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CIVIL DIVISION OF THE UNITED STATES DEPARTMENT OF JUSTICE

HEARING

BEFORE THE

SUBCOMMITTEE ON
COMMERCIAL AND ADMINISTRATIVE LAW

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

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CIVIL DIVISION OF THE UNITED STATES DEPARTMENT OF JUSTICE

THURSDAY, JUNE 24, 2010

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMERCIAL
AND ADMINISTRATIVE LAW,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 11:10 a.m., in room 2141, Rayburn House Office Building, the Honorable Steve Cohen (Chairman of the Subcommittee) presiding.

Present: Representatives Cohen, Chu, Franks and King.

Staff Present: (Majority) James J. Park, Counsel; Carol Chodroff, Counsel; Adam Russell, Professional Staff Member; and Zachary Somers, Minority Counsel.

Mr. COHEN. This hearing of the Committee on the Judiciary, Subcommittee on Commercial and Administrative Law will now come to order.

Without objection, the Chair will be authorized to declare a recess of the hearing.

I will now recognize myself for a brief statement. One of this Subcommittee's duties and obligations is to oversee the activities of the various components of the Department of Justice over which the Subcommittee has jurisdiction. These are also the duties of every Committee to have oversight over the Administration, just as important for an Administration that has the majority as it is when the Administration is of the other party.

But the Civil Division is why we are here today. The last time this Subcommittee held an oversight hearing on the Civil Division was in 2003, a long time ago, when we invited the Civil Division and four other DOJ components to testify at the same hearing. Given the long time that has elapsed since the last hearing and given that new Administration has taken over since then, we concluded the time was right to conduct due diligence and have the oversight hearing that should have been held during the last 6 years.

I thank Assistant Attorney General Tony West of California and points west, the head of the Civil Division, for appearing before us today and to report on the division's recent activities. The DOJ Civil Division is responsible for litigating a broad range of matters on behalf of the government; defending the constitutionality of Federal legislation; recovering money for the U.S. that was lost through fraud; enforcing Federal consumer protection laws; defend-

ing immigration and enforcement actions; and representing the United States in habeas cases. Approximately 88 percent of the Civil Division's work is defensive in nature.

While there are many topics we could cover, there are two areas of interest to me particularly that we will look at. First, learn more about the Civil Division's role with respect to the ongoing investigation of the explosion and sinking of the Deepwater Horizon oil rig in the Gulf of Mexico, as well as the spill that we are experiencing, experienced, and will experience. The government's latest estimate is 60,000 barrels of oil, 2.5 million gallons each day. So the estimate seems to go up every few weeks, and we don't know how much oil is out there.

I know the Civil Division has been working with other Department of Justice components and has been since the initial explosion to investigate the facts and coordinate the government's legal response with all the Federal agencies involved. I appreciate that the Attorney General has made clear that taxpayers not pay a dime for any cleanup costs associated with this spill. And that is important, that BP pays. And, of course, we have had some progress with the President. I would like to know what the Civil Division's role will be in assuring that all responsible parties are held accountable.

I also want to applaud Judiciary Chairman John Conyers's leadership on this issue and for introducing H.R. 5503, the "Securing Protections of the Injured from Limitations on Liability Act," or "SPILL Act," which we had yesterday in markup. That bill is needed to patch up a lot of the holes that were exposed by the Deepwater Horizon explosion. And I would hope that we could pass this unanimously and get it through on a bipartisan basis.

I would also hope that Memphis wins the NCAA football next year, but that is not going to happen either.

Additionally, I believe the Administration should consider placing BP under receivership. Not a light suggestion, but one that I think we should consider. First Robert Reich mentioned it. He thought it important because it would put the Federal Government in a control position, taking over the spill and making the decision, so there is not a conflict of interest on whether you get the oil or whether you stop the spill. And I would like to know what your thoughts are on how that could happen.

My thoughts on receivership are more because I don't trust them, and I think we need every dollar they have got to pay all the claims that they will eventually be responsible for. And has the Justice Department looked at receivership and the burden that would be needed to be met to go into that area?

The second area of interest for me is the Civil Division's role with respect to ensuring transparency and government openness. Throughout my career, I have advocated sunshine. To that end, I have been a strong supporter for bringing into the public as much as can be revealed about government decision making. One of the things I found most disconcerting about the previous Administration was its penchant for aggressively imposing government secrecy under the guise of national security. This tendency manifests itself in several ways, including in the broad invocation of the State Secrets Privilege and the vigorous defense of agency decisions to deny requests for information under the Freedom of Information Act.

I recognize that under this present Administration, the department has instituted new policies in both of these areas. I would like to know how these policies are being implemented and practiced.

Given the broad range of issues the Civil Division handles, I know there will be other areas of inquiry from other Members.

The issue about fraud, which you look into, which I appreciate—and I don't know there are any moneys that you deal with in some of these New York situations with Madoff and some of those folks, if we get involved is there money from the United States Government trust to collect that we may be owed in those hearings of those matters.

Anyway, I appreciate the willingness of Assistant Attorney General West to appear before the Subcommittee. I look forward to his testimony.

And I now recognize my colleague, Mr. Franks, the distinguished Ranking Member of the Subcommittee, for his opening remarks.

Mr. FRANKS. That is a good opening, isn't it?

Well, thank you, Mr. Chairman.

And thank you, Attorney General West, for appearing before us today. I want to just express my gratitude to the Chairman for holding this hearing. I think the oversight of the Department of Justice and its components is one of the Judiciary Committee's most important obligations.

The Civil Division plays a very important role in many of the department's missions, from the global war on terror to combating fraud against Federal health care programs. I mean, a whole range of things. And I commend the division staff for their hard work across the wide spectrum of the division's responsibilities.

However, as you might imagine, I am concerned that the division has become distracted from its important mission by engaging in politicized litigation over the areas on the immigration law. Now, I am from Arizona, so that probably doesn't shock you terribly.

But, Mr. West, not only has the department announced that it plans to challenge the Arizona law, but I understand that you travelled to Arizona to meet with State officials about the law. And I guess I can't help but question why, with the wide range of important items the Civil Division has on its plate, that time is being spent preparing challenges to the law?

The people of my State are really just trying to do what the Federal Government has failed to do, which is to enforce America's immigration laws and secure the border. The department's proposed lawsuit against Arizona, I think, is irresponsible and insults the views of the majority of the American people who support the law on its face.

And I know the law has engendered a great deal of criticism, but analysis demonstrates that the criticism really is unfounded if you look at the arguments that are made.

Critics claim that the law promotes racial profiling. And yet, if you read it, the law expressly prohibits racial profiling four separate times in the text.

Critics claim that the law requires citizens to carry identification that they otherwise wouldn't be required to carry. But Federal law has actually required noncitizens, including visitors and lawful per-

manent residents, to keep their registration documents on their person. This has been the law in America for 50 years.

Additionally, critics claim that the law requires police officers to stop people on the streets to question them about their immigration status, but the provision of the law about the questioning one about immigration status can only take place, can only take effect, if police officers have made a, quote, lawful stop, detention or arrest in the enforcement of any other law or ordinance. So, in other words, the individuals may not be stopped simply on the basis of suspicion and ask for papers.

I will just simply tell you that Arizona is trying to take a reasonable constitutional approach to dealing with a problem that has really been ignored by the Federal Government, of which I take my share of the responsibility.

So, Mr. West, I hope that the department that you work with can reconsider its decision to file the suit and look at some of the things that we have mentioned today. I am sure the Civil Division's time and resources could be better spent cracking down on fraud against the Federal Government, defending lawsuits and going after those who have taken part in mortgage fraud schemes that have caused so many Americans to lose their homes.

My State needs the law to protect our residents, secure our borders, and preserve jobs for our unemployed citizens and legal immigrant workers. The department should not compound its lack of immigration enforcement by attempting to strike down the Arizona law. And, again, I say that being a Member of Congress from Arizona, and I know that there are varying perspectives on this. But nevertheless, everything I have said about the law is accurate. And I appreciate you being here today, and I appreciate the Chairman for bringing this hearing to the forefront. Thank you.

