S. HRG. 108–782

DOJ OVERSIGHT: TERRORISM AND OTHER TOPICS

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED EIGHTH CONGRESS

SECOND SESSION

JUNE 8, 2004

Serial No. J–108–79

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

98–625 PDF WASHINGTON : 2005

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2250 Mail: Stop SSOP, Washington, DC 20402–0001

COMMITTEE ON THE JUDICIARY

ORRIN G. HATCH, Utah, *Chairman*

CHARLES E. GRASSLEY, Iowa
ARLEN SPECTER, Pennsylvania
JON KYL, Arizona
MIKE DEWINE, Ohio
JEFF SESSIONS, Alabama
LINDSEY O. GRAHAM, South Carolina
LARRY E. CRAIG, Idaho
SAXBY CHAMBLISS, Georgia
JOHN CORNYN, Texas

PATRICK J. LEAHY, Vermont
EDWARD M. KENNEDY, Massachusetts
JOSEPH R. BIDEN, JR., Delaware
HERBERT KOHL, Wisconsin
DIANNE FEINSTEIN, California
RUSSELL D. FEINGOLD, Wisconsin
CHARLES E. SCHUMER, New York
RICHARD J. DURBIN, Illinois
JOHN EDWARDS, North Carolina

BRUCE ARTIM, *Chief Counsel and Staff Director*
BRUCE A. COHEN, *Democratic Chief Counsel and Staff Director*

CONTENTS

STATEMENTS OF COMMITTEE MEMBERS

	Page
Hatch, Hon. Orrin G., a U.S. Senator from the State of Utah	1
prepared statement	182
Leahy, Hon. Patrick J., a U.S. Senator from the State of Vermont	4
prepared statement	186
Schumer, Hon. Charles E., a U.S. Senator from the State of New York, prepared statement and attachment	195

WITNESS

Ashcroft, Hon. John, Attorney General, Department of Justice, Washington, D.C.	7

QUESTIONS AND ANSWERS

Responses of John Ashcroft to questions submitted by Senator Leahy	54
Responses of John Ashcroft to questions submitted by Senators Leahy, Wyden, Grassley, Biden, Edwards, Kennedy, Kohl, Durbin, and Feingold	63

SUBMISSIONS FOR THE RECORD

Allegheny Technologies, Jon D. Walton, Executive Vice President, Human Resources, Chief Legal and Compliance Officer, Pittsburgh, Pennsylvania, prepared statement	161
Ashcroft, Hon. John, Attorney General, Department of Justice, Washington, D.C., prepared statement	163
New York Times, June 8, 2004, article	192
Specter, Hon. Arlen, a U.S. Senator from the State of Pennsylvania, letter and attachment	200
Wall Street Journal, Jess Bravin, article	203
Washington Post, June 8, 2004, article	209

DOJ OVERSIGHT: TERRORISM AND OTHER TOPICS

TUESDAY, JUNE 8, 2004

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:05 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Orrin G. Hatch, Chairman of the Committee, presiding.

Present: Senators Hatch, Grassley, Specter, Kyl, DeWine, Sessions, Craig, Cornyn, Leahy, Kennedy, Biden, Kohl, Feinstein, Feingold, Schumer, Durbin, and Edwards.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Chairman HATCH. If we could have order. I apologize for my laryngitis. We welcome you, Mr. Attorney General.

Before I make my introductory remarks concerning this hearing, I want to say a few words about former President Ronald Reagan. He took office during a difficult time in America's history and helped usher in an era of both peace and prosperity. And you really cannot do much better than that.

As we face new challenges from terrorists both at home and abroad, we would do well to emulate President Reagan's unfailing qualities of dignity and courtesy as well as his reliance on traditional American values, including his remarkable ability to communicate a sense of confidence and optimism about the future of our country.

As we work to thwart the new threat posed by terrorists, we must not forget the fact that our Nation has a history of defeating determined adversaries through the leadership of men like President Reagan and the perseverance of many citizens in many nations over a sustained period of time. We prevailed against fascism and communism and have made old enemies into new allies, and it took that type of leadership to do it. He was one of my closest friends. I think I am the only person he ever pre-primary endorsed, or at least up to that time, and we were very close. And so I wish Nancy and the children the very best, and I certainly send all of the sympathy, I am sure, of all of us to them.

Now, as we work here today, today's oversight hearing will mark the seventh hearing at which our Committee will have an opportunity to explore the effectiveness and the preparedness of the Federal Government to prevent and respond to terrorism on American soil.

Let me welcome our distinguished witness, the 79th Attorney General of the United States and our former colleague on this Committee, John Ashcroft.

The Attorney General and his colleagues in the law enforcement and intelligence communities face challenging times in defending our country from terrorists.

Prosecuting terrorists after they have attacked our civilians does not bring back lost lives to grieving families, and it is certainly an imperfect deterrent as these extremists are often bent on taking their own lives in these suicide missions.

Instead, as has been widely acknowledged over the last 3 years, the key is to prevent terrorism before it occurs and, when possible, interdict the terrorists on their homelands before they come to America to carry out their attacks.

And that is exactly what the Department of Justice is doing—taking the battle to the terrorists by using every available tool. Let me commend you, Mr. Attorney General, for your Department's efforts to protect this great Nation.

Unfortunately, no one can guarantee 100-percent success in warding off all future terrorist attacks, but we have to do our best to try and do so. The American public appreciates the commitment and energy that the Department of Justice brings to this task each and every day.

In recent weeks, we have been reminded about the dangerous nature of the situation we currently face. The Attorney General and the Director of the FBI publicly stated that credible intelligence, from multiple sources, indicates that al Qaeda plans to attempt an attack on the United States in the next few months.

Another very troubling development involves the terrorist conspiracy revealed by the Department's recent response to my April 22, 2004, letter requesting information on the detention of enemy combatant and American citizen Jose Padilla.

According to the Department of Defense, we know that Jose Padilla received training in a terrorist camp in Afghanistan, including with an al Qaeda explosives expert. We are told that he served as an armed guard of what we understood to be a Taliban outpost in Kabul.

There is also reason to believe that Mr. Padilla discussed plans to detonate a dirty bomb or, alternatively, to blow up multiple apartment buildings using natural gas lines in New York, Washington, D.C., or Florida with high-level al Qaeda operatives, including Khalid Sheikh Mohammed.

As my colleagues may recall, last year U.S. law enforcement and intelligence agents, working together with Pakistani intelligence agents, captured Khalid Sheikh Mohammed, who was al Qaeda's leading operational planner and organizer. He is believed to be the mastermind behind the September 11th attacks.

Given our democratic society's strong tradition of protecting civil liberties, all of us—especially Members of this Committee—have an interest in the general procedures and policies, as well as the specific facts and circumstances, under which any American citizen may be designated and detained as an enemy combatant.

Our system of checks and balances is designed to place limits on the powers of each branch of Government. But he unabashed and

self-proclaimed goal of terrorists to obtain and use weapons of mass destruction against American civilians compels us to rethink the adequacy of our legal structure to prevent further terrorist attacks. We live in a dangerous world, and our Commander-in–Chief must have the proper amount of authority to act decisively to protect the public.

I think the information released last week about Mr. Padilla provided useful information to the Congress and the public about the nature of these new terrorist threats. Having said that, I am also mindful that some have raised legitimate questions about a system that, to date at least, limits the ability of the designated enemy combatants and their legal representatives to develop a defense and get their side of the story out.

Nevertheless, I am also concerned that these new terrorists, who do not wear conventional military uniforms and are unaffiliated with specific nation states, and whose ultimate goal is nothing less than to destroy our way of life, would like nothing more than the opportunity to use all of our traditional due process protections to drag out the proceedings, tie the Government prosecutors in knots, and make publicized political speeches.

Frankly, questions can be raised about the decision to try Zacarias Moussaoui in a criminal proceedings in an Article III court. A strong argument can be made that Mr. Moussaoui is the quintessential enemy combatant and deserves to be tried by a military commission.

We need more debate and discussion on the question of whether those designated as enemy combatants should be tried, and afforded attorneys, only after they are determined to be of no intelligence value or have exhausted their intelligence value.

As well, we need more discussion about where and by whom the line should be drawn between permissible aggressive interrogation techniques, and when interrogation becomes torture and whether torture is ever justified. We have all read the recent press accounts on these issues with great interest.

While I hope that 1 day al Qaeda will be defeated and formally surrender, it is possible that the day will never come when many of those detained at Guantanamo will agree to lay down their arms against the American people. This poses perplexing problems for a democratic country whose history suggests that wars end with finality for all combatants.

Now, let me take a moment to speak about the PATRIOT Act. This legislation was a measured attempt to help protect Americans from terrorist attacks and is consistent with our traditional civil liberties. Despite the negative predictions of some, the PATRIOT Act has not eroded the civil liberties that we Americans hold dear.

As I understand it, the Department's Inspector General has consistently reported in three semi-annual reports that it has received no complaints alleging misconduct by Department of Justice employees in their use of substantive provisions of the PATRIOT Act. Let me repeat—absolutely no complaints. Nevertheless, if we can improve and fine-tune the PATRIOT Act, we ought to do so.

Despite the enormous task of defending against terrorist attacks, the Department remains committed to ensuring that its traditional

law enforcement responsibilities are met. Recently, the Department reported that violent crime has fallen 3.2 percent nationwide.

The Department continues its vigorous enforcement of civil rights violations. And in fiscal year 2003, the Department provided almost $7 billion to State and local governments for various law enforcement initiatives, including almost $3 billion for training emergency first responders and purchasing equipment, as well as research and development of counterterrorism technology.

Finally, let me say that on the Committee's markup agenda is S. 1700, the DNA legislation. I believe that the Committee will report and the Senate should adopt this important bipartisan bill, which has already passed the House by a wide bipartisan vote.

This bill will help bring justice to thousands of victims of crimes, including many rape victims that have fallen through the cracks in the system due to the substantial 20-year backlog of rape test kits. In addition to using DNA technology to help bring about convictions, DNA tests can also be appropriately used to help exonerate those wrongfully charged or wrongfully convicted of crimes. I will work to bring this bill to the President's desk for his signature.

Mr. Attorney General, I look forward to your testimony here today. I hope to continue our bipartisan commitment to enacting measures that may be needed to win the war against terrorism and to work together on a wide range of programs that the Department implements. I appreciate the service that you have given to our country. I know how exhausting and demanding that service is.

[The prepared statement of Chairman Hatch appears as a submission for the record.]

With that, we will turn to our Ranking Member, Senator Leahy.

STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator LEAHY. Well, thank you, Mr. Chairman, and like you, we all join sending out our condolences to Mrs. Reagan. She has been a model of caring during the long, long years of her husband's illness, an illness they knew was there, an illness they knew incurable, at least today, and would lead to the eventual end. I think all Americans of whatever political stripe commend her for her conscience and her support of her husband.

Mr. Attorney General, welcome. It has been, I believe, about 15 months that have passed since your last very brief appearance in March last year. Your testimony here comes today about a thousand days after the September 11th attacks and the subsequent launch of your efforts against terrorism. As National Security Adviser Condoleezza Rice acknowledged in her testimony before the 9/11 Commission, the terrorist threats to our Nation did not begin in September 2001. But the preliminary findings of the 9/11 Commission suggested that counterterrorism simply was not a priority of your Justice Department prior to September 11th. Problems ranged in your Department from an understaffed foreign translation program, to woefully inadequate information systems, to cultural attitudes that frustrated information sharing across agencies.

Just one day before the attacks, on September 10th, you rejected the FBI's request to include more money for counterterrorism in your budget proposal. And while you have recently been critical of

the so-called wall between criminal investigators and intelligence agencies, you did nothing to lower it during your first 7 full months in office. In fact, you put up exactly the same wall in your administration.

The President is fond of saying that September 11th changed everything, as if to wipe out all missteps and misplaced priorities of the first year of this administration. After the attacks, you promised a stunned Nation that this Government would expend every effort and devote all necessary resources to bring the people responsible for these crimes to justice. Certainly the American people would expect no less. So a thousand days later, it is time to ask for the fulfillment of the promise you made.

Mr. Attorney General, your statement lists accomplishments of the Department of Justice since 9/11, but you leave out a number of things. For example, of course, the obvious, Osama bin Laden remains at large. At least three senior al Qaeda operatives who helped plan the 9/11 attacks are in U.S. custody, but there has been no attempt to bring them to justice. The Moussaoui prosecution has bogged down before any trial. A German court acquitted two 9/11 co-conspirators, in part because the U.S. Government, the Justice Department, and others refused to provide evidence to them.

Three defendants who you said had knowledge of the 9/11 attacks did not have such knowledge. The Department retracted your statement, and then you had to apologize to the court because you violated a gag order in the case.

The man you claimed was about to explode a dirty bomb in the U.S. had no such intention or capability, and because he has been held for 2 years without access to counsel, any crimes he did commit might never be prosecuted.

Terrorist attacks on Capitol Hill and elsewhere involving the deadly bioterror agents anthrax and ricin have yet to be solved. And the Department is defending itself in a civil rights action brought by a man who you publicly identified as a "person of interest" in the anthrax investigation.

U.S. citizens with no connection to terrorism have been imprisoned as material witnesses for chunks of time—with an "Oops, I'm sorry" when what the Justice Department announced was a "100 percent positive" fingerprint match turned out to be 100 percent wrong.

Non-citizens with no connection to terrorism have been rounded up seemingly on the basis of their religion or ethnicity, held for months without charges, and, in some cases, physically abused.

Interrogation techniques approved by the Department of Justice have led to abuses that have tarnished our Nation's reputation and driven hundreds, if not thousands, of new recruits to our enemies, the terrorists.

Your Department turned a Canadian citizen over to Syria to be tortured. And then your Department deported another individual to Syria over the objection of experienced prosecutors and agents who thought he was a terrorist and wanted to prosecute him.

And one of the most amazing things, your Department under your direction has worked to deny compensation to American victims of terrorism, including former POWs tortured by Saddam

Hussein's regime. You have tried to stop former POWs tortured by Saddam Hussein—Americans. You have tried to stop them from getting compensation.

Documents have been classified, unclassified, and reclassified to score political points rather than for legitimate national security reasons.

Statistics have been manipulated to exaggerate the Department's success in fighting terrorism.

The threat of another attack on U.S. soil remains high, although how high depends apparently on who within the administration is talking.

Mr. Attorney General, you spent much of the past 2 years increasing secrecy, lessening accountability, and touting the Government's intelligence-gathering powers. The threshold issue, of course—and I believe you would agree with me on this—is: What good is having intelligence if we can't use it intelligently? Identifying suspected terrorists is only a first step. To be safer, we have to follow through. Instead of declining tough prosecutions, we need to bring the people who are seeking to harm us to justice. That is how our system works. Instead, your practices seem to be built on secret detentions and overblown press releases. Our country is made no safer through self-congratulatory press conferences when we are facing serious security threats.

The Government agency that bears the name of Justice has yet to deliver the justice for the victims of the worst mass murder in this Nation's history. The 9/11 Commission is working hard to answer important questions about the attacks and how the vulnerabilities in our system that allowed them to occur, but it cannot mete out justice to those involved. Neither the 9/11 Commission nor this Committee can do the work of your Department of Justice.

Mr. Attorney General, since September 11th, you have blamed former administration officials for intelligence failures that happened on your watch. You have used a tar brush to attack the patriotism of Americans who dare to express legitimate concerns about constitutional freedoms. You have refused to acknowledge serious problems, even after the Justice Department's own Inspector General exposed widespread violations of the civil liberties of immigrants caught up in your post–September 11 dragnets.

Secretary Rumsfeld recently went before the Armed Services Committee to say that he, Secretary Rumsfeld, should be held responsible for the abuses of Iraqi prisoners on his watch. Director Tenet is resigning from the Central Intelligence Agency. Richard Clarke went before the 9/11 Commission and began with his admission of the failure that this administration bears for the tragedy that consumed us on 9/11. And I am reminded this week, as we mourn the passing of President Reagan, that one of the acts for which he will be remembered is that he conceded that while his heart told him that the weapons-for-hostages and unlawful funding of insurgent forces in Nicaragua should not have been acts of his administration, his head convinced him that they were and he took personal responsibility.

We need checks and balances. There is much that has gone wrong that you stubbornly refuse to admit. For this democratic republic to work, we need openness and accountability.

Mr. Attorney General, your style is often to come to attack. You came before this Committee shortly after 9/11 to question our patriotism when we sought to conduct Congressional oversight and ask questions. You went before the 9/11 Commission to attack a Commissioner by brandishing a conveniently declassified memo in a so unfairly slanted presentation that President Bush himself disavowed your actions.

So I challenge you today to abandon any such plans for this session and begin it instead by doing that which you have yet to do. Talk plainly with us and with the American people about not only what is going right in the war on terrorism—and there are those things that are going right—but also about the growing list of things that are going wrong so that we can work together to fix them. Let's get about the business of working together to do a better job protecting the American people and making sure that the wrongdoers are brought to justice, are brought to trial, and are given the justice that this country can mete out.

Thank you, Mr. Chairman.

[The prepared statement of Senator Leahy appears as a submission for the record.]

Chairman HATCH. Thank you, Senator.

General Ashcroft, we will take your statement at this time if you would care to make one.

STATEMENT OF HON. JOHN ASHCROFT, ATTORNEY GENERAL, DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Attorney General ASHCROFT. Good morning, and I thank you for the opportunity to make this statement. Obviously, I would be disappointed to think that I might spend my time responding to all of the charges that have just been leveled toward me. I have an agenda of things that I think are important for us to discuss with the Committee, and with that in mind, I would like to proceed with my statement rather than seek to be responsive to these items.

I was reminded as I came to the Senate this morning of the passing of a great giant in American Government. The caisson was in the street, apparently in a rehearsal for the events that will later follow this week, and President Ronald Reagan, who stood as a leader, certainly is a person whose leadership does indeed dwarf mine. And if I could agree with the Senator from Vermont, he is a man of much greater stature than I could ever hope to be who rallied the Nation to fight for very, very great ideals and to dare to do great things. And we remember his words as we fight once again for freedom against tyranny.

At the height of the Cold War, he put it this way: "The ultimate determinate in the struggle now going on for the world will not be bombs and rockets but a est of wills," he said, "a test of wills and ideas—a trial of spiritual resolve; the values we hold, the beliefs we cherish and the ideas to which we are dedicated."

And today we do meet at a time of war that does test our resolve, and we face dire threats.

Around the world we hear reports daily of this war, the war against al Qaeda: bombings in Spain, murder sprees in Saudi Arabia, and improvised explosive devices in Iraq—terrorist attacks that kill innocent men, women, and children.

At times, the war on terror might seem distant and September 11th may seem a faint memory, but it is not. It is not distant. It is not faint.

Credible intelligence indicates that al Qaeda wants to hit the United States and wants to hit it hard. We are locked in a mortal struggle between two visions for human life in a way that can know only one victor. And we choose to be the victor.

Our vision is a vision of freedom; it is a vision of human dignity and tolerance for every citizen.

Let me give you an example of how this Nation's dedication to that vision is played out. Nashala Hearn is a brave 12-year-old Muslim girl who goes to school in Muskogee, Oklahoma. Her favorite subject is world cultures. Someday she wants to write children's books. On September 11, 2003, school officials forbad her to wear the hijab, or headscarf, that is the expression of her religious faith.

Nashala's father filed suit. He believed that his daughter's constitutional rights were being violated.

The United States Justice Department agreed. The Civil Rights Division intervened to protect the constitutional rights of this quite sixth-grader who likes reading. We won a consent decree to protect her rights of religious expression. She may now wear her hijab at her school. And later this afternoon, Nashala will wear her hijab when she appears in the United States Senate.

The war we are fighting is a war for Nashala and for freedom-loving people everywhere. We continue to strive, after two centuries, to build that city upon a hill—a nation that values the religious liberty of a single young girl and the constitutional liberties of all of its citizens.

Now, contrast these ideals with the dark ambition of our enemies. In the nightmare vision of the Taliban and al Qaeda, little girls like Nashala are denied their rights. As a woman, she could not go to school. She could not appear in public without a man from her family to speak for her. She would never be allowed to vote, but she could be whipped. To our enemies, a 12-year-old American girl is just another target for their attacks.

But in the United States of America, under our Constitution, Nashala's life is so precious that her cause commands the attention of the Government. Her right to religious freedom is so secure that it gained the full weight of the United States Department of Justice.

Every day, the men and women of the Department of Justice prove their commitment to protect the lives and liberties of the American people.

For more than 32 months, the Justice Department has been using every tool and every tactic in the arsenal of the justice community to stop terrorism—from aggressive enforcement of the criminal code to the deployment of the new and critical tools of the USA PATRIOT Act.

We have disrupted the al Qaeda network and the terrorist presence using immigration violations, minor criminal infractions, and tougher visa and border controls. And we have been criticized for these tough tactics. But we will continue to use every means within the Department in its reach and within the Constitution and the statutes to deter, disrupt, and destroy terrorist threats.

These are not just words. We are proving in deeds our commitment to win the war against the networks of terror. We have leveled criminal charges against 310 individuals. To date, we have won 179 convictions. We have broken up terrorist plots all across America, from Virginia to Oregon, Florida to New York, in the heartland, on the coasts. We have targeted the lifeblood of the transnational terrorism financing stream, launching 70 investigations into terrorist financing.

But the most tangible measure of our success is found in a fact for which we are grateful to God and the citizens of this country and law enforcement officials: We have not experienced a major terrorist attack on U.S. soil.

Our clear strategy of prevention combined with aggressive tactics has prevented major terrorist attacks.

America has caught numerous known al Qaeda operatives seeking to strike America, including: Ali Saleh Kahleh al–Marri, Jose Padilla, Iyman Faris, Zacarias Moussaoui, and Richard Reid, to name a few.

Al–Marri was sent by al Qaeda to facilitate a second wave of terrorist attacks on Americans. He arrived on U.S. soil on September 11, 2001. Further investigation revealed that al–Marri was an al Qaeda sleeper operative who was sent to provide support to newly arriving al Qaeda operatives.

Jose Padilla dreamed of detonating a dirty bomb in the United States and was sent here by al Qaeda to blow up apartment buildings. After he was arrested, we learned that Khalid Sheikh Mohammed had personally given him full authority to conduct operations for al Qaeda in the United States of America.

Iyman Faris, an Ohio truck driver, scouted sites in America to help al Qaeda blow up a bridge in New York and to look for ways to attack America's rail system.

We all know about Richard Reid, who, on December 22, 2001, sought to ignite a bomb on a commercial airliner traveling from Paris to Miami, Florida. Reid pled guilty, calling himself a disciple of Osama bin Laden and an enemy of the United States.

These individuals are not alone. Al Qaeda has a fanatical desire to wage war on Americans in America. Al Qaeda will send terrorist-soldier after terrorist-soldier to infiltrate our borders and to melt into our communities. And they do not wear uniforms. They do not respect human rights. They target civilians.

Our successes preventing al Qaeda attacks are the direct result of information sharing, coordination, and cooperation of the men and women in U.S. law enforcement and intelligence. This teamwork would have been utterly impossible without the passage of the PATRIOT Act, for which I thank and commend the Congress.

The Act did four things:

It tore down the bureaucratic wall that had been imposed between law enforcement and intelligence, allowing cooperation and information sharing that has been very valuable.

The PATRIOT Act, secondly, strengthened criminal laws against terrorism.

Third, it helped speed the investigation of terrorist threats, putting agents on the street, instead of behind desks doing paperwork, to pursue terrorists, untrapped in their offices.

And, finally, the PATRIOT Act updated our antiterrorism laws to reflect new technologies and to give us the same tools used to fight against drug dealers and organized crime so that we could fight against terrorists.

We know that the terrorists plan to escalate their operations in America. Credible intelligence, as mentioned by the Chairman, from multiple sources indicates that al Qaeda plans to attempt an attack on the United States during this summer or fall. As this Committee knows, we are entering a season of events of great symbolism and great consequence for our Nation—events that would be attractive targets for terrorism.

It is a sad commentary when the observation of a memorial service for a former President of the United States must be labeled a national security special event. Such is the fact of modern life in Washington, and such is the nature of the war against al Qaeda.

We know from Spain's bitter experience that Osama bin Laden and al Qaeda believe they advanced their extremist cause with the Madrid train bombings that brought the death of nearly 200 people and the injury of about 1,600 more.

We have alerted the public and State and local law enforcement to these threats because we believe the face of al Qaeda is changing and their tactics are evolving.

Al Qaeda continues to attract fanatical extremists from many nationalities and ethnicities, including North Africans and South Asians, in particular. Al Qaeda and other extremist groups have also shown an interest in recruiting young converts inside target countries as operatives who can portray themselves as traditionally European.

Al Qaeda's ideal operatives may be older than those we have seen before—men in their late 20's to early 30's. In addition, they may be traveling with families to lower their profile.

In the face of this new threat—a threat that we have seen with a new face—we have shown the terrorists that America is not the same America we were on September 11. We have learned lessons. We are continuing to learn.

Credible intelligence tells us that the coming months are months of vulnerability. The justice community has taken the following steps to ensure our safety:

First, the FBI has established a special Threat Task Force that is focusing on the developing threat. The task force is coordinating all our intelligence, analysis, and field operations. All field offices and LEGATs have been tasked to review all counterterrorism case files and threat reporting for intelligence relevant to our intelligence requirements, that is, the defense of the Nation this year. Our 84 Joint Terrorism Task Forces are collecting specific information, developing additional intelligence sources, and reporting new information as well as reviewing old files to ensure that the 2004 Threat Task Force has all available intelligence.

Second, we have informed State and local law enforcement and sought their help in uncovering specific, actionable intelligence.

The FBI has developed a series of critical intelligence priorities to guide State and local law enforcement so they can investigate and collect information that fills gaps in our Nation's intelligence needs.

We have directed our 93 U.S. Attorneys to convene their Anti–Terrorism Advisory Councils to enlist State and local support, and there are about 670,000 State and local law enforcement officials who ares o important to the defense of America.

Specific intelligence is the foundation for effective counterterrorism strategies including hardening targets, disrupting cells, and elevating threat levels to engage our level of preparedness.

Third, we have alerted the public. It is the essence of freedom and the core strength of free societies to trust the citizenry to participate in the defense of their lives and liberties. We have asked the public to join in the hunt for seven suspected al Qaeda operatives and to be alert for suspicious activity.

These suspects are Amer El–Maati, Aafia Siddiqui, Adnan G. El Shukrijumah, Fazul Abdullah Mohammed, Adam Gadahn, Abderaoud Jdey, and Ahmed Khalfan Ghailani. They are all sought in connection with possible terrorist threats in the United States. They pose a clear and present danger. They should be considered as armed and dangerous.

The public has responded, providing over 2,000 tips in the first 24 hours alone regarding this request for assistance.

In this Nation, we learned on the morning of September 11, 2001, that blue skies and quiet mornings should not be mistaken for peace—however earnestly we desire that peace. Our terrorist enemies have declared war on America, and they have brought the war onto our soil.

Over the last 2 years, we have made progress. But the war is far from over. The networks of terror continue their search for any opportunity to turn quiet and calm mornings into scenes of carnage and death.

In this war—in this time of heightened threat—we must remember the ideals we fight for. We must remember the precious liberties, even those of 12-year-olds such as Nashala Hearn.

When we remember these blessings of freedom, when we reflect on the vision we defend, our path, even amidst the challenges of war, is clear.

I thank you for this opportunity to make my remarks.

[The prepared statement of General Ashcroft appears as a submission for the record.]

Chairman HATCH. Well, thank you, Mr. Attorney General. Let me just ask a couple of questions.

You and FBI Director Mueller recently warned us about an increased risk of terrorist attacks within the next few months. Can you tell us whether you believe and, if so, why you believe our Nation is better prepared to stop these acts of terrorism today than we were on September 11, 2001, and whether or not you think the Department needs additional legal tools to better protect or help protect the American public from acts of terrorism on U.S. soil? I noticed from your statement earlier, the one that we have, that you oppose, as do I, allowing certain provisions of the PATRIOT Act to sunset next year. But there are additional provisions such as the terrorist hoax legislation that Senators Schumer, Corny, and I are cosponsoring that you may think are advisable for Congress to adopt. So if you could answer that, I would appreciate it.

Attorney General ASHCROFT. Mr. Chairman, I do believe that we are better prepared than we were before. The tools of the United States PATRIOT Act, which were tools enacted by this Congress, have taken down the wall between the intelligence community and the law enforcement community, and that is an important amalgamation of information. And the best friend of prevention is information. If you have the right information, you can prevent. Without that information, you cannot.

In addition, the efficiencies provided in the Act, which provides, say, for the use of so-called multi-point or roving wiretaps in matters relating to terrorism, really make efficient our ability to monitor or surveil terrorists in a way that we have long had the authority against drug dealers and organized crime figures, since 1986 when that was accorded the Department in its fight against those individuals. And, obviously, those kinds of things are just illustrative of the kinds of structural changes that have upgraded our capacity to be effective in the war on terror.

And there are other aspects which are equally important. The FBI has changed its method of operating so that it is much more focused on intelligence. It is working to establish a Directorate of Intelligence within the FBI. But the resources devoted to intelligence, the kind of communication internal to the FBI, the—Senator Leahy pointed out that the kind of communication system in the FBI was deficient. I believe that was part of the thrust of his remarks. And the improvement of the communication inside the FBI, with the right kind of computers that can now talk from the field to headquarters, where we can have a central understanding of intelligence rather than a fragmented understanding of intelligence, which had previously characterized the case system where information was held exclusively at localities rather than being centralized, the creation of the Terrorist Threat Integration Center, where intelligence which comes from domestic sources is pooled with intelligence that comes from international sources, so that we have a basin that receives intelligence, and that Terrorist Threat Integration Center can provide an understanding of how we can connect dots between things that are happening within the United States and things happening outside the United States to help us deter or disrupt or otherwise displace threatening terrorist activities. All of these things are improved circumstances, and these are exemplary.

For me to go and try and be exhaustive in the list of changes that have been undertaken would stress our time frame this morning. But those are the things that I think are very important that we have now.

As it relates to the ways that we could improve, every time someone requires the Department to respond to a hoax, it takes valuable resources. There have been thousands of hoaxes, for instance, on anthrax alone, and there should be significant penalties for individuals who divert the resources that can fight terror away from the fight against terror and are just responding to hoaxes.

Similarly, the seriousness of, I believe, the threat of terror requires that we should have available in circumstances where people are killed and significant killing of individual in terrorist activities should result in the death penalty. There are circumstances

where we do not believe that that exists now, and that would be an improvement.

In the law for major crimes of violence and drug offenses, there is a presumption that a person charged would be detained. There is no such presumption for a person charged with terrorist activity. I think it would be prudent to say that those kinds of presumptions which inure to drug dealers of significant scale and violent criminals, if there is a reason for a presumption there, that would be appropriate.

There are about, I think, 335 different areas of the Federal Government in which enforcement officials have the right to request on an official basis documents from businesses, business records. Those are called administrative subpoenas. I believe that if those are requestable on the basis of health care fraud and other things, for terrorism cases we would be well served to have that same kind of authority.

This does not mean that there is an automatic ability to get them. If a person resists that, then the courts would, again, step in to decide whether or not it was merited. But that kind of administrative subpoena authority exists for well over 300 other kinds of circumstances.

Another item which I believe Senator Kyl and Senator Schumer and you have joined to work on is what is called the lone wolf amendment to FISA which would provide the ability to surveil someone known to be involved in terrorism, but not being involved in terrorism with someone else, but doing it exclusively on his own or her own motion. It seems to me that our ability to surveil that kind of person should be commensurate with our ability in other settings. So that is another one of the proposals you have been involved with, in addition to the hoax statute.

But these are the kinds of things that are important. The sunsetted provisions, of course, must not expire unless we want simply to let down the guard of the United States against terror. And if we were to expose the United States to in some way reset the balance in favor of terror, we could do so by deciding that we would not re-enact those provisions of the PATRIOT Act. I think it would be a tragedy.

Chairman HATCH. My time is up. I would like to ask you to help us to work on the Radiation Exposure Compensation Act funding with the appropriators. It is very important that we keep that funding going and live up to those promises.

With that, we will turn to Senator Leahy.

Senator LEAHY. Thank you, Mr. Chairman.

Mr. Attorney General, yesterday in the Wall Street Journal, they had a Department of Defense memo that argues that the President has the authority as Commander-in–Chief to approve almost any physical or psychological actions during interrogation, up to and including torture. Today, the Washington Post quotes from a memo from your Department that purportedly argues that torturing a terrorism suspect may be justified.

Now, I have been asking for copies of post–September 11th policy memos for over a year, but your Department has repeatedly said such documents are classified or that it simply won't release them. I asked you for the specific memo that is now reported in the press

10 days ago and received no response. I can read it in the press, but I have not received a response from you. You selectively declassify memoranda to suit your political purposes, such as the Gorelick memo you offered in the midst of a 9/11 Commission hearing. But you have denied information to Members of this Committee on both sides of the aisle, and so we conduct our oversight via what we learn in the press. I have four questions.

First, when will you provide a copy of this and all other requested memos to each Member of this Committee, Republican and Democrat?

Second, all Americans want to know whether anyone followed through on the advice of your Justice Department. Has torture or anything approaching torture been committed by U.S. personnel or in the presence of U.S. personnel anywhere in the world?

Third, has there been any order or directive from the President with respect to interrogation of detainees, prisoners, or combatants?

And, fourth, can you assure this Committee, can you assure this Committee today, that your Justice Department will aggressively prosecute any person for whom there is probable cause of committing torture, regardless of whether the individual was acting under a direct order of the President and regardless of whether the person being tortured was in U.S. custody?

Attorney General ASHCROFT. I want to be sure to answer these. My note taking—

Senator LEAHY. If you miss a couple—

Attorney General ASHCROFT. You will remind me.

Senator LEAHY. I will want to help you out by reminding you.

[Laughter.]

Attorney General ASHCROFT. Thank you. Congress has enacted an extensive framework of laws relevant to the way individuals who are apprehended, detained, or captured during wartime are interrogated during wartime. The laws are numerous. They relate to everything from the Uniform Code of Military Justice to the torture statute, to the War Crimes Act, to the Military Extraterritorial Jurisdiction Act, to the special maritime and territorial jurisdiction statute.

In addition to these statutory enactments that have been passed by the Congress and signed by the President and are part of our laws, the Senate, in conjunction with the President, has committed the United States to the following of various treaties, and related to these issues would be treaties like the Geneva Conventions and—

Senator LEAHY. Mr. Attorney General, without—and I know you have no intention of filibustering the answer, but could we go to my specific question? Did your Department issue a memorandum that would suggest that torture is allowed under certain circumstances, as the press has reported? That is a simple enough question. It could take a yes or no answer.

Attorney General ASHCROFT. Well, first of all, I am not going to comment on the memos and advice that I give to executive departments of Government, but I will say this: that while the job is to explain the meaning of these statutes and to explain in memos the law, I want to confirm that the President has not directed or or-

dered any conduct that would violate the Constitution of the United States, that would violate any one of these enactments of the U.S. Congress, or that would violate the provisions of any of the treaties as they have been entered into by the United States, the President, the administration, and this Government. It is—

Senator LEAHY. Does that mean that your Department would aggressively prosecute anybody who might come under your jurisdiction under any of these laws any person for whom there is probable cause of committing torture, regardless of whether that person was acting under a direct order of the President or anybody else?

Attorney General ASHCROFT. The Department of Justice will both investigate and prosecute individuals who violate the law. The Torture Act is a law that we include in that violation. The laws relating to various other aspects of conduct are. We have before us at this time a number of investigations underway. We have established a special team for prosecuting such violations in the Eastern District of Virginia. It is a U.S. Attorney's office that is accustomed to international items because it is the home of both the CIA and the Pentagon.

There is one case outside that framework that is being prosecuted and was being prosecuted earlier, before we became aware that we might have a broader responsibility here. But we are investigating items both on referral from the Department of Defense and from the Intelligence Agency, and those matters taken into account our responsibility to enforce the laws enacted by this Congress.

Senator LEAHY. I would assume that you would carry out your responsibilities. You have sworn a solemn oath to do so. But does your answer mean that there has or has not been an order or directive from the President within respect to interrogation of detainees, prisoners, or combatants?

Attorney General ASHCROFT. The President of the United States has not ordered any activity which would contradict the laws enacted by this Congress or previous Congresses—

Senator LEAHY. Not quite my—

Attorney General ASHCROFT. —or the Constitution of the United States, or any of—

Senator LEAHY. Mr. Attorney General, that was not my question—

Attorney General ASHCROFT. —the treaties—

Senator LEAHY. That was not my question. Has there been any order or directive from the President with respect to interrogation of detainees, prisoners, or combatants? Yes or no.

Attorney General ASHCROFT. I am not in a position to answer that question.

Senator LEAHY. Does that mean you don't know or you don't want to answer? I don't understand.

Attorney General ASHCROFT. The answer to that question is yes.

Senator LEAHY. You don't know whether he has issued such an order?

Attorney General ASHCROFT. For me to comment on what the President—what I advised the President—

Senator LEAHY. I am not asking—

Attorney General ASHCROFT. —or what the President's activity is, is inappropriate. I will just say this: that he has made no order that would require or direct the violation of any law of the United States enacted by the Congress or any treaty to which the United States is a party as ratified by the Congress or the Constitution of the United States.

Senator LEAHY. That doesn't answer my question, but I think my time is up. We will come back to this later.

Chairman HATCH. Senator Grassley?

Senator GRASSLEY. Yes, I would like to cover a classification issue, a terrorist financing matter, and information sharing.

On the classification issue, I would like to ask about the FBI and Justice Department going back in time and classifying information that Congress was given in briefings 2 years ago. This information involves a whistle-blower by the name of Edmonds, a translator who was fired from the FBI because of problems pointed out. Three issues. I would like to raise all three and then have you address them.

First, what was your involvement in the decision to retroactively classify information already given to Congress, if you had an involvement?

Second, who made this decision, Civil Division lawyers or operational people at the FBI?

And, third, laws and executive orders have requirements for how information is classified. So since we do have those laws and executive orders, could you explain how the FBI and the Justice Department followed those requirements in this case?

Attorney General ASHCROFT. If I am not mistaken, in the matter to which you make reference, the national interests of the United States would be seriously impaired if information provided in one briefing to the Congress were to be generally available. And in order to protect the national interest, a decision was made to classify the information.

I take responsibility for that decision, and I have reviewed the matter within the last couple months, I think at your request or a request of a letter on your part. I am not sure if we have talked about this personally, and that is the reason for which the decision was made.

Senator GRASSLEY. So you made the decision, so Civil Division lawyers or operational people at the FBI would not have been involved in that?

Attorney General ASHCROFT. I don't know that they would have been uninvolved. It may be that my decision was shaped based on recommendations of theirs and the participation that they would have had in some measure. But it relates to both a lawsuit which is underway and the national security interests of the United States.

Senator GRASSLEY. Isn't a little ludicrous, though, saying that you classify this information now, though, because it could, if it was exposed to the public at large? If I were briefed on it and I were not told that it was security or anything, I could have been talking about it for the last 10 months and it could have been out to the public.

Attorney General ASHCROFT. That is exactly right, Senator.

Senator GRASSLEY. I mean I could have been, because it was just recently reclassified, so I could have done that. So isn't it ludicrous to classify it now?

Attorney General ASHCROFT. Well, let me just put it this way: If there is spilt milk and there is no damage done, if you can re-collect it and put it back in the jar, you are better off than saying, well, it is spilt, no damage has been done, we might as well wait until damage is done.

Our responsibility is, if information is made available which is against the national interest to be in the public sphere, to say we should do what we can to curtail the availability of the information. It is on that basis that I made the decision.

Senator GRASSLEY. Okay. Now, on terrorist financing, a number of departments and agencies have jurisdiction over different aspects of terrorist financing, and officials within the departments have repeatedly assured me that everyone is cooperating smoothly on this issue. But what I see instead of a lot of in-fighting and one-upsmanship—what I do see is a lot of in-fighting and one-upsmanship that is splintering our efforts instead of unifying them. The departments participate in working groups and in coordinating committees that are supposed to alleviate much of this in-fighting. But what we really need is effective leadership and strategic thinking.

Does the Department of Justice have primary responsibility for determining terrorist financing and money-laundering methods and in coordinating our Government's response to these vulnerabilities? And how is this responsibility, if you have it, being executed?

Attorney General ASHCROFT. I believe that the Department does have the primary responsibility in money-laundering cases to first determine whether or not those cases are terrorism-related, and if they are, they remain the responsibility of the Justice Department.

There are money-laundering cases which have also been a part of the traditional Treasury and now I believe in the Homeland Security arena as well. But the first cut on such cases is a terrorism appraisal, which belongs with the Department of Justice, and we seek to coordinate any secondary activities after that appraisal has been made.

Senator GRASSLEY. I have a bill, S. 1837, that extends the national money-laundering strategy for 3 years. The Department of Homeland Security has significant expertise in money-laundering investigations. But the Department didn't exist when we first passed this legislation. What should the Department of Homeland Security's role be in developing the national strategy in combating terrorist financing from the standpoint of your having primary responsibility in this area?

Attorney General ASHCROFT. Well, we believe that the Department of Justice in terms of its—obviously, its role will always be to prosecute the violations. So let me just first make it clear that when we talk about other agencies that are involved in curtailing money laundering, they are involved in the development of the case or the detection of a scheme or the understanding that there is a problem. But when it comes to actually bringing the charges, the prosecutions are carried forward by the Justice Department.

Our responsibility has been obviously to make an assessment about whether or not the money-laundering scheme was more than simply money laundering, but whether it was a funding effort that related to terrorism. And for that reason, the Department has the first responsibility in the arena. But if other agencies are involved, whether it is in conjunction with Customs Enforcement or in conjunction with matters related to immigration or things that are covered by other departments, those are areas where we try to coordinate our efforts, but we do not seek to control the effort. And we will have to work to get that done.

For me to go further would require me to do additional study.

Chairman HATCH. Senator, your time is up. Do you want to make a—

Senator GRASSLEY. My third question has to be submitted in writing because time has run out, but it deals with information sharing on law enforcement between Government agencies as well as be the Federal, State, and local level. So it is something that comes up all the time back home, and I hope you would give serious consideration to my third question and answer it in writing.

Attorney General ASHCROFT. It is a matter of serious importance to us, and I will.

Senator GRASSLEY. Thank you.

Chairman HATCH. Thank you, Senator.

Senator Kennedy?

Senator KENNEDY. Thank you, and welcome, General.

Attorney General ASHCROFT. Thank you.

Senator KENNEDY. On the front page of the Times, it has this quote: "A team of administration lawyers concluded in a March 2003 legal memorandum that President Bush was not bound by either an international treaty prohibiting torture or by a Federal antitorture law because he had the authority as Commander-in–Chief to approve any technique needed to protect the Nation's security."

Do you agree with that conclusion?

Attorney General ASHCROFT. Senator Kennedy, I am not going to try and issue a hypothetical—

Senator KENNEDY. I am not asking hypothetical. This is a memorandum that, again, was referred to today in the Post: "In August 2002, the Justice Department advised the White House that torturing al Qaeda terrorists in captivity abroad 'may be justified,' and that international laws against torture 'may be unconstitutional if applied to interrogations...'" Do you agree with that?

Attorney General ASHCROFT. I am not—first of all, this administration rejects torture. It does not engage in torture.

Senator KENNEDY. I am asking you whether this is—there are three memoranda: January 9, 2002, signed by John Yoo; the August 2002 Justice Department memo; and the March 2003, the interagency working group. Those are the three memoranda. Will you provide those to the Committee?

Attorney General ASHCROFT. No, I will not. The—

Senator KENNEDY. On what basis? Under what basis?

Attorney General ASHCROFT. On the basis that the longstanding established reasons for providing opinions provided to the executive branch—

Senator KENNEDY. General, the executive privilege is not a legitimate basis for withholding memoranda from this Committee. This Congress is investigating the prisoner abuses that have occurred. Immense importance. We have a specific need of the documents that have allowed these abuses to occur. The memoranda at issue did not involve confidential communications between the Justice Department and the President, but instead legal advice that was widely distributed throughout the executive branch. There are many examples of executive privilege that have been waived or overridden. President Clinton waived the privilege. President Nixon claimed absolute executive privilege in Watergate. And interesting, as we—and I will speak about President Reagan later this afternoon or tomorrow about my own personal feelings and commendation of his life. President Reagan, on November 4, 1982, issued guidelines on executive privilege. Ronald Reagan issued executive privilege memoranda to heads of the executive to comply with Congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations of the executive branch, and added that executive privilege would be used only in the most compelling circumstances and only after careful review demonstrated that assertions of the privilege was necessary.

Now, are you invoking executive privilege here in denying us those memoranda? You have had 72 hours to think about this, General. This has been in the newspapers. You had information about it. You have had 72 hours to think about it. You knew you were going to be asked about this. I am a member of the Armed Services Committee. We have been investigating and looking into this, the courageous act of the Chairman, John Warner. And we are entitled to know whether that information is going to be available to the committees.

Attorney General ASHCROFT. Well, the confidential memoranda provided—any confidential memoranda provided to members of the executive branch—

Senator KENNEDY. This was generally circulated. This was—

Chairman HATCH. Let him answer the question.

Attorney General ASHCROFT. Is considered by the Department to be important that we maintain it, that we not provide it outside the executive branch. And let me just say that we are at war, and to talk about the—

Senator KENNEDY. So is this—do I understand—

Attorney General ASHCROFT. —powers of the President—

Senator KENNEDY. This is executive privilege that you are—and I just have a couple of final questions. My time is running out.

What is the reason, what is the justification not providing it?

Attorney General ASHCROFT. We believe that to provide this kind of information would impair the ability of advice-giving in the executive branch to be candid, forthright, thorough, and accurate at all times, and so the disclosure of such advice and the threatened disclosure that all memos would be in some way provided would impair our ability to conduct ourselves in the executive branch. And let me just, if I may, this is not something new. The Attorney—

Senator KENNEDY. All right. Okay. Well, we have your answer on this, and I will just have another minute. But in these memoranda, the memoranda claim that existing laws and international treaties

prohibiting torture do not apply with the President or other officials or acting commander-in-chief. It says the Justice Department cannot bring criminal prosecutions against officials who commit torture while acting "pursuant to an exercise of the President's constitutional power," and it claims that the President can immunize subordinates from criminal liability by issuing a Presidential directive or other writing authorizing the use of torture. And you claim that the authority to set the laws aside is inherent in the President of the United States.

In other words, the President of the United States has the responsibility. The President of the United States. We have been looking about where the President—because we know when we have these kinds of orders what happens. We get the stress test. We get the use of dogs. We get the forced nakedness that we have all seen on these. And we get the hooding. This is what directly results when you have that kind of memoranda out there. And it says that it is all because of executive authority and executive power. And it seems—how can anyone else conclude that it is the President of the United States then that has the ultimate authority and responsibility in the issuing of these orders or the failure to stop this kind of activities?

Chairman HATCH. Senator, your time is up, but if you would care to answer?

Attorney General ASHCROFT. I do care to answer because the Senator raises very serious issues, and I think they deserve an answer.

First of all, let me completely reject the notion that anything that the President has done or the Justice Department has done has directly resulted in the kinds of atrocities which were cited. That is false. It is an inappropriate conclusion. The kind of atrocities which the Senator has recited and which he has displayed in the photograph that he raised are being prosecuted by this administration. They are being investigated by this administration. They are rejected by this administration. They are not pursuant to any order, directive, or policy of this administration. They contravene the law and they are going to be rejected as having contravened the law. So the suggestion that somehow this administration is engaged in conduct that provided a basis for that activity is simply false.

Second, we are at war, and for us to begin to discuss all the legal ramifications of the war is not in our best interest, and it has never been in times of war. This is a long-understood and long-established practice. Frank Murphy, for example, who during the World War II time, in the Roosevelt administration, let me just read to you what he said about the way these things—he explained in part, refusing to give his opinion to the Senate, citing what was already long-established practices of Attorneys General, in 1939 he put it this way, and I am quoting: Well, the constitutional powers of the President in time of war—now the quote starts—"have never been specifically defined and, in fact, cannot be since their extent and limitations are largely dependent on conditions and circumstances. The right to take specific action might not exist under one state of facts, while under another it might be the absolute duty of the Executive to take such action."

I am not doing anything other than to say that there is a long-established policy reason, grounded in national security, that indicates that the development and debate of hypotheses and practice of what can and cannot be done by a President in time of war is not good government. And this isn't something that comes from this administration. It comes from another administration that faced a very serious threat, and it comes from an Attorney General whose respect for and familiarity with the law was so profoundly understood that he became a member of the United States Supreme Court. And it is with that in mind that this Justice Department seeks to preserve the capacity of the Department to serve the executive branch and to serve it well and to not respond to hypotheticals about what the powers of a President may or may not be.

I will say that this administration rejects terror—pardon me, torture. It rejects terror as well. It has operated with respect to all of the laws enacted by the Congress, all of the treaties embraced by the President and the Congress together, and the Constitution of the United States. And no direction or order has been given to violate any of those laws. And last, again, when any of those laws is violated, an investigation is pursued, and the pursuit of that investigation, where appropriate, results in the prosecution of offenses.

Chairman HATCH. Senator Cornyn, we will turn to you. It is your turn.

Senator CORNYN. Thank you, General Ashcroft. You have stated on multiple occasions here today and before, of course, that we are at war. And, indeed, it was the 107th Congress who voted 98–0 in the Senate and 420–1 in the House to authorize the use of military force. And, indeed, that is what we are doing in fighting this war on terror.

But I am very much impressed with the challenge that that presents in the minds of many Americans to understand how this war on terror comports with our historical experience with what war entailed, where we fought against—our armies fought against other uniformed armies, with all of the equipment and armament that goes along with war. And, indeed, there have been high elected officials serving here in Washington and elsewhere who have questioned whether, in fact, this is a war. But isn't it the case, General Ashcroft, that the resolution of this very Congress that authorized the use of force and the President as Commander-in–Chief, his execution of his powers under the Constitution and pursuant to that resolution, that provides the authority that is necessary for us to not only investigate but to preempt much of the terrorist activity that has made this country safe or prevented a terrorist attack since 9/11?

Attorney General ASHCROFT. Senator, this war is different, your first point. But there are similarities to previous conflicts, and the basis upon which this administration has acted to secure the United States in the war against al Qaeda is found in the precedents from previous settings.

In the Second World War, much discussion of which has taken place as we have celebrated the heroism of the greatest generation, un-uniformed saboteurs came into the United States from our

enemy and sought to—with a view to disrupting and destroying and killing Americans. They were treated as enemy combatants, and the basis for the apprehension by the executive branch of individuals as enemy combatants comes from the Supreme Court cases that followed that apprehension of unconventional, un-uniformed individuals who, against the laws of war, threatened the United States.

Senator CORNYN. Indeed, isn't it that precedent, that Supreme Court precedent that you are referring to, that provides the basis of the Government's position in the Padilla and Hamdi cases currently pending before the United States Supreme Court?

Attorney General ASHCROFT. Among the precedents cited in those cases is that case. Of course, the courts also have considered the Acts of the Congress taken in this particular situation, which you cited earlier in your remarks, providing a basis for understanding that the President needed to take action to defend the American people in this war against al Qaeda and that the authority to take such action had been granted by the U.S. Congress.

Senator CORNYN. Let me just ask you, in your opinion, what would be the consequences of a decision that prevented us from acting to preempt terrorist attacks that merely treated terrorism as some species of a crime that could not be investigated and punished until after it occurred? What would be the consequences on the national security of the United States?

Attorney General ASHCROFT. Well, I can give you one example, and I believe I can cite the Deputy Attorney General of the United States who was an active prosecutor of terrorists in New York before he became the U.S. Attorney in New York and before he became the Deputy U.S. Attorney General. In commenting on the Padilla case, he indicated that we would be incapable of restraining an individual whose expressed intent was to, in acts of war, destroy innocent people in America by detonating explosions which would destroy things like apartment houses and the like.

Of course, we know also that Padilla had also spent time studying the potentials of a dirty bomb so as to detonate a device which would disperse radioactive or other very dangerous contamination materials.

The ability to intercept and to interdict the activities of an enemy combatant, one who is a part of the enemy, has trained with the enemy, has developed a skill which could be very injurious to the public, is a longstanding ability in the United States. As I say, it was employed by President Roosevelt in the Second World War, and obviously it is a responsibility of the President in the war against al Qaeda to be willing to defend the American people and to take such steps to do so in this war as well.

Senator CORNYN. It has been said that the United States Constitution is not a suicide pact, so I assume that you believe—I trust you believe that it is within the authority under international treaties, under the—

Chairman HATCH. Senator, your time is up.

Senator CORNYN. Well, I will send you any other questions I may have in writing. Thank you.

Attorney General ASHCROFT. Thank you.

Chairman HATCH. Thank you.

Senator Biden?

Senator BIDEN. Thank you very much.

On my 6 minutes, can I yield 20 seconds to my colleague to follow up on a question?

Senator KENNEDY. General, has the President authorized you to invoke the executive privilege today on these documents?

Attorney General ASHCROFT. I am not going to reveal discussions, whether I have had them or not had them, with the President. He asked me to deal with him as a matter of confidence. I have not invoked executive privilege today. I have explained to you why I am not turning over the documents.

Senator KENNEDY. Well, what are you invoking then?

Attorney General ASHCROFT. I have not invoked anything. I have just explained to you why I am not turning over the documents as a matter of policy.

Senator BIDEN. Thank you very much, General. That means you may be in contempt of Congress then. You have got to have a reason not to answer our questions, as you know from sitting up here. There may be a rationale for executive privilege that misses the point, but, you know, you have to have a reason. You are not allowed, under our Constitution, not to answer our questions. And that ain't constitutional. But that is a different question. I don't want to get off on it because I have got to talk to you about other things. But you all better come up with a good rationale because otherwise it is contempt of Congress.

One of the things that I am a little confused about here is I don't know anybody in America who has argued we shouldn't attempt to preempt terrorist attacks. The question is: What are we allowed under our Constitution to do to preempt terrorist attacks? And that is really the issue here, not whether we should preempt or want to preempt but what we are allowed to do to preempt.

Now, one of the questions I have—and if you don't have an answer, I understand, if you could just let me know. It is so seldom we get to see you. When you were on the Committee, Janet Reno was up 12, 13 times, 22 times in her tenure. You have been up three times. We miss you, John. We would like to see you more.

But, at any rate, is there, to the best of your knowledge, a Presidential order—not a secret, a Presidential order anywhere—that immunizes interrogators of al Qaeda suspects? Is there any order that the President has issued that lets it be known that they are immunized based on the tactics they use from prosecution? Is there such an order? If you know.

Attorney General ASHCROFT. The President has issued no such order.

Senator BIDEN. Okay, good. I just wanted to get the record straight. Now, I have a couple more questions along these lines, if I may.

Is it your position that in time of war, which we are in now, that Congress has no authority to question the legal judgments of the executive branch, even if we think the administration may have violated a treaty or a law or the Constitution? If we think you violated a treaty, a law, a statute, or the Constitution, is it your position that in a time of war we, the Congress, do not have the authority to question you and get answers to those questions?

Attorney General ASHCROFT. First of all, I think that Congress has the right to ask any question it wants and to question and to—it has a responsibility, its oversight responsibility, and to debate and to criticize where it chooses to and commend where it chooses to and not say anything if it chooses to do that.

There are certain things, in the interests of the executive branch operating effectively, that I believe it is inappropriate for the Attorney General to say. Some of those relate to things that he has said, perhaps in advice he has given, and some relate to hypotheticals that he might say or might not give.

I think in terms of drawing that issue sharply, I thought Attorney General Murphy, who subsequently became the Justice of the Supreme Court, said it very clearly.

Senator BIDEN. What he said was generic. He didn't say anything specific. I know what he said. He didn't say anything specific. He was generic.

Attorney General ASHCROFT. Yes, sir, and I am trying to do the same.

