U.S. Department of Justice

Office of Legislative Affairs

Washington, D.C. 20530

April 12, 2007

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Please find enclosed additional responses to questions for the record, which were posed to Attorney General Alberto Gonzales following his appearance before the Committee on January 18, 2007. The hearing concerned Department of Justice Oversight. This letter supplements our submission to the Committee on April 5, 2007. The Department is working expeditiously to provide the remaining responses, and we will forward them to the Committee as soon as possible.

The Office of Management and Budget has advised us that from the perspective of the Administration's program, they have no objection to submission of this letter.

We hope this information is helpful. Please do not hesitate to contact this office if we may be of further assistance on other matters.

Sincerely,

Richard A. Hertling

Richard A. Hertling
Acting Assistant Attorney General

Enclosures

cc: The Honorable Arlen Specter
Ranking Minority Member

Department of Justice Responses to
Questions for the Record posed to
Attorney General Alberto Gonzales
Senate Judiciary Committee
Oversight Hearing January 18, 2007
(Part 2)

QUESTIONS FROM CHAIRMAN LEAHY

Leahy 5 **More than three years after Congress unanimously approved the Hometown Heroes Survivors Benefit Act of 2003, it is my understanding that nearly 150 survivors have applied for consideration under the law, yet no determinations have been made -- positively or negatively. The families of our fallen first responders deserve closure, and unacceptable delays by the Department of Justice are only exacerbating an already difficult situation. Please explain the reasons for these continued delays in implementing the law, and provide a timetable as to when you expect to begin making determinations on these cases.**

ANSWER: The Department values the contributions of those who serve their communities in potentially dangerous circumstances. For this reason we are committed to ensuring the success of the Hometown Heroes Survivors Benefit. The delay in implementing this important law is due to the amount of time it took to develop the final regulations.

As you know, the Hometown Heroes Act expanded the Public Safety Officers Benefit by establishing a statutory presumption that public safety officers who die from a heart attack or stroke following a non-routine stressful or strenuous physical public safety activity or training, died in the line of duty for benefit purposes. The Hometown Heroes presumption may be overcome by "competent medical evidence to the contrary."

In developing the regulations, the Office of Justice Programs (OJP), Bureau of Justice Assistance (BJA) consulted extensively with the Armed Forces Institute of Pathology and other medical and other experts knowledgeable in the field of cardiovascular disease and work-life-related diseases and afflictions. BJA also considered comments from national organizations representing law enforcement and firefighters.

OJP published the proposed Hometown Heroes regulations in the July 26, 2005 Federal Register, with a 60-day comment period. During the comment period, OJP received comments from a number of interested parties, including national police and fire associations; municipal police, fire, and rescue departments; PSOB hearing officers; survivors of fallen public safety officers; and individual concerned citizens. OJP carefully reviewed and analyzed these comments, using them to make changes in the regulations.

The new PSOB regulations, including the provisions which implement the Hometown Heroes Act, were published in the Federal Register on August 10, 2006 (on page 46028). The final regulations went into effect on September 11, 2006. Since then, all claims submitted under the Hometown Heroes law have been reviewed and BJA is in the process of making contact with agencies and survivors for claims that require additional information based on the stage of review and information submitted with the original claim. In January 2007, nine determinations were made on pending claims. To date, there are approximately 20 more claims that have been submitted to the Armed Forces Institute of Pathology for medical review.

Leahy 6 **In addition, it has come to my attention that the Department of Justice is asking applicants under the Hometown Heroes provisions of the Public Safety Officers Benefit ("PSOB") to provide ten years of medical records before a determination can be made, even though the PSOB web site is very specific in asking them to only provide three years of records. This requirement runs counter to the intent of Congress, which crafted the Hometown Heroes Survivors Benefit Act to create a presumption for line-of-duty fatalities due to heart attacks and strokes. Please explain the rationale behind requesting this additional information specifically for cases involving heart attacks and strokes, and outline your process for making determinations on these cases**

ANSWER: During the PSOB public comment period, it was determined that 10 years of medical records would provide physicians with the information required to competently review claims according to the Hometown Heroes law and regulations.

Agencies and survivors are requested by the PSOB Office to submit the past 10 years of medical records for the fallen officer, or however many years of medical records (up to 10) that may be available. It is important to note that no claim submitted for Hometown Heroes purposes is denied consideration based on the availability of these 10 years of medical records.

Leahy 7 **The USA PATRIOT Act and its reauthorization legislation mandate that the Department of Justice submit various reports regarding how it is using the new legal authorities to investigate terrorism under this legislation. When he appeared before the Committee in December 2006, Director Mueller testified that the FBI has satisfied all of its reporting requirements under the PATRIOT Act. But, he could not address whether the entire Department of Justice has done so. (a) Has the Department of Justice met all of its reporting requirements under the PATRIOT Act, as reauthorized by Congress, to date?**

ANSWER: As you are aware, the PATRIOT Act, as reauthorized by Congress, imposed numerous reporting requirements on the Department. We are making every effort to ensure that we are providing information to the Congress consistent with these requirements.

Leahy 13 **I was heartened when, after initially refusing to provide any new information in response to my inquiries, you wrote to me in January to say that you would work to develop "an accommodation that provides the Judiciary Committee with a sufficient understanding of the Department's position on legal questions related to the CIA program." This is a step in the right direction. Ultimately, in order for Congress to carry out its constitutional oversight functions, it will be important for the members of the Senate Judiciary Committee to learn the content of those documents setting out important United States policy. Will you continue in the spirit of compromise and accommodation that your recent letter suggested and work with us to come up with ways for the Senate Judiciary Committee to learn the content of these and other key documents without compromising security?**

ANSWER: We will work with Committee staff to explore options for accommodating the Committee's information needs regarding the Department's legal position on this matter.