Mr. COHEN. Thank you, Mr. Franks.

I appreciate your statement.

And I now would like to start with our first panel of witnesses.

Mr. King, would you like to make an opening remark?

Mr. KING. Thank you, Mr. Chairman.

First, I want to address that I am going to turn my attention to this department and some of the things that are going on within Justice. And I have had a number of public statements over the last couple of weeks that focus on the lack of objectivity on the part of the Department of Justice.

And I think that when we talk about law, Lady Justice needs to remain blind. And I like to think we have to reblindfold Lady Justice. So I want to focus on that. There have been a number of decisions that have been made within the Department of Justice that I think were anything but that.

And if we are going to have a country that grows together, heals together, and one that can be unified, one that understands that we have something that is an overarching concern, which I will call it cultural continuity, the idea that we are Americans joined together for a common cause, with a common history and a common belief system. And that is what unifies us and strengthens us and allows us then to incorporate the differences between us and use those differences as a strength.

If we allow for the division of us or even the suspicion of a built-in bias of any kind, then that divides us and weakens us as a people. So my under-riding theme here is a belief in the Constitution—that should be our default system—and a belief in a rule of law that applies to all of us, regardless of who we might be. And I think that when we start putting labels on people and then providing a level of justice, whether it is in the Criminal or Civil Division, then it is something that undermines our country and diminishes our ability to ward off our enemies and certainly diminishes our ability to take this country to the next level of its destiny in a positive way.

And so that is as positively as I can express the things that are in my mind right now. And I look forward to the testimony from the witnesses today.

Mr. Chairman, I yield back the balance of my time.

Mr. COHEN. Thank you, Mr. King.

Ms. Chu passes.

Thank you.

And we will now start with our testimony. We have a system of lights or a light in this circumstance. Green means you are started; you have got 4 minutes until it turns yellow. And yellow is the last minute, in a total of 5. Red means over, hopefully. And if you are finished, you will be one of the few. But we have the lighting system.

After your testimony, each person will get an opportunity to question you for 5 minutes and maybe a second round and have other questions.

So our first witness is Assistant Attorney General Tony West. Mr. West was nominated by President Obama to be the Assistant Attorney General For the Justice Department's Civil Division on January 22, 2009; confirmed by the Senate April 20. From 1993 to 1994, he served as special assistant in the Department under the direction of U.S. Deputy Attorneys General Philip Heymann and Jamie Gorelick, as well as Attorney General Janet Reno. From 1994 to 1999, he served as Assistant U.S. Attorney for the Northern District of California, later served as Special Assistant Attorney General, appointee of California Attorney General Bill Lockyer. Prior to his return to Justice, he was a litigation partner in San Francisco at Morrison and Foerster. His trial practice there included representing individuals and companies in civil and criminal matters.

Thank you, Mr. West. And you can begin your testimony.

TESTIMONY OF THE HONORABLE TONY WEST, ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION, DEPARTMENT OF JUSTICE

Mr. WEST. Thank you, Mr. Chairman and Ranking Member Franks, and Members of the Subcommittee. It is a great privilege for me to be here to appear before you at this hearing to discuss the work of the Justice Department's Civil Division and respond to any questions you may have.

As you know, the Justice Department's Civil Division represents the United States in a variety of matters, virtually every executive branch agency, as well as the President, Cabinet officials, and

Members of Congress, are clients of ours at one time or another. With nearly 1,000 attorneys and over 400 support staff, the Civil Division is the Justice Department's largest litigating component, and the cases we handle touch upon virtually every aspect of this Administration's policy priorities and the Federal Government's operations.

And as part of our mission, the Civil Division defends the constitutionality of congressional statutes when they are challenged, as well as the lawfulness of government regulations. We seek to recover moneys lost to government through fraud, waste and abuse. We help to administrator sensitive national compensation programs, such as the Radiation Exposure Compensation Act. We enforce important consumer protection statutes, and we represent the government in a wide range of cases, from contract disputes to tort cases, from loan defaults to immigration.

Since assuming this position in April 2009, I have focused on three main priorities for the Civil Division: Protecting the American people, protecting taxpayer dollars, and protecting the Nation's consumers.

Protecting the American people remains the department's highest priority. Part and parcel to that, the Civil Division is currently defending around 140 habeas corpus petitions brought by detainees held at the detention facility at Guantanamo Bay, Cuba. In these cases, we vigorously defend our national security consistent with the rule of law.

Moreover, our attorneys have performed excellent work in the area of terrorist financing, defending the government's actions in court when they are challenged to help shut down the flow of money to international terrorist organizations. We are particularly proud of that work.

In terms of protecting taxpayer dollars, we have enjoyed significant success. Since January 2009, the government has recovered approximately $4 billion in civil fraud cases. And when that is coupled with the criminal recoveries from the Civil Division's Office of Consumer Litigation Criminal Cases, the Civil Division has standing side by side with U.S. attorneys around the country obtained over $5.7 billion in civil and criminal fraud settlements, judgments, penalties, restitution and forfeitures.

Health care fraud, of course, comprises the largest category of our fraud recovery. Since January 2009, the Civil Division has recovered over $3 billion in all health care fraud matters, with the largest of those matters being pharmaceutical and medical device industry cases.

But our efforts to tackle fraud don't end with health care. They extend to other areas as well. We have actively pursued economic fraud. We seek to recover ill-gotten gains for the benefit of fraud victims. Our increased enforcement efforts in this area and particularly in the area of housing and mortgage fraud have increased recoveries in this area from $15 million in 2008 to $52 million in 2009 and the first half of 2010. In fact, last week we announced Operation Stolen Dreams, a mortgage fraud sweep which involved over 190 civil enforcement actions, including recoveries of more than $147 million in mortgage fraud.

We have also been very vigilant in our efforts to root out fraud in connection with the procurement of goods and services used by our military and civilian agencies, including fraud affecting our men and women fighting in Iraq and Afghanistan. Since January 2009, procurement fraud cases have accounted for approximately $645 million in recoveries, more than the department's procurement fraud efforts in 2007 and 2008 combined.

Finally, the Civil Division continues to be at the forefront of our efforts to protect consumers through vigorous civil and criminal enforcement of our Federal consumer protection laws.

Mr. Chairman, my written testimony describes in more detail other areas where the Civil Division is actively engaged and where we feel we may actually need additional resources. The department's work in supporting the Federal Government's response to the Deepwater Horizon oil spill is one example. I would be happy to address those other areas should you have questions. And again, I thank you for the opportunity of appearing before you today.

[The prepared statement of Mr. West follows:]

PREPARED STATEMENT OF THE HONORABLE TONY WEST

Department of Justice

STATEMENT

OF

TONY WEST
ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION
DEPARTMENT OF JUSTICE

BEFORE THE

SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING

CIVIL DIVISION OF THE
UNITED STATES DEPARTMENT OF JUSTICE

PRESENTED ON

JUNE 24, 2010

STATEMENT OF
TONY WEST
ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION
DEPARTMENT OF JUSTICE

BEFORE THE
SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING
CIVIL DIVISION OF THE
UNITED STATES DEPARTMENT OF JUSTICE

JUNE 24, 2010

Chairman Cohen, Congressman Franks, and Members of the Subcommittee:

Thank you so much for inviting me here to testify on the work of the Civil Division. I appreciate the opportunity to discuss the work of the Civil Division of the Department of Justice and our budget and resource needs for Fiscal Year 2011.

The Civil Division represents the United States, its agencies, Members of Congress, Cabinet officers and other Federal employees. Its litigation reflects the diversity of government activities, involving, for example, the defense of challenges to Presidential actions; national security issues; benefit programs; energy policies; commercial issues such as contract disputes, banking, insurance, patents, fraud, and debt collection; all manner of accident and liability claims; enforcement of immigration laws; and civil and criminal violations of consumer protection laws. The Division is made up of approximately 1,400 permanent employees, nearly 1,000 of whom are attorneys. Each year, Division attorneys handle thousands of cases that collectively involve billions of dollars in claims and recoveries. The Division confronts

significant policy issues, which often rise to constitutional dimensions, in defending and enforcing various Federal programs and actions. The priorities of the Division include protecting the nation, protecting taxpayers, and protecting consumers.