Senator BIDEN. You are being very generic, that is true. I acknowledge that. You are as generic as they come. I got it. This is generic. We are trying to get specific. And, you know, you said that there has been no—you are not going to give us the memoranda that were referenced here. But let me ask you, as a lawyer, as a lawyer with an advanced degree beyond law school, I would like your legal opinion as Attorney General. If, in fact, there was a memo that said that torture might be justified and would be constitutional if applied to interrogations, if such a memo existed, is that good law? Do you believe that to be the law? You, the Attorney General of the United States, two degrees from prestigious law schools and institutions—

Attorney General ASHCROFT. I have two degrees. The third degree I get when I visit the Senate.

[Laughter.]

Attorney General ASHCROFT. So I don't have a degree beyond law school other than the ones that I—

Senator BIDEN. I thought you had a master's as well in law.

Attorney General ASHCROFT. No, I don't.

Senator BIDEN. Oh, okay.

Attorney General ASHCROFT. But I am wishing I did at this time.

[Laughter.]

Senator BIDEN. Where did you go to law school?

Attorney General ASHCROFT. It wasn't under your tutelage, but maybe—

Senator BIDEN. No, I understand.

Attorney General ASHCROFT. I know you teach.

Senator BIDEN. But do you think that torture might be justified? That is a question to you. Not memorandum. Just you, John Ashcroft, Attorney General of the United States, highest-ranking law enforcement officer in the United States of America, and lawyer. Do you believe in this time of war torture might be justified and be viewed as constitutional?

Attorney General ASHCROFT. Well, first of all, this administration has not ordered or approved it.

Senator BIDEN. I am not asking you that, John, with all due respect.

Attorney General ASHCROFT. And I am not going to—

Senator BIDEN. I just want to know your opinion.

Attorney General ASHCROFT. —issue or otherwise discuss hypotheticals. I will leave that to the academics. This has been the subject—

Senator BIDEN. Okay. Do you think this is justified? It is not hypothetical.

Attorney General ASHCROFT. That is not a hypothetical. That is a circumstance, and that is the kind of circumstance that, when it is referred to the Justice Department, we investigate. And if there is a basis for prosecution, we would prosecute. And we have investigations—

Senator BIDEN. John, you sound like you are in the State Department. Remember the old days when you were here looking for answers? Remember being on this side?

Attorney General ASHCROFT. I have a recollection of that.

Senator BIDEN. Well, my time is up, I can see.

Attorney General ASHCROFT. You know, I condemn torture. I think it—

Senator BIDEN. So it is not justified then?

Attorney General ASHCROFT. I don't think it is productive, let alone justified.

Senator BIDEN. Well, I don't either, and, by the way, there is a reason—I will conclude by saying there is a reason why we sign these treaties: to protect my son in the military. That is why we have these treaties, so when Americans are captured, they are not tortured. That is the reason, in case anybody forgets it. That is the reason.

Attorney General ASHCROFT. Well, as a person whose son is in the military now on active duty and has been in the Gulf within the last several months, I am aware of those considerations. And I care about your son. I care about—

Senator BIDEN. He is not there. He is in JAG, and he is back here. But that is the reason.

Attorney General ASHCROFT. He may not be there, but my son has been. He happens to be stateside right now for more training, but is scheduled to go back within the month.

Senator BIDEN. My son was in Pristina working for you guys, and the same thing occurred.

Attorney General ASHCROFT. I just want you to know—

Chairman HATCH. Senator, your time is up.

Senator Sessions?

Senator SESSIONS. Thank you, Attorney General Ashcroft, for your service. I believe the Department of Justice has achieved great things since September 11th. It has completely re-evaluated how you do business. You have made sure that our investigative agencies know that prevention of attacks against the United States are just as important as investigating and prosecuting them afterwards, even more important. And that was really not the psychology of the American Government before. Our agents were just taught—as a former prosecutor who worked with them so often, they were taught to investigate crimes after they occurred. And you

have broken down the wall between the CIA and FBI and done a lot of other things that have made us a lot more effective in defending this country and defending American citizens from attacks by a group of people who desire nothing more than to kill innocent people to further their twisted aims. And I want to thank you for it.

I know in this body, we know, the Ranking Member knows that he can talk and make one allegation after another after another after another, and you would like to respond to them, but you will not have time to do that, and neither do I. But I believe there is an answer to every one of those charges. And I appreciate the dedication of you and your staff, the long hours they have worked, long weeks and months and months beyond any normal work to make sure this country is safe and protected. I hope you use every legal power given you. You should do that. I believe that is your obligation—do you not?—to protect this country.

Attorney General ASHCROFT. Well, I have said over and over again that we will use all the assets at our disposal to protect the American people from terror. And I believe that is what they expect of their Government and they have a right to expect it.

Senator SESSIONS. And I understand these leaked memos, some of them apparently were in draft form. I am not sure who has seen those memos or whether they were final drafts or not on torture. But I think you are wise not to express an ultimate decision on the absolute ultimate power of a President of the United States to protect the people of this country. But I know this because I was on the Senate Armed Services Committee when we had extensive hearings on these prisons. Every memorandum, every policy directive from the Department of Defense directed that they should comply with the Geneva Conventions, comply with the laws of the United States, and, frankly, it does not enhance the safety of American soldiers and, in fact, I think could endanger them when we have Senators suggesting that we have changed Saddam Hussein's prisons to American prisons and there is no difference. So I feel strongly about that, and I thank you for your service.

I have offered legislation dealing with mass transportation, and after the attack in Spain, we have seen that our country has some gaps in our laws with regard to mass transportation. Have you had a chance to review S. 2289 that would close some of the gaps and enhance our ability to prosecute those who might conduct attacks on our mass transit system in America?

Attorney General ASHCROFT. My staff has spent some time considering these issues and seeking to close gaps in statutes that might relate to the protection of mass transportation systems. I think in particular to extend to railroads the same protection against terrorist attacks that are currently provided to mass transportation systems under the Federal law now is something that should be very actively considered. And I think while frequently railroad trains in much of the country are not perhaps mass transportation in the same way of moving people that other mass transportation systems are, they certainly are a part of our critical infrastructure that deserves our attention and protection.

Senator SESSIONS. Mr. Attorney General, I believe the PATRIOT Act, as I have read it, in essence corrected a number of basic weak-

nesses that existed in our current legal system or legal system at that time, and that we fixed a lot of those. I do not believe the PATRIOT Act represents any major expansion of Government power. It simply made sure you could utilize that power that had been approved constitutionally against drug dealers and others against terrorists. Isn't that true?

Attorney General ASHCROFT. I think that is a fair characterization of the Act. It does expand the power to take it to the area of terrorism, but it doesn't invade or raise new constitutional questions or issues. The so-called roving wiretap provisions where you could tap more than one phone of a single person, or if they threw one phone away, you could tap the next one, that has been in place since 1986 for drug traffickers. So similar other expansions had already been made available in the pursuit of other kind of criminal activity. So the Department supports the PATRIOT Act re-enactment because to forfeit that would be terrible, just like the Department supports the Railroad Carriers and Mass Transportation Act about which you asked earlier.

Senator SESSIONS. Well, I believe that the proposed changes that some have offered weaken the Act substantially. I think we should not do that. And I think we ought to take some time and go over every word of the Act, and we can do that. But in the end, I believe we should not make that change.

And I would just note about these memorandums, you know, we have had people here complain about the memorandums from their staff to them being leaked, and rightly so. And I do believe a President has a right to obtain legal advice from his Attorney General on matters and not have to have that revealed to the whole world.

Chairman HATCH. Senator, your time is up.

We will now turn to Senator Feinstein.

Senator FEINSTEIN. Thanks very much, Mr. Chairman. Welcome, Attorney General.

I am really concerned by the answers that I have heard today because we have passed laws against torture. The Uniform Code of Military Justice has laws. The Geneva Conventions have laws to which we subscribe by treaty. And it seems to me what you are doing this morning—and please correct me if I am wrong—is essentially reserving this for the executive domain and not being willing to share the public policy that results in the ratification of treaties and the passage of laws as it respects torture.

These memos clearly do exist, and if you read the newspapers, they appear to be an effort to redefine torture and narrow the prohibition against it by carving out a class of something called "exceptional interrogation." So these memos actually either reverse or substantially alter 30 years of interpretation by our body, as well as the executive, of the Geneva Conventions.

I would like to ask you this: Will you share access of these memos on a classified basis?

Attorney General ASHCROFT. It is a longstanding position of administrations going back decades that a variety of high-level memoranda and advice are presumptively protected as a function of a separation of powers, that the President has the right to get advice from his attorney without having the advice provided outside that stream of counsel. Only the President asserts privilege, which I

have not done. But I believe that is the basis for my refusal, and I think it is a valid basis.

Now, let me just say that it is not the job of the Justice Department or this administration to define torture. Torture has been defined by the Congress. It is defined in the Torture Act. And Congress was very careful in defining it. And in Section 2340 of the Torture Act, torture means an act committed by a person acting under color of law—it is narrowly defined by the Congress. You have to be doing something pursuant to a governmental authority specifically intended—that is a term of art. The Congress knows that well. When you have specific intent, it is a higher level of intent than it is in other settings—to inflict severe physical or mental pain or suffering. And the Congress goes to a sub-point to define severe mental pain or suffering in its own—this is part of the statute. "Severe mental pain or suffering means the prolonged mental harm caused by or resulting from the intentional infliction or threatened infliction of severe physical pain or suffering." And it goes on for three more paragraphs in just defining that.

Now, I just want to make clear that I don't view my job as a job of defining torture. The Congress of the United States defined torture, and it defines torture based on the way the Senate of the United States agreed to international conventions relating to torture and to the Geneva Conventions. And the reservations expressed by the Senate in ratifying or providing advice and consent in terms of those conventions was then drawn down into this statute. And this is something that is not the product of the Justice Department. This is the product of the action of the U.S. Congress.

So I want to resist the notion that the Justice Department defines torture. The Justice Department doesn't define torture. It is defined, and painstakingly defined—I don't mean any special double entendre with the word "pain" in relation to torture. But it is painstakingly defined by the U.S. Congress in this, and the definition is the same as it occurs in the treaties as it is in the statute because the statute on torture is designed to be an enforcement mechanism for the treaty. But it is something done by the Congress.

Senator FEINSTEIN. But, Mr. Attorney General, I take it then that your answer to my question is no, that you will not make it available on a classified basis?

Attorney General ASHCROFT. That is correct.

Senator FEINSTEIN. I think Article 17 and Article 31 of the Fourth Geneva Convention is rather clear. I don't think it needs definition. Article 17 says, "No physical or mental torture, nor any other form of coercion may be inflicted on prisoners of war to secure from them information of any kind whatsoever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind."

On its face, it seems to me that is crystal clear. So the only reason, in my view, for memos was to be able to find some basis to protect people who do not follow the Geneva Conventions from prosecution. You know, I really think—

Attorney General ASHCROFT. I really need to have a chance—Mr. Chairman, I hope you will allow me to answer this.

Senator FEINSTEIN. If I may have time—

Attorney General ASHCROFT. I am sorry. I didn't mean to interrupt.

Senator FEINSTEIN. You go ahead, please. I want to hear the answer.

Attorney General ASHCROFT. Well, first of all, you are making reference to the Geneva Conventions.

Senator FEINSTEIN. Correct.

Attorney General ASHCROFT. And the Geneva Conventions apply in certain circumstances and don't apply in other circumstances. Article 3 of the Geneva Conventions applies to prisoners of war.

Senator FEINSTEIN. But you have been saying we are in war all morning, Mr. Attorney General.

Attorney General ASHCROFT. I have been saying that, and I believe it. We are in a war with al Qaeda. But the only people who are accorded the protections of the Geneva Convention are, number one, according to the Convention itself, those nations that are high-contracting parties to the Convention. Al Qaeda is not a high-contracting party to the Geneva Convention. It repudiates the rules of war. It operates against civilians. It doesn't wear uniforms, and it has never sought to be a high-contracting party. The Geneva Conventions do not apply as it relates to al Qaeda, and they are not intended to apply as it relates to al Qaeda.

Now, the law against torture applies because it was intended to apply. But if you cite the Geneva Conventions, Section 3 applies to high-contracting parties, and so you don't have the—now, the President, he said we are going to follow principles—I am not sure I can quote his exact language, but he said we will follow and accord principles of respect similar to those in the Geneva Convention in dealing with al Qaeda warriors that we apprehend. But the idea that somehow the Geneva Convention covers every conflict is simply not the law.

Senator FEINSTEIN. So let me, because my time—

Attorney General ASHCROFT. And if it were intended to be the law, the Senate hasn't said so.

Chairman HATCH. Senator, your time is up.

Senator FEINSTEIN. So if I understand you correctly, you are saying in the war against terror, which is non-state, asymmetric warfare, as far as the administration is concerned, the Geneva Conventions do not apply.

Attorney General ASHCROFT. Well, I am saying that there are a variety of laws that govern whether or not—the conduct of the United States as it relates to individuals we detain in time of war. Some of those laws are—some of those relationships are governed by Geneva, but the Uniform Code of Military Justice, it is everywhere. And the torture statutes apply to a variety of circumstances.

When the Congress enacted the torture statute, it enacted a law that said it applied everywhere outside the United States. But when the Congress defined the United States, it is not simple, because when the Congress defined the United States in the torture statute, it said the United States shall include special maritime and territorial jurisdictions, which means that the United States just doesn't include our 50 States. It will sometimes include military bases. It will sometimes include consular offices. It will some-

times include the residences or embassy offices. And when the Congress of the United States makes these definitions, that is what I have to live by.

It seems a little bit of an anomaly to me that, on the one hand, there would be those who would accuse me of defining the law, and, on the other hand, individuals who would protest the fact that I had lived by the Congressional definition of the law. When I provide to the President of the United States or members of the executive branch an assessment of what the law is, I have to go and read the law. And when there are technical definitions placed in the law by the U.S. Congress, I am sworn on my oath to represent the law as to what it is, not as a person whether in my view this would be one way or another.

It is a complex arena, with the Military Extraterritorial—I cannot even pronounce it—Military Extraterritorial Jurisdiction Act, with the special maritime and territorial jurisdiction responsibilities, with the Uniform Code of Military Justice, with the various conventions, both Geneva Conventions and the antitorture conventions. And they both have these carve-outs. We haven't gotten to the technical part of defining the United States, which includes territory outside the United States for these purposes, because then the Congress has come in and said that if you look at Part 9 that defines the special maritime and territorial jurisdiction, it takes some people out. So for some people, the United States is defined by one set of limits; for other people, it is defined by another.

All I am saying is that when I render advice to the executive branch, which I seek to do, and the professionals of my Department who know this much better than I do, they have to live by those definitions. And we cannot re-create them in what would—you know, just to say it is common sense to read this provision, that means it is everywhere. Well, the Geneva Convention doesn't apply everywhere by its own terms and by the terms embraced by the Congress in ratification, and I have to reflect that in my advice. I simply do.

Chairman HATCH. Senator, your time is up.

Senator Craig?

Senator CRAIG. Thank you very much, Mr. Chairman.

John, it is great to see you again. You look healthier, not generic—healthier—and I appreciate that. We wish you could have been with us more often. After today, I can understand—

Attorney General ASHCROFT. I had intended to be with you on a continuing basis at one time in my life.

[Laughter.]

Senator CRAIG. For those who haven't been home recently—

Attorney General ASHCROFT. I lost the election.

Senator LEAHY. I thought you meant you intended to be up here to testify.

Attorney General ASHCROFT. There is a difference between being here to testify and sitting on your side.

Senator CRAIG. For those of us who have not been home most recently, if we had—and I have, and I have been on the main streets of Boise, Idaho, in the last 48 hours, there is no appearance of war. Our economy is—

Attorney General ASHCROFT. We want to keep it that way.

Senator CRAIG. Our economy is growing and thriving, and it is robust, and Idaho citizens are trafficking in their most normal ways, except for 2,000 families in Idaho at this moment whose sons and daughters and husbands or wives have just been called up out of the Reserves and the National Guard to go on special training to be deployed to Iraq in October. Two thousand young men and women out of Idaho out of a total population of 1.2 million, that is a heavy impact on Idaho. Idaho is very much at war.

Last Thursday evening, I spent time at Walter Reed with young men and women who were pinned and taped and stitched back together. They had been brought home from Iraq. They were the victims of war. They were not the victims of traffic accidents on Pennsylvania Avenue.

I know it is very difficult to walk out on the main streets of America and to even sense we are at war. But we are. I believe there was a young man or a woman in our uniform killed in Iraq in the last 24 hours. We are very much at war, and we must not forget that. And war does afford the executive branch of Government some extraordinary powers.

But, having said that, what happened at Abu Ghraib prison is not acceptable, and we know that, and that is why it is being investigated fully today. And if those who are being investigated are found guilty, I trust they will be prosecuted. And the greatest transparency of this Government will be necessary and appropriate in that process. And so thank you for being vigorous in that area.

But, John, you said something a couple of moments ago that frustrates me a bit when you said defining versus interpreting, and that is in relation to the PATRIOT Act. You and I have some disagreements there as friends, and we have disagreements on policy. I strongly believe in the PATRIOT Act, and I voted for it. And the Congress of the United States did extend powers in areas where it should exist and hadn't existed. And hopefully that will be improved.

It is also true that you have had your attorneys before us proposing change in the PATRIOT Act. I find it fascinating, therefore, that when some of us propose them, we become victims of high levels of criticism. I am proposing changes in the PATRIOT Act, known as the SAFE Act. I am a primary sponsor of that, along with some of my colleagues. And we will look at those issues. Senator Sessions just said we will look at it in great detail, and we must. You see, I trust you, but I don't know about the next Attorney General or the next Attorney General or the next Attorney General. And, therefore, we will not build law based on trust. What have you just said? You cannot redefine the law. You can only interpret it as Congress meant it, and we gave you extraordinary powers in an area—or I should say we extended them out of drugs into terrorism.

But I do believe in safeguards, and I do believe that there is an importance in asking for the right to proceed at certain times along the way, and that is all that the SAFE Act largely does. And we will pursue that with you. We will debate it thoroughly in a most collegial manner. It is important. Civil liberties in this country are a basis of our great country. And while I respect you and trust you, I don't trust Government. And I don't expect our citizens to unless

the law is in place to make Government perform in the appropriate fashion. And so that is what we are about here, and I thank you very much for your diligence and your effort to be tough and strong throughout these most difficult times for our country.

What I hope, though, in the end is that Saddam Hussein will not have taken away from us something that our Constitution in large part granted us and that we have it taken away in the name of safety and security. That is the intent of the SAFE Act. That will be the intent as we debate it and as we reauthorize the PATRIOT Act. I will vote for a reauthorized PATRIOT Act. But I will vote for it with some slight changes in its that are going to be necessary and important, now and in the future. And that is what we are about.

But I thank you for your presence here today and for your forthrightness. That is what we expect of you. You are a candid, bright, and capable person, and that is highly respected by this individual. Thank you.

Chairman HATCH. Thank you, Senator Craig.

Senator Kohl?

Senator KOHL. Mr. Attorney General, Jose Padilla was arrested on May 2nd, way back in 2002, at O'Hare and declared an enemy combatant a month later. In February of 2003, the FBI announced that al Qaeda might be seeking to attack soft targets like apartment buildings.

Then 2 weeks ago, Deputy Attorney General Comey held a press conference to fill us in on details of the Padilla case, that he has admitted to plotting to blow up apartment buildings inside the U.S. He was allegedly trained to prepare and seal an apartment building in order to obtain the highest explosive yield. So we have a man in custody that we knew had met with the highest members of al Qaeda. We believed that he was trained to blow up apartment buildings, and we had information about how he was going to do that.

I believe it would have been beneficial to share this information with the American public at that time, millions of whom live in apartment buildings. Putting the American public on notice that al Qaeda was planning this sort of attack would have added another layer of protection. Instead of relying exclusively on law enforcement, we could have had immediately millions of Americans assisting us in preventing such an attack. Why wasn't that information made public back then, Mr. Attorney General?

Attorney General ASHCROFT. The information of which you speak was shared with a variety of individuals who we felt could be helpful to us in making sure that the plots never transpired. We shared that very extensively with State and local government law enforcement officials. As you know, we have an alert list of 18,000 law enforcement agencies around the country, and that covers almost 700,000 law enforcement officials.

We also went to the apartment owners groups of individuals to talk to them about security and to make sure that they would taken whatever actions they could to be alert and to alert individuals in their various settings in their operations to make sure that we did what we could to protect the American people.

Our awarenesses of Mr. Padilla's circumstances and intentions was a progressive awareness, and I am not at this time capable of re-creating exactly when we learned each of these things. But I know that we early went into the apartment owners and operators community with information about the vulnerability that apartment buildings have, particularly those where the parking is associated with the building. But, obviously, if someone were to carry small amounts of explosives into a building one day at a time and then go on vacation, it would be a very—you could have a very serious circumstance, even absent parking associated with the building.

Senator KOHL. Mr. Attorney General, last month, FBI Director Mueller testified here. I questioned him about security at the upcoming Summer Olympic games. His answer was not entirely satisfying. He acknowledged that there were gaps in Greek security, but that it was too early to assess how well the Greek authorities were doing to fill these gaps. Can you give us some further information, some further sense of assurance?

Attorney General ASHCROFT. Well, the United States of America is not responsible for security at the Greek games. We are interested in assisting and providing assistance, but the responsibility for the security is the responsibility of the Greek nation. It is on their territory. It is in their sovereign jurisdiction.

The FBI and our Department were involved in preparations. Shortly after 9/11, you will remember we had the Winter Olympics under the jurisdiction of the Chairman of this Committee, and we spent a lot of time and energy considering security. We have sent a team of individuals that were involved in that endeavor to make sure that those involved with the games in Greece have a capacity to understand what the challenges are. We have provided input for a Europol threat assessment for the Greek games. Our Ambassador has coordinated with a working group regarding security.

We will do what we can to be of assistance. I know that there are other parts of this administration other than the Justice Department that are aggressively involved, and during the operational period of the games, the FBI will be deploying a team of personnel to Athens. But, very frankly, much of security is determined before the games begin, in the structure and the way things are set up and the way things are done.

The support that we have been involved in developing has been a matter of our volunteering to assist. The FBI has not been given any specific operational tasking in support of the Olympic games, nor has the FBI been given any specific operational mandate in the event of an incident during the games. But we are providing the help that is being requested and trying to provide input that will elevate the level of security and reduce the risk to both athletes and spectators in Athens.

Senator KOHL. In March, Chairman Hatch and I urged Justice to complete a rulemaking that would require all imported explosive materials to be marked in the same way domestic explosives are marked. This would allow investigators to determine the origin of explosives and aid them in tracking down criminals. Four years to finalize that rulemaking, it seems to me, is too long for a very straightforward issue. Now I hear the target release date of June

2004 will not be met. We are concerned that the threat of imported explosives is not being taken seriously enough, so I am going to introduce legislation next week that will require markings to be placed on all imported explosives. Can I count on your support, your Department's support, for that legislation?

Attorney General ASHCROFT. Well, let me just say that we recognize this as a serious issue. It is something I would much appreciate the opportunity to review before I made comment on it. ATF has submitted a final draft rule to the Department for review. The Department has also recently met with representatives of the explosives industry that are concerned about this and the fact that there ought to be a level playing field between both domestic and foreign manufacturers and producers of explosives.

So I thank you for your interest in this. Your prodding is appropriate. I think you are right. Four years is too long. And we will work to issue the rule, but I could understand if you want to go forward with the legislation because you have been patient, and this is an important matter which you don't want to be damaged as a result of your patience.

Chairman HATCH. Senator, your time is up.

Senator DeWine?

Senator DEWINE. Mr. Attorney General, good to have you with us today.

Attorney General ASHCROFT. Thank you.

Senator DEWINE. The FISA statute is one of the most important weapons we have in the fight against terrorism. In fact, really I am not sure that there is anything that the Justice Department does that is more important than administering the FISA statute.

Unfortunately, it appears that we are still having problems with the FISA process. On the plus side, it seems as though the Justice Department has been more aggressive in filing FISA applications with the result that last year we saw a record number of applications, over 1,700, according to your testimony. Unfortunately, however, many applications are still sitting and waiting to be processed. The staff of the independent 9/11 Commission tells us, and I quote, "The application process, nonetheless, continues to be long and slow." And that process is still subject to, and again I quote, "bottlenecks."

Similarly, Mr. Attorney General, on May 20th, at the last FBI oversight hearing held by this Committee, I asked FBI Director Mueller how well he thought the FISA statute was being utilized. Frankly, he seemed a little uncomfortable with the question, and he didn't want to go into much detail because some of the information understandably might be classified. But what he said was this—and I must tell you, Mr. Attorney General, I was very concerned with what he did say, and let me quote, and this is a direct quote. "We still have concerns. There is still frustration out there in the field in certain areas where, because we have had to prioritize, we cannot get to certain requests for FISA as fast as perhaps we might have in the past."

So you have got the independent 9/11 Commission saying that. You have got the FBI Director with his very candid comment to our Committee. Other information that I received indicates there is a bottleneck. You know, I understand that you are doing a better job,

you are putting more resources into this, but governance is priorities. And I don't know anything that is more important that you all are doing than getting these FISA applications through. And if I was somebody out in the field and I had worked up a FISA application and I thought it was the most important thing in the world and I had worked it up, and I had everything lined up, and it was sitting there and sitting in Washington and I couldn't get it through, I would be very discouraged. I think it has to have had a demoralizing effect on the people out in the field.

There is still a problem there. I mean, there is still a problem. And I guess my question is what can we do, what can you do to put more resources on this?

I just think, Mr. Attorney General, you have got a while to go on this, and I just do not think there is anything more important that you are doing, and I just think you need to put more resources on it and prioritize this.

Attorney General ASHCROFT. Let me thank you for raising this issue. It is a matter of great concern to me.

The first or second thing that happened to me after I got into office was a call from the FISA Court saying that we needed to renovate the FISA operation. We did, and that was early in the year 2001. And then when September 11th hit, the demand for FISA coverage skyrocketed. It has increased, well, the numbers really are not very helpful because we can say, by the number of petitions, by 85 percent, but some of these are very substantial multiple surveillance petitions, so that it does not really reflect the true numbers total.

I think there are a couple of things that we wanted to do, and we want to restructure the operation so that we do not have a duplicative effort—one on the FBI side and then have it done all over again when it comes to Justice and redone. And we want to be able to work promptly by avoiding those kinds of bottlenecks.

In April of this year, in response to these issues, and part of them I think you had written about or conferred with me about, as I recall.

Senator DEWINE. That is correct.

Attorney General ASHCROFT. We created a special group of attorneys to look at this out of the Office of Intelligence, Policy and Review to cut down on the costs of moving across the street, back and forth, to the FBI and moving from the field to Washington, and we are making progress. The problem is remediating. We have fewer pipeline FISAs now than before, but we are not home yet, and so we will continue to work in that respect.

I have asked, in each of the past 3 weeks, the Chairman of this task force for reports, and the reports are encouraging. I would just say this, that we are prioritizing among FISA applications—

Senator DEWINE. I understand you are.

Attorney General ASHCROFT. —so that at least the most promising of those applications are the ones that would be first attended to, but, frankly, it is not easy always to know where you are going to get the best intelligence, and it is not a situation where I am confident in saying, "Oh, well, we do not have to worry about that one. That might not be as productive as a—"

Senator DEWINE. Mr. Attorney General, my time is up, but I think that is just the point. I think you are prioritizing, and you have to, but I think it is dangerous when you have to prioritize. I think you are doing a better job, but all of the information I can get indicates that we have still got a while to go. I think you all can do a better job, and I just think that you need to put more resources on this, and I would just encourage you to put more resources on this.

I do not know that there is anything more important that you are doing in the war on terrorism, and I do not know how to say it any stronger. You have got to put more resources on this. You have got to do a better job, and I thank you, sir.

Chairman HATCH. Thank you, Senator.

Senator Feingold?

Senator FEINGOLD. Thank you, Mr. Chairman.

Mr. Attorney General, welcome. I must tell you I am deeply troubled by this administration's repeated efforts to misrepresent to the American people the true substance of the debate over the PATRIOT Act. As you are well aware, no one in the Senate is suggesting that the PATRIOT Act be repealed. Furthermore, this is not, nor has it ever been, about the wall coming down between intelligence and criminal investigators. We all enthusiastically supported that needed change.

But we do deserve to have an honest discussion about the use of the PATRIOT Act so the Congress can decide if it has been abused, if it needs to be fixed or if every word of the PATRIOT Act should be extended without change beyond the sunset date for some provisions almost 18 months from now.

It has been almost 3 years since the USA PATRIOT Act was signed into law, and still the American people do not know how some of the most controversial provisions, dealing with roving wiretaps, access to library and book-seller records and sneak-and-peek warrants are being used. Three months ago, I wrote to you and asked specifically how Section 215, dealing with library records, was being used, and I still have not been provided a satisfactory response.

In the meantime, you, the President and others in the administration have been calling on Congress to simply renew the PATRIOT Act, while allowing the deafening silence on how it is being used to grow louder every day. We, in the Congress and the American people, deserve better.

Mr. Attorney General, when can I and others in Congress expect to hear the specifics about how the PATRIOT Act is being used, either in an open forum or in a classified briefing?

Attorney General ASHCROFT. The information is provided to the Intelligence Committees and is available to members of the Congress through the Intelligence Committees. We have reported, on a regular basis, to the Intelligence Committees about the operation of the PATRIOT Act, and we are required to do so in the PATRIOT Act. Part of the safeguards of the PATRIOT Act, in addition to every activity of the FISA community basically being preauthorized by a Federal judge and the fact that we have that kind of screening by the Federal Courts in advance, we are required, twice a year, to report to the Congress and the Intelligence Committees—

Senator FEINGOLD. General, are you saying that this is not something you will be providing directly to members of this Committee?

Attorney General ASHCROFT. We do not provide those kind of classified reports directly to the Judiciary Committee. We do provide them to the Intelligence Committees. That has been the format for providing and the procedure for providing classified information to the Congress.

Senator FEINGOLD. General, I am confused. I have been provided in the past with some information that I wanted updated of this very kind, and I do not understand why I would not get an update, for example, on the number of sneak-and-peek searches and the use of that. It seems to me that, instead of broader information that should be provided at a time when we need the information to decide what to do with the Act, the scope of the information that I am going to be allowed to look at is narrowing.

Attorney General ASHCROFT. I am told that that is being assembled for you and that you will be provided with information about the implementation of the Delayed Notification Search Warrant provision of the act, which I would hope to be able to clarify is not a part of the specific antiterror parts of the act, but is simply part of the generic criminal law which was added to the act in the passage of it.

Senator FEINGOLD. Which has surely been cited repeatedly as an important tool in the fight against terrorism.

Attorney General ASHCROFT. It certainly has, but not exclusively.

Senator FEINGOLD. Mr. Chairman, I hope that we can figure out, as a Committee, how this information can be obtained, and whether classified or not, in the context of the Judiciary Committee. Otherwise I do not know how we are going to be able to evaluate with the PATRIOT Act as these sunset provisions come up.

Mr. Attorney General, I also want to make a clarification for the record. In discussing the PATRIOT Act with Senator Sessions, you stated that roving wiretap authority has been available since 1986 in the criminal law, and that is true. But the PATRIOT Act gave the FBI authority under FISA that is broader than that available under the criminal law. The SAFE Act, which I co-sponsor with Senator Craig, does not seek to eliminate roving wiretap authority, as the administration officials have repeatedly tried to tell people it does. It just seeks to put in place protections for innocent people that are already present in the criminal law.

So let me, respectfully, challenge you and your staff to engage in good-faith discussion with us about this issue, rather than continuing to assert incorrectly both what the PATRIOT Act does and also what the SAFE Act does.

General Brandon Mayfield is an innocent American citizen who was falsely implicated and detained for the May 11th terrorist bombing in Spain. But for the fact that he had access to counsel and judicial review, Mr. Mayfield might still be in jail today. If held as an enemy combatant, Mr. Mayfield would be in a military jail without the right to an attorney, and his truthful statements of innocence would be taken simply as failures of his interrogators.

In the Mayfield case, I am very trouble by what appears to have been a rush to judgment by the U.S. attorney. At least 3 weeks before the Government sought to detain Mayfield as a material wit-

ness, DOG was already aware that the Spanish police disputed the FBI's conclusion. As you are aware, in the Government's filings in the Mayfield case, one of the explicit reasons cited for detaining Mr. Mayfield as a material witness was that the FBI learned from an informant that the informant had distributed copies of the Koran throughout U.S. prisons and that this version contained an appendix called, "The Call to Jihad in the Koran: Holy Fighting for Allah's Cause."

The Material Witness Affidavit does not state that Mr. Mayfield ever read this Koran, endorsed this version of the Koran, possessed this Koran or had ever seen this Koran. Yet, after describing this apparently irrelevant reference to the Koran in the affidavit, the very next paragraph of the Material Witness Affidavit states that surveillant agents "have observed Mayfield drive to the Bilal Mosque, located at 4115 160th Avenue, Beaverton, Oregon, on several different occasions."

Mr. Mayfield appears to have been singled out for heightened scrutiny based on a number of legitimate factors, but also because of his religious beliefs. And I do have to say I appreciate, General, what you said in your statement about Nashala Hearn, who will testify this afternoon in the Constitution Subcommittee. I agree with you, that she has a right to wear a head scarf to school, but I hope you and the Department would extend the same respect for free exercise of religion to those who attend mosques or other houses of worship. I would hate to see our Nation become a place where simply exercising one's religious beliefs is a basis for investigation and criminal prosecution.

So, General, I do not know if you personally reviewed the affidavit before it was filed, but in light of what happened in the Mayfield case, what steps have you taken that will assure the millions of law-abiding Muslims in this country that their religion will not cause them to be targeted for criminal investigation or prosecution.

Chairman HATCH. Senator, your time is up, but if the General cares to answer.

Attorney General ASHCROFT. Well, very frankly, I want to thank the Senator. I think these remarks are well-taken, especially as it relates to Brandon Mayfield. Although I am very happy to discuss the SAFE Act and what I consider would be the impairment of our ability, for instance, in roving wiretaps for the SAFE Act would require, I believe, that we have an identity for a person before we could get a wiretap. And frequently these terrorists are very good at concealing their identity and disguising themselves, and there are things that perhaps need to be discussed, and you may be willing to do that.

Let me move to the Mayfield situation. That is an unfortunate situation which I regret. Any time any American is detained and we later find out that the detention was not necessary for the maintenance of public safety and that someone's liberties were offended, I think that is something to regret. There are inevitably times when people are charged and then found innocent. If you have a system, you will have circumstances like that. As a matter of fact, the pride of our system is that people are found innocent because we adjudicate these things.

I would want to assure you that, when the fingerprint came from—when we gained access to the fingerprint, we had no identifying characteristics, whether it was male, female, who it belonged to. It was only identified to a specific person after the analysis, which brought the reason for the identification and the match. So that this was not a circumstance where someone colored his or her judgment about the analysis.

I would point out, as well, something that was, frankly, shocking to me. It was that the independent fingerprint expert appointed by the Court reached the same conclusion. The fingerprint had been a photograph from a partial print, and obviously when the real print became available and additional analysis was engaged in, it was determined, and early in that process, before we actually—when we learned that the reservations of the Spanish were so substantial, we went to the Court, asked for the release of Mr. Mayfield. I understand, though, that he had already been detained, and that is a matter to regret.

In terms of what are we doing to avoid that, first of all, the Director of the FBI has convened a group to try and look and review.

And, secondly, you asked about what are we doing to assure Muslim Americans that their rights are respected. And we have a pretty significant history of that. Today's action, which I mentioned regarding Nashala, is not usual. We have investigated over 400 cases of discrimination that followed the 9/11 plots. We have been to mosques. We have helped prosecute cases. We have provided assistance in State and local investigations that have resulted in over 100 convictions, I believe, and there have been Federal cases that have involved convictions of between I would say close to 15 to 20 cases where discrimination against Muslim Americans. So that we have worked together with State and local authorities. There have been heinous acts of discrimination, including shootings and things like that, arson, and we will continue to do everything we can to signal that we believe the religious liberties of individuals of all faiths merit our respect and protection, aggressively.

And to the extent we can continue to communicate that, we will, and I would be open to suggestions about how we might do it more effectively.

Senator FEINGOLD. Let me thank you, General, and just say—because I know my time is up—that we are going to be spending the entire afternoon here in the Subcommittee on the issue of alleged concerns about freedom of exercise of religion in our country.

This kind of situation that you, of course, apologized for, raises a very serious concern about the freedom of exercise of religion on the part of many millions of Americans who could easily feel intimidated if we get this wrong, and I am deeply concerned that that not happen. But I do appreciate your answer, and I thank you, Mr. Chairman.

Chairman HATCH. Thank you, Senator.

Senator Specter?

Senator SPECTER. Thank you, Mr. Chairman.

Attorney General Ashcroft, I believe that there are many important provisions of the PATRIOT Act; for example, the provision which tore down the law between warrants under the Foreign Intelligence Surveillance Act, so that when evidence was uncovered

which was relevant on the trial of a criminal case, that there would not be that artificial barrier. There are other aspects of the PATRIOT Act where I have some concerns with respect to the issue of showing reasons for exercising the authority which is enumerated in the act.

There has been a good deal of questioning on the provisions of the act, which relate to library books, relate to records, relate to other documents. There is an analogous situation as to provisions on the detention of aliens, analogous from the point of view of exercising authority where there is probable cause or, articulated in another fashion, very good reason for doing so.

I raised a question with you back on July 25th at 2002 about the detention issue, where there had been a ruling by the immigration judge and the Board of Immigration Appeals and that you had the authority to overrule both of those boards. And at that time you responded that you had never exercised that authority.

On April 17th of last year, an issue came before you where there was a young Haitian refugee, where there had not been any showing of a problem with respect to terrorism, and you overruled both the Immigration judge and the Board of Immigration Appeals. And then the Inspector General of the Department of Justice criticized the Department for the failure to distinguish between immigration detainees who are connected to terrorism and those who do not have any reason for detention.

I would ask you to reconsider the policy so that there is an individualization of what you do. If there is an indication of terrorism, probable cause or an articulatable standard for concern, I can see that. But it seems to me that the essence of American justice to evaluate everybody on an individual basis ought to lead you to a different policy than that which you had the blanket articulation back on April 17th of last year.

Attorney General ASHCROFT. If you care for me to make remarks about that, I would be pleased to be responsive.

Senator SPECTER. Okay. I would appreciate that.

Attorney General ASHCROFT. This was known as the "Matter of D.J." It involved a group of 216 undocumented individuals from Haiti and the Dominican Republic, who arrived in Florida in October of 2002. The vessel was one that came into the waters in an unauthorized way, evaded Coast Guard attempts at interdiction, and many of the passengers attempted to flee from law-enforcement officers before they were apprehended. So here we had individuals whose intention was to come into the United States and remain here illegally.

Section 236 of the Immigration and Naturalization Act provides broad discretion to me as to whether to detain or release such aliens pending a final decision on their removal.

Now, individuals who are willing to come to the United States, and many of these people, I admire their initiative and their drive—

Senator SPECTER. Attorney General Ashcroft, I just have 10 minutes. Could you focus on the issue as to whether there is individual treatment for that behavior.

Attorney General ASHCROFT. Well, sometimes individual treatment is important. Sometimes it is important to make a statement

about groups of people that come. If we make a statement that groups of people that can come, can just merge into society and will not be detained in the United States when they come illegally, one of the communications that takes place is back to the country of origin: All you have to do is come. Even if they stop you and catch you, you will be evaluated as just fine and set loose in the country, which is what you had hoped to have happen anyhow.

And the triggering of mass migrations, which can be very disconcerting, can result from a signal that if you come to the United States, you will not be detained.

I think national security interests have to be considered when we are encountering aliens who arrive in large numbers from overseas and do so illegally, and that is the basis for my decision.

Senator SPECTER. Attorney General Ashcroft, a final question. There is only 6 minutes here. This is a matter that I wrote to you back on November 12th of 2003, and I got an answer from an assistant which was a nonanswer. I will ask that both these letters be made a part of the record.

But it involves a constituent of mine, Allegheny Technologies, Incorporated, which you and I talked about last week. And this involves the clean-up of a site which has tungsten, which is a naturally radioactive material. And my constituent had paid $5 million voluntarily and was then asked to pay another $7 million, with the prospect of an additional $5 million on an allocation made by the Department of Justice which had a conflict of interest, where the Department was representing both sides—representing the Environmental Protection Agency and the U.S. Government, which was a responsible party.

And it seems to me that it is fundamentally unfair to have the Department of Justice on both sides of the issue with a conflict of interest.

I would ask unanimous consent, Mr. Chairman, that the letters that I referred to and a memorandum, dated June 7th, from Allegheny Technologies to me, be placed in the record, which will set forth in some greater detail the underlying factors, and I would appreciate a response from the Attorney General.

Chairman HATCH. Without objection.

Attorney General ASHCROFT. Well, the case I believe to which you refer is the United States v. City of Glen Cove. I think you have characterized the case as a consent judgment was lodged with the Court to provide an opportunity for public comment. The TDY Holdings Company, which is owned by Allegheny Technologies, recently was granted the right to intervene in the case and will have the opportunity to participate directly in any Court review of the consent judgment.

And I believe their being at the table allows them to get justice in the context of the supervision of the Federal Court. And they are represented by counsel, and represented well by counsel. So, for me to go beyond that, in this forum, would be, I believe, inappropriate.

Senator SPECTER. Mr. Attorney General, they had to get leave to intervene, and there was an enormous hurdle that they had to overcome after the Department of Justice made a finding holding them for 49 percent of responsibility, only because they were a deep pocket. And where that eliminates obligations by others, in-

cluding the U.S. Government, do you not think it is fundamentally unfair to represent both sides in a controversy?

Chairman HATCH. Senator, your time is up.

Attorney General ASHCROFT. This case is before the Court at this time. For me to comment on fairness or unfairness of it would be imprudent, to say the least, in representing the United States.

Senator SPECTER. Mr. Attorney General, that is not the point.

A final comment, Mr. Chairman. This is what you did in the Department of Justice. The Court is going to consider the matter really reviewing your discretion. Apparently, they have a disagreement because they allowed Allegheny Technologies to intervene. But I am asking you a very separate question, not what is pending on litigation, but what the Department of Justice did in imposing these burdens on my constituent.

Attorney General ASHCROFT. I will be happy to review this matter.

Senator SPECTER. I would appreciate it if you would.

Chairman HATCH. Thank you.

Senator Schumer?

Senator SCHUMER. Mr. Chairman, thank you.

And, Mr. Attorney General, I know this has not been an easy day for you, and we respect your being here. But in all due respect, I have to say sometimes you are your own worst enemy, and I would like to try to interject a note of balance here.

There are times when we all get in high dudgeon. We ought to be reasonable about this. I think there are probably very few people in this room or in America who would say that torture should never ever be used, particularly if thousands of lives are at stake.

Take the hypothetical. If we knew that there was a nuclear bomb hidden in an American city, and we believed that some kind of torture, fairly severe maybe, would give us a chance of finding that bomb before it went off, my guess is most Americans and most Senators, maybe all, would say do what you have to do.

So it is easy to sit back in the armchair and say that torture can never be used, but when you are in the foxhole it is a very different deal. And I respect, I think we all respect the fact that the President is in the foxhole every day. So he can hardly be blamed for asking you or his White House counsel or the Department of Defense to figure out, when it comes to torture, what the law allows, and when the law allows it, and what there is permission to do.

The problem is not in asking the question. The problem is not with the issues being explored. The problem is there has to be very careful guidance, and it should be made public. And most people are reasonable and would understand that. If it does not, it has no legitimacy. And the penchant for secrecy, the fact that JAG lawyers had to release this, is what I think ends up making this issue far more difficult or that is what is reported in the papers that JAG lawyers might have released this, JAG lawyers, makes it more difficult.

To me, it is the same thing as what happened in the PATRIOT Act. The PATRIOT Act, as it emerged from the Congress, ended up being fairly balanced, but people wanted to scrutinize it, as they should, as they should with torture, as they should with any of these things. Whenever security and liberty are in balance, that is

just the point where the Founding Fathers wanted open and wide debate.

Well, you know, librarians all across this country thought that all of the books were being looked at, and it took a year. I wrote you letter after letter saying, "Make it public." Finally, you made it public. No libraries had—the provision, I think it was 215, as I remember, was not used, but not before large numbers of people got into a whole panic.

So secrecy is the issue here. There has to be open debate, and particularly on an issue like this one, which is a sensitive issue, which is a difficult issue, which, in our new world where everything is public, makes your job, the President's job in this difficult world, difficult, and I appreciate that difficulty. I really do. I do not agree with the ideologues on either side here—far left or far right.

So I would renew the request that you make these memoranda public. If they are not tight enough, if they allow too many loopholes, we certainly do not want torture to be used willy-nilly. We do not want, at the whim of a lieutenant, to say, "Hey, there is security at stake here. We should use it," but we also do not want the situation like I mentioned in Chicago to preclude it. But it has got to be done carefully. And if it is pubic, and if there is debate, you can be sure it will be careful. That is what the Founding Fathers in their wisdom said.

You said two different things in response to the questions of Senators Kennedy, Leahy and Feinstein. You said you could not release them because they were privileged, but I tend to doubt that because they were evidently widely distributed. It is not the President hearing from the counsel.

Then, you said they could not be released because they are classified. I tend to doubt that because you can redact whatever needs to be redacted in terms of classified. Certainly, the balancing tests would not be classified because they cannot be terribly specific.

Why can you not release these documents? We can we not have a discussion, in this brave, new post–9/11 world? And Lord knows I live with it as much as anybody, coming from the city I do and knowing people that were lost. Why can we not start doing these things publicly, openly, understanding that there are many different views and coming to a consensus or as close to a consensus that we are going to?

So I renew my plea and the plea of others. Why can you not release these memos? And let us have a debate. Maybe they are not 100 percent. They are probably not 100-percent right. Maybe they are 10 percent, maybe they are 90 percent. We do not know.

Could you again reiterate to me the specific reasons why these memos cannot be made public, and we can take the debate from there.

Attorney General ASHCROFT. I think the reason—and if I did say that I was exerting executive privilege—I do not believe I said that, and I did not intend to say I was exerting the privilege. I think only the President exerts the privilege, and I have not done so.

Senator SCHUMER. Right.

Attorney General ASHCROFT. I have stated a reason, and that is that the President has a right to receive advice from his Attorney General in confidence and so do other executive agencies of Govern-

ment. And this does not mean that there cannot be debate on such topics, it just means that the private advice that the President gets from his Attorney General does not have to be a part of the debate.

There is nothing in what I am saying here that would restrain debate either in the Congress or in the public about such issues. You have given I think a little dissertation on this, and I do not mean anything pejorative about that. It is the kind of thing you would get in law school. Some professor would toss out the deal, and set these things up, and it would be the occasion for the kind of give-and-take in a debate which might well be appropriate.

And I think I commend that kind of debate except when the persons involved in the actual conduct of a war signal the parties to the war the entirety of the strategy and understanding of the way the war may be conducted. There are times when that is not in the best interests.

And if I may just say this. I know this, that our armed forces train our own people to resist interrogation techniques. As soon as we know what the interrogation techniques are, we go to our own armed forces, and we say this is the way you resist these interrogation techniques.

Now, for us to advertise by way of a variety of means, whether it includes one kind of disclosure or not, exactly the way in which we do things may not be the right way to conduct policy at the time of war. Senator Biden talked about the fact that there may be things that we would do in order to protect and secure the interests of our own citizens who are a part of these—our responsibility of war. That strikes home at my house.

Senator SCHUMER. But, sir, you are saying there is no—

Chairman HATCH. Senator, your time is up.

Senator SCHUMER. Well, I just want to make this one point.

Chairman HATCH. All right.

Senator SCHUMER. And maybe I do not understand it fully. You are saying that you are not asserting privilege, but then you are saying, when I speak to the President directly, I want to do that privately. So you are sort of asserting privilege.

Attorney General ASHCROFT. I am asserting the need for the Executive Branch to be able to receive confidential advice regarding the state of the law as a function of the doctrine of separation of powers.

Senator SCHUMER. But these memos were more pol—they had an effect on policy and what happened not just they were not just your private advice in a discussion with the President one evening. They are far more authoritative than that. Thousands rely on it. And I would be happy to—

Attorney General ASHCROFT. I am not going to comment on the documents that you allege provided the basis for a news story. I am simply not going to do that.

Chairman HATCH. Senator Kyl?

Senator KYL. Thank you very much, Mr. Chairman.

Welcome back, Mr. Attorney General. I appreciated very much not only your oral testimony, but reviewing your written statement as well. I regret that I was not here for all of the exchange that you had with colleagues. I do not want to dwell on that either, just

to maybe make one quick point, and then get back to something I think that is very important.

Most of us here are lawyers, and we understand the importance of getting good, confidential advice from staff, especially legal advice, and it is frequently conflicting. And if it is subject to being misunderstood, that is to say that maybe one piece of it gets out into the public and is then assumed or portrayed as the totality of advice or your conclusion or the decision that the President made, then lots of misinterpretations can result.

And so it does seem to me that the question here is not what a particular memo may or may not have said, and I conclude that you are not in a position to confirm or deny that that is the whole story, but rather what the President's policy was, what the administration's policy is. And my understanding, from the very first response to Senator Leahy, was that the President's decisions and directives are in accord with the law and in accord with the Constitution. I mean, for me, that is the ultimate answer here. Am I incorrect in that conclusion?

Attorney General ASHCROFT. Well, the President has ordered the Department of Defense to treat al Qaeda and Taliban detainees humanely and, to the extent consistent with military necessity and in a manner consistent with the principles of the Geneva Conventions, in spite of the fact that they are not parties to Geneva, because we respect those principles.

Obviously, in terms of the Iraq conflict, where Iraq is a high-contracting party to the Geneva Conventions, the United States is bound by those Conventions, both Article 3 relating to prisoners of war, and Article 4 relating to civilian population. And that is the basis for my indicating the President has issued no order or directive directing conduct that would violate the torture statute or any of these other laws which guide our behavior—should guide our behavior, and do guide and have guided our behavior.

Senator KYL. And I thank you for that.

And then the second point you made, since Fort Huachuca, in Arizona, is a place where a lot of our military intelligence work is done, where people are trained to interrogate prisoners and so on, and a lot of the ideas about how to train our soldiers in resisting interrogation techniques is analyzed, I think it is worth mentioning that to provide a blueprint to potential enemies as to precisely how we might go about interrogating them is to give them exactly the information they need to know in determining how to resist it.

There are a lot of stories, and stories in the sense of factual information that has come out of this war on terror relative to professional training that al Qaeda terrorists have gotten on how to resist interrogation techniques. Somebody is training them very well. Some of them are very, very good at it, and I take your point that it is not useful to give anybody a blueprint as to how we might go about interrogating them fully within American law and the Geneva Conventions.

Can I change the subject, though, and ask you just to comment on something that you wanted to talk about here, I think is critical. You are perhaps aware that we have introduced a bipartisan bill to reinstate all of the provisions of the PATRIOT Act, that is to say, to eliminate the sunset provisions, on the theory that the ter-

rorists are not going to be sunsetting any time soon and that we need to continue to pursue them in the same way that we pursue other kinds of criminals in our society.

You detailed, in your written statement, a wonderful list of examples of cases that the PATRIOT Act has been useful for and some statistical information about that. I just wanted to conclude by asking you, for the American people, to succinctly state why it is important for us to retain these provisions of the law that we have used temporarily so far, but are permanent in the law with respect to bank robbers, and kidnappers, and other kinds of criminals, why it is important to keep these provisions of the law in the PATRIOT Act, the act that is now being very useful in going after terrorists.

Attorney General ASHCROFT. It is important because terrorists are sophisticated users of technology—the roving wiretap provision, which really does not mean you can rove around and tap wires. It means you can follow a person from the use of one phone to the use of another phone. If a guy gets on his car phone, and then his home phone, and then his vacation house phone, and his office phone, you do not have to go back to court each time to get a separate order.

Terrorists have understood that switching phones is a way to avoid detection and avoid surveillance. The drug community understood this in the 1980's and began, and the Congress recognized that and gave authority to follow them. We need that same kind of robust authority to curtail terrorism that we have to curtail the drug traffic.

Similarly, we need the ability to get business records that would tell us where terrorists are. Now, we have had 300-plus administrative subpoena authorities for Federal agencies to be able to ask businesses about their business records.

Shortly after 9/11, we needed to try and find out the whereabouts of an individual. We went into a hotel to ask if such a person was there. They said, "We need a subpoena before we can release that. It is a matter of corporate policy." Well, going to get a grand jury subpoena is a bigger deal than we have had the administrative subpoena capacity we have in areas like health care fraud that could provide quick information about the whereabouts of a terrorist.

Those are the kinds of things that make it necessary for us to have a robust authority, within the framework of the Constitution, as a matter of fact, within the limits that have already been reached by other enforcement techniques for other crimes. And for us to walk away from those is for us to let down our guard against an enemy which is not getting less sophisticated, but is getting more sophisticated.

Senator KYL. Thank you, Mr. Attorney General. I appreciate your dedication to this effort and that of all of the people in the Department that work with you, and it is good to see you back in great health.

Chairman HATCH. Thank you, Senator.

Senator Durbin?

Senator DURBIN. Thank you very much, Mr. Chairman.

Mr. Attorney General, thank you for being here.

I do not believe what we have seen today is a routine Senate Judiciary Committee hearing. I think a lot of people are following this hearing around the world, and they are asking hard questions of us and our Government, particularly after Abu Ghraib.

And I think the questions that are being asked is whether or not something has changed in America, whether some of our time-honored commitments have become a casualty of the war against terrorism. The President, and virtually every leader in Congress, has assured them that it does not, that we still stand by the same values and principles that we always have.

But today, Mr. Attorney General, you quote former Justice Murphy, and tell us "a Nation at war is bound by different rules, rules that limit disclosure, rules that expand the powers of the Government and rules that change time-honored standards."

Notwithstanding the wisdom of Justice Murphy, I think the Supreme Court, in *Ex Parte Milligan*, should be our guide in commenting on the suspension of habeas corpus by President Abraham Lincoln during the Civil War, and this is what the Court said:

"The Constitution of the United States is a law for rulers and people equally in war and in peace, and covers, with the shield of its protection, all classes of men at all times under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of Government. Such a doctrine leads directly to anarchy or despotism."

Mr. Attorney General, you have said you will not disclose these memos, and I will get to that point in a moment, but I can tell you, frankly, contents of the memos have already been disclosed for the world to see. And the contents of the memos call into question your statement that it is not your job or the job of this administration to define torture.

Here is a memo by your Assistant Attorney General, Jay Bybee, quoted in this morning's paper, which defines torture as "must be equivalent in intensity to the pain accompanying serious physical injury such as organ failure, impairment of bodily function or even death."

Another memo, which you will not disclose, but which has been leaked and is quoted this morning, talks about seven techniques that the Courts have considered torture. And the memo goes on to say, "While we cannot say with certainty that the acts falling short of these seven would not constitute torture, we believe that interrogation techniques would have to be similar to these in their extreme nature and in the type of harm caused to violate law."

Mr. Attorney General, if that is not a definition of torture coming straight out of your Department by the people who answer to you, what is it?

And here is the problem we have. You have said that you are not claiming executive privilege. That is for the President to claim. But the law is very clear. You have two options when you say, no, to this Committee. Either the executive claims privilege and refuses to disclose or you cite a statutory provision, whereby Congress has limited its constitutional right to information.

So which is it, Mr. Attorney General, is it executive privilege or which statute are you claiming is going to shield you from making this disclosure of these memos at this point?

Attorney General ASHCROFT. Thank you for your remarks.

First of all, let me agree with you as it relates to the value of the Constitution, both at war and at peace. I could not agree more heartily with you that the Constitution is controlling, and I would never suggest that we absent ourselves from the consideration of, and adherence to, and complete compliance with the Constitution of the United States. And if there is any way in which I have suggested in my remarks today that we would not do that, I want to take this opportunity to make it very clear that the Constitution of the United States is controlling in every circumstance and is never to be disregarded. There is flatly no doubt.

Senator DURBIN. I respect that. But under which standard are you denying this Committee the memos, either executive privilege or a specific statutory authority created by Congress, exempting your constitutional responsibility to disclose? Under which are you refusing to disclose these memos?