Leahy 14 **American citizen Jose Padilla was held in military custody for more than three years before being charged with any crime. According to his lawyers and medical doctors, Mr. Padilla was subject to intense interrogation – including sleep deprivation, prolonged isolation, hooding, being placed in stress positions, and subject to assaults and threats of imminent execution. There are press reports indicating that the Government's terrorism case against Mr. Padilla has been imperiled, because of the abuse he suffered during his military detention. And just recently, the federal judge in his criminal case ordered that Mr. Padilla undergo a mental evaluation assessing the impact of this interrogation before proceeding with his trial. Has the Government's interrogation policy jeopardized the terrorism case against Mr. Padilla?**

ANSWER: As you are aware, this case is currently pending in the Southern District of Florida and pursuant to Department policy we do not comment on pending matters beyond what is in the public record. What is in the public record is that the District Court recently found Mr. Padilla competent to stand trial.

Leahy 17 **Can you assure this Committee that no similar interrogation techniques will be used on American citizens awaiting trial?**

ANSWER: This question calls for comment upon pending matters. Pursuant to Department policy we do not comment on pending matters beyond what is in the public record.

Leahy 27 **I am concerned about widespread accounts of voter intimidation and suppression in recent elections. For example, I understand that the FBI investigated allegations in Virginia that, in the days leading up to last November's election, many voters in heavily Democratic precincts received calls directing them to the wrong polling sites,**

giving incorrect information about their eligibility to vote or encouraging them not to vote on Election Day. In the 9th precinct in Tucson, Arizona, an area with a heavy percentage of Latino voters, it has been reported that three vigilantes armed with a clipboard, a video camera and a visible firearm stopped only Latino voters as they entered and exited the polls on Election Day, issuing implied and overt threats. What role does the Justice Department have in investigating and preventing this type of voter intimidation? How does the Justice Department intend to better prevent these types of voter intimidation from occurring in future elections?

ANSWER: The Department has successfully devoted, and continues to devote, considerable resources to enforce protections against voter intimidation and suppression. Indeed, during the period between the 2004 and 2006 general elections, the Department filed far more actions to protect voters against discrimination at the polls than in any time in its history. Since 2002, successful lawsuits to enforce protections against voter intimidation and suppression have included key cases to (1) protect the rights of minority voters against race-based challenges to the eligibility of minority voters; (2) ensure appropriate treatment of minority voters; (3) prevent improperly influencing, coercing or ignoring the ballot choices of minority voters; (4) ensure that voters, including minority voters, are provided with provisional ballots; (5) ensure that voters, including minority voters, are provided the assistance in voting that they are legally entitled to receive; (6) ensure that minority language voters are provided the bilingual assistance in voting that they need and are legally entitled to receive; and (7) ensure that localities provide voters, including minority voters, with the information Congress determined necessary in all polling places, including the posting of information on voters' rights. *See, e.g., United States v. Cochise County, Arizona; United States v. City of Azusa, California; United States v. City of Paramount, California; United States v. City of Rosemead, California; United States v. San Benito County, California; United States v. San Diego County, California; United States v. Ventura County, California; United States v. Miami-Dade County, Florida; United States v. Orange County, Florida; United States v. Osceola County, Florida (2002)*; *United States v. Osceola County, Florida (2005)*; *United States v. Long County, Georgia*; *United States v. City of Boston, Massachusetts*; *United States v. City of Springfield, Massachusetts*; *United States v. Suffolk County, New York; United States v. Westchester County, New York; United States v. Brentwood Union Free School District, New York; United States v. Berks County, Pennsylvania*; *United States v. Brazos County, Texas; United States v. Ector County, Texas; United States v. Hale County, Texas; United States v. N. Harris Montgomery Community College District, Texas; United States v. Yakima County, Washington*. These cases include approximately 60 percent of all cases the Department has filed in its entire history under the language minority provisions of the Voting Rights Act and approximately 75 percent of all cases the Department has filed under the voter assistance provisions of the Act.

In addition, since 2002, the Department has taken an increasingly proactive approach to potential Election Day problems and issues. Rather than wait for complaints, the Voting Section of the Civil Rights Division has attempted to identify locations where problems were likely to occur, to pre-position personnel both to document and address such issues as arise on Election Day, and to deter some potential problems. As a result of this extensive pre-election investigation and outreach, on Election Day 2006, the Department assigned more than 800 federal observers and Department monitors – a record number for a mid-term election – to selected polling places in 69 jurisdictions in 22 states across the country. Records were also set for Election Day federal observers and Department monitors in 2002 and 2004.

The Department will continue its vigorous enforcement of federal civil rights laws. This enforcement, particularly under Sections 2, 4(f)(4), 203, and 208 of the Voting Rights Act, protects Latino Americans and others subject to discrimination on the basis of race or membership in a language minority group. The Department also will continue its unprecedented and vigorous outreach to Latino community and advocacy organizations, as well as other groups representing language and other minority citizens. In addition, the Department will continue its vigorous outreach to state and local election officials to advise them of the requirements of federal law and urge their voluntary compliance. Finally, the Department will continue its robust program of monitoring elections to protect the rights of all citizens.

The Constitution vests in states the primary responsibility for the method and manner of elections, except where Congress has expressly legislated otherwise. Federal laws provide limited jurisdiction over incidents such as the ones described in your question. Where federal jurisdiction exists, the Department has historically concluded that the responsibility to ensure voter access, on the one hand, should be distinct from the responsibility to police voter fraud, on the other. For example, the Criminal Division has a great deal of institutional expertise in prosecuting all types of fraud, including voter fraud, while the Civil Rights Division is best situated to deal with issues of discrimination at the polls.

