the Bureau of Indian Affairs), the Department of Homeland Security, other affected Federal departments and agencies, and Federal courts.

(7) Other comments and information received from tribal consultation.

(8) Other comments and information received from other sources, including governors and State and local law enforcement agencies.

(e) *Decision.* (1) The decision whether to consent to a tribal request for assumption of concurrent Federal criminal jurisdiction shall be made by the Deputy Attorney General after receiving written recommendations from the Office of Tribal Justice, the Executive Office for United States Attorneys, and the Federal Bureau of Investigation.

(2) The Deputy Attorney General will:

(i) Consent to the request for assumption of concurrent Federal criminal jurisdiction, effective as of some future date certain within the next twelve months (and, if feasible, within the next six months), with or without conditions, and publish a notice of the consent in the FEDERAL REGISTER;

(ii) Deny the request for assumption of concurrent Federal criminal jurisdiction; or

(iii) Request further information or comment before making a final decision.

(3) The Deputy Attorney General shall explain the basis for the decision in writing.

(4) The decision to grant or deny a request for assumption of concurrent Federal criminal jurisdiction is not appealable. However, at any time after a denial of such a request, a tribe may submit a renewed request for assumption of concurrent Federal criminal jurisdiction. A renewed request shall address the basis for the prior denial. The Office of Tribal Justice may provide appropriate technical assistance to any tribe that wishes to prepare and submit a renewed request.

(f) *Retrocession of State criminal jurisdiction.* Retrocession of State criminal jurisdiction under Public Law 280 is governed by 25 U.S.C. 1323(a) and Executive Order 11435 of November 21, 1968. The procedures for retrocession do not govern a request for assumption of concurrent Federal criminal jurisdiction under 18 U.S.C. 1162(d).

[AG Order No. 3314-2011, 76 FR 76042, Dec. 6, 2011]

PART 51—PROCEDURES FOR THE ADMINISTRATION OF SECTION 5 OF THE VOTING RIGHTS ACT OF 1965, AS AMENDED

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Media Relations at FBIHQ and in Field Offices Policy Guide

Federal Bureau of Investigation
Office of Public Affairs
0809PG
October 13, 2015

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1. Introduction

The requirements for effective media relations have evolved significantly in the twenty-first century due to various factors, including 24/7 news coverage, an expansive cable market, channels dedicated solely to law enforcement programming, social media, Internet sites with original programming and articles, and the growth of opinion-driven, citizen-generated journalism. This changed environment requires intensive public affairs activities by dedicated public affairs specialists and media coordinators (MC), and it requires adaptability in the ways the Federal Bureau of Investigation (FBI) engages media outlets.

1.1. Purpose

As the principal voice of the FBI, the Office of Public Affairs (OPA) works to enhance the public's trust and confidence in the FBI by releasing and promoting information about the FBI's responsibilities, operations, accomplishments, policies, and values. In support of this objective, OPA works to improve public understanding and perceptions of the FBI through liaisons with traditional and nontraditional media. Effective work in media relations and media outreach also supports FBI operational priorities through efforts to mobilize, educate, and protect the public. The public can be a powerful force multiplier for law enforcement, serving as additional eyes and ears on the ground, calling in tips, notifying law enforcement of the location of fugitives or missing persons, and taking steps to protect themselves, their families, and their communities from becoming victims of crime.

1.2. Intended Audience

This policy guide (PG) is intended for OPA employees, MCs in field offices (FO), and all FBI personnel engaged in media relations.

2. Roles and Responsibilities

2.1. Federal Bureau of Investigation Office of Public Affairs

2.1.1. Assistant Director (AD), Office of Public Affairs

The AD, OPA serves as the FBI's national spokesperson and provides leadership, oversight, and direction for OPA and FBI-wide media relations, community outreach, history, executive speeches, and employee communications functions. The AD must brief and advise the Director and senior executives on a range of public affairs and communication matters, including the current news environment and the impact of their decisions on public opinion, the FBI's public image, and communication to the FBI workforce. The AD must ensure that public affairs matters are closely coordinated with the AD of the Office of Congressional Affairs (OCA) and public affairs executives at the Department of Justice (DOJ), White House, Department of Homeland Security (DHS), Office of the Director of National Intelligence (ODNI), and other agencies. The AD must maintain high-level liaison with news and entertainment industry leaders, executive producers, managing editors, and current and retired FBI executives. The AD must also approve requests for use of the FBI's name, initials, and seal in media whose content has been specifically reviewed and approved by the FBI (e.g., in public service announcements [PSA] and official letters to the editor). (See Corporate Policy Directive (PD) 0625D, *FBI Seal Name Initials and Special Agent Gold Badge*.)

2.1.2. Section Chief (SC), Media and Investigative Publicity Section, Office of Public Affairs

The SC must manage the FBI-wide media relations and community outreach programs, directly overseeing the National Press Office (NPO), Investigative Publicity and Public Affairs Unit (IPPAU), Executive Writing Unit (EWU), and coordinating various field office and FBI Headquarters (FBIHQ) components that contribute to these programs. The SC must act as a high-level media relations and outreach expert to interact with the national news media, national-level community-based groups, and counterparts in other government agencies (OGA) on a daily basis.

2.1.3. Section Chief, Strategic Communications Section, Office of Public Affairs

The SC has oversight of the OPA units in the Strategic Communications Section, including the FBI.gov and Internet Operations Unit (FIOU), formerly the Online/Print Media Unit, Employee Communications Unit (ECU), Community Relations Unit (CRU), and Executive Staff and Education Center Unit (ESECU). The SC must ensure that OPA's activities support and are aligned with FBI strategic objectives and priority initiatives. The SC must work in coordination with the unit chief (UC) of ESECU on goals, objectives, performance measures, and strategic planning. The SC is responsible for policies, compliance matters, and personnel professional development matters for OPA and the FBI's larger public affairs workforce in FOs and throughout FBIHQ divisions.

2.1.4. National Press Office

NPO must manage daily relations with the national and international media and ensures timely responses to all media requests, with the exception of requests from monthly publications and nontraditional media outlets, which are handled by IPPAU. (See subsection 2.1.5. of this PG.)

NPO must:

- Coordinate interview requests.
- Draft and issue written press releases and responses.
- Produce analytical and briefing products for executives.
- Produce public affairs guidance (PAG), talking points, questions and answers (Q&A), and other materials to help guide FBI communications on issues in the news.
- Design, recommend, and, upon the approval of the AD, OPA, execute media strategies using print, broadcast, Internet, and social media platforms.
- Provide on-site and remote assistance for major media events involving the FBI.
- Serve as the FBI's external public communication center during a major incident or crisis, managing dissemination of all FBI public information via a number of methods, including, but not limited to, telephone, electronic mail (e-mail), and social media.
- Provide general program management of media relations and provide daily guidance to FOs.
- Coordinate media relations training for key executives and MCs and serve as their point of contact (POC) for the support and coordination of issues pertaining to the media.
- Maintain staff-level liaison contacts with the public affairs offices of DOJ, the White House, DHS, ODNI, and other federal entities.

2.1.5. Investigative Publicity and Public Affairs Unit

IPPAU must oversee and manage publicity efforts that directly support investigations or intelligence activities. IPPAU must manage media relationships with national and international monthly publications and magazines. In addition, IPPAU must connect with media outlets not traditionally handled by NPO, such as authors, publishers, documentary productions, podcasts, and the radio, television, motion picture, and other entertainment industries, including those in foreign languages and those aimed at women, ethnic, religious, industry, and specific age groups.

IPPAU must:

- Coordinate with operational FBIHQ divisions and FOs on national and international investigative publicity matters.
- Approve and coordinate press releases and other public disclosures to solicit public assistance in fugitive, missing person, unknown bank robber, and cold cases.
- Develop national publicity campaigns.

- Create Wanted posters and other fugitive publicity.
- Manage the Ten Most Wanted Fugitives and the Most Wanted Terrorists programs.
- Manage the "Most Wanted" pages of <www.fbi.gov>.
- Manage the "FBI Most Wanted" Twitter account.
- Manage the Wanted Bank Robbers Web site, a national system for publicizing the FBI's unknown bank robbery suspects.
- Manage the relationships with digital outdoor advertisers.
- Oversee the creation of PSAs.
- Coordinate approval for the recording of live-action FBI operations (also known as media ride-alongs) with appropriate input from the FO, applicable United States Attorney's Office (USAO), and DOJ.
- Coordinate "FBI 101s" (or workshops to educate different segments of the media on FBI jurisdiction and operations) by planning the agenda, coordinating speakers, and producing presentations, talking points, Q&As, fact sheets, and/or other background materials for these workshops, in coordination with subject matter experts (SME).
- Offer briefings and training classes to both traditional and nontraditional media to promote the development of positive feature stories.

2.1.6. FBI.gov and Internet Operations Unit

FIOU is responsible for content, security, compliance, and technical support for <www.fbi.gov>, the Web sites of the FBI's 56 FOs, the FBI's presence on all social media sites (such as Facebook and YouTube), and all other external FBI Web sites, unless they are exempted by FIOU. The unit vets and posts information from all FBIHQ divisions, oversees FO postings, and creates original stories and videos to keep the public informed on FBI news and issues.

2.2. Office of the General Counsel (OGC)

OGC must review all requests for authorized recordings of FBI operations and related activities. OGC must review and approve releases and waivers that any members of the media or production companies ask FBI employees to sign. In addition, OGC must advise OPA on the potential impact of public comment on FBI policies and proposed and pending litigation.

2.3. Individuals in Federal Bureau of Investigation Headquarters Branches and Divisions Outside of the Office of Public Affairs

Individuals in other FBIHQ branches and divisions engaged in public affairs activities such as those in the Criminal Justice Information Services Division (CJIS), Training Division (TD), Laboratory Division (LD), National Security Branch (NSB), do not have the full autonomy afforded to FOs pursuant to these guidelines to conduct liaison with the news media.

Accordingly, such individuals must:

- Maintain close working relationships with OPA.