Attorney General ASHCROFT. I am refusing to disclose these memos because I believe it is essential to the operation of the Executive Branch that the President have the opportunity to get information from his Attorney General that is confidential and that the responsibility to do that is a function of the Executive Branch and a necessity that is protected by the doctrine of the separation of powers in the Constitution.

Senator DURBIN. Mr. Attorney General—

Attorney General ASHCROFT. And for that reason, and that is the reason for which I have not delivered to the Congress or the members of the Senate these memos—any memos.

Senator DURBIN. Mr. Attorney General, with all due respect, your personal belief is not a law, and you are not citing a law, and you are not claiming executive privilege. And, frankly, that is what Contempt of Congress is all about. You have to give us a specific legal authority which gives you the right to say, no, or the President has to claim privilege, and you have done neither.

I think this Committee has a responsibility to move forward on this.

Chairman HATCH. Are these memos classified?

Senator LEAHY. Is this a side-bar conference on something the Attorney General has so authoritatively stated his position on?

Attorney General ASHCROFT. This is me getting advice which will remain confidential.

Chairman HATCH. That is great.

Senator LEAHY. I know, but the Attorney General has been speaking about these memos so authoritatively, that you ought to at least be able to say whether they are classified or not.

Attorney General ASHCROFT. I have answered your questions. The Committee has not made a decision to ask for these memos.

Senator DURBIN. No, but the Chairman asked you a specific question. Are these memos classified?

Attorney General ASHCROFT. Some of these memos may be classified in some ways for some purposes. I do not know, I do not—

Senator DURBIN. Mr. Attorney General, with all due respect, that is a complete evasion. What you have done is refuse to cite a statutory basis for disclosing these memos, refused to claim executive privilege, and now suggest that some parts of these may be classified.

Mr. Chairman, I hope we take this up very seriously because I think it gets to the heart of our relationship. The Attorney General is an occasional guest here, and we are glad to have him. But I think to come here and basically tell us that we cannot see documents from your Department on the basis of what you have said this morning is not fair and not consistent with our Constitution.

Mr. Chairman, since you used a bit of my time, I ask one last question.

Chairman HATCH. I would be glad to give you one.

Senator DURBIN. I would like to go to the SAFE Act for a moment. And I listened carefully, as you were discussing the SAFE Act with Senator Larry Craig, who is a cosponsor, and we discussed the PATRIOT Act. You discussed it with Senator Feingold.

Attorney General ASHCROFT. I did not discuss anything with Senator Craig. It is the one Senator with whom I made no response. He consumed his entire time, and they went to the next questioner. So you may have listened carefully, but if you heard me talking, you heard something that did not happen.

Senator DURBIN. Let me acknowledge what the Senator said. The Senator said that we were acknowledging what Senator Sessions had said earlier, we are going to go through the PATRIOT Act line-by-line, and then your conversation with Senator Feingold abut the roving wiretaps.

Do I take it from what you have said that you are open to a discussion of the PATRIOT Act and whether there are provisions which should be revisited and changed?

Attorney General ASHCROFT. I am prepared to give reasons for the administration's position on the PATRIOT Act in the context of a discussion, and I expect the United States Senate to be involved in robust discussions about all of the kinds of things it undertakes. I cannot imagine that the United States Senate would not be interested in a robust discussion of those kinds of issues.

Senator DURBIN. Well, you served on this Committee, and in the Senate, and understand as I do that the only perfect laws written were the Ten Commandments, and occasionally the others need amendment.

I would ask you if you believe those of us who are questioning some of the provisions of the PATRIOT Act, do you believe that we are playing politics with national security?

Attorney General ASHCROFT. I have never asserted that, and I have no reason to believe it. I have not even considered it. I simply have my own beliefs about the act, and I am a little bit stunned to hear a question about politics and the act.

Senator DURBIN. Well, let me say that when we introduced the SAFE Act, and I have been on Capitol Hill for over 20 years, it is the first time I could ever remember the administration said they would veto it, as it was introduced, without a Committee hearing, without amendment, without even presenting the bill to the White House. And you have charged that the SAFE Act would unilater-

ally disarm America's defenses, risk American lives and eliminate some of the PATRIOT Act's most critical new tools.

So, for me, to ask the question of you as to whether or not you believe Senator Craig, myself, Senator Sununu, Senator Kerry and others, are in some way playing politics with national security, I do not think is an unreasonable inquiry.

Attorney General ASHCROFT. I simply expressed my position that I believe that it would be to place the United States in serious jeopardy, to forfeit a number of the protections that are included in the PATRIOT Act. I stand by that statement. I believe it would be a very unwise course to chart, to retreat from the authorities which have made possible the interruption and displacement of terrorist activities and individuals involved in them in the United States.

Senator DURBIN. Thank you, Mr. Attorney General.

Thank you, Mr. Chairman.

Chairman HATCH. Senator Leahy has a question he would like to ask.

Senator LEAHY. Mr. Chairman, it is so extremely rare we get the Attorney General up here, I wish we actually had time to follow up on the questions.

Chairman HATCH. We will keep the record open, and we will allow until Friday, at 5 o'clock, written questions to be submitted.

Senator LEAHY. And do we have a time for response? Because we still have questions out, and it took about 15 months the last time to get some answers, and we still have things out there that seem to have disappeared in the Justice Department. How long would you set for the time for the response to the questions, Mr. Chairman?

Chairman HATCH. General, how much time do you think you might need.

Attorney General ASHCROFT. Well, that depends.

Chairman HATCH. You do not know what the questions are.

Attorney General ASHCROFT. Mr. Chairman, it depends because the responsibility depends upon how many questions are asked. We have answered about, in the last 15 months, over 800 questions, and they average three parts each. That is about close to 2,500 questions from this Committee. I know that we have answered about 80 letters from Senator Leahy, and we work hard to get, in addition to the questions that are proposed, the letters that are sent.

We have had about 2,500 letters that we have answered so far in this. I believe we are in the 108th now Congress of the United States, and so we will do our best to answer with expedition, but it depends on how many questions are asked in terms of how much resource and capacity we have to answer them.

Chairman HATCH. I cannot differ with that. Let me just say that assuming that there are a reasonable number of questions from the Committee, and I suspect most of them will come from the Democrat's side, we would like you to have your answers back within a couple of weeks. Now, if you need more time—

Attorney General ASHCROFT. Why do we not say this, that if you would let us have until the end of June, and if we need more time, we will come and explain to you why we need more time.

Chairman HATCH. I think that is fair because I suspect you are going to get a lot of questions, and we will give you enough time.

Senator LEAHY. Mr. Chairman, there would probably be a lot less questions, and a lot less letters if these were more accountability and cooperation. I know that an awful lot of letters, both mine and—

Attorney General ASHCROFT. You are not the champion. There are Republicans who ask more than you.

Senator LEAHY. —members of the Republican side who do not get responses or, if they do, it is after 8 months, a year or sometimes longer. There would probably be a lot less, Mr. Attorney General, if you actually appeared before this Committee more often, and we could actually ask the questions.

I wanted to compliment you not on not answering Senator Durbin's question, which you did not answer, but on answering Senator Biden's when you said there was no presidential order immunizing torture. I appreciate your straightforward answer to that question, and your follow-up with an answer to Senator Kyl.

However, I would like the same kind of straightforward answer to my own "yes or no" question which I asked you earlier. Has there been any order or directive from the President with respect to interrogation of detainees, prisoners or combatants?

I should think you could answer either yes or no on that.

Attorney General ASHCROFT. You know, the President—as a matter of fact, I have it here—the President ordered the Department of Defense to treat al Qaeda and Taliban detainees humanely and to the extent consistent with military necessity in a manner consistent with the principles of the Geneva Conventions.

Senator LEAHY. I appreciate that.

Attorney General ASHCROFT. That means the answer to your question at least is yes to that extent. I do not know if—

Senator LEAHY. Has there been any other order or directive from the President with respect to interrogation of detainees, prisoners or combatants?

Attorney General ASHCROFT. I am unable to tell you more than that at this time.

Senator LEAHY. I will submit that as one of the questions, so you have a good heads up as to one of the questions for the record. It is simply this: Has there been any other order or directive from the President with respect to interrogation of detainees, prisoners or combatants? It is a pretty easy question. It should have a pretty easy answer. I mean, there either is one or there is not.

Attorney General ASHCROFT. Mr. Chairman, a note just handed me indicates that I should correct something that I said to Senator Feingold, and I am sorry he is not here. They indicate that we provide, on a semi-annual basis, classified information on Section 215, relating to business records, to this Committee not just to the Intelligence Committees. I guess I was confused with the House.

[Pause.]

Attorney General ASHCROFT. I guess we are doing it to both Committees now. It had been our practice earlier.

So at least that circumstance is less sticky than we thought. Twice a year we provide classified information on Section 215, relating to business records and—

Chairman HATCH. That was my understanding.

Attorney General ASHCROFT. Well, thank you. I am sorry to have misstated that earlier, and I at least am grateful for the—I can correct one of the errors I have made this morning.

Chairman HATCH. General, I told you that I would try not to keep you beyond 12:30—2.5 hours. We have kept you three.

Let me just say this to you. Naturally, members of this Committee are interested in these very important issues, and I think you handled yourself very well here today, but I also fully understand, when you are at war, that it is important to follow the advice of people like former Justice Murphy during the Franklin Delano Roosevelt administration.

We want you to be as forthcoming as you can in response to written questions, but I do understand how difficult it is to answer some of these questions during the time of this very unique situation that we have never faced before—a war with terrorists all over the world and different groups of terrorists all over the world, in addition to Afghanistan and Iraq, and the difficulty of dealing with these hidden enemies who basically are trying to undermine the very principles of democratic Government around the world, and especially in our country, and following 9/11 and the potential of perhaps more terrorist activities and destructive activities not only around the world, but in our country.

So I have a great deal of empathy for you in this position. It is a tough job, and people can distort what you say. They can fail to understand what you say. You have had to be very careful of what you have said here today, and I fully understand why, and I think any reasonable person who looks at it understands why, too.

Having said that, our colleagues on the other side will submit, and maybe some on this side, written letters and written questions, and I hope that you will have your staff and others work with you to give us the responses as quickly as you can—hopefully, before the end of June.

And I hope that both sides will be reasonable in their questions and not play political games, but really ask questions for the purpose of helping us to defend our country, and our laws, and our Constitution, rather than to try to score cheap political points, which occasionally happens on this Committee. I know nobody knows that, but me, but I sure know it.

So we appreciate that you have give us 3 hours and 5 minutes of your time today. We know that is a long time for any Cabinet-level official to testify, and we appreciate the way you have testified and those who work with you.

I appreciate my colleagues. They are all very interesting. They are all very, very bright. This is a tough Committee, some say the toughest on Capitol Hill. I concur with that.

I will turn for the last remarks from Senator Leahy.

Senator LEAHY. Mr. Chairman, first off, I want to compliment you on what is a rare appearance of the Attorney General, for giving time for this hearing. I think you have given a lot of time. Obviously, we would like to do follow-ups, but absence of that I would ask, one, that we put in the record some of the articles referenced here today. I would ask consent for that.

Chairman HATCH. Without objection.

Senator LEAHY. And, secondly, on a parenthetical issue that has nothing to do with the Attorney General or anybody else, I would like to raise the issue of the comments that we have to take these extraordinary measures because we are at war. I was with President Bush and others at Normandy this weekend looking at the graves of the thousands of people who died there. That was a war, and that was a time when extraordinary steps, extraordinary sacrifice and extraordinary measures were taken to save this country, Europe and the rest of the world. That was a real war.

We should understand—you, and I and the rest of us here—we will face terrorist activities for as long as we live. Some will be effective, some will not be effective. Whoever is Attorney General, whoever is President will do their best to fight against terrorists.

But that is not quite the same, because what I would hope is that even though these various terrorist groups, including some that may come up years from now that we have never even suspected, may come and go, this country will survive because of its Constitution. I would hope the Constitution will live long after all of us are gone, and that is a concern, also. Terrorists will strike at us. We will defeat them. Eventually, we will, I am sure of it. But we defeat ourselves if we do not protect our Constitution and allow it to remain alive and well long after every one of us have left office, and long after we have left this earth and gone on to whatever may be our eternal reward.

Chairman HATCH. Well, thank you, Senator, and I want to thank you, General.

I was in Guantanamo just a few weeks ago, went thoroughly through all of the procedures there, and I have to say that these are difficult times. These are difficult issues, difficult questions, but I was satisfied that they were working within the bounds of the Geneva Convention, even though they are terrorists down there or a significant number of the approximately 600 of them are brutal terrorists. And because of the way they are working with them, we are getting a lot of very important and useful information, and I know that could not occur without the help of the Justice Department.

So I just want to thank you for all of the hard work you do. I know that you have had recent illness, and you have still been willing to come here today, and I want to just personally thank you for it and tell you that I think you have done a very good job.

With that, we will recess until further notice.

[Whereupon, at 1:35 p.m., the Committee was adjourned.]

[Question and answers and submissions for the record follow.]

[Additional material is being retained in the Committee files.]

QUESTIONS AND ANSWERS

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

July 1, 2004

The Honorable Patrick J. Leahy
Ranking Minority Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Senator Leahy:

This responds to your letter, dated June 15, 2004, which enclosed written questions for the record of the Committee's oversight hearing on June 8, 2004, regarding terrorism, with particular reference to the interrogation of detainees.

Questions 1 through 4: Administration Documents

In response to the requests for documents contained in your first four questions, enclosed are six Department of Justice documents that have been released publicly. They are: 1) a memorandum from the Office of Legal Counsel (OLC) to the Counsel to the President and the General Counsel of the Department of Defense on the "Application of Treaties and Laws to al Qaeda and Taliban Detainees," dated January 22, 2002; 2) a letter from the Attorney General to the President on the status of Taliban detainees, dated February 1, 2002; 3) a memorandum from OLC to the Counsel to the President on the "Status of Taliban Forces Under Article 4 of the Third Geneva Convention of 1949," dated February 7, 2002; 4) a memorandum from OLC to the General Counsel of the Department of Defense on the "Potential Legal Constraints Applicable to Interrogations of Persons Captured by U.S. Armed Forces in Afghanistan," dated February 26, 2002; 5) a letter from OLC to the Counsel to the President on the legality, under international law, of interrogation methods to be used during the war on terrorism, dated August 1, 2002; and 6) a memorandum from OLC to the Counsel to the President on "Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A," dated August 1, 2002.

While these are documents that would not usually be disclosed to anyone outside the Executive Branch, the Administration decided to release a number of documents, including these and including many from the Department of Defense, to provide a fuller picture of the issues the Administration had considered and the narrower policies the Administration actually adopted in this important area. While we appreciate your interest in the additional documents set forth in the attachment to your letter, the Executive Branch has substantial confidentiality interests in those documents. OLC opinions consist of confidential legal advice, analysis, conclusions, and recommendations for the consideration of senior Administration decision-makers. The

disclosure of OLC opinions that have not been determined to be appropriate for public dissemination would harm the deliberative processes of the Executive Branch and disrupt the attorney-client relationship between OLC and Administration officials. We are not prepared to identify these documents specifically or reveal which documents may be classified, but we can assure you that no portions of any of these documents have been classified since the Attorney General's testimony on June 8, 2004.

We also can state that included in the memoranda that have been released are all unclassified, final written opinions from the Department of Justice addressing the legality of interrogation techniques used in interrogations conducted by the United States of al Qaeda and Taliban enemy combatants. While the Department has not issued written opinions addressing interrogation practices in Iraq, it has been the consistent understanding within the Executive Branch that the conflict with Iraq is covered by the Geneva Conventions, and the Department has concurred in that understanding.

Lastly, we note that some of the documents requested originated with other agencies such as the Departments of State and Defense. Consistent with established third-agency practice, we suggest that you contact those agencies directly if you wish to obtain copies of their documents.

5. **Do you agree with the conclusions articulated in an August 1, 2002, memorandum from Jay Bybee, then AAG for the Office of Legal Counsel, to Alberto Gonzales, Counsel to the President, that: (A) for conduct to rise to the level of "torture" it must include conduct that a prudent lay person could reasonably expect would rise to the level of "death, organ failure, or the permanent impairment of a significant bodily function," and (B) section 2340A of the Federal criminal code "must be construed as not applying to interrogations undertaken pursuant to [the President's] Commander-in-Chief authority"?**

(A). In sections 2340 & 2340A of title 18, Congress defined torture as an act "specifically intended to inflict severe physical or mental pain or suffering." Because Congress chose to define torture as encompassing only those acts that inflict "severe . . . pain or suffering," Department of Justice lawyers who are asked to explain the scope of that prohibition must provide some guidance concerning what Congress meant by the words "*severe* pain" (emphasis added). In an effort to answer that question, the August 1, 2002 memorandum examines other places in the federal code where Congress used the same term – "severe pain." In at least six other provisions in the U.S. Code addressing emergency medical conditions, Congress identified "severe pain" as a typical symptom that would indicate to a prudent lay person a medical condition that, if not treated immediately, would result in – "(i) placing the health of the individual . . . in serious jeopardy, (ii) serious impairment to bodily functions, or (iii) serious dysfunction of any bodily organ or part." 42 U.S.C. § 1395w-22(d)(3)(B); *see also* 8 U.S.C. § 1369(d) (same); 42 U.S.C. § 1395x(v)(1)(K)(ii); *id.* § 1395dd(e)(1)(A); *id.* § 1396b(v)(3); *id.* § 1396u-2(b)(2)(C). In light of Congress's repeated usage of the term, the memorandum concluded that, in Congress's view, "severe pain" was the type of pain that would be associated

with such conditions. (The opinion refers to these medical consequences as a guide for what Congress meant by "severe pain"; it does not state, as your question suggests, that, to constitute torture, conduct must be likely to cause those consequences.)

Although, in other statutory provisions, Congress repeatedly associated "severe pain" as a symptom with certain physical or medical consequences, it is open to doubt whether that statutory language actually provides useful guidance concerning the prohibition in sections 2340 & 2340A. A description of medical consequences – consequences which could be accompanied by a variety of symptoms including varying degrees of pain – does not necessarily impart useful guidance to a lay person concerning the meaning of "severe pain." The Office of Legal Counsel is currently reviewing that memorandum with a view to issuing a new opinion to replace it and may well conclude that the meaning Congress intended when it defined torture to require "severe pain" is best determined from the other sources addressed in the original memorandum, including standard dictionary definitions. *See, e.g.*, *FDIC v. Meyer*, 510 U.S. 471, 476 (1994) ("In the absence of [a statutory] definition, we construe a statutory term in accordance with its ordinary or natural meaning.").

(B). The analysis in the August 1, 2002, memorandum concerning the President's authority under the Commander-in-Chief Clause, U.S. Const. art. II, sect. 2, cl. 1, was unnecessary for any specific advice provided by the Department. The Department has concluded that specific practices it has reviewed are lawful under the terms of sections 2340 & 2340A of title 18 and other applicable law without regard to any such analysis of the Commander-in-Chief Clause. The discussion is thus irrelevant to any policy adopted by the Administration. As a result, that analysis is under review by the Office of Legal Counsel and likely will not be included in a revised memorandum that will replace the August 1, 2002, memorandum. The Department believes that, as a general matter, the better course is not to speculate about difficult constitutional issues that need not be decided. For the same reason, it would be imprudent to speculate here concerning whether some extreme circumstances might exist in which a particular application of sections 2340 & 2340A would constitute an unconstitutional infringement on the President's Commander-in-Chief power. *Cf. Request of the Senate for an Opinion as to the Powers of the President 'In Emergency or State of War,'* 39 Op. A.G. 343, 347-48 (1939).

6. **Has President Bush or anyone acting under his authority issued any order, directive, instruction, finding, or other writing regarding the interrogation of individuals held in the custody of the U.S. Government or an agent of the U.S. Government? If so, please provide copies. If any portion of any document is provided with redactions, please explain the basis for such redactions. The basis for withholding any document should also be explained in detail.**

On June 22, 2004, the White House released the instruction issued by the President to the Department of Defense on February 7, 2002, concerning the treatment of al Qaeda and Taliban detainees (it does not, however, expressly address interrogation practices). The Department of Justice is not aware of any writing issued by the President that expressly addresses the issue of

interrogations practices. The President has, however, made it clear that the United States does not condone or commit torture. We should also emphasize that the President has not in any way made a determination that doctrines of necessity or self-defense would permit conduct that otherwise constitutes torture. The President has never given any order or directive that would immunize from prosecution anyone engaged in conduct that constitutes torture.

We assume that to the extent your question asks about directives issued by others under the President's authority it is limited to interrogations of enemy combatants in the conflict with al Qaeda and the Taliban or interrogations of persons detained in connection with the conflict in Iraq. As you know, numerous law enforcement agencies of the Executive Branch have likely acted under the President's authority as Chief Executive to issue numerous directives concerning interrogations or interviews of subjects in custody in the ordinary course of enforcing the criminal and immigration laws. We assume that such directives are outside the scope of your question.

Numerous individuals acting under the President's authority have undoubtedly issued orders or instructions regarding interrogations of individuals in U.S. custody, both in the conflict with al Qaeda and the Taliban and in the conflict in Iraq. Such documents, however, are not Department of Justice documents. Those documents should be sought from the appropriate departments or agencies that issued them, through the appropriate oversight committees in Congress.

As for the Department of Justice, the General Counsel of the FBI issued a memorandum on May 19, 2004, reiterating existing FBI policy with regard to the interrogation of prisoners, detainees or other persons under United States control. That memorandum reiterated established FBI requirements that FBI personnel "may not obtain statements during interrogations by the use of force, threats, physical abuse, threats of such abuse, or severe physical conditions." It also set forth reporting requirements for known or suspected abuse or mistreatment of detainees. A copy of that memorandum is enclosed. The Department is still following up to determine whether there are any other similar written directives relevant to your question. Please also see the response to Question 8 concerning the Department's legal advice to other agencies.

7. **On Friday June 11, 2004, the President was asked the following question at a press conference: "Mr. President, the Justice Department issued an advisory opinion last year declaring that as Commander-in-Chief you have the authority to order any kind of interrogation techniques that are necessary to pursue the war on terror ... [D]id you issue any such authorization at any time?" The President answered: "No, the authorization I issued ... was that anything we did would conform to U.S. law and would be consistent with international treaty obligations." Please provide a copy of the authorization to which the President was referring. Please also provide a copy of the Presidential directive you had before you and referred to at the hearing.**

At the press conference to which you refer, it seems likely that the President was referring to the February 7, 2002, instruction discussed above. At the hearing before the Committee, the Attorney General was also referring to the President's instruction of February 7, 2002. The Attorney General did not have any Presidential directive before him at the hearing. He was merely reading language from the February 7, document that had been incorporated into his notes.

8. **Were you ever asked to approve or otherwise agree to a set of rules, procedures, or guidelines authorizing the interrogation of individuals held in the custody of the U.S. Government or an agent of the U.S. Government? If so, please indicate when you were asked to do so, and whether you did, in fact, approve or agree in any way in whole or in part. In addition, please provide a copy of any such rules, procedures or guidelines, or explain your basis for refusing to do so.**

The Department of Justice has given specific advice concerning specific interrogation practices, concluding that they are lawful. The institutional interests the Executive Branch has in ensuring that agencies of the Executive Branch can receive confidential legal advice from the Department of Justice require that that specific advice not be publicly disclosed. In addition, that advice is classified. We understand that, to the extent the client department(s) have not already done so, they will arrange to provide the advice to the relevant oversight committees in a classified setting.

As noted above, included among the memoranda that the Department has already released are all unclassified, final written opinions from the Department of Justice addressing the legality of interrogation techniques used in interrogations conducted by the United States of al Qaeda and Taliban enemy combatants. While the Department has not issued written opinions addressing interrogation practices in Iraq, it has been the consistent understanding within the Executive Branch that the conflict in Iraq is covered by the Geneva Conventions, and the Department has concurred in that understanding.

9. **What were the criteria the Department used in selecting civilian contractors to assist in the reconstituting of Iraq's prison system? Please describe the vetting process to which they were subjected. To what extent were concerns about their backgrounds known to the officials who recommended them to you and to what extent were you aware of such concerns when you selected them? Why were such concerns dismissed when such individuals were recommended to you and selected by you? Please explain in detail.**

It was and is essential that we do whatever we can to help create a fair and humane criminal justice system in Iraq. To that end, the Department of Justice responded to urgent requests from the Coalition Provisional Authority ("CPA") and its predecessor for the provision of experts in the areas of prosecution, policing, and corrections. The individuals whom the Department of Justice has sent to Iraq – federal prosecutors, former state and local police

officers, and corrections experts – have volunteered to take on one of the most dangerous missions in that country. They are literally on the front lines: in the courts, in the police stations, and in the prisons.

The experts the Department provided to the CPA – including the corrections experts – have had neither responsibility for, nor control over, individuals detained by the Coalition military forces. The Department's role is strictly limited to the Iraqi criminal justice system. In particular, the corrections experts have operated heretofore under the direction of the CPA's Senior Advisor to the Iraqi Justice Ministry. Thus they have had no involvement in any of the alleged abuses at the military portions of the Abu Ghraib prison that are currently under investigation by Congress and by the United States Military.

Ensuring that these contractors are appropriately screened is a responsibility that we take very seriously. But it is important to note that we are aware of no allegation that any of the corrections contractors committed or countenanced any abuse of prisoners in Iraq. To the contrary, their central role in rebuilding the Iraqi prison system – including creating systems for reporting and correcting abuses by Iraqi prison officials – has been highly praised by the CPA's Senior Advisors to the Iraqi Justice Ministry. Nevertheless, at the Attorney General's request, the Inspector General is undertaking a review of the process used to screen and hire corrections advisors sent to Iraq.

With regard to the process for selecting the initial team of corrections experts, which deployed in May 2003, the Department of Justice consulted experts in the Bureau of Prisons (BOP) and the American Correctional Association. The Department contacted one of the individuals recommended by BOP, a former BOP Regional Director, and requested his assistance in further vetting proposed assessment team members. That individual agreed to join the first assessment team, and to help recommend other members. Candidates were required to submit SF 85Ps (Questionnaires for Public Trust Positions) and fingerprint cards. NCIC checks were conducted. No disqualifying information was found.

A second assessment team was deployed starting in September 2003. This team was selected based in part on BOP recommendations and in part on recommendations of members of the first assessment team. To be sure, some of the corrections experts sent to Iraq previously had been named in lawsuits in the United States, in their capacities as the directors of major state corrections systems. Although we do not minimize the significance of such lawsuits, they are commonplace for prison officials. And as far as we are aware, none of the corrections experts sent to Iraq was ever found by a court to have committed or countenanced abuses against prisoners in their custody.

As the need for corrections advisors grew, the Department worked with a government contractor firm to identify qualified candidates willing to serve in Iraq. Since January 2004, more than 80 additional correctional experts have served, or are now serving, in Iraq. These candidates were also required to submit SF85Ps and fingerprint cards. The preliminary results of

our internal review indicate that a few candidates were deployed before the necessary checks had been completed. (We would note, however, that we are aware of no allegations or findings of abuse of prisoners by these candidates in Iraq or elsewhere.) Appropriate remedial action is being taken to address this situation.

It goes without saying that these experts have taken on one of the most dangerous of tasks in Iraq. We are glad to be able to report to you that, so far as we have been able to determine, they have done so in a manner that has brought honor to the United States. We nevertheless recognize that we must engage in constant vigilance to ensure that this remains the case, and intend to do so throughout the duration of our mission in Iraq.

10. Is the Department of Justice currently drafting, or considering drafting, legislation to authorize the President to detain individuals as "enemy combatants? If the Department is drafting or considering drafting such legislation, will you consult with us before submitting it to Congress?

The Department is not currently drafting or considering drafting such legislation. The Department does not believe that such legislation is necessary at the present time. Although the Department is still evaluating the full import of the Supreme Court's recent decisions, the decision in *Hamdi v. Rumsfeld*, No. 03-6696, slip op. at 9-17 (June 28, 2004), confirms that additional legislation is unnecessary. In *Hamdi*, the Court held that in the Authorization for Use of Military Force, 115 Stat. 224 (Sept. 18, 2001), Congress has "clearly and unmistakably authorized detention" of enemy combatants, *id.* at 12, including American citizens, where an enemy combatant is defined as a person who is "part of or supporting forces hostile to the United States or coalition partners" and who "engaged in an armed conflict against the United States," *id.* at 9 (internal quotation marks omitted).

Should circumstances change, the Department would always be willing to work with the Committee to ensure that necessary and appropriate legislation is enacted.

11. During the Judiciary Committee hearing last week, you mentioned the limitation placed on the torture statute (18 U.S.C. § 2340-2340A) by 18 U.S.C. § 7(9). This section was added to the definition of "special maritime and territorial jurisdiction" by section 804 of the USA-PATRIOT Act – originally an Administration proposal. The Administration explained at the time, in its sectional analysis, that the provision would "extend" Federal jurisdiction to ensure that crimes committed by or against U.S. nationals abroad on U.S. Government property did not go unpunished. Unmentioned in the Administration's explanation was that this provision creates a jurisdictional gap in our ability to prosecute acts of torture.

(A) Did the Department of Justice know and intend that the proposed amendment would restrict the applicability of the anti-torture statute?

(B) Would the Department support legislation to restore the pre-PATRIOT Act reach of the torture statute, making it applicable to U.S.-owned, U.S.-run, and U.S.-controlled facilities, including aircraft, ships, and other mobile sites, located outside of the United States? If not, why not?

(C) Would the Justice Department support further extension of the torture statute, to make it applicable anywhere outside the geographical borders of United States (*i.e.*, the 50 States, the District of Columbia, and the commonwealths, territories, and possessions of the United States)? If not, why not?

(A). An inquiry with Department personnel who were involved in drafting the amendment to the provision defining the special maritime and territorial jurisdiction of the United States ("SMTJ"), 18 U.S.C. § 7, has determined that they were unaware of the potential that the amendment had for affecting the applicability of sections 2340 & 2340A. To the contrary, the provision was intended, as the Department's section-by-section analysis indicated, to ensure jurisdiction over crimes committed by or against U.S. nationals at embassies and consular offices and on military bases and other U.S. facilities overseas. In particular, the amendment was intended to address a conflict among the courts of appeals concerning the extraterritorial application of an existing paragraph in section 7 and to codify the longstanding position of the United States that the SMTJ did extend to overseas bases. *Compare United States v. Gatlin*, 216 F.3d 207 (2d Cir. 2000) (holding, contrary to position taken by the United States, that section 7(3) *does not* apply extraterritorially), *with United States v. Corey*, 232 F.3d 1166 (9th Cir. 2000) (holding that section 7(3) *does* apply extraterritorially), *and United States v. Erdos*, 474 F.2d 157 (4th Cir. 1973) (same).

(B). The Department would support legislation making sections 2340 & 2340A applicable to U.S.-owned, U.S.-run, and U.S.-controlled facilities outside the United States. The question, however, assumes that such applicability was clear before the passage of the USA PATRIOT Act. As our answer to part A indicates, that is not entirely accurate. Rather, before the PATRIOT Act, there was a circuit split concerning the scope of the SMTJ and whether or not it applied to overseas military bases. Thus, under the view of the Ninth Circuit, the SMTJ extended to military bases overseas and accordingly sections 2340 & 2340A would *not* have applied to such bases. *See Corey*, 232 F.3d at 1172. Under the view of the Second Circuit, on the other hand, the SMTJ did not extend to bases overseas, and sections 2340 & 2340A *would* have applied to such bases. *See Gatlin*, 216 F.3d at 223.

The Department will gladly work with Congress to draft appropriate legislation to achieve the objective of applying sections 2340 & 2340A to such bases overseas. Simply returning statutory language to its pre-PATRIOT Act form, however, is likely not the best means for achieving that goal.

(C). The Department would have no objection to such legislation, and would work with the Committee to ensure that it is carefully drafted to achieve its intended effect.

* * *

We hope that this information is helpful. We will supplement this response with additional information relating to other questions for the hearing record as soon as possible. Please do not hesitate to contact this office if you would like additional assistance regarding this or any other matter.

Sincerely,

William E. Moschella

William E. Moschella
Assistant Attorney General

cc: The Honorable Orrin G. Hatch
Chairman

Enclosure

U. S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

February 3, 2005

The Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

Enclosed please find responses to questions posed to Attorney General John Ashcroft, following Mr. Ashcroft's appearance before the Committee on June 8, 2004. The subject of the Committee's hearing was: "Department of Justice Oversight: Terrorism and other topics."

We hope you find this information helpful. If we may be of additional assistance, we trust that you will not hesitate to call upon us.

Sincerely,

William E. Moschella

William E. Moschella
Assistant Attorney General

Enclosure

Cc: The Honorable Patrick J. Leahy
Ranking Minority Member

Senate Judiciary Committee Hearing:
"DOJ Oversight: Terrorism and Other Topics"
June 8, 2004
Questions for the Record
Attorney General John Ashcroft

QUESTIONS FROM SENATOR LEAHY

Prisoner Abuse

1. Without commenting on any particular investigation, please explain, in general, what jurisdiction DOJ has in cases involving possible criminal acts involving the treatment of prisoners when committed overseas by non-military personnel, including CIA officials and civilian contractors.

ANSWER: The jurisdiction of the Department of Justice (DOJ) in cases of possible criminal acts involving the treatment of prisoners when committed overseas by non-military personnel, including CIA officials and civilian contractors, is determined by the interrelationship of a number of factors including: (a) the elements of the applicable substantive criminal statute, (b) whether the locus of the offense is "outside the United States" or within the expanded definition of the Special Maritime and Territorial Jurisdiction (SMTJ) of the United States provided by Title 18 U.S.C. §7(9), and (c) the employment status or nationality of the alleged offender. As explained below, each of these elements may have an impact on whether or not DOJ had jurisdiction to prosecute certain categories of individuals for particular offenses at the time they were committed.

Without reference to any specific investigation, there are a number of provisions in Title 18 U.S.C. that are potentially applicable to criminal acts against prisoners or detainees in the custody of U.S. personnel. At one end of the spectrum of potential offenses is §2441, which punishes war crimes, whether committed "inside or outside the United States..." The underlying conduct must meet the statutory definition of a "war crime" under 2441 (c), and the person committing the war crime, if not a member of the Armed Forces of the United States, must be a national of the United States as defined in § 101 of the Immigration and Nationality Act.[1] Additional provisions in Title 18 U.S.C. that are potentially relevant if committed within the SMTJ are those punishing assault (§113) and sexual abuse (§§2241-2245).

By its express terms the torture statute, §2340A, is only applicable "outside the United States." Prior to October 28, 2004, when the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 (NDAA-05) was enacted, Title 18 U.S.C. § 2340

[1]§2241 also punishes war crimes committed against nationals of the U.S. without regard to the nationality of the perpetrator.

provided that the term "United States" includes all areas under the jurisdiction of the United States including any of the places described in sections 5 ("United States") and 7 ("Special maritime and territorial jurisdiction of the U.S.") of this title.[2] Section 1089 of the NDAA-05 amended §2340(3) to read as follows: "(3) 'United States, means the several States of the United States, the District of Columbia and the commonwealths, territories and possessions of the United States." By narrowing the definition of "United States" Congress expanded the reach of the Torture Statute.

In October 2001, Congress amended §7, by the addition of paragraph 9. Section 7(9) now defines the SMTJ to include, "with respect to offenses committed by or against a national of the United States "...the premises of United States diplomatic, consular, military or other United States Government missions or entities in foreign States, including associated lands and buildings regardless of ownership." Subsection (9) was added to 18 U.S.C.§7 by Congress in the USA PATRIOT Act, Pub. Law. No.107-56 § 804, 115 Stat. 272, 377 (2001) (PATRIOT Act), in order to resolve a split in the circuits over the reach of section 7(3), which provides that the SMTJ includes "[a]ny lands reserved or acquired for the use of the United States, and under the exclusive jurisdiction thereof. See H. Rep. No 107-236, pt. 1 at 74 (2001). Prior to the PATRIOT Act, the courts of appeals were divided over whether section 7(3) applied extraterritorially to military bases and embassies. Compare *United States v. Gatlin,* 216 F.3d 207 (2d Cir.2000) (holding that section7(3) does not apply extraterritorially) *with United States v. Corey,* 232 F.3d.1166 *(* 9th Cir. 2000) (holding that it does).

Excluded from the reach of §7(9) is an offense committed by a person described in section 2 of the Military Extraterritorial Jurisdiction Act (MEJA), 18 U.S.C. §3261(a), which provides in pertinent part that:

> Whoever engages in conduct outside the United States that would constitute an offense punishable by imprisonment for more than 1 year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States---
>
> > (1) while employed by or accompanying the Armed forces outside the United States; or
> >
> > (2) while a member of the Armed Forces subject to.... the Uniform Code of Military Justice,
>
> Shall be punished as provided for that offense.[3]

---

[2] Section 5 of Title 18 provides that: "The term "United States", as used in this title in a territorial sense, includes all places and waters, continental or insular, subject to the jurisdiction of the Untied States, except the Canal Zone."

[3] Section 3261(d) also provides that no prosecution under the UCMJ may be commenced against a member of the Armed Forces under that section, unless "(1) such member ceases to be subject [to the UCMJ]; or (2) an indictment or information charges that the member committed the offense with one or more other defendants, at least one of whom is not subject to [the UCMJ]."

MEJA generally confers jurisdiction on the Department of Justice to prosecute defined categories of individuals for crimes committed overseas that would be felonies if committed within the SMTJ.

Prior to the enactment of the NDAA-05, those categories of civilians covered by MEJA were:

(a) former service members, having been released or separated from active duty, who thereafter commit an offense while in another qualifying status, such as while a civilian employed by the Armed Forces outside the United States[4];

(b) civilian employees employed by the U. S. Armed Forces outside the United States who commit an offense under the Act while present or residing outside the U. S. in connection with such employment. In section 3267, Congress defined such civilian employees to include:

1. persons employed as a civilian employee the Department of Defense;

2. persons employed as a DOD contractor, including a subcontractor at any tier; or

3. employees of a DOD contractor, including a subcontractor at any tier; and, not a national or ordinarily resident in the host nation.

Section 1088 of the NDAA-05 amended §3267(1)(A) to include within the coverage of MEJA "a civilian employee of...(II) any other Federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of the Department of Defense overseas..."

There is nothing in the statute or the legislative history of NDAA-05[5] that further defines, or explains, what Congress intended by the use of the phrase "to the extent such employment relates to supporting the mission of the Department of Defense overseas". Accordingly, whether or not a civilian employee or contractor of the CIA could now be prosecuted under MEJA would depend on the specific evidence in any case, and the extent to which that evidence satisfied this jurisdictional element of 18 U.S.C.§3267(1)(A).

MEJA also provides federal jurisdiction over certain classes of civilians "accompanying the Armed Forces outside the United States". Section 3267 (2) provides that the term "accompanying the Armed Forces outside the United States" means:

(A.) A dependent of-

(i) a member of the Armed Forces;

---

[4] It should be noted, however, that persons who retired from a regular component of the Armed Forces are still subject to the UCMJ, and would not be subject to MEJA, unless they committed the offense with one or more other defendants, at least one which is not subject to the UCMJ.

[5] P.L. 108-735, 118 Stat. 1811, October 28, 2004: H.R. 4200; Conference Report 108-767

(ii) a civilian employee of the Department of Defense ...;

(iii) a Department of Defense Contractor (including a subcontractor at any tier) or an employee of a Department of Defense Contractor (including a subcontractor at any tier;

(B) residing with such member, civilian employee, contractor, or contractor employee outside the United States; and

(C) not a national of or ordinarily resident in the host nation.

It is clear from the language of §3267 (1) that, prior to the enactment of NDAA-05, the term "employed by the Armed Forces outside the United States was not intended to cover employees or contractors of agencies other than the Department of Defense.[5] The language of §3267(2) defining the term "accompanying the Armed Forces outside the United States" was intended to confer jurisdiction over various categories of dependents. We, therefore, did not read §3267(2) as conferring jurisdiction under MEJA over civilian employees or contractors of non-DOD agencies of the U.S. Government. However, section 1088 of NDAA-05 amended §3267(1)(A) to extend jurisdiction over a contractor, or a subcontractor at any tier, of "... any other Federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of the Department of Defense overseas..."

MEJA also expressly provides in §3261(c), that it may not be construed to deprive a court-martial, military commission, provost - court or other military tribunal of concurrent jurisdiction with respect to offenders or offenses that by statute or the law of war may be tried by court-martial etc. In summary, the jurisdiction of the Department of Justice in this area is determined by the interplay of a complex statutory scheme and the availability of evidence to meet the jurisdictional elements in any particular case.

2. Is DOJ encountering any jurisdictional hurdles in any criminal investigations it may be pursuing, or attempting to pursue, in Iraq, Afghanistan, or Guantanamo Bay?

ANSWER: With respect to allegations into detainee abuse by civilian contractors, the Department has investigations into potential violations of MEJA and felonies falling within the SMTJ. One indictment has already been returned. *See Passaro.* If at any time the Department determines that there are significant jurisdictional hurdles, we will seek legislative remedies.

---

[5] However, when the Department of Defense (DOD) contracts with another U.S. Department for services to be provided to DOD overseas, we believe that the other Department is a DOD contractor for purposes of MEJA, and that the person employed is covered by MEJA as an employee of a DOD contractor or subcontractor.

3. Do you believe that the Military Extraterritorial Jurisdiction Act (MEJA) needs to be expanded to include a larger class of individuals who may accompany the military overseas, such as intelligence agents and contractors to intelligence agencies?

ANSWER: As discussed above, prior to the enactment of NDAA-05 on October 28, 2004, MEJA did not cover situations in which civilian contractors employed by U.S. Government agencies other than the Department of Defense deploy overseas in support of military operations not involving a declared war, and thereafter commit crimes otherwise prosecutable within the SMTJ.

Now, however, with the amendment of 18 U.S.C. §3261 by NDAA-05 the statute would clearly cover situations in which contract interrogators, analysts, or translators are hired by another Federal Agency at the request of the Department of Defense (DOD), but are employed totally in support of DOD's mission overseas. Therefore, MEJA need not be further amended to address this concern. As we noted in our response to question 1, whether or not MEJA, as amended, covers CIA employees and contractors (including intelligence agents) will depend on the availability of the evidence that meets the jurisdictional element. To the extent that this situation creates uncertainty in the application of the statute in situations involving deployments overseas of intelligence agents, primarily in furtherance of the mission of the intelligence agency, but also to a greater or lesser extent in support of DOD's mission, then we suggest that this concern should be addressed independently, instead of as a further amendment to MEJA .

Jose Padilla

4. At a press conference on June 1, 2004, DOJ released newly declassified intelligence information about Jose Padilla, a U.S. citizen who has been held for two years as an "enemy combatant." How does DOJ's press conference square with longstanding DOJ policy and ABA ethics rules on the release of information in criminal and civil cases? The U.S. Attorney's Manual prohibits the release by DOJ of any information that will have a substantial likelihood of materially prejudicing an adjudicative proceeding. The ABA Model Rules of Professional Conduct contain a similar prohibition for all lawyers. The Padilla case was pending before the U.S. Supreme Court at the time of the June 1 press conference, with a decision expected by the end of the month. Why did the Department release the information about Padilla when it did rather than wait a few weeks until the Court had ruled?

ANSWER: The Department released the information regarding Mr. Padilla on June 1, 2004, because the information had become available in unclassified form at that time. It was important to share the information with the American public to show that, while additional intelligence had been developed concerning Padilla since his designation as an enemy combatant, the new intelligence continued to support his detention as an enemy combatant and as a threat to Americans. The bar association rules and provisions of the USAM are designed to safeguard the fairness of civil and criminal proceedings, particularly jury proceedings. In this instance, Padilla was in custody by virtue of his designation as an enemy combatant, and there was and remains extraordinary public value in informed commentary on the circumstances under which this anti-terrorism measure is to be applied. By way of background, the Department had already received requests from members of Congress for information relating to Padilla's status and had

previously advised Chairman Hatch that unclassified responsive material could be released upon formal request. Chairman Hatch made a formal, written request on April 22 2004, and was provided with responsive material that had been declassified on June 1, 2004. Chairman Hatch released that material to the public that morning. As of June 1, 2004, briefing before the Supreme Court had been completed in Rumsfeld v. Padilla; argument had been held; and the case had been taken under submission. In our view it cannot reasonably be said that dissemination of the information about Padilla on June 1, 2004 could give rise, in the words of ABA Model Rule 3.6, to "a substantial likelihood of materially prejudicing" the Supreme Court of the United States in its resolution of the issues that had been presented to it. Accordingly, release of the information at the June 1, 2004, press conference was not inconsistent with Department policy, USAM §1-7.401(H),1-7.500, or ABA Model Rule 3.6(a).

5. On June 10, 2002, while visiting Moscow, you held a press conference at which you announced, "We have disrupted an unfolding terrorist plot to attack the United States by exploding a radioactive 'dirty bomb.'" But at the hearing on June 8, 2004, you said that Jose Padilla only "dreamed" of detonating a dirty bomb in the United States, and the declassified document that DOJ released on June 1 revealed that al Qaeda's leaders were skeptical of the "dirty bomb" scheme and tasked Padilla instead with an operation to blow up apartment buildings. In light of the new information, would you agree that your initial characterization of the case was inaccurate, and that the alarm it caused was unjustified under the circumstances?

ANSWER: The designation of Padilla as an enemy combatant by the President on June 9, 2002, and the Attorney General's press conference of June 10th, were based on the intelligence available to the United States at that time. Two years later in our battle against terrorism, we have developed substantial additional intelligence supplementing what was available in June 2002. As is evident from the summary document released at the June 1, 2004 press conference and my testimony of June 8, 2004, the new intelligence comes from interrogations of Padilla while he was detained as an enemy combatant, as well as from other al Qaeda detainees, five of whom are described in the document. That later intelligence confirms statements the Department made to the American people on June 10, 2002 – that Padilla was closely associated with al Qaeda, that on several occasions in 2001 he met with senior al Qaeda officials, that he was an al Qaeda operative, that as an al Qaeda operative he was exploring a plan to build and explode a radiological (dirty) bomb, that he trained with the enemy, including on how to wire explosive devices, that he was involved in planning future terrorist attacks against American civilians in the United States and wanted to pursue a dirty bomb mission, and that he had been sent to the United States to carry out an attack. The fact that we now have more detailed intelligence showing that there was another terrorist mission that he trained for and was asked by senior al Qaeda leaders to conduct, shows the value of our ability to detain enemy combatants to gather intelligence and prevent terrorist attacks on this Nation. Thus, we do not agree that the initial characterization of the case was inaccurate, or that it caused unjustified alarm among the American people.

At the June 1 press conference, Deputy AG Comey said, in response to a question about whether DOJ planned to present its case against Padilla to a grand jury, "We could care less about a criminal case when right before us is the need to protect American citizens and to save lives."

6. Do you agree with Deputy AG Comey that DOJ "could care less" about whether or not terrorism defendants are successfully prosecuted?

ANSWER: When the choice is between prosecution and saving lives at risk from terrorist attacks, it is more important to protect the Nation and its citizens than to prosecute anyone criminally. That was the case with Padilla in June 2002. However, the Department does not believe that making a criminal case and protecting American citizens are necessarily, or even usually, incompatible objectives. In most circumstances, it is possible to investigate and disrupt terrorist plans in ways that both protect the lives of Americans and preserve the option of criminal prosecution. Criminal prosecution of terrorists is in many circumstances an effective method of protecting American citizens.

7. Is it the Department's view that making a criminal case and protecting American citizens are incompatible objectives?

ANSWER: See answer to Question 6, above.

Coordination With DHS

I, along with millions of other Americans, watched with great interest on May 26, 2004, when you held a press conference to announce that al Qaeda intends to "hit the United States hard" in the coming months. The same day, Homeland Security Secretary Ridge said there were no plans to raise the national threat level and that the intelligence you cited was nothing new. This sort of mixed message is very troubling and very confusing, both for ordinary Americans who want to plan their summer vacations, and for the State and local first responders who are trying to protect them. I have several questions about it.

8. It has been reported that the Justice Department failed to coordinate its announcement with Homeland Security and other agencies. Is that true? Did the Justice Department tell anyone over at Homeland Security in advance of your press conference that you planned to issue a new terrorism threat warning?

ANSWER: We informed the Department of Homeland Security in advance of our press conference on May 26, 2004. As we said in our joint press release of May 28, 2004, the Departments of Homeland Security and Justice are in partnership with the CIA, the Terrorist Threat Integration Center and other agencies, who jointly review threat information each and every day. As you are aware, we have received credible intelligence in recent months and we have acted appropriately in response. We are working together, and we will take all necessary actions to protect the American people, including raising the threat level or alerting the public to be on the lookout for possible terrorist suspects, whenever warranted by the information we receive.

We have improved intelligence collection and sharing, enabling government agencies to better prevent terrorist attacks and protect the American people. Specific intelligence is the foundation for effective counter-terrorism strategies such as hardening targets, disrupting cells, elevating threat levels and alerting State and local law enforcement.

Your question seems to allude to the speculation in the media that DHS and DOJ are engaged in a "turf battle" over the duties of protecting the American people from terrorist attacks. This is simply untrue. Many officials throughout the homeland security, law enforcement, and intelligence communities, all of whom are aware of the coordination and cooperation required to keep the American people safe, share this weighty mission. The 2004 Threat Task Force is comprised of FBI, DHS, and intelligence community personnel. During this time of heightened threat to U.S. interests around the world, Americans can be certain that thousands of homeland security, law enforcement, and intelligence officials will continue to be working together day and night to ensure America's continued safety.

9. Why were you and Director Mueller issuing this warning, when Congress has clearly tasked DHS with that job?

ANSWER: The press conference on May 26 was to announce what is called a BOLO, which stands for Be On the LookOut for a specific individual who is wanted for questioning. BOLOs were issued for four individuals (Mohammed, Ghailani, Gadahna, and El-Maati), and re-issued for three others (Jdey, Shukrijumah, and Siddiqui). The BOLO was issued in order to emphasize the need for vigilance against our terrorist enemies and to boost the public's awareness of these individuals in order to enlist the public's help in apprehending them. We also want law enforcement authorities across America to renew their efforts to collect valuable intelligence.

10. According to Secretary Ridge, the intelligence you cited at your press conference did not appear to be new. He said he had been more concerned about the level of danger over the Christmas holiday period. What precipitated your decision to announce threat information on May 26?

ANSWER: Credible intelligence from multiple sources indicated that Al Qaeda continued to plan for an attack on the United States. An alert and vigilant public can reduce the risk of terrorist attack by participating in an aggressive approach to disruption -- the BOLOs issued on May 26 were in part meant to increase public awareness that the seven named individuals were perhaps already here in the United States and that we were seeking the public's assistance in locating these individuals. The Justice Department and the FBI will continue to do everything we can, including issuing such warnings, to protect the American people and to help the American people protect themselves.

During the same news conference on May 26, you displayed photographs of seven people who are being sought in connection with terrorism investigations – six of which have been shown previously.

11. What precipitating factor caused you to release, and in most instances, re-release, this information on May 26?

ANSWER: The FBI was aware of recent public statements made by al Qaeda leaders suggesting that plans to attack the United States may have been nearly complete. Upcoming significant events in the United States, including the G-8 Summit in Sea Island, Georgia, the national party nominating conventions in Boston and New York City, the November 2004 presidential election, and the Summer Olympics in Greece, were very possible targets of opportunity for al Qaeda.

The FBI believed it important to inform the public that the face of al Qaeda may be changing. While al Qaeda may attempt to infiltrate young Middle Eastern extremists into America, as they did prior to September 11, al Qaeda is a resilient and adaptable organization known for altering tactics in the face of new security measures, and intelligence sources have suggested that the ideal al Qaeda operative may now be in his late 20s or early 30s and may travel with a family to lower his profile. The FBI's intelligence also indicates that al Qaeda is seeking recruits who can portray themselves as Europeans to more easily avoid law enforcement attention. Female operatives, who have been used with respect to other terrorist targets, may also be used against the United States or U.S. interests. Al Qaeda also attracts Muslim extremists among many nationalities and ethnicities, including North Africans and South Asians, and recruits young Muslim converts of any nationality inside target countries. Despite the capture of high-level operatives, al Qaeda continues to modify its techniques and operational plans to overcome U.S. security countermeasures. Therefore, it was imperative that the public be made aware of this new information in order to assist the FBI's Joint Terrorism Task Forces in identifying potential al Qaeda operatives and plans.

12. Are these seven individuals related or connected in any way, directly or indirectly?

ANSWER: The BOLOs were based on separate information about each of the seven individuals, each of whom is separately sought in connection with possible terrorist threats in the United States.

13. With respect to each of the seven individuals discussed, when did the Federal Government first learn that each was a threat; when did it corroborate the information such that it was determined to be highly credible; and when did it decide to disclose the information to the public?

ANSWER: The seven individuals highlighted in the May 26th press conference are subjects of FBI investigations pursued in the global war on terrorism. These investigations are currently on going, and we are continuing to investigate and act upon credible information. Therefore, it would be inappropriate to comment further at this time. Intelligence indicates that al Qaeda may have been in the final stages of planning another terrorist act within the United States. The May

26th press conference was an opportunity to alert the public to the FBI's interest in these individuals and to solicit assistance in locating them.

According to Newsweek magazine, as early as October 2001, the FBI was alerted to Aafia Siddiqui and her husband's possible terror links by a series of suspicious activity reports filed by Fleet Bank. According to statements by FBI representatives, Siddiqui was in Gaithersburg, Maryland in December 2002 or January 2003. But it was not until in or about March 2003, when Khalid Shaikh Mohammed reportedly told U.S. interrogators that Siddiqui was supposed to support "other AQ operatives as they entered the United States," that you issued a lookout for Siddiqui.

14. Given the seriousness of the information that appears to have been gathered about Siddiqui even before March 2003, why did the FBI wait until March 2003 to seek public assistance in finding her?

ANSWER: The information responsive to this question is not appropriate for disclosure because it pertains to sensitive law enforcement matters.

15. What is the last known date for Siddiqui's presence in the United States?

ANSWER: The information responsive to this question is not appropriate for disclosure because it pertains to sensitive law enforcement matters.

16. Has the FBI ever interviewed Siddiqui or her husband about the suspicious activity reports? Where and when?

ANSWER: The information responsive to this question is not appropriate for disclosure because it pertains to sensitive law enforcement matters.

On May 25, 2004, the FBI announced that police in Vermont and New York will soon be able to check suspects instantly against federal terrorist watch lists under a first-of-its-kind, FBI-coordinated program. As you probably know, the Department of Homeland Security has the Law Enforcement Support Center (LESC) that works 365 days a year, 24 hours a day with State and local law enforcement in all 50 States. That Center works over the NLETS network -- the backbone communications system for local law enforcement -- to respond immediately to queries from local law enforcement officers in the field. Officers are given results from searches of not only a criminal alien and absconder database, but also the National Crime Information Center (NCIC).

17. Was DHS involved in or consulted about the development of the FBI program? Should it have been?

ANSWER: State and local law enforcement agencies in New York, and now Vermont, are participants in the Upstate New York Regional Intelligence Center (UNYRIC). The UNYRIC has an established a Memorandum of Understanding (MOU) with the Counterterrorism Watch

unit (CT Watch) in the FBI's Counterterrorism Division, pursuant to which UNYRIC submits a name check request for subjects who are stopped in circumstances consistent with possible terrorism activity. Under this agreement, CT Watch checks submitted names against the FBI's Automated Case Support (ACS) system, the TIPOFF database, the FBI Watchlist, the DHS Interagency Border Inspection System (IBIS), and the Customs Service's Treasury Enforcement Communications System (TECS) for possible terrorism watchlisting. The agreement provides for response within 20 minutes for "immediate" requests and within a reasonable amount of time for "routine" requests. The CT Watch has been performing these checks for UNYRIC since 2003 and sends facsimiles to requesters indicating search results. The UNYRIC has always serviced the State of New York and recently entered into an agreement to provide these same services to the State of Vermont.