The vast majority of election fraud matters are investigated and prosecuted by the United States Attorneys' Offices under the general supervision of the Criminal Division. USAOs may commence preliminary investigations of election fraud allegations without consulting Headquarters. However, if a USAO wishes to open a grand jury investigation of the matter, Department procedures require that the Office first consult with the Public Integrity Section of the Criminal Division; such consultation is also required before a USAO seeks criminal charges in an election fraud matter. 9 USAM 85-210. At this time, the Department is investigating the Arizona allegations, and it would be inappropriate to comment further.

Leahy 28 **In a November 16, 2006 letter to Senator Schumer about the events in Virginia, the Justice Department told him that the Criminal Division was reviewing the matter. What is the status of this review? Will there will be any charges filed relating to these deceptive practices? How is the Justice Department following up on the events in Arizona?**

ANSWER: At this time, both the Criminal Division and the Civil Rights Division have open investigations of the Pima County allegations. As these are ongoing investigations, we cannot comment further. The Virginia allegations remain under review by the Criminal Division**.**

Leahy 30 **At the Civil Rights Division oversight hearing, I asked Mr. Kim about barriers to ballot access taking place in Maryland, where Republican leaders admitted to distributing misleading flyers in African-American communities on Election Day suggesting that prominent African-American Democrats supported Republican candidates. In the Department's November 16, 2006 letter to Senator Schumer, the Department told him that "there is an insufficient legal basis to initiate a formal investigation." The Department's January 11, 2007 letter to Senator Schumer described an October 2002 Ballot Access and Voting Integrity Initiative. This letter touts the Department's record since this Initiative began at targeting voter fraud, stating that the Department has charged over 120 persons with voter fraud, convicted over 80 defendants, and has over 150 voter fraud investigations pending throughout the country. The letter does not describe similar investigations or prosecutions for conduct suppressing voter access, such as during the recent election in Maryland, which affects the rights of many voters. (a) Since the 2002 Initiative, has the Department expended as many resources combating voter intimidation and suppression as it has combating voter fraud? If so, how do you reconcile the Department's success race at pursuing voter fraud, which it discusses in the January 11 letter, with its apparent lack of success at enforcing protections against voter intimidation and suppression? How many prosecutors and investigators are currently handling voter suppression issues within the Department?**

ANSWER: Please see the response to question 27 above. Regarding the number of prosecutors and investigators currently handling voter suppression issues within the Department, as of February 15, 2007, 33 attorneys work in the Voting Section of the Civil Rights Division, and each of these attorneys receives work assignments related to voting matters. The Criminal Section of the Civil Rights Division does not assign a specific number of attorneys to address election and voting related matters. Rather, cases that are opened are assigned to an attorney at the time the case is opened.

The Criminal Division's Public Integrity Section has one attorney assigned full time and another part time to handle election crime matters. In addition, on occasion other Section attorneys are assigned to handle specific election fraud matters. We have no information as to the number of personnel handling voter suppression matters within the various United States Attorneys' Offices.

In a recent prosecution handled jointly by the Computer Crimes and Intellectual Property Section and the Public Integrity Section of the Criminal Division, four persons were convicted on telephone harassment charges arising from a scheme to jam the telephone lines of two organizations offering transportation to the polls during the 2002 general federal elections in Manchester, New Hampshire.

Leahy 40 **Between 1995 and 2006, we have seen a steady and significant decline in the funds appropriated and spent for the Community Oriented Policing Program. The COPS program was increased police presence on the streets, and by all accounts aided in the steady decline in the national crime rate in the 1990's. Beginning with President Bush's first year in office, the Administration has proposed consistent cuts, and in fact has proposed to completely do away with the COPS program. Between 1994 and 2001, violent crime dropped by 29%. In 2005, the GAO recognized that the COPS program had been effective in reducing violent crime. State and local law enforcement officers have consistently appreciated the program. Since the Administration and the Republican Congress began cutting this program, violent crime is once again on the rise. Despite the GAO's findings and the rising crime statistics for 2005 and the first half of 2006, the Justice Department still has not acknowledged a possible connection between the dramatic cuts to the COPS program, and rising crime. Would you agree that it is fair to credit the COPS program with some success in reducing crime between 1994 and 2001?**

ANSWER: This question suggests that violent crime has been on the rise since 2001. It has not been. The UCR's 2005 violent crime rate is slightly higher than the 2004 rate, but is lower than the rates for 2003, 2002, 2001, 2000, and every year since 1977. The 2005 violent crime rate is significantly lower than the rates of the previous decade. The NCVS shows a similar trend: from 2000 to 2005, the rate of violent crime as measured by the NCVS decreased 24%. The 2005 NCVS reported that the overall violent crime rate remained statistically unchanged between 2004 and 2005.

Despite the fact that both the UCR and the NCVS show a decline in overall crime rates and no or only modest increases in violent crime nationally, the Department is aware that the UCR data show increases in violent crime rates in a number of communities. The Department is also aware of anecdotal reports from a number of local law enforcement officials that violent crime is currently increasing in a number of communities.

Changes in the rate of violent crime do not appear related to the level of federal spending for state and local law enforcement. Department of Justice spending on state and local law enforcement has never accounted for more that 4.5% of state and local law enforcement spending, which has increased every year regardless of the size of the federal contribution. And ongoing partnerships among federal, state, and local law enforcement, such as the Project Safe Neighborhoods (PSN) gun-crime reduction initiative, continue to be highly effective at combating serious and specific crime problems.