NATIONAL SECURITY

Defending the nation remains the Department's highest priority. The Civil Division currently is defending approximately 140 habeas corpus petitions brought by detainees held at the detention facility at Guantanamo Bay, Cuba. In these cases, we vigorously defend our national security interests in a manner consistent with the rule of law. The Civil Division also successfully defended against extending habeas corpus rights to detainees held in Afghanistan, a theatre of war where detainees are provided robust Department of Defense review.

The Division defends in the federal courts every removal order involving terrorist and other national-security-risk aliens and litigates detention, benefits denials, and naturalization and denaturalization cases involving these aliens. Since 1997, the Division has successfully defended the State Department's and Treasury Department's designations of terrorist organizations. For instance, on June 21, 2010, the Supreme Court, in *Holder* v. *Humanitarian Law Project v. Holder*, voted 6-3 to reject a free-speech challenge from humanitarian aid groups to the law that bars "material support" – everything from money to technical know-how – to foreign terrorist organizations. We also obtained dismissal of over 40 nationwide class action suits against numerous telecommunications companies that allegedly assisted the National Security Agency in post-September 11th surveillance activities. The Division's national security successes continued in the federal appellate courts around the country. In 2009, the Division

prevailed in cases involving photographs of alleged abuse of detainees in Iraq and Afghanistan, records regarding the NSA's "Terrorist Surveillance Program," a challenge to the Foreign Intelligence Surveillance Act, and individuals held as part of the investigation into the terrorist attacks of September 11th.

Since September 2009, the Department has used new policies and procedures regarding the invocation of the state secrets privilege that provide greater accountability and reliability. The Department's policy is that the privilege should be invoked only to the extent necessary to protect against the risk of significant harm to national security. Under the new procedures there is a State Secrets Review Committee, consisting of senior Department officials, which evaluates the recommendation to invoke the privilege.

PROTECTING THE PUBLIC FISC

The Department takes seriously its obligation to guard the public fisc. Over the last year, the Department has made significant strides in protecting taxpayer dollars – as well as the integrity of government programs that depend on those dollars – through aggressive civil enforcement actions aimed at rooting out waste, fraud, and abuse. One of the most potent weapons we have at our disposal is the False Claims Act. Since January 2009, the government has recovered $3.99 billion in civil fraud cases.

HEALTH CARE FRAUD

Fighting health care fraud is a priority for the Division. The evils of health care fraud are many – it undermines the judgment of health care professionals, deprives people of the treatment

that they need, and, in many cases, can put patients' health and safety at risk. On May 20, 2009, the Attorney General and the Secretary of the Department of Health and Human Services (HHS) announced the creation of a new interagency task force, the Health Care Fraud Prevention and Enforcement Action Team (HEAT), to increase coordination and optimize criminal and civil enforcement. Through enforcement actions under the False Claims Act, and aided by the efforts of HEAT, the Department has recovered over $3 billion in health care funds lost to fraud since January 2009.

A significant component of the Department's health care fraud caseload consists of cases alleging misconduct by manufacturers of pharmaceutical and device products. For example, in April of this year, we obtained a $520 million settlement agreement with AstraZeneca LP and AstraZeneca Pharmaceuticals LP to resolve allegations that AstraZeneca illegally marketed the anti-psychotic drug Seroquel for uses not approved as safe and effective by the FDA. Last fall, the Department announced the largest health care fraud settlement in its history in a case involving Pfizer, which paid $2.3 billion in combined criminal and civil penalties (of which $1 billion was a civil fraud recovery), and pled guilty for illegal marketing of the painkiller Bextra.

Health care fraud that affects the health, safety, and well-being of Medicare and Medicaid beneficiaries is of paramount concern to the Department. In January of this year, the Department negotiated a $24 million settlement to resolve allegations that a national chain of Small Smiles dental clinics was providing unnecessary dental services to children on Medicaid in order to maximize the company's Medicaid reimbursements. The services included unnecessary tooth

extractions that resulted in healthy teeth being pulled and needless crowns and excessive baby root canals.

The Department also leads an Elder Justice and Nursing Home Working Group, which focuses on health care fraud involving elderly patients, such as when a skilled nursing facility bills Medicare or Medicaid for services so deficient as to be effectively worthless. Such conduct not only wastes taxpayer dollars, but also threatens the health of some of our most vulnerable citizens.

FINANCIAL FRAUD/MORTGAGE FRAUD

As millions of Americans continue to try and cope with the fallout of the housing crisis, the Department has made protecting America's consumers against mortgage fraud a top priority. The Department is devoting increased resources to better detect, deter, prosecute, and punish mortgage fraud. The President created the Financial Fraud Enforcement Task Force to bring together a coalition of federal agencies and regulators, along with state and local partners, to provide a broad enforcement effort to combat financial fraud. I co-chair the Task Force's Mortgage Fraud Working Group. In that capacity, the Civil Division coordinates with other state and federal officials to marshal the civil and criminal capabilities of the state and federal governments to combat the mortgage fraud that has proliferated as a result of the current financial crisis and help homeowners who have suffered from mortgage fraud. The increased enforcement efforts aimed at addressing fraud in the housing and mortgage industries have increased recoveries in this area from $15 million in 2008 to $52 million in 2009 and the first half of 2010.

On June 17, 2010, the Attorney General, along with other members of the Financial Fraud Enforcement Task Force, announced the results of a nationwide takedown, Operation Stolen Dreams, which targeted mortgage fraudsters throughout the country. Starting on March 1, 2010, through the date of the announcement, Operation Stolen Dreams has involved 1,215 criminal defendants nationwide, including 485 arrests, who are allegedly responsible for more than $2.3 billion in losses. Additionally, the operation has resulted in 191 civil enforcement actions which have resulted in the recovery of more than $147 million.

One of the Mortgage Fraud Working Group's most important initiatives is to hold fact-finding summits in cities across the country that have been hardest hit by mortgage fraud. Thus far, it has held summits in Miami, Florida; Phoenix, Arizona; Detroit, Michigan; and Columbus, Ohio. At these meetings, the Working Group makes its presence felt in communities deeply affected by mortgage fraud while working with our partners at the state and local levels to better understand the mortgage fraud crisis and become increasingly effective in combating the problem.

PROCUREMENT FRAUD

Ensuring that our military and procurement systems are protected from fraud is vitally important. Using the False Claims Act, the Department is aggressively pursuing fraud in connection with the wars in Southwest Asia. Thus far, we have reached settlements in cases involving goods and services provided in connection with the war effort amounting to $77 million, and since January 2009, procurement fraud cases have accounted for approximately

$645 million in recoveries – more than the Department's procurement fraud recoveries in 2007 and 2008 combined.

The Department has intervened in a case against Public Warehousing Company, a multi-billion dollar defense contractor that is alleged to have engaged in war profiteering on three prime vendor contracts (valued at $7 billion) with the Defense Logistics Agency to supply food to U.S. troops in Kuwait, Jordan, and Iraq. At home, the Department is leading an investigation into companies, as well as individual executives, who manufacture and sell defective Zylon fabric used as the key ballistic material in bulletproof vests sold to the United States for use by federal, state, local, and tribal law enforcement agencies. Our investigation has revealed that, in some cases, the companies were aware that the Zylon fabric degraded quickly, but took no action to inform the government. Thus far, the Department has obtained more than $58 million in this effort, and our investigation continues today.

CONSUMER PROTECTION

The Civil Division is at the forefront of efforts to protect consumers through vigorous civil and criminal enforcement of federal consumer protection laws. Between January 2009 and June 1, 2010, the Office of Consumer Litigation has obtained convictions of 51 defendants and courts have imposed criminal penalties exceeding $2 billion for illegal activities in connection with defrauding consumers. During this same time period, 27 defendants were sentenced to some form of incarceration, receiving a total of more than 92 years.