- Coordinate all media relations with OPA.
- Keep NPO advised of any significant cases or programs that could result in national press or media attention at the earliest practicable time.
- Refer any media inquiries related to recent or breaking news or matters requiring immediate attention to NPO.
- Refer any media inquiries on long-term projects and any requests from authors or filmmakers to IPPAU.

2.4. Field Offices

2.4.1. Assistant Director in Charge (ADIC) or Special Agent in Charge (SAC)

The ADIC or SAC is responsible for overseeing and participating in media relations in his or her FO, including appointing or hiring an MC who reports directly to the ADIC or SAC, as well as a back-up MC and/or a supervisory senior resident agent (SSRA), as appropriate. The ADIC or SAC must give interviews to the media, hold press conferences, and make appropriate FO personnel available to the news media. The FO head must approve any memoranda of understanding (MOU), following OGC review, that are executed between the FBI and media outlets, such as those governing the authorized recording of FBI operations and related activities. The FO head must be involved in the MOU negotiations for live-action recording, must execute the MOUs once all parties are in agreement, and must oversee the approval process outlined in subsection 4.2.2. of this document.

2.4.2. Media Coordinators

All FBI FOs must have at least one MC, either professional staff or special agent (SA), who functions as a liaison for the FO and as an official spokesperson, coordinating media activities and information with his or her USAO(s), which exercises independent discretion as to investigative matters affecting its own districts. MCs should not be the sole spokesperson for the FO and, to the extent practical, should respond to requests for information by coordinating interviews with managers, SMEs, or case agents.

MCs must:

- Respond orally or in writing to inquiries from members of the media.
- Focus on proactive activities that highlight the priorities, mission, and accomplishments of the FBI.
- Build relationships with local media outlets and with other law enforcement MCs in their area of responsibility (AOR).
- Provide materials such as speeches and talking points to assist the ADICs or SACs with press events and other public affairs efforts.
- Coordinate press conferences.
- Draft press releases.

- Update press releases and other information on their public-facing FO Web sites and, if applicable, on their OPA-approved Twitter account.
- Work with the media in crisis and emergency situations.
- Coordinate national or significant media matters with NPO.
- Coordinate investigative publicity matters through IPPAU.
- Coordinate all interaction with authors, publishers, documentary productions, television, motion picture, and other entertainment industries through IPPAU.
- Coordinate with the community outreach specialist (COS) to publicize community programs. (See *Community Outreach in Field Offices Corporate Policy Directive and Policy Implementation Guide* [DPG], 0575DPG.)
- Brief new SAs on how to interact with the media.
- Brief new professional staff on the FBI media policy in the event that they have contact with members of the media.
- Ensure that the provisions in MOUs for media ride-alongs are followed by the production companies. This responsibility cannot be delegated to a squad supervisor or any other employee.

2.5. All Federal Bureau of Investigation Employees

All employees must have an understanding of the FBI's media relations program and its guidelines, as contained in this policy. Employees must immediately contact NPO or their FO MC if contacted by any member of the traditional or nontraditional media about FBI matters and refer the media to NPO or the applicable FO MC. Additionally, employees must inform NPO or the FO MC when there is an issue, a situation, or an event with the potential to generate significant media coverage. FBI employees may contact NPO via the main telephone line or e-mail address. (See Appendix C, "Contact Information," of this PG.)

3. Policies

3.1. Authorization of Federal Bureau of Investigation Personnel to Make and Coordinate Disclosures and Information Releases to the Media

At FBIHQ, the Director, deputy director (DD), associate deputy director (ADD), AD for OPA, and OPA personnel designated by the AD are authorized to speak to the media. FBI executives, including executive assistant directors (EAD), ADs, deputy assistant directors (DAD), and SCs are authorized to speak to the media and must do so in coordination with OPA at FBIHQ. Other FBIHQ personnel, such as managers and SMEs, must only speak to the media at OPA's request or following coordination with, and approval by, OPA at FBIHQ.

In an FO, only the ADIC or SAC, assistant special agent in charge (ASAC), and the designated MC or other personnel specifically authorized by the head of office may communicate with the media on behalf of the FBI. On particularly sensitive issues or stories that may garner national attention, media contact must be coordinated with OPA at FBIHQ. Other FBI FO personnel, such as managers and SMEs, may communicate with the media at the request of the SAC, ASAC, or MC or following coordination with, and approval by, the SAC, ASAC, or MC.

Legal attachés (LEGAT) are authorized to speak to the media, but each request for media contact must be evaluated and considered by the LEGAT in coordination with the chief of mission and OPA. No media interviews or other cooperation with the media should go forward without a representative of the embassy present. OPA must coordinate with the International Operations Division (IOD) and any other applicable FBIHQ division for any additional consideration on behalf of the LEGAT.

Across the FBI, employees interested in planning national publicity campaigns or PSA initiatives must first coordinate with OPA at FBIHQ.

Across the FBI, if there is any doubt regarding a disclosure (see Appendix D, "Definitions and Acronyms," of this PG) to (or any interaction with) the media, the contents of the disclosure must be coordinated with OPA or the MC and with the FO's chief division counsel (CDC) or OGC, as applicable. In all cases, employee contacts with the media that are not authorized and not part of the employee's official duties are governed by FD-291, "FBI Employment Agreement."

OPA must consult with OGC's Litigation Branch on proposed media contacts that involve FBI personnel policies or that may impact proposed or pending litigation.

3.2. The Federal Bureau of Investigation's Open Stance with the Media

Authorized FBI personnel must be as responsive as appropriate to inquiries and requests made by media representatives within the bounds of applicable law and policy. Other than by reason of a court order, the FBI must not interfere with efforts to photograph, tape, record, or televise events that take place in public. This may include, for example, taking pictures of a sealed crime scene from outside the sealed perimeter (the perimeter must be no larger than absolutely necessary for operational needs) or recording other activities engaged in by FBI personnel.

3.3. Constraints on the Sharing of Information with Media Outlets

All releases of information by public affairs specialists, MCs, and any FBI personnel (see Appendix D, "Definitions and Acronyms," of this PG) authorized to speak to the media must conform with all applicable laws and regulations, as well as policies issued by DOJ, as itemized in Section 5, "Summary of Legal Authorities," of this PG.

All releases of information must be fair, accurate, and sensitive to the rights of defendants. The criteria of fairness, accuracy, and sensitivity to the rights of defendants, as well as to the public's right to know, must prevail in all dealings with the news media. (See subsection 4.2.3, "Freedom of the Press," of the *Domestic Investigations and Operations Guide* [DIOG], 0667DPG.)

Releases of information involving juveniles must not contain personally identifiable information (PII). Title 18 United States Code (U.S.C.) Section (§) 5038(e), the Federal Juvenile Delinquency Act, as amended, provides in part, "Unless a juvenile who is taken into custody is prosecuted as an adult neither the name nor picture of any juvenile shall be made public in connection with a juvenile delinquency proceeding." The Department has advised that a news release concerning the arrest of a juvenile would not violate any restrictions of the act so long as it contains no identifying information. (See DIOG subsection 19.12.2[H].)

All FBI personnel authorized to release information must comply with Privacy Act provisions. The Privacy Act of 1974 (5 U.S.C. § 552(a)) prohibits the FBI from disclosing PII about an individual without his or her written consent or, in the case of a juvenile, the consent of a parent or a legal guardian, unless disclosure is authorized by an exemption or an exception contained in the Privacy Act. One such exception authorizes the disclosure of information pursuant to a published routine use so long as the disclosure is compatible with the purpose for which the information was collected. The FBI has published in the *Federal Register* one or more routine uses authorizing the disclosure of information subject to the Privacy Act. Blanket Routine Use (BRU) 3, Appropriate Disclosures to the Public, published at 66 *Federal Register* 33559 (June 22, 2001), authorizes the FBI to disclose information "To the news media or members of the general public in furtherance of a legitimate law enforcement or public safety function as determined by the FBI, e.g., to assist in locating fugitives; to provide notifications of arrests; to provide alerts, assessments, or similar information on potential threats to life, health, or property; or to keep the public appropriately informed of other law enforcement or FBI matters or other matters of legitimate public interest where disclosure could not reasonably be expected to constitute an unwarranted invasion of personal privacy."

The Privacy Act also requires agencies to maintain an accurate accounting of the date, nature, and purpose of each disclosure and the name and address of the person and the agency to whom the disclosure was made. This accounting must be retained for five years or the life of the record, whichever is longer. All disclosures of PII must be documented. When PII is disclosed for the purposes as stated in the paragraph above, the information is documented in 80-HQ-C1144322, Investigative Publicity Matters. The disclosure may also be referenced in 80-HQ-C1702378, NA - Ten Most Wanted Fugitive Matters, or 80-HQ-C1353047, Most Wanted Terrorists Program – Most Wanted Terrorists Program.

3.4. Content of Disclosures

Disclosures must not prejudice an adjudicative proceeding and, except as indicated below, must not address an ongoing investigation.

Disclosures must not be erroneous, deceptive, or misleading. Any facts disseminated to the media must be validated to the extent practicable.

Material posted to an Internet Web site, a social media page, or a publicly-available mobile software application can reach audiences worldwide and must be given the same scrutiny and vetting that would typically be afforded a written statement to the press. Such releases are governed by the same legal and policy framework as other releases of information to the press (see Section 5, "Summary of Legal Authorities" of this PG) and the same restrictions regarding disclosures and requirements to coordinate with the USAO and/or OPA apply.

In some instances, it is permissible to [redacted] but only with the prior approval of FBIHQ entities (OGC and operational FBIHQ divisions, as appropriate, coordinated by OPA) and under the careful supervision of OPA. This does not include the release of any classified information, which is governed by *Safeguarding Classified National Security Information Corporate Policy Directive and Policy Implementation Guide*, 0632DPG. b7E -2

For example, it may be permissible to [redacted] to assure the public that an investigation is in progress.

- It may be permissible to [redacted] to protect the public interest, welfare, or safety. b7E -2
- It may be permissible to [redacted] In an FO, these releases must be approved by both the MC and the applicable USAO. At FBIHQ, these releases must be approved by both OPA and DOJ Office of Public Affairs (DOJ-OPA), and, if applicable, any relevant operational FBIHQ divisions.