Leahy 43 **Last year, the Bush Administration agreed to pay $2 million to settle a case that had been brought by Oregon lawyer Brandon Mayfield. Mr. Mayfield was improperly jailed for two weeks in 2004 as a material witness, in connection with the Madrid train bombing. As part of the settlement, the government made a formal apology to Mr. Mayfield and his family for the suffering caused by his mistaken arrest. After the 9/11 attacks, the Justice Department began using the material witness law not to secure**

testimony from possible witnesses, but rather to lock up possible suspects in counter-terrorism investigations without charge until there is enough evidence to indict. This appears to be what happened in the Mayfield case. Is that correct?

<u>ANSWER:</u> No. Allow me respectfully to correct your statement about the Department's use of material witness warrants after the 9/11 attacks. Every person detained as a material witness as part of the 9/11 investigation was found by a federal judge to have information material to the grand jury's investigation. An individual is detained under the material witness statute, 18 U.S.C. § 3144, only when a federal judge concludes that (1) his testimony is "material in a criminal proceeding," (2) it may become impracticable to secure his presence by subpoena, and (3) he meets criteria for detention under the Bail Reform Act, 18 U.S.C. § 3142. Each and every material witness is entitled by statute to counsel. Counsel will be appointed if the material witness cannot afford to pay for a lawyer. *See* 18 U.S.C. § 3006A(a)(1)(G). Once the warrant is issued and the witness is arrested, a *court* employs the standards in the Bail Reform Act, 18 U.S.C. § 3142, to decide whether to detain the witness pending his or her testimony. The material witness is entitled to a speedy detention hearing before the court at which he or she is represented by counsel, can present evidence, and can cross-examine government witnesses, see 18 U.S.C. § 3142(f), and the government must establish that "no condition or combination of conditions will reasonably assure the appearance of the person as required." 18 U.S.C. § 3142(e). Moreover, under Federal Rule of Criminal Procedure 46(h), a court must supervise the detention of material witnesses to eliminate unnecessary detention, and an attorney for the government must report biweekly to the court, listing each material witness held in custody for more than 10 days, and explaining why the witness should not be released. In short, there are numerous judicial safeguards built into the long-established practice of detaining material witnesses pursuant to a warrant. See *United States v. Awadallah*, 349 F.3d 42, 62 (2d Cir. 2003) (the material witness statute and related rules "require close institutional attention to the propriety and duration of detentions").

The decision to arrest Mr. Mayfield on a material witness warrant on 5/6/04 was made to secure his testimony and was based upon probable cause to believe that Mr. Mayfield had testimony material to the investigation of the 3/11/04 Madrid train bombings (primarily because his fingerprint was matched, albeit erroneously, to evidence found in Madrid and connected to the bombing) and that it might have become impracticable to secure his testimony by subpoena. In the days leading up to the decision to seek the material witness warrant, media reporting on the investigation was believed to be imminent, and there was significant concern about the risk of flight by Mr. Mayfield once the story broke. On Friday, 5/7/04, the day after his arrest, U.S. District Court Judge Robert E. Jones advised Mr. Mayfield that his deposition could begin at 1:30 p.m. that day, Mr. Mayfield could be released for the weekend with electronic monitoring, and the deposition could resume on the morning of 5/10/04. Mr. Mayfield declined to be deposed on that date and, as a result, he remained incarcerated.

Leahy 44 **The Second Circuit Court of Appeals wrote in 2003, in the Awadallah case, that the purpose of the material witness law is to secure testimony where it may become impracticable to secure the presence of the witness by subpoena. The Court added: "It would be improper for the government to use [the material witness law] for other ends, such as the detention of persons suspected of criminal activity for which probable cause has not yet been established." Do you agree that it is improper for the government to use the material witness law for purposes other than securing testimony?**

ANSWER: The proper use of material witness warrants is specified in statute and case law. 18 U.S.C. § 3144 permits a prosecutor to seek an arrest warrant for a material witness if a judge finds that the witness possesses information material to a criminal proceeding and that it is impracticable to secure the presence of that person by subpoena. Pursuant to the same statute, a judge may order such a witness to be detained as necessary to secure the witness's testimony after careful application of the factors identified in 18 U.S.C. § 3142. As in the *Awadallah* case, wherein the Second Circuit Court of Appeals ruled that the detention was a scrupulous and constitutional use of the statute, DOJ only seeks such warrants when authorized by the statute to secure the presence and testimony of a material witness. *See U.S. v. Awadallah*, 349 F.3d 42, 64 (2d Cir. 2003).

Leahy 45 **During the last Congress, I introduced legislation to amend the material witness law to strengthen procedural safeguards (S. 1739). My bill would ensure that the law is used as Congress intended – to secure testimony. Would you support this legislation?**

ANSWER: The Department believes that the existing framework for the use of material witness warrants, as detailed in response to questions 43 and 44 above, provides clear and sufficient procedural safeguards. For a more detailed statement of our position on S. 1739, please see the views letter we submitted during the last Congress.

Leahy 46 **The FBI's investigation into the 2001 anthrax attacks that killed 5, infected 17 others and terrified millions of Americans is now well into its fifth year and most believe that the investigation has gone very cold. After spending millions of dollars for experts and scientific studies, conducting thousands of interviews and issuing subpoenas, and making several missteps, including declaring Stephen [Hatfill] a "person of interests," no arrests have been made in the case. When do you expect the Department will bring criminal charges in this case? How many Department prosecutors and investigators are currently assigned to the Amerithrax investigation?**

ANSWER: The investigation into the deadly 2001 anthrax attacks is one of the largest and most complex investigations ever conducted by law enforcement. While no arrests have been made to date nor any criminal charges brought, the scientific advances gained from this investigation are unprecedented and have greatly strengthened the government's ability to prepare for, and to prevent, future biological attacks. Charges will be brought, if and when appropriate.