With the creation of the Terrorist Screening Center (TSC), the watchlist subjects in these databases are now uploaded into both ACS and the Department's Violent Gang and Terrorist Organization File (VGTOF). The UNYRIC now receives hits from all of these databases by directly querying NCIC/VGTOF, and continues to send facsimile requests directly to CT Watch for subjects who are stopped in circumstances consistent with possible terrorism activity but on whom there is no NCIC/VGTOF hit. When these facsimile requests are received, they are checked against ACS (which now has includes TIPOFF, IBIS, and VGTOF records) for any references to FBI-related matters.

DHS was not involved in or consulted regarding the development of this program because the only DHS involvement in this process is the inclusion of the DHS IBIS database in the pool of information against which submitted names are checked.

18. Was the LESC or NLETS communications system considered as a platform for sending information out on the terrorist watch list?

ANSWER: The Law Enforcement Support Center (LESC) and the National Law Enforcement Telecommunications System (NLETS) were not considered as platforms for sending information because the FBI does not send terrorist watch list information to UNYRIC, it simply advises UNYRIC if there is a hit and, when this occurs, ensures that the appropriate FBI Joint Terrorism Task Force (JTTF) or case agent coordinates with the UNYRIC regarding the proper response to the incident precipitating the inquiry.

19. How is the FBI project being coordinated with the LESC and its demonstrated capabilities?

ANSWER: This FBI "project" was not coordinated with the LESC because it is simply the provision of assistance to the UNYRIC by reviewing ACS records with respect to suspicious matters.

Crime Statistics

20. In your statement you drew a causal connection between "fulfilling the President's vision to prosecute and jail criminals who illegally use guns to commit crime" and a "violent crime rate [that] is at its lowest level in 30 years." Please provide any scientific, analytical or other support that you used for the proposition that "charg[ing] over 13,000 offenders with federal firearms offenses" affected a violent crime rate which is based, primarily, on reports by victims to State and local law enforcement of violent crimes such as robberies, aggravated assault and rapes.

ANSWER: Project Safe Neighborhoods (PSN) is an initiative that focuses on the aggressive prosecution of gun crimes in both federal and state courts by encouraging strong partnerships and working relationships between federal, state, and local prosecutors. In every district, federal and state prosecutors work together to make the best decisions about whether a violent criminal should be prosecuted in federal court or state court, depending on a variety of factors including the seriousness of the offense, the offenders' criminal record, and the state court sentencing practices or guidelines. In addition to increased federal resources, PSN provided funding for the hiring and training of 540 state prosecutors who have been an essential aspect of the PSN program.

Because PSN is a comprehensive, coordinated gun violence reduction program that includes partnerships, strategic planning, training, community outreach, and accountability, increased federal gun prosecutions is but one measurement of PSN's effectiveness. In fact, the record 13,037 defendants charged under 18 U.S.C. §922 or §924 does not include those defendants deferred for state prosecution, where a mutual decision indicated that state court was the best venue. Although there are a variety of factors that impact violent crime statistics, we believe that PSN is one important factor in the formation of federal, state, local, and community partnerships that help to reduce violent gun crime. In addition, deterrence is another important strategy of PSN. The threat of detection, arrest and prosecution for gun offenders has become real and credible through community outreach, general public awareness, and awareness within the offender grapevine, and is augmented by innovative prison and offender notification programs.

21. Presumably the date you were relying on for the statement you made about gun prosecutions and violent crime came from the Preliminary Uniform Crime Report for 2003 for which only limited information is available at this time. This Preliminary Report indicates that the murder rate is actually up by 1.3% since last year. And, the final 2002 UCR states that 9,369 of the 14,054 murders reported in 2002 involved a firearm. This number is up significantly from 2001, when 8,890 of the 14,061 murders reported involved firearms. In fact, the number of murders involving firearms in 2002 is the highest in any of the preceding four comparison years (1998, 1999, 2000, and 2001). How are these facts consistent with your report to the Judiciary Committee that the federal prosecution of firearm offenses somehow has affected the violent crime rate? To what do you owe the sharp increase in the use of guns to commit murders?

ANSWER: It is important to note that population-based rates cannot be compared with raw numbers or "counts" when evaluating a possible change in the frequency of criminal conduct

over time. The question asserts that there have been increases in the rates of both violent crime (which consists of four crimes: murder, robbery, aggravated assault, and rape) and murder alone. Regarding the first item, the 1.3% increase in the number of murders, not the murder rate, is an increase of 167 murder victims. When population growth is taken into account, the overall murder rate did not change – remaining stable at 5.6 per 100,000 people. The Attorney General correctly reported that the violent crime rate is at its lowest level in 30 years – since the development of the National Crime Victimization Survey (NCVS) in 1973.

Data on murder, which account for only one percent of the four crimes, are from the FBI's Uniform Crime Reports (UCR). In 1973, the total violent crime rate was 47.7 (per 100,000), and in 2002 it was 22.8. The actual numbers for those years reflect the same decline: 3,590,500 in 1973 and 1,686,600 in 2002. Regarding murders – a small subset of violent crime – both the UCR and the NCVS show that there has been a steady decline for about the last ten (10) years. FBI five and 10-year trend analyses revealed that the 2002 murder rate was 10.5% lower than the rate in 1998 and 40.9% lower than the 1993 rate. Computed gun homicide victimization rates (per 100,000) offer a more simple way of looking at the same decrease. In 1993, the rate was 6.6, and in 2002, it was 3.8.

Finally, there has been no "sharp increase in the use of guns to commit murders." In 2001, data on weapons were available for 79% of murders, while in 2002, data on weapons covered 81% of murders. The footnote in Table 2.10 in the UCR shows that the number of victims murdered with an unknown weapon in 2002 was 869, while for 2001 it was 1,245 – a difference of 376 victims. It is improper to compare the counts for the two years due to missing and incomplete reporting by state and local law enforcement agencies. When population-based or per capita rates are calculated for each year since 1999, the gun-homicide rate is essentially flat at about 3.8 per 100,000 persons (ranging from 3.6 to 3.9).

22. You also reported that under "Project Safe Neighborhood," the Administration has "has increased federal [firearm] prosecutions by 68 percent over the last three years... the highest figure ever recorded for a single year and 23 percent higher than the previous year." Of the 13,000 offenders charged with federal firearms offenses, how many were actually <u>convicted</u> of a federal firearm offense?

ANSWER: Through Project Safe Neighborhoods (PSN), the Department continues to charge record numbers of defendants with federal firearms crimes under 18 U.S.C. §§922 and 924. In Fiscal Year (FY) 2003, the Department charged over 13,000 defendants with federal firearms offenses, and a record of 10,556 cases were filed. The 13,037 defendants filed in FY 2003 included those charged in cases that were handled by the United States Attorneys' Offices as purely firearms cases, and defendants charged with firearms offenses in any other criminal cases, such as narcotics cases, organized crime cases, violent crime in Indian Country cases, or bank robberies. In FY 2003, 8,290 defendants who were charged with federal firearms offenses were convicted of those firearms offenses. In FY 2003, 9,558 defendants who were charged with federal firearms offenses were convicted of firearms offenses or other non-firearms offenses. This is the highest conviction rate over the last several years. Of these 9,558 defendants, 8,868, or 93% were sentenced to prison. Of the defendants sentenced to prison, 6,375 or 72% percent, were sentenced to terms of at least 3 years in prison, and 4,405, or 50% were sentenced to terms of 5 or more years in prison, including 83 life sentences. Because of the Department's record-

setting firearms prosecutions, some of the most dangerous criminals are being taken off the streets and placed behind bars where they cannot re-offend.

23. You also reported that "compared to the year 2000, almost one million fewer Americans experienced the anguish of violent crime in 2002." Although you make no specific reference to your source data, the primary dataset used to evaluate crime victimization is actually the annual National Crime Victimization Survey (NCVS) issued by the Department's Bureau of Justice Statistics rather than the FBI's Uniform Crime Report since many crimes go unreported. In the most recent NCVS report available, there are a number of references to a footnote (either by a * or by a +) which reflects the "confidence level" in the data. Indeed, at numerous points in the NCVS Report, BJS makes the statement that the NCVS has "undergone sample reductions because of the escalating costs of data collection" which has resulted, in part, in a "diminished ability to detect statistically significant year to year changes in rates." Can you detail for me the data collection issues facing NCVS and how it impacts on this important dataset for crime victimization?

ANSWER: Reports from the NCVS issued by BJS indicate that estimates for 2000 and for 2002 indicate approximately 1 million fewer violent victimizations experienced by the public---from approximately 6.3 million in 2000 to 5.3 million in 2002. On a per capita basis, this translates to a rate reduction of about 17%---from a rate of 27.9 per 1,000 persons aged 12 and older to 23.1 per 1,000 persons aged 12 and older. Both the decline in the number of victimizations and in the rate of victimization pass a significance test at the 95% level which means that if we repeatedly drew national samples of the U.S. population, 95 out of 100 of those samples would show a reduction in violent crimes experienced and in the rate at which violent crime is experienced of at least twice the size of the error (confidence interval) around each year's estimate. This is generally the highest standard typically used by federal statistical agencies to assess change from sample data.

As the BJS report for 2002 indicates, "since 1995, the NCVS has undergone sample reductions because of the escalating costs of data collection. At the same time, the rate of violence has continued to decline. The combination of the two---fewer survey respondents and less crime---has resulted in a diminished ability to detect statistically significant year-to-year changes." Beginning in 2002, BJS initiated a two-year rolling average of the number of victimizations and the victimization rate so as to boost samples used in the analysis and to ensure that changes over two-year periods could be detected. This technique is often used by statisticians and by other federal statistical agencies (USDA, EPA, IRS, etc.) when, due to small samples or low base rate events, fluctuations would produce an erroneous understanding of the true trend in the data.

Perhaps the most challenging issue facing the NCVS is the sample cuts associated with the increased costs of data collection, particularly annual cost-of-living adjustments, which must be paid to the Census Bureau (Census) to cover federal pay increases and the need to respond to unfunded and under-funded congressionally-imposed data collection requirements (such as estimating the rate of crime victimization of the developmentally disabled, estimating the extent of excessive use-of-force encounters between the public and the police, producing individual-level data on all deaths in custody, etc.). Redirection of funds to these efforts has had to occur during a period of reduced funding from the Congress for statistics carried out by BJS---the BJS appropriation requested by the President for FY 2004 for statistics, for example, was reduced by

11.2% by the Congress. (The FY 2004 request by the President included a $2 million enhancement to the NCVS.)

BJS and Census have worked diligently to reduce cost through both methodological changes (such as greater use of clustering in sample selection) and new conceptual strategies to increase our revenue by marketing of survey supplements to other federal agencies (DoED, NIOSH, OVAW, OJJDP, etc.). In addition, BJS and Census have an ongoing effort to automate the survey so as to reduce the cost of data keying and rely to a larger extent on electronic survey management.

However, even with these efforts, we have found it necessary to reduce the size of the NCVS sample, with the consequence that the resulting estimates and findings have decreased precision with larger confidence intervals around national estimates of crime. This translates into greater difficulty in detecting changes over time and is the basis for our shift to a rolling two-year average victimization rate rather than an annual victimization rate for testing short-term change. To illustrate, between 1995 and the estimated sample size to be used in 2005, a one-third cut in sample has been necessary to maintain the survey within budget. The result is a doubling of the size of the confidence interval around the estimate of violent crime by 2005. In 1995, NCVS carried out 180,000 interviews with a margin of error of ±5.2% around the estimate of the violent crime rate. In 2005, assuming flat-funding, BJS will only be able to support 120,000 interviews with the public and will report the violent crime rate with a margin of error of ±11.2%.

Niaz Khan

The press has reported that more than a year before 9/11, a British Muslim named Niaz Khan contacted the FBI and told agents that he had been trained by al Qaeda to hijack airplanes, and that he had come to the U.S. to carry out an attack with other trained terrorists who were already in the U.S. The FBI questioned Khan for weeks, but then let him go. It seems to me that this was yet another unconnected dot that the Government had in its possession, but did nothing with, in the lead-up to 9/11.

24. Was there any corroboration, apart from the 9/11 attacks themselves, that what Khan told the FBI was good intelligence and should have been acted on? What did the FBI or DOJ actually do in response to Khan's claims besides let him go?

ANSWER: The information responsive to this question is not appropriate for disclosure because it pertains to sensitive law enforcement matters.

25. What if anything has DOJ done, since September 11, 2001, to ensure that intelligence information like that reportedly provided by Niaz Khan does not fall through the cracks? If this exact type of information were received today, how would it be processed internally, and who would be advised and how quickly?

ANSWER: Since 9/11, the FBI is much more aggressive in its handling of all threats, even those of questionable validity. All threats are completely run to ground, and intelligence reports

are issued to the United States Intelligence Community (USIC) as soon as possible. Internally, CTD executive management and the Director are briefed daily regarding all significant threats. The White House is made aware of all significant threats via the Threat Matrix, and the Threat Matrix is reviewed daily in joint meetings attended by executives of the NSC, FBI, CIA, DHS, and TTIC. Measures that were not commonplace before 9/11 are now available for use even in ambiguous cases such as Khan's. For example, violations of immigration law are more aggressively pursued, material witness procedures are used more often, and prosecutors are more aggressive in filing charges for the provision of false information. Follow up has also improved substantially: cases are no longer routinely closed when a subject leaves the U.S., and cooperation with U. S. intelligence services and foreign law enforcement and security services is routinely employed to investigate subjects overseas.

Nabil al-Marabh

The Associated Press reported last week that the Bush Administration had deported suspected terrorist Nabil al-Marabh back to his native Syria. Al-Marabh was at one time Number 27 on the FBI's list of Most Wanted Terrorists. He was arrested after a nationwide manhunt, and several federal prosecutors, including the Chicago U.S. Attorney, wanted to indict him. Instead, he was set free.

According to the AP article, the Justice Department's explanation for its decision to free al-Marabh was not that it lacked evidence, or that al-Marabh was not dangerous. Rather, the Department explained that it could not effectively try al-Marabh in court without giving away intelligence sources and methods. The article quotes a Department spokesman as saying, "If the government cannot prosecute terrorism charges, another option is to remove the individual from the United States via deportation. After careful review, this was determined to be the best option available under the law to protect our national security."

26. Is it true that the decision not to prosecute al-Marabh was based on a desire to protect intelligence sources?

ANSWER: Nabil al-Marabh was arrested in September 2001, and was convicted of conspiracy to commit alien smuggling in the Western District of New York. He was sentenced to prison and subjected to deportation. Prior to his being deported, but following his conviction and sentence, al-Marabh was detained as a material witness for the defense in the Koubriti case in the Eastern District of Michigan. Thus, Al-Marabh was prosecuted for a crime in the United States and was subsequently deported at least in part as a result of that conviction. Although al-Marabh remained a target of further criminal investigation, the determination was made that the best course of action was deportation rather than further criminal prosecution.

The decision not to bring additional criminal charges against Al-Marabh was based on a thorough and careful assessment of the law, the potential evidence, and the Principles of Federal Prosecution set forth in the U.S. Attorney's Manual. See U.S.A.M. § 9-27.00 et seq. The availability of some potential evidence was problematic because it came from intelligence sources, but that was only one of many factors that led to the Department's decision. The decision came after careful deliberation among the Criminal Division, the affected United States Attorney's Offices, and other Executive Branch agencies. The conclusion reached was that the

best option available under the law to protect the national security of the United States was to remove al-Marabh from the United States through deportation.

27. If you have credible intelligence information that links al-Marabh to terrorist activity, how does deporting him to a terrorism-sponsoring state do anything whatever to "protect our national security"?

ANSWER: As stated in the answer to question 26, the decision to deport al-Marabh to Syria was made after a lengthy and thorough review both within the Justice Department and among other Executive Branch agencies. During this process, we considered the potential evidence against al-Marabh, the legal options available to us, and the Department's guidelines on the prosecution of criminal cases. After this review, the conclusion was reached that the best option to protect our national security was to have al-Marabh removed from the United States through deportation proceedings, under the auspices of the Department of Homeland Security.

The decision of the country to which al-Marabh would be removed is handled within the Department of Homeland Security. It is our understanding that al-Marabh was deported to Syria because that was the only country of which he was a national. Further information may be available from the Department of Homeland Security. In any case, al-Marabh has been removed far from the United States homeland, and measures are in place to prevent his return.

9/11 Investigation

28. The Washington Post reported on June 13, 2004, that the number of FBI agents investigating the September 11, 2001 attacks has dwindled from 70 to 10. Why? How many Department of Justice employees, including Federal prosecutors, are working on the investigation full time?

ANSWER: While currently 7 FBI Special Agents are assigned to the 9/11 investigation in the narrowest sense, this does not reflect the hundreds of Agents assigned to the broader aspects of that investigation. For example, the FBI's Counterterrorism Division continues to pursue the many terrorism financing leads and the personal associations revealed through that investigation in its broader counterterrorism efforts. So, while the 9/11 investigation in its narrowest sense is now limited primarily to the trial of Zacharias Moussaoui as an alleged participant in the conspiracy that resulted in the 9/11 attacks, the FBI's greatly increased Counterterrorism and Intelligence staffs continue to investigate the 9/11 attacks in the broader context of the terrorism movement of which they are a part. Three federal prosecutors are currently working full time on the investigation, with assistance as needed by numerous other prosecutors. Those prosecutors are supported by two FBI Agents full time.

USA PATRIOT Act/FISA

29. It has been argued that Congress should repeal the sunset provision in the USA PATRIOT Act because there have been no reported "misuses" or "abuses" of the Act. But what does that mean? The PATRIOT Act made sweeping changes to a number of laws, but most of the concerns that have been raised relate to the enhanced surveillance provisions. Let's suppose that the FBI "misused" or "abused" one of its secret FISA authorities. How would the Members of this Committee ever know?

ANSWER: The USA PATRIOT Act provides for ample accountability for the executive branch's use of FISA authorities. For instance, section 215 of the Act provides that "On a semiannual basis, the attorney general shall provide to the committees on the judiciary of the House of Representatives and the Senate a report setting forth with respect to the preceding 6-month period (1) the total number of applications made for orders approving requests for the production of tangible things under section 1861 of this title; and (2) the total number of such orders either granted, modified, or denied." 50 U.S.C. § 1862(b). Section 215 also requires the Attorney General to report even more extensively to the Senate Select Committee on Intelligence, on which a substantial and bipartisan number of Senate Judiciary Committee members currently serve or have served. *See* 50 U.S.C. § 1862(a) ("On a semiannual basis, the Attorney General shall fully inform the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate concerning all requests for the production of tangible things under section 1861 of this title."). Moreover, it is our understanding that any Member of Congress may review these reports. Provisions such as these ensure that the legislative branch remains informed of the executive's exercise of FISA authorities.

Finally, under section 1001 of the USA PARTIOT Act, the Inspector General of the Department of Justice is charged with "review[ing] information and review[ing] complaints alleging abuses of civil rights and civil liberties by employees and officials of the Department of Justice." The Inspector General consistently has found that the Department has not misused or abused the powers granted under the Act.

30. Regarding the set of rules that erected the so-called "wall" between criminal investigators and intelligence agents, when were they first developed? How did DOJ handle information-sharing between criminal investigators and intelligence agents before the 1995 Guidelines went into effect?

ANSWER: Based on a handful of circuit court decisions before and after FISA's enactment, the Department in the 1980s began to adopt the view that FISA authorities could be used only where the "primary purpose" of an investigation was foreign intelligence gathering. As the Foreign Intelligence Surveillance Court of Review (FISC) noted in its 2002 decision upholding the Attorney General's information-sharing guidelines, "the exact moment" when this occurred "is shrouded in historical mist." *In re Sealed Case*, 310 F.3d 712, 717. The Department included a thorough history of information-sharing policies and procedures before the 1995 Guidelines in its Supplemental Brief to the FISC in *In re Sealed Case*.

31. In your testimony before the 9/11 Commission, you stated that in 2000, the Department opposed legislation to lower the wall. Please identify the legislation to which you refer, and provide the Committee with any contemporaneous Administration testimony or statement of position regarding that legislation.

ANSWER: In 2000, Senator Kyl introduced an amendment to S. 2507, the Intelligence Authorization Act for Fiscal Year 2001, which would have lowered the wall by allowing criminal investigators to share with the intelligence community any foreign intelligence and counterintelligence information obtained in a criminal investigative wiretap. In a letter dated September 28, 2000, from Robert Raben, Assistant Attorney General for the Office of Legislative Affairs, the Justice Department expressed its opposition to this proposal. The substance of that proposal was later enacted in Section 203 of the USA PATRIOT Act.

32. I have some concerns about the breadth of the language used to define "domestic terrorism" in section 802 of the PATRIOT Act. Are there any internal documents or memoranda within DOJ that provide guidance on this definition and would you please share them with me?

ANSWER: We believe that the statutory language is clear and consistent with statutory language for other similar provisions, such as the definition of "international terrorism" found at 18 U.S.C 2331(1). Accordingly, we have issued no specific internal guidance on this definition.

33. The PATRIOT Act created a new offense that prohibits knowingly harboring persons who have committed or are about to commit a variety of terrorist offenses, such as destruction of aircraft, use of weapons of mass destruction, bombing of government property, and sabotage of nuclear facilities. Has DOJ used this provision and, if so, please describe the case or cases.

ANSWER: We have not yet prosecuted any cases under this statute.

<u>OIG's Review of the Bureau of Prisons' Selection of Muslim Religious Services Providers (April 2004)</u>

34. The April 2004 report by the OIG made several startling findings including the fact that chaplaincy services in the Bureau of Prisons remain vulnerable to infiltration by religious extremists, and supervision practices in BOP chapels need strengthening. However, it is the issue of information sharing again that I must question. The OIG stated that the FBI and the BOP have not effectively exchanged information about endorsing organizations' possible connections to terrorism. As such, this practice (and others) may create unnecessary risks to prison and national security. What information sharing procedures or policies are in place, if any, to ensure that the BOP and FBI are working together in the war on terrorism?

ANSWER: Over the last two years, the FBI and BOP have considerably improved information sharing related to terrorism and religious activities in the prison system. Procedures are now in

place that substantially lower the risk of infiltration of the prisons, and we are continuing to bolster our efforts in this area.

In late February 2003, the Correctional Intelligence Initiative (CII) of the National Joint Terrorism Task Force (NJTTF) was formally activated to directly address concerns regarding efforts by terrorist or extremist groups to radicalize or recruit from inmate populations, among other issues. The issue of utilizing Islamic endorsing organizations in the BOP Imam selection process was an area of specific interest, and research began almost immediately regarding how to effectively address this issue. This initiative is a joint effort between the BOP and FBI and is managed by the full-time BOP detailee to the NJTTF.

In late 2003, the BOP provided the FBI with a list of religious services endorsing organizations. The FBI developed an initiative, which after a series of test searches, evolved into a formalized project that researched all of the endorsing organizations. This portion of the process was completed in March 2004, and work was then finalized regarding how to frame the results.

In April 2004, the FBI provided a classified briefing to BOP management regarding the project's results. In consultation with agency legal staff, the BOP is developing actions to discontinue the use of those endorsing organizations with significant derogatory information. Evaluation of those endorsing organizations with inconclusive derogatory information will continue as new information is developed.

In addition to the significant and meaningful direct coordination and information exchange between the BOP and the FBI NJTTF regarding Islamic endorsing organizations, other related projects are ongoing or have neared completion. For example, the BOP and FBI have expanded the current name check capabilities and the evaluation of inmate telephone activities, and have initiated multiple security strategies to evaluate contractors and volunteers entering BOP facilities to provide religious services to inmates. Additionally, the BOP requires all wardens to develop intelligence sharing relationships with their local Joint Terrorism Task Force.

In a continuing effort to further affirm and expand the BOP and FBI intelligence and information sharing relationship, efforts are currently underway to more closely coordinate the NJTTF CII with the FBI Office of Intelligence and other units within the FBI Counterterrorism Division. In an effort to enhance and facilitate the exchange of information and sharing of intelligence the BOP will be announcing a second liaison position assigned to the NJTTF.

The NJTTF (including the BOP representative) has relocated to the new Liberty Crossing Building with the Terrorist Threat Integration Center. Direct briefings have been provided to the Foreign Terrorist Tracking Task Force, and an expanded relationship with the Terrorist Screening Center is being developed.

In summary, the terrorist information sharing relationship between the FBI and the BOP continues to be significant, effective, and constantly expanding. BOP staff detailed to the FBI have been fully integrated into the counterterrorism structure, have detailed access to FBI information resources, and receive very clear FBI support for terrorism issues and concerns of mutual interest.

OIG Review of the Critical Incident Response Plans of the U.S. Attorneys' Offices (December 2003)

The primary finding of the Office of Inspector General's review of the Critical Incident Response Plans of the US Attorneys' Office was that most USAOs have not effectively implemented the required Crisis Management Coordinator (CMC) Program. The OIG found that the failure of the USAOs and EOUSA to fully implement the CMC Program leaves the Department less prepared than it could be – and should be – to respond to critical incidents. According to the OIG, event the Plans that have been developed by some USAOs are inadequate in scope and content to ensure a quick and appropriate response to a terrorist attack or other critical incident.

35. What has been done since the Report was issued in December 2003 to ensure that all USAO's have adopted the 48 fundamental actions that OIG feels should be taken when responding to a critical incident?

ANSWER: Please see combined answer to question 37, below.

36. The OIG also found that USAOs generally do not follow the standard crisis preparedness practice of conducting regular critical incident response exercises. What has the Department done since December 2003 to respond to this criticism?

ANSWER: Please see combined answer to question 37, below.

37. The OIG provided ten recommendations to improve the preparedness of the USAOs to respond to critical incidents. Please address in detail the Department's efforts to implement these recommendations.

ANSWER: We believe that the Department is more prepared today to respond to critical incidents than it has been in the past. Greater preparedness is attributable, in part, to the Department's revision of its Strategic Plan to place more emphasis on terrorism matters, programmatic changes such as the establishment of the Anti-Terrorism Advisory Councils in each district, and extensive training. While the OIG report focused primarily on historical flaws in the process by which Critical Incident Response Plans were developed and assessed, the use of the Critical Incident Response Plans is merely one factor to consider in assessing whether the USAOs are adequately prepared to respond to a critical incident.

Since the OIG report was issued in December of 2003, the Executive Office for United States Attorneys (EOUSA) and the Department's Counterterrorism Section (CTS) have worked together to ensure that the recommendations made by the Office of the Inspector General are being implemented in the United States Attorneys Offices (USAOs). In January of 2004, a Critical Incident Working Group (CIWG) was formed consisting of experienced Crisis Management Coordinators in the USAOs who have developed a model Critical Incident Response Plan (CIRP), determined criteria to evaluate the USAOs CIRPs, and are providing individual feedback to each USAO on the CIRPs. All USAOs have revised their CIRPs in accordance with the Model Plan, are receiving feedback from the CIWG, and are planning to exercise their CIRPs within the next two months. In April of 2004, a Crisis Management

Coordinators' (CMCs) Conference was held in Columbia, South Carolina, and the CMCs from the USAOs were provided with guidance regarding the revision and exercise of their CIRPs. At the Conference, CMCs participated in a tabletop exercise in which they exercised a CIRP in small, interactive groups and were instructed on how to lead a tabletop exercise in their own districts. Other procedural requirements have been put into place to ensure that the USAOs keep their CIRPs updated and exercise the plans at least once a year.

Heroin/Afghanistan/Terrorism Financing

I have read in the press that farmers in Afghanistan have harvested another bumper crop of heroin-producing poppies. By some press accounts, the government does not have a strategy to eliminate this source of al Qaeda funding.

38. Does the Department of Justice have a plan in place for eliminating drug trade financing of al Qaeda? If so, what is it?

ANSWER: The potential for proceeds of drug trafficking to finance terrorist activities is a significant concern. As of October 2003, the DEA has identified seventeen Foreign Terrorist Organizations, as designated by the Department of State, with potential ties to the drug trade. In October 2001, a joint DEA/FBI investigation targeting two heroin traffickers in Peshawar, Pakistan led to the seizure of 1.4 kilograms of heroin in Maryland, and identification of two suspected money launderers, one with suspected ties to al Qaeda. Similarly, Operation Marble Palace in 2001 determined that several members of a targeted heroin trafficking organization had possible ties to the Taliban and that a connected bank account had been used to launder proceeds to alleged Taliban supporters in Pakistan.

Based on that demonstrated potential, many have suggested that there must be financial ties between drugs and terrorism in Afghanistan. At this time, we do not have evidence capable of sustaining an indictment of direct links between terrorism and narcotics trafficking groups within Afghanistan. To the extent that allegations have been raised based on more than speculation, they generally come from single sources. Clear corroborating evidence of such sources has been difficult to obtain, in part because many traditional investigative techniques cannot be used within the country.

Raw intelligence and uncorroborated confidential sources continue to indicate possible relationships between drug traffic and terrorist groups within Afghanistan. The DEA will continue to assign the highest priority to investigating any information linking drugs to terrorism. We will do so in cooperation with our law enforcement and intelligence partners, and we will aggressively work to gather and document intelligence relating to drug activity that may finance terrorism.

39. Have shipments out of Afghanistan been detained by the United States government in the past year? If so, what has happened to the shipments and the persons involved?

ANSWER: Since March 2002, 23 significant seizures of narcotics and precursor chemicals led to the dismantlement and disruption of several major distribution/transportation organizations involved in the Southwest Asian drug trade. These include the disruption, in Istanbul, of the

Galip Kuyucu transportation group, which was one of the most significant heroin traffickers in Turkey and a Justice Department international priority target. The Turkish National Police, working with the DEA and Her Majesty's Customs and Excise, seized 495 kilograms of Afghan heroin, and disrupted this organization, which was regularly transporting similarly sized amounts of drugs throughout Western Europe. This investigation also led to the arrest of Urfi Cetinkaya, a major source of heroin supply with direct ties to Afghan drug traffickers.

Another significant success was the arrest of 15 members of the Attila Ozyildirim heroin trafficking organization and the seizure of 7.4 tons of morphine base in Turkey during March 2002. This is the largest seizure of morphine base ever made. To put the magnitude of this seizure in perspective - the amount seized was more than four times greater than the total worldwide morphine base seizures made in 2000. Morphine base can be converted to heroin at a ratio of 1:1.

40. More generally, on November 12, 2003, the Office of Inspector General forwarded to the Committee the list of top management challenges facing the Department of Justice. Two new challenges were added. The first, "Reducing the Supply of and Demand for Illegal Drugs," is not a new problem. Still, please describe any specific initiatives the Department has in place to reduce the supply of illegal drugs coming into the country, the diversion of legal drugs for illicit use and the demand for drugs.

ANSWER: The Department is guided by the Office of National Drug Control Policy's (ONDCP) National Drug Control Strategy, which establishes as a goal: disrupting the illicit drug market by attacking the drug trade's agricultural resources through eradication, its processing and transportation systems through interdiction, its organizational hierarchy through organizational attack, and its financing mechanisms through seizure of assets and bank accounts. The Department is making steady progress in fulfilling its mandate under the National Drug Control Strategy. Important organizational structures are in place to further the Department's mission, including: (a) revitalization of Organized Crime Drug Enforcement Task Force (OCDETF), regional task forces composed of prosecutors and federal law enforcement investigators and intelligence analysts from agencies such as DEA, FBI, ICE, ATF, Marshal's Service, Internal Revenue Service, and Coast Guard; (b) use of the DEA Special Operations Division (SOD) to coordinate multi-jurisdictional and international investigations; (c) the initiation of the new OCDETF Intelligence Fusion Center, which will analyze drug trafficking and financial intelligence and disseminate leads to OCDETF participants.

Using these important organizational structures, the Department is engaged in numerous initiatives to address interdiction, organizational attack and drug financing mechanisms. Regarding organizational attack, the Department focuses its resources on the most significant international drug trafficking and money laundering organizations. The leaders of these organizations have been placed on a list and are collectively referred to as Consolidated Priority Organization Targets (CPOTs). The CPOT list for FY2004 identified 41 targets. During FY 2003 and 2004, 30 CPOT targets were indicted in the United States, and 73% (30 of 42) of the current FY 2005 CPOT targets face charges in the United States. The Department announced in July 2003 Mexican drug lord Ismael Zambada Garcia was indicted and over 240 individuals were arrested as part of Operation Trifecta. The indictment against Zambada alleged that his organization illegally distributed over 2,700 kilograms of cocaine into the United States between August 2001 and June 2002.

Within the Criminal Division, through the Bilateral Case Initiative (BCI), the Narcotic and Dangerous Drug Section (NDDS) works with foreign law enforcement agencies to build cases against foreign persons who illegally manufacture or distribute controlled substances that are intended to be imported to the United States. Through 38 investigations in 22 countries, the NDDS has obtained over 40 indictments (16 of which are CPOT) and over 50 convictions. The NDDS has indicted members of the FARC and AUC, two Colombian terrorists groups that have been implicated in drug trafficking, and has pursued numerous high-level international drug traffickers.

Regarding interdiction, the Departments of Justice and Homeland Security law enforcement agencies jointly manage Operation Panama Express, an intelligence-driven OCDETF-funded program that targets maritime vessels departing from Colombia's Pacific and Caribbean coasts with drug contraband. The U.S. Attorney's Office in the Middle District of Florida has played a crucial role in this program. In 2003, 228 defendants were prosecuted and 83 tons of cocaine were removed. Since 2000, the program has led to the seizure or destruction of approximately 260 metric tons of cocaine and the arrest and prosecution of over 470 defendants.

International cooperation has proved to be a potent tool in our supply reduction arsenal. In Operation United Eagles, which was initiated in June 2003, the law enforcement agencies from the governments of the United States and Mexico joined to aggressively pursue and apprehend indicted CPOTs. In June 2004, 67 specially trained Mexican Federal Agents apprehended two top leaders of the Arellano Felix Organization (AFO), Efrain Perez and Jorge Aureliano-Felix, which was followed by the arrest of Gilberto Higuera-Guerro, a top lieutenant of the AFO. The AFO has been implicated in trafficking multi-ton quantities of cocaine and marijuana, as well as significant quantities of heroin and methamphetamine.

The Department also maintains an extensive training and outreach program to promote justice sector reform in countries that seek our assistance. Through the Criminal Division's Office of Overseas Prosecutorial Development, Assistance and Training (OPDAT) and DEA's Office of Training, the Department conducts international training and criminal justice development in South and Central America, the Caribbean, Russia, other Newly Independent States, and Central and Eastern Europe. Judges, prosecutors and law enforcement officials are trained in human rights, due process, witness protection, and anti-corruption procedures. In Colombia, the Department maintains a robust justice-sector reform initiative. The Department is training prosecutors and police officers in counter narcotics, maritime, anti-corruption and financial investigation techniques.

The Committee also sought information on the Department's efforts to reduce demand for illegal drugs, and to reduce the diversion of legal drugs. The DEA's Demand Reduction Program provides law enforcement and the community at large, with assistance and advice on prevention matters. This includes the Governors' Prevention Councils, which are located in 19 states and two territories. The DEA also works with community coalitions, the medical community, the media, the general public and opinion leaders to provide information on the collateral damage that drugs cause our society. Thirty-one DEA Demand Reduction coordinators, stationed across the country, are resources for communities, treatment and prevention organizations, coalitions, parent organizations, educators, students and the general public. Among other related areas, the DEA Demand Reduction Program targets methamphetamine prevention, prescription drug abuse,

marijuana education and predatory drugs such as ecstasy. In addition, the DEA works with and supports the National Guard, Weed and Seed, the Community Anti Drug Coalition of America, and many other prevention organizations.

With regard to prevention of drug diversion, DEA carries out the mandates of the Controlled Substances Act (CSA) by ensuring that adequate supplies of controlled drugs are available to meet legitimate domestic medical, scientific, industrial, and export needs, while preventing, detecting, and eliminating the diversion of these substances into illicit channels. Specifically, the DEA provides regulatory guidance and support to over one million legitimate handlers of controlled substances. Keeping legitimate importers, exporters, manufacturers, retailers, and practitioners compliant with CSA regulations contributes significantly toward reducing the diversion of controlled substances and chemicals.

In March 2004, the President announced a coordinated national strategy to confront the illegal diversion and abuse of prescription drugs. The DEA, in conjunction with the President's National Synthetic Drugs Action Plan, is implementing additional investigative efforts and enforcement actions against the illegal sale, use, or diversion of controlled substances, including diversion occurring over the Internet. In 2003, as a result of its online investigations, DEA seized approximately $2.5 million in computers, cash, real-estate, and bank accounts. An additional $2.6 million was seized in 2002. As of March 2004, DEA has 95 open investigations involving the online sales of controlled substances without a prescription.

Federal Death Penalty

41. In a January 2004 U.S. News & World Report article entitled "Ashcroft's Way," the author reports that nearly 40 percent of the cases you have authorized for the death penalty have been against the wishes of the U.S. Attorney, but that you have "seldom reject[ed]" their requests to seek the death penalty. Is this report accurate? Please detail (A) the percentage of cases in which you have authorized the death penalty when the U.S. attorney has recommended against seeking the death penalty, and (B) the number of cases in which you have declined to pursue the death penalty when the U.S. attorney has recommended that the death penalty be sought.

ANSWER: We do not keep a running total of the cases in each category. As you know, the goal underlying the Department's review and decision-making process in capital cases is the consistent and even handed application of the capital sentencing provisions in appropriate cases. Each death penalty-eligible offense and offender is considered individually and a decision to seek the death penalty follows my consideration of the analyses, thoughts, and concerns of all parties to the review process. The U.S. Attorney's recommendation is given great deference and a decision contrary to that recommendation is never easily reached. Nonetheless, the focus of the review and decision making process is on doing the right thing in each individual case consistent with the decisions in other federal capital cases nationwide.

Pen Register Report

Section 3126 of Title 18 requires the Attorney General to report annually to Congress on the number of pen register orders and orders for trap and trace devices applied for by law enforcement agencies of the Department of Justice. Specifically, reports should include "(1) the period of interceptions authorized by the order, and the number and duration of any extensions of the order; (2) the offense specified in the order or application, or extension of an order; (3) the number of investigations involved; (4) the number and nature of the facilities affected; and (5) the identity, including district, of the applying investigate or law enforcement agency making the application and the person authorizing the order."

42. **In 1999, I introduced S. 1769, the Automatic Elimination and Sunset Reports Exemption Act ,which Senator Hatch co-sponsored and Congress subsequently passed (P.L. 106-197), to ensure that such reporting would continue so that Congress could exercise adequate oversight over surveillance activities. Reporting requirements are key to effective oversight, particularly where we have expanded the Department's surveillance powers. For example, in the Patriot Act, we specifically extended pen registers to Internet communication, and changed the standard for pen registers obtained under FISA. However, your staff has indicated that the Section 3126 reporting requirement has not been followed since 1999. Can you provide a date certain by which you will provide the reports from 2000 to the present?**

ANSWER: The Department submitted this report to the Congress in November 2004.

Victims Compensation

43. **As part of the Victims of Trafficking and Violence Protection Act of 2000 (Pub. L. 106-386), Congress enhanced the ability of DOJ's Office for Victims of Crime (OVC) to respond when Americans are killed or injured by acts of terrorism abroad. Specifically, Congress charged OVC with establishing a program to compensate victims of terrorist acts that occur outside the United States. I wrote to the Department on February 4, 2003, asking whether OVC had established such a program and, if not, what steps it had taken toward this end and when it expected the program to be operational. The Department responded by letter dated March 14, 2003, that OVC was "in the process" of establishing such a program; that regulations for the program "have been drafted and currently are being edited and approved for publication in the Federal Register"; and that OVC had "prepared a contract solicitation that will be made available to potential contractors for the bidding process in the next few weeks." The Department concluded by saying it anticipated that the program would be "operational" by the end of calendar year 2003. Please provide an update on this program. Has anything been published in the Federal Register? Has a contractor been selected to process claims from eligible applicants? Is the program "operational"? Please explain your responses.**

ANSWER:

- Regulations and Application Form:
  The Office for Victims of Crime (OVC) has been working with the Office of Justice Programs' (OJP) Office of General Counsel to establish an international terrorism victim expense reimbursement program (ITVERP) (referred to in the March 14, 2003 letter to Senator Leahy as the International Terrorism Victim Compensation Program). Proposed regulations and application form for the ITVERP were drafted and cleared by the Department of Justice (DOJ) for review by the Office of Management and Budget (OMB) in December 2003. Application forms to collect victim (claimant) information were submitted simultaneously to OMB for clearance under the Paperwork Reduction Act. On April 6, 2004, DOJ returned the draft regulations to OJP for reconsideration of the suggested expense categories and funding amounts. OJP submitted revised draft regulations to DOJ on May 11, 2004, which are now undergoing internal review. The draft regulations will be re-submitted to OMB upon clearance by DOJ. Once the draft regulations have been approved by OMB, they will be published in the *Federal Register* for 30 days for public comment and finalized, incorporating comments received, as appropriate.

- Victim Identification and Notification:
  Once the regulations are finalized, OVC plans to do wide-scale notification to victims through the *Federal Register* and other appropriate means. OVC will disseminate and accept applications at that time. In the meantime, OVC drafted and published in the *Federal Register* a *System of Records* for maintaining general information on individuals who are killed or injured in acts of international terrorism OVC has developed and continues to update a database of potentially eligible victims and other relevant information to facilitate timely notification and distribution of application for benefits once the regulations are finalized.

- Program Informational Materials:
  Informational materials, such as brochures, fact sheets, question and answer documents, etc., describing the parameters of the program are being developed for eventual public dissemination. OVC expects to notify, receive, process and pay claims immediately upon publication of the final regulations.

- Claims Processing Software:
  In March 2003, OVC issued a Request for Quotation (RFQ) for administrative support for the ITVERP. The administrative support includes such tasks as processing of victim expense reimbursement applications/claims and case management. This was a full and open competition. The contract was awarded to Courtesy Associates of Washington, D.C. Courtesy Associates is also, through a separate contract, currently providing emergency assistance to victims of international terrorism, as described in the "Interim Measures to Assist Victims of Terrorism with Emergency Needs" section below.
  In early July 2004, OVC drafted an RFQ for the design, development and implementation of a claims processing and case management software package for the ITVERP. The RFQ will be reviewed within OJP. OJP will then solicit quotes through a competitive procurement process. OVC hopes to award the contract by mid-October 2004.

- Interim Measures to Assist Victims of Terrorism with Emergency Needs:
  Because the ITVERP program is not operational at this time, OVC has established two mechanisms to assist victims of international terrorism. In March 2003, OVC initiated a Memorandum of Understanding (MOU) between the Federal Bureau of Investigation (FBI), the Department of State, and OVC. The MOU outlines the conditions and procedures to be followed by each agency in providing emergency assistance to victims of international terrorism. As set forth in the MOU, the first mechanism for emergency assistance is the FBI Crime Victim Assistance Fund. OVC provided the FBI with funding to support immediate crisis response assistance, such as emergency travel, transportation, and medevac costs to transport injured victims to appropriate medical facilities. OVC has the capacity to provide supplemental funding to the FBI on an as needed basis.

The second mechanism for providing assistance to victims of international terrorism, for emergency expenses that may fall outside the parameters of the FBI Crime Victim Assistance Fund, is an OVC contract with Courtesy Associates to handle requests from eligible victims and their family members for reimbursement for funeral/burial expenses, mental health counseling, and other emergency expenses. To date, OVC has assisted victims of international terrorism that occurred overseas, including the terrorist bombings in Bali, Moscow and Yemen in 2002; terrorist bombings in Saudi Arabia and UN Baghdad in 2003; and four terrorist attacks thus far in Saudi Arabia in 2004. This assistance has included the medical evacuation of injured victims to medical facilities, funeral/burial expenses, mental health counseling, and emergency travel.

- Funding to Support the Implementation of the ITVERP and Pay Victim Claims:
  OVC has set aside funds from the Antiterrorism Emergency Reserve ($50 million, the maximum authorized, in FY 2004) to provide compensation to eligible victims of acts of international terrorism that occur outside the United States for expenses associated with that victimization. OVC has allocated money from this account to support the above-described implementation and assistance efforts.

The Department is eager to move forward with the implementation of this important program. However, the implementation of the program is contingent upon the issuance of final regulations.

QUESTIONS FROM SENATOR WYDEN

44. Since you took office, how much of the taxpayers' money has the Department of Justice spent in its effort to overturn Oregon's Death with Dignity Act including the preparation of the directive you issued on November 6, 2001 and legal expenses to prepare and defend the Department's position in court?

ANSWER: During my tenure, the DEA and the Civil Division expended resources pursuant to the matter of Oregon's Death with Dignity Act. DEA responded to questions concerning the applicability of the Controlled Substances Act to physicians who may use controlled substances to assist in a suicide. DEA's estimated costs associated with this activity are $20,044. The Civil Division's litigation cost for *State of Oregon v. Ashcroft* is estimated to be $97,331. This results in the Department spending a total of approximately $117,375 on this Act during Attorney General Ashcroft's tenure.

45. **Is it your intent to have the Department seek to appeal the Ninth Circuit ruling, and if the Department decides to appeal the Ninth Circuit ruling, what are the estimated costs for pursuing further court action?**

ANSWER: On November 9, 2004, the Solicitor General filed a petition for certiorari with the Supreme Court of the United States. That petition remains pending. The Solicitor General is currently deciding whether to file a reply brief regarding certiorari. We have no way of estimating further costs. Those costs may be zero (for example, if the Solicitor General decides not to file a reply brief and the Supreme Court denies the petition) or additional costs may be incurred (for example, if a reply brief is filed or if the Supreme Court grants the petition).

46. Since two courts have now determined that you do not have the authority to overturn Oregon's law and that the Controlled Substance Act does not provide authority to intervene in the state regulation of medicine, what other options are you considering, if any, to seek to overturn a policy that the people of Oregon have passed twice?

ANSWER: As stated previously, we are currently seeking rehearing and rehearing en banc. We have no knowledge regarding any other steps. We must note, however, that the premise of this question is incorrect in two respects. First, the Department has never sought to overturn the Death with Dignity Act. Instead, the Department has sought to enforce a federal law - the Controlled Substances Act - uniformly throughout the country. Thus this case actually involves an attempt by Oregon to prevent federal enforcement of federal law, not an attempt by the Department to prevent State enforcement of State law. Second, as a legal matter, there is only one ruling against the Department in this case - that of the Ninth Circuit panel from which the Department is seeking rehearing. Before ruling on the merits, that panel unanimously held that the district court lacked jurisdiction. The district court's decision is therefore void.

QUESTIONS FROM SENATOR GRASSLEY

Information Sharing

For many years I've heard complaints about the flow of criminal intelligence from the federal government down to state and local law enforcement. The incidents of 9/11 highlighted how critical it is that local law enforcement be included in the information loop.

To address this issue, the GLOBAL Working Group recommended the National Criminal Intelligence Sharing Plan (NCIS Plan). This plan calls for a "system of systems" in which the various information sharing programs at the different agencies are able to communicate.

47. **I understand that the DOJ is in the process of developing the Law Enforcement Information Sharing Strategy (LEIS). How will the LEIS fit with the NCIS Plan?**

ANSWER: The FBI is participating in the development of the Department of Justice Law Enforcement Information Sharing Program (LEISP) Strategy and is represented on the Global Criminal Intelligence Coordinating Council (CICC), which is overseeing the implementation of the National Criminal Intelligence Sharing (NCIS) Plan. The FBI Executive Assistant Director (EAD) for Intelligence also chairs the Justice Intelligence Coordinating Council, which is considering policy issues related to the LEISP Strategy. These leadership roles enable the FBI to assist the Department in the process of integrating LEIS with the NCIS Plan. For example, the NCIS Plan calls for a trusted web-based communications network for the law enforcement community, and the LEISP strategy will meet that need. As recommended in the NCIS Plan, the FBI will ensure that its Law Enforcement Online (LEO) network, along with the DOJ-supported Regional Information Sharing System (RISS) network, makes whatever contribution is necessary for this purpose. In addition, the NCIS Plan endorsed an initiative of the FBI Criminal Justice Information Services (CJIS) Division to develop a national system for the exchange of crime information, building on the CJIS Division's experience with NCIC and the Uniform Crime Reporting (UCR) program. The FBI has supported the inclusion of the National Law Enforcement Data Exchange (N-DEx) initiative in the LEISP Strategy.

48. I further understand that the Department of Homeland Security has developed a counter terrorism information-sharing program as part of its Homeland Security Information Network. Will the Joint Regional Information Exchange Service, as this program is called, be a <u>competitor</u> to or a <u>companion</u> to the LEIS project that DOJ is developing? Also, how does it fit in the NCIS Plan? Second, is it designed to supplant or supplement the Regional Information Sharing System?

ANSWER: The Department is working with DHS to ensure that the networks serving the nationwide law enforcement community are properly connected to the Homeland Security Information Network (HSIN). The FBI intends that its LEO network will be a companion to the new HSIN, which is based on the Joint Regional Information Exchange Service (JRIES). This partnership was not considered in the NCIS Plan, which was developed before the DHS proposals were completed. The FBI is also working with DOJ and DHS to include the RISS network within this collaborative effort.

QUESTIONS FROM SENATOR BIDEN

USA PATRIOT Act Section 215

Section 215 of the Patriot Act amended sections 501-503 of the Foreign Intelligence Surveillance Act (FISA), pertaining to access to certain business records. 50 U.S.C. § 1861. Specifically, the government's application to the FISA court seeking production of business records requires that the government "specify that the records concerned are sought for an authorized investigation...." 50 U.S.C. § 1861(b)(2). Section 215 removed the requirement that the government also demonstrate that "there are specific and articulable facts giving reason to believe that the person to whom the records pertain is a foreign power or an agent of a foreign power." Unlike grand jury subpoenas for business records in the criminal context, then, the government is not required to show that the requested records are relevant to the FISA investigation when obtaining such records pursuant to 50 U.S.C. § 1861.

FBI Director Robert Mueller testified at a terrorism oversight hearing of the Senate Judiciary Committee on May 20, 2004. At that hearing, Senator Specter asked Director Mueller about the standard to obtain business records under section 215 and noted concerns which have been raised about that standard. Director Mueller responded that he believed that the standard for obtaining business records under FISA should be a relevance standard, as are required of grand jury subpoenas in the garden variety criminal context. Specifically, Director Mueller told the Judiciary Committee:

> **in terms of going after books [under section 215], I believe a standard of relevance is appropriate, so that the Court can look at the rationale, but not necessarily probable cause. We do not require . . . that in a criminal context, a grand jury subpoena for the same materials require a much lesser standard than probable cause. It is relevance to an investigation. I think the same standard should be applied when we are addressing terrorism. (emphasis added)**

When Senator Specter responded that the relevance standard is not in the USA PATRIOT Act, Director Mueller conceded it was not, but that "it is in the criminal code."

49. Does the Justice Department agree with the FBI that the standard for obtaining business records under 50 U.S.C. § 1861 should be a relevance standard, rather than the lower standard that merely requires that government to specify that the requested documents are "sought for an authorized investigation"?

ANSWER: The Department supports the current standard for obtaining business records under 50 U.S.C. § 1861, which is the equivalent of a relevance standard. 50 U.S.C. § 1861 currently provides that the FISA court may only enter an order requiring the production of records if such records are "sought for an authorized investigation conducted in accordance with [50 U.S.C. § 1861(a)(2)] to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities." This is the equivalent of a relevance standard because, for example, if records are irrelevant to an authorized investigation to protect against international terrorism, then it is not possible to maintain that such records are being "sought for" that investigation.

50. How does the criminal code intersect with FISA's business records section?

ANSWER: 50 U.S.C. § 1861 is not used to obtain business records or other tangible things in criminal investigations; such records, in criminal investigations, may be obtained through the issuance of grand-jury subpoenas. 50 U.S.C. § 1861, rather, is used to obtain business records or other tangible things in authorized intelligence investigations to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities.

51. I long supported efforts to harmonize the tools for law enforcement to combat terrorists with those already available for fight drug kingpins and mobsters. President Bush and Attorney General Ashcroft have made similar arguments in support of renewing the USA PATRIOT Act. As Director Mueller noted, however, Congress may have created a wrinkle in the law by creating a different standard for obtaining business records under FISA as opposed to under a grand jury criminal subpoena. Given that Justice Department agrees with me that the playing field should be level between criminal and terrorism investigative tools, does the Department, as a conceptual matter, support efforts to improve and refine the USA PATRIOT Act where, as with Section 215, there are different standards between criminal and terrorism provisions?

ANSWER: The Department believes that the required showing for obtaining business records in criminal investigations is the same as that for obtaining business records in intelligence investigations related to international terrorism. It is well established that the simple standard of relevance governs grand jury subpoenas in criminal investigations. *See, e.g., United States v. R. Enterprises*, 498 U.S. 292, 301 (1991). And, as explained in the answer to question #49, an equivalent standard applies to the issuance of FISA court orders for the production of business records in authorized international terrorism and espionage investigations pursuant to section 215 of the USA PATRIOT Act. *See* 50 U.S.C. §§ 1861(a)(1), 1862(b)(2). It is no coincidence that similar standards apply to these investigative tools. Grand jury subpoenas and section 215 orders are not warrants for searches and seizures – for which the Fourth Amendment to the Constitution requires probable cause – but rather informational requests to third parties, and the building blocks of criminal and international terrorism/espionage investigations, respectively.

It is important to note, however, that orders for the production of business records under section 215 are subject to greater judicial oversight than are grand jury subpoenas, which prosecutors regularly use to obtain business records in criminal investigations. A court must explicitly authorize the use of section 215 to obtain business records. A grand jury subpoena for such records, by contrast, is typically issued without any prior review by a judge. Section 215 orders are similarly subject to greater congressional oversight than are grand jury subpoenas. As stated above in the response to Question 29, every six months, the Attorney General must "fully inform" the House and Senate Intelligence Committees "concerning all requests for the production of tangible things" under section 215. 50 U.S.C. § 1862(a). There is no similar mechanism, however, for congressional oversight of grand jury subpoenas.

52. Would the Department support amending 50 U.S.C. § 1861 to impose a grand jury relevance standard, as required in the criminal context?

ANSWER: As explained in the answer to question 49, the Department believes that 50 U.S.C. § 1861 currently contains the equivalent of a relevance standard. The Department believes that this relevance standard is entirely appropriate and, as a result, does not see any need to amend 50 U.S.C. § 1861. If, however, a member of the Committee were to develop legislative language making it absolutely clear that a standard of relevance governs orders for the production of business records under that statutory provision, the Department would be happy to review and provide its views on such a proposal.

There have also been concerns raised about the potential for a FISA "John Doe" indictment [sic] under 50 U.S.C. § 1805. This concern appears to result because unlike in the Title III context – which has separate sections proscribing procedures for obtaining a traditional tap (21 U.S.C. § 2518(4)) and for a roving tap (21 U.S.C. § 2518(11)) – section 1805 collapses discussion of both traditional and roving FISA taps into a single section.

53. **Would the Department support amending 50 U.S.C. § 1805 to create separate sections for traditional and roving FISA taps, following the model of 18 U.S.C. § 2518, in an effort to clarify that roving wires always require identification of the target?**

ANSWER: The Department does not see any need to amend 50 U.S.C. § 1805 at this time. The Department believes that section 206 of the USA PATRIOT Act appropriately amended 50 U.S.C. § 1805 to allow for the use of multipoint, or "roving," wiretaps in national-security investigations under FISA. Such wiretaps had been available for years in ordinary criminal investigations, and the USA PATRIOT Act simply authorized the use of the same technique in international terrorism and other intelligence investigations. Section 206 can be of significant value to counterterrorism investigators because it enhances their ability to investigate sophisticated international terrorists who are trained to thwart surveillance, such as by rapidly changing cell phones, just before important meetings or communications.

With respect to concerns that have been raised regarding so-called "John Doe" wiretaps under 50 U.S.C. § 1805, it is important to point out that the "John Doe" moniker is a misnomer. It is misleading because, even if the government is unsure of a target's name, it still must provide "a description of the target of the electronic surveillance" to the Foreign Intelligence Surveillance Court ("FISA court") in order to obtain a wiretap order. Thus, a wiretap order is tied to a particular target of surveillance – that is, a particular person, even if the government does not know exactly who that target is. The government cannot change the target of its surveillance under such a wiretap order; instead, if a new target is identified, the government must apply to the FISA court for a new order for the new target. It is important to keep in mind that, in international terrorism investigations, it may be the case that the government has a detailed physical description of a suspected terrorist but may not know that suspect's name. In such cases, it is important that the government not be precluded from obtaining a wiretap order.