The Department also successfully defended critical consumer protection initiatives. In *United States v. Philip Morris*, the D.C. Circuit unanimously affirmed a landmark decision holding that cigarette manufacturers had deceived consumers as to health risks and nicotine addiction through a complex web of organizations over a period of nearly five decades. The court sustained injunctive relief that, among other things, requires manufacturers to cease making deceptive health claims for so-called "light" cigarettes and requires them to issue corrective public statements on the health effects and addictiveness of cigarettes. In a related matter, the Department is currently defending the Food and Drug Administration's (FDA) recently adopted tobacco control regulations in federal court in Kentucky.

HEALTH CARE REFORM LITIGATION

The Civil Division is vigorously defending the Affordable Care Act health care reform statute against multiple lawsuits brought on constitutional and other grounds. These suits have been filed across the country in at least a dozen different locations, including Michigan, Florida, Virginia, and Mississippi. The Division has assembled a strong team to defend the law. We are confident that this statute is constitutional and that we will prevail in court.

DEEPWATER HORIZON OIL SPILL

As you know, the Justice Department has opened criminal and civil investigations into the oil spill in the Gulf of Mexico. As the Attorney General made clear, the Department will ensure that every cent of taxpayer money owed will be repaid; damages to the environment and wildlife will be reimbursed; those responsible for the mess will clean it up; and that anyone who has violated the law will be prosecuted to the full extent of the law.

The Civil Division is actively supporting other federal agencies in the ongoing, coordinated response efforts to mitigate the impact of the oil spill in the Gulf of Mexico. While the federal government is focused on providing a robust response to the oil spill, complex legal questions arise in the course of such federal efforts. The Civil Division, in close collaboration with the Environment and Natural Resources Division (ENRD), has been providing critical legal advice and guidance to agencies involved in the response, so that they can proceed as quickly, efficiently, and effectively as possible. In May, Assistant Attorney General Ignacia Moreno of ENRD and I led a team of Department attorneys who traveled to Louisiana to meet with our federal and state partners to monitor the situation. Though the federal government's immediate priority is controlling the source of the oil and cleaning up the spill, the Civil Division stands ready to ensure that all applicable laws are enforced and that those responsible for the explosion and fire on the Deepwater Horizon and the subsequent oil spill will be held accountable. The Civil Division will take the lead in pursuing a complete recovery of all relevant costs from parties responsible for the oil spill.

KATRINA LITIGATION

The Civil Division's Torts Branch is defending against more than 400 tort suits for flood damage in New Orleans as a result of Hurricane Katrina. The suits are consolidated in the Eastern District of Louisiana under the caption *In re Katrina Canal Breaches Consolidated Litigation*. The suits, which include putative class actions, allege that the Army Corps of Engineers negligently designed, constructed, and maintained the levees and floodwalls that failed during the hurricane. They also allege that the Corps negligently designed, constructed, and

maintained a navigation channel that caused the hurricane-protection defenses to fail. This latter claim was sustained in part in a test case tried to the court in 2009.

TRANSPARENCY AND OPENNESS/
FREEDOM OF INFORMATION ACT (FOIA)

The President has pledged to make this Administration the most open and transparent in history, and the Department is doing its part to make that pledge a reality. We have worked to implement the President's Executive Memorandum on Transparency, including the Attorney General's Guidelines with respect to FOIA. Through outreach, education, and the review of cases in litigation, additional information was – and continues to be – disclosed to the public through careful application of the Guidelines at the agency level. The Division has resolved FOIA cases so as to promote these goals of transparency and openness.

NATIVE AMERICAN ISSUES

In the past year, the Department has made some significant strides in improving the relationship between the United States government and tribal nations. On December 7, 2009, the Department reached a settlement in the extraordinarily lengthy and contentious case of *Cobell v. Salazar*, a class-action involving the government's handling of over 300,000 individual Indian trust accounts. The agreement, which is contingent upon legislation and a district court fairness determination, provides for approximately $1.4 billion to be distributed to class members and another $2 billion to fund a buy-back program to address the continuing "fractionation" problem caused by land interests being repeatedly divided as they pass through succeeding generations.

The Department administers the Radiation Exposure Compensation Act Program, which provides payments to those who contracted certain cancers and other serious diseases after being exposed to radiation through nuclear weapons tests or in the uranium mining industry during the 1940s, 1950s, and 1960s. In March 2010, the Civil Division launched a new internship program through which approximately 30 Native American students will complete a two-week training program in Washington, D.C. and then be employed in the Four Corners region of New Mexico, Colorado, Arizona, and Utah to conduct intensive outreach efforts in tribal communities. The goal of the program is to address the special concerns and difficulties faced by Native American populations in the claims process.

FARMERS' ALLEGED DISCRIMINATION LITIGATION

In February 2010, the Civil Division resolved the long-standing *Pigford II* case, which was brought by African-American farmers who allegedly suffered racial discrimination in the administration of U.S. Department of Agriculture (USDA) farm loan programs. The settlement, which is contingent upon a congressional appropriation, will provide $1.25 billion to eligible African-American farmers. The settlement establishes a non-judicial claims process through which individual farmers may demonstrate their entitlement to cash damages and, in most cases, tax relief and debt forgiveness.

The Division is also handling *Keepseagle v. Vilsack*, a class action brought on behalf of Native American farmers who claim that they suffered discrimination in connection with their attempts to obtain farm loans. The plaintiffs in the case seek both injunctive and monetary relief. In December 2009, following the close of discovery, the matter was stayed pending

settlement discussions between the parties. The stay has been extended several times as negotiations have proceeded. The current stay expires on July 29, 2010.

Finally, the Division is defending lawsuits brought by Hispanic farmers, *Guadalupe L. Garcia Jr. v. Vilsack*, and by female farmers, *Rosemary Love v. Thomas Vilsack*, who allege that USDA discriminated against them in the awarding of government loans and other assistance. The Department is actively working to resolve those cases with affected farmers.

IMMIGRATION MATTERS

The Civil Division defends and prosecutes the nation's most complex civil immigration matters in federal court. In 2009, the Civil Division's Office of Immigration Litigation (OIL) prevailed in more than 90 percent of its cases in the trial and appellate courts, while increasing its district court case load by more than 60 percent. Through regular meetings with stakeholders, OIL has helped to resolve policy issues that have arisen in litigation. One example is the "widow's fix" a statute that eliminated the requirement that a couple be married for two years prior to the U.S. citizen spouse's death for the alien widow or widower to qualify as an "immediate relative" and remain in the United States. A second example is the Office's ongoing efforts at greater collaboration with the Department's Criminal Division to ensure greater consistency in matters of overlap between criminal prosecutions and removal of dangerous criminal aliens.

MISCELLANEOUS DEFENSIVE LITIGATION

The Division continues to protect taxpayer dollars by vigorously defending the government in civil litigation, and limiting monetary judgments entered against the United States to just pennies for each dollar sought. For example, the Department has brought near to a close the 18-year-long saga of litigation involving the A-12 stealth fighter by defeating the contractors' billion dollar claims; virtually finished resolving the massive *Winstar* claims that resulted from the savings and loan crisis of the 1980s, with recoveries averaging only six cents on each dollar claimed; and continued to defend the Treasury against the multi-billion dollar claims advanced by the nuclear power industry over the government's delay in taking possession of spent nuclear fuel.

ALTERNATIVES TO LITIGATION

The Division also currently helps administer the Vaccine Injury Compensation Program (VICP). The VICP was created in 1986 by the National Childhood Vaccine Injury Act to encourage childhood vaccination by providing a streamlined system for compensation in rare instances where an injury results. The most important and controversial litigation ongoing in the program concerns the issue of whether there is a causal connection between childhood vaccines and the development of autism. The Civil Division recently succeeded in several important test cases in the Omnibus Autism Litigation, involving nearly 5,000 claims, in convincing the court that the prevailing scientific evidence strongly demonstrates no causal connection between the measles, mumps and rubella (MMR) vaccine combined with other vaccines containing thimerosal and the development of autism spectrum disorders. The opinions in those test cases were widely praised by experts in the public health community as critical to addressing growing

misconceptions about vaccines and maintaining public confidence in the safety and efficacy of the nation's vaccine program.