The FBI has devoted hundreds of thousands of agent-hours to the case, conducting more than 9,000 interviews, obtaining over 6,000 grand jury subpoenas, and conducting over 60 searches. Eight panels of scientific experts have been convened to develop a comprehensive analytical scheme for evaluating and analyzing the anthrax evidence. As a result, valuable relationships have been forged in the scientific and public health communities, greatly increasing the government's ability to deal with future biochemical threats. Although its membership varies some, approximately 17 FBI Special Agents (SAs) and 10 U.S. Postal Inspectors are assigned to the AMERITHRAX task force. A senior prosecutor in the U.S. Attorney's Office in the District of Columbia has played a significant role in the Amerithrax investigation from its inception. In addition, numerous federal prosecutors in United States Attorneys' Offices across the nation and in the Counterterrorism Section of the National Security Division have actively participated in the Amerithrax investigation.

Leahy 54 **2005's Detainee Treatment Act and 2006's Military Commissions Act both set standards for what types of interrogation techniques are and are not permissible. In each case, though, the standards are general and open to interpretation. (a) Did the Office of Legal Counsel or any other legal office at the Justice Department provide guidance to the FBI, the CIA, the White House, or any other branch of government regarding how to interpret the provisions of the Detainee Treatment Act governing what interrogation practices are permissible?**

ANSWER: Yes. The Department of Justice has provided advice to senior Executive Branch officials regarding the legal requirements applicable to detainee treatment, and the Detainee Treatment Act of 2005 is among those legal requirements.

Leahy 55 **What form did this guidance take? Did it dictate what specific interrogation techniques can and cannot be used?**

ANSWER: We are not in a position to disclose specific details regarding the classified and/or confidential legal advice provided by the Department of Justice to others in the Executive Branch. As stated in the Attorney General's January 12, 2006, letter to Chairman Leahy, however, we do recognize the legitimacy and importance of the Committee's oversight responsibilities. Accordingly, we are working with the Committee to provide a briefing for Committee staff as to the Justice Department's general interpretation of relevant legal standards, including the requirements of the Detainee Treatment Act of 2005. We believe that such discussions will allow the Committee to fulfill its oversight responsibilities, while at the same ensuring the protection of classified information and the confidentiality of legal advice and internal deliberations within the Executive Branch.

Leahy 56 **What was the substance of this legal guidance? Please provide a copy of any such document to the Judiciary Committee.**

ANSWER: Please see the response to Question 55, above.

Leahy 57 **Has the Office of Legal Counsel or any other legal office at the Justice Department provided guidance to the FBI, the CIA, the White House, or any other branch of government regarding how to interpret the provisions of the newly passed Military Commissions Act governing what interrogation practices are permissible? (a) If so, what is the substance of that guidance? Please provide a copy of any such document to the Judiciary Committee.**

ANSWER: It is part of the function of the Department of Justice to provide advice where necessary on the legal requirements applicable to the treatment of detainees, and the Military Commissions Act would be among those requirements. For the reasons set forth in Question 55, however, we cannot provide specific details concerning the Department of Justice's classified and confidential legal advice provided to others within the Executive Branch. We are working with the Committee, however, to provide an appropriate briefing for Committee staff on the Department's general interpretation of relevant legal standards, including the requirements of the Military Commissions Act.

Leahy 58 **If not, please explain how agents know what is permitted or prohibited by the broad language of the Military Commissions Act without legal guidance. Do you expect the Justice Department to issue legal guidance in the future?**

ANSWER: Please see the response to Question 57, above.

Leahy 59 **An FBI Supervisory Special Agent at Guantanamo Bay wrote a memo in November 2002 entitled "Legal Analysis of Interrogation Techniques," in which he or she concluded that rendering terrorism suspects to "Jordan, Egypt, or another third country to allow those countries to employ interrogation techniques that will enable them to obtain the requisite information" would violate 18 U.S.C. § 2340 (the torture statute). Specifically, the memo states:**

In as much as the intent of this category is to utilize, outside the U.S., interrogation techniques which would violate 18 U.S.C. § 2340 if committed in the U.S., it is a per se violation of the U.S. Torture Statute. Discussing any plan which includes this category, could be seen as a conspiracy to violate 18 U.S.C. § 2340. Any person who takes any action in furtherance of implementing such a plan, would inculpate all persons who were involved in creating this plan. This technique can not be utilized without violating U.S. Federal law.

Legal Analysis of Interrogation Techniques (available online at http://www.humanrightsfirst.org/us_law/etn/pdf/fbi-brief-inter-analysis-112702.pdf

Do you agree that the "technique" of rendering suspects to third countries in order to allow those countries to use coercive interrogation techniques that violate U.S. law "cannot be utilized without violating U.S. Federal law"?

ANSWER: The President repeatedly has made clear that the United States does not condone or encourage the torture of anyone, anywhere in the world. *See*, *e.g.*, President's Speech on September 6, 2006 ("I want to be absolutely clear with our people and the world: The United States does not torture. It's against our laws, and it's against our values. I have not authorized it, and I will not authorize it."). Consistent with this policy, and with our obligations under both international and domestic law, the United States does not transfer persons in its custody to countries where there is a reasonable basis to believe that it is more likely than not he will be tortured. An explicit agreement to transfer a person to a foreign country for the intended purpose of torturing him could constitute a conspiracy to commit torture under 18 U.S.C. § 2340A(c). We note, however, that the quoted passage is unclear in its use of the phrase "a per se violation of the U.S. Torture Statute." The anti-torture statute prohibits a person from intentionally committing, attempting to commit, or conspiring to commit torture (outside the United States). Such an *actus reus* would be necessary to establish a violation of the statute.