For all of these reasons, the Department does not currently see any need to amend 50 U.S.C. § 1805. If, however, a member of the Committee were to develop legislative language creating separate statutory provisions for "traditional" FISA wiretaps and "roving" FISA wiretaps, which preserved the government's ability to obtain a wiretap order in instances where

the government has a detailed physical description of a suspected terrorist but does not know that suspect's name, the Department would be happy to review and provide its views on such a proposal.

FBI Personnel

54. How many agents does the FBI currently have working on traditional crime functions (as opposed to counter-terrorism efforts) today? How many agents did the FBI have working on traditional crime before September 11 (i.e., on September 10)?

ANSWER: The FBI had 4,490 Agents working on traditional crime matters as of August 21, 2004, and had 6,621 Agents working on traditional crime matters before September 11, 2001. The decrease of 32% or loss of 2,131 Agents working traditional crime matters is due to the FBI's shift in priorities and the continuing need to divert Agents from traditional crime matters to higher priority counterterrorism, counterintelligence, and cyber crime matters.

Prior to September 11, 2001, the FBI's Funded Staffing Level (FSL)[1] to address traditional crime matters was 6,457 Agents, and the number of Agents actually working traditional crime matters was 6,621 (+2.5%) Agents, based on the Average On Board (AOB)[2]. The FBI's FSL for traditional crime matters was reduced by 659 (-10%) Agents following September 11, 2001, and is now 5,798 Agents. However, the actual number of Agents currently addressing traditional crime matters, based on AOB calculations as of August 21, 2004, is only 4,490 Agents. This is 1,308 Agents (-23%) less than currently authorized to work traditional crime matters, due to the continued need to support the higher priorities of Counterterrorism, Counterintelligence, and Cyber crime matters, and is 2,131 Agents (-32%) less than the 6,621 Agents who worked traditional crime matters prior to September 11, 2001.

The chart on the following page illustrates the current FSL and AOB levels for traditional crime matters by criminal investigative program:

[1]Funded Staffing Level or FSL is the number of agents allocated per program.

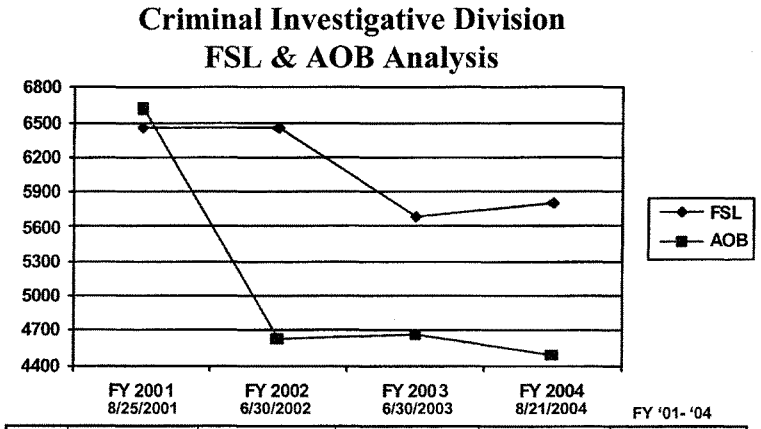
[2]Because Agents may devote their time to various investigative programs during the course of a year, the Average On Board formula was developed to calculate the number of "full time equivalent" Agents actually devoted to a particular investigative program during the year.

Current FSL and AOB levels for traditional crime:

Criminal Investigative Programs	Current Funded Staffing Level (FSL)	Current Average On Board (AOB)	Difference Between FSL and AOB
White Collar Crime	2,342	1,886	- 456 (-19%)
Violent Crime	1,007	898	-109 (-11%)
Organized Crime	720	475	-245 (-34%)
Criminal Enterprise	700	524	-176 (-25%)
Organized Crime & Drug Enforcement Task Force (OCDETF)	540[3]	419	-121 (-22%)
Drugs	336	166	-170 (-51%)
Civil Rights	153	122	-31 (-20%)
Totals	**5,798**	**4,490**	**-1,308 (-23%)**

[3]OCDETF FSL was increased from 488 to 540 as of 06/27/2004.

The graph set forth below further illustrates the decrease in FBI Agents working on traditional crime matters following September 11, 2001.



FSL	6457	6456	5687	5798	-10%
AOB	6621	4628	4672	4490	-32%

55. **Has the Administration submitted budget requests since September 11 that would have allowed the FBI's commitment to combating traditional crime to remain the same or to increase since September 11?**

ANSWER: Following the events of September 11th, the FBI's number one priority became protecting the United States from terrorist attack. Despite this, the FBI continues to dedicate substantial resources to combating traditional crime such as organized crime, significant violent crime, white-collar crime, and civil rights violations.

The Administration's requests for increases related to the FBI's efforts to combat traditional crime since September 11th have included program enhancements for:

- The Corporate Fraud Task Force (118 positions and $16,000,000 in FY 2004)
- The Innocent Images National Initiative (32 positions and $3,594,000 in FY 2004; $3,000,000 in FY 2005)
- The Child Exploitation and Obscenity program (10 positions and $1,785,000 in FY 2005)
- Child Prostitution investigations (16 positions and $1,831,000 in FY 2005)
- The Cyber Crime program (7 positions and $1,082,000 in FY 2004)
- Criminal Enterprise investigations (8 positions and $2,383,000 in FY 2005)
- Computer Analysis Response Teams (45 positions and $18,040,000 in FY 2004)
- The Forensic DNA Program (32 positions and $3,283,000 in FY 2004)
- Various information technology, security, and infrastructure enhancements that support all program areas.

The Administration is committed to ensuring that the FBI continues to meet all of its priorities by protecting America from terrorist attack and combating traditional crime.

Terrorist Watch List

When FBI Director Mueller testified before this Committee on May 20, he told us that the Bureau now has one unified and authoritative terrorist watch list in place and that this system has been up and running since March 12. He also noted, however, that the mechanisms for this list to be shared with local law enforcement are not yet in place.

56. **Do you have a time estimate for when this unified terrorist watch list will be able to be shared with our local cops all across the country?**

ANSWER: State and local police agencies currently have electronic 24/7 access to the information contained in the terrorist screening database (TSDB), which is maintained by the TSC, through the National Crime Information Center (NCIC). While the TSC does not yet have an online connection to NCIC, it regularly updates the TSDB information in NCIC. Online connectivity will further enhance the speed with which this information is exchanged. TSC plans to provide other agencies with direct connections to the TSDB by the summer of 2005. (The transition to online access is labor intensive because of the need to ensure that this capability does not degrade response time for the current operations of NCIC, which handles approximately four million transactions per day. In addition, establishing online communications with other systems requires proper, and time consuming, attention to security

and privacy concerns.) From 12/1/03 to 1/18/05, the TSC received approximately 18,000 inquiries from federal, state, and local agencies, including more than 3,000 calls from state and local law enforcement officials.

57. A 2003 GAO report noted that, at that time, there were at least twelve terrorist watch lists that were being maintained by nine federal agencies, including the:

- **Consular Lookout and Support System (State Department).**
- **TIPOFF (State Department)**
- **Interagency Border Inspection (Homeland Security/Customs)**
- **No-Fly (Homeland Security/TSA)**
- **Selectee (Homeland Security/TSA)**
- **National Automated Immigration Lookout (Homeland Security/INS)**
- **Automated Biometric Identification System (former INS)/Integrated Automated Fingerprint Identification (FBI)**
- **Warrant Information Network (US Marshals Service)**
- **Violent Gang and Terrorist Organization File (FBI)**
- **Top Ten Fugitive (Defense)**

Are all of these watch lists being fed into this one unified list that the FBI Terrorist Screening Center is coordinating?

ANSWER: As of March 12, 2004, the TSC had incorporated data from every watch list detailed above, except for the biometric data related to the Automated Biometric Identification System and the Integrated Automated Fingerprint Identification System. Requirements for future enhancements to the TSDB will include the ability to capture biometric data from these two lists.

QUESTIONS FROM SENATOR EDWARDS

In December of 2001, I wrote to you and asked whether the Justice Department had initiated any enforcement actions based upon the problems in the 2000 election. In February 200[2], three months later, I received a letter back from your office stating that several investigations were "open and pending" and that "we expect to make final decisions in the near future." When nothing happened, I asked then-Assistant Attorney General Ralph Boyd about this when he testified before this committee in May of that year. Mr. Boyd said in his testimony that he had personally authorized five lawsuits, three of which were in Florida, one in Missouri and one in Tennessee.

Mr. Boyd said that these lawsuits would be filed "well in advance of the primaries for the November 2002 elections." He specifically said it would be done "within the next 30 to 60 days." That would have taken us to July of 2002.

58. Two years have passed since Mr. Boyd stated that the Justice Department would file voting rights suits in Florida, Missouri and Tennessee within two months. Were any of these lawsuits to which Mr. Boyd referred in his May 2002 testimony ever filed? If so, please identify the parties to such suits, the courts in which they were filed, the specific issues involved, and state the current status of each suit.

ANSWER: Five lawsuits were filed as follows:

United States v. Miami-Dade County, Florida (S.D. Fla.) -- Complaint alleged that Haitian-American voters were not permitted to bring assistors of their choice into the polling places in violation of Section 208 of the Voting Rights Act. A consent decree remedying the violations was entered on June 17, 2002. Since entry of the consent decree, several elections have been monitored to ensure compliance with the consent decree.

United States v. Orange County, Florida (M.D. Fla.) -- Complaint alleged that limited English-proficient Hispanic voters were not receiving adequate language assistance in violation of Section 203 of the Voting Rights Act. A consent decree remedying the violations was entered on October 8, 2002. Since entry of the consent decree, the Civil Rights Division has monitored several elections to ensure compliance with the consent decree.

United States v. Osceola County, Florida (M.D. Fla.) -- Complaint alleged that Hispanic voters were discriminated against through hostile treatment at the polls, failure to provide adequate language assistance in violation of Section 2 of the Voting Rights Act, and Hispanic voters were not permitted to bring assistors of their choice into the polling places in violation of Section 208 of the Voting Rights Act. A consent decree remedying the violations was entered on July 22, 2002. Since entry of the consent decree, the Civil Rights Division has monitored several elections to ensure compliance with the consent decree.

United States v. City of St. Louis, Missouri (E.D. Mo.) -- Complaint alleged that the Board of Elections' purging procedures resulted in the improper removal of over 50,000 inactive registered voters from the voter registration rolls in violation of Section 8 of the National Voter Registration Act. A consent decree remedying the violations was entered on August 14, 2002. Since entry of the consent decree, the Civil Rights Division has monitored several elections to ensure compliance with the consent decree.

United States v. Tennessee (M.D. Tenn.) -- Complaint alleged that Tennessee failed to properly implement voter registration procedures in the Department of Safety, Department of Human Services, Department of Health, and Department of Veterans' Affairs, in violation of Section 7 of the National Voter Registration Act. A consent decree remedying the violations was entered on October 15, 2002. Since entry of the consent decree, the Civil Rights Division has monitored several elections to ensure compliance with the consent decree.

59. How many lawsuits has the Justice Department filed under Section 2 of the Voting Rights Act since you were sworn in as Attorney General? Please identify the parties to such suits, the courts in which they were filed, the specific issues involved, and state the current status of each suit.

ANSWER: Four lawsuits have been filed under Section 2 of the Voting Rights Act as follows:

United States v. Crockett Co. Tennessee (W.D. Tenn.) -- Complaint alleged that the method of electing the county's Board of Commissioners diluted the voting strength of African-American voters. The case was resolved by a consent decree, which remedied the violation.

United States v. Alamosa County, Colorado (D. Colo.) -- Complaint alleged that the at-large method of election of the Alamosa County Board of Commissioners diluted the voting strength of Hispanic voters in violation of Section 2. The case was tried in May, 2003. On November 26, 2003 the Court found for Alamosa County, entering an extensive opinion finding that a Section 2 violation had not been proved.

United States v. Osceola County, Florida (M.D. Fla.) – See discussion above.

United States v. Berks County, Pennsylvania (E.D. Pa.) -- Complaint alleged that Hispanic (primarily Puerto Rican) voters were discriminated against through hostile treatment at the polls, failure to provide adequate language assistance, and not permitting Hispanic voters to bring assistors of their choice into the polling place, in violation of Sections 2, 4(e), and 208 of the Voting Rights Act. The Court granted a preliminary injunction on March 18, 2003 and permanent relief on August 20, 2003. Both decisions included in-depth findings of fact and conclusions of law and provided extensive relief designed to protect Hispanic voters. *See* 250 F. Supp. 2d 525 (E.D. Pa.)(preliminary injunction); 277 F. Supp. 2d 570 (E.D. Pa.)(decision on merits). Since the decision, a major monitoring effort, including a record number of federal observers, has ensured compliance with the Court's order.

In addition, several other Section 2 vote dilution cases were approved for filing, but filing was rendered unnecessary by subsequent events. These were cases against the Chelsea, Massachusetts School Board, where the prospective defendant agreed to remedy the violation voluntarily prior to suit being filed; and against the St. Landry Parish, Louisiana Police Jury and School Board, and the Sikeston, Missouri School Board, because minority candidates were elected after approval of the lawsuits, making filing of the lawsuits neither necessary nor appropriate.

Also, since 2001 the Division has litigated two Section 2 vote dilution trials – one involving the dilution of Native American votes in Blaine County, Montana, and one regarding

African American vote dilution in Charleston County, South Carolina. In both instances, the United States prevailed both in the trial court and on appeal, and earned extensive written decisions in each case.

The district court in the Blaine County case upheld the constitutionality of Section 2 on July 23, 2001. *United States v. Blaine County, Montana*, 157 F. Supp. 2d 1145 (D. Mont. 2001). Trial on the merits was held from October 9-18, 2001 and on March 21, 2002 the district court issued an unreported 22-page decision finding for the United States. Both of these lower court decisions were affirmed by the Ninth Circuit Court of Appeals on April 7, 2004. *See* 363 F.3d 897 (9th Cir. 2004). The first election under the new plan resulted in the election of the first Native American ever to the County Commission.

In the Charleston case, partial summary judgment for the United States was granted on July 10, 2002 in an unreported decision. Trial began on July 15, 2002. On March 6, 2003 the district court found a Section 2 violation in a 62-page decision. *United States v. Charleston County, South Carolina,* 316 F.Supp.2d 268 (D. S.C. 2003). The Court relied upon "decisive[ ]" evidence of "severe voting polarization, minimal minority electoral success, and an uncommonly large voting district," among other factors, to conclude that the County's at-large method of election diluted minority voting strength in violation of Section 2. These decisions were affirmed by the Fourth Circuit Court of Appeals on April 29, 2004, which dismissed the County's evidence supporting its partisanship defense as "far from persuasive." *United States v. Charleston County, South Carolina,* 365 F.3d 341 (4th Cir.), cert. denied, 125 S.Ct. 606 (2004).

QUESTIONS FROM SENATOR KENNEDY

Ashcroft-Mueller Press Conference

Your major press conference two weeks ago with FBI Director Mueller on the likelihood of new terrorist attacks occurred immediately after the revelation of the Department's serious error in arresting and incarcerating a man in Oregon on the basis of an invalid fingerprint match. At the time, the Department of Defense had just admitted major omissions from the copy of the Taguba Report provided to the Senate on abuses of prisoners in Iraq, and a bi-partisan complaint had been submitted about the unexplained delay in the Administration's delivery of long-promised copies of reports by the International Committee if the Red Cross on U.S. detention and interrogation practices in Iraq.

60. Was the occurrence of any of these events a factor in the decision to hold the press conference? Please provide details. You decided to go ahead, despite Homeland Security Secretary Ridge's unwillingness to join you and despite his dissemination of a very different threat message the same day. Who at the White House or elsewhere outside the Department had a role in the decision to hold the press conference or to go forward at that time and in spite of Secretary Ridge's decision?

ANSWER: No. As Director Ridge and I said in our May 28, 2004, joint statement on this matter, were in a season of symbolic events that could be attractive targets for terrorism. During the past few months our country has experienced significant national celebrations - most notably of course being the recent Presidential election. Therefore, it was appropriate to make the public aware that there may have been people in this country who have nefarious intentions. The press conference was meant to raise the level of awareness regarding the seven individuals Director Mueller and I spoke about with hopes that information would be forthcoming that would help us locate those individuals.

As a result, we received many tips and are aggressively pursuing those leads. We continue to encourage citizens, if they see suspicious activity, to report it to their local police department, sheriff's office or the FBI. Public awareness is an important element in helping to disrupt terrorist plans.

Finally, DHS and DOJ, in partnership with the CIA, the Terrorist Threat Integration Center and other agencies, jointly review threat information each and every day. We are working together, and we will take all necessary actions to protect the American people, including raising the threat level or alerting the public to be on the lookout for possible terrorist suspects, whenever warranted by the information we receive.

Board of Immigration Appeals

A few years ago, you oversaw substantial changes in the way the Board of Immigration Appeals reviews immigration cases and issues appellate decisions. You said at that time that this streamlining initiative would help reach quick decisions, bring quick justice, and save the government millions of dollars. The federal circuit courts of appeals now say that they are swamped with appeals by persons who have been subject to the Board's new streamlining procedures. The courts have had to hire new staff to try to keep up, and have had to request more federal money to keep up with the huge surge in appeals. Several organizations had warned that this undesired effect would occur.

61. In retrospect, do you think that it has been wise to simply shift the adjudication burden from the BIA to the federal courts?

ANSWER: The reason for the unprecedented leap in petitions for review filed with the Federal courts has little to do with any increase in the Board of Immigration Appeals' (Board) adjudications under the restructuring regulation, or its use of the summary affirmance (or affirmance without opinion) provisions. First and foremost, this is not the predominant form of adjudication; in fact, only one-third of the Board's cases are affirmed without opinion. Furthermore, based on requests for certified copies of Executive Office for Immigration Review proceedings for review in the Federal courts,[1] appeals from summary affirmances are the consistent minority.

Second, the reason for the rise in filings is that more aliens (and their counsel) have chosen to file petitions for review, not because the Board has increased the number of decisions it renders. In this respect, I note that the historical number of petitions for review filed was approximately 120 per month. The Board's increased adjudications would cause that number to rise to 200. In recent months, that monthly figure has skyrocketed to 1,000-1,200 filings, meaning only 7% of the increase is due to the Board's decision rate.

The reasons for this upsurge are unclear, but there are probably several factors at play. The most probable reason is that filing an appeal to the Board no longer means a lengthy stay of deportation. Historically, the Board took years to render a decision, and aliens benefited from an automatic stay of deportation during that time. Now, only 2% or fewer of the Board's decisions are older than 2 years. Furthermore, many courts of appeal are granting stays of deportation as a matter of course, and the cost of a petition for review is low in exchange for a delay in removal from the United States. Finally, there are indications that the immigration bar, having lost all legal challenges to the restructuring regulation, is now deliberately filing more petitions for review in an effort to undermine the regulation.

Whatever the ultimate reasons, such petitions for review are permitted by law, and in theory many more aliens could avail themselves of this route than do, even with these unparalleled numbers of filings.

---

[1] The Board does not have direct access to comprehensive data regarding petitions for review filed with the Federal courts. However, most, if not virtually all, such matters require a certified copy of the administrative proceedings, and the Board does track those requests for its records. The figures above are accordingly derived from that data.

Under the new Board of Immigration Appeals streamlining rules, the Board seldom issues an appellate opinion explaining the basis for a decision in a case. The streamlining has also deprived many respondents of the ability to understand why they are being ordered removed from the U.S. They say they are now forced to appeal to the federal circuit courts in order to receive a full appellate decision -- a decision that often involves life or death matters.

62. Do you still think that this a wise use of federal resources and taxpayer dollars?

ANSWER: We take serious issue with the first two statements above, which are simply not true. As mentioned above, the Board issues a summary affirmance in only one-third of the cases; two thirds are individualized determinations. Second, even if an appeal to the Board is summarily affirmed without opinion, the restructuring regulation makes clear that it is the immigration judge's decision that stands as the final agency determination of the issues in the case, and that decision makes clear the reasons for the alien's removal from the United States. I note that every court that has heard a challenge to the restructuring regulation has rejected it. In fact, the Federal circuit courts make wide use of similar summary dismissals of petitions for review, and recognize the value of the procedure when adjudicating routine or meritless challenges to well-reasoned lower court decisions.

Finally, the state of affairs prior to the restructuring regulation also involved considerable costs in the form of extensive delays. This allowed for abuses of the immigration proceeding process, and prevented aliens meriting relief from removal from receiving that relief for many years. It is in the interest of all that immigration proceedings move expeditiously while assuring due process and an adequate opportunity to be heard. The restructuring regulation has allowed the Board to best allocate its limited resources to achieve this goal.

Automatic Stays of Immigration Custody Determinations

You implemented a regulation that allowed government immigration attorneys in bond hearings to request automatic stays of immigration custody determinations made by immigration judges. This automatic stay regulation essentially strips immigration bond hearings of their legitimacy and authority by enabling government immigration attorneys, in effect, to overrule immigration judges. In promulgating this regulation, you did not say that immigration judges or the Board of Immigration Appeals were abusing their power or failing to keep terrorist suspects in detention. Instead, you said that the regulation will "avoid the necessity for a case-by-case determination of whether a stay [of a release order] should be granted in particular cases." But that case-by-case determination is at the very core of due process when an individual's liberty is at stake.

63. Please explain why, other than for expediency, this regulation is necessary.

ANSWER: The current version of the automatic stay regulation became effective in October 2001 as an interim regulation with a request for comments. Publication of the final rule is pending. This regulation made reasonable and necessary changes to the original rule, published in May 1998 by the previous Attorney General, which first introduced the automatic stay provisions.

Chief among those changes in the interim rule is its application to any detained alien determined by the Department of Homeland Security (DHS) to either not merit release on bond or require a bond of at least $10,000 while removal proceedings were pending. Previously, the rule only applied to mandatorily detained aliens.

Release of any alien during a removal proceeding is not required by statute, but is solely within my discretion. Because DHS decisions to either set a high bond or to withhold release entirely are made in the most serious cases, I must exercise my discretion to modify that determination carefully. This rule sets out a clear and quick timetable for review of proposed changes to a DHS bond determination before releasing a detained alien. Although the decision to stay the modification of a release order is triggered automatically by the filing of a notice of intent to appeal, the decision whether to uphold the modification is made after consideration of the individual merits of the alien's request for release. In no way are an alien's due process rights under the immigration law violated.

State and Local Law Enforcement of Immigration Laws

As you know, under the Immigration and Nationality Act, section 287(g), the Department may enter into a memorandum of understanding with a state to authorize state and local law enforcement officers to enforce immigration laws.

64. With what states are you negotiating currently to implement memos of understanding? What states have refused to negotiate with the Department on this issue? What are their reasons for refusing?

ANSWER: Section 287(g) of the Immigration and Nationality Act (INA) permitted the Attorney General to enter into written agreements with a state to perform certain functions of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the U.S. After the Homeland Security Act of 2002 was enacted, however, responsibility for entering into such written agreements was assumed by the Department of Homeland Security (DHS).

In 2002, prior to the enactment of the Homeland Security Act, the Department of Justice entered into a Memoranda of Understanding (MOU) with the state of Florida pursuant to section 287(g). That MOU terminated on September 1, 2003, but was renewed by DHS on November 26, 2003. In addition, DHS entered into a separate agreement with the state of Alabama on September 10, 2003. Because of the lead role assumed by DHS, questions related to the implementation of existing MOUs issued pursuant to section 287(g) of the INA or efforts to enter into additional MOUs should be addressed to the Secretary of Homeland Security.

65. What databases do they use for such information at the time of interdiction? How are such databases corrected if the data are not accurate? Will the police be instructed to conduct the same review of databases for all those interdicted, or will the use of profiling again be expanded as in the Department's NSEERS program? What efforts are being taken to prevent abuses?

ANSWER: Questions about the procedures and information used by state and local law enforcement under existing section 287(g) MOUs with DHS should be addressed to the

Secretary of Homeland Security because of the lead role DHS has assumed. In general, state and local law enforcement rely on the NCIC for information related to individuals stopped for questioning. U.S. Immigration and Customs Enforcement (ICE) of the Department of Homeland Security enter records on removable aliens into the NCIC Immigration Violator File (IVF). The IVF clearly distinguishes NCIC immigration violator records from the purely criminal categories of NCIC and provides a specific, dedicated repository for entry of a broad range of administrative immigration violators. All the violators for whom records are being entered into the IVF are, however, subject to criminal prosecution. NCIC also contains outstanding ICE criminal arrest warrants that are placed in the NCIC Wanted Person File. ICE is the only agency authorized to enter, modify, validate, or delete records in the IVF and, pursuant to general NCIC policy, any challenge to the accuracy of the records is referred to ICE as the agency that entered the record into the relevant NCIC file.

Immigration Cases in NCIC

Last year, you announced that information on more than 400,000 immigrants with deportation orders and an unknown number of other alleged immigration violators would be included in the national crime database, the NCIC. As you know, these are cases of persons with administrative warrants, not criminal warrants.

66. What is the legal authority for the FBI to enter administrative warrants into its principal criminal law database? What other immigration-related records does the Administration plan to include? Are there any restrictions on the type of cases that can be entered?

ANSWER: The authority of the Attorney General to acquire, collect, classify, and preserve identification, criminal identification, crime, and other records is provided by 28 U.S.C. 534. Pursuant to this authority, the FBI serves as the national focal point and central repository for identification and other records disseminated to state and local authorities through the NCIC. In some instances, civil records that bear on the administration of criminal justice, such as civil protection orders, missing person records, and immigration warrants, are included in the NCIC files.

Although immigration removal proceedings are handled as civil matters, most immigration violations also are subject to criminal prosecution. For example, an alien who willfully fails to depart, willfully fails to apply for travel documents, conspires to prevent or hamper the alien's departure, or willfully fails to surrender for removal may be imprisoned for four years under section 243(a) of the INA; an alien who willfully fails to register may be imprisoned for six months under section 266(a); an alien who improperly enters the United States, eludes inspection, or enters by means of willfully false or misleading representations may be imprisoned for six months under section 275(a) of the INA (for a second offense, the alien may be imprisoned for two years); and an alien who illegally reenters after removal may be imprisoned for two years and certain aliens may be imprisoned for as long as 10 or 20 years under section 276(a) of the INA.

In addition, 8 U.S.C. 1252c(a) provides that "[s]tate and local law enforcement officials are authorized to arrest and detain an individual who - (1) is an alien illegally present in the United States; and (2) has previously been convicted of a felony in the United States and

deported or left the United States after such conviction, but only after the State or local law enforcement officials obtain appropriate confirmation from the Immigration and Naturalization Service of the status of such individual and only for such period of time as may be required for the Service to take the individual into Federal custody for purposes of deporting or removing the alien from the United States." Subsection (b) of that provision also requires that the Attorney General "cooperate with the States to assure that information in the control of the Attorney General, including information in the National Crime Information Center, that would assist State and local law enforcement officials in carrying out duties under subsection (a) of this section is made available to such officials."

Because of the responsibilities assumed by DHS after enactment of the Homeland Security Act of 2002, any questions relating to the scope of future immigration records that may be made a part of the NCIC should be addressed to the Secretary of Homeland Security.

The error rate in immigration records has always been very high. Numerous reports by the Department's Inspector General have confirmed the notorious unreliability of INS records.

67. What precautions are being taken to ensure that immigration records in NCIC are accurate, so that persons with legal status are not wrongly arrested as a result of a fake record? What is the mechanism for updating and correcting information in the database?

ANSWER: The primary responsibility for the entry and maintenance of accurate, timely, and complete records lies with the entering agency. A record may be modified only by the agency that entered the record. ICE's Law Enforcement Support Center (LESC) is the only entity that can enter records into the NCIC IVF, and it must comply with all NCIC policies. The following information, provided by ICE, describes the steps ICE takes to comply with NCIC policies.

NCIC policies require that every record entered be based on a valid original source document. For deported felons, that document is an executed warrant of removal; for alien absconders it is a warrant of removal; and for National Security Entry-Exit Registration System violators it is an administrative warrant of arrest. NCIC policies require that hit confirmation be conducted 24 hours a day, seven days a week, and within ten minutes. To meet the ten minute response time requirement, the LESC maintains fingerprints and photographs, as well as the original documentation to support a record's entry in the NCIC IVF.

The LESC reviews each alien file to determine if a record should be entered in one of the IVF categories. These reviews involve comprehensive research of the source documents and electronic data contained in the separate ICE databases to ensure data integrity and suitability for an NCIC entry.

Additionally, validation procedures exist to ensure that accurate records are entered into NCIC. Validation obliges the LESC to confirm that the record is complete, accurate, and still outstanding or active. IVF records must be validated 60 to 90 days after entry and every year thereafter. Validation is accomplished by reviewing the original entry and current supporting documents.

As the manager of NCIC, the FBI helps maintain the integrity of the system through: 1) automatic computer edits which reject certain common types of errors in data, 2) automatic purging of records after they are in a file for a prescribed period of time, 3) quality control checks by the FBI's Data Integrity staff, and 4) periodically furnishing lists of all records on file for validation by the agencies that entered them.

Each federal and state CJIS System Agency is audited at least once every three years by the FBI's audit staff. This audit includes a sample of state and local criminal justice agencies and their records. The objective of this audit is to verify adherence to FBI policies and regulations, and is termed a compliance audit. The FBI audit staff also conducted an informational NCIC audit of LESC in August 2003. Since the LESC acquired sole responsibility over the entry and maintenance of the NCIC IVF, there has been an improvement in the validity, accuracy, and completeness of both the records and the supporting documentation.

Pending legislation would require the inclusion of immigrants with minor immigration violations in the national crime database. The bill is opposed by many law enforcement agencies around the country. It was sharply criticized last month by the Heritage Foundation, which said it "may hinder law enforcement by undermining the usefulness" of the database. As the report states: "Filling the database with records of minor immigration violators could also distract or impede police officers from using the database to obtain information about violent criminals and terrorists." The report concluded that the database "should be reserved for serious, significant immigration violations."

68. Do you support the conclusions of the Heritage Foundation? Can we afford to jeopardize the usefulness of the database?

ANSWER: The main issue of concern for the law enforcement community, as voiced through the CJIS APB, has been the authority to arrest immigration violators. The law enforcement community does not want to retrieve records from NCIC with respect to individuals on whom they can take no action. In response to a recent request by ICE to expand the IVF, the APB supported the expansion in concept but delayed implementation until the expansion could be supported with criminal warrants, directed by appropriate authority, or adjusted to include this content in "information only" files. The inclusion of immigration violators in NCIC and local law enforcement's right of arrest are currently the basis of a lawsuit filed by the American Civil Liberties Union and are under consideration by the Office of Domestic Policy, Homeland Security Council. Although the entry of immigration violators' records into NCIC would not jeopardize the operational integrity of the system, it would create a level of frustration within the user community if they could not take action based on those records or were exposed to liability if they did take action.

Assault Weapons Ban

The Justice Department has been aggressively lobbying to renew the provisions of the PATRIOT Act that sunset at the end of 2005, even though the date was selected so that renewal of the PATRIOT Act would not become a political football in this election year. However, we've heard nothing from the Justice Department about another essential protection against terrorism which is due to expire in only three months: the federal assault weapons ban.

President Bush says that he supports renewing the ban, and you've confirmed the Administration's position. But you haven't done anything to encourage the House or Senate to extend the ban.

69. Why hasn't the Administration made renewing the assault weapons ban a high legislative priority? Why haven't you urged action on this issue? Given the importance of this issue, will you support a vote on the assault weapons ban on the next amendable vehicle in the Senate?

ANSWER: The President's position on the extension of the now-expired assault-weapons restrictions is well known. I support the President's position. The Department of Justice enforces all laws restricting firearms possession. During the first three years of President Bush's administration, through the auspices of Project Safe Neighborhoods, federal firearms prosecutions increased 68 percent. Were Congress to have extended the restrictions on assault weapons, the Department of Justice would have continued to enforce the law vigorously.

Voting Rights

One of the Justice Department's most important functions is to protect the right to vote by enforcing the Voting Rights Act. In that role, the Department's Civil Rights Division traditionally sends federal observers to the polls to ensure fairness to minorities in elections. In addition, the Criminal Division sometimes becomes involved in criminal prosecution of election fraud.

The Voting Rights Act authorizes the Department to send federal observers, supervised by Civil Rights Division personnel, to monitor elections for civil rights enforcement purposes, but not to investigate criminal voter fraud that is not related to civil rights violations. Given the history of the use of "fraud" investigations as an intimidation tool, if minority voters believe Civil Rights Division workers are at the polls to gather information or make arrests related to voter fraud, some may be afraid to go to the polls or to provide information about civil rights violations to these federal workers.

70. Have Department of Justice personnel in the Civil Rights Division, the Civil Division, and the United States Attorneys' Offices been clearly informed that Civil Rights Division employees lack authority to become involved in voter fraud issue that are not related to civil rights?

ANSWER: All Department of Justice Divisions are well aware of their areas of legal responsibility for enforcement of federal statutes. Investigations and prosecutions of election crimes are the responsibility of the Election Crimes Unit of the Public Integrity Section of the Criminal Division, in conjunction with the United States Attorneys' Offices. Information on such matters that is received by the Civil Rights Division from citizen complaints is referred to the Election Crimes Unit for handling. Moreover, when the Division and the Office of Personnel Management train voting rights election monitors and observers, those monitors and observers are trained only in civil rights laws, and not in criminal fraud laws. These individuals similarly well understand their area of responsibility at polling places on Election Day.

71. Will you issue a written clarification on that point to personnel in the Civil Rights and Criminal Divisions, as well as in U.S. Attorneys' Offices?

ANSWER: As is clear from the foregoing response, Department of Justice personnel well understood their designated areas of responsibility at polling places on Election Day.

72. Please list, by date of election, the jurisdictions to which federal observers and/or Civil Rights Division personnel have been sent during your tenure as Attorney General.

ANSWER: Since 2001, the Department deployed a total of 2,887 federal observers and 1,024 Civil Rights Division personnel to monitor elections. Please see list below:

02/27/01 Cicero (Cook County), IL
03/06/01 St. Louis, MO
04/03/01 Cicero (Cook County), IL
04/17/01 Passaic County, NJ
05/01/01 Clarksdale (Coahoma County), MS
05/01/01 Webb (Tallahatchie County), MS
05/01/01 Macon (Noxubee County), MS
05/05/01 Irving (Dallas County), TX
05/05/01 Selma (Bexar, Comal and Guadalupe Counties), TX
05/08/01 Passaic (Passaic County), NJ
05/15/01 Clarksdale (Coahoma County), MS
05/15/01 Reading (Berks County), PA
06/05/01 Clarksdale (Coahoma County), MS
06/05/01 Isola (Humphreys County), MS
06/05/01 Sunflower (Sunflower County), MS
06/05/01 Vicksburg (Warren County), MS
06/26/01 Passaic County, NJ
08/21/01 Osceola County, FL
09/11/01 Hamtramck (Wayne County), MI
09/11/01 New York City (Bronx, Kings, New York and Queens Counties), NY
09/11/01 Suffolk County, NY
09/25/01 New York City (New York County), NY
10/11/01 New York City (Bronx and New York Counties), NY
11/06/01 Lawrence (Essex County), MA
11/06/01 Hamtramck (Wayne County), MI
11/06/01 Passaic County, NJ
11/06/01 New York City (Bronx, Kings and New York Counties), NY
11/06/01 Suffolk County, NY
11/06/01 Maple Heights (Cuyahoga County), OH
11/06/01 Reading (Berks County), PA
12/11/01 Ridgeville (Dorchester County), SC
01/15/02 Drew (Sunflower County), MS
02/12/02 Centreville (Wilkinson County), MS
03/19/02 Ridgeville (Dorchester County), SC
04/06/02 St. Martinville (St. Martin Parish), LA
04/06/02 Winnsboro (Franklin Parish), LA
04/16/02 Middlesex County, NJ
04/16/02 Passaic County, NJ
05/04/02 St. Martinville (St. Martin Parish), LA
05/04/02 Winnsboro (Franklin Parish), LA
05/04/02 Kenedy (Karnes County), TX
05/04/02 Seagraves (Gaines County), TX
05/14/02 Hudson County, NJ
05/14/02 Passaic County, NJ
05/21/02 Reading (Berks County), PA

05/21/02 Brentwood Union Free School District (Suffolk County), NY
06/04/02 Chambers County, AL
06/04/02 Hale County, AL
06/04/02 Passaic County, NJ
06/04/02 Cibola County, NM
06/04/02 San Juan County, NM
06/04/02 Sandoval County, NM
06/04/02 Socorro County, NM
06/25/02 San Juan County, UT
08/06/02 Hamtramck (Wayne County), MI
08/06/02 St. Louis, MO
08/20/02 Atlanta (De Kalb and Fulton Counties), GA
09/10/02 Apache County, AZ
09/10/02 Navajo County, AZ
09/10/02 Miami-Dade County, FL
09/10/02 Orange County, FL
09/10/02 Osceola County, FL
09/10/02 Queens County, NY
09/10/02 Suffolk County, NY
11/05/02 Apache County, AZ
11/05/02 Navajo County, AZ
11/05/02 San Francisco County, CA
11/05/02 Waterbury (New Haven County), CT
11/05/02 Broward County, FL
11/05/02 Duval County, FL
11/05/02 Miami-Dade County, FL
11/05/02 Orange County, FL
11/05/02 Osceola County, FL
11/05/02 Randolph County, GA
11/05/02 Hamtramck (Wayne County), MI
11/05/02 St. Louis, MO
11/05/02 Adams County, MS
11/05/02 Amite County, MS
11/05/02 Passaic County, NJ
11/05/02 Bernalillo County, NM
11/05/02 Cibola County, NM
11/05/02 San Juan County, NM
11/05/02 Sandoval County, NM
11/05/02 Socorro County, NM
11/05/02 Kings County, NY
11/05/02 New York County, NY
11/05/02 Queens County, NY
11/05/02 Reading (Berks County), PA
11/05/02 Titus County, TX
11/05/02 San Juan County, UT
11/12/02 Century (Escambia County), FL
01/04/03 Honolulu County, HI
02/25/03 Cicero (Cook County), IL
03/04/03 St. Louis, MO
04/01/03 Cicero (Cook County), IL
04/05/03 Baker School District (East Baton Rouge Parish), LA
04/15/03 Jacksonville (Duval County), FL
04/15/03 Passaic County, NJ
05/03/03 Moore County, TX
05/06/03 North Miami Beach (Miami-Dade Cty), FL
05/13/03 Jacksonville (Duval County), FL
05/13/03 Passaic (Passaic County), NJ
05/20/03 Reading (Berks County), PA
06/03/03 Passaic County, NJ
06/03/03 Brentwood Union Free School District (Suffolk County), NY
08/05/03 Kemper County, MS
08/05/03 Leake County, MS
08/05/03 Neshoba County, MS
08/05/03 Newton County, MS
08/05/03 Noxubee County, MS
09/09/03 Hamtramck (Wayne County), MI
09/13/03 Moore County, TX
09/23/03 Lawrence (Essex County), MA
10/04/03 Tangipahoa Parish, LA
10/06/03 Greenville (Washington County), MS
11/04/03 San Francisco County, CA
11/04/03 Jefferson County, KY
11/04/03 Lawrence (Essex County), MA
11/04/03 Hamtramck (Wayne County), MI
11/04/03 Humphreys County, MS
11/04/03 Jones County, MS
11/04/03 Kemper County, MS
11/04/03 Leake County, MS
11/04/03 Neshoba County, MS
11/04/03 Newton County, MS
11/04/03 Noxubee County, MS
11/04/03 Winston County, MS
11/04/03 Passaic County, NJ
11/04/03 New York City (Queens County), NY
11/04/03 Reading (Berks County), PA
11/04/03 Houston (Harris County), TX
11/15/03 Tangipahoa Parish, LA
12/06/03 Houston (Harris County), TX
02/03/04 Yakima County, WA
03/02/04 Imperial County, CA
03/02/04 Kings County, CA
03/02/04 Lo s Angeles County, CA
03/02/04 San Benito County, CA
03/02/04 San Diego County, CA
03/02/04 San Francisco County, CA
03/02/04 San Joaquin County, CA
03/09/04 Baker (East Baton Rouge Parish), LA
03/09/04 Tangipahoa Parish, LA
03/09/04 Jones County, MS
03/09/04 Kemper County, MS
03/09/04 Leake County, MS
03/09/04 Neshoba County, MS
03/09/04 Newton County, MS
03/09/04 Noxubee County, MS
03/09/04 Winston County, MS
03/09/04 Harris County, TX
03/09/04 Tarrant County, TX
03/09/04 Waller County, TX
04/06/04 Summerton (Clarendon County), SC
04/20/04 Aberdeen (Monroe County), MS
04/27/04 Reading (Berks County), PA
05/04/04 East Chicago (Lake County), IN
05/04/04 Aberdeen (Monroe County), MS

05/15/04 Dallas County, TX
05/15/04 Harris County, TX
05/18/04 Pulaski County, AR
05/18/04 Brentwood Union Free School District (Suffolk County), NY
06/01/04 Bernalillo County, NM
06/01/04 Cibola County, NM
06/01/04 Rio Arriba County, NM
06/01/04 Sandoval County, NM
06/01/04 Santa Fe County, NM
06/01/04 Socorro County, NM
06/01/04 Bennett County, SD
06/01/04 Buffalo County, SD
06/01/04 Dewey County, SD
06/01/04 Jackson County, SD
06/01/04 Mellette County, SD
06/01/04 Shannon County, SD
06/01/04 Todd County, SD
06/01/04 Ziebach County, SD
06/08/04 Passaic County, NJ
06/08/04 Charleston County, SC
06/08/04 Dorchester County, SC
06/22/04 Salt Lake County, UT
06/22/04 Utah County, UT
07/20/04 Randolph County, GA
07/20/04 Hamtramck (Wayne County), MI
08/03/04 Hamtramck (Wayne County), MI
08/10/04 Randolph County, GA
08/24/04 Kodiak Island Borough, AK
08/31/04 Broward County, FL
08/31/04 Miami-Dade County, FL
08/31/04 Orange County, FL
08/31/04 Osceola County, FL
09/07/04 Apache County, AZ
09/07/04 Cochise County, AZ
09/07/04 Gila County, AZ
09/07/04 Graham County, AZ
09/07/04 Maricopa County, AZ
09/07/04 Navajo County, AZ
09/07/04 Santa Cruz County, AZ
09/07/04 Yuma County, AZ
09/14/04 Nassau County, NY
09/14/04 Queens County, NY
09/14/04 Richmond County, NY
09/14/04 Suffolk County, NY
09/14/04 Franklin County, WA
09/14/04 Yakima County, WA
09/21/04 Lee County, SC
10/05/04 Kodiak Island Borough, AK
10/12/04 Baylou La Bartre (Mobile County), AL
10/26/04 East Chicago (Lake County), IN
11/02/04 Kodiak Island Borough, AK
11/02/04 Pulaski County, AR
11/02/04 Apache County, AZ
11/02/04 Cochise County, AZ
11/02/04 Maricopa County, AZ
11/02/04 Navajo County, AZ
11/02/04 Pima County, AZ
11/02/04 Santa Cruz County, AZ
11/02/04 Yuma County, AZ
11/02/04 Imperial County, CA
11/02/04 Orange County, CA
11/02/04 San Benito County, CA
11/02/04 San Diego County, CA
11/02/04 Ventura County, CA
11/02/04 Broward County, FL
11/02/04 Duval County, FL
11/02/04 Gadsden County, FL
11/02/04 Hillsborough County, FL
11/02/04 Miami-Dade County, FL
11/02/04 Orange County, FL
11/02/04 Osceola County, FL
11/02/04 Palm Beach County, FL
11/02/04 Atkinson County, GA
11/02/04 Henry County, GA
11/02/04 Long County, GA
11/02/04 McIntosh County, GA
11/02/04 Cicero (Cook County), IL
11/02/04 East Chicago (Lake County), IN
11/02/04 Polk County, IA
11/02/04 Jefferson County, KY
11/02/04 Detroit (Wayne County), MI
11/02/04 Hamtramck (Wayne County), MI
11/02/04 Pontiac (Oakland County), MI
11/02/04 Hennepin County, MN
11/02/04 St. Louis, MO
11/02/04 Jones County, MS
11/02/04 Kemper County, MS
11/02/04 Leake County, MS
11/02/04 Neshoba County, MS
11/02/04 Newton County, MS
11/02/04 Winston County, MS
11/02/04 Alamance County, NC
11/02/04 Scotland County, NC
11/02/04 Wake County, NC
11/02/04 Passaic County, NJ
11/02/04 Bernalillo County, NM
11/02/04 Chaves County, NM
11/02/04 Cibola County, NM
11/02/04 Rio Arriba County, NM
11/02/04 San Juan County, NM
11/02/04 Sandoval County, NM
11/02/04 Socorro County, NM
11/02/04 Clark County, NV
11/02/04 Washoe County, NV
11/02/04 Kings County, NY
11/02/04 Nassau County, NY
11/02/04 New York County, NY
11/02/04 Queens County, NY
11/02/04 Richmond County, NY
11/02/04 Suffolk County, NY
11/02/04 Westchester County, NY
11/02/04 Cuyahoga County, OH
11/02/04 Franklin County, OH
11/02/04 Hamilton County, OH
11/02/04 Adair County, OK

11/02/04 Cherokee County, OK
11/02/04 Delaware County, OK
11/02/04 Philadelphia County, PA
11/02/04 Reading (Berks County), PA
11/02/04 Bennett County, SD
11/02/04 Buffalo County, SD
11/02/04 Corson County, SD
11/02/04 Dewey County, SD
11/02/04 Jackson County, SD
11/02/04 Mellette County, SD
11/02/04 Shannon County, SD
11/02/04 Todd County, SD
11/02/04 Tripp County, SD
11/02/04 Ziebach County, SD
11/02/04 Dallas County, TX
11/02/04 Harris County, TX
11/02/04 Hidalgo County, TX
11/02/04 Tarrant County, TX
11/02/04 Waller County, TX
11/02/04 Franklin County, WA
11/02/04 Yakima County, WA
11/16/04 San Diego County, CA
12/28/04 East Chicago (Lake County), IN
01/04/05 San Diego County, CA

73. Please describe in detail the criteria the Department of Justice has used since you became Attorney General to determine the federal jurisdictions to which it would send observers and/or Civil Rights Division personnel to monitor elections. In addition, please describe in detail the criteria that will be used to make this determination during the November 2004 elections.

ANSWER: Prior to an election, the Civil Rights Division prioritizes jurisdictions to best deploy its observer and monitor resources. Jurisdictions are surveyed in the following order:

1. Jurisdictions subject to court orders, consent decrees, and settlement agreements authorizing federal observers or monitors;

2. Jurisdictions where violations of the Voting Rights Act or other federal voting rights statutes have recently occurred; and

3. Jurisdictions where substantial and credible evidence, including that obtained through citizen complaints or requests for monitoring from local election officials, indicates the need to monitor for compliance with federal voting rights statutes.

In determining where to allocate election-monitoring assets, the Civil Rights Division considers the following criteria in no particular order:

- The receipt of credible citizen complaints about either the election or election officials in the jurisdiction;

- Credible and substantial evidence of significant racial tension surrounding the election;

- The extent to which problems can be effectively addressed by on-site monitoring;

- The Division's prior experience with the jurisdiction;

- The presence of elections that include inter-racial contests; and

- Ongoing Division investigations that would be aided by election-day monitoring.

These priorities and criteria also applied to determinations made with respect to the November 2004 general election.

As you know, after the November 2000 elections in Florida, there were widespread, credible allegations that voting irregularities disproportionately reduced the ability of minority groups to have their votes counted. The U.S. Commission on Civil Rights found that in Florida and other parts of the nation, the names of eligible voters were erroneously purged or incorrectly entered on registration lists. Recently, similar allegations have been raised about Florida's proposal to purge voters from the voting rolls before the 2004 elections.

74. Has the Department of Justice taken any action to investigate these new allegations? Please provide the Committee with a detailed docket of investigations and cases pending in the Voting Section of the Civil Rights Division, including a description of each case or matter, the nature of the claims, and the date the case or investigation was opened.

ANSWER: The Department is aware of and has been monitoring recent allegations regarding Florida's proposed purge of voters from the voting rolls for the 2004 elections. Much of that criticism has focused on Florida's use of a list prepared earlier this year, which apparently contained the names of a number of individuals who were in fact eligible to vote. The State has, since withdrawn that list, and indicated its intention not to use it. Accordingly, upon withdrawal of that list, the Department determined that no investigation of those allegations was warranted. Since then, we have received a number of additional requests to investigate various aspects of Florida's election processes and planning, some of which have purported to provide new information. We are at present reviewing those requests.

75. In your written testimony, you compared the Department's civil rights enforcement in certain areas to its enforcement in past years, in one instance dating back to the mid-1990s. Your comparison did not mention the Department's enforcement of the Voting Rights Act. Please provide information listing, by case name, the number of cases filed by the Voting Section of the Civil Rights Division since 1994, and a brief description of the facts and legal claims in each.

ANSWER: Since January 1, 1994, the United States has been a plaintiff in 66 separate lawsuits seeking to enforce the provisions of the Voting Rights Act, the Uniformed and Overseas Citizens Absentee Voting Act, the National Voter Registration Act, and the Help America Vote Act. In several of these actions, the United States sought relief under more than one statutory provision, resulting in 77 claims designed to ensure that all Americans have full, fair, and equal voting rights.

In addition, the United States has participated as plaintiff-intevenor in six other cases, and has defended the constitutionality of the Voting Rights Act in two cases. The Voting Rights Act identifies the United States as the statutory defendant in several categories of cases, including declaratory judgment actions where a jurisdiction covered by the Act's special provisions seek a declaratory judgment under Section 5 that a proposed voting change does not have a discriminatory purpose or effect and where covered jurisdictions seek to bail out from the special provisions of Section 4.

Since 1994, the United States has been a defendant in 21 Section 5 declaratory judgment actions and 9 bailout actions. The United States was named as a defendant in eight lawsuits including challenges to the constitutionality of the National Voter Registration Act and to actions that the Attorney General had taken under Section 5.

Finally, the United States intervened as a defendant in ten lawsuits; in nine of them seeking to defend the constitutionality of a redistricting plan. Also, where appropriate, the United States has participated as *amicus curiae* in cases where the Government's expertise, particularly with regard to issues that arise under Section 5 of the Act, may be of assistance to the court. During this time period, the United States appeared as *amicus* in 27 cases, 15 of which implicated Section 5.