4. Procedures and Processes

4.1. Administration and Management of Media Relations

4.1.1. Office of Public Affairs and the Department of Justice

OPA interacts closely with DOJ-OPA, and its operations are governed by DOJ-OPA's instructions, located at Title 28 Code of Federal Regulations (CFR) § 50.2, and by the *United States Attorneys' Manual* [USAM], Title 1-7.000, "Media Relations."

4.1.2. "The Horizon"

MCs must submit to NPO any activities and matters that could potentially draw or are drawing significant media attention in their area of operations. The inclusion of such activities or matters in "The Horizon" is at the discretion of the MC.

NPO must compile and publish these activities each business day in "The Horizon" report and disseminate the report to internal audiences, including all MCs and FBI senior leadership. NPO must maintain records of "The Horizon" in 80-HQ-A1199962-HORIZON in Sentinel.

4.1.3. Biannual Reports

NPO must review and use biannual reports from every FO's MC to program manage the media relations program across FOs. The MC in each FO must submit these biannual reports by the designated deadline to NPO. NPO must maintain records of these biannual reports in 80-HQ-A1199962-FO MED REP in Sentinel.

4.1.4. Waivers and Releases

Producers and publishers occasionally ask FBI personnel who participate in television, film, or book projects on behalf of the FBI to sign releases, waivers, or other written agreements. Through the use of releases, waivers, and other agreements (e.g., "life rights contracts"), production companies may attempt to secure authorization to use recorded material, including an employee's interviews, statements, likeness, and biographical data, in connection with a particular project, or limit the employee's or FBI's ability to share the story with other media outlets. Such documents often contain provisions rendering them legally objectionable or otherwise inappropriate for an FBI employee to sign.

Accordingly, employees participating in media projects in their official capacity must not sign releases, waivers, or other types of agreements provided by a producing or publishing entity. OPA has developed standard authorization letters that can be tailored to fit individual projects, which are maintained in 80-HQ-1077659, Public Affairs Matters Documentaries Television Movies. FBI employees or their FO MCs, on their behalf, must contact IPPAU to coordinate a review of the request for releases or other agreements and to prepare an appropriate authorization letter. FBI personnel asked to participate in television, film, or book projects for personal reasons and on personal time, unconnected to their FBI affiliation, must consult with the Office of Integrity and Compliance (OIC) since this may constitute outside employment and thus require OIC's review and approval.

FBI personnel who speak to a non-FBI audience or who participate as a panelist at a non-FBI conference, seminar, or other event in which the public or media have access, may also be asked

to sign a release, waiver, or other written agreement authorizing publicity, promotion, or sharing of information related to that event. Those personnel must advise OPA of the participation and must consult with OGC and OIC to ensure that legal and ethical considerations are addressed.

4.1.5. Office of Public Affairs and Media Coordinator Teleconferences

OPA must hold monthly teleconferences with MCs in FOs to discuss specific issues and matters of timely interest. Depending on the topic, OPA may invite the FO community outreach specialists to participate in the teleconferences.

4.1.6. Public Affairs Guidance

NPO will determine when a media issue warrants a PAG. NPO will issue PAG on significant and/or emerging issues for appropriate dissemination. MCs are permitted to use the language in PAGs as preapproved statements that can be offered in response to a media inquiry.

NPO must draft a PAG by coordinating information with the appropriate substantive FBIHQ division(s) to establish appropriate responses. NPO must also obtain approvals from the appropriate FBIHQ division(s), OPA executives, and, as required, DOJ-OPA. NPO must e-mail the PAG to all MCs and upload it to the SharePoint site, Media Representatives Learning Community.

4.1.7. Federal Bureau of Investigation Social Media Accounts

All employees authorized to use FBI social media accounts must abide by federal privacy, accessibility, and recordkeeping laws.

Employees using the FBI social media accounts must not share or "retweet" non-FBI information without first obtaining approval from the NPO UC (or the acting designee).

4.1.8. Press Releases

NPO must draft press releases of executive appointments of SACs, ADs and above in coordination with the selectee.

NPO must consult with DOJ-OPA regarding any national press releases about pending cases or investigations that may result in an indictment.

IPPAU must approve and coordinate any press releases or other public disclosures regarding soliciting public assistance for the Ten Most Wanted Fugitives program, Most Wanted Terrorists program, and other fugitive, missing person, unknown bank robbers, and cold cases.

4.1.8.1. Single Office Local Press Releases

MCs must obtain their SAC's approval before publishing and disseminating press releases. If a press release involves cases or investigations that may result in an indictment, MCs must also obtain the approval of the relevant USAO. If a press release involves significant or particularly sensitive issues or stories that may garner national attention, MCs must consult with NPO to determine if OPA's and the substantive FBIHQ division's approval is necessary.

MCs must use a uniform format for press releases, write them with both the media and public in mind, and simultaneously disseminate the press release by e-mail to media outlets and FIOU to post on <www.fbi.gov>.

MCs must e-mail FIOU any press release issued by the relevant USAO on FBI operational matters as quickly as possible for posting on <www.fbi.gov>.

When the FO's ADIC or SAC decides to issue a national press release locally, MCs must not expand on the content without the approval of both the substantive FBIHQ division and OPA.

MCs do not need prior approval from NPO to issue press releases regarding noninvestigative matters, such as community outreach initiatives, employee award announcements, PSAs, transfers of FO executives, and other administrative matters.

4.1.8.2. Multioffice Local Press Releases

In the event that a wide-ranging investigation requires close coordination and simultaneous press releases to the media by two or more FOs, MCs must consult OPA before issuing a press release. OPA may opt to release the information as a national press release. In joint or multidistrict cases, the approving official must consult with the other districts or FOs affected. (See the USAM, Title 1-7.400, for more information.)

4.1.8.3. Recordkeeping of Press Releases

Each FO must maintain a control file containing all press releases issued by the FO. Press releases concerning investigative matters must be also filed in the investigative case file noting the time and date the release was made and where it was released.

NPO must file FBIHQ press releases into 80-HQ-A1199962-PR.

4.1.9. Press Conferences

NPO must request approval to hold a press conference in advance from DOJ-OPA for any case or investigation that may result in an indictment. NPO must coordinate with DOJ-OPA on any materials, quotes, or information to be released in the press conference.

MCs in FOs must request approval in advance for press conferences from their SAC and, for issues relating to federal investigations and/or prosecutions, the applicable USAO. If a press conference involves significant or particularly sensitive issues or stories that may garner national attention, MCs must consult with NPO to determine if OPA's and the substantive FBIHQ division's approval is necessary.

Local press conferences about pending cases or investigations that may result in an indictment must be approved by the appropriate assistant Attorney General (AAG) or by the United States attorney (USA) responsible for the case. In joint or multidistrict cases, the approving official must consult with the other districts or FOs affected. (See the USAM, Title 1-7.401, for more information.)

NPO and MCs hosting press conferences must:

- Choose the time, location, and physical layout to accommodate spokespersons and the news media.
- Alert the media to the event by distributing a media advisory or inviting them to attend via e-mail, phone, or other form of communication.

- Create and provide press releases, media packets, and/or other materials to attendees before the press conference begins.
- Explain the ground rules at the onset of the press conference, such as whether the event is on or off the record and whether cameras are permitted.
- Introduce the names and titles of the FBI officials who will speak and take reporters' questions.
- Write and/or coordinate the public statements by the speakers.
- Close the press conference when its preset time is reached or when questions taper off.
- Address follow-up media inquiries as needed.

4.1.10. Pen-and-Pad Briefings

NPO must coordinate pen-and-pad briefings (informal, on-the-record briefings to press regulars) with any FBIHQ entity that may be a relevant stakeholder. If the pen-and-pad briefing will address ongoing investigations that may result in an indictment, NPO must consult with DOJ-OPA in advance.

NPO must:

- Issue a media advisory announcing the pen-and-pad briefing by e-mail, as appropriate.
- Secure room and security access for invited members of the media.
- Identify and schedule the briefer from the appropriate FBIHQ division.
- Escort attending media to and from the briefing location, at the scheduled times.

4.2. Media Inquiries and Requests

4.2.1. Media Inquiries

When NPO staff or MCs receive media inquiries, they must:

- Respond to media inquiries within the shortest possible time frame.
- Provide responses that are factual, courteous, and helpful.
- Not address hypothetical questions nor express personal opinions.
- Never ask or suggest that a journalist withhold information from the public without the concurrence of the substantive FBIHQ division and OPA.

NPO staff members may refer media requests to an FO, as appropriate.

MCs must:

- Coordinate all media contacts with the USAO on any matters that might affect that office, including any federal investigations and/or prosecutions.
- Advise NPO immediately of any media contacts that could result in national media attention.

- Refer to NPO any inquiries related to recent or breaking news or that require a short turnaround time.

All other FBI employees must immediately contact their FO MC or NPO if contacted by any member of the traditional or nontraditional media about FBI matters.

4.2.2. Recording of Live-Action Federal Bureau of Investigation Operations

In an effort to mitigate the legal and operational risks of filming live-action FBI operations (also known as media ride-alongs), the following rules must be followed:

- MCs must direct all requests for media ride-alongs to IPPAU for coordination. The media recording of live FBI events should be approved in rare instances and should not become the norm.
- If IPPAU approves the request in concept, IPPAU and the FO, including the FO's CDC, must collaboratively negotiate an MOU that will be executed between the FBI and the production company and/or media outlet. A standard model MOU was created and approved by OGC and can be found in Appendix B of this PG. The MOU must ensure that the applicable statutes, regulations, and guidelines pertaining to the filming of law enforcement activities are followed. The MOU is an important vehicle for formally communicating to the production companies the legal limitations and requirements placed on the FBI, as well as the many considerations relevant to the FBI's mission as a law enforcement agency.
- MCs, by virtue of their responsibility for media relations within their FOs, must be present for all filming activities and must ensure that the parameters set forth within the MOU are followed by the production companies. This responsibility must not be delegated to a squad supervisor or any other employee.
- Production company employees and others acting on behalf of the company must sign appropriate liability acknowledgements and nondisclosure agreements. All MOUs, nondisclosure agreements, and liability agreements must be maintained in 80-HQ-1077659 and the relevant investigative file. Examples of the MOU and nondisclosure agreements can be found in Appendix B of this PG.
- Production companies must agree to indemnify the FBI and hold it harmless for liabilities arising from the FBI's actions.
- OPA, in consultation with OGC, the substantive FBIHQ division, other affected FOs, and the participating FO's CDC must review and approve a production company's proposed video project, as well as the text of the MOU, prior to signature by any FBI official and any filming of FBI operations and related activities. The focus of the review must be whether the proposed project appears to be in the best interests of the FBI after considering the circumstances and attendant risks, and whether the MOU adequately addresses the risks.
- OPA must also ensure that the FBI has conducted the required coordination with DOJ-OPA in accordance with DOJ policy.