Leahy 64 **Last year, the United Nations Office on Drugs and Crime ("UNODC") reported that there has been a surge in opium cultivation in Afghanistan that is fueling the insurgency in that country. According to the report, opium production in Afghanistan has increased 59 percent over last year, and in the southern region where Taliban insurgents have intensified their attacks on Afghan government and U.S. forces, opium cultivation has increased by 162 percent. Given that the Bush Administration routinely describes the international narcotics trade as a national security issue, and that the production of opium has skyrocketed since the invasion of Afghanistan and removal of the Taliban, what does this mean for our national security at home and for the safety of our troops in Afghanistan?**

ANSWER: Economic dependency on poppy cultivation, limited law enforcement resources, corruption and the lack of an effective institutional framework for drug control all contribute to the complexity of the situation in Afghanistan. Afghanistan's huge drug trade severely impacts efforts to rebuild the economy and develop a strong democratic government based on rule of law. It also threatens regional stability, encouraging terrorism. Dangerous security conditions and corruption constrain government and international efforts to combat the drug trade and provide alternative incomes.

In the past, terrorist groups derived much of their funding and support from state sponsors of terrorism. With increased international pressure, many of these funding sources have become less reliable and, in some instances, have disappeared altogether. As a result, terrorist groups have turned to alternative sources of financing, including fundraising from sympathizers and nongovernmental organizations, and criminal activities such as arms trafficking, money laundering, kidnap-for-ransom, extortion, racketeering, and/or drug trafficking. This trend is true not only in Afghanistan, but around the world, and increasingly blurs the distinction between terrorist and drug trafficking organizations. Both criminal organizations and terrorist groups continue to develop international networks and establish alliances of convenience. In the new era of globalization, both terror and crime organizations, have expanded and diversified their activities, taking advantage of the internationalization of communications and banking systems, as well as the opening of borders to facilitate their activities.

The DEA has developed a cadre of reliable sources of information regarding the nexus between terrorist activity and narcotics trafficking in Afghanistan. Over the past year in particular, these sources have provided actionable intelligence of ongoing anti-coalition activity, which the DEA has passed on to thwart numerous IED and rocket attacks against U.S. personnel and interests inside of Afghanistan.

Leahy 65 **What steps is the Department taking steps to address the growing opium trade in Afghanistan?**

ANSWER: The greatest threat to Afghanistan's stability and security is the spread of an organized, violent, criminal element, fueled by the narcotics trade. To confront this challenge to sovereignty and the rule of law, the DEA led enforcement operations in Afghanistan serve multiple functions battling the insurgency and drug warlords while developing and enhancing the capabilities of Afghanistan's law enforcement community. In support of this effort, the DEA has undertaken an aggressive approach to combat drug trafficking organizations, corruption, the flow of precursor chemicals, money laundering and the production of opium in Afghanistan. These efforts work in concert with DOJ's extradition program, while developing the skills of the vertical prosecution taskforce and the training and vetting of judges.

To provide a base of operations the DEA has opened and staffed its Kabul Country Office, initiated the Foreign-deployed Advisory and Support Team program, established an aviation presence in the country, developed a five-year plan for the Afghan Counter Narcotics Police and continues to expand its regional presence.

The Five Pillar Plan

The DEA has joined with coalition partners, the State Department (DOS), and the Department of Defense (DOD) in the development of the Counternarcotics Implementation Plan, more commonly known as the "Five Pillar Plan." The five pillars are public information, alternative livelihoods, elimination/eradication, interdiction, and law enforcement and justice reform. The plan provides for all the elements to contribute to the stabilization and revitalization of Afghanistan. The DEA's primary role falls under the interdiction pillar where the DEA is responsible for dismantling drug trafficking organizations. To achieve that goal, the DEA has expanded its presence in Afghanistan by permanently stationing additional Special Agents and Intelligence Analysts to enhance that country's counternarcotics capacity. The DEA also provides drug law enforcement training to its counterparts in the Counternarcotics Police-Afghanistan (CNP-A). This effort will build Afghanistan's institutions of justice and strengthen internal counternarcotics capabilities.

Operation Containment

In response to September 11, 2001, the DEA, with special support from Congress, initiated Operation Containment. This regional, large-scale, multi-national enforcement initiative emphasizes coordination and information sharing among 19 countries from Central and Southwest Asia, the Caucuses, Europe, and Russia. The program implements a joint strategy to place a security belt around Afghanistan to prevent precursor chemicals and drug money from entering Afghanistan and drugs from leaving. This strategy deprives drug trafficking organizations easy market access and easy movement of chemicals and drugs and helps to deprive international terrorist groups of the financial support they receive through their facilitation of the trafficking in illegal drugs, precursor chemicals, weapons, ammunition, and currency. The operation has shown success as it brings together nations that historically have had little or no interaction from a law enforcement perspective and facilitates the sharing of intelligence and exchange of operational initiatives.

Out of the six major Drug Trafficking Organization (DTO) heads targeted by Operation Containment, four have been arrested, to include Haji Bashir NOORZAI and Haji Baz MOHAMMAD. DEA operations have also led to significant seizures of narcotics and precursor chemicals and the dismantlement and disruption of organizations involved in the Southwest Asian drug trade. In the past two years, Operation Containment resulted in the seizure of more than 26 metric tons of heroin, the initiation of 267 investigations, and the arrest of more than 1,000 individuals. To put that in perspective, between 2002 and 2003, only about 136 kilograms of Afghan heroin was seized in the region.