The United States has participated in some capacity in the following matters:

Able v. Wilkins (D.S.C.) [Intervention to defend constitutionality of redistricting plan]
Amalfitano v. U.S. (S.D.N.Y.) [Defend constitutionality of NVRA]
Askew v. City of Rome (N.D. Ga.) [Intervened to defend constitutionality of VRA]
Baton Rouge and Parish of E. Baton Rouge v. U.S. (D.D.C.) [Section 5 declaratory judgment action]
Brenda K. v. Hooks (D.N.J.) [*Amicus curiae* regarding NVRA]
Bone Shirt v. Hazeltine (D.S.D.) [*Amicus Curiae* as to VRA Section 2]
Bossier Parish Louisiana School Board v. Reno (D.D.C.) [Section 5 declaratory judgment action]
Boxx v. Bennett (M.D. Ala.) [*Amicus Curiae* as to VRA Section 2]
Brown v. City of Shreveport (W.D. La.) [Enforce VRA Section 5]
Cannon v. City of Tallulah (W.D. La.) [*Amicus Curiae* as to VRA Section 2]
City of Andrews, Texas v. U.S. (D.D.C.) [Section 5 declaratory judgment action]
City of Baton Rouge, Louisiana v. U.S. (D.D.C.) [Section 5 declaratory judgment action]
City of Fairfax, Virginia v. Reno (D.D.C.) [VRA Section 4 bailout case]
City of Harrisonburg, VA v. Ashcroft (D.D.C.) [VRA Section 4 bailout case]
City of Winchester, VA v. Reno (D.D.C.) [VRA Section 4 bailout case]
City of Zachary, Louisiana v. Reno (D.D.C.) [Section 5 declaratory judgment action]
Clay v. City of St. Louis (E.D. Mo.) [*Amicus curiae* regarding NVRA]
Cleveland County Association v. Cleveland County, North Carolina Board of Commissioners (D.D.C.) [Amicus curiae regarding constitutionality of redistricting plan]
Common Cause of Vermont v. Dean (D. Vt.) [NVRA]
Commonwealth of Virginia v. Reno (D.D.C.) [Section 5 declaratory judgment action]
Commonwealth of Virginia v. U.S. (E.D. Va.) [NVRA]
Condon v. Reno (D.S.C.) [NVRA]
Cook v. Marshall County (N.D. Miss.) [Intervention to defend constitutionality of redistricting plan]
Cofield v. City of LaGrange, Georgia (D.D.C.) [Response to Subpoena]
Cotera v. State of Texas (W.D. Tex.) [*Amicus Curiae* as to VRA Section 2]
Cromartie v. Hunt (E.D.N.C.) [*Amicus Curiae* regarding constitutionality of redistricting plan]
Davis v. Ieyoub (W.D. La.) [Intervened as defendant in VRA Section 5]

Elliot v. U.S. Department of Justice (M.D. Fla.) [Defend constitutionality of redistricting plan]
Frederick County, Virginia v. Reno (D.D.C.) [VRA Section 4 bailout case]
Fouts v. Mortham (S.D. Fla.) [*Amicus Curiae* regarding constitutionality of redistricting plan]
Giles v. Ashcroft (S.D. Miss.) [Miscellaneous]
Giles v. Ashcroft (D.D.C.) [Miscellaneous]
Glasper v. City of Baton Rouge and East Baton Rouge Parish (M.D. La.) [*Amicus Curiae* as to VRA Section 2]
Greene Co., VA v. Ashcroft (D.D.C.) [VRA Section 4 bailout case]
Grieg v. City of St. Martinville (W.D. La.) [VRA Section 2]
Johnson v. Governor of Florida (M.D. Fla.) [*Amicus Curiae*]
Johnson v. Hamrick (N.D. Ga.) [Intervened to defend constitutionality of VRA]
Johnson v. Miller (S.D. Ga.) [Intervention to defend constitutionality of redistricting plan]
Johnson v. Miller (III) (S.D. Ga.) [Intervention to defend constitutionality of redistricting plan]
Johnson v. Smith (N.D. Fla.) [Intervention to defend constitutionality of redistricting plan]
Knight v. McKeithen (M.D. La.) [*Amicus Curiae* as to VRA Section 2]
Lopez v. Monterey County (N.D. Cal.) [*Amicus Curiae* as to VRA Section 2]
Louisiana House of Representatives v. Ashcroft (D.D.C.) [Section 5 declaratory judgment action]
Love v. Putnam County Board of Registrars (M.D. Ga.) [*Amicus Curiae* as to VRA Section 2]
LULAC v. State of Texas (W.D. Tex.) [*Amicus Curiae* as to VRA Section 2]
Marascalco v. City of Grenada (N.D. Miss.) [*Amicus Curiae* as to VRA Section 2]
Martinez v. Bush (S.D. Fla.) [*Amicus Curiae* as to VRA Section 2]
Navajo Nation v. Arizona Ind. Redistrict. Comm. (D. Ariz.) [*Amicus Curiae* as to VRA Section 2]
North Carolina State Board of Elections v. U.S. (D.D.C.) [Section 5 declaratory judgment action]
Rubalcaba v. City of Raymondville (S.D. Tex.) [Miscellaneous]
Shaw v. Hunt (E.D.N.C.) [*Amicus curiae* regarding constitutionality of redistricting plan]
PAC for Middle America v. State Bd. of Elections (N.D. Ill.) [Intervention to defend constitutionality of redistricting plan]
Perschall v. State of Louisiana (E.D. La.) [Intervention to defend constitutionality of redistricting plan]
Quilter v. Voinovich (N.D. Ohio) [*Amicus Curiae* regarding constitutionality of redistricting plan]
Rockingham County, VA v. Ashcroft (D.D.C.) [VRA Section 4 bailout case]
Roanoke County, VA v. Reno (D.D.C.) [VRA Section 4 bailout case]
Ruiz v. City of Santa Maria (C.D. Cal.) [*Amicus Curiae*]
Scott v. U.S. Department of Justice (M.D. Fla.) [Miscellaneous]
Shenandoah County, Virginia v. Reno (D.D.C.) [VRA Section 4 bailout case]
Singer v. City of Alabaster (Cir. Ct., Ala.) [*Amicus Curiae*]
Singer v. City of Alabaster (AL Sup. Ct.) [*Amicus Curiae*]
Smith v. Beasley (D.D.C.) [Response to Subpoena]

Smith v. Beasley (D.S.C.) [Intervened to defend redistricting plan]
State of Alabama v. Reno (D.D.C.) [Section 5 declaratory judgment action]
State of Arizona v. U.S. (judgeships) (D.D.C.) [Section 5 declaratory judgment action]
State of Florida by Butterworth v. Ashcroft (D.D.C.) [Section 5 declaratory judgment action]
State of Georgia v. Reno (II) (D.D.C.) [Section 5 declaratory judgment action]
State of Georgia v. Reno (III) (D.D.C.) [Section 5 declaratory judgment action]
State of Georgia v. Ashcroft (D.D.C.) [Section 5 declaratory judgment action]
State of Louisiana v. U.S. (D.D.C.) [Section 5 declaratory judgment action]
State of Mississippi v. Reno (D.D.C.) [Section 5 declaratory judgment action]
State of New York v. U.S. (D.D.C.) [Section 5 declaratory judgment action]
State of North Carolina v. Ashcroft (D.D.C.) [Section 5 declaratory judgment action]
State of Texas v. U.S. (Edwards Underground Water District) (D.D.C.) [Section 5 declaratory judgment action]
State of Texas v. United States (judgeships) (D.D.C.) [Section 5 declaratory judgment action]
State of Texas v. United States (D.D.C.) [Section 5 declaratory judgment action]
Stovall v. City of Cocoa (M.D. Fla.) [*Amicus Curiae*]
Statewide Reapprnt. Adv'ry Comm. v. Campbell (D.S.C.) [*Amicus Curiae* as to VRA Section 2]
Sullivan v. DeLoach (Waynesboro) (S.D. Ga.) [*Amicus Curiae* as to VRA Section 2]
Teague v. Attala County (N.D. Miss.) [VRA Section 2]
Theriot v. Jefferson Parish (E.D. La.) [Intervention to defend constitutionality of redistricting plan]
Thornton v. Molpus (S.D. Miss.) [Defend constitutionality of redistricting plan]
U.S. v. Alameda County (N.D. Cal.) [VRA Sections 2, 203 & 208]
U.S. v. Alamosa County (D. Colo.) [VRA Section 2]
U.S. v. Attala County (N.D. Miss.) [VRA Section 2]
U.S. v. San Benito County (N.D. Cal.) [VRA Sections 4 or 203 & HAVA]
U.S. v. Benson County (D.N.D.) [VRA Section 2]
U.S. v. Berks County (E.D. Pa.) [VRA Sections 2 & 208]
U.S. v. Bernalillo County (D.N.M.) [VRA Sections 2 & 203]
U.S. v. Blaine County (D. Mont.) [VRA Section 2]
U.S. v. Board of Elections of the City of New York (S.D.N.Y.) [VRA Section 2]
U.S. v. Brentwood Union Free School District (E.D.N.Y.) [VRA Sections 4 or 203]
U.S. v. Charleston County (D.S.C.) [VRA Section 2]
U.S. v. City of Baton Rouge (M.D. La.) [VRA Section 2]
U.S. v. City of Hamtramck (E.D. Mich.) [VRA Section 2]
U.S. v. City of Lawrence (D. Mass.) [VRA Sections 2 & 203]
U.S. v. City of Monroe (M.D. Ga.) [VRA Sections 2 & 5]
U.S. v. City of Newport News (E.D. Va.) [VRA Section 2]
U.S. v. Passaic City and Passaic County (D.N.J.) [VRA Sections 2, 4 or 203 & 208]
U.S. v. City of Santa Paula (C.D. Cal.) [VRA Section 2]
U.S. v. City of St. Louis (E.D. Mo.) [NVRA]
U.S. v. City of Wilmer (N.D. Tex.) [VRA Section 5]
U.S. v. Commonwealth of Pennsylvania (M.D. Pa.) [UOCAVA]
U.S. v. Commonwealth of Pennsylvania (E.D. Pa.) [NVRA]

U.S. v. Crockett County (W.D. Tenn.) [VRA Section 2]
U.S. v. Day County & Enemy Swim San. Dist. (D.S.D.) [VRA Section 2 & 42 U.S.C. 1971(a)]
U.S. v. Lee County (N.D. Miss.) [VRA Sections 2 & 5]
U.S. v. Marion County (M.D. Ga.) [VRA Section 2]
U.S. v. Miami-Dade County (S.D. Fla.) [VRA Section 208]
U.S. v. Morgan City (W.D. La.) [VRA Section 2]
U.S. v. Moses (S.D. Tex.) [VRA Section 5]
U.S. v. New Roads (M.D. La.) [VRA Section 2]
U.S. v. New York City Board of Elections (S.D.N.Y.) [VRA Section 5 & UOCAVA]
U.S. v. Orange County (M.D. Fla.) [VRA Sections 4 or 203]
U.S. v. Orr (N.D. Ill.) [UOCAVA]
U.S. v. Osceola (M.D. Fla.) [VRA Sections 2 & 208]
U.S. v. Passaic City and Passaic County (D.N.J.) [VRA Sections 2, 203 & 208]
U.S. v. Pulaski County (E.D. Ark.) [NVRA]
U.S. v. Roosevelt County (D. Mont.) [VRA Section 2]
U.S. v. San Diego County (S.D. Cal.) [VRA Sections 4 or 203]
U.S. v. State of Alabama (M.D. Ala.) [VRA Section 5]
U.S. v. State of Arizona (D. Ariz.) [VRA Section 5]
U.S. v. State of Georgia (N.D. Ga.) [VRA Section 5]
U.S. v. State of Georgia (N.D. Ga.) [UOCAVA]
U.S. v. State of Illinois (N.D. Ill.) [NVRA]
U.S. v. State of Louisiana (W.D. La.) [VRA Section 5]
U.S. v. State of Michigan (W.D. Mich.) [UOCAVA]
U.S. v. State of Michigan (W.D. Mich.) [NVRA]
U.S. v. State of Mississippi (S.D. Miss.) [VRA Section 5 & NVRA]
U.S. v. State of Mississippi (S.D. Miss.) [UOCAVA]
U.S. v. State of New Jersey (D.N.J.) [UOCAVA]
U.S. v. State of New York (E.D.N.Y.) [NVRA]
U.S. v. State of New York (N.D.N.Y.) [NVRA]
U.S. v. State of Oklahoma (W.D. Okla.) [UOCAVA]
U.S. v. State of South Dakota (D.S.D.) [VRA Section 2]
U.S. v. Tennessee (M.D. Tenn.) [NVRA]
U.S. v. State of Texas (W.D. Tex.) [UOCAVA]
U.S. v. Suffolk County (E.D.N.Y.) [VRA Sections 4 or 203]
U.S. v. Town of Cicero (N.D. Ill.) [VRA Section 2]
U.S. v. Upper San Gabriel Valley Mun. Water Dist. (C.D. Cal.) [VRA Section 2]
U.S. v. Yakima County (E.D. Wash.) [VRA Sections 4 or 203]
Vera v. Richard (S.D. Tex.) [Intervention to defend constitutionality of redistricting plan]
White v. Alabama (M.D. Ala.) [*Amicus Curiae* as to VRA Section 2]
Wilson v. U.S. (N.D. Cal.) [NVRA]
Warren County, VA v. Ashcroft (D.D.C.) [VRA Section 4 bailout case]
Wilson v. Jones (Dallas County, Alabama) (S.D. Ala.) [Enforce VRA Section 5]

76. The Help America Vote Act (HAVA) gives the Attorney General a role in enforcing compliance with several of its provisions. Has the Department provided advice or technical assistance to particular jurisdictions in implementing HAVA? If so, please identify the jurisdiction, the nature of the advice or assistance, and provide any correspondence between the Department and the covered jurisdiction related to these matters.

ANSWER: The Attorney General has assigned to the Civil Rights Division the Department of Justice's enforcement responsibilities under Section 401 for the uniform and nondiscriminatory election technology and administration requirements of Sections 301, 302, and 303 of Title III of HAVA.

Since the Commissioners for the new United States Election Assistance Commission (EAC) were not confirmed by the Senate until late 2003, the Civil Rights Division took on the added responsibility of providing pre-enforcement assistance to states as they prepared to begin timely compliance with those provisions of HAVA which took effect on January 1, 2004. To that end, the Division undertook extensive outreach to state and local election officials, which included contacting each and every jurisdiction covered by HAVA. This effort included: making presentations at a number of conferences around the country; setting up an extensive HAVA webpage as part of the Civil Rights Division's website; sending a letter and a copy of the HAVA statute to the chief election officials, governors and attorneys general of all 55 states and territories covered by HAVA; posting a state-by-state list of contacts for HAVA-related matters; responding to questions from election officials; meeting with state and local election officials; and coordinating with the Office of Election Administration at the Federal Election Commission and with the new Election Assistance Commission. These materials are largely available on the Division's website at www.usdoj.gov/crt/voting/hava/hava.html, including a section on "frequently asked questions on HAVA", links to a large amount of HAVA information including examples of new state registration forms, DOJ press releases, information on voter information postings under Section 302 of HAVA drafted by DOJ, as well as a number of public letters sent out by the Division to states in response to their questions on HAVA.

Federal Abortion Ban

In February 2004, the Department of Justice issued subpoenas for thousands of women's confidential medical records. Although the subpoenas were issued as part of the Justice Department's defense of the so-called "Partial-Birth Abortion Ban Act," these women were not party to the suits. According to a February 12 article in the New York Times, the Justice Department stated that the effort to subpoena these medical records did not "intrude on any significant privacy interest of the hospital's patients" because identifying information could be omitted. The article also reported that the Department claimed, "individuals no longer possess a reasonable expectation that their [medical] histories will remain completely confidential."

77. What is the basis for these claims regarding the lack of medical privacy? Please provide the Department of Justice briefs on this issue. From a public-health perspective, shouldn't patients have a right to privacy in their medical records, to enable them to speak freely to their doctors? Without such privacy, aren't you endangering patients' health? That is, won't patients be reluctant to discuss medical conditions and concerns if they know

that their records are not confidential? By singling out providers of abortion services, were you aware that you may have been jeopardizing those doctors and their patients by exposing them to anti-choice violence?

ANSWER: First, we wish to assure you that, from the onset of this litigation, the Department has had no interest whatsoever in the identity of the patients associated with the medical records. Further, we agree that any information that might reveal the identity of a patient can and should be fully redacted from the medical records.

The Department sought redacted medical records because the plaintiffs in the underlying case for which the records were sought themselves put the records squarely at issue in the litigation. Plaintiffs, who are challenging the constitutionality of the Partial Birth Abortion Ban Act, contend that the prohibited abortion procedures are medically necessary. In making that contention they rely on the basis of the plaintiffs' own personal experiences in performing the procedures. The Department simply sought the disclosure of redacted medical records on the basis of the plaintiffs' own assertions, as is the right of any defendant in civil litigation.

In response to your specific questions, it is the Department's view that the subpoena of fully-redacted medical records does not intrude upon any patient's privacy interests because there is no general federal common law physician-patient privilege that would bar disclosure. That view is based upon the Supreme Court's opinion in Whalen v. Roe, 429 U.S. 589, 602 n.28 (1977), in which the Court commented that "[t]he physician-patient evidentiary privilege is unknown to the common law."

Second, there is no constitutional right to medical privacy for fully-redacted information that is kept under seal – as would have been the case with the subpoenas in the Partial Birth Abortion Ban Act litigation. That view is based upon several decisions of U. S. Circuit Courts of Appeal. For example, in Greenville Women's Clinic v. South Carolina Dep't of Health, 317 F.3d 357, 367-68 (4th Cir. 2002), the court rejected a claimed violation of the constitutional right to medical privacy noting that any violation "can be cured by . . . redacting the documents to remove such information" as "the names of the patients procuring abortions". That view is in accord with other federal Circuit and district courts, and state courts. The Department's Reply Brief to the Court of Appeals for the Seventh Circuit in Northwestern Memorial Hospital v. Ashcroft (at pages 12-17) catalogs the relevant authorities. As you requested, a copy of the Department's briefs in that case accompany this response. They are also available online at the Seventh Circuit's website (www.ca7.uscourts.gov/briefs.htm) by entering that case's docket number (04-1379).

Third, there is no federal statutory right to patient privacy under the circumstances of the subpoenas issued in the Partial Birth Abortion Ban Act litigation. While patient privacy is protected by federal statute under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), that statute also delegates rulemaking authority to the Secretary of Health and Human Services. The Secretary, in turn, promulgated a rule under which medical records can be disclosed pursuant to a court order. See 45 C.F.R. § 164.512(e)(1). In the Northwestern Memorial Hospital case, the Department sought and obtained such an order. Furthermore, HIPAA regulations ensure privacy of "individually identifiable health information," but such information does not include medical records where all patient identifying-information has been fully redacted. See 45 C.F.R. § 164.514(a).

Fourth, patient information is often protected by state statute; in the context of the Partial Birth Abortion Ban Act litigation, as the United States Court of Appeals for the Seventh Circuit held, those state statutes did not apply. See Northwestern Memorial Hospital v. Ashcroft, 362 F.3d 923, 925 (7th Cir. 2004)

In short, while patients have a limited expectation of privacy in their medical records, the confidentiality of those records is not absolute. Where all patient-identifying information is removed from the records, where those redacted records will remain under seal, and where a federal court has ordered and approved disclosure of those records, it is the Department's view that no patient privacy right is violated by disclosure.

Finally, we address the issue of whether patients will be reluctant to discuss medical conditions if they know that their records are not confidential, and whether abortion service providers may be jeopardized by the disclosure of medical records. As we understand it, both your questions assume that the medical records – including the patients' identities – would be disclosed to the public. That, however, would not be the case. As the Department explained in its briefs, the records at issue would have been fully redacted to remove all patient-identifying information, and then the redacted records would have been maintained under seal by the court. Consequently, no public disclosure of those records would occur.

Other Civil Rights

78. Please identify any pending cases in which the Department of Justice is a party and which involves a federal program or policy that has race-conscious and/or gender-conscious provisions.

ANSWER: The Civil Rights Division is not presently aware of any lawsuit regarding the Civil Rights Division in which the Department has been named as Defendant, and which regards a race-conscious and/or gender-conscious provision.

The Civil Division is handling the case of Durnford v. Ashcroft (EEOC), in which a class of white male applicants for immigration judge positions has alleged that a policy of the Executive Office for Immigration and Review during 1994 and 1995 discriminated against them. The Department has entered into a settlement agreement, and the Administrative Judge granted final approval to the settlement on December 23, 2004. Under the terms of the settlement agreement, the Department will pay $11.5 million, including attorney's fees, and no injunctive relief will be provided. Administrative appeals to the EEOC will be timely until about February 1, 2005, and collateral litigation is possible for several months thereafter.

QUESTIONS FROM SENATOR KOHL

Information Sharing

Sharing information with our foreign allies is essential to fighting and winning the war against Al Qaeda.

So far this year, however, a German court acquitted a suspected terrorist after our government refused to share intelligence information essential to his prosecution. Then, a few weeks ago, the FBI was forced to release Brandon Mayfield, an Oregon lawyer, after it mistakenly connected his fingerprints to ones found at the scene of the terrorist attack in Madrid. It now appears that a lack of communication with the Spanish government, after it raised concerns about Mr. Mayfield's involvement, was a major contributing factor to the FBI's inability to realize it had the wrong person in custody.

If we cannot even talk openly with our closest allies in a high profile terrorism case, that is reason for concern about our ability to effectively combat terrorism around the world. It appears our cooperation with our foreign allies – at least in these two high profile cases – is not as good as it should be.

79. Please discuss our cooperation with the German and Spanish governments in these two cases.

ANSWER:

Cooperation with the Spanish Government. Throughout the investigation of the Madrid train bombing, the FBI maintained extraordinary liaison with its Spanish National Police counterparts. The Spanish judicial system requires that judges oversee and authorize the passage of information, and in this case the judge did so for purposes of police-to-police cooperation but not for evidentiary purposes. Because the Department's Office of the Inspector General (OIG) has initiated an independent review of the Mayfield matter, it would not be appropriate to comment further at this time.

Cooperation with the German Government. There has been extensive cooperation and dialogue with our German counterparts at the law enforcement and prosecutorial levels in an attempt to assist German prosecutors with the prosecutions in Hamburg of suspected September 11 co-conspirators Abdelghani Mzoudi and Mounir el Motassadeq. Following September 11, the Department of Justice assigned an attorney from its Counterterrorism Section to support German prosecutors virtually full-time, and a German prosecutor was co-located in the Department of Justice to facilitate communication on these cases. As part of this dialogue, DOJ consulted extensively with German prosecutors regarding the court's request for access to alleged enemy combatants. German requests for formal and informal assistance on these matters have been given priority by senior Department officials.

In specific regard to the Hamburg trials, the United States has provided extensive documentary evidence obtained from our criminal investigation of the September 11 attacks for use at all three German trials. In the trials of Motassadeq and Mzoudi, we provided an FBI

Special Agent to testify about this evidence; this agent is also scheduled to testify in the Motassadeq retrial. At all times during the three Hamburg trials, the Department of Justice has maintained a dialogue with the German prosecutors and has indicated to them our willingness to provide additional evidence, witnesses, or other assistance to the greatest extent possible.

Despite this cooperation, Abdelghani Mzoudi was acquitted. However, the court's decision to acquit Mzoudi was based on a series of events, including the testimony of a high-ranking German intelligence official whose testimony contradicted the prosecution's theory, and the judge's publicly expressed belief that the prosecutors had withheld relevant information separate from the U.S. intelligence information at issue in the case. Again, during this time, the Department maintained a close dialogue with German prosecutors and offered its assistance.

Also despite this cooperation, the German Supreme Court overturned Mounir el Motassadeq's conviction on appeal. The Supreme Court's decision was based on a newly created rule of law, which altered the standard applied at trial. This new standard was discussed extensively with German prosecutors, including General Federal Prosecutor Kay Nehm (whose office is responsible for prosecuting the September 11 cases), to determine how best the U.S. government could provide information that satisfied this new standard without compromising U.S. national security interests. As a result of these discussions, the U.S. engaged in an unprecedented effort to draft and de-classify summaries of the relevant intelligence information for use in the Motassadeq retrial. As we have stressed, the summary evidence provided to German prosecutors for use in the Motassadeq case is comparable in character to that being afforded to the Department of Justice's own prosecutors in the ongoing U.S. criminal proceedings against Zacarias Moussaoui on terrorism charges related to the September 11 attacks.

80. Please discuss our overall approach to sharing information and cooperating with foreign governments. For instance, what is being done to improve our cooperation with foreign governments and ensure that appropriate sharing of terrorist-related intelligence is taking place?

ANSWER: The Department, including the FBI, recognizes that the war against terrorism transcends national boundaries, and therefore strong international partnerships are required to effectively deter and disrupt terrorist activities worldwide. Because information and intelligence sharing between the United States government and its collaborative foreign counterparts is a critical component of those efforts, the FBI has pursued an aggressive international outreach initiative in concert with the Department of State and other members of the USIC. The FBI's international outreach is coordinated through the network of FBI Legal Attachés (Legats) located in 57 key cities worldwide, providing coverage for over 200 countries, territories, and islands. For example, the FBI communicates daily with Legats in London, Amman, Riyadh, Seoul, Tel Aviv, Rome, Ottawa and others in order to coordinate international investigations, facilitate information sharing, and establish healthy, functional relationships with our foreign counterpart agencies. FBI Headquarters also works closely with the Baghdad Operations Center, communicating several times daily to pass along terrorist-related intelligence and receive updates on FBI initiatives in Iraq.

The FBI is committed to establishing and strengthening international relationships by sharing appropriate information and expertise with foreign governments. Among the myriad examples of cooperation between the FBI and foreign governments, the Terrorist Financing Operations Section (TFOS) has coordinated and participated in numerous overseas trips to examine financial records, share information regarding terrorist financing trends, and assist foreign countries in their investigative efforts. The FBI also participates, along with the Department of State, the Department of the Treasury, and others in the Department of Justice, in assessment teams that evaluate and provide guidance regarding foreign countries' money laundering laws and compliance policies.

The dissemination of information by the FBI and other members of the USIC to foreign countries is subject to substantial controls. Although arduous, these controls are necessary to protect classified and sensitive information and are shared by our foreign counterparts. The foremost consideration influencing the decision to disseminate information to a foreign government is the means by which it was obtained; e.g., via Federal Grand Jury or other subpoena process, court authorized criminal search warrant and Title III electronic surveillance order, consent search, Foreign Intelligence Surveillance Act (FISA) authorized search and surveillance collection, National Security Letter, or other sensitive or classified intelligence collection method or source. For example, the dissemination of information obtained through criminal court processes is subject to controls imposed by court orders, statutes, and federal rules of criminal procedure, while the dissemination of information obtained through or derived from FISAs is subject to special controls. When FISA information is involved, the FBI's National Security Law Branch and the Department's Office of Intelligence Policy and Review are consulted, pertinent procedures are followed, and any information obtained or derived from the FISA process is appropriately marked to ensure that dissemination complies with relevant procedures and controls. Similarly, when foreign intelligence information is involved, coordination with foreign intelligence services is governed by policy promulgated by the Director of Central Intelligence (DCI). Information obtained or derived from other means is carefully evaluated according to a number of factors before it is disseminated to a foreign government. These factors include the sensitivity and potential benefit of the information, the status of the country to which the information will be provided, the reason the information was requested, and its intended use. While the USA PATRIOT Act removed many barriers to the timely sharing of information between intelligence operations and criminal investigations, appropriate controls over the dissemination of information to foreign countries remain.

Some of the FBI's activities may illustrate the benefits of this emphasis on international cooperation. The FBI has conducted joint operations with various Intelligence Services and Law Enforcement agencies from other countries, including MI-5, MI-6, the Russian FSB, and the Canadian Special Intelligence Service and RCMP. These joint activities involve sharing classified information in appropriate circumstances (including FISA information, with the approval of the Attorney General) and conducting joint undercover operations. The FBI has also emphasized the Latin American Counterterrorism Initiative (LACI) pursuant to which the FBI will place agents in CIA stations in order to provide a law enforcement voice in operations overseas. The first LACI agent will be assigned to Asuncion, Paraguay.

To address issues specific to particular regions, the FBI has, for example, met weekly with the Israeli Security Agency (ISA) to exchange information concerning terrorist matters. In some instances, the information provided to the ISA has assisted that agency in preventing acts of terrorism. Additionally, the ISA has provided to the FBI training in counterintelligence

matters. The FBI also meets regularly with the British Security Service to exchange intelligence relevant to both services. The FBI has solidified its relationships in Latin America through various means, including the provision of guidance, training, information, and legal assistance in the pursuit of Hizballah and Iranian activities in Tri-Border region, the pursuit of phone numbers and leads for the Argentinian prosecutions of the 1993 and 1994 Israeli embassy and community center bombings, and recommendations to Paraguayan legislature for establishing money laundering laws in that country and assistance in the conduct of their money laundering investigations. The FBI has also established task forces in Bern, Switzerland, and Riyadh, Saudi Arabia, to work jointly with their investigative entities, and participates with the United Kingdom, Canada, New Zealand, and Australia on the International Working Group on Terrorist Financing.

In addition to the FBI efforts listed above, Department of Justice prosecutors cooperate with their foreign counterparts both formally and informally to facilitate information sharing and case-specific dialogue. The Department's Office of International Affairs (OIA) is the U.S. Central Authority responsible for receiving and making formal requests for evidence and extradition. OIA prioritizes international terrorism cases and expedites these requests to the greatest extent possible. The Department's Counterterrorism Section has promoted informal information sharing and case-specific dialogue through its "International Initiative," under which it assigns attorneys to monitor terrorism investigations and cases in certain countries and to provide assistance and support to foreign counter-terrorism efforts.

Prior to 9-11, the FBI was not communicating effectively. It was not talking to other agencies, and it was not talking to itself. We know that part of that was a result of the "wall" that separated criminal and intelligence functions. But, that problem was exacerbated by the cultural divide at the FBI. Criminal investigators at the FBI were not talking to their counterparts who were investigating the terrorist threat.

Last week, Director Mueller proposed the creation of a separate intelligence service within the FBI.

81. How can you be sure that separating these functions will not lead us back to an era where turf is protected and information is not shared?

ANSWER: The FBI today has a clear hierarchy of national priorities with the prevention of terrorist attacks at the top. We recognize that a prerequisite for any operational coordination is the full and free exchange of information. Without procedures and mechanisms that allow for information sharing on a regular and timely basis, we and our partners cannot expect to align our operational efforts to best accomplish our shared mission. Accordingly, we have taken steps to establish unified FBI-wide policies for sharing information and intelligence. This has occurred under the umbrella of the FBI's Intelligence Program.

The mission of the FBI's Intelligence Program is to optimally position the FBI to meet current and emerging national security and criminal threats by (1) aiming core investigative work proactively against threats to US interests, (2) building and sustaining enterprise-wide intelligence policies and human and technical capabilities, and (3) providing useful, appropriate, and timely information and analysis to the national security, homeland security, and law enforcement communities. Building on already strong FBI intelligence capabilities,

Director Mueller created in January 2003 the position of EAD for Intelligence and an Office of Intelligence (OI).

The FBI has built its Intelligence Program on the following core principles:

- *Independent Requirements and Collection Management:* While intelligence collection, operations, analysis, and reporting are integrated at headquarters divisions and in the field, the OI manages the requirements and collection management process. This ensures that we focus intelligence collection and production on priority intelligence requirements and on filling key gaps in our knowledge.

- *Centralized Management and Distributed Execution:* The power of the FBI intelligence capability is in its 56 field offices, 400 resident agencies, and 56 legal attaché offices around the world. The OI must provide those entities with sufficient guidance to drive intelligence production effectively and efficiently, but not micro-manage field intelligence operations.

- *Focused Strategic Analysis:* The OI sets strategic analysis priorities and ensures they are carried out both at headquarters and in the field. This is accomplished through a daily production meeting.

- *Integration of Analysis with Operations:* Intelligence analysis is best when collectors and analysts work side-by-side in integrated operations.

The OI Concepts of Operations (CONOPs) guide FBI intelligence processes with detailed implementation plans that drive specific actions to implement them. The CONOPs cover the following core functions: Intelligence Requirements and Collection Management; Intelligence Assessment Process; Human Talent for Intelligence Production; Field Office Intelligence Operation; Intelligence Production and Use; Information Sharing; Community Support; Threat Forecasting and Operational Requirements; and Budget Formulation for Intelligence.

We have made great progress, but we have much work to do. As the President indicated earlier this week, the FBI will continue to create a specialized work force for collecting and analyzing domestic intelligence on terrorism. We also look forward to continuing our cooperation and coordination with other intelligence agencies. The President has announced that a National Counter-Terrorism Center will be established to coordinate and monitor the counterterrorism plans and activities of all government agencies and departments. This Center will ensure that the federal government's efforts to combat terrorism are unified in priority and purpose. He has also asked Congress to create the position of the National Intelligence Director to serve as his principal intelligence advisor and to oversee and coordinate the foreign and domestic activities of the intelligence community. We believe that both of these reforms will help to create an integrated and unified national intelligence effort.

82. The war against al Qaeda will likely continue even after the current FBI leadership is gone. Therefore, a system must be put in place that can facilitate communication and coordination within the FBI, regardless of who is in charge. What specific steps are you taking to ensure this does not happen?

ANSWER: Under Director Mueller's leadership, the FBI has moved aggressively to implement a comprehensive plan that has fundamentally transformed the FBI with one goal in mind: establishing the prevention of terrorism as the Bureau's top priority. Although formerly the FBI's primary focus was the investigating of crimes, including crimes of terrorism, after they occurred, the FBI is now dedicated to disrupting terrorists before they are able to strike. Director Mueller has overhauled counterterrorism operations, expanded intelligence capabilities, modernized business practices and technology, and improved coordination with our partners.

The FBI is taking full advantage of its dual role as both a law enforcement and an intelligence agency. As its transformation to address its new priorities continues, a number of steps have taken place to enhance operational and analytical capabilities and to ensure the continued sharing of information with partners at the federal, state, local, tribal, and international levels. As a result, the FBI:

- Has more than doubled the number of counterterrorism Agents, intelligence analysts, and linguists.
- Has created and expanded its Terrorism Financing Operations Section, which is dedicated to identifying, tracking, and cutting off terrorist funds.
- Is an active participant in the Terrorist Threat Integration Center (TTIC) and TSC, which provide a new line of defense against terrorism by making information about known or suspected terrorists available to the national security, homeland security, and law enforcement communities.
- Has worked hard to break down the walls that have sometimes hampered its coordination with partners in federal, state, and local law enforcement. Today, the FBI and CIA are integrated at virtually every level of intelligence operations. This cooperation will be further enhanced as the FBI's Counterterrorism Division continues to co-locate with the DCI's Counterterrorism Center and the multi-agency TTIC.
- Has expanded the number of JTTFs from 34 to 100 nationwide.
- Has created and refined new information sharing systems, such as the FBI National Alert System and the interagency Alert System that electronically link the FBI with its domestic partners.
- Has sent approximately 275 FBI executives to the Kellogg School of Management at Northwestern University to receive training on executive leadership and strategic change.

The FBI has centralized management of its counterterrorism program at Headquarters to limit the "stove-piping" of information, to ensure the consistency of counterterrorism priorities and strategy across the FBI, to integrate counterterrorism operations domestically and overseas,

to improve coordination with other agencies and governments, and to make senior managers accountable for the overall development and success of the FBI's counterterrorism efforts.

Recognizing that a strong, enterprise-wide intelligence program is critical to investigative success, the FBI has worked to develop a strong intelligence capability and to integrate intelligence into every investigation and operation across the FBI:

- Establishing the OI under the direction of a new Executive Assistant Director for Intelligence. The OI sets unified standards, policies, and training for analysts, who examine intelligence and ensure it is shared with the FBI's law enforcement and intelligence partners. The OI has already provided over 2,600 intelligence reports and other documents for the President and members of the USIC.
- Establishing a formal analyst training program. The FBI is accelerating the hiring and training of analytical personnel and developing career paths for analysts that are commensurate with their importance to the FBI's mission.
- Developing and executing a Concepts of Operations governing all aspects of the intelligence process, including the identification of intelligence requirements, the development of a methodology for intelligence assessment, and the drafting and formatting of intelligence products.
- Establishing a Requirements and Collection Management Unit to identify intelligence gaps and develop collection strategies to fill those gaps.
- Establishing Reports Officers positions and Field Intelligence Groups (FIGs), whose members work in field offices reviewing investigative information not only for use in that field office's investigations, but for dissemination throughout the FBI and among its law enforcement and USIC partners.

The FBI's JTTF Program continues to have primary operational responsibility for terrorism investigations that are not related to ongoing prosecutions. The JTTFs are comprised of FBI Special Agents and personnel from other federal, state, local, and tribal government and law enforcement agencies. The FBI has also established the National Joint Terrorism Task Force (NJTTF) at FBI Headquarters, staffed by representatives from 38 federal, state, and local agencies. The mission of the NJTTF is to enhance communication, coordination, and cooperation by acting as the hub of support for the JTTFs throughout the United States and providing a point of fusion for intelligence acquired in support of counterterrorism operations.

In addition, the FBI has continued to increase the number of FIG personnel. FIGs have been established in every FBI field office, and approximately 280 Intelligence Analysts have been added to the FIGs since December 2003, representing growth of more than 45% over a one-year period. The FIGs conduct analysis, direct the collection of information to fill identified intelligence gaps, and ensure that intelligence is disseminated horizontally and vertically to internal and external customers, including the FBI's state, local, and tribal law enforcement partners.

The FBI has also improved its relationships with foreign governments by building on the overseas expansion of the Legat Program, by offering investigative and forensic support and training, and by working on task forces and joint operations. Finally, the FBI has expanded

outreach to minority communities, and improved coordination with private businesses involved in critical infrastructure and finance.

The FBI recognizes that a prerequisite for successful operational coordination is the full and free exchange of information. Without procedures and mechanisms that both appropriately protect the privacy of information and allow information sharing on a regular and timely basis, the FBI and its partners cannot expect to align operational efforts to best accomplish the shared mission. Accordingly, the FBI has taken steps to establish unified FBI-wide policies for sharing information and intelligence both within the FBI and outside it. This has occurred under the umbrella of the FBI's Intelligence Program.

The mission of the FBI's Intelligence Program is to optimally position the FBI to meet current and emerging national security and criminal threats by: 1) directing core investigative work proactively against threats to U.S. interests; 2) building and sustaining enterprise-wide intelligence policies and human and technical capabilities; and 3) providing useful, appropriate, and timely information and analysis to the national security, homeland security, and law enforcement communities.

The OI's CONOPs guide FBI intelligence processes, and detailed implementation plans drive specific actions to implement them. The CONOPs describe the Intelligence Requirements and Collection Management system and are supported by lower-level collection and collection-support processes and procedures defined in the *Intelligence Requirements and Collection Management Handbook.* These concepts and processes complement FBI operations and will be enhanced by implementation of the 9/11 Commission's recommendations.

Following are some of the FBI's key intelligence accomplishments.

- Issuance of its first collection tasking for international threats, including international terrorism. These requirements were based on the National Intelligence Priorities Framework and, in cooperation with the Intelligence Community, issued in an unclassified version for the use of the FBI's state and local law enforcement partners.
- Inventory of the FBI's collection capability through the creation of an on-line inventory of all collection sources. This tells the FBI what it could know about all threats.
- Comparison between the FBI's intelligence requirements and its capabilities, and identification of the gaps in its ability to produce the information described in its requirements. Dedicated targeting analysts at FBI headquarters and in the field then analyze how these gaps could be filled by developing new sources. Source development tasks are assigned to the FIGs.
- Both raw intelligence and finished assessments are produced in response to requirements. Each intelligence report requests customer feedback and, based on what is learned, the FBI adjusts collection and production.

The Washington Post recently published a memo written by the Department of Justice Office of Legal Counsel, the same memo that you refused to provide to our Committee last week. The memo concluded that federal law prohibiting the use of torture "may be unconstitutional if applied to interrogations undertaken of enemy combatants pursuant to the President's Commander-in-Chief powers."

83. In your opinion, would that immunity from prosecution extend to the torture of United States citizens, believed to be members of Al Qaeda, who are captured and held overseas?

ANSWER: The President has made it absolutely clear that the United States does not condone or commit torture and that our Government honors all legal prohibitions against torture. The U.S. Government will vigorously investigate any cases of alleged torture and, if the facts show that an act of torture has been committed, will prosecute to the full measure of the law. There is no "immunity from prosecution" for torture.

The analysis in the August 1, 2002, memorandum concerning the President's authority under the Commander-in-Chief Clause of the Constitution was never relied upon for any legal advice provided by the Department and was irrelevant to any decision made by the Administration. That opinion was withdrawn in June 2004 and superseded in its entirety by an opinion issued and publicly released on December 30, 2004, that does not include any discussion of the Commander-in-Chief power.

QUESTIONS FROM SENATOR DURBIN

The National Instant Criminal Background Check System (NICS) Retention Policy

Under the Brady Handgun Violence Prevention Act, licensed firearms dealers generally are prohibited from transferring firearms to an individual until a search of the National Instant Criminal Background Check System (NICS) determines that the transfer would not violate applicable federal or state law. Current regulations allow the records of approved firearms sales to be retained in a computer database, also known as the NICS Audit Log, for up to 90 days, after which the records must be destroyed.

The NICS Audit Log performs many useful and necessary functions. First, it allows examiners to determine if, based on new information, someone who was allowed to receive a firearm is in fact prohibited by federal law from doing so. Second, the NICS Audit Log allows the FBI to search for patterns of fraud and abuse by both gun dealers and purchasers. Finally, it can help determine if gun buyers have submitted false identification in order to thwart the background check system.

A provision in the Consolidated Appropriations Act of 2004 reduced the length of time records in the NICS Audit Log could be retained from 90 days to 24 hours. In July 2001, the Department of Justice proposed an almost identical policy change, and I asked the non-partisan General Accounting Office what the effect would be on public safety. The GAO Report stated:

> **"Regarding public safety, the FBI would lose certain abilities to initiate firearm-retrieval actions when new information reveals that individuals who were approved to purchase firearms should not have been. Specifically, during the first 6 months of the current 90-day retention policy, the FBI used retained records to initiate 235 firearm-retrieval actions, of which 228 (97 percent) could not have been initiated under the proposed next-day destruction policy."**

84. The Consolidated Appropriations Act of 2004 required this change in the NICS retention policy to be completed by July 21, 2004. Has the Department of Justice implemented this new policy yet?

ANSWER: Yes. The FBI NICS Section implemented the new 24-hour record retention requirement for records on proceeded transactions on July 20, 2004. A final rule was published on July 23, 2004, effective July 20, 2004, implementing the requirements of section 617 of Pub. L. No. 108-199, the Consolidated Appropriations Act, 2004, and finalizing the proposed rule on record retention published by the Department on July 6, 2001.

85. What steps has the Department of Justice taken to address the findings of the GAO Report and to prevent hundreds of people each year from possessing a firearm—even though they are prohibited by federal law from having one?

ANSWER: The issue identified by the GAO of continuing to be able to identify a purchaser on whom the NICS receives prohibiting information after a "proceed" response is given to a Federal Firearms Licensee (FFL) was addressed in the final rule by providing for the continued retention for 90 days of the FFL number associated with a proceeded NICS transaction. As explained in the final rule's preamble:

> [W]hen [section 617 of the Omnibus] provision becomes effective, the FBI will continue to retain for not more than 90 days non-identifying data associated with transactions such as the FFL number, as well as the NTN and date (which are retained indefinitely), for *all* transactions in the NICS Audit Log. In addition, when asking an agency for information in connection with a NICS check, the NICS will provide the NTN, which the agency can reference in any response to the NICS. By retaining the FFL and NTN numbers for up to 90 days, the FBI will be able to trace the transaction back to the FFL if prohibiting information is provided by an agency more than 24 hours after the NICS issued a "proceed" response. FFLs are required to record the NTN on the Firearms Transaction Record (ATF Form 4473) and must keep those forms for 20 years if the firearm is transferred. 27 CFR 478.129(b). As a result, the FBI will retain the ability to refer the case to ATF for the retrieval of the erroneously transferred firearm and any other firearms illegally possessed by the prohibited person. This practice will ensure that firearm retrievals can continue under the language in the Omnibus bill.
>
> This continued retention of the FFL number is possible because the Department believes that the text of the Omnibus provision only requires the destruction within 24 hours of "*identifying information submitted by or on behalf of*" the approved purchaser. The statute is most naturally read to equate "identifying information" with information identifying the prospective transferee, rather than information that identifies anyone or anything. The FFL number does not identify the prospective transferee. Additionally, the phrase "identifying information submitted by or on behalf of" a transferee is best read to encompass information in the NICS records provided by the transferee – either directly ("submitted by [the transferee]"), or indirectly through a surrogate, such as the FFL ("submitted on behalf of [the transferee]"). Even though an FFL must submit its FFL number to the NICS before any firearm transfer may be authorized, this number is most naturally characterized not to constitute information "submitted by or on behalf of" a transferee because the transferee plays no role in providing it to the NICS.
>
> To be clear, the Omnibus provision's 24-hour record destruction requirement applies only to transactions in which the NICS has affirmatively determined that possession or receipt of a firearm by the purchaser would not violate 18 U.S.C. 922(g) or (n) or state law and has so "advised" the FFL, i.e. has provided the FFL with a "proceed" response. Section 617 is not applicable to

"denied" or "open" transactions. In the case of denied transactions, records are retained indefinitely. Furthermore, as discussed below, the FBI will also continue to be able to retain for up to not more than 90 days (as it does under current law) information on "open" transactions – i.e., where the NICS has not yet provided a "proceed" or "deny" response because it has not received definitive information about the status of a prospective gun buyer's record (e.g., a missing arrest disposition). If prohibiting information is received within 90 days, continued retention of such records will allow the FBI to change an open transaction to a "denied" response and refer the case to ATF for a firearm retrieval if the firearm has been transferred by the FFL (as allowed under the Brady Act when the FFL has not received within three business days a response on whether the transfer is lawful).

69 Fed. Reg. at 43894.

The following law enforcement agencies oppose this change in the NICS retention policy: the Law Enforcement Steering Committee (a nonpartisan coalition of the Federal Law Enforcement Officers Association, the International Brotherhood of Police Officers, the Major Cities Chiefs Association, the Major County Sheriff's Association, the National Association of Police Organizations, the National Organization of Black Law Enforcement Executives, the National Troopers Coalition, the Police Executive Research Forum, and the Police Foundation), the FBI Agents Association, and the International Association of Chiefs of Police.

86. Has the Department of Justice consulted with any these organizations to address their law enforcement and public safety concerns?

ANSWER: While the Department has not consulted with the cited organizations on NICS retention policy, the public safety and law enforcement concerns expressed in comments submitted on the proposed rule were substantially addressed in the preamble of the final rule implementing Section 617.

According to the GAO Report, the FBI has determined that when this change in the NICS retention policy is implemented, many of the audits currently conducted on a monthly or quarterly basis would have to be conducted on a real-time basis—either hourly or daily. The FBI has said it would need to add ten staff members to conduct these real-time audits, which would bring the total number of audit staff to 19.

87. Has the FBI added these ten staff members to its NICS audit staff? If so, what duties were these staff members performing before they were added to the NICS audit staff? Do you believe this is an appropriate use of our limited resources, as the Department of Justice works to prevent and combat terrorism?

ANSWER: The FBI NICS Section has assigned 11 additional staff members to its audit staff and is successfully completing the audits of proceeded transactions within 24 hours. The additional audit staff was transferred from the general population of 430 NICS examiners who

process NICS checks. The FBI NICS Section has been able to continue to process NICS checks in a timely fashion with this transfer of personnel to the audit function.

Meetings with Arab-American and Muslim-Americans

88. FBI Director Mueller has made a practice of meeting with Arab-American and Muslim-American community leaders on a regular basis. As Attorney General, when and how many times have you met with Arab-American and Muslim-American community leaders? Please provide a list of all Arab-American and Muslim American organizations and leaders with whom you have met.

ANSWER: As indicated in the list below, the Attorney General has made a practice of meeting periodically with Arab-American, Sikh-American, and Muslim-American community leaders. In addition to these meetings, the Attorney General is briefed regularly by other senior officials within the Department regarding their meetings with leaders from these communities. For example, Assistant Attorney General R. Alexander Acosta, Civil Rights Division, hosted or attended over 15 such meetings in 2004 alone.

Below Please find a list of meetings that have occurred between the Attorney General and Arab-American, Sikh-American, and Muslim-American community leaders:

October 16, 2001
Description: Arab, Muslim and Sikh groups meeting at the Department of Justice
Attendees: Islamic Institute, American-Arab Anti-Discrimination Committee, Arab American Institute, Muslim Public Affairs Council, Sikh Mediawatch, and Resource Task Force

November 19, 2001
Description: White House Iftaar Dinner on 11/19/01
Attendees: President Bush, Cabinet Members, Ambassadors from various Muslim countries, and representatives from Muslim-American groups

Novermber 27, 2001
Description: Islamic Center Iftaar Event at the Islamic Center of Washington DC
Attendees: board of Islamic Institute and D.C. Muslim community leadership

December 2, 2001
Description: Meet with Arab Community Leaders in Detroit, MI
Attendees: Arab American Press, American Muslim Council, Lebanese American Heritage Club, Lebanese American Community, Arab Americans Against Discrimination

June 23, 2004
Description: Muslim/Arab/Sikh leaders meeting at the Department of Justice
Attendees: Arab American Institute, American-Arab Anti-Discrimination Committee, Karamah: Muslim Women Lawyers for Human Rights, Islamic Free Market Institute, Muslim Public Affairs Council, Sikh Coalition, Sikh Mediawatch, and Resource Task Force

Civil Rights

89. In your June 8 written testimony, you stated: "Over the first three years of this administration, we charged more individuals for criminal civil rights violations than in the previous three-year period." What is your explanation for this statistic? To what extent do you believe the increase is a result of the additional prosecutors that were allocated to the Civil Rights Division when Bill Lann Lee was the Assistant Attorney General for Civil Rights? Please provide data regarding the number of prosecutors serving in the Civil Rights Division's Criminal Section each year for the past eight years, as well as the number of criminal civil rights defendants charged and convicted each year for the past eight years, indicating whether the prosecutions involved laws regarding hate crimes, human trafficking, law enforcement misconduct, the Freedom of Access to Clinic Entrances Act, or other applicable statutes.

ANSWER: The Justice Department's strong performance in criminal civil rights prosecutions in recent years reflects the emphasis this Administration has placed on these important cases. It is not possible to attribute this performance to any one factor.

Civil Rights prosecutions have remained robust, even in the wake of the terrorist attacks in 2001, which placed unprecedented pressures on the Department's investigative resources. This Administration has dramatically increased human trafficking prosecutions, more than tripling the number of such cases, while in no way sacrificing performance in other areas of responsibility. This is especially significant in view of the fact that human trafficking investigations are extremely time consuming and labor intensive, often involving scores of victims, multiple defendants and complex fact patterns requiring teams of lawyers working exclusively for many months on a single case.

The following summarizes the performance of the Criminal Section of the Civil Rights Division for the past eight years.

FY 2004 (as of July 29, 2004)

Number of prosecutors: 47
Number of defendants charged: 151
Number of defendants convicted: 111
Number of bias crimes prosecutions: 38
Number of human trafficking prosecutions: 27 with 51 charged
Number of color of law prosecutions: 36
Number of FACE prosecutions: 1

FY 2003

Number of prosecutors: 47
Number of defendants charged: 123
Number of defendants convicted: 103
Number of bias crimes prosecutions: 15
Number of human trafficking prosecutions: 13 with 32 charged
Number of color of law prosecutions: 27
Number of FACE prosecutions: 2

FY 2002

Number of prosecutors: 45
Number of defendants charged: 125
Number of defendants convicted: 124
Number of bias crimes prosecutions: 19
Number of human trafficking prosecutions: 10 with 41 charged
Number of color of law prosecutions: 43
Number of FACE prosecutions: 2

FY 2001

Number of prosecutors: 45
Number of defendants charged: 191
Number of defendants convicted: 119
Number of bias crimes prosecutions: 26
Number of human trafficking prosecutions: 10 with 38 charged
Number of color of law prosecutions: 49
Number of FACE prosecutions: 3

FY 2000

Number of prosecutors: 43
Number of defendants charged: 122
Number of defendants convicted: 112
Number of bias crimes prosecutions: 25
Number of human trafficking prosecutions: 3 with 5 charged
Number of color of law prosecutions: 40
Number of FACE prosecutions: 2

FY 1999

Number of prosecutors: 35
Number of defendants charged: 138
Number of defendants convicted: 98
Number of bias crimes prosecutions: 31
Number of human trafficking prosecutions: 6 with 19 charged
Number of color of law prosecutions: 36
Number of FACE prosecutions: 6

FY 1998

Number of prosecutors: 31
Number of defendants charged: 153
Number of defendants convicted: 166
Number of bias crimes prosecutions: 17
Number of human trafficking prosecutions: 2 with 19 charged
Number of color of law prosecutions: 39
Number of FACE prosecutions: 4

FY 1997[1]

Number of prosecutors: 31 (estimate)
Number of defendants charged: 189
Number of defendants convicted: 117

In your June 8 written testimony, you also stated: "We have quadrupled the number of investigations into civil-rights violations at juvenile-justice facilities."

90. During what time frame was there a quadrupling of such investigations?

ANSWER: During the period between January 20, 2001 and July 30, 2004, 13 investigations were authorized regarding alleged civil rights violations at juvenile-justice facilities. During a comparable period between July 1, 1997 and January 19, 2001, 3 such investigations were authorized. Thus, the number of investigations during the more recent period quadrupled the number of investigations during the preceding period.

91. Please provide data regarding the number of civil rights investigations you opened at juvenile-justice facilities each year for the past eight years, and the number of attorneys serving in the Civil Rights Division's Special Litigation Section each year for the past eight years.

ANSWER: Please see answer to question 92, below.

92. Please provide a brief description of each investigation the Justice Department has opened at a juvenile-justice facility over the past eight years, indicating the status or resolution of each investigation. If a lawsuit was not brought as a result of the investigation, please indicate the reasons why.

ANSWER: Based on currently available data, the number of attorneys serving in the Special Litigation Section has been as follows:

- FY 2004 -- 44
- FY 2003 -- 45
- FY 2002 -- 45
- FY 2001 -- 33
- FY 2000 -- 33
- FY 1999 -- 28
- FY 1998 -- 26
- FY 1997 -- 26

[1] Certain detailed statistics are not available for 1997.

In December 2003, the Civil Rights Division filed suit against the State of Mississippi over the conditions of confinement at the State's Oakley and Columbia Training Schools. The Division's investigation found evidence of numerous unconstitutional practices, including hogtying, pole-shackling, and placing suicidal students for extended periods of time into a "dark room" in which the students were stripped naked had only a hole in the floor for a toilet. The Division also found that children who became ill during strenuous physical exercise were made to eat their own vomit. Mississippi is actively fighting the lawsuit and the case remains pending, early in the discovery phase.

The juvenile justice civil rights investigations authorized each year from 1996 to 2004 are listed below.

2004: 4 investigations

• Plainfield Juvenile Correctional Facility, IN	2/10/04	Pending
• Logansport Juvenile Intake/Diagnostic Facility, IN	2/10/04	Pending
• South Bend Juvenile Correctional Facility, IN	2/10/04	Pending
• L.E. Rader Center, OK	3/31/04	Pending

2003: 3 investigations

• Santa Clara County Juvenile Hall, CA	2/6/03	Pending
• Louisiana Juvenile Delinquency Proceedings	2/28/03	Resolved by MOU
• N.A. Chaderjian Youth Correctional Facility, CA	4/3/03	Pending

2002: 5 investigations

• Alexander Youth Services Center, AR	5/8/02	Resolved by Consent Decree
• Mississippi Juvenile Justice Facilities o Oakley Training School o Columbia Training School	5/8/02	Complaint Filed
• Maxey Training School, MI	6/6/02	Findings Letter Issued 05-19-04
• Arizona Juvenile Justice Facilities o Adobe Mountain School o Black Canyon School o Catalina Mountain School	6/6/02	Rule 41 Dismissal
• Maryland Juvenile Justice Facilities o Charles H. Hickey, Jr. School o Cheltenham Youth Facility	8/30/02	Findings Letter Issued 04-09-04

2001: 1 investigation

• Nevada Youth Training Center	12/6/01	Resolved by MOU

2000: 1 investigation

- Los Angeles Juvenile Justice Facilities, CA — 11/8/00 — Findings Letter Issued 04-09-03
  - Barry J. Nidorf Juvenile Hall
  - Los Padrinos Juvenile Hall
  - Central Juvenile Hall

1999: 1 investigation

- S. Dakota Juvenile Justice System (6 Facilities) — 12/29/99 — Investigation closed

1998: 1 investigation

- Kagman Youth Facility, Northern Mariana Islands — 4/10/98 — Resolved by Consent Decree

1997: 2 investigations and one investigation expansion

- Georgia Juvenile Facilities (11 facilities) — 3/3/97 — Resolved by Rule 41 dismissal
- Scioto Joint Juvenile Correctional Complex, OH — 6/3/97 — Investigation closed
- Daviess County, KY (Expanded existing investigation) — 6/19/97 — Investigation closed

In your June 8 written testimony, you also stated: "We have resolved four times as many police pattern or practice investigations."

93. During what time frame was there a quadrupling of such resolutions?

ANSWER: Since the inception of the police misconduct statute in 1994, the Civil Rights Division has obtained 18 settlements (16 enforceable settlement agreements and two letter agreements) to resolve our investigations of 15 agencies. During the period between January 20, 2001 to June 2004 (date of written testimony), the Civil Rights Division successfully resolved 14 pattern or practice police misconduct investigations, compared to three such investigations resolved during the previous three and one-half years (July 1, 1997 and January 19, 2001).

94. Please provide data regarding the number of police pattern or practice investigations that you opened each year and the number that you resolved each year for the past eight years.

ANSWER: Please see answer to Question 95, below.

95. Please provide a brief description of each police pattern or practice investigation the Justice Department has opened over the past eight years, indicating the status or resolution of the investigation. If a lawsuit was not brought as a result of the investigation, please indicate the reasons why.

ANSWER: Since the enactment of 42 U.S.C. § 14141 in 1994, we have received authorization to conduct 41 "pattern or practice" investigations of law enforcement agencies.

	Police Investigations Authorized 1994 to Present		(Status)
1.	New Jersey State Police, NJ	12/94	(consent decree)
2.	Torrance Police Department, CA	5/95	(investigation closed w/o agreement)
3.	Adelanto Police Department, CA	6/95	(investigation closed w/o agreement)
4.	Steubenville Police Department, OH	7/95	(consent decree)
5.	Pittsburgh Bureau of Police, PA	4/96	(consent decree)
6.	Volusia City Sherriff's Office, FL	4/96	(closed w/o agreement)
7.	New Orleans Police Department, LA	4/96	(closed w/o agreement – investigation was never made public)
8.	Illinois State Police	4/96	(investigation closed w/o agreement)
9.	Montgomery County Police Depart.	6/96	(MOA)
10.	Beverly Hills Police Department, CA	8/96	(investigation closed w/o agreement)
11.	Los Angeles Police Department	8/96	(consent decree)
12.	NY City Police Department, NY (EDNY)	8/97	(investigation closed w/o agreement 12/23/04)
13.	Orange County Police Department, FL	11/97	(closed w/o agreement)
14.	Buffalo Police Department, NY	12/97	(MOA)
15.	Columbus Police Department, OH	3/98	(Letter agreement - monitoring concluded as of 5/12/04)
16.	Eastpointe Police Department, MI	3/98	(investigation closed w/o agreement 1/3/05)
17.	Metropolitan Police Department, DC	1/99	(MOA)
18.	Charleston Police Department, WV	3/99	(investigation closed w/o agreement)
19.	NY City Police Department, NY (SDNY)	3/99	(pending investigation)
20.	PG County Police Department, MD	7/99	(consent decree)
21.	Riverside Police Department, CA	7/99	(investigation closed w/o agreement)
22.	Mt. Prospect Police Department, IL	5/00	(MOA)
23.	Highland Park Police Department, IL	5/00	(MOA - monitoring concluded as of 7/14/04)
24.	Cleveland Police Department, OH	8/00	(Letter agreement)
25.	PG County Police Department, MD	10/00	(MOA)
26.	Detroit Police Department, MI	12/00	(consent decree)
27.	Tulsa Police Department, OK	2/01	(pending invest.)
28.	Cincinnati Police Department, OH	5/01	(MOA)
29.	Detroit Police Department, MI	5/01	(consent decree)
30.	Schnecteday Police Department, NY	4/02	(pending invest.)
31.	Portland Police Department, ME	5/02	(pending invest.)
32.	Miami Police Department, FL	5/02	(pending invest.)
33.	Cleveland Police Department, OH	7/02	(MOA)
34.	Providence Police Department, RI	12/02	(pending invest.)