PRESIDENT'S BUDGET REQUEST

The President's FY 2011 request seeks 1,500 positions (1,072 attorneys), 1,469 FTE and $334,944,000. Included in this request are the base resources required to maintain the superior legal representation services that have yielded such tremendous success and additional funds to provide adequate defense for cases involving the government's responsibilities for storing spent nuclear fuel and cases involving the government's response to the Nation's financial crisis. Additional resources are also being sought to implement the Department's Electronic Discovery initiative.

At this time, Mr. Chairman, I would be happy to address any questions you or Members of the Subcommittee may have.

Mr. COHEN. Thank you, General West. I appreciate it. And you were perfect, even though I think our lighting system failed.

Tell me about the Deepwater Horizon. What are we doing? What are we going to do?

Mr. WEST. Well, Mr. Chairman, soon after the explosion on the Deepwater Horizon, the Attorney General sent Ignacia Moreno, who is the Assistant Attorney General For Environment and Natural Resources, and myself down to the Gulf, where we engaged primarily in advising the Federal agencies responsible for being first responders on the scene and any legal advice that they may need, but also to enforce the law, because it was important early on to make it clear that we would hold the responsible party, BP, accountable for every dime of removal costs, cleanup costs associated with the spill.

Since that time, both Ms. Moreno and myself have returned to the Gulf. We have been there with the Attorney General. The Attorney General has acknowledged the existence of civil and criminal investigations into the causes of this explosion and our intent to hold individuals accountable for not only the financial damage but the natural resources damages as well.

The Civil Division has been engaged in ongoing discussions with BP and with Transocean, making it clear to them what their responsibilities are as responsible parties. And that extends to efforts that were led by Associate Attorney General Tom Perrelli from the Department of Justice to help negotiate the existence, the creation of this $20 billion escrow fund, an independent claims process.

Mr. COHEN. Will you be participating in any way in the escrow fund in meting out or ferreting out the claims?

Mr. WEST. It is important that the claims process be truly independent. Certainly the Department of Justice anticipates it will be consulted as protocols and other details are being worked out with the creation of the independent claims process, but it is very important that it have integrity, that the American people see it as an independent process, and that is what we are committed to.

Mr. COHEN. Let me ask you about FOIA claims. The Civil Division has resolved FOIA cases so as to promote President Obama's agenda of transparency and openness.

But the Civil Division has litigated multiple FOIA cases that originated under the Bush administration policy. How do you reconcile that decision? Is there really a change in policy?

Mr. WEST. Well, last year, in fact, the Attorney General did issue a new FOIA guidelines policy. It is one which puts forward the Administration's presumption that we will be an open and transparent government. In fact, the presumption is that in response to FOIA cases, we will be transparent, we will seek to disclose whenever we can, sometimes with regard to the Department of Justice, of course, that is a little tricky because we often have confidential criminal investigations going on. But not withstanding that, the intent is to, wherever we can, err on the side of disclosure. And that policy has not only been communicated throughout the Department of Justice, throughout the Civil Division, but we are communicating that to our client agencies as well.

Mr. COHEN. But don't some of these Bush administration FOIA cases that you all are pursuing because of a continuum theory, I guess, that they might conflict with Obama's position, the President's position, don't we have discretion, and we don't really have to pursue those? Why are we pursuing them, and why are we

maintaining certain policies of the previous Administration that are counter to hope and the future?

Mr. WEST. Without commenting on any particular piece of litigation, which I wouldn't be able to do, I can say, as a general matter, there are cases, of course, which any Administration inherits, and they obviously pursue them in accordance with the law and with the facts of those cases.

So I can assure you, with regard to how we view FOIA cases and how we evaluate our disclosure obligations in those cases, they are consistent with the President's preference for an open, transparent government. They are consistent with the Attorney General's——

Mr. COHEN. Let me ask you this. In March, the National Security Archive at GW audited the Administration's performance with respect to FOIA requests and found that only 4 of 90 Federal agencies studied showed both increases in information released and decreases in denials under FOIA since the implementation of the Attorney General's 2009 memorandum.

What steps will the Civil Division take to increase the number of agencies that show both increases in releases and decreases in denials? The statistics seem to say it is the same game. Sometimes it does happen that the Administration does come in and the Administration that used to be against National Security Letters because they were part of the legislative oversight, and then once they become part of the Administration, they fall prey to the same type of beliefs that sometimes the executive would have,"This is mine, so I'm going to do it."

Well, it seems like there should be—sometimes there is a conflict, and why have the departments—the statistics say we are not doing any better under FOIA than what happened with the Bush administration.

Mr. WEST. With respect, Mr. Chairman, I think the jury is still out on exactly how, at the end of the day, how our FOIA performance will be evaluated. As I know, you appreciate the fact that the policy was issued in the spring of last year; it still takes time, of course, to make sure that that change in policy, that change in attitude is something that is communicated throughout the Federal Government and that it is communicated throughout all levels of the government. That does take some time, but I can assure you that when it comes to evaluating these cases and when it comes to making the decisions about disclosure, not only are we obviously taking into consideration the existing law and the facts of the case, but what is governing and guiding our work in that is the new policy as articulated by the Attorney General.

Mr. COHEN. Thank you, Mr. West. I have a red light.

Mr. Franks has a green light.

Mr. FRANKS. Thank you, Mr. Chairman.

Again, Mr. West, I appreciate you being here.

In fiscal year 2009, the Federal Government's Health Care Fraud and Abuse Control Program returned about $2.5 billion to the Medicare trust fund. Considering that taxpayers are estimated to be losing anywhere between $24 billion and $80 billion per year in the Medicare and Medicaid programs and I think that it is my personal opinion that under the government takeover that is coming, that that is going to increase precipitously; and it seems to me that

the Justice Department needs to be doing more to combat health care fraud.

What additional tools and resources does the Civil Division need to combat health care and fraud like that perpetrated against health care programs more effectively? What do you need?

Mr. WEST. Thank you, Ranking Member Franks.

I think we have a pretty impressive record of impact and success when you look at how we tackled health care fraud since January 2009.

One of the most important things that we did in May of last year at the direction of the President was to form something called the Health Care Fraud Prevention and Enforcement Task Force, HEAT, which brings together the Department of Justice's resources with those of the Health and Human Services Department and Secretary Sebelius's resources in a coordinated way that is really unprecedented. It is sharing data, sharing information, sharing resources, and creating efficiencies which allow us to be much more effective in combatting health care fraud.

And there have been two things that have come out of that. One are the strike forces, which are being directed by the Criminal Division, which have had enormous success. And then the increase, as I talked about in my oral statement and is in the written testimony, the increase that we have seen in the civil recoveries of health care fraud. So I think that we are making the most of the resources that we have, and the President's budget reflects those additional resources that we think we need.

Mr. FRANKS. Well, Mr. West, this country has also been going through a subprime mortgage crisis that has had a great impact and great cost to investors and banks and has forced many Americans, of course, to lose their homes. And certainly, much of this crisis was brought about by poor underwriting standards and people borrowing more than they could afford. I think we all know that.

But mortgage fraud has also played a significant role in the subprime mortgage crisis. What is the Civil Division doing to go after these individuals or groups that have taken part in mortgage fraud schemes to help prevent mortgage fraud in the future?

Mr. WEST. Mortgage fraud is one of the most difficult challenges that the Nation faces, as you correctly point out, and it is one of the highest priorities that we have in the Civil Division.

The President last November created something called the Financial Fraud Enforcement Task Force, which brings together a wide array of Federal agencies as well as State and local government law enforcement agencies which are focused on financial fraud. And one of the key components of that task force is the Mortgage Fraud Working Group, which I am a co-chair of. And just this past year, we began a series of listening tours, really, a summit, mortgage fraud summits. The last one we held in fact was in Phoenix, and where we went were those areas where the data showed us that the mortgage fraud challenge was the most acute and where we believe we could find some of the best practices where communities and law enforcement and industry were working together to try to tackle this problem.