- Production companies, their employees, and others acting on their behalf must comply with their obligations under these agreements. The FBI may enforce these agreements by requiring additional controls, limiting participation, terminating the agreement, or any other lawful means it determines to be appropriate. However, the involved FBI officials must understand that once a violation occurs, it may be difficult or impossible for the FBI to adequately remedy any harm done to FBI mission interests.
- The appropriate USAO must approve filming of any cases selected in accordance with the USAM.
- Filming must not be permitted in an area where an individual has, or may have, a reasonable expectation of privacy, such as within a residence or an enclosed yard, even if the FBI has obtained consent to enter the area. Production company personnel are not permitted to accompany FBI personnel into such locations.
- Law enforcement personnel must not reenact a law enforcement action for the purpose of creating footage for a production company.
- Production companies must not film FBI personnel or disclose their identities in a production without the employees' consent. The responsible FO must verify and document such consent. The FBI may provide a letter to a production company authorizing use of the footage and identification of specified employees. FBI personnel may not sign releases or waivers without prior consultation with, and written approval by, OGC.
- The FBI must always guard the privacy of victims and witnesses. (See *The Attorney General Guidelines for Victim and Witness Assistance*, Article II(C), pp. 3-4, "Privacy and Confidentiality Considerations for Victims and Witnesses," and Article V(J), pp. 47-48, "Right to Fairness and Respect for Dignity and Privacy.") To ensure "best efforts" to protect the dignity and privacy of victims and witnesses, the FBI must alert the relevant production personnel as soon as practical whenever FBI personnel are aware that there is a reasonable likelihood of encountering a victim or a witness in a given situation. The production personnel, in turn, must agree to make their best efforts not to film victims or witnesses whenever it receives such notice from the FBI.
- If a production company uses film of an arrested individual in a production, IPPAU must provide a written consent form to the individual, including an acknowledgement that nothing has been given or promised to him or her in return for consent. IPPAU must retain the original, signed consent form, with a second original copy routed to the USAO.
- A production company must provide DOJ and the FBI an opportunity to review the final production before it is publicly screened. This check is to ensure that legally protected or sensitive investigative information is not disclosed and that the requirements of the signed agreement are followed.
- A production company must agree to provide, without the necessity of a subpoena or other legal order, a copy of the entire unedited film to DOJ or the FBI, the prosecution, defense, or court if requested by DOJ or the FBI.

- A production company must not publicly screen footage until after the case is fully adjudicated.

4.2.3. Handling Requests from Television Series, Movies, Documentaries, Radio, or Authors for Federal Bureau of Investigation Assistance

MCs must direct all requests from authors or the entertainment industry for FBI assistance and cooperation to IPPAU.

Once IPPAU receives a detailed description of the type of assistance or cooperation needed in writing, including a detailed treatment or a script in the case of movie industry requests, an IPPAU staff member must evaluate the quality, scope, and viability of each project.

If IPPAU approves the request in concept, IPPAU must prepare a communication to the substantive FBIHQ division and/or FO with a recommendation on the level of support the FBI will offer, as well as a request for input and concurrence from either the FBIHQ division or FO. In some instances, the substantive FBIHQ division or FO may have knowledge of the case or issue that would preclude participation in the project at a given time. Support can include guidance on content, assistance with props and costumes, interviews with SMEs, and/or assistance in identifying supporting material.

If all relevant parties approve cooperation with the requestor, IPPAU must coordinate the execution of the request with the appropriate entities.

IPPAU must direct authors to submit a Freedom of Information Act (FOIA) request via <www.foia.fbi.gov> for access to or information from FBI investigative files.

4.2.4. Ongoing Liaison with Television Series Depicting the Federal Bureau of Investigation

IPPAU must coordinate all ongoing liaisons with television series depicting FBI personnel, investigations, and/or services.

All liaison activity must be approved by IPPAU, the substantive FBIHQ division, and any relevant FO head.

IPPAU supports and coordinates ongoing liaison with television writers and producers in an effort to ensure a more realistic portrayal of FBI investigations, operations, and personnel.

Once IPPAU receives a detailed description of the type of assistance or cooperation needed in writing from the writer, producer, or other production personnel, an IPPAU staff member must evaluate the quality, scope, and viability of each project. If IPPAU approves the request in concept, IPPAU must prepare a communication to the substantive FBIHQ division and/or FO with a recommendation on the level of support, as well as a request for input and concurrence.

If all relevant parties approve cooperation with the television production, IPPAU must coordinate the fulfillment of the request with the appropriate entity or SME. Support can include guidance on content, fact checks, assistance with costumes and props, liaison and coordination with FOs, coordination of location shots, access to FBI facilities for filming scenes, interviews with SMEs, and/or supporting film footage.

IPPAU must direct television personnel to submit a FOIA request via <www.foia.fbi.gov> for access to or information from FBI investigative files.

4.3. Publicity and Proactive Campaigns

4.3.1. Managing Proactive Campaigns

IPPAU must create and coordinate national proactive program or investigative publicity campaigns.

MCs must contact IPPAU for guidance on proactive program communications efforts or investigative publicity with the local media. MCs must contact IPPAU at the idea stage to request concept approval, strategic guidance, and content review for local proactive program or investigative publicity campaigns.

IPPAU must ensure that all facets of a campaign comply with federal laws regulating the dissemination of information to the public and the receipt of gifts from prohibited sources. IPPAU will assist in the production and design of the campaign, assist with script writing, provide guidance on the nature and timing of the release, and help MCs navigate through the restrictions on endorsements by outside entities.

IPPAU may leverage the following elements for a national publicity campaign: press releases, television, radio, podcasts, newspapers, magazines, outreach to international and nontraditional media, PSAs, digital outdoor advertisements, print advertisements, Wanted posters, and social media.

4.3.2. Producing Radio Shows and Podcasts

IPPAU will leverage its FBI radio programs for proactive publicity purposes.

IPPAU must coordinate all requests and necessary approvals for program or investigative publicity via FBI radio programs.

4.3.3. Creating Public Service Announcements

IPPAU coordinates the creation of all PSAs, including the concept, design, content approval, and production to ensure consistent messaging and approval by all internal and external stakeholders. IPPAU must coordinate and seek approval from other federal entities, as applicable.

4.3.4. Fugitive Publicity

MCs must obtain approval from IPPAU for investigative publicity related to a fugitive, a missing person, or other active investigation.

MCs may draft press releases and other public disclosures designed to solicit public cooperation in the apprehension of FBI fugitives. MCs may include more facts about the fugitive's criminal background than are otherwise permissible in press releases and announcements regarding arrests or indictments.

MCs must avoid prejudicial statements in these public disclosures. These statements may include, but are not limited to, statements that brand a fugitive as guilty of a crime for which he or she has not been convicted or photographs that show arrest numbers or other data that identifies a subject's past arrest or imprisonment.

MCs must send written requests for publicity related to a fugitive, a missing person, or other active investigation to IPPAU. For fugitive cases, MCs must provide the following information:

- A detailed summary of the case
- Descriptive information about the fugitive, including eye and hair color, height, weight, date and place of birth, scars, tattoos or other marks, medical problems, locations where the fugitive might travel, hobbies or habits, occupations, and any known aliases
- If the fugitive should be considered armed and dangerous
- Any rewards being offered by the FBI

MCs must also submit the following enclosures with the request:

- Any applicable state or federal warrants, including when, where, and in which judicial districts the state and federal warrants were issued. Sealed indictments and warrants must not be submitted.
- Photographs of the best possible quality and highest resolution must be submitted electronically or on a disk and must be in .jpg format. If available, MCs must provide the date(s) when the photographs were taken.
- Relevant videos, if available. Video is extremely beneficial in cases with potential coverage by media outlets.
- Certification that "all other law enforcement authorities involved with this investigation have been contacted and have no objections to the requested national/international publicity." This must include contact with the FBI Legat office and foreign authorities, as appropriate.

IPPAU must obtain the concurrence of the applicable operational FBIHQ division for the investigative publicity.

After receipt of the appropriate documentation, IPPAU must consult with the case agent and MC to determine the most impactful avenues of publicity. At a minimum, IPPAU must create a Wanted poster for posting on <www.fbi.gov> and the affected FO's Intranet site. IPPAU may also suggest pitching the case to national and international media outlets, creating a podcast or a radio show, using digital billboard publicity, and/or engaging with the public via social media.

The case agent, in coordination with the MC, must approve all materials created by IPPAU prior to publication on <ww.fbi.gov> or on the FO's Intranet site or prior to dissemination to the media.

4.4. Crisis Situations

4.4.1. Crisis Planning

FOs' and OPA's crisis response plans (CRP) must include an outline of how OPA or the FO will deal with the media during the course of a crisis, including specific potential situations, agreed allocation of personnel and financial resources to handle media requests, and planned coordination with federal, state, and local agencies.

FOs' and OPA's Continuity of Operations Plans (COOP) must include guidance on media relations issues.

MCs must develop professional relationships with other federal, state, and local law enforcement public information officers to develop strategies and protocols in responding to the news media in joint law enforcement operations or in a crisis event. MCs may also proactively meet public information officers in local military, academic, and/or private sector environments, as appropriate.