35.	Villa Rica, GA	1/03	(MOA)
36.	Alabaster Police Department, AL	3/03	(pending invest.)
37.	Bakersfield Police Department, CA	6/03	(pending invest.)
38.	V.I. Police Department	2/04	(pending invest.)
39.	V.I. Narcotics Strike Force (NSF)	2/04	(pending invest.)
40.	Beacon, NY	08/04	(pending investigation)
41.	Warren, OH Police Department	12/04	(pending investigation)

The vast majority of the pattern or practice investigations authorized by the Department of Justice have involved allegations of use of excessive force. We have filed seven lawsuits but only one such lawsuit, involving the Columbus, OH Police Department, resulted in contested litigation. The other seven were resolved through consent decrees.

96. Your June 8 written testimony stated: "In the area of employment discrimination, the Civil Rights Division is on pace to have a record year of prosecutions unmatched since the mid-1990's." Please provide information regarding the number of employment discrimination lawsuits brought each year by the Civil Rights Division over the past ten years including a brief description of each suit and information regarding whether the lawsuit alleged a pattern or practice of discrimination, and the number of attorneys in the Civil Rights Division each year for the past ten years who served in the Employment Litigation Section.

ANSWER:

FY 2004:

- U.S. v. City of Erie (W.D. Pa.) (p/p) (sex)
- U. S. v. Univ. Medicine & Dentistry at N J (D NJ) (§706) (retaliation)
- Bond v. Baltimore City Public Works, MD (D. MD) (§706) (sexual harassment)
- Jane Doe I v. District of Columbia Fire (D. DC) (§706) (sex)
- Jane Doe II v. District of Columbia Fire (D. DC) (§706) (sex)
- Jane Doe III v. District of Columbia Fire (D.DC) (§706) (sex)
- U.S. v. University of New Mexico (D. NM) (§706) (sex)
- Lemons v. Pattonville FPD (E.D. Mo.) (§706) (race)
- U.S. v. Los Angeles Co MTA (CD. Ca.) (§707)(religion)
- U.S. v. City of Gallup, New Mexico (D. NM) (§707) (race)
- U.S. v. New York MTA & NYCTA (§707)(religion)

FY 2003:

- U.S. v. City of Erie (W.D. Pa.) (p/p) (sex)
- U.S. v. University of Guam (D. Guam) (§706) (national Origin)
- U.S. v. University of CA, Medical Center, Davis (E.D. CA) (§706) (sexual harassment)
- U.S. v. West Terre Haute, In. (S.D. IN) (§706) (sexual harassment)
- U.S. v. Greenwood Community School Corp. (S.D. IN) (§706) (retaliation)
- U.S. v. Prince Georges Co. (D. MD) (§706) (sex, retaliation)

FY 2002:

- U.S. v. New York City Dep't of Parks & Recreation (S.D.N.Y.) (p/p) (race, national origin)
- U.S. v. NW NM Regional Solid Waste Auth. (D. NM) (§706) (sex, race, national origin)
- U.S. v. Indiana Department of Transportation (S.D. IN) (§706) (race, national origin)
- U.S. v. Fort Lauderdale City, Fl. (S.D. FL) (§706) (race)
- U.S. v. NYC Human Resources Administration (S.D. NY) (§706)
- U.S. v. Zuni Public School District, NM (D. NM) (§706) (sex)

FY 2001:

- U.S. v. Delaware (D. Del.) (p/p) (race)
- U.S. v. NM Department of Public Safety (D. NM) (§706) (religion)
- U.S. v. City of Bastrop, La. (W.D. LA) (§706) (race, sex)
- U.S. v. Matagorda Co. Sheriff (S.D. TX) (§706) (sex, retaliation)
- U.S. v. Sulphur County (E.D. OK) (§706) (national origin)
- U.S. v. City of Cuba (D. NM) (§706) (sexual harassment)
- U.S. v. Arkansas Department of Corrections (E.D. AR) (§706) (religion)

FY 2000:

- Owen v. L'Anse Area Schools (W.D. Mich.) (p/p) (religion)
- U.S. v. Tennessee DOT (M.D. Tenn.) (p/p) (sex)
- Owen v. L'Anse Area Schools (W.D. Mich.) (§706) (religion)
- U.S. v. City of Dallas (N.D. TX) (§706) (retaliation)
- U.S. v. Lumberton Municipal District (E.D. TX) (§706) (sex harassment)
- U.S. v. Calcasieu Parish School Board (W.D. LA) (§706) (sex)
- U.S. v. City of Newton, NC (W.D. NC) (§706) (racial harassment)
- U.S. v. Harris County Justice of the Peace (S.D. TX) (§706) (race, sex harassment)
- U.S. v. Ashtabula County Sheriff's Department (N.D. OH) (§706) (sex)
- U.S. v. Newark Police Department (D. NJ) (§706) (religion)

FY 1999:

- U.S. v. Belen (D.N.M.) (p/p) (sex harassment, retaliation)
- U.S. v. Erie County (W.D. NY) (§706) (sex)
- U.S. v. Columbus County (E.D. NC) (§706) (sex harassment)
- U.S. v. City of Alma & Bacon County (S.D. GA) (§706) (sex)
- U.S. v. City of Winter Springs (M.D. FL) (§706) (religion)
- U.S. v. North Little Rock School District (E.D. AR) (§706) (sex harassment, retaliation)
- U.S. v. Mecklenburg County (W.D. NC) (§706) (sex harassment)
- U.S. v. Hampshire County Sheriff (N.D. WV) (§706) (sex)

FY 1998:

- U.S. v. Garland (N.D. Tex.) (p/p) (religion, national origin)
- U.S. v. School City of East Chicago (N.D. IN) (§706) (sex)
- U.S. v. Florida Dept. of Corrections (S.D. FL) (§706) (sex harassment)

- U.S. v. University of New Mexico (D. NM) (§706)
- U.S. v. Arkansas State University (E.D. AR) (§706) (sex)
- U.S. v. Sheriff of McClennan County (W.D. TX) (§706) (sex)
- U.S. v. City of Willis (S.D. TX) (§706) (race harassment)
- U.S. v. Baltimore City Public Schools (New Baltimore) (D. MD) (§706) (race)

FY 1997:

- U.S. v. Fullerton (C.D. Cal.) (p/p) (religion, national origin)
- U.S. v. East Baton Rouge (M.D. La.) (p/p) (race)
- U.S. v. SEPTA (E.D. Pa.) (p/p) (sex)
- U.S. v. Metro Dade County (S.D. FL) (§706) (sex harassment)
- U.S. v. Regents of Univ. of Ca (N.D. CA) (§706) (sex)
- U.S. v. City of Forney (N.D. TX) (§706) (race)
- U.S. v. SE Dubois School Co. Corp. (S.D. IN) (§706) (sex)
- U.S. v. Canton Police Dept. (S.D. MS) (§706) (sex)

FY 1996:

- U.S. v. Louisiana State Police (M.D. La.) (p/p) (race)
- U.S. v. Beaumont Housing Authority (E.D. Tex) (p/p) (race)
- U.S. v. New York City Board of Education (S.D.N.Y.) (p/p) (race, national origin, sex)
- U.S. v. City of Wilmington (D. DE) (§706) (religion)
- U.S. v. Hutcheson Medical Center (N.D. GA) (§706) (religion)
- U.S. v. Alabama State Docks (S.D. AL) (§706) (sex)
- U.S. v. New York City Police Dept. (S.D. NY) (§706) (sex harassment)
- U.S. v. Spring Ind. School District (S.D. TX) (§706) (race)
- U.S. v. California University of Pennsylvania (W.D. PA) (§706) (sex harassment)
- U.S. v. Virgin Islands Housing Authority (D. VI) (§706) (religion)
- U.S. v. Phoenix (D. AZ) (§706) (retaliation)

FY 1995:

- U.S. v. New Jersey Dep't of Human Services (D.N.J.) (p/p) (race)
- U.S. v. Arkansas Dep't of Corrections (E.D. Ark.) (p/p) (sex)
- U.S. v. Steubenville (S.D. Ohio) (p/p) (sex)
- U.S. v. Ormond Beach (M.D. Fla.) (p/p) (sexual harassment)
- U.S. v. Maury County (M.D. TN) (§706) (sex)
- U.S. v. New York DOC (S.D. NY) (§706) (religion)
- U.S. v. Mississippi Housing Auth (S.D. MS) (§706) (retaliation)
- U.S. v. Glassboro (D. NJ) (§706) (sex)
- U.S. v. Illinois State University (C.D. IL) (§706) (sex)
- U.S. v. Kansas DOC (D. KS) (§706) (sex harassment)
- U.S. v. City of Slidell (E.D. LA) (§706) (disability)
- U.S. v. City of Phoenix (D. AZ) (§706) (sex harassment)
- U.S. v. City of Pontiac (E.D. MI) (§706) (disability)

The end-of-year on-board levels for the Employment Section are as follows:

1997	28
1998	31
1999	32
2000	30
2001	38
2002	36
2003	34
2004	35

97. On March 31, 2004, a U.S. district court judge issued a decision in United States v. City of Garland, Texas, ruling against the United States in a title VII pattern-or-practice lawsuit. The Justice Department decided not to appeal the decision. Please explain why the Justice Department did not appeal the decision.

ANSWER : Please see answer to question 98, below.

98. Please indicate all other instances since the passage of Title VII when the Justice Department lost a Title VII pattern-or-practice lawsuit and decided not to appeal. Please provide a brief description of those instances, including dates, defendants, and the nature of the case.

ANSWER: The Civil Rights Division does not maintain the requested information, which would span a forty year period, in any readily retrievable form. Generally speaking, however, determinations not to appeal adverse decisions turn on a variety of factors, such as the trial court's conclusions and the trial record. In some instances, trial court decisions rely heavily on adverse findings of fact, which as you know are reviewed by the appellate courts for clear error, whereas legal conclusions are reviewed de novo. Where an adverse trial result rests on findings of fact rather than legal conclusions, prevailing on appeal is much less likely. In some instances, intervening decisions from other courts may vacate a legal theory, or intervening events may moot the factual basis on which the Government proceeded, either of which would militate against an appeal.

99. Your June 8 testimony contained data about increases in certain areas of civil rights investigations and prosecutions during the Bush Administration, as discussed in previous questions. Are there any areas of civil rights enforcement in which the number of investigations or lawsuits has decreased under the Bush Administration? If so, please indicate which areas and provide data as well as explanations about why the decreases took place.

Please also provide data regarding the total number of attorneys who have served in the Civil Rights Division each year for the past eight years.

ANSWER: Over the past eight years, the number of congressionally authorized attorney positions in the Civil Rights Division has been as follows:

2004 - 336
2003 - 336
2002 - 336
2001 - 322
2000 – 301
1999 - 261
1998 - 254

The level of prosecutions or case filings under any particular statute is driven primarily by a circumstance entirely beyond the Department's control, specifically the level of violations committed by other parties. The rate of violations, therefore, necessarily varies from year to year. Even within a given year, the rate at which the Department files suit under any given statute is affected by a host of variables, including the rate of violations of other statutes which demand more resources or more immediate attention, the Department's priorities at any given time, changes in applicable law, and intervening judicial decisions broadening or restricting the Department's ability to employ a specific statute. Accordingly, it is impossible to identify precisely why action under any particular statute rises or falls over any period of time with any meaningful level of accuracy.

During the Clinton Administration, the Attorney General formed a Hate Crimes Working Group to address legislative, training, and prosecution issues involving hate crime violations.

100. Is this working group still in existence? If so, please describe its duties and responsibilities, indicating how often it meets and its membership. If not, please explain why it was disbanded.

ANSWER: In 1997, Attorney General Janet Reno asked the office of the Deputy Attorney General to establish a Hate Crimes working group to examine the problem of bias-motivated crimes. Over a six-month period, this working group examined five principle areas related to bias-motivated crimes including: legislative initiatives, data collection, community outreach, prosecution and enforcement, and coordination. The working group fulfilled its mandate in October 1997, when it submitted to the Attorney General a memorandum outlining specific proposals that were approved by the Attorney General, and became the Department's hate crimes

initiative. In December 1997, the Attorney General directed the implementation of the hate crimes initiative. The Department of Justice, including U.S. Attorneys' Offices, the Civil Rights Division, and the FBI continue to vigorously investigate and prosecute bias-motivated crimes.

Since September 2001, federal, state, and local authorities have investigated over 600 alleged incidents of religiously or racially motivated backlash crime. State and local prosecutors have brought charges in nearly 150 of these incidents, in a number of cases with federal assistance. In addition, federal authorities have brought federal charges in 22 cases against 27 defendants, and have secured 20 convictions. Currently, 8 defendants are awaiting trial or sentencing. (One defendant was acquitted; one committed suicide prior to trial).

101. Has the Department of Justice taken a position yet on whether it supports the bipartisan Local Law Enforcement Enhancement Act of 2003, S. 966? In response to previous inquiries, the Justice Department indicated that it had not yet developed a position on the bill. If you have taken a position, please indicate what that position is.

ANSWER: The Department of Justice has not yet taken a position on the bill.

QUESTIONS FROM SENATOR FEINGOLD

Brandon Mayfield Case

At the hearing, I asked you about the government's court filings in the Brandon Mayfield case. The government's handling of this case suggests that Mr. Mayfield's religion and religious practices were a factor in the Department's decision to investigate him and later seek his detention. As you are aware, after making an apparently irrelevant reference to another individual distributing copies of the Holy Qur'an to U.S. prisons, the material witness affidavit then states that surveillance agents "have observed Mayfield drive to the Bilal Mosque located at 4115 160th Avenue, Beaverton, Oregon on several different occasions." I welcomed your testimony before the Committee that the Department of Justice is working to investigate instances of discrimination against Muslims in our nation. But those instances of discrimination and hate crimes that you described are largely, if not solely, perpetrated by private or state or local government individuals or entities, not federal law enforcement officials.

102. Why was information about Mr. Mayfield's religious activities included in the material witness affidavit?

ANSWER: The Office of the Inspector General is reviewing the general matter to which you refer. In light of the pending investigation, we are restrained from answering your question. We look forward to any findings and recommendations the Inspector General may have.

103. What steps have you taken to make sure that religion will not be used as the basis for criminal investigation or prosecution by the Department of Justice?

ANSWER: The Attorney General Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations specifies that "investigations not be based solely on activities protected by the First Amendment or on the lawful exercise of any other rights secured by the Constitution or laws of the United States." See also the answer to question 105, below.

Since shortly after September 11, 2001, the Justice Department's Community Relations Service office has organized training workshops to educate law enforcement officials about the religion and culture of Arab and Muslim Americans. These programs have been conducted by Connecting Cultures and are entitled, "Building Cultural Competency: Understanding Arabs and Muslims in America." I understand that these workshops have sometimes included FBI agents and federal prosecutors, but there has apparently been no directive from or concerted effort by the Attorney General or FBI Director requiring FBI counterterrorism agents and federal prosecutors working on counterterrorism to participate in such educational workshops.

104. What training about Islam and the culture of Arab and Muslim Americans has the Justice Department required and conducted of its federal prosecutors and FBI agents assigned to counterterrorism?

ANSWER: Please see answer to question 105, below.

105. Would you be willing to require all counterterrorism FBI agents and federal prosecutors and all federal, state and local members of the Joint Terrorism Task Forces to participate in training to learn about the religion and culture of Arab and Muslim Americans, such as the workshop conducted by Connecting Cultures? If not, why not?

ANSWER: The Department has included training about Arab and Muslim culture in almost every training exercise that it has conducted since 9/11. In November of 2001, the first Anti-Terrorism Task Force Coordinators (now Anti-Terrorism Advisory Council Coordinators (ATAC)) Conference held in Washington, DC included a presentation on Middle-Eastern culture focusing on religious beliefs and history. In January of 2002, the Executive Office for United States Attorneys via its Justice Television Network conducted two, two-day teleconferences broadcast by satellite to the United States Attorneys Offices (USAOs) around the country including similar presentations on Middle-Eastern culture. This training was for federal prosecutors, FBI/JTTF, and state and local law enforcement. From April 2002 to August 2002, six regional training conferences were held for federal prosecutors and state prosecutors, FBI/JTTF and federal, state, and local law enforcement. All of these conferences included presentations on Arab and Muslim Culture and its impact on terrorism. Additional training conferences conducted for ATAC Coordinators and Intelligence Research Specialists (IRS') in 2002, 2003, and 2004 have included these cultural presentations. The Department's Community Relations Service Office has coordinated several of the presentations for these Conferences. In addition, ATAC Coordinators and IRS' in the USAOs have provided cultural training in their districts for members of their ATACs as part of their ATAC meetings and continuous training. The Department recognizes the importance of this type of cultural training, and will continue to include those presentations in anti-terrorism training sessions provided in the future.

Jose Padilla Case

Two weeks ago, the Department of Defense released more detailed information about the reasons Mr. Padilla, a U.S. citizen, is being held as an enemy combatant. Deputy Attorney General James Comey indicated that the Department of Justice has no intention of prosecuting Mr. Padilla because information was obtained from him without counsel being present and would not be admissible at a criminal trial.

106. In light of the extensive involvement of the Department of Defense in this matter and the apparently limited involvement of the Department of Justice, why did Department of Justice personnel conduct the press conference on Mr. Padilla and not personnel from the Department of Defense?

ANSWER: First, it is important to address the statement above that the "Deputy Attorney General indicated that the Department of Justice has no intention of prosecuting Mr. Padilla. . . ." Mr. Comey made it clear on several occasions during the question and answer session that---while no decisions ha been made regarding potential criminal charges---the Department was keeping open all future legal options. While the Department may never bring criminal charges against Padilla, that option cannot b ruled out at this time, nor had it been ruled out as of June 1, 2004.

Second, the Department of Justice worked closely and extensively with the Department of Defense in this matter. Given the legal questions involved, it was determined that the Department wa the most appropriate agency to brief the American people.

107. Mr. Comey suggested that the Padilla interrogation was a success because holding Mr. Padilla as an enemy combatant precluded him from exercising any rights that he could have claimed in the criminal justice system, including the right to counsel. While we would all agree that there are many dangerous people in this country – such as accused rapists, murderers, and pedophiles – no one has suggested that people accused of these crimes have their constitutional rights be limited. Does the Department of Justice contend that the only way to protect the public from suspected terrorists, but not from other types of criminals, is to suspend the Bill of Rights in order to more effectively interrogate and investigate them?

ANSWER: No. The right to counsel, among others, is a critical component of our civilian criminal justice system. This system has an extremely important role to play in the struggle against global terrorism, as shown by the successful prosecutions brought by the Department of Justice.

But in limited cases, after careful consideration of a host of factors, the President has deemed it necessary to defend our Nation by detaining individuals as enemy combatants. A critical element of that detention is intelligence gathering. Accordingly, where individuals have associated themselves with terrorist forces in armed conflict with the United States, detention as an enemy combatant allows immediate, ongoing, and uninterrupted interrogations for intelligence that are critical to protecting our citizens and armed forces.

108. The allegations that the government has made against Mr. Padilla are not undisputed. In the recent letter to Senator Hatch detailing the allegations against Mr. Padilla, in footnote 7, the government briefly listed Mr. Padilla's claims of innocence. What opportunity does Mr. Padilla have as an enemy combatant to challenge the allegations against him and prove his innocence before an impartial judge or jury?

ANSWER: As noted in the question, the summary of intelligence on Mr. Padilla included with the Department's letter to Chairman Hatch contained a summary of Mr. Padilla's claims of innocence. Those claims were not suppressed by the Government, but in fairness included in our document. Mr. Padilla will now have the opportunity to present those claims, or to otherwise challenge the allegations against him supporting his detention as an enemy combatant, under the guidelines of the recent Supreme Court decision in Hamdi v. Rumsfeld, No. 03-6696 (June 28, 2004). We note that Mr. Padilla has already re-filed his habeas case in the United States District Court for the District of South Carolina.

Law Enforcement Funding

109. The Administration has proposed slashing many of the most critical law enforcement funding programs like COPS, Byrne grants, Local Law Enforcement Block Grants and the Office of Domestic Preparedness. What are the Administration's justifications for these repeated attempts to cut assistance to these programs providing critical funding for dedicated public servants?

ANSWER: The President's budget request for Fiscal Year 2005 contains a proposal for $508.937 million in spending that is intended to enhance assistance to local law enforcement through the Edward Byrne Memorial Justice Assistance Grant (JAG) Program. The JAG program would incorporate the best aspects of the current Edward Byrne Memorial Law Enforcement Formula Grant Program (Byrne Formula) and the Local Law Enforcement Block Grant (LLEBG) Program, both of which are administered by the Office of Justice Programs' (OJP) Bureau of Justice Assistance (BJA). JAG would maintain the current equitable division of funds between states and local recipients, but would also give states and local jurisdictions greater flexibility. JAG would have fewer purpose areas than the 29 currently authorized under the Byrne Formula program, but the purpose areas would be broader, giving grantees freedom to respond quickly to pressing crime problems, including terrorist threats.

Under the Administration's JAG proposal, resources would be available for the following broadly defined purpose areas:

1) Law enforcement projects;
2) Prosecution and court projects;
3) Prevention and education projects;
4) Institutional and community corrections projects;
5) Drug treatment projects [demand reduction and substance abuse]; and
6) Planning, evaluation, and technology improvement projects.

Under JAG, every initiative now funded through Byrne and LLEBG would continue to be eligible for funding, and states, cities, and counties that currently receive funds through the program would also remain eligible. JAG resources are proposed to be distributed to both state and local governments by formula. Cities and counties that currently receive direct funding under the LLEBG program will be eligible for direct funding under JAG. States will continue to receive direct awards as they currently do under the Byrne Formula program.

JAG would help us correct a serious problem in the Byrne and LLEBG programs - the lack of coordination between the states and local communities that receive these funds. A single, closely coordinated funding mechanism would give us the ability to expand, without the duplication inherent in separate grant programs, the technical assistance in strategic collaborative planning that state and local entities tell us they want and need.

We believe that adoption of the JAG Program would open the door to more resources, not less. While total funding for JAG could be less than what Congress has typically allocated for the two programs separately, JAG would produce more resources by eliminating the programs' redundancies and promoting collaboration and resource sharing between states and local communities and among communities regionally.

JAG is also a significant vehicle for states and local governments to engage in developing new programs and cross-cutting initiatives, including field testing and evaluation of these initiatives. JAG funds will also enable state and local governments to fill gaps in their efforts to achieve system-wide improvements, provide resources for quick responses to emerging local problems, and build or enhance infrastructure.

The House of Representatives endorsed the JAG plan in two venues - first, in H.R. 3036, The Department of Justice Appropriations Authorization Act for Fiscal Years 2004 through 2006, and in H.R. 4754, the Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Bill for Fiscal Year 2005, which mirrors the authorization bill. The House recommended $634 million for the JAG program for FY 2005

The Department cannot speak relative to the budget request or resources for the Office for Domestic Preparedness, which, effective March 1, 2003, was transferred from OJP to the Department of Homeland Security.

The Office of Community Oriented Policing Services (COPS) has already dedicated $10.6 billion to add 118,000 community policing officers to the streets and schools, purchase crime-fighting technology, improve public trust with law enforcement, fight methamphetamine, improve the law enforcement infrastructure in Indian Country, and increase training and technical assistance. This year COPS grants will continue to be used for those purposes, including to hire community policing officers who will be engaged in homeland security activities. COPS grants will also be used to pay the salaries of school resource officers and will be used to improve interoperable communications between law enforcement and other first responders.

The Administration's FY05 budget for COPS includes a number of initiatives to continue supporting state, local and tribal law enforcement. More than $17 million is available for community policing development, to continue to strengthen the investment the Justice Department has already made in community policing. This will help pay for training and technical assistance and other programs to ensure that community policing strategies and curricula are available to help law enforcement fight crime and secure the homeland. The Administration's FY05 budget includes $20 million for a COPS Indian Country grant program, to help improve the law enforcement infrastructure for Tribal police agencies. The budget also includes $10 million to support programs to improve trust between law enforcement and the communities they serve, $20 million to support methamphetamine lab clean-up efforts, and $1.5 million to support the Administration's Interoperable Communications Technology programs.

Presidential Pardons and Role of the Attorney General

On May 21, 2004, President Bush issued pardons for five individuals.

110. How were these people identified?

ANSWER: As an initial matter, we assume the question concerns the five persons granted pardons on May 20, 2004. No pardons were granted on May 21.

All five of these persons had applied for pardons in the regular course. They had sent pardon petitions to the Pardon Attorney at the Department of Justice. This is the procedure set out in the Rules Governing Petitions for Executive Clemency, 28 CFR § 1.1. Thus, the people were "identified" for presidential action because they had applied, and the Department of Justice had made a recommendation to the President in each case, at the conclusion of the process it routinely follows in pardon cases.

111. Who was consulted in the Department of Justice?

ANSWER: The Office of the Pardon Attorney is the primary Department of Justice component that processes and evaluates pardon petitions. That office is supervised by the Deputy Attorney General. The usual process followed by the Office of the Pardon Attorney often involves consultation with other Justice Department components including the Office of the United States Attorney that prosecuted the case, a litigating division of the Department – such as the Tax Division or the Antitrust Division – if such a component was involved in the prosecution, and the FBI, which may conduct a background investigation of the applicant.

112. What position, if any, did the Department of Justice take on the inclusion of the five individuals and the exclusion of others?

ANSWER: The Department of Justice does not disclose either its recommendation in a clemency case or the specific information considered by the President in rendering his decision in any particular case. For reference, however, the factors generally taken into account in evaluating a pardon petition are described in the *United States Attorney's Manual*, §§ 1-2.110 to 1-2.113, which may be found at the Pardon Attorney's website, www.usdoj.gov/pardon. The decision whether to grant or deny clemency in any case is solely that of the President. The decision is within his sole discretion irrespective of the facts or the recommendations of other parties.

Death Penalty

In March 2003, I sent you a letter asking a number of questions seeking detailed information about the decision-making process in federal death penalty-eligible cases. My letter followed news reports from early 2003 indicating that you had overridden the recommendation of local federal prosecutors in over 20 death-eligible cases. While I received a response from the Department in August, my substantive questions largely went unanswered. Among other things, I had requested an update of the 2000 federal death penalty study commissioned by then-Attorney General Janet Reno. You responded that you no longer keep these statistics.

113. Will you order the collection of data on the use of the federal death penalty as an update to the 2000 study?

ANSWER: There are no plans to update the 2000 federal death penalty study.

114. If yes, will you ensure that the supplemental study tracks cases through disposition in order to get an accurate picture of the entire case, from beginning to end?

ANSWER: There are no plans to update the 2000 federal death penalty study.

115. In 1998, the Judicial Conference issued a study of defense costs in federal death penalty cases. The study included "the cost information concerning 21 of 24 completed federal death penalty prosecutions in which the Attorney General had decided to seek the death penalty after January 1995... The Department of Justice reported an average total cost per prosecution of $365,296, but this figure does not include the cost of investigation or the cost of scientific testing and expert evaluations performed by law enforcement personnel." This study is clear precedent for providing a cost-accounting of how much money is being spent for the Capital Case Unit, and for each death case that you authorize. Will you authorize the disclosure of an updated cost-accounting of death case funding?

ANSWER: Any assessment of the cost of capital prosecutions would require a reconstruction and estimation of expenses in each case that would be extremely involved and burdensome. There is always an issue as to what expenses should be included as a cost of prosecution. There are no plans at present to undertake such an assessment.

The Capital Case Unit not only assists actual death penalty prosecutions when asked to do so by the prosecuting district, it is also responsible for a variety of other functions including informing and facilitating the Department's review and decision-making process for each death penalty eligible offense and offender. In addition, the Capital Case Unit provides education to prosecutors in the procedure and substantive law applicable to capital cases.

Racial Profiling

In June 2003, the Civil Rights Division issued guidelines to federal law enforcement banning racial profiling.

116. What steps have you and the Department taken to implement this guidance and to ensure that federal agencies are complying with it?

ANSWER: In June of 2003, the Department of Justice issued *Guidance Regarding the Use of Race by Federal Law Enforcement Agencies*. The Civil Rights Division distributed that *Guidance* to federal law enforcement agencies along with a memorandum specifically noting that it had been adopted by the President as executive policy for federal law enforcement activities and that it immediately governed all federal law enforcement activities. The memorandum also instructed federal law enforcement agencies to review, and to make any necessary revisions to, their policies, procedures, and training materials to ensure conformity with the *Guidance*.

Each federal law enforcement agency is primarily responsible for ensuring that the *Guidance* is being enforced within its sphere of activities. The Department of Justice nonetheless has requested information from federal law enforcement agencies regarding activities take to train its officers in, and to enforce, this *Guidance*. The Department is committed to full implementation of the *Guidance*.

The Department moreover hosted a conference in June of 2004, inviting the general counsels and other representatives of federal law enforcement agencies to highlight once again the importance of following the racial profiling *Guidance* and to review the specific steps agencies had taken to implement the *Guidance*. The purpose of the meeting was to ensure full and complete implementation. The Assistant Attorney General for Civil Rights chaired the conference, which included presentations regarding implementation of the *Guidance* by various agencies. The agencies reported that they had received the *Guidance*, had reviewed their policies and procedures to ensure conformance, and had updated or were in the process of updating their training materials to ensure that veteran and newly-hired federal law enforcement officials understand and follow the *Guidance*. In addition, the Department stressed the importance of eliminating invidious racial profiling by following the *Guidance*, not only because it is the right thing to do, but also because it results in more effective use of limited law enforcement resources and increases the confidence and respect that citizens have in the work done by federal law enforcement officials.

The Department – and this Administration – remain fully committed to the elimination of invidious racial profiling by law enforcement agencies.

117. These guidelines only apply to federal law enforcement, not state and local law enforcement. What steps will you take to end and prevent racial profiling at the state and local level?

ANSWER: The promulgation of the *Guidance* itself was intended in part to provide a model for state and local law enforcement to follow. Such agencies frequently look to federal law enforcement for guidance, and the Department intended the *Guidance* to serve as such

In addition, the Department will continue to seek injunctive and declaratory relief against state and local law enforcement agencies who engage in a pattern or practice of discriminatory law enforcement. The Department also may suspend or terminate federal grants to law enforcement agencies that discriminate on the basis of race.

National Criminal Intelligence Sharing Plan

When the Department of Justice recently announced the National Criminal Intelligence Sharing Plan, nowhere in the announcement did anyone address the privacy and civil liberty concerns raised by this intelligence sharing plan.

118. What steps are being taken to ensure that only accurate information is in the system?

ANSWER: The Plan is not an information system or database. Rather, it is an initiative to provide law enforcement with the appropriate criminal intelligence sharing policies, procedures, standards, technologies, and training to leverage the available resources for detecting threats and combating crime. The Plan does recommend policies and procedures for reviewing, auditing, and managing the criminal intelligence process so that the most timely and accurate information can be made available to the public safety decision- makers who protect the lives of our citizens.

Specific recommendations to agencies to protect the accuracy and accountability of the criminal intelligence function include:

- Ensure that standards are developed concerning background investigations of all staff who are part of the criminal intelligence process;
- Provide appropriate intelligence and privacy training for all personnel impacted by the criminal intelligence process;
- Support the development of sound, professional analytic products;
- Implement a method and/or system for dissemination of criminal intelligence;
- Implement published policies and procedures regarding the criminal intelligence process;
- Put in place an appropriate audit or review processes to ensure compliance with procedures, security, and privacy policies;
- Whenever the issue does not affect security, promote a policy of openness when communicating with the public and all interested parties regarding the criminal intelligence process.

119. What can a person do to address a potential error in the records?

ANSWER: As described above, the Plan is not an information system or database. Though the Plan does support the development of a nationwide communications capacity for sharing criminal intelligence among local, state, tribal, and federal law enforcement, this

communications backbone would simply be a secure network for transmission and not an information system or a database.

Local, state, tribal, and federal agencies that would connect to the communications backbone would retain local control over the accuracy and security of their data. Citizens wishing to address potential errors in the records of specific databases would seek redress through the applicable local, state, federal or tribal policy and statutes governing their agency's data base. Some states have specific statutes regarding the rights of citizens to review their criminal history records.

OJP is working with the Department of Homeland Security and state governments to implement national standards for the sharing, monitoring and updating of criminal intelligence records.

120. Exactly who in local law enforcement will have access to the information and what penalties will there be for someone who abuses the system?

ANSWER: Local, state, federal, and tribal jurisdictions have specific statutes in place governing who has access to criminal intelligence data, and those laws, where relevant, would be applied to those agencies participating in the Plan.

121. If the idea is to do more than just provide names and criminal records to state and local law enforcement but to also give them raw intelligence, what systems are in place to guarantee that private information like the names and addresses of cooperating witnesses will be adequately protected?

ANSWER: Direct control and responsibility for the accuracy and security of criminal intelligence systems will remain in the hands of the local, state, tribal, or federal agencies that implement and operate those systems. However, the Plan seeks to provide national standards, policies and procedures to improve the accessibility and effectiveness of those systems.

The Plan provides a blueprint for establishing appropriate standards, policies, architecture and training for the gathering and sharing of criminal intelligence at all affected levels of law enforcement so that the privacy and constitutional rights of individuals can be appropriately considered and protected.

The Plan itself is will be reviewed periodically so that it can be updated and changed based on feedback solicited from law enforcement and intelligence communities, national organizations, public safety organizations, and the public. We want to determine if the Plan is working effectively as a helpful tool for all participating entities and will make adjustments accordingly.

A key goal of the Plan is to respect and protect privacy and civil liberties, and changes will be made as needed to achieve this goal. The full text of the Plan and an overview highlighting key recommendations and the collaborative development history of the Plan are available at the Web site http://it.ojp.gov/topic.jsp?topic_id=93. Hard copies of both the Plan and CD may be obtained by contacting the Department of Justice Office of Legislative Affairs.

SUBMISSIONS FOR THE RECORD

1000 Six PPG Place, Pittsburgh, PA 15222-5479
phone: 412.394.2836 fax: 412.394.2837
e-mail: jwalton@alleghenytechnologies.com

Jon D. Walton
Executive Vice President,
Human Resources,
Chief Legal and Compliance Officer

MEMORANDUM

TO: Senator Arlen Specter

DATE: June 7, 2004

RE: Financial Impact on ATI of DOJ and EPA Actions at Li Tungsten Superfund Site in Glen Cove, NY

ATI, a major specialty materials manufacturer headquartered in Pittsburgh, PA, has been subjected to a multi-year concerted effort by the Department of Justice (DOJ) and the Environmental Protection Agency (EPA) to single out ATI among potentially responsible parties ("PRPs") to force the company to remediate a Superfund site in Glen Cove, NY known as the "Li Tungsten" Site.

The Site was developed by the Government during World War II and used through the Cold War for the processing and storage of tungsten, which is a naturally radioactive material. ATI had only tangential connections to the Li Tungsten Site through a company it purchased that was active at the Site for a relatively brief period of time. An agreement is needed that will permit mediation or other resolution of the respective liability of ATI, other commercial PRPs who were active at the Site, and particularly the federal PRPs who should bear primary responsibility for this wartime Site.

Damages to ATI

This situation cries out for action to prevent further damages to ATI, impacting upon the company's ability to maintain current and planned capital expenditures in Western PA. ATI employs 9,000 people nationwide, including more than 3,000 in Western PA. The company has lost hundreds of millions of dollars in recent years; and most of its competitors have gone into bankruptcy in the face of recession and foreign competition. The manufacturing economy in Western PA, and the steel industry specifically is finally beginning to improve, but this is no time for the Government to unilaterally impose financial hardships on the company.

The Superfund statute was passed by Congress to advance efforts to remediate sites throughout the country. ATI supports such efforts and has spent approximately $5 million dollars at the Li Tungsten Site pursuant to EPA unilateral orders that were issued *before* any determination of liability by a mediator or court. However, the statute

was not intended to benefit Sites in one state to the financial detriment of entire regions of other states, and DOJ in implementing and enforcing the statute must act reasonably.

Proposed Solution

The Attorney General should: 1) order DOJ to withdraw the proposed "settlement" between EPA and the federal PRPs. Section 122 of the Superfund statute permits the Attorney General to withdraw his consent to a proposed settlement if it is "inappropriate, improper or inadequate." Clearly, the proposed settlement between the federal PRPs and EPA meets this standard; the settlement has no credibility since it was negotiated by attorneys from the DOJ representing both sides. Further, the Attorney General should: 2) order DOJ and EPA to enter into a reasonable mediation or arbitration agreement to determine a proper allocation of liability between ATI and the federal PRPs; and agree to forebear imposing unilateral cleanup orders, requiring additional work by ATI, and threatening imposition of penalties on ATI while the parties are mediating. Such forbearance should continue for however long the mediation takes, assuming all parties are proceeding in good faith.

Questions

- Why is ATI being singled out by DOJ and EPA? Why isn't DOJ pursuing *other* companies that were active at the Li Tungsten site, some more active than ATI, and all of whom have joint and several liability under the statute? Do DOJ and EPA regard ATI as a "deep pocket" to the exclusion of other PRPs?
- Why is DOJ asking ATI to agree to mediate under terms that will permit EPA to issue orders requiring additional work by ATI at the Site, even during the mediation?
- Why won't DOJ and EPA disclose the basis for their determination in the proposed settlement between EPA and the federal PRPs (Departments of Defense and Commerce and GSA) that the federal agencies are liable for only 51% of the costs of the remediation? Isn't this a "sweetheart" deal between EPA and the federal agencies, essentially getting the agencies off the hook at the lowest possible price?
- Why did DOJ represent *both sides* in negotiating the settlement -- the federal agencies and the EPA? How can such a settlement have any credibility?

Jon D. Walton

STATEMENT OF
JOHN ASHCROFT
ATTORNEY GENERAL

BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

OVERSIGHT OF THE DEPARTMENT OF JUSTICE:
TERRORISM AND OTHER TOPICS

JUNE 8, 2004

Good morning, Mr. Chairman and Members of the Committee.

It is useful, from time-to-time, for those of us in government to remind ourselves why we are here, and what we are pursuing. Today, more than most times in the life of our nation, the answer should be clear: The first priority of government is to protect the lives and liberties of the people. The United States Department of Justice is pressing this cause forward with tireless energy and with marked success.

Fighting Terrorism

For 32 months, the Justice Department has been using every tool and every tactic in the arsenal of the justice community to stop terrorism—from aggressive enforcement of the criminal code to the deployment of the new and critical tools of the USA Patriot Act. We have used—and we will use—every lawful means to deter, disrupt and

destroy terrorist threats.

This powerful strategy of prevention has borne impressive results. For more than two years, we have not seen a major terrorist attack on U.S. soil.
For example:

- **Our ongoing war on terrorism has resulted in criminal charges against 310 individuals, with 179 convictions to date.**
- **We have broken up terrorist cells from Virginia to Washington State, from Florida to New York, from Oregon to North Carolina.**
- **We have launched 70 investigations into terrorist financing.**
- **And in cooperation with the Treasury Department, these investigations have resulted in the freezing of over $139 million in assets.**

Considered in full, our response to the events of September 11, 2001, represents the largest criminal investigation in history. This effort has lead to the capture of the following men:

Zacarias Moussaoui: Moussaoui is charged with six counts of conspiracy connected with the September 11 attacks.

John Walker Lindh: Mr. Lindh pled guilty to aiding the Taliban. He was sentenced to 20 years imprisonment.

Richard Reid: The so-called "shoe bomber" was charged as a trained Al Qaeda terrorist who attempted to destroy American Airlines Flight 63. He pled guilty to all charges and was sentenced to life imprisonment on January 30, 2003.

In Seattle, Earnest James Ujaama pleaded guilty to providing material support to the Taliban.

In North Carolina, members of a cell who provided material support to Hizballah were convicted, with the lead defendant being sentenced to 155 years in prison.

In New York, Mustafa Kamel Mustafa, a.k.a. "Abu Hamza," was charged with, among other things, hostage taking in Yemen and material support to terrorism for unsuccessfully attempting to establish a violent jihad training camp in Bly, Oregon and for conspiracy to provide material support to the Taliban.

In Houston and San Diego, the Department brought material support for terrorism charges against individuals who allegedly engaged in plots to trade drugs for weapons.

In addition, we have charged hundreds of airport workers with falsifying documents and violating immigration laws at airports nationwide. At Dulles and Reagan National Airports in Virginia, 94 workers were arrested for allegedly falsifying Social Security applications and violating immigration laws. In Charlotte, North Carolina, 67 undocumented aliens were indicted for document fraud.

FBI investigation uncovered facts to indicate that the Benevolence International Foundation (BIF) was actually a conduit for funding Islamic Fighters engaged in battle in Chechnya, Bosnia, Sudan, and other places. BIF also employed several high-ranking Al Qaeda operatives and facilitated the international travel of these individuals under the guise of charity work. The BIF leader was arrested by the FBI in April 2002 and pled guilty to operating BIF as a Racketeering Enterprise. The BIF organization is now a designated terrorist entity and has been dismantled.

Our intelligence and law enforcement communities, and our partners, both here and abroad, have identified and disrupted over 150 terrorist threats and cells. Nearly two-thirds of al Qaida's known senior leadership has been captured or killed, and more than 3,000 operatives have been incapacitated.

We will continue to fight terrorism using all the tools at our disposal. As the Committee is aware, however, key provisions of one such critical tool -- the Patriot Act -- are currently scheduled to "sunset" at the end of 2005. In our view, it is imperative that this "sunset" not be allowed to take place. Instead, these provisions need to be renewed.

The Justice Department and the American people have benefitted tremendously in preventing terrorism, thanks to the Patriot Act. This important bipartisan legislation removed the bureaucratic wall between law enforcement and intelligence. This has translated

into results.

For example, in Tampa, Florida, Sami Al Arian and seven other individuals were indicted for their alleged support of the terrorist group Palestinian Islamic Jihad (PIJ), in a case that resulted in large part from the ability of prosecutors to consider and use all of the information collected about the defendants' alleged criminal activities.

The Department is gathering and cultivating detailed intelligence on terrorism in the U.S.:

- **thousands of terrorist suspects have been identified and tracked throughout the U.S.;**
- **human sources of intelligence have doubled;**
- **counterterrorism investigations have doubled in one year;**
- **18,000 subpoenas and search warrants have been issued;**
- **over 1,700 applications in 2003 were made to the FISA court targeting terrorists, spies and foreign powers who threaten our security.**

The Department also provides the Intelligence Community with valuable information obtained from confidential sources and cooperating defendants developed during criminal investigations and prosecutions.

Earnest James Ujaama is cooperating in terrorism investigations after pleading guilty in April 2003 in Seattle to providing material support to the Taliban.

John Walker Lindh cooperated after pleading guilty to supporting the Taliban in exchange for 20-year prison sentence. Lindh provided information about training camps and fighting in Afghanistan in 2001.

All six Buffalo "Cell" defendants are cooperating after pleading guilty. They have provided information about a pre-9/11 trip to the al-Qaeda-affiliated al-Farooq training camp in Afghanistan.

Iyman Faris cooperated after pleading guilty to providing material support to al Qaeda and provided information about post-9/11 plans by al Qaeda for attacks within the U.S.

In the Northern Virginia jihad case, six defendants pleaded guilty and agreed to cooperate.

In the Portland "Cell" case, four defendants agreed to cooperate after pleading guilty. The cooperation agreements from these four defendants were essential to obtaining guilty pleas from the final two defendants in custody, and are proving vital to the on-going investigation into those who provided support to the Portland Cell.

The Justice Department is also working closely with our international partners to disrupt and prevent terrorist acts. The assistance of our allies has been critical in the War on Terror, as we use the full range of investigative and intelligence tools to protect our citizens at home and abroad.

Many of these efforts cannot be made public. But one example that has come to light is our prosecution of Hemant Lakhani in Newark. Lakhani is alleged to have attempted to smuggle shoulder-fired missiles into the United States to sell to a person he believed to be the representative of a terrorist group. That prosecution resulted from an unprecedented degree of cooperation with our Russian partners in the war against terror.

Fighting Violent Crime

We have achieved these anti-terrorism victories at the same time we have proven our dedication to the fight against domestic crime. Here, too, the results speak for themselves.

Thanks to Project Safe Neighborhoods, we are fulfilling the President's vision to prosecute and jail criminals who illegally use guns to commit crime. We have increased federal prosecutions by 68 percent over the last three years. In the 2003 fiscal year alone, we charged over 13,000 offenders with federal firearms offenses—the highest figure ever recorded for a single year and 23 percent higher than the previous year.

It should not be surprising, then, that the violent crime rate is at its lowest level in 30 years. A comparison of the two-year period of 1999-2000 to the two-year period of 2001-2002 reveals that the violent crime rate plunged 21 percent.

The continuing success in our nation's fight against crime means that when comparing those same two-year periods,

- **27 percent fewer people were robbed;**
- **23 percent fewer men and women were victims of**

aggravated assault; and

- 27 percent fewer women—sisters, mothers, and daughters—were raped.

Behind these statistics are many Americans whose lives have been spared the pain of victimization: Compared to the year 2000, almost one million fewer Americans experienced the anguish of violent crime in 2002.

Thanks to aggressive enforcement of gun laws already on the books, there were 130,000 fewer victims of gun crime in the period of 2001-2002 than in 1999-2000.

Stopping Illegal Drugs

By setting new priorities on the most violent and dangerous offenders, the Justice Department is focusing government resources on the most critical and pressing problems—and this translates to real results.

For the first time ever, the Justice Department has compiled a list of the government's top priority targets in the struggle to protect Americans from the scourge of illegal drugs. To help restrict the supply of drugs and to focus our attack, we have, with greater clarity and determination than in the past, directed our law enforcement efforts at the largest, most organized international drug cartels. We designate these drug organizations Consolidated Priority

Organization Targets (CPOTs). The CPOT list is increasingly used to guide the efforts of federal, state, and local participants in the High Intensity Drug Trafficking Area program, the mission of which is to enhance and coordinate federal, state, and local drug law enforcement efforts in regions of the U.S. designated as having significant levels of drug trafficking, in order to reduce and eliminate drug trafficking and its consequences.

Our goal and our measure of success is to take out these priority targets, incarcerate their chief operatives, end their market influence, and create power vacuums with transaction costs for the entire illegal drug trade.

More than merely law enforcement actions, however, these efforts have helped to stop use before it starts:

- **We have seen an 11 percent drop in drug use among eighth-, tenth-, and twelfth-graders. That is the first drop in all three grades in a decade.**
- **By taking out some of the major traffickers in Ecstasy and disrupting trafficking routes, law enforcement has contributed to a 50 percent drop in Ecstasy use among eight-, tenth-, and twelfth-graders.**
- **By targeting the top LSD producers, we have seen a nearly two-thirds drop in LSD use. That is the lowest level in nearly three decades.**
- **And thanks to the Office of Justice Programs, our Drug**

Courts Program is helping non-violent offenders with substance-abuse problems.

Fighting for the Most Vulnerable

The Department of Justice is also protecting the nation's most vulnerable citizens from those who would prey on them for profit and personal gain. By working closely with state and local law enforcement we are stopping dehumanizing crimes such as child pornography and human trafficking—crimes that primarily victimize immigrants, young children, and the elderly.

In the fiscal years of 2001 to 2003, we opened 210 new human-trafficking investigations. That is double the number of the previous three years. In fiscal year 2003, the Department indicted or charged 1,261 individuals for child exploitation offenses, including child pornography, enticement of children for sexual acts, and sexual child abuse, and obtained 983 convictions for such offenses.

But we are not just prosecuting crimes after the fact. We are protecting children by increasing the speed and preventive capabilities of law enforcement. We instituted the national AMBER alert program to help recover abducted children. Thanks to AMBER alerts more than 130 children have been recovered.

At the Department of Justice we understand that effective prevention requires more than the imprisonment of individual child

predators. We are finding and destroying the perverse underworld that provides a market for and a prelude to crimes against children.

We recently saw the first results of this strategy in our ongoing investigation and prosecution of peer-to-peer computer file sharing of child pornography. Thanks to coordinated efforts of the Justice Department, the FBI, U.S. Immigration and Customs Enforcement, and 39 local Internet Crimes Against Children Task Forces, we have executed hundreds of searches nationwide.

At last count, we had identified 3,371 suspect computers distributing child pornography through the use of peer-to-peer software over the Internet.

Child predators often open websites with a slight misspelling or variation in the spelling of innocent, child-friendly websites in order to expose children to indecent material. We have responded to this repugnant tactic by initiating a false domain-name program. This program locates and shuts down websites that expose children to sexual exploitation and pornographic images by using misleading web names.

Fighting for Equal Rights for All

In addition to protecting the lives of Americans—including the most vulnerable among us—the Department is equally focused on protecting the liberties of Americans. We are committed to a justice

system that guarantees fairness and equality under the law:

- **Over the first three years of this administration, we charged more individuals for criminal civil rights violations than in the previous three-year period.**
- **Likewise, over the past three years, we have tripled the number of defendants charged with human trafficking.**
- **We have quadrupled the number of investigations into civil-rights violations at juvenile-justice facilities.**
- **In the area of employment discrimination, the Civil Rights Division is on pace to have a record year of prosecutions unmatched since the mid-1990's.**
- **We have resolved four times as many police pattern or practice investigations.**
- **And we announced the first federal law enforcement policy prohibiting racial profiling.**

In addition, we are protecting religious institutions from unlawful discrimination through the strong enforcement of the Religious Land Use and Institutionalized Persons Act. Thus far, we have opened 18 such investigations.

Fighting Corporate Fraud

The Justice Department, working in tandem with every member of the President's Corporate Fraud Task Force, continues to swiftly and aggressively punish corporate wrongdoers. It has fulfilled the

President's admonition that the Task Force send a "clear warning and a clear message to every dishonest corporate leader: You will be exposed, and you will be punished. No board room in America is above or beyond the law."

That is why the Justice Department is committed to insuring the accuracy of the information so important to the integrity of the market and the confidence of the investor. To that end:

- **Since the inception of the Task Force, more than 700 defendants have been charged with corporate fraud in more than 300 criminal cases.**
- **More than 300 defendants have been convicted or have pled guilty, including top executives from Enron, WorldCom, HealthSouth, and Rite Aid.**

Our successes are all a direct result of the unparalleled cooperation between all members of the Task Force, including the Securities and Exchange Commission, and a deliberate strategy of charging offenses promptly, rather than pursuing difficult and extended investigations that delay notice to the public and punishment of wrongdoers.

Enforcing Environmental Law

The Justice Department has also set new records for environmental enforcement in the 2003 fiscal year. Court awards and consent decrees resulted in more than $202 million in penalties for civil violations of the nation's environmental laws.

In addition, enforcing the Clean Air Act reduced air pollution in 2003 by more than 465,000 tons per year. And last year, the Justice Department obtained the largest civil penalty in history against a single company, Colonial Pipeline, for violations of an environmental statute.

Fighting Health-Care Fraud

Enforcement of civil and health-care fraud laws have shown a marked increase in recoveries for victims, consumers, and for the benefit of the free markets.

- **In a comparison of two three-year periods—1998-2000 to 2001-2003—civil fraud recoveries nearly doubled from $2.7 billion to $5.0 billion.**
- **And in the same time period, civil health-care fraud recoveries nearly tripled from $1.5 billion to $4.1 billion.**

In addition to swift and decisive action against criminals from civil rights violators and corporate polluters to child predators and violent offenders, the Department of Justice has strengthened outreach efforts to communities and support for victims of crime.

Fighting for Victims

In order to hold criminal offenders more accountable, the Justice Department is giving crime victims a greater voice in the criminal justice process. For example:

- **We are amending guidelines and proposing changes to federal law to improve victim services.**
- **We are also mobilizing support for the constitutional amendment to protect victims' rights.**

Fighting for Accountability

To achieve the President's goal of greater efficiency and accountability in government, and to meet its critical role in the war on terrorism, the Justice Department implemented a new five-year strategic plan in 2001. Our overarching focus is targeting Department resources to achieve results for the American people.

Three years into our strategic plan, we are delivering measurable results for the American people. Justice Department efforts fall into three key areas:

- **Fostering integrity and accountability;**
- **Utilizing technology; and,**
- **Achieving safety and security.**

First, we are fostering integrity and accountability.

In the 2001 fiscal year, for the first time in the history of the Justice Department, the Office of the Inspector General reported a clean audit for all Department financial reports. This has been followed by clean ratings in each of the last two fiscal years.

Second, the Justice Department is harnessing technology to improve information management and use.

Effective information technology is critical for both the fight against terrorism and the efficient delivery of services to the public. That is why we have revitalized our Information Technology organization. With the appointment of a new Chief Information Officer, or CIO, the new tech team is leveraging the leadership of experienced executives and managers to implement an Information Technology strategy that is on the cutting edge. For example, we have:

- **Published the first Department Information Technology Strategic Plan in 2002. This means we turned fragmented, stand-alone plans into a single, cohesive Department-wide strategy for effective technology deployment in the future.**
- **Begun designing a single enterprise architecture. This means we will have a technology plan that promotes communication interoperability, and information sharing,**

with core business functions.

Our upgraded IT organization is showing results. To cite two examples:

- **We have initiated the first ever Law Enforcement Information Sharing (LEIS) strategy to coordinate information sharing across the law enforcement community, from the small-town sheriff to the director of the FBI.**
- **We have improved public access to our grant programs. In 2003 more than 97% of Office of Justice Programs grants were processed via the Internet. This vastly improved electronic grants process has resulted in significantly reduced grantee paperwork and faster disbursement of grant funds to needed programs.**

Third, our management initiatives are helping us focus our resources to increase the safety and security for the American people.

Mr. Chairman, the terrorist attacks of September 11 made it clear that if America was to defend its freedom successfully, a new culture of prevention was needed.

This required the Justice Department to initiate a fundamental shift in the design of the Department's infrastructure, so that it could

better enforce the laws of our land to more effectively neutralize the terrorist threat. We are succeeding.

In the past 30 months we have centralized and streamlined management of the FBI's counter-terrorism, counter-intelligence, and cyber programs to expand resources, while strengthening prevention efforts, information sharing, and accountability.

Today, more than one thousand new agents, 400 new analysts and 1,200 linguists with skills in critical languages are focused on terrorism prevention.

The Department's FY 05 budget includes $2.6 billion for counterterrorism operations, a 19 percent increase over FY 04 levels. As a percentage of the Department's budget, counterterrorism resources have increased from 3.6 percent to over 13 percent – a near four-fold increase. The Department's total funding for counterterrorism and counterintelligence has risen from approximately $1 billion in FY 01 to $3.5 billion in our FY 05 request.

We will continue to re-organize and streamline to achieve our No. 1 priority: protecting the lives and liberties of the people. And we will pursue this noble goal in a way that carefully stewards our nation's tax dollars and the people's trust.

Our strategic plan and its ongoing implementation allow us to move forward swiftly and with studied purpose in our defense of

freedom and in the protection of the lives and liberties of the American public.

Mr. Chairman, that completes my prepared remarks. I would be pleased to respond to the Committee's questions at this time.

###

News Release

JUDICIARY COMMITTEE

United States Senate • Senator Orrin Hatch, Chairman

June 8, 2004 Contact: Margarita Tapia, 202/224-5225

Statement of Chairman Orrin G. Hatch
Before the United States Senate Judiciary Committee
Hearing on

"DOJ OVERSIGHT: TERRORISM AND OTHER TOPICS"

Before I make my introductory remarks concerning this hearing, I want first to say a few words about President Ronald Reagan. He took office during a difficult time in America's history and helped usher in an era of both peace and prosperity. You can not do any better than that.

As we face new challenges from terrorists both at home and abroad, we would do well to emulate President's Reagan unfailing qualities of dignity and courtesy as well as his reliance on traditional American values, including his remarkable ability to communicate a sense of confidence and optimism about the future of our country.

As we work to thwart the new threat posed by terrorists, we must not forget the fact that our Nation has a history of defeating determined adversaries through the leadership of men like President Reagan and the perseverance of many citizens in many nations over a sustained period of time, we prevailed against fascism and communism and have made many old enemies into new allies.

Today's oversight hearing will mark the seventh hearing at which our Committee will have an opportunity to explore the effectiveness and the preparedness of the federal government to prevent and respond to terrorism on American soil.

Let me welcome our distinguished witness, the 79th Attorney General of the United States and former colleague on this Committee, John Ashcroft.

The Attorney General and his colleagues in the law enforcement and intelligence communities face challenging times in defending our country from terrorists.