One of the things that came out of that was Operation Stolen Dreams, which was the massive mortgage fraud sweep that we just

announced last week, where we have a record number of civil enforcement actions, over 190; a record number of recoveries, $147 million, when it comes to mortgage fraud. And so we are actively engaged, working with our State and local partners and U.S. Attorney's Offices around the country on this issue.

Mr. FRANKS. Well, thank you, Mr. West. I wish you the very best.

And, Mr. Chairman, I am going to go ahead and yield back at this point.

Mr. COHEN. Thank you, Mr. Franks.

I now yield to Mr. King of Iowa.

Mr. KING. Thank you, Mr. Chairman.

Mr. West, thanks for your testimony. First, I have a softball question for you to kind of break the ice here. And that would be the Office of Immigration Litigation, the acronym for that is, what?

Mr. WEST. OIL.

Mr. KING. Have you considered changing that particular name?

Mr. WEST. Well, there are some things that are easy to do in government, and some things are not. I don't think changing the name of OIL is one of those things.

Mr. KING. I am glad you are comfortable with that. I won't belabor that point. It just caught my attention.

Let me see. I would like to start down here with the activity that you had with regard to the impending litigation on the health care act. And I would just pose this question to you, what, if you prevail and as I understand your argument, rather than go into it very deeply, if you prevail, it will be on your argument that the Commerce Clause grants constitutional authority for the Federal Government to pass legislation which we know now as Obama care. Would I be correct on that?

Mr. WEST. Well, if I could answer you this way. We certainly believe the law is constitutional. We believe that we will prevail in court. But I think it would be appropriate, given that it is pending litigation, that I allow our pleadings to speak for me on that point.

Mr. KING. In other words, you would rather not comment until it is litigated?

Mr. WEST. Well, certainly, in fact, we will have the first opportunity—we have filed.

Mr. KING. I am helping you shape your argument, though, Mr. West.

Mr. WEST. We have filed certainly in Virginia and other States, in Florida, where you can see the arguments as clearly laid out as to sort of why we believe the Affordable Care Act is constitutional. But——

Mr. KING. My question to you, then, is if the commerce clause is a component of that argument, and by your testimony it is, then what would be the left of the Commerce Clause should you prevail on that point?

Mr. WEST. Again, I think I am going to allow the litigation to speak for me. In fact, next week will be the first oral argument in this—in one of the various cases.

Mr. KING. And I would submit that if you prevail on the point that is the Commerce Clause, then there would be nothing left of the Commerce Clause, in my judgment, because there could be—there always has been—babies born within the States that don't

have access or utilize any kind of health care, that live and die. So they would still be compelled to buy health insurance under this legislation. So I was just going to take this argument for you to consider because you have to be nimble when you face these people that are smart attorneys.

And somebody has already gone back to *Wicker v. Filburn* and said that, even though he raised the wheat and ate his own wheat and didn't sell it to anybody, it affected the overall supply because he would have bought the wheat from somebody else. That is the Commerce Clause, right? Now, I think it is a completely weak argument, and it has been weakened otherwise.

Now, Obama care does this. If you look at *Wicker v. Filburn,* and it takes it to another level. It takes it to this level that says, government either raises the wheat or the health care in this case, or approves those who do and approves the product and requires everyone to buy wheat and eat wheat. That is your Commerce Clause argument. So I put that into the record, so you are nimble enough to deal with that at the time when it comes, Mr. West.

I would really rather spend our time, though, talking about the Arizona immigration law. And I am going to toss you out the Judge Poe softball that surely you have prepared yourself to respond to when you are asked, have you read the bill?

Mr. WEST. Oh, yes. I have read the bill several times.

Mr. KING. As have I. And I appreciate that, because now we have a basis of understanding here.

And the news reports have reported that you have issued a draft, that you have an internal document that would be a draft civil complaint in preparation to bring suit against Arizona on S.B. 10 70. Is that correct?

Mr. WEST. Congressman, I am not in a position to make any announcements today about that. We are working through various issues in connection with that issue. I do anticipate that the department will make some type of announcement fairly soon.

Mr. KING. Mr. West, I am reading from a news report here. This is a Fox News, June 18: Obama administration planning to file suit against Arizona immigration law. I believe this article, and I don't have it highlighted here, but my memory says that your department has produced a draft civil complaint. Does that exist?

Mr. WEST. I can't respond to the news report that you in fact—I don't think I have even read it—that you——

Mr. KING. Respond to my question as to whether you or your department have produced a draft civil complaint?

Mr. WEST. Again, we are still working through various issues. I think it would be inappropriate for me to get into any type of internal deliberations that we have at the Department of Justice. I can say that this is an issue——

Mr. KING. It is pretty astonishing, Mr. West, not to be able to answer a question like that. It is not like this affects any pending litigation; whatever you are doing internally, you are apparently advising people on how to act according to Arizona's immigration law. And if there is an internal document known as a draft civil complaint, I would think that you could tell us. It has been discussed as far up as the Secretary of State. So I wouldn't think that

there would be an impediment to answering a direct question like that.

Mr. WEST. Well, again, I am not in a position to make any announcements today about that. And I think it would be inappropriate for me to comment on internal deliberations.

Mr. KING. Let me ask you, then, since you read the bill and you are familiar with the preemption, do you read anything in the bill that would be preempted by existing Federal statute?

Mr. WEST. Again, I think, at this point, it would be premature for me to share my own thoughts on this.

I think one of the important steps that we have taken is we have, in looking at all of the issues regarding this bill, this law, I have personally gone out to Arizona. I have wanted to get the input of the Attorney General out there, the Governor out there, because it is important to law enforcement officials, because it is important for us to take into consideration all of the varying views that folks have on this particular issue. We are still working through various issues. And—but I do anticipate that soon the department will make the——

Mr. KING. Have you had any contact with the ACLU on this? Have you reviewed their lawsuit? Have you had any contact with them?

Mr. WEST. Again, we have reached out to law enforcement, to a number of different interested parties——

Mr. KING. Including the ACLU?

Mr. WEST. Quite frankly——

Mr. COHEN. Time is up.

Mr. KING. Mr. Chairman, I just ask that the gentleman be allowed to answer the question as to whether he has had contact with the ACLU.

Mr. WEST. I don't know the answer to that question. I personally have not.

Mr. KING. Thank you, Mr. Chairman.

Mr. COHEN. Recently Mr. Lawrence Wilkerson, chief of staff to former Secretary of State Colin Powell, said that President Bush and others in the Administration knowingly covered up the fact that hundreds of innocent men were sent to Guantanamo out of fear for their release, for the fear that their release could harm the push for war in Iraq and the broader war on terror; that they knew what they were doing and knew it was illegal.

Given the severity of those allegations by such a distinguished gentleman in that position, what does the Civil Division intend to do in following up on these allegations? Is there an investigation that you are going to pursue?

Mr. WEST. Well, Mr. Chairman, I wouldn't be able to comment on whether or not an investigation has been launched with regard to that. I can certainly assure you that to the extent that there are any violations of law that fall under the jurisdiction of the Civil Division, to the extent there is a Civil Division component, that would be implicated, it would be the type—and again, not speaking specifically to this case, but in any case, it would be the type of thing that would get some type of attention. But I can't confirm or deny any type of investigation.

Mr. COHEN. What is the status of Yucca Mountain nuclear waste litigation?

Mr. WEST. Well, we are engaged in various lawsuits involving spent nuclear fuel with individuals—with companies from the nuclear industry. They are in various stages of litigation, some, and I think, beyond that, I probably couldn't comment specifically on where we are.

Mr. COHEN. How much money has been spent on attorneys on this case so far?

Mr. WEST. I don't know the answer to that question.

Mr. COHEN. Do you have a ballpark figure?

Mr. WEST. For both private and public attorneys, I don't know the answer to that question.

Mr. COHEN. Ballpark figure?

Mr. WEST. I don't even have a ballpark figure. I think I would have to know a little more about the billing rates of the private attorneys involved in those cases.

Mr. COHEN. How much discretion does the Justice Department exercise in determining which cases it is going to pursue? Has the Justice Department had any opportunities where they could decline? You can decline to defend an action, can you not? Are you obligated to defend every action or represent?