MCs must foster healthy relationships with reporters to build trust and to ensure that reporters are aware of the dangers of speculation about tactical situations. MCs must encourage reporters to confine reports to facts released by authorized law enforcement officials in such situations.

4.4.2. During Crises

MCs must train SAs on situational awareness in fast-moving situations. SAs are authorized to identify themselves as "an SA of the FBI," identify their FO, state the general nature of the operation (e.g., "we are here to serve an arrest warrant"), and refer further media questions to the MC or management. In an emergency situation, SAs are permitted to call media questions directly in to the SAC or ASAC and may relay the answers in that SAC's or ASAC's name.

In major crisis situations, MCs must:

- Coordinate the establishment of a broadcast area for the news media near the incident but apart from a regular law enforcement perimeter and apart from any victim services staging area.
- Establish a joint information center, if practical, to consolidate the flow of information between local, state, and other federal agencies.
- Engage regularly with their SACs and other management.
- Participate in operational briefings to remain fully informed.
- Maintain regular communication with NPO.
- Request media not telephone or otherwise attempt to contact a hostage taker or a hostage.
- Request media to advise law enforcement of any calls received from hostage takers or hostages and to not publish those conversations without advice and approval of an on-scene commander and hostage negotiators, via the MC.
- Request media to limit live broadcasting with no close-ups of locations of tactical personnel during the course of the incident.
- Request that media not identify groups claiming responsibility for the incident.

4.4.2.1. On-Site Assistance

NPO may provide on-site assistance for major media events involving the FBI, as appropriate and as resources allow, with the concurrence of the AD of OPA and the FO head. On-site NPO personnel will assist the local MC and FO head and will function as a liaison with relevant individuals at FBIHQ. NPO may assist the MC with:

- Shaping a media strategy.
- Working with on-scene members of the media.
- Staffing a 24/7 command post such as a joint operations center or a joint information center.
- Liaising with state and local law enforcement.
- Liaising with relevant individuals at FBIHQ.
- Liaising with other on-scene federal agencies.

4.4.2.2. Off-Site Assistance

NPO must also provide off-site assistance as the FBI's external public communications center during a major incident or a crisis by managing the dissemination of all FBI public information. NPO's responsibilities during a major incident may include:

- Preparing written statements for the press.
- Monitoring news and social media coverage.
- Responding to incoming press inquiries.
- Gathering Q&As from SMEs and executives.
- Providing briefing materials to senior executives.

NPO must also function as the primary liaison between all interested parties during a major media event. NPO must:

- Coordinate information with other OPA units, as appropriate, and provide briefs as needed to OPA leadership.
- Coordinate with senior FBI executives at FBIHQ.
- Coordinate with the FO in whose AOR the incident occurred.
- Maintain an open line of communication between FBIHQ and the FO, including with any on-site personnel.
- Coordinate with the White House, DOJ, and other federal or national-level partners.

If appropriate, NPO will establish a presence in the Strategic Information and Operations Center (SIOC) command post to liaise with operational FBIHQ divisions.

4.5. Training

4.5.1. Training for Internal Audiences

NPO must provide training to key internal groups, including, but not limited to, any new Senior Executive Service (SES) employees, on their roles and responsibilities with regard to media guidelines and policies.

IPPAU must provide training to employees within FOs on effectively using investigative publicity to assist with cases and to all employees on their responsibility to report requests to OPA for any media research assistance from any traditional or nontraditional media sources.

MCs must brief new SAs, intelligence analysts (IA), and professional staff on media matters when they arrive in an FO. On an annual basis, they must brief the FO population on the FBI's media policy, as stated herein, in the event that employees are contacted by members of the media. MCs must also train FO personnel selected for media exposure on handling press interviews.

Any records on training that OPA provides should be retained in 1Y-HQ-1702408.

4.5.2. Training for External Audiences

NPO must review and evaluate requests for public affairs trainings and exercises to domestic and international intelligence agencies, law enforcement agencies, and community groups and deliver any approved training, with the following exceptions:

- If the training falls under the purview of the National Academy Unit (NAU), then TD is responsible for reviewing the request and delivering any approved training.
- If the requestor is a foreign law enforcement entity, the request should first be submitted to IOD, who must evaluate the training request and, if approved, forward the request to NPO to deliver the training.
- If MCs receive local requests, they must evaluate the requests and must provide any approved training. MCs may contact NPO for advice and resources to assist in any such training.

Any records on training that OPA provides must be retained in 1Y-HQ-1702408.

4.6. Special Circumstances

4.6.1. Investigations Involving Members of the Media

Investigations of members of the news media are considered sensitive investigative matters (SIM) and are governed by special provisions in the DIOG, including, but not limited to:

- Subsection 6.10, "Sensitive Investigative Matters (SIM) in Preliminary Investigations"
- Subsection 7.10, "Sensitive Investigative Matters (SIM) in Full Investigations"
- Subsection 8.8, "Sensitive Investigative Matters (SIM) in Enterprise Investigations"
- Subsection 9.10, "Sensitive Investigative Matters (SIM) in a Full Positive Foreign Intelligence Investigation"
- Subsection 10.1, "Sensitive Investigative Matters (SIM)"
- Subsection 16.2.3.5, "Sensitive Undisclosed Participation"
- Subsection 18.5.6.4.8, "Members of the News Media"
- Subsection 18.6.4.3.4.3, "Members of the News Media"

- Subsection 18.6.5.3.5.1, "Members of the News Media"
- Subsection 18.6.6.3.7.4, "Contact with Members of the News Media by a [redacted] b7E -2
- Subsection 18.6.8.4.2, "Compelled Disclosure"
- Subsection 18.7.2.6, "Standards for Use and Approval Requirements for Sensitive Title IIIs"
- Subsection 19.10, "Arrest of News Media Members"
- Appendix G.7, "Sensitive Investigative Matters"
- Appendix G.12, "National Security Letters for Telephone Toll Records of Members of the News Media or News Organizations"

4.6.2. Financial Institution Investigations

In financial institution investigations, MCs or any other FO personnel must not disclose the amount of money or property involved without prior concurrence from the Criminal Investigative Division (CID) and OPA.

4.6.3. Special Agent-Involved Shootings

MCs must not identify nor verify the names of SAs involved in shooting incidents in the performance of duty. If the names of SAs involved in shooting incidents have been made public through inclusion in public records or disclosures at public proceedings, SACs may verify the SAs' identities in response to inquiries by members of the media.

4.6.4. Threats Against Human Life

In order to protect the safety of victims, MCs must not disclose any information regarding kidnap-for-ransom cases or other crimes that involve a threat against human life without the approval of the applicable investigative FBIHQ division and OPA.

4.6.5. Overseas Incidents

FOs must coordinate media responses with NPO if the victims, suspects, or other individuals thought to be related to an overseas incident are from the FO's AOR.

4.6.6. Hot Pursuit

In hot pursuit fugitive cases, SACs have discretion to approve radio and television broadcasts without advance approval from OPA. As soon as possible, MCs must coordinate these cases with NPO.

5. Summary of Legal Authorities

- 28 CFR § 50.2, Release of information by personnel of the Department of Justice relating to criminal and civil proceedings
- *United States Attorneys' Manual*, Title 1-7.000, "Media Relations."
- *The Attorney General Guidelines for Victim and Witness Assistance,* Article II(C), pp. 3-4, "Privacy and Confidentiality Considerations for Victims and Witnesses"
- *The Attorney General Guidelines for Victim and Witness Assistance*, Article V(J), pp. 47-48, "Right to Fairness and Respect for Dignity and Privacy"
- 18 U.S.C. § 5038(e), The Federal Juvenile Delinquency Act
- Privacy Act of 1974 (5 U.S.C. § 552(a))
- 18 U.S.C. § 3052, Powers of Federal Bureau of Investigation
- 18 U.S.C. § 3107, Service of warrants and seizures by Federal Bureau of Investigation
- 28 CFR § 0.85, General functions [of the FBI Director]

6. Recordkeeping Requirements

The Privacy Act also requires agencies to maintain an accurate accounting of the date, nature, and purpose of each disclosure and the name and address of the person and the agency to whom the disclosure was made and to retain this accounting for five years or the life of the record, whichever is longer. All disclosures of PII must be documented. When PII is disclosed for the purposes as stated in the paragraph above, the information is documented in 80-HQ-C1144322, Investigative Publicity Matters. The disclosure may also be referenced in 80-HQ-C1702378, NA - Ten Most Wanted Fugitive Matters, or 80-HQ-C1353047, Most Wanted Terrorists Program – Most Wanted Terrorists Program.

Appendix A: Final Approvals

POLICY TITLE: *Media Relations at FBIHQ and in Field Offices Policy Guide*	
Primary Strategic Objective	P10-Enhance trust and confidence in the FBI.
Publish Date	2015-10-13
Effective Date	2015-10-13
Review Date	2018-10-13
REFERENCES	
PD 0664D, *Office of Public Affairs Statement of Authorities and Responsibilities*	
Social Media and Other Electronic Information Sharing Technologies Policy Directive and Policy Guide, 0579DPG	
PD 0672D, *Creating and Maintaining FBI Public Websites and FBI Web Presences on the Internet*	
APPROVALS	
Sponsoring Executive Approval	**Michael P. Kortan** Assistant Director Office of Public Affairs
Final Approval	**Mark F. Giuliano** Deputy Director Director's Office

Appendix B: Additional Information for Media Ride-Alongs

This appendix contains a sample MOU and a sample liability agreement to be used for the recording of live-action FBI operations.

Sample Agreement With a Media Production Company

Note: Any substantial deviation from the language provided below must be fully justified. Before execution, the agreement must be reviewed by the CDC (if applicable), OGC, and FBI's OPA. It may only be signed for the FBI by the responsible FBIHQ division head (i.e., AD) or FO head (i.e., ADIC or SAC) after receiving the approval of the FBI's OPA and OGC.