Prosecuting terrorists after they have attacked our civilians does not bring back lost lives to grieving families and it is certainly an imperfect deterrent as these extremists are often bent on taking their own lives in these suicide missions.

Instead, as has been widely acknowledged over the last three years, the key is to prevent terrorism before it occurs and, when possible, interdict the terrorists on their homelands before they come to America to carry out attacks.

And that is exactly what the Department of Justice is doing – taking the battle to the terrorists by using every available tool. Let me commend you, Mr. Attorney General, for your Department's efforts to protect this great Nation.

Unfortunately, no one can guarantee 100 percent success in warding off all future terrorist attacks, but we must try to do so. The American public appreciates the commitment and energy that the Department of Justice brings to this task each and every day.

In recent weeks, we have been reminded about the dangerous nature of the situation we currently face. The Attorney General and the Director of the FBI publicly stated that credible intelligence, from multiple sources, indicates that al Qaeda plans to attempt an attack on the United States in the next few months.

Another very troubling development involves the terrorist conspiracy revealed by the Department's recent response to my April 22, 2004 letter requesting information on the detention of enemy combatant and American citizen Jose Padilla.

According to the Department of Defense, we now know that Jose Padilla received training in a terrorist camp in Afghanistan, including with an al Qaeda explosives expert. We are told that he served as an armed guard of what he understood to be a Taliban outpost in Kabul.

There is also reason to believe that Mr. Padilla discussed plans to detonate a dirty bomb or, alternatively, to blow up multiple apartment buildings using natural gas lines in New York, Washington, D.C. or Florida with high level al Qaeda operatives, including Khalid Shaykh Muhammad.

As my colleagues may recall, last year U.S. law enforcement and intelligence agents, working together with Pakistani intelligence agents, captured Khalid Shaykh Muhammad, who was al Qaeda's leading operational planner and organizer. He is believed to be the mastermind behind the September 11th attacks.

Given our democratic society's strong tradition of protecting civil liberties, all of us -- especially Members of this Committee -- have an interest in the general procedures and policies, as well as the specific facts and circumstances, under which any American citizen may be designated and detained as an enemy combatant.

Our system of checks and balances is designed to place limits on the powers of each branch of government. But the unabashed and self-proclaimed goal of terrorists to obtain and use weapons of mass destruction against American civilians compels us to rethink the adequacy of our legal structure to prevent further terrorist attacks. We live in a dangerous world and our Commander-in-Chief must have the proper amount of authority to act decisively to protect the public.

I think the information released last week about Mr. Padilla provided useful information to the Congress and the public about the nature of these new terrorist threats. Having said that, I am also mindful that some have raised legitimate questions about a system that, to date at least, limits the ability of the designated enemy combatants and their legal representatives to develop a defense and get their side of the story out.

Nevertheless, I am also concerned that these new terrorists, who do not wear conventional military uniforms and are unaffiliated with nation-states, and whose ultimate goal is nothing less than to destroy our way of life, would like nothing more than the opportunity to use all our traditional due process protections to drag out the proceedings, tie the government prosecutors in knots, and make publicized political speeches.

Frankly, questions can be raised about the decision to try Zacarias Moussaoui in a criminal proceeding in an Article III court. A strong argument can be made that Mr. Moussaoui is the quintessential enemy combatant and deserves to be tried by a military commission.

We need more debate and discussion on the question of whether those designated as enemy combatants should be tried, and afforded attorneys, only after they are determined to be of no intelligence value or have exhausted their intelligence value.

As well, we need more discussion about where and by whom the line should be drawn between permissible aggressive interrogation techniques, and when interrogation becomes torture and whether torture is ever justified. We have all read the recent press accounts on these issues with great interest.

While I hope that one day al Qaeda will be defeated and formally surrender, it is possible the day will never come when many of those detained at Guantanamo will agree to lay down their arms against the American people. This poses perplexing problems for a democratic country whose history suggests that wars end with finality for all combatants.

Let me take a moment to speak about the Patriot Act. This legislation was a measured attempt to help protect Americans from terrorist attacks and is consistent with our traditional civil liberties. Despite the negative predictions of some, the Patriot Act has not eroded the civil liberties that we Americans hold dear.

As I understand it, the Department's Inspector General has consistently reported in three semi-annual reports that it has received no complaints alleging misconduct by DOJ employees in their use of substantive provisions of the Patriot Act. Let me repeat—no complaints. Nevertheless, if we can improve and fine tune the Patriot Act, we should do so.

Despite the enormous task of defending against terrorist attacks, the Department remains committed to ensuring that its traditional law enforcement responsibilities are met. Recently, the Department reported that violent crime has fallen 3.2 percent nationwide.

The Department continues its vigorous enforcement of civil rights violations. And, in fiscal year 2003, the Department provided almost $7 billion to state and local governments for various law enforcement initiatives, including $2.78 billion for training emergency first responders and purchasing equipment, as well as research and development of counterterrorism technology.

Finally, let me say that on the Committee's mark-up agenda is S.1700, the DNA legislation. I believe that the Committee will report and the Senate should adopt this important bi-partisan bill, which has already passed the House by a wide bi-partisan vote.

This bill will help bring justice to thousands of victims of crimes, including many rape victims that have fallen through the cracks in the system due to the substantial backlog of rape test kits. In addition to using DNA technology to help bring about convictions, DNA tests can also be appropriately used to help exonerate those wrongfully charged or wrongfully convicted of crimes. I will work to bring this bill to the President's desk for his signature.

I look forward to hearing your testimony today. I hope to continue our bi-partisan commitment to enacting measures that may be needed to win the war against terrorism and to work together on the full range of programs the Department implements.

###

Opening Statement of Senator Patrick Leahy,
Ranking Member,
Senate Judiciary Committee
Oversight Hearing
Attorney General John Ashcroft
June 8, 2004

Welcome, Mr. Attorney General. It is good to have you back before the Committee, and we are pleased to see you have recovered so swiftly from your surgery earlier this year. It has been a long time since our last oversight hearing with you. Fifteen months have passed since your last, brief appearance in March last year.

Sparse And Grudging Cooperation

Mr. Attorney General, I must speak frankly about an issue that has emerged as a basic problem during your tenure. There are two words that succinctly sum up the Justice Department's accountability and its cooperation with congressional oversight on your watch. Those two words are "sparse," and "grudging." Even those of us who have served through several presidents cannot recall a worse performance record when it comes to responsiveness.

Too often we on this Committee, on both sides of the aisle, get the sense that under your direction and example, the Justice Department and its agencies consider oversight by Congress to be nothing more than a nuisance.

But lack of oversight has costs and consequences, and we are beginning to reap them. Why is oversight important? Beyond the fact that the Constitution prescribes such checks and balances among the three branches of government, proper oversight – with cooperation from Executive agencies – helps make government work better. It also contributes to accountability. How is the Justice Department using all of the tools this Congress has provided in the USA PATRIOT Act? With the lack of oversight cooperation we have received, and with the secrecy that shrouds several aspects of the law, how would any of us know the real answer to that question, or dozens of other questions on other vital topics?

Now more than ever, the American people need the Justice Department and the FBI to be as good as we need them to be in combating terrorism. Congressional oversight is an essential ingredient in identifying problems and forging solutions.

Just days ago we learned of Justice Department involvement in devising legal arguments to minimize our obligations under such U.S. laws and international agreements as the convention on torture. Yet a letter I wrote to you last November, well before most of these abuses came to light, went unanswered for months, and when we are lucky enough to get responses, the premium is on unresponsiveness. Few of the answers we get are worth much more than the paper they are printed on. We often learn more about what's really happening in the Justice Department in the press than we do from you.

Could the Administration's cooperation with Congressional oversight have prevented such disasters as the prison abuse scandal? The answer is obvious.

What We Know

So in the meantime, the problems and the questions just keep on piling up.

In the 1000 days since the catastrophic attacks of September 11th, we have learned little from our Justice Department. We know this:

- Osama bin Laden remains at large;
- At least three senior al Qaeda operatives who helped plan the 9/11 attacks, including the suspected mastermind of the plot, are in U.S. custody, but there has been no attempt to bring any of them to justice;
- The Moussaoui prosecution has bogged down because the prosecution refuses to let the defense interview witnesses in U.S. custody;
- A German court acquitted two 9/11 co-conspirators, in part because the U.S. Government refused to provide evidence for the cases;
- Three defendants who you said had knowledge of the 9/11 attacks did not have such knowledge; the Department retracted your statement, and then you had to apologize to the court for violating a gag order in the case;
- The man you claimed was about to explode a "dirty bomb" in the U.S. had no such intention or capability, and because he has been held for two years without access to counsel, any crimes he did commit might never be prosecuted;
- Terrorist attacks on Capitol Hill and elsewhere involving the deadly bioterror agents anthrax and Ricin have yet to be solved, and the Department is defending itself in a civil rights action brought by a man who you publicly identified as a "person of interest" in the anthrax investigation;
- U.S. citizens with no connection to terrorism have been imprisoned as material witnesses for chunks of time -- with an "Oops, I'm sorry" when a "100 percent positive" fingerprint match turns out to be 100 percent wrong;

- Non-citizens with no connection to terrorism have been rounded up on the basis of their religion or ethnicity, held for months without charges and, in some cases, physically abused;

- Interrogation techniques approved by the Department of Justice have led to abuses that have tarnished our nation's reputation and likely given strength and driven hundreds, if not thousands, of new recruits to our enemies;

- Your Department turned a Canadian citizen over to Syria who was tortured;

- Documents have been classified, unclassified, and reclassified to score political points rather than for legitimate national security reasons;

- Statistics have been manipulated to exaggerate the Department's success in fighting terrorism; and

- The threat of another attack on U.S. soil remains high, although how high depends on who, in the Administration, is talking and what audience they are addressing.

Unfinished Business After 1000 Days

Your testimony here comes about 1000 days after the September 11th attacks and the subsequent launch of your efforts against terrorism. As National Security Advisor Condoleezza Rice acknowledged in her testimony before the 9/11 Commission, the terrorist threats to our nation did not begin in September 2001. Yet preliminary findings of the 9/11 Commission suggest that counterterrorism simply was not a priority of the Justice Department before September 11th. In fact, just one day before the attacks, you rejected the FBI's request to include more money for counterterrorism in your budget proposal. Arab language translators were so sorely lacking that when we did intercept information, we did not have the capacity to learn from it. The FBI lacked computer analysis capability to make sense of the valuable information we did have, such as an informant's claim that he and other al Qaeda operatives had been sent to the United States to hijack planes. The strong concerns of FBI agents like Coleen Rowley in Minnesota and Kenneth Williams in Phoenix were falling on deaf ears. The Justice Department failed to understand and apply the correct standard to get a search warrant for the computer of Zaccarias Moussaoui, who was in federal custody in August 2001. We were more concerned about Mexican immigration along our southern border than with securing American borders from terrorists. We were not coordinating effectively with international allies or our own State and local law enforcement agencies. And while you have recently been sharply critical of the so-called "wall" between criminal investigators and intelligence agents, you did nothing to "lower" it during your first seven full months in office. The President is fond of saying that September 11 changed everything, as if to wipe out all the missteps and misplaced priorities of the first year of this Administration.

Now, 1000 days later, there is ample cause for concern about whether, even now, the Justice Department is using its increased resources well and is setting its priorities toward the right goals.

Another Suspected Terrorist Goes Free

After the attacks you promised a stunned nation that its Government would "expend every effort and devote all necessary resources to bring the people responsible for these crimes to justice."

Last week we learned from press reports that you chose to deport rather than prosecute Terrorist No. 27 on the FBI's Most Wanted List. This is one of the most disturbing and frankly, stunning, revelations to emerge from the home front in the war on terrorism. According to the Associated Press, seasoned prosecutors like Chicago U.S. Attorney Patrick Fitzgerald believed that a prosecution was viable. Instead, the Justice Department declined this case on the ground that the United States could not effectively prosecute terrorists without giving away intelligence sources and methods. And instead, this suspected terrorist was deported and turned loose where he presumably could still wage jihad against us.

This was not the only instance since September 11 that the Government has chosen an easy option instead of effective criminal prosecution. I hope that you can explain how mere deportations, dragnets, detentions contrary to international law and definitional charges to inflate "terrorism" statistics serve to make American safer in the long run.

Mr. Attorney General, you have spent much of the past two years increasing secrecy, lessening accountability and touting the Government's intelligence-gathering powers under the PATRIOT Act. I and others here in Congress from both sides of the aisle worked together in unparalleled cooperation to pass the PATRIOT Act shortly after September 11.

But now I must ask, to what end? The threshold issue really is: What good is having intelligence if we cannot use it intelligently? Identifying suspected terrorists is only a first step. To be safer, we must follow through. Instead of declining tough prosecutions, we need to bring the people seeking to do us harm to justice. That is how our system works. Instead, your practices seem to be built on secret detentions and overblown press releases. Our country is made no safer through self-congratulatory press conferences when we face serious security threats.

A Responsibility To Deliver Justice

In December 2001, you announced the indictment of Zacarias Moussaoui and told the world that al Qaeda would now "meet the justice it abhors." At that moment, those who watched the Twin Towers fall in New York City, the destruction of the Pentagon and the carnage in a field in rural Pennsylvania, embraced your promise that "the awesome

weight of justice against the terrorists who blithely murdered innocent Americans" would now be brought to bear.

But in the 1000 days since the attacks, the public justice we yearn for has eluded the very criminal justice system we hold up as a successful symbol of democracy to the rest of the world. We need to know why our Government is unwilling or unable to investigate and prosecute the crimes of September 11. From the moment that maniacal scheme was hatched and through its implementation on that terrible day, those responsible in any way must be identified and held accountable.

The Government agency that bears the name of Justice has yet to deliver the justice for the victims of the worst mass murder in this nation's history. The 9/11 Commission is working hard to answer important questions about the attacks and how the vulnerabilities in our system that allowed them to occur, but it cannot mete out punishment for those involved. Neither the 9/11 Commission nor this Committee can do the job of the Justice Department.

You spoke recently about efforts that are under way in a number of nations to transform their criminal justice systems from an inquisitorial system to one modeled after our own -- a system that relies on evidence and adversarial proceedings. But you are not allowing our system to work.

The United States should not be afraid or reluctant to accord those charged with heinous crimes basic due process. Our prosecutors and criminal investigators are ready, willing and able to do their jobs. We have techniques to provide security for sensitive information through the Classified Information Procedures Act, the Foreign Intelligence Surveillance Act and other provisions. This Administration's expansion of all manner of government secrecy has, however, served to undercut the mission of the Justice Department.

There are times and occasions when the United States must act militarily. There are aspects of this effort that must be undertaken diplomatically in the international community and the President is belatedly discovering the benefits of diplomacy and alliances. But our criminal justice system is another dimension of our efforts against those who commit terrorist acts against the United States and our citizens. The skilled and hard-working men and women of the Justice Department and the FBI deserve so much credit for all they do, day and night, month after month, to protect the security of the American people. But under your leadership the Justice Department seems to have all but abandoned the field on so many of these cases. Instead, you deploy the Justice Department's resources to deny justice to the American victims of terrorism who have sought compensation in the courts, while failing to implement the victim compensation program that Congress called for nearly four years ago.

For 1000 days now, the families of the victims of September 11 have waited for the killers of their loved ones to pay the price for their crimes. As you yourself recognized, the indictment of Zaccarias Moussaoui was an important step in securing

justice for the victims of September 11. Unfortunately, it appears to have been the last step.

A Time for Accountability

Mr. Attorney General, since September 11 you have blamed former Administration officials for intelligence failures that happened on your watch; you have used a tar brush to attack the patriotism of Americans who dare to expressing legitimate concerns about constitutional freedoms and civil rights; and you have refused to acknowledge these problems, even when your own Inspector General exposed widespread violations of the civil liberties of immigrants caught up in your post-September 11 dragnets.

Secretary Rumsfeld recently went before the Armed Services Committee to say that he should be held responsible for the abuses of Iraqi prisoners on his watch. Director Tenet is resigning from the Central Intelligence Agency. Richard Clarke went before the 9/11 Commission and began with his admission of the failure that this Administration bears for the tragedy that consumed us on 9/11. I am reminded this week as we mourn the passing of President Reagan that one of the acts for which he will be remembered is his concession that while his heart told him that the weapons for hostages and unlawful funding of insurgent forces in Nicaragua should not have been acts of his Administration, his head convinced him that they were and that he took responsibility.

We need checks and balances. There is much that has gone wrong that your Administration stubbornly refuses to admit. For this democratic republic to work, we need openness and accountability.

Mr. Attorney General we all know that your style is to come to attack. You came before this Committee shortly after 9/11 to question our patriotism when we sought to conduct congressional oversight and ask questions. You went before the 9/11 Commission to attack a Commissioner by brandishing a conveniently declassified memo in so unfairly slanted a presentation that the President himself disavowed your action. I challenge you today, however, to abandon any such plans for this session and begin it, instead, by doing that which you have yet to do: Talk plainly with us and with the American people about not only what is going right in the war on terrorism, but also about the growing list of things that are going wrong, so that we can work together to fix them. Let us get about the business of working together to do a better job protecting the American people and ensuring that wrongdoers are effectively brought to justice.

# # # # #

The New York Times
nytimes.com

June 8, 2004

Lawyers Decided Bans on Torture Didn't Bind Bush

By NEIL A. LEWIS and ERIC SCHMITT

WASHINGTON, June 7 — A team of administration lawyers concluded in a March 2003 legal memorandum that President Bush was not bound by either an international treaty prohibiting torture or by a federal antitorture law because he had the authority as commander in chief to approve any technique needed to protect the nation's security.

The memo, prepared for Defense Secretary Donald H. Rumsfeld, also said that any executive branch officials, including those in the military, could be immune from domestic and international prohibitions against torture for a variety of reasons.

One reason, the lawyers said, would be if military personnel believed that they were acting on orders from superiors "except where the conduct goes so far as to be patently unlawful."

"In order to respect the president's inherent constitutional authority to manage a military campaign," the lawyers wrote in the 56-page confidential memorandum, the prohibition against torture "must be construed as inapplicable to interrogation undertaken pursuant to his commander-in-chief authority."

Senior Pentagon officials on Monday sought to minimize the significance of the March memo, one of several obtained by The New York Times, as an interim legal analysis that had no effect on revised interrogation procedures that Mr. Rumsfeld approved in April 2003 for the American military prison at Guantánamo Bay, Cuba.

"The April document was about interrogation techniques and procedures," said Lawrence Di Rita, the

Pentagon's chief spokesman. "It was not a legal analysis."

Mr. Di Rita said the 24 interrogation procedures permitted at Guantánamo, four of which required Mr. Rumsfeld's explicit approval, did not constitute torture and were consistent with international treaties.

The March memorandum, which was first reported by The Wall Street Journal on Monday, is the latest internal legal study to be disclosed that shows that after the Sept. 11 terrorist attacks the administration's lawyers were set to work to find legal arguments to avoid restrictions imposed by international and American law.

A Jan. 22, 2002, memorandum from the Justice Department that provided arguments to keep American officials from being charged with war crimes for the way prisoners were detained and interrogated was used extensively as a basis for the March memorandum on avoiding proscriptions against torture.

The previously disclosed Justice Department memorandum concluded that administration officials were justified in asserting that the Geneva Conventions did not apply to detainees from the Afghanistan war.

Another memorandum obtained by The Times indicates that most of the administration's top lawyers, with the exception of those at the State Department and the Joint Chiefs of Staff, approved of the Justice Department's position that the Geneva Conventions did not apply to the war in Afghanistan. In addition, that memorandum, dated Feb. 2, 2002, noted that lawyers for the Central Intelligence Agency had asked for an explicit understanding that the administration's public pledge to abide by the spirit of the conventions did not apply to its operatives.

The March memo, a copy of which was obtained by The Times, was prepared as part of a review of interrogation techniques by a working group appointed by the Defense Department's general counsel, William J. Haynes. The group itself was led by the Air Force general counsel, Mary Walker, and included military and civilian lawyers from all branches of the armed services.

The review stemmed from concerns raised by Pentagon lawyers and interrogators at Guantánamo after Mr. Rumsfeld approved a set of harsher interrogation techniques in December 2002 to use on a Saudi detainee, Mohamed al-Kahtani, who was believed to be the planned 20th hijacker in the Sept. 11 terror plot.

Mr. Rumsfeld suspended the harsher techniques, including serving the detainee cold, prepackaged food instead of hot rations and shaving off his facial hair, on Jan. 12, pending the outcome of the working group's review. Gen. James T. Hill, head of the military's Southern Command, which oversees Guantánamo, told reporters last Friday that the working group "wanted to do what is humane and what is legal and consistent not only with" the Geneva Conventions, but also "what is right for our soldiers."

Mr. Di Rita said that the Pentagon officials were focused primarily on the interrogation techniques, and that the legal rationale included in the March memo was mostly prepared by the Justice Department and White House counsel's office.

The memo showed that not only lawyers from the Defense and Justice departments and the White House approved of the policy but also that David S. Addington, the counsel to Vice President Dick Cheney, also was involved in the deliberations. The State Department lawyer, William H. Taft IV, dissented, warning that such a position would weaken the protections of the Geneva Conventions for American troops.

The March 6 document about torture provides tightly constructed definitions of torture. For example, if an interrogator "knows that severe pain will result from his actions, if causing such harm is not his objective, he lacks the requisite specific intent even though the defendant did not act in good faith," the report said. "Instead, a defendant is guilty of torture only if he acts with the express purpose of inflicting severe pain or suffering on a person within his control."

The adjective "severe," the report said, "makes plain that the infliction of pain or suffering per se, whether it is physical or mental, is insufficient to amount to torture. Instead, the text provides that pain or suffering must be `severe.' " The report also advised that if an interrogator "has a good faith belief his actions will not result in prolonged mental harm, he lacks the mental state necessary for his actions to constitute torture."

The report also said that interrogators could justify breaching laws or treaties by invoking the doctrine of necessity. An interrogator using techniques that cause harm might be immune from liability if he "believed at the moment that his act is necessary and designed to avoid greater harm."

Scott Horton, the former head of the human rights committee of the Association of the Bar of the City of New York, said Monday that he believed that the March memorandum on avoiding responsibility for torture was what caused a delegation of military lawyers to visit him and complain privately about the administration's confidential legal arguments. That visit, he said, resulted in the association undertaking a study and issuing of a report criticizing the administration. He added that the lawyers who drafted the torture memo in March could face professional sanctions.

Jamie Fellner, the director of United States programs for Human Rights Watch, said Monday, "We believe that this memo shows that at the highest levels of the Pentagon there was an interest in using torture as well as a desire to evade the criminal consequences of doing so."

The March memorandum also contains a curious section in which the lawyers argued that any torture committed at Guantánamo would not be a violation of the anti-torture statute because the base was under American legal jurisdiction and the statute concerns only torture committed overseas. That view is in direct conflict with the position the administration has taken in the Supreme Court, where it has argued that prisoners at Guantánamo Bay are not entitled to constitutional protections because the base is outside American jurisdiction.

Kate Zernike contributed reporting for this article.

New York's Senator

CHARLES E. SCHUMER

313 Hart Senate Office Building • Washington, DC 20510
Phone: (202)224-7433 • Fax: (202)228-1218

FOR IMMEDIATE RELEASE
June 8, 2004

CONTACT: Brent Colburn
(202) 224-7433

DOJ INSPECTOR GENERAL RESPONDS TO SCHUMER LETTER, OPENS INVESTIGATION INTO FORMER US PRISON OFFICIALS WITH CHECKERED RECORDS SERVING IN IRAQ

Investigation comes in response to numerous Schumer revelations involving past tolerance of prisoner abuse by officials chosen by DOJ to rebuild Iraqi prisons

DOJ Inspector General to Schumer--Inspector General's office to conduct investigation based on Schumer letter; letter asked series of pointed questions regarding recruitment, selection and vetting of US prison officials with questionable histories for sensitive duty in Iraq

US Senator Charles E. Schumer today announced that, in response to a letter he sent last week to the Department of Justice, Inspector General Glenn Fine is opening an investigation to examine how former US prison officials with troubling records concerning the abusive treatment of prisoners were named by the Department of Justice to positions of authority in the reconstitution and running of Iraq's prison system.

"It defies imagination that official after official who had checkered records concerning the mistreatment of prisoners in the United States were appointed to major positions in this most sensitive of prison situations," said Schumer. "Many questions remain unanswered, including how these officials were chosen, who recruited them and what kind of vetting system was in place, and I hope that Inspector General Fine will get to the bottom of all of them."

Over the past month Senator Schumer has revealed information concerning the checkered records of former corrections officials Lane McCotter and Gary Deland of Utah, John Armstrong of Connecticut and Terry Stewart of Arizona. Each of these individuals served as the head of the corrections department in their respective states and had tenures in that position that were marred with scandal, including incidents involving tolerating of prisoner abuse. Three of these questionable individuals, McCotter, Deland and Stewart, were named by the Department of Justice to serve in senior roles rebuilding the Iraqi prison system.

Based on these revelations Senator Schumer had repeatedly called on the Department of Justice to investigate how these individuals were chosen for duty and what type, if any, of vetting system they were required to go through. These calls culminated in a letter to the Department's Inspector General last week.

Schumer most recently revealed information concerning Terry Stewart, one of a handful of former prison officials recruited by the Department of Justice to help rebuild Iraq's prison system, had come under scrutiny for numerous incidents involving the mistreatment of inmates while serving as the head of the Arizona Department of Corrections from 1995-2002. In 1997, the Department of Justice Civil Rights Division named Stewart in a suit brought against the Arizona Department of Corrections concerning a pattern of sexual assault against female prisoners by male prison guards. Stewart was charged with knowingly turning a blind eye to repeated incidents of sexual abuse by guards against female prisoners ranging from sexual assault, rape and sodomy to watching female prisoners undress and use the restroom. The suit was eventually settled after the Arizona Department of Corrections agreed to make major changes in numerous prison policies.

Under Stewart's watch prisoners at Arizona facilities were also made to stand outside in the summer for up to four days in the summer and for up to 17 hours in the winter without sanitation, adequate drinking water, changes of clothing, proper food or protection from the elements. In a third questionable incident a class action suit was brought against the Arizona Department of Corrections during Stewart's tenure charging that the prison system had failed to properly use protective custody to shield certain at-risk inmates from harm.

Schumer's revelations concerning Stewart came on the heels of his discoveries concerning John Armstrong, who was forced from his post as the head of Connecticut's corrections department for defending abuses of prisoners before eventually serving in a high-ranking management position overseeing the Iraqi prison system. Armstrong was selected for service in Iraq under a Department of State program. While running Connecticut's prison system, Armstrong made a practice of shipping even low-level offenders to a supermax facility in Virginia which was notorious for its use of excessive force - ranging from unjustified use of stun guns shooting 50,000 volts through prisoners to locking inmates in five-point restraints for such lengthy periods that they were routinely forced to defecate on themselves.

Armstrong resigned under a cloud of credible allegations that he tolerated and personally engaged in the sexual harassment of female employees under his command.

Lane McCotter, who had a similarly disturbing history of defending inmate abuses, was also tapped to be one of four individuals sent by the Department of Justice to redevelop Iraq's prison system. McCotter was forced out of the top spot in Utah's Department of Corrections when a schizophrenic prisoner died after being strapped to a chair naked for sixteen hours. His record was further tainted when the DOJ investigated a New Mexico prison that was run by a private corrections firm that employed McCotter for failing to provide inmates with a safe environment and adequate medical facilities.

Gary DeLand served in the same position later held by McCotter, as head of Utah's Department of Corrections, in the late 1980's. According to Salt Lake City Mayor Rocky Anderson, Deland was well known for the "sadistic" manner in which he ran the state's penal institutions. DeLand was also recruited to help reconstitute Iraq's prison system, including Abu Ghraib.

"A pattern like this just doesn't happen spontaneously," said Schumer. "It is time for the Department of Justice to explain how lightening managed to strike four times in the same place. This why I am calling on the Inspector General to investigate how the United States government manage to send four individuals

with histories of involvement in prisoner abuse cases to oversee a prison system that is now notorious for prisoner abuse. Given the far reaching impact of the revelations of abuse at Abu Ghraib it is vital that we answer this fundamental question, and we must answer it soon."

Senator Schumer letter to Inspector General Fine attached.

###

CHARLES E. SCHUMER
NEW YORK

COMMITTEES:
BANKING
JUDICIARY
RULES

United States Senate
WASHINGTON, DC 20510

June 02, 2004

Honorable Glenn Fine
Inspector General
U.S. Department of Justice
950 Pennsylvania Avenue, NW, Room 1145
Washington, DC 20530

Dear Mr. Fine:

I write to respectfully request that you investigate and report on how at least three individuals selected by the Department of Justice to oversee the reconstitution of Iraq's prison system could have been chosen for such a sensitive and important role despite credible allegations of serious misconduct when they served as corrections officials in the United States.

Lane McCotter, who had a disturbing history of defending inmate abuses, was tapped to be one of four individuals sent by the Department of Justice to redevelop Iraq's prison system. McCotter was forced out of the top spot in Utah's Department of Corrections when a schizophrenic prisoner died after being strapped to a chair naked for sixteen hours. His record was further tainted when the DOJ investigated a New Mexico prison that was run by a private corrections firm that employed McCotter for failing to provide inmates with a safe environment and adequate medical facilities. Nonetheless, the Department of Justice selected him to help oversee the reconstitution of Iraq's prisons, including service training guards at the notorious Abu Ghraib facility.

Gary DeLand served in the same position later held by McCotter, as head of Utah's Department of Corrections, in the late 1980s. According to Salt Lake City Mayor Rocky Anderson, Deland was well known for the "sadistic" manner in which he ran the state's penal institutions. DeLand was also recruited to help reconstitute Iraq's prison system, including Abu Ghraib. DeLand was reportedly sent to Iraq by the Department of Justice as well.

A third civilian contractor, John Armstrong, was forced from his post as the head of Connecticut's corrections department for defending abuses of prisoners before eventually serving in a high-ranking management position overseeing the Iraqi prison system. Armstrong served in Iraqi pursuant to a State Department contract. While running Connecticut's prison system, Armstrong made a practice of shipping even low-level offenders to a supermax facility in Virginia which was notorious for its use of excessive force - ranging from unjustified use of stun guns shooting 50,000 volts through prisoners to locking inmates in five-point restraints for such lengthy periods that they were routinely forced to defecate on themselves.

Now, evidence has surfaced that a fourth civilian contractor with a troubling history in the United

States' corrections system, Terry Stewart, was one of a handful of former prison officials recruited by the Department of Justice to help rebuild Iraq's prison system. Stewart came under scrutiny for numerous incidents involving the mistreatment of inmates while serving as the head of the Arizona Department of Corrections from 1995-2002. In 1997, the Department of Justice Civil Rights Division named Stewart in a suit brought against the Arizona Department of Corrections concerning a pattern of sexual assault against female prisoners by male prison guards. Stewart was charged with knowingly turning a blind eye to repeated incidents of sexual abuse by guards against female prisoners ranging from sexual assault and rape to watching female prisoners undress and use the restroom. The suit was eventually settled after the Arizona Department of Corrections agreed to make major changes in numerous prison policies.

Under Stewart's watch prisoners at Arizona facilities were also made to stand outside in the summer for up to four days in the summer and for up to 17 hours in the winter without sanitation, adequate drinking water, changes of clothing, proper food or protection from the elements. In a third questionable incident a class action suit was brought against the Arizona Department of Corrections during Stewart's tenure charging that the prison system had failed to properly use protective custody to shield certain at-risk inmates from harm.

Given the backgrounds of the three individuals who were selected by DOJ to serve in Iraq, I am respectfully requesting that you investigate and report on: the criteria used to select them, the vetting process to which they were subjected, the identities of the officials who selected them, the extent to which concerns about their backgrounds were known by the officials who vetted and selected them, and the reasons such concerns were disregarded when these individuals were appointed.

Thank you for your attention to this matter and I look forward to hearing from you soon.

Sincerely,

Charles Schumer

Charles E. Schumer
United States Senator

ARLEN SPECTER
PENNSYLVANIA

COMMITTEES:
JUDICIARY
APPROPRIATIONS
VETERANS' AFFAIRS
GOVERNMENTAL AFFAIRS

United States Senate
WASHINGTON, DC 20510-3802
specter.senate.gov

November 12, 2003

The Honorable John Ashcroft
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

RE: *United States v. City of Glen Cove, et. al.*, Civil Action No. CV-03-4975, D.J. Ref. 90-11-3-06561/2

Dear Attorney General Ashcroft:

I am writing on behalf of Allegheny Technologies Incorporated (ATI) of Pittsburgh, Pennsylvania in connection with its strong concerns about the proposed Glen Cove Li Tungsten superfund settlement, which was announced in the October 17, 2003 *Federal Register*.

It is my understanding that the Li Tungsten superfund site has a history that stretches back to World War II. During World War II, the U.S. government had long and intensive involvement in the production of tungsten due to its qualities as one of the hardest, densest, and most heat resistant metals available. The Glen Cove production facility was built to chemically refine and concentrate tungsten ores for the federal government's stockpile programs.

Wah Chang Corporation is one of the companies that operated at the site in the post-war era. Wah Chang was purchased by Teledyne Inc. (now known as TDY Holdings, LLC), which was in turn purchased by Allegheny Technologies Incorporated. As a result, ATI finds itself in the position of being a Potential Responsible Party (PRP). ATI is particularly concerned that in the negotiation process under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the U.S. government entities have negotiated among themselves and specifically excluded ATI from participation, despite repeated requests to be involved.

The settlement announced in the *Federal Register* assigns the federal government 51% liability with 49% unallocated. ATI is concerned that it will be unfairly targeted as a "deep pocket" and assigned an inappropriately high share of responsibility due to the fact that many of the PRPs originally involved at the Glen Cove site either no longer exist or are without the financial means to make any significant contribution. Alternatively, ATI is concerned that an "orphan share" of unfunded liability would be created and could impede efforts to remediate the Glen Cove site in a timely manner.

PRINTED ON RECYCLED PAPER

When I met with officials from ATI, they informed me that they were not consulted about the settlement allocation even though they had made numerous efforts to be involved in the proposed settlement. As a matter of basic fairness, it seems to me that a party with ATI's standing should, at the very least, have its views taken into consideration.

It is my understanding that the Court has the ultimate authority to approve, modify or reject the proposed settlement. As a matter of efficiency for the Court's time, ATI's position ought to be considered by the Department of Justice and EPA before the matter comes before the Court.

CERCLA law provides that the Department of Justice and the U.S. Environmental Protection Agency have the discretion to withdraw or amend a proposed settlement agreement.

I urge you to consider ATI's position and consider modifying the proposed settlement agreement in a way which would address the need for continuing remediation at the Glen Cove site and address ATI's fairness concerns including allowing them to participate in further discussions on these issues.

Sincerely,

Arlen Specter

AS/trd

Jolter —
As a matter of basic fairness, ATI's views ought to be considered before this matter goes forward.

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

January 9, 2004

The Honorable Arlen Specter
United States Senate
Washington, DC 20510

Dear Senator Specter:

Thank you for your November 12, 2003, letter to Attorney General Ashcroft regarding the proposed consent judgment in the case United States v. City of Glen Cove, et al.

As you may know, the consent judgment was lodged with the court in accordance with the provisions of Section 122 of the Comprehensive Environmental Response, Compensation, and Liability Act and 28 C.F.R. § 50.7 to provide an opportunity for public comment. The comment period closed on December 2, 2003. The Department of Justice will now evaluate all comments received, determine whether any of them disclose facts or considerations which indicate that the proposed settlement is inappropriate, inadequate or improper, and advise the court whether the United States requests that the consent judgment be entered. A copy of the documents submitted to the court by the United States regarding its determination will be forwarded to you at the time they are filed with the court.

Please be assured that all submitted comments will receive full and fair consideration by the Department of Justice. If we can be of further assistance on this or any other matter, please do not hesitate to contact this office.

Sincerely,

William E. Moschella

William E. Moschella
Assistant Attorney General

Pentagon Report Set Framework For Use of Torture --- Security or Legal Factors

Could Trump Restrictions, Memo to Rumsfeld Argued

By Jess Bravin

Source: The Wall Street Journal Date: June 07, 2004 Page: A1

Bush administration lawyers contended last year that the president wasn't bound by laws prohibiting torture and that government agents who might torture prisoners at his direction couldn't be prosecuted by the Justice Department.

The advice was part of a classified report on interrogation methods prepared for Defense Secretary Donald Rumsfeld after commanders at Guantanamo Bay, Cuba, complained in late 2002 that with conventional methods they weren't getting enough information from prisoners.

The report outlined U.S. laws and international treaties forbidding torture, and why those restrictions might be overcome by national-security considerations or legal technicalities. In a March 6, 2003, draft of the report reviewed by The Wall Street Journal, passages were deleted as was an attachment listing specific interrogation techniques and whether Mr. Rumsfeld himself or other officials must grant permission before they could be used. The complete draft document was classified "secret" by Mr. Rumsfeld and scheduled for declassification in 2013.

The draft report, which exceeds 100 pages, deals with a range of legal issues related to interrogations, offering definitions of the degree of pain or psychological manipulation that could be considered lawful. But at its core is an exceptional argument that because nothing is more important than "obtaining intelligence vital to the protection of untold thousands of American citizens," normal strictures on torture might not apply.

The president, despite domestic and international laws constraining the use of torture, has the authority as commander in chief to approve almost any physical or psychological actions during interrogation, up to and including torture, the report argued. Civilian or military personnel accused of torture or other war crimes have several potential defenses, including the "necessity" of using such methods to extract information to head off an attack, or "superior orders," sometimes known as the Nuremberg defense: namely that the accused was acting pursuant to an order and, as the Nuremberg tribunal put it, no "moral choice was in fact possible."

According to Bush administration officials, the report was compiled by a working group appointed by the Defense Department's general counsel, William J. Haynes II. Air Force General Counsel Mary Walker headed the group, which comprised top civilian and uniformed lawyers from each military branch and consulted with the Justice Department, the Joint Chiefs of Staff, the Defense Intelligence Agency and other intelligence agencies. It isn't known if President Bush has ever seen the report.

A Pentagon official said some military lawyers involved objected to some of the proposed interrogation methods as "different than what our people had been trained to do under the Geneva Conventions," but those lawyers ultimately signed on to the final report in April 2003, shortly after the war in Iraq began. The Journal hasn't seen the full final report, but people familiar with it say there were few substantial changes in legal analysis between the draft and final versions.

A military lawyer who helped prepare the report said that political appointees heading the working group sought to assign to the president virtually unlimited authority on matters of torture -- to assert "presidential power at its absolute apex," the lawyer said. Although career military lawyers were uncomfortable with that conclusion, the military lawyer said they focused their efforts on reining in the more extreme interrogation methods, rather than challenging the constitutional powers that administration lawyers were saying President Bush could claim.

The Pentagon disclosed last month that the working group had been assembled to review interrogation policies after intelligence officials in Guantanamo reported frustration in extracting information from prisoners. At a news conference last week, Gen. James T. Hill, who oversees the offshore prison at Guantanamo as head of the U.S. Southern Command, said the working group sought to identify "what is legal and consistent with not only Geneva [but] . . . what is right for our soldiers." He said Guantanamo is "a professional, humane detention and interrogation operation . . . bounded by law and guided by the American spirit."

Gen. Hill said Mr. Rumsfeld gave him the final set of approved interrogation techniques on April 16, 2003. Four of the methods require the defense secretary's approval, he said, and those methods had been used on two prisoners. He said interrogators had stopped short of using all the methods lawyers had approved. It remains unclear what actions U.S. officials took as a result of the legal advice.

Critics who have seen the draft report said it undercuts the administration's claims that it recognized a duty to treat prisoners humanely. The "claim that the president's commander-in-chief power includes the authority to use torture should be unheard of in this day and age," said Michael Ratner, president of the Center for Constitutional Rights, a New York advocacy group that has filed lawsuits against U.S. detention policies. "Can one imagine the reaction if those on trial for atrocities in the former Yugoslavia had tried this defense?"

Following scattered reports last year of harsh interrogation techniques used by the U.S. overseas, Sen. Patrick Leahy, a Vermont Democrat, wrote to National Security Adviser Condoleezza Rice asking for clarification. The response came in June 2003 from Mr. Haynes, who wrote that the U.S. was obliged to conduct interrogations "consistent with" the 1994 international Convention Against Torture and the federal Torture Statute enacted to implement the convention outside the U.S.

The U.S. "does not permit, tolerate or condone any such torture by its employees under any circumstances," Mr. Haynes wrote. The U.S. also followed its legal duty, required by the torture convention, "to prevent other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture," he wrote.

The U.S. position is that domestic criminal laws and the Constitution's prohibition of cruel and unusual punishments already met the Convention Against Torture's requirements within U.S. territory.

The Convention Against Torture was proposed in 1984 by the United Nations General Assembly and was ratified by the U.S. in 1994. It states that "no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture," and that orders from superiors "may not be invoked as a justification of torture."

That prohibition was reaffirmed after the Sept. 11 attacks by the U.N. panel that oversees the treaty, the Committee Against Torture, and the March 2003 report acknowledged that "other nations and international bodies may take a more restrictive view" of permissible interrogation methods than did the Bush administration.

The report then offers a series of legal justifications for limiting or disregarding antitorture laws and proposed legal defenses that government officials could use if they were accused of torture.

A military official who helped prepare the report said it came after frustrated Guantanamo interrogators had begun trying unorthodox methods on recalcitrant prisoners. "We'd been at this for a year-plus and got nothing out of them" so officials concluded "we need to have a less-cramped view of what torture is and is not."

The official said, "People were trying like hell how to ratchet up the pressure," and used techniques that ranged from drawing on prisoners' bodies and placing women's underwear on prisoners heads -- a practice that later reappeared in the Abu Ghraib prison -- to telling subjects, "I'm on the line with somebody in Yemen and he's in a room with your family and a grenade that's going to pop unless you talk."

Senior officers at Guantanamo requested a "rethinking of the whole approach to defending your country when you have an enemy that does not follow the rules," the official said. Rather than license torture, this official said that the report helped rein in more "assertive" approaches.

Methods now used at Guantanamo include limiting prisoners' food, denying them clothing, subjecting them to body-cavity searches, depriving them of sleep for as much as 96 hours and shackling them in so-called stress positions, a military-intelligence official said. Although the interrogators consider the methods to be humiliating and unpleasant, they don't view them as torture, the official said.

The working-group report elaborated the Bush administration's view that the president has virtually unlimited power to wage war as he sees fit, and neither Congress, the courts nor international law can interfere. It concluded that neither the president nor anyone following his instructions was bound by the federal Torture Statute, which makes it a crime for Americans working for the government overseas to commit or attempt torture, defined as any act intended to "inflict severe physical or mental pain or suffering." Punishment is up to 20 years imprisonment, or a death sentence or life imprisonment if the victim dies.

"In order to respect the president's inherent constitutional authority to manage a military campaign . . . (the prohibition against torture) must be construed as inapplicable to interrogations undertaken pursuant to his commander-in chief authority," the report asserted. (The parenthetical comment is in the original document.) The Justice Department "concluded that it could not bring a criminal prosecution against a defendant who had acted pursuant to an exercise of the president's constitutional power," the report said. Citing confidential Justice Department opinions drafted after Sept. 11, 2001, the report advised that the executive branch of the government had "sweeping" powers to act as it sees fit because "national security decisions require the unity in purpose and energy in action that characterize the presidency rather than Congress."

(MORE)

The lawyers concluded that the Torture Statute applied to Afghanistan but not Guantanamo, because the latter lies within the "special maritime and territorial jurisdiction of the United States, and accordingly is within the United States" when applying a law that regulates only government conduct abroad.

Administration lawyers also concluded that the Alien Tort Claims Act, a 1789 statute that allows noncitizens to sue in U.S. courts for violations of international law, couldn't be invoked against the U.S. government unless it consents, and that the 1992 Torture Victims Protection Act allowed suits only against foreign officials for torture or "extrajudicial killing" and "does not apply to the conduct of U.S. agents acting under the color of law."

The Bush administration has argued before the Supreme Court that foreigners held at Guantanamo have no constitutional rights and can't challenge their detention in court. The Supreme Court is expected to rule on that question by month's end.

For Afghanistan and other foreign locations where the Torture Statute applies, the March 2003 report offers a narrow definition of torture and then lays out defenses that government officials could use should they be charged with committing torture, such as mistakenly relying in good faith on the advice of lawyers or experts that their actions were permissible. "Good faith may be a complete defense" to a torture charge, the report advised.

"The infliction of pain or suffering per se, whether it is physical or mental, is insufficient to amount to torture," the report advises. Such suffering must be "severe," the lawyers advise, and they rely on a dictionary definition to suggest it "must be of such a high level of intensity that the pain is difficult for the subject to endure."

The law says torture can be caused by administering or threatening to administer "mind-altering substances or other procedures calculated to disrupt profoundly the sense of personality." The Bush lawyers advised, though, that it "does not preclude any and all use of drugs" and "disruption of the senses or personality alone is insufficient" to be illegal. For involuntarily administered drugs or other psychological methods, the "acts must penetrate to the core of an individual's ability to perceive the world around him," the lawyers found.

Gen. Hill said last week that the military didn't use injections or chemicals on prisoners.

After defining torture and other prohibited acts, the memo presents "legal doctrines . . . that could render specific conduct, otherwise criminal, not unlawful." Foremost, the lawyers rely on the "commander-in-chief authority," concluding that "without a clear statement otherwise, criminal statutes are not read as infringing on the president's ultimate authority" to wage war. Moreover, "any effort by Congress to regulate the interrogation of unlawful combatants would violate the Constitution's sole vesting of the commander-in-chief authority in the president," the lawyers advised.

Likewise, the lawyers found that "constitutional principles" make it impossible to "punish officials for aiding the president in exercising his exclusive constitutional authorities" and neither Congress nor the courts could "require or implement the prosecution of such an individual."

To protect subordinates should they be charged with torture, the memo advised that Mr. Bush issue a "presidential directive or other writing" that could serve as evidence, since authority to set aside the laws is "inherent in the president."

The report advised that government officials could argue that "necessity" justified the use of torture. "Sometimes the greater good for society will be accomplished by violating the literal language of the criminal law," the lawyers wrote, citing a standard legal text, "Substantive Criminal Law" by Wayne LaFave and Austin W. Scott. "In particular, the necessity defense can justify the intentional killing of one person . . . so long as the harm avoided is greater."

In addition, the report advised that torture or homicide could be justified as "self-defense," should an official "honestly believe" it was necessary to head off an imminent attack on the U.S. The self-defense doctrine generally has been asserted by individuals fending off assaults, and in 1890, the Supreme Court upheld a U.S. deputy marshal's right to shoot an assailant of Supreme Court Justice Stephen Field as involving both self-defense and defense of the nation. Citing Justice Department opinions, the report concluded that "if a government defendant were to harm an enemy combatant during an

interrogation in a manner that might arguably violate criminal prohibition," he could be justified "in doing so in order to prevent further attacks on the United States by the al Qaeda terrorist network."

Mr. LaFave, a law professor at the University of Illinois, said he was unaware that the Pentagon used his textbook in preparing its legal analysis. He agreed, however, that in some cases necessity could be a defense to torture charges. "Here's a guy who knows with certainty where there's a bomb that will blow New York City to smithereens. Should we torture him? Seems to me that's an easy one," Mr. LaFave said. But he said necessity couldn't be a blanket justification for torturing prisoners because of a general fear that "the nation is in danger."

For members of the military, the report suggested that officials could escape torture convictions by arguing that they were following superior orders, since such orders "may be inferred to be lawful" and are "disobeyed at the peril of the subordinate." Examining the "superior orders" defense at the Nuremberg trials of Nazi war criminals, the Vietnam War prosecution of U.S. Army Lt. William Calley for the My Lai massacre and the current U.N. war-crimes tribunals for Rwanda and the former Yugoslavia, the report concluded it could be asserted by "U.S. armed forces personnel engaged in exceptional interrogations except where the conduct goes so far as to be patently unlawful."

The report seemed "designed to find the legal loopholes that will permit the use of torture against detainees," said Mary Ellen O'Connell, an international-law professor at the Ohio State University who has seen the report. "CIA operatives will think they are covered because they are not going to face liability."

FSELCTviaNewsEdge

:PAGE: A1

washingtonpost.com

Memo Offered Justification for Use of Torture

Justice Dept. Gave Advice in 2002

By Dana Priest and R. Jeffrey Smith
Washington Post Staff Writers
Tuesday, June 8, 2004; Page A01

In August 2002, the Justice Department advised the White House that torturing al Qaeda terrorists in captivity abroad "may be justified," and that international laws against torture "may be unconstitutional if applied to interrogations" conducted in President Bush's war on terrorism, according to a newly obtained memo.

If a government employee were to torture a suspect in captivity, "he would be doing so in order to prevent further attacks on the United States by the Al Qaeda terrorist network," said the memo, from the Justice Department's office of legal counsel, written in response to a CIA request for legal guidance. It added that arguments centering on "necessity and self-defense could provide justifications that would eliminate any criminal liability" later.

The memo seems to counter the pre-Sept. 11, 2001, assumption that U.S. government personnel would never be permitted to torture captives. It was offered after the CIA began detaining and interrogating suspected al Qaeda leaders in Afghanistan and elsewhere in the wake of the attacks, according to government officials familiar with the document.

The legal reasoning in the 2002 memo, which covered treatment of al Qaeda detainees in CIA custody, was later used in a March 2003 report by Pentagon lawyers assessing interrogation rules governing the Defense Department's detention center at Guantanamo Bay, Cuba. At that time, Defense Secretary Donald H. Rumsfeld had asked the lawyers to examine the logistical, policy and legal issues associated with interrogation techniques.

Bush administration officials say flatly that, despite the discussion of legal issues in the two memos, it has abided by international conventions barring torture, and that detainees at Guantanamo and elsewhere have been treated humanely, except in the cases of abuse at Abu Ghraib prison in Iraq for which seven military police soldiers have been charged.

Still, the 2002 and 2003 memos reflect the Bush administration's desire to explore the limits on how far it could legally go in aggressively interrogating foreigners suspected of terrorism or of having information that could thwart future attacks.

In the 2002 memo, written for the CIA and addressed to White House Counsel Alberto R. Gonzales, the Justice Department defined torture in a much narrower way, for example, than does the U.S. Army, which has historically carried out most wartime interrogations.

In the Justice Department's view -- contained in a 50-page document signed by Assistant Attorney General Jay S. Bybee and obtained by The Washington Post -- inflicting moderate or fleeting pain does not necessarily constitute torture. Torture, the memo says, "must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death."

By contrast, the Army's Field Manual 34-52, titled "Intelligence Interrogations," sets more restrictive rules. For example, the Army prohibits pain induced by chemicals or bondage; forcing an individual to stand, sit or kneel in abnormal positions for prolonged periods of time; and food deprivation. Under mental torture, the Army prohibits mock executions, sleep deprivation and chemically induced psychosis.

Human rights groups expressed dismay at the Justice Department's legal reasoning yesterday.

"It is by leaps and bounds the worst thing I've seen since this whole Abu Ghraib scandal broke," said Tom Malinowski of Human Rights Watch. "It appears that what they were contemplating was the commission of war crimes and looking for ways to avoid legal accountability. The effect is to throw out years of military doctrine and standards on interrogations."

But a spokesman for the White House counsel's office said, "The president directed the military to treat al Qaeda and Taliban humanely and consistent with the Geneva Conventions."

Mark Corallo, the Justice Department's chief spokesman, said "the department does not comment on specific legal advice it has provided confidentially within the executive branch." But he added: "It is the policy of the United States to comply with all U.S. laws in the treatment of detainees -- including the Constitution, federal statutes and treaties." The CIA declined to comment.

The Justice Department's interpretation for the CIA sought to provide guidance on what sorts of aggressive treatments might not fall within the legal definition of torture.

The 2002 memo, for example, included the interpretation that "it is difficult to take a specific act out of context and conclude that the act in isolation would constitute torture." The memo named seven techniques that courts have considered torture, including severe beatings with truncheons and clubs, threats of imminent death, burning with cigarettes, electric shocks to genitalia, rape or sexual assault, and forcing a prisoner to watch the torture of another person.

"While we cannot say with certainty that acts falling short of these seven would not constitute torture," the memo advised, ". . . we believe that interrogation techniques would have to be similar to these in their extreme nature and in the type of harm caused to violate law."

"For purely mental pain or suffering to amount to torture," the memo said, "it must result in significant psychological harm of significant duration, e.g., lasting for months or even years." Examples include the development of mental disorders, drug-induced dementia, "post traumatic stress disorder which can last months or even years, or even chronic depression."

Of mental torture, however, an interrogator could show he acted in good faith by "taking such steps as

surveying professional literature, consulting with experts or reviewing evidence gained in past experience" to show he or she did not intend to cause severe mental pain and that the conduct, therefore, "would not amount to the acts prohibited by the statute."

In 2003, the Defense Department conducted its own review of the limits that govern torture, in consultation with experts at the Justice Department and other agencies. The aim of the March 6, 2003, review, conducted by a working group that included representatives of the military services, the Joint Chiefs of Staff and the intelligence community, was to provide a legal basis for what the group's report called "exceptional interrogations."

Much of the reasoning in the group's report and in the Justice Department's 2002 memo overlap. The documents, which address treatment of al Qaeda and Taliban detainees, were not written to apply to detainees held in Iraq.

In a draft of the working group's report, for example, Pentagon lawyers approvingly cited the Justice Department's 2002 position that domestic and international laws prohibiting torture could be trumped by the president's wartime authority and any directives he issued.

At the time, the Justice Department's legal analysis, however, shocked some of the military lawyers who were involved in crafting the new guidelines, said senior defense officials and military lawyers.

"Every flag JAG lodged complaints," said one senior Pentagon official involved in the process, referring to the judge advocate generals who are military lawyers of each service.

"It's really unprecedented. For almost 30 years we've taught the Geneva Convention one way," said a senior military attorney. "Once you start telling people it's okay to break the law, there's no telling where they might stop."

A U.S. law enacted in 1994 bars torture by U.S. military personnel anywhere in the world. But the Pentagon group's report, prepared under the supervision of General Counsel William J. Haynes II, said that "in order to respect the President's inherent constitutional authority to manage a military campaign . . . [the prohibition against torture] must be construed as inapplicable to interrogations undertaken pursuant to his Commander-in-Chief authority."

The Pentagon group's report, divulged yesterday by the Wall Street Journal and obtained by The Post, said further that the 1994 law barring torture "does not apply to the conduct of U.S. personnel" at Guantanamo Bay.

It also said the anti-torture law did apply to U.S. military interrogations that occurred outside U.S. "maritime and territorial jurisdiction," such as in Iraq or Afghanistan. But it said both Congress and the Justice Department would have difficulty enforcing the law if U.S. military personnel could be shown to be acting as a result of presidential orders.

The report then parsed at length the definition of torture under domestic and international law, with an eye toward guiding military personnel about legal defenses.

The Pentagon report uses language very similar to that in the 2002 Justice Department memo written in response to the CIA's request: "If a government defendant were to harm an enemy combatant during an interrogation in a manner that might arguably violate criminal prohibition, he would be doing so in order to prevent further attacks on the United States by the al Qaeda terrorist network," the draft states. "In

that case, DOJ [Department of Justice] believes that he could argue that the executive branch's constitutional authority to protect the nation from attack justified his actions."

The draft goes on to assert that a soldier's claim that he was following "superior orders" would be available for those engaged in "exceptional interrogations except where the conduct goes so far as to be patently unlawful." It asserts, as does the Justice view expressed for the CIA, that the mere infliction of pain and suffering is not unlawful; the pain or suffering must be severe.

A Defense Department spokesman said last night that the March 2003 memo represented "a scholarly effort to define the perimeters of the law" but added: "What is legal and what is put into practice is a different story." Pentagon officials said the group examined at least 35 interrogation techniques, and Rumsfeld later approved using 24 of them in a classified directive on April 16, 2003, that governed all activities at Guantanamo Bay. The Pentagon has refused to make public the 24 interrogation procedures.

Staff writer Josh White contributed to this report.

© 2004 The Washington Post Company