Mr. WEST. Well, no, there is discretion. There is certainly prosecutorial discretion. And within the Civil Division, we exercise discretion on whether or not we will intervene in a certain case or whether or not we will pursue a certain case. So certainly there is an appropriate role for discretion to be exercised.

Mr. COHEN. Have there been times where you can cite to me where you exercised this discretion and worked out and resolved a case rather than take it to the Supreme Court because you thought the facts were different than maybe the other Administration had?

Mr. WEST. I probably would not be able to cite a specific case, not because there isn't one, but because I don't know if it would be appropriate to——

Mr. COHEN. I don't see why it wouldn't be appropriate. If you have settled the case, it is a case of the United States Government, and part of transparency and openness is to disclose those things. There is no problem in disclosing that, Mr. West.

Mr. WEST. Certainly not disclosing settlements, you are right. I am happy to talk about settlements. But if the question is, are there cases where we looked at the facts in an investigation, made a determination that we would not either prosecute or would not go forward, and it did not result in a public settlement, then that would be inappropriate for me to comment on.

But I am happy to talk about, Mr. Chairman, if there are any settlements in which clearly we have decided to compromise——

Mr. COHEN. Can you give me a few examples, cases where you decided because of policy differences between this and the previous President that, rather than continue litigation, you have engaged in negotiations and come to a settlement?

Mr. WEST. Because of policy. I am sorry. I misunderstood your question. I think there are two very good examples. One is the Cobell litigation, involving Native Americans. Another is the Pigford litigation, involving African American farmers, which by

the way, we appreciate the Congress's movement on both of those cases, and we hope that the Senate will follow suit.

Mr. COHEN. There was a problem, I guess, we had—I don't know how much we got on the Pigford case, but there was more money than some wanted, and the issue was, did it need a PAYGO?

When the United States Government settles a case, shouldn't the Secretary of Agriculture find a way to pay it? I mean, why should he have to be bound by PAYGO when the United States Justice Department has settled a case? That is an obligation of the government up to that point, right?

Mr. WEST. Mr. Chairman, I think I would defer to the Secretary's response on that. Certainly, as you know, when the Civil Division evaluates a case, it is evaluating it from the standpoint is this money that ought to be expended out of the judgment fund. Is that an appropriate use of public money to compromise a case.

Mr. COHEN. I yield.

Would you like to go on, or we can——

Mr. FRANKS. Thank you, Mr. Chairman. I will be really brief.

The Civil Division has filed, Mr. West, motions to dismiss both lawsuits brought by States challenging the constitutionality of the recently passed health care law. And I am just wondering if the Office of Legal Counsel has issued an opinion on the constitutionality of the health care law, and if so, can you provide the Committee with a copy of that opinion?

Mr. WEST. I can certainly check and see. I am not—as I sit here, I am not aware of that. But I can certainly check and get back to you.

Mr. FRANKS. All right.

For the record, Mr. Chairman, I hope we can make that an official request, at least on my part.

In this Congress, Representative Nadler introduced H.R. 984, the "State Secrets Protection Act." And of course, I am concerned, you know, being on the Armed Services Committee and some other Committees, that this could potentially be a threat to our national security. I think it potentially endangers it. But what is your department's position on H.R. 984? Are you concerned that the bill threatens U.S. national security in any way?

Mr. WEST. I am not aware that the department has taken a position on that bill.

I can tell you that the department has instituted, the Attorney General has articulated a State Secrets Policy. It is a new policy that we follow before any assertion of that privilege is made. And the legal standard that we implement is to protect against the unauthorized disclosure of any information that might cause significant harm to the national security.

Mr. FRANKS. So, then, if I am understanding you right, you have a policy in place. Do you think you need additional congressional legislation to deal with that issue?

Mr. WEST. Well, again, I am not aware of the department having taken a position on that case.

Mr. FRANKS. What is your position?

Mr. WEST. Well, my position is I think we would be—always welcome the opportunity to talk about these issues with Congress, and we would welcome the opportunity in this instance as well.

Mr. FRANKS. Well, you would talk about any issue, wouldn't you? That doesn't mean you have a position on it.

Mr. WEST. That is true. And certainly, I wouldn't be the one to announce, as a matter of first impression, the position of the Department of Justice on this issue.

But I can say that the department's State Secrets Policy is one which reflects our concern that it be asserted only in those instances where it is absolutely necessary; that it be narrowly tailored but that it be tailored to protect against any significant harm to the national security.

Mr. FRANKS. I think that is the best I am going to get. But thank you. That is pretty good actually.

Thank you, Mr. Chairman.

Thank you, sir.

Mr. WEST. Thank you.

Mr. COHEN. We have votes, Mr. King. If you would like to ask a few questions, go ahead.

Mr. KING. Thank you, Mr. Chairman.

Mr. West, I have drafted a letter that I sent to Attorney General Holder that is dated May 28th, and it is only addressed to him, and it has to do with a request for a copy of the draft civil complaint that I referenced earlier in our discussion and which you have not acknowledged yet of its existence. I would just ask you, should I have addressed that letter to you? Have you seen that letter?

Mr. WEST. I have not seen that letter, Congressman. But I am happy if you would like to send me a copy or I can pick one up before I leave——

Mr. KING. Actually, I can have my aid hand it to you right now. It is pretty short.

And I would ask unanimous consent to introduce that letter into the record.

Mr. COHEN. Without objection.

[The information referred to follows:]

STEVE KING
5th District, Iowa

COMMITTEES:
AGRICULTURE
JUDICIARY
POLICY
SMALL BUSINESS

Congress of the United States
House of Representatives
Washington, DC 20515-1505

May 28, 2010

The Honorable Eric Holder
Attorney General
United States Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530

Dear Attorney General Holder,

It has been reported that the Department of Justice has prepared a "draft complaint" to challenge Arizona's illegal-immigration enforcement law, SB 1070. I am writing to request a copy of the draft complaint.

Please forward the DOJ's "draft complaint" pertaining to Arizona's SB 1070 to my Washington office.

Thank you in advance for your timely cooperation.

Sincerely,

Steve King
United States Representative

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Mr. KING. Thank you, Mr. Chairman.

And it is very brief, and I won't belabor this point. It simply asks for a copy of the draft civil complaint. And I understand that you won't be in a position to respond to that letter here. And I won't put you on that spot and ask you, Mr. West.

Mr. WEST. I appreciate it.

Mr. KING. Thank you.

But I would like to explore this Arizona case just a little bit more. Also, I think I may have put some words in your mouth in the earlier exchange, and I would like to provide the opportunity

for clarification, because I believe I said that you or your department had argued that the interstate commerce—the Commerce Clause was a component. I have read that in the news, but I don't know that I have read a quote from the Justice Department on that point.

So would you care to clarify as to whether that is on the record one of the arguments that would be made by the Justice Department?

Mr. WEST. I can certainly say that, in the briefs that we have filed, several of them—several of the cases that have been filed challenging the Affordable Care Act raise the Commerce Clause issue. They make Commerce Clause arguments and we have responded in kind. So we are responding to suits that have been filed, and our response is a motion to dismiss, respond to arguments based on the Commerce Clause that plaintiffs have raised.

Mr. KING. Fair enough. I just wanted to make sure we had the record clear, and I didn't push you into something that wasn't your position or imply something, because I recall the testimony of the Attorney General here some weeks ago before the Committee, and I think most everybody in America saw some clips from that.

In that testimony that day, without putting words in the mouth of the Attorney General, I will submit that he conceded the point that he had been directed by the President or the White House at least to bring suit against Arizona's immigration law. And when questioned about where he might have concerns about Arizona's immigration law, S.B. 1070, questioned about what points in the Constitution might be unconstitutional, what points—what Federal statute might preempt Arizona's law or what controlling case law might be the concern that would bring the Justice Department to bring suit against Arizona, the Attorney General wasn't able to answer any of those questions about the Constitution, Federal preemption or case law.

Subsequent to that questioning, he acknowledged he hadn't read the bill, but he had been directed to bring suit against Arizona. And at the end of his response to my questions, he was allotted time to respond to my questions after the clock had run out, and he said that the office is not politicized.