CONTAINS ATTORNEY PRIVILEGED /

PRE-DECISIONAL INFORMATION

AGREEMENT

BETWEEN

THE FEDERAL BUREAU OF INVESTIGATION

AND

[PRODUCTION COMPANY]

AND

[NETWORK]

[Production Company] ("PRODUCTION COMPANY") has asked the Federal Bureau of Investigation ("FBI") for approval to accompany personnel from the FBI's [DIVISION] on a variety of law enforcement activities and to film all or a portion of such activities for use as part of a documentary program regarding [identify topic, crime type, etc.] ("DOCUMENTARY") for broadcast by [Network] ("NETWORK"). As used herein, "film" includes any recording whatsoever, whether of audio or video.

[Identify and briefly describe Production Company and Network – e.g. official corporate name, state of incorporation, nature of business etc. as applicable]

The FBI enters into this agreement pursuant to its authorities in 28 U.S.C. Section 533 and 28 CFR Section 0.85 [Insert other authorities if appropriate]. The parties understand that the FBI is bound by 28 CFR Section 50.2, and will not provide information or filming assistance that violates this regulation. The FBI agrees to support this project in an effort to increase public awareness and understanding of the issues and FBI missions related to [describe crime problem and any other FBI objectives in the project (e.g. a recent uptick in violent crime in a particular geographic region, a specific type of cyber crime, etc.)].

In recognition of PRODUCTION COMPANY's request and the applicable law, regulations, and rules pertaining to Department of Justice assistance to the media, the parties to this agreement understand that the following parameters will guide the filming and production of the DOCUMENTARY:

1. The parties understand that the Assistant Director, Office of Public Affairs has final authority for the FBI to grant or deny requests from PRODUCTION COMPANY to film specific law enforcement activities. Such requests will be coordinated with the Division signing this agreement, as well as the FBI General Counsel, other affected divisions at FBI Headquarters, and the Department of Justice.

2. The responsible United States Attorney's Office(s) must provide prior written approval for any case(s) selected for filming. If a case selected for filming involves the participation of state and/or local law enforcement authorities, their prior approval must also be obtained.

3. PRODUCTION COMPANY may not film an area in which an individual may have a reasonable expectation of privacy, such as in the interior of a residence or an enclosed yard. All filming must be of activity occurring in a place open to the public or plainly in public view. PRODUCTION COMPANY will not enter, or allow any member of the film/production crew to enter any individual's home or other non-public areas that law enforcement personnel may enter to accomplish an arrest, search, interview, or any other case-related activity.

4. During any filming of FBI activities pursuant to this agreement, PRODUCTION COMPANY will immediately comply with requests or direction from FBI officials, such as to cease filming or to depart from an area.

5. The DOCUMENTARY shall not reveal the name of any suspect, defendant, witness or bystander, nor display their faces. Digital or other means should be used to hide faces as well as to conceal license plates in any televised or otherwise publicly screened, broadcast, or exhibited version of the DOCUMENTARY.

6. FBI personnel will not re-enact any law enforcement activity. FBI personnel will not conduct any type of "perp walk" for the purpose of filming. This means that FBI personnel may not intentionally create, for the benefit of PRODUCTION COMPANY, an opportunity to film the defendant(s) after arrest.

7. [Choose one of the following provisions to address filming of victims. The preference of the local USAO must be considered in making this determination. However, even where the USAO does not insist on an absolute prohibition against filming victims, the agreement proponent should still consider other relevant factors such as the type of crime issues involved, age of victims, any particularly sensitive privacy issues, etc. in evaluating whether any contact between PRODUCTION COMPANY and victims is appropriate.]

a. PRODUCTION COMPANY shall not film any crime victim without the individual's express written consent, and advance authorization from the FBI.

b. PRODUCTION COMPANY shall not film any crime victim.

8. PRODUCTION COMPANY, NETWORK, and any other party in interest shall provide, without the necessity of a subpoena or other order, a copy of the entire

unedited film to the Department of Justice or the FBI, the prosecution, defense counsel, or court upon request made by the Department of Justice or the FBI.

9. Notwithstanding any of the foregoing provisions, both the PRODUCTION COMPANY and the FBI/USAO must obtain an original release from an arrested individual before footage pertaining to the individual may be televised or otherwise publicly screened, broadcast, or exhibited. Each original release must contain the following language:

"I understand that my agreement to be included in the [Production Company] documentary about the Federal Bureau of Investigation is completely voluntary. I have not received, and was not promised, any right or benefit, substantive or procedural, by any officer, employee, agent, or other associated personnel of the United States Government in return for my agreement to be included in the documentary."

10. PRODUCTION COMPANY and NETWORK, and their respective employees, contractors, servants, and agents, must not disclose any law enforcement or case-related information provided by the FBI, or obtained as a result of FBI participation in the documentary, including any image or other information identifying any crime suspect, victim, or third party, unless expressly authorized by the FBI. Before filming begins, PRODUCTION COMPANY and NETWORK will require all employees, contractors, servants, and agents of PRODUCTION COMPANY and NETWORK who work on the DOCUMENTARY to sign a non-disclosure agreement provided by the FBI, and will provide copies of such agreements to the FBI upon request. As appropriate, the FBI will provide a separate written permission for PRODUCTION COMPANY or NETWORK to use footage of FBI law enforcement activities and interviews, as well as to use the FBI Seal or other insignia as set dressing.

11. Neither the finished DOCUMENTARY nor any portion thereof, including raw footage, may be televised or otherwise publicly exhibited until final review by the FBI in conjunction with the relevant United States Attorney's Office(s). PRODUCTION COMPANY and NETWORK shall not televise or otherwise publicly exhibit footage to which the FBI or relevant United States Attorney's Office(s) objects.

12. Further, neither the finished DOCUMENTARY nor any portion thereof, including raw footage, may be televised or otherwise publicly exhibited until the final disposition of the case approved for filming with respect to <u>all</u> potential defendants in the case, as determined by the FBI. For cases prosecuted in Federal Court, final disposition shall be determined by the prosecuting United States Attorney's Office.

13. PRODUCTION COMPANY and NETWORK agree that all employees, personnel, contractors, and agents of PRODUCTION COMPANY and NETWORK who participate in the filming and/or production of the DOCUMENTARY must sign a

separate Release and Acknowledgement of Risk provided by the FBI, prior to such participation.

14. PRODUCTION COMPANY and NETWORK acknowledge that they and their employees are voluntarily participating in the filming of FBI law enforcement activities with full knowledge and awareness that there is inherent risk in such activities, including but not limited to risk inherent in the potential use of force and the potential pursuit and physical apprehension of a criminal subject. [Optional: add any other substantial known risk particular to investigation, if applicable.] With such knowledge and awareness, PRODUCTION COMPANY and NETWORK hereby assume such risk with respect to any personal injury or damage to personal property which may occur directly or indirectly as a result of the participation of their personnel, agents, contractors or employees in such filming.

15. To the extent permitted by law, PRODUCTION COMPANY and NETWORK, their respective employees, servants, and agents, and their heirs and assigns, hereby agree to hold harmless, release, discharge, and indemnify the United States, the FBI, and their personnel, agents and employees, from any and all claims, demands, causes of action, and damages should any be found, which may result or arise from the acts or omissions of PRODUCTION COMPANY and NETWORK, their employees, servants, or agents, while participating in the filming and/or production of a documentary program concerning FBI law enforcement operations. PRODUCTION COMPANY and NETWORK shall maintain sufficient insurance coverage for such liability or indemnification.

16. This agreement is not an obligation or commitment of funds, nor a basis for transfer of funds, but rather, is a basic statement of the terms to which the parties mutually agree concerning the activities described herein. Unless otherwise agreed in writing, each party shall bear its own costs in relation to this agreement. Expenditures by each party will be subject to its own budgetary processes and to the availability of funds and resources pursuant to applicable laws, regulations, and policies. The parties expressly acknowledge that the language in this agreement in no way implies that funds will be made available for such expenditures.

17. Any notice required to be given pursuant to this agreement shall be in writing and mailed by certified or registered mail, return receipt requested, or delivered by a national overnight express service, as follows:

To:	Federal Bureau of Investigation	To:	[PRODUCTION COMPANY]
	Attn: [ADIC/SAC]		[ADDRESS]
	[ADDRESS]		[CITY/STATE]

[CITY/STATE]

To: [NETWORK]
[ADDRESS]
[CITY/STATE]

18. This agreement constitutes the entire understanding of the parties and revokes and supersedes any prior agreements between the parties. It shall not be modified or amended except in writing signed by the parties hereto and specifically referring to this agreement.
19. This agreement is effective as of the date signed by the parties below, and will remain in effect until terminated. Any party may terminate this agreement at any time. Such termination must be in writing, and the terminating party will endeavor to provide 30 days notice of termination to the other parties. In the event of termination of this agreement, all responsibilities regarding any recorded material as outlined herein remain in effect.
20. The undersigned representatives of Production Company and Network warrant that they possess authority to bind Production Company and Network to their obligations in this agreement.

_____

[NAME]
[TITLE]
[PRODUCTION COMPANY]

_____

[NAME]
[TITLE]
[NETWORK]

_____

[NAME]
[AD, ADIC, or SAC]
FBI, [DIVISION] Division

_____

[NAME]
Assistant Director
FBI, Office of Public Affairs

_____

[NAME and TITLE]
[USAO-1]

_____

[NAME and TITLE]
[USAO-2]

Sample Acknowledgment to be Signed by Production Company Employees and Representatives

RELEASE AND ACKNOWLEDGMENT OF RISK

I, _____, hereby acknowledge that I have chosen to voluntarily participate in the filming and/or production of a documentary regarding law enforcement activities engaged in by employees of the Federal Bureau of Investigation (FBI), _____ Division, with full knowledge and awareness that there is inherent risk in such activities, including but not limited to risk inherent in the potential use of force and potential pursuit and physical apprehension of a criminal suspect. [Optional: add any other substantial known risk particular to investigation, if applicable.] With such knowledge and awareness, I hereby assume such risk with respect to any injury to my person or property which may occur directly or indirectly as a result of my participation in such filming and/or production.

I hereby assume full responsibility for any personal injury or damage to my personal property or to others which may occur directly or indirectly as a result of my acts or omissions while participating in the filming and/or production of the documentary.