Kabul Country Office

The DEA's Kabul Country Office was reopened in January 2004 and has made significant progress under difficult conditions. The DEA also has enhanced staffing levels in Afghanistan to more effectively complete its mission. The office is currently staffed with Special Agents, Intelligence Research Specialists, and Administrative Support personnel. In addition to the positions permanently assigned to Afghanistan, the DEA presence in the Kabul Country Office is augmented by the Foreign-deployed Advisory and Support Teams (FAST), which provide intensive operational support. Specially trained and equipped teams of DEA Special Agents and Intelligence Research Specialists provide guidance to our Afghan partners and conduct bilateral investigations to identify and dismantle drug trafficking and money laundering organizations operating throughout the region.

FAST

In 2005, the DEA formed the Foreign-deployed Advisory and Support Team (FAST) program to augment enforcement and training operations in Afghanistan in support of the Kabul Country Office and Operation Containment. The FAST provides guidance and mentoring to their Afghan counterparts, while conducting bilateral investigations aimed at the region's most significant drug trafficking organizations. In April 2005, the first two FASTs arrived in Afghanistan, and other teams have deployed on a rotational basis. FAST is also amplified by contract medical, communication, and logistical experts. The FASTs currently follow a rotation cycle and are mandated to work directly with elements of the newly DEA trained National Interdiction Unit (NIU) of the Counter Narcotics Police – Afghanistan (CNP-A). There are five units of NIU with each team comprised of 25 members.

Air Wing

The DEA has moved aviation support into Afghanistan to enhance regional investigations and to facilitate the transportation of agents, counterparts, prisoners, and evidence. The first of two King Air 350 fixed wing aircraft arrived in Afghanistan in July 2006. The DEA plans to have another King Air 350 in Afghanistan by 2008. One of the aircraft is supported by Special Agent pilots and mechanics. These aircraft are not designed to provide force protection, troop transport, or in extremis extraction, for which the DEA must rely on ISAF or the U.S. military to provide.

NIU

Working with the CNP-A, the DEA has established the National Interdiction Unit (NIU), which is comprised of CNP-A officers who have been selected to work on major narcotic enforcement operations with the Kabul Country Office. Through assistance and training, the DEA's goal is to make the NIU capable of conducting independent operations. Five classes of the NIU have graduated from a six-week training program that was sponsored by the U.S. Government. All NIU graduates are operationally deployed and work bi-laterally with the DEA FAST teams. Presently, there are 125 NIU officers who received training and future plans exist to continue this important program.

International Training Teams

The DEA is also providing training and assistance to law enforcement personnel in Afghanistan, and, along with the DOJ Senior Federal Prosecutors Program, is directly involved in advising U.S. Government and Afghan officials in counternarcotics programs and drug policy issues in Afghanistan.

Employing its International Mobile Training Teams in the past 18 months, the DEA has deployed 12 instructors to Afghanistan to conduct approximately 609 actual training days of counterdrug instruction. This instruction has reached 720 law enforcement and military personnel from Afghanistan since 2003. In-country, that training has included basic drug law enforcement as well as Heroin Laboratory Familiarization and Safety Techniques for the Counter Narcotics Police of Afghanistan and members of the coalition forces. The rudiments of drug law enforcement have been augmented for the National Interdiction Unit (NIU) with more advanced training in interviewing, confidential source debriefing, evidence collection, surveillance, operational planning, and raid training.

In addition to these in-country efforts, the Afghan Deputy Minister of Security Affairs for the Ministry of Interior has attended an executive level International Narcotics Enforcement Management Seminar in Washington, D.C. and members of various Afghan police forces have attended the Drug Unit Commander Course in Turkey and a law enforcement seminar in the Maldives. This aggressive training regimen will continue in 2007 when two 45-member Afghan Special Investigative Units (SIU) will travel to the DEA's Quantico training academy to attend a five-week Basic Drug Enforcement course that will train them to on work high level drug investigations.

Counter Narcotics Police – Afghanistan (CNP-A) Five-Year Strategic Plan

In addition to the Five Pillar plan, the U.S. Government, along with British and Afghan counterparts, has developed a strategic plan to develop the CNP-A and augment its professionalism and capabilities. This plan includes the establishment of vetted units to attack command and control nodes of Afghanistan's major DTOs. The CNP-A plan augments and supports the Government of Afghanistan's law enforcement reorganization (Tashkiel).

DEA, with support from DoD and DoS, are empowering the CNP-A by training and mentoring them to investigate, arrest, and prosecute the highest level drug traffickers. The U.S. interagency community (DEA, DoD, DoS), in conjunction with British and Afghan counterparts, have developed a long-term strategic plan for the development of the CNP-A. The CNP-A will support government stability in Afghanistan by disrupting the production and trafficking of illicit drugs across international borders. The U.S. Government's goal for the plan is for the CNP-A to become a self-sustaining law enforcement agency.

The CNP-A plan will strengthen Afghanistan's law enforcement capacity by providing intelligence, interdiction, eradication, and investigative capabilities. The plan will expand the current staff of 500 to 2,900, as authorized under the Tashkiel. The CNP-A plan complements and augments the Tashkiel, which delineates the structure (including pay and rank reform) of each police unit within the Ministry of Interior (MOI) and establishes a table of organization for the CNP-A. The plan establishes a road map to advance Afghan counter narcotics efforts and will be implemented in phases over the next five years. It will cover three key areas of development: operational, infrastructure, and human capital. In essence, the interagency community is working to stand up an Afghan equivalent of the DEA.

Leahy 66 **In December 2006, there were unconfirmed reports of a possible Internet attack on U.S. stock market and the Banking industry websites by a radical Muslim group. According to press reports, the attack would be in retaliation for the detention of Muslim prisoners at Guantanamo Bay. How many resources does the Department currently have dedicated to U.S. cyber security?**

ANSWER: Combating threats to our nation's computer systems and information networks, particularly threats driven by terrorist activities, is one of the Department's key strategic priorities. To implement this priority, the Department has established a multi-pronged strategy for targeting such threats, including investigators, analysts, and prosecutors working cooperatively to respond to, investigate, and prosecute such attacks. Investigating and prosecuting attacks on computer networks is an integral part of ensuring overall cyber security because it deters future attacks, and yields information that helps prevent such attacks.