It is hard to accept that statement when there is a suit that is being brought by the Justice Department against a law that has been passed by a State that mirrors Federal law; if Federal law is constitutional and the legislation itself says that it will be able to conform with Arizona and the U.S. Constitution, it is hard to accept the idea that the Justice Department is not politicized if a decision can be made in the White House, directed to the Attorney General, acted upon by the Justice Department, including your division within the Justice Department, and you are the first person that has come from the Justice Department that has actually read the bill.

You recognize how hard it is for us here on this panel, representing the voice of the American people, to accept the argument that the office has not become politicized. What else could be the motive if the President has made this order or the people who speak for him and nobody has read the bill? What otherwise could be the motive? And how could the Justice Department act on any-

thing other than the law itself? And the equal justice under the law, the blindfolded Lady Justice that I mentioned in my opening remarks, Mr. West. Those trouble me and I would appreciate your response.

Mr. WEST. Just to clarify the question that you would like me to answer is—I am sorry, I just didn't quite——

Mr. KING. How can we be asked to accept the statement of the Attorney General that the Justice Department is not politicized in the face of all of this and evidence to the contrary, much of which I haven't stated today?

Mr. WEST. I think, really, the only way that I can answer that—I appreciate the perspective that you have—is that the Attorney General really thinks of himself as a career Justice Department attorney. He grew up in the Department of Justice, started there as a line attorney, made his career there. And I know that he is committed in an unwavering way to a nonpartisan, nonpoliticized Department of Justice that acts to do what is in the best interest of the United States and the American people.

For me, I got my start at the Department of Justice early. I think of myself very much as a line lawyer. I was an AUSA for 5 years. And before that, I was an attorney in Main Justice.

And I think one of the things that the Attorney General has articulated well and one of the things that I have always loved about the Department of Justice is that it is one of the few places in this country where you can go and your overriding charge is to do, not what is popular or partisan or political, but to do what is right. And I appreciate that there may be differences of opinion on whether or not one is doing what one is doing in alliance with any particular view of the world.

But I guess the only way I can answer that question is to say that I appreciate the perspective. With regard to this particular law, this particular litigation, we have endeavored to get the input of the Attorney General of the State of Arizona, the Governor of the State of Arizona. It is something that we take very seriously, and we continue to work through various issues.

Mr. KING. Mr. West, I appreciate the manner with which you have conducted yourself here at this hearing today and also the difficult position that you might find yourself in today. So thank you very much for your testimony.

I yield back the balance of my time.

Mr. WEST. Thank you, Congressman.

Mr. COHEN. Thank you.

I would like to thank the witness for his testimony today.

Without objection, the Members have 5 legislative days to submit additional written questions, which are forwarded to the witness, and ask him to answer as promptly as he can to be made a part of the record.

Without objection, the record will remain open for 5 legislative days for the submission of any other material.

Thank you, Mr. West.

The hearing is adjourned.

[Whereupon, at 12:03 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE HENRY C. "HANK" JOHNSON, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF GEORGIA, AND MEMBER, SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

Congressman Henry C. "Hank" Johnson, Jr.

Statement for the Hearing on the
Civil Division of the United States Department of Justice

June 24, 2010

Thank you, Mr. Chairman, for holding this hearing on the Civil Division of the United States Department of Justice.

Many times, when you think of the Department of Justice criminal issues come to mind, but the Department also takes an active role in civil investigations and litigation.
Assistant Attorney General, I thank you for taking time out of your schedule to testify before this Subcommittee.

The Civil Division represents the United States, its departments and agencies, cabinet officers and other federal agencies.

It is responsible for a broad range of litigation that includes defending the constitutionality of federal legislation, recovering money for the United States that was lost through fraud, enforcing federal consumer protection laws, defending immigration enforcement actions, and representing the United States in habeas cases.

The Civil Division's litigation reflects the diversity of a wide range of governmental entities. It confronts significant policy issues, which often rise to constitutional dimensions, in defending and enforcing various federal programs and actions.

I want to thank the Assistant Attorney General for his leadership in the Civil Division.

The Civil Division has done a tremendous job is helping Americans try to cope with the fallout of the housing crisis.
Enforcement efforts have increased recoveries in this area from $15 million in 2008 to $52 million in 2009 and the first half of 2010.

In addition, the Civil Division continues to vigorously protect consumers. Between January 2009 and June 1, 2010, the Division has obtained convictions of 51 defendants and courts have imposed criminal penalties exceeding $2 billion for illegal activities in connection with defrauding consumers.

I look forward to hearing from Assistant Attorney General West about the Civil Division's continued response to the financial meltdown that led to the housing crisis America is still digging out of, its response to the BP oil spill, and how it is handling abusive debt collections practices under the Fair Debt Collections Privacy Act.

I look forward to hearing from to the hearing today and yield back the balance of my time.

POST-HEARING QUESTIONS SUBMITTED TO THE HONORABLE TONY WEST, ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION, DEPARTMENT OF JUSTICE*

Questions for the Record
Subcommittee on Commercial and Administrative Law
Hearing on the "Civil Division of the United States Department of Justice"
Jnne 24, 2010

The Honorable Tony West, Assistant Attorney General, Civil Division, United States Department of Justice

Questions from the Honorable Steve Cohen, Chairman

1. **In yonr view, will the problem of mortgage frand grow worse in the near fnture? Will the DOJ require additional resources as a result?**
2. **With respect to the Mortgage Fraud Working Gronp, what do the fact-finding summits that yon mentioned in your written testimony entail?**
3. **How does the Civil Division use the information gathered at fact-finding summits to shape its efforts to combat mortgage fraud?**
4. **In what ways can the Civil Division mitigate both the cost of litigation and the exposnre of taxpayer dollars in the Yucca Mountain/spent nnclear waste litigation?**
5. **What efforts have the Civil Division undertakeu to respond to abnsive debt collectiou practices? Has the Office of Consumer Litigation noticed any increase in abnsive debt collection practices since the onset of the Nation's cnrrent economic difficulties?**
6. **You mentioned in your testimony that you have recovered more from procurement fraud cases since January of 2009 than you did in 2007 and 2008 combined. Is this due to an increase in fraud or an increased focus on litigating procnrement fraud cases?**
7. **The new state secrets policy you describe is silent as to whether the Department will consent to judicial review of the information over which it is asserting the state secret privilege. Can you offer any insight about whether the Department will offer such consent?**
8. **Will DOJ establish a process for creating non-privileged substitutes for resolution of privilege claims or information that is deemed privileged? The policy you described appears to be silent on this issue.**

*Note: The Subcommittee did not receive a response to the post-hearing questions submitted to this witness prior to the printing of this hearing.

Questions from the Honorable Henry C. "Hank" Johnson, Jr.

1. **As you know, earlier this year, the safety of Toyota vehicles dominated the airwaves and Toyota recalled several of its vehicles. I nnderstand that the Civil Division's Office of Consumer Litigation began an investigation into Toyota's possible deceptive acts and practices affecting commerce in the United States. The goal of the investigation is to determine what Toyota knew about the safety of its products when Toyota informed its customers and the general public about problems it was having with its vehicles. Please discuss what type of findings may trigger fnrther action by the Civil Division and what possible actions the Civil Division may take.**

2. **During a November 2009 press conference, Attorney General Holder announced the launch of the Fiuancial Fraud Enforcement Task Force. This task force is charged with investigating and prosecuting financial crimes. Please discuss the Civil Division's role in this task force. How many civil enforcement actions have been filed as a result of this task force?**

3. **Mortgage fraud continues to be a huge problem. Mortgage fraud has become more prevalent throughout the nation, especially in my home state of Georgia, particularly the Atlanta metropolitan area. Mortgage fraud has wreaked havoc ou ueighborhoods, ruiued iudividuals' credit stauding, aud caused many millions of dollars of losses in Georgia. What is the Civil Division doing to address this problem? Will the Civil Division set up a special task force or intra-agency coalition to address the mortgage fraud crisis?**

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