To the extent permitted by law, I, along with my heirs and assigns, hereby agree to hold harmless, release, discharge, and indemnify the United States, the FBI, and the personnel, agents, and employees thereof, from any and all claims, demands, causes of action, and damages should any be found, resulting or arising from my acts or omissions while participating in the filming and/or production of the documentary.

_____
Signature of Participant

_____
Date

Appendix C: Contact Information

Office of Public Affairs	202-324-5352
National Press Office	(202) 324-3691 [redacted]
Investigative Publicity and Public Affairs Unit	public.affairs@ic.fbi.gov
Address	J. Edgar Hoover Building 935 Pennsylvania Avenue, NW Washington, DC 20535

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Appendix D: Definitions and Acronyms

Definitions:

Disclosure: any release of information to a media outlet, whether made in person, over the telephone, via e-mail, instant message, social media, Web site, or otherwise

FBI personnel: individuals who are directly employed by the FBI or who are associated with it in the capacity of detailees, contractors, interns, or task force officers (TFO) and members

Media: any person, organization, or entity (other than the federal, state, local, tribal, and territorial governments) primarily engaged in the collection, production, or dissemination of information to the public in any form, which includes print, broadcast, film, and the Internet

Acronyms:

AAG	assistant Attorney General
AD	assistant director
ADD	associate deputy director
ADIC	assistant director in charge
AOR	area of responsibility
ASAC	assistant special agent in charge
BRU	blanket routine use
CDC	chief division counsel
CFR	Code of Federal Regulations
CID	Criminal Investigative Division
CJIS	Criminal Justice Information Services Division
COOP	continuity of operations plan
COS	community outreach specialist
CRP	crisis response plan
CRU	Community Relations Unit
DAD	deputy assistant directors

DD	deputy director
DHS	Department of Homeland Security
DIOG	*Domestic Investigations and Operations Guide*
DOJ	Department of Justice
DOJ-OPA	Department of Justice Office of Public Affairs
DPG	directive and policy guide
DPO	division policy officer
EAD	executive assistant directors
ECU	Employee Communications Unit
ESECU	Executive Staff and Education Center Unit
EWU	Executive Writing Unit
FBI	Federal Bureau of Investigation
FBIHQ	Federal Bureau of Investigation Headquarters
FIOU	FBI.gov and Internet Operations Unit
FO	field office
FOIA	Freedom of Information Act
IA	intelligence analyst
IOD	International Operations Division
IPPAU	Investigative Publicity and Public Affairs Unit
LD	Laboratory Division
LEGAT	legal attaché
MC	media coordinator
MIOG	*Manual of Investigative Operations and Guidelines*

MOU	memorandum of understanding
NAU	National Academy Unit
NPO	National Press Office
NSB	National Security Branch
OCA	Office of Congressional Affairs
ODNI	Office of the Director of National Intelligence
OGA	other government agency
OGC	Office of the General Counsel
OIC	Office of Integrity and Compliance
OPA	Office of Public Affairs
PAG	public affairs guidance
PD	policy directive
PG	policy guide
PII	personally identifiable information
POC	point of contact
PSA	public service announcement
Q&A	question and answer
SA	special agent
SAC	special agent in charge
SC	section chief
SES	Senior Executive Service
SIM	sensitive investigative matter
SIOC	Strategic Information and Operations Center

SME	subject matter expert
SSRA	supervisory senior resident agent
TD	Training Division
TFO	task force officer
UC	unit chief
USA	United States attorney
USAM	*United States Attorneys' Manual*
USAO	United States Attorney's Office
U.S.C.	United States Code

United States Department of Justice

OFFICES of THE
UNITED STATES ATTORNEYS

1-7.000 - Media Relations

1-7.001	Purpose
1-7.110	Interests Must Be Balanced
1-7.111	Need for Confidentiality
1-7.112	Need for Free Press and Public Trial
1-7.210	General Responsibility
1-7.220	Designation of Media Representative
1-7.310	Department of Justice Components
1-7.320	United States Attorneys
1-7.330	Procedures to Coordinate with OPA
1-7.400	Coordination With United States Attorneys—Issuance of Press Releases
1-7.401	Guidance for Press Conferences and Other Media Contacts
1-7.500	Release of Information in Criminal and Civil Matters—Non-Disclosure
1-7.520	Release of Information in Criminal and Civil Matters—Disclosable Information
1-7.530	Disclosure of Information Concerning Ongoing Investigations
1-7.531	Comments on Requests for Investigations
1-7.540	Disclosure of Information Concerning Person's Prior Criminal Record
1-7.550	Concerns of Prejudice

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 04-09-2018 BY [redacted] NSICG b6 -1 b7C -1

1-7.600 Assisting the News Media

1-7.700 Freedom of Information Act (FOIA)

1-7.001 - Purpose

The purpose of this policy statement is to establish specific guidelines consistent with the provisions of 28 CFR 50.2 governing the release of information relating to criminal and civil cases and matters by all components (FBI, DEA, INS, BOP, USMS, USAO, and DOJ divisions) and personnel of the Department of Justice. These guidelines are: 1) fully consistent with the underlying standards set forth in this statement and with 28 CFR 50.2; 2) in addition to any other general requirements relating to this issue; 3) intended for internal guidance only; and 4) do not create any rights enforceable in law or otherwise in any party.

1-7.110 - Interests Must Be Balanced

These guidelines recognize three principal interests that must be balanced: the right of the public to know; an individual's right to a fair trial; and, the government's ability to effectively enforce the administration of justice.

1-7.111 - Need for Confidentiality

Careful weight must be given in each case to protecting the rights of victims and litigants as well as the protection of the life and safety of other parties and witnesses. To this end, the Courts and Congress have recognized the need for limited confidentiality in:

- On-going operations and investigations;
- Grand jury and tax matters;
- Certain investigative techniques; and,
- Other matters protected by the law.

1-7.112 - Need for Free Press and Public Trial

Likewise, careful weight must be given in each case to the constitutional requirements of a free press and public trials as well as the right of the people in a constitutional democracy to have access to information about the conduct of law enforcement officers, prosecutors and courts, consistent with the individual rights of the accused. Further, recognition should be given to the needs of public safety, the apprehension of fugitives, and the rights of the public to be informed on matters that can affect enactment or enforcement of public laws or the development or change of public policy.

These principles must be evaluated in each case and must involve a fair degree of discretion and the exercise of sound judgment, as every possibility cannot be predicted and covered by written policy statement.

1-7.210 - General Responsibility

Final responsibility for all matters involving the news media and the Department of Justice is vested in the Director of the Office of Public Affairs (OPA). The Attorney General is to be kept fully informed of appropriate matters at all times.

Responsibility for all matters involving the local media is vested in the United States Attorney.

1-7.220 - Designation of Media Representative

Each United States Attorney's Office and each field office of the various components of the Department shall designate one or more persons to act as a point of contact on matters pertaining to the media.

In United States Attorneys' offices or field offices where available personnel resources do not permit the assignment of a full time point of contact for the media, these responsibilities should be assigned to a clearly identified individual. (This, of course, could be the United States Attorney or field office head.)

1-7.310 - Department of Justice Components

The public affairs officers at the headquarters level of the Federal Bureau of Investigation, Drug Enforcement Administration, Immigration and Naturalization Service, Bureau of Prisons, United States Marshals Service, Office of Justice Programs, and Community Relations Service are responsible for coordinating their news media effort with the Director of OPA.

1-7.320 - United States Attorneys

Recognizing that each of the 93 United States Attorneys will exercise independent discretion as to matters affecting their own districts, the United States Attorneys are responsible for coordinating their news media efforts with the Director of OPA in cases that transcend their immediate district or are of national importance.

[cited in USAM 1-3.000, 1-7.401]

1-7.330 - Procedures to Coordinate with OPA

In order to promote coordination with the OPA, all components of the Department shall take all reasonable steps to insure compliance with the following:

A. **International/National/Major Regional News.** As far in advance as possible, OPA should be informed about any issue that might attract international, national, or major regional media interest. However, the OPA should be alerted not to comment or disseminate any information to the media concerning such issues without first consulting with the United States Attorney.

B. **News Conferences.** Prior coordination with OPA is required of news conferences of national significance.

C. **Requests from National Media Representatives (TV, Radio, Wire Service, Magazines, Newspapers).** OPA should be informed immediately of all requests from national media organizations, including the television and radio programs (such as the nightly news, Good Morning America, Meet the Press and Sixty Minutes), national wire services, national news magazines and papers (such as the New York Times, U.S.A. Today, and the Wall Street Journal) regarding in-depth stories and matters affecting the Department of Justice, or matters of national significance.

D. **Media Coverage Affecting DOJ.** When available, press clippings and radio/television tapes involving matters of significance should be forwarded to OPA.

E. **Comments on Specific Issues (i.e., New Policies, Legislative Proposals, Budget).** OPC should be consulted for guidance prior to commenting on new policies and initiatives, legislative proposals or budgetary issues of the Department. This should not be interpreted to preclude recitation of existing well-established Departmental policies or approved budgets.

[cited in USAM 1-3.000; 1-7.401]

1-7.400 - Coordination With United States Attorneys—Issuance of Press Releases

By OPA or Headquarters. In instances where OPA or the headquarters of any division, component or agency of the Department issues a news release or conducts a news conference which may affect an office or the United States Attorney, such division, component, or agency will coordinate that effort with the appropriate United States Attorney.

Issuance of Press Release by Field Officers of Any Division. In instances where local field officers of any division or component plans to issue a news release, schedule a news conference or make contact with a member of the media relating to any case or matter which may be prosecuted by the United States Attorney's office, such release, scheduling of a news conference or other media contact shall be approved by the United States Attorney. See the DOJ Organizations and Functions Manual at 28 for a discussion of press releases in cases involving the Internal Revenue Service.

[cited in USAM 1-3.000; USAM 1-7.401]

1-7.401 - Guidance for Press Conferences and Other Media Contacts

The following guidance should be followed when Department of Justice components or investigative agencies consider conducting a press conference or other media contact:

A. The use of a press release which conforms to the approval requirements of USAM 1-7.400 is the usual method to release public information to the media by Department of Justice components and investigative agencies. Press conferences should be held only for the most significant and newsworthy actions, or if a particularly important deterrent or law enforcement purpose would be served. Prudence and caution should be exercised in the

conduct of any press conference or other media contact.