Main Justice

The Department's prosecutors are another integral part of the Department's strategy to investigate and prosecute threats to and attacks on cyber networks. Investigating and prosecuting criminals who attack our nation's computer systems, whether to steal information or cause damage, is one of the Department's highest priorities. The Department also works closely with other departments and agencies, including the Intelligence Community, to ensure that vulnerabilities to critical computer systems and networks are identified, analyzed, and patched as quickly as possible. The Department also co-chairs, with the Departments of Defense and Homeland Security, the National Cyber Response Coordinating Group, a cross-agency group designed to facilitate a government-wide response to major cyber incidents.

Since the early 1990s, the Department of Justice has steadily increased the resources dedicated to addressing the rapidly increasing incidence of high-tech crime. In 1991, the Department created its first Computer Crime Unit with five prosecutors, which has since grown to become the Computer Crime and Intellectual Property Section (CCIPS) in the Criminal Division. In 1995, the Department created a dedicated network of computer crime and intellectual property prosecutors across the country. This network of specialized prosecutors -- the Computer Hacking and Intellectual Property (CHIP) coordinators -- now has over 200 Assistant U.S. Attorneys and other federal prosecutors dedicated to aggressive investigation and prosecution of computer intrusions and other high-tech crimes. This network of attorneys receives intensive training at national conference held approximately yearly.

The Assistant U.S. Attorneys in the CHIP network are charged with prosecuting computer crime and intellectual property offenses, serving as the legal counsel to their district on matters relating to those offenses and to the collection of digital evidence, training other prosecutors and law enforcement, and conducting public and industry outreach and awareness activities. Attorneys in the CHIP network serve as a point of contact for conducting investigations into computer intrusions, attacks on computer networks and other critical information infrastructures.

Within the Criminal Division, CCIPS has primary responsibility for developing the Department's overall computer crime enforcement strategy, and provides key expertise to the Department on difficult legal and policy issues affecting cyber security. CCIPS prosecutors develop and prosecute their own cases, help coordinate multi-district and international computer crime investigations, and provide investigation and trial support to CHIP network prosecutors on request. CCIPS also provides information and legal expertise through the distribution of manuals, monographs, legislative analysis, and high-quality training on computer crime and related issues to Department prosecutors and law enforcement agencies.

FBI

The FBI has successfully investigated computer crime and has worked to protect the nation's computers and networks since well before the Internet became widely accessible to the public in the 1990s. In 2002, the Cyber Division was created to target online threats and to use FBI’s global investigative, intelligence, and analytical expertise and resources to address these threats to the Nation’s critical infrastructures. The strategic focus of the Cyber Division is to effectively support the FBI's priorities by working closely with the Counterterrorism, Counterintelligence, and Criminal Divisions to identify and neutralize hostile and illegal computer-supported operations.

As the only agency with a mandate to investigate both computer and network intrusions which affect national security and criminal activity involving the Internet, the FBI has the unique ability to coalesce information across these distinct disciplines and to determine the nature of the attack and the intent of the attacker -- whether criminal, state-sponsored, or terrorist in nature. Moreover, the FBI has developed significant expertise and technical capabilities relative to computer and network intrusions and criminal matters which involve the use of computers. Having the breadth and depth of the FBI’s jurisdictional, investigative, and technical resources housed within one agency, which is both a member of the intelligence community and an investigative entity, is critical to the infrastructure security of the United States.

The FBI's Computer Intrusion Program is dedicated to identifying and neutralizing the most significant individuals or groups that are conducting computer intrusions, disseminating malicious code, or engaging in other illegal activity involving computers and networks. As the number of actors who can use computers for potentially devastating purposes grows worldwide, the FBI is devoting the necessary resources toward defeating them. The FBI’s cyber strategy also includes an intelligence component which dedicates highly trained analysts who focus on cyber threats nationally at FBI Headquarters and with the domains of the 56 field offices.

International Partnerships

Finally, because threats to our cyber security frequently originate outside the United States, the Department also cooperates with international partners to protect cyber security. The Department was a founding member of and administers the G8 24/7 High Tech Crime Point of Contact Network, which now has approximately 50 member nations, committed to assisting one another to preserve critical data and cooperate in the investigation of computer crime cases. At the beginning of this year, the United States also joined the international Convention on Cybercrime, following the advice and consent of the Senate. This important treaty, which is the first of its kind, provides a formal structure for cooperation with other countries on cybercrime matters. Further, the Department has made it a priority to work with other nations to strengthen their computer crime laws and bolster their cybercrime fighting capacity.

In addition, the Criminal Division's Office of International Affairs (OIA) works closely with our international counterparts on behalf of federal, state and local law enforcement authorities to extradite fugitives charged with felony offenses, including those related to computer crime. OIA also serves as the United States Central Authority for our approximately 50 bilateral Mutual Legal Assistance Treaties, through which we can request critical evidence for use in criminal investigations and prosecutions of computer crime and other serious offenses.

In conclusion, we have made cyber security and response a key priority for the Department, and we have significant resources and capabilities committed to deterring, preventing, and responding to threats to our cyber security.

Leahy 77 **Please state if any applications related to the TSP or its successor program were denied by the FISC, and, if so, whether any appeals were taken or whether the FISC provided any communication to the Department related to the denial?**

ANSWER: We assume that by "the TSP or its successor program" you refer to the orders issued by a Judge of the FISC on January 10, 2007. Details on this matter have been provided in briefings to the Intelligence