B. Press conferences about pending cases or investigations that may result in an indictment by all Department of Justice components and investigative agencies must be approved by the appropriate Assistant Attorney General or by the United States Attorney responsible for the case. In joint or multi-district cases the approving official should consult with other districts or divisions affected. If it is a national case, press conferences must be approved by the Director, Office of Public Affairs. *See* USAM 1-7.320 to 1-7.330.

C. There are exceptional circumstances when it may be appropriate to have press conferences or other media outreach about ongoing matters before indictment or other formal charge. These include cases where: 1) the heinous or extraordinary nature of the crime requires public reassurance that the matter is being promptly and properly handled by the appropriate authority; 2) the community needs to be told of an imminent threat to public safety; or 3) a request for public assistance or information is vital. *See* USAM 1-7.530 to 1-7.550 and 28 C.F.R. 50.2.

D. There are also circumstances involving substantial public interest when it may be appropriate to have media contact about matters after indictment or other formal charge but before conviction. In such cases, any communications with press or media representatives should be limited to the information contained in an indictment or other charging instrument, other public pleadings or proceedings, and any other related non-criminal information, within the limits of USAM 1-7.520, .540, .550, .500 and 28 C.F.R. 50.2.

E. Any public communication by any Department component or investigative agency or their employees about pending matters or investigations that may result in a case, or about pending cases or final dispositions, must be approved by the appropriate Assistant Attorney General, the United States Attorney, or other designate responsible for the case. In joint or multi-district cases, the approving official should consult with other districts or divisions affected. If it is a national case, press conferences must be approved by the Director, Office of Public Affairs.

F. The use of displays or handouts in either press conferences or other media outreach when it involves a pending case or an investigation that may lead to an indictment requires separate and specific approval by the officials authorizing approval as set forth in section B.

G. All Department personnel must avoid any public oral or written statements or presentations that may violate any Department guideline or regulation, or any legal requirement or prohibitions, including case law and local court rules.

H. Particular care must be taken to avoid any statement or presentation that would prejudice the fairness of any subsequent legal proceeding. See also 28 C.F.R. 16.26(b). In cases where information is based directly or indirectly on tax records, care should be taken to comply with any applicable disclosure provisions in the Tax Reform Act, section 6103 of

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the Internal Revenue Code of 1986. The fact of conviction, sentences and guilty pleas may be reported in a press release based on information uttered in court as opposed to waiting for the publicly filed documents relating to the fact of conviction, plea or sentence. If you have any questions please contact the Tax Division. Special rules apply and should be closely followed to ensure that the identity of minors directly or indirectly is not revealed in juvenile proceedings.

I. For press releases or other public comment concerning the filing of a request for commutation of a federal death sentence or whether such a sentence should be commuted, special rules apply. In clemency matters, the Department acts both as prosecutor and as advisor to the President on the issue of clemency. In order to ensure clarity about the role in which the Department is making a public comment and to ensure that there is no potential for infringement upon the President's prerogative in exercising his clemency powers or conflict in the Department's role in such matters, press releases or other comment to the press concerning the issue of clemency should be transmitted through the Office of Public Affairs to the Deputy Attorney General for final approval.

J. Prior to conducting a press conference or making comments on a pending investigation regarding another DOJ component, the U.S. Attorney shall coordinate any comments, including any written statements, with the affected component.

K. The Office of Inspector General is exempt from any approval requirement for media contacts. However, the Office of Inspector General should inform the Office of Public Affairs on public or other media issues.

[Added November 2003] [cited in USAM 1-7.401]

1-7.500 - Release of Information in Criminal and Civil Matters—Non-Disclosure

At no time shall any component or personnel of the Department of Justice furnish any statement or information that he or she knows or reasonably should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

1-7.520 - Release of Information in Criminal and Civil Matters—Disclosable Information

Department personnel, subject to specific limitations imposed by law or court rule or order and consistent with the provisions of these guidelines, may make public the following information in any criminal case in which charges have been brought:

The defendant's name, age, residence, employment, marital status, and similar background information;

A. The substance of the charge, limited to that contained in the complaint, indictment, information, or other public documents;

B. The identity of the investigating and/or arresting agency and the length and scope of an investigation;

C. The circumstances immediately surrounding an arrest, including the time and place of arrest, resistance, pursuit, possession and use of weapons, and a description of physical items seized at the time of arrest. Any such disclosures shall not include subjective observations; and

D. In the interest of furthering law enforcement goals, the public policy significance of a case may be discussed by the appropriate United States Attorney or Assistant Attorney General.

In civil cases, Department personnel may release similar identification material regarding defendants, the concerned government agency or program, a short statement of the claim, and the government's interest.

[cited in USAM 1-7.401]

1-7.530 - Disclosure of Information Concerning Ongoing Investigations

A. Except as provided inn subparagraph B. of this section, components and personnel of the Department of Justice shall not respond to questions about the existence of an ongoing investigation or comment on its nature or progress, including such things as the issuance or seving of a subpoena, prior to the public filing of the document.

B. In matters that have already received substantial publicity, or about which the community needs to be reassured that the appropriate law enforcement agency is investigating the incident, or where release of information is necessary to protect the public interest, safety, or welfare, comments about or confirmation of an ongoing investigation may need to be made. In these unusual circumstances, the involved investigative agency will consult and obtain approval from the United States Attorney or Department Division handling the matter prior to disseminating any information to the media.

[cited in USAM 1-3.000, USAM 1-7.401]

1-7.531 - Comments on Requests for Investigations

Individuals, groups, or organizations often send letters to the Department of Justice or a Department component requesting that a person or entity be investigated for violations of law. Sometimes, the requestor then conducts a press conference or releases a statement leaving an implication that an investigation will result. This can cause media inquiries.

Receipt of a request to open an investigation may be publicly acknowledged. Care should be taken to avoid any implication that the referral will necessarily lead to an investigation. It should be pointed out that there is a distinction between "reviewing a request for an investigation" and "opening an investigation."

Any acknowledgment should state that such requests are referred to the proper investigative agency for review but that no decision has been made whether to proceed on the specific request

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received. Finally, it should be noted that all substantiated allegations are reviewed in light of The Principles of Federal Prosecution (see USAM 9-27.000), and the Department does not ordinarily confirm or deny the existence or status of an investigation.

The same considerations apply if there is an investigation already underway when such a request is received. If the existence of an investigation is not public the same procedure should be followed as outlined above.

[Added November 2003] [cited in USAM 1-7.401]

1-7.540 - Disclosure of Information Concerning Person's Prior Criminal Record

Personnel of the Department shall not disseminate to the media any information concerning a defendant's or subject's prior criminal record either during an investigation or at a trial. However, in certain extraordinary situations such as fugitives or in extradition cases, departmental personnel may confirm the identity of defendants or subject and the offense or offenses. Where a prior conviction is an element of the current charge, such as in the case of a felon in possession of a firearm, departmental personnel may confirm the identity of the defendant and the general nature of the prior charge where such information is part of the public record in the case at issue.

[cited in USAM 1-7.401]

1-7.550 - Concerns of Prejudice

Because the release of certain types of information could tend to prejudice an adjudicative proceeding, Department personnel should refrain from making available the following:

A. Observations about a defendant's character;

B. Statements, admissions, confessions, or alibis attributable to a defendant, or the refusal or failure of the accused to make a statement;

C. Reference to investigative procedures, such as fingerprints, polygraph examinations, ballistic tests, or forensic services, including DNA testing, or to the refusal by the defendant to submit to such tests or examinations;

D. Statements concerning the identity, testimony, or credibility of prospective witnesses;

E. Statements concerning evidence or argument in the case, whether or not it is anticipated that such evidence or argument will be used at trial;

F. Any opinion as to the defendant's guilt, or the possibility of a plea of guilty to the offense charged, or the possibility of a plea of a lesser offense.

1-7.600 - Assisting the News Media

A. Other than by reason of a Court order, Department personnel shall not prevent the lawful efforts of the news media to photograph, tape, record or televise a sealed crime scene from outside the sealed perimeter.

B. In order to promote the aims of law enforcement, including the deterrence of criminal conduct and the enhancement of public confidence, Department personnel with the prior approval of the appropriate United States Attorney may assist the news media in photographing, taping, recording or televising a law enforcement activity. The United States Attorney shall consider whether such assistance would:

1. Unreasonably endanger any individual;

2. Prejudice the rights of any party or other person; and

3. Is not otherwise proscribed by law.

C. A news release should contain a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

D. In cases in which a search warrant or arrest warrant is to be executed, no advance information will be provided to the news media about actions to be taken by law enforcement personnel, nor shall media representatives be solicited or invited to be present. This prohibition will also apply to operations in preparation for the execution of warrants, and to any multi-agency action in which Department personnel participate.

E. Justice Department employees who obtain what may be evidence in any criminal or civil case or who make or obtain any photographic, sound or similar image thereof, in connection with a search or arrest warrant, may not disclose such material to the news media without the prior specific approval of the United States Attorney or Assistant Attorney General, who shall consider applicable regulations and policy, or upon a court order directing such production.

If news media representatives are present, Justice Department personnel may request them to withdraw voluntarily if their presence puts the operation or the safety of individuals in jeopardy. If the news media declines to withdraw, Department personnel should consider cancelling the action if that is a practical alternative.

Exceptions to the above policy may be granted in extraordinary circumstances by the Office of Public Affairs.

[cited in USAM 1-3.000]

1-7.700 - Freedom of Information (FOIA)

Nothing contained herein is intended to control access to Department of Justice records which are publicly available under provisions of the Freedom of Information Act (FOIA).

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(28 U.S.C. 509) (Order No. 469-71, 367 F. 21028, No. 3, 1971. Amended by Order No. 602-75, 40 FR 22119, May 20, 1975)

‹ 1-6.000 - DOJ Personnel As Witnesses up 1-8.000 - Congressional Relations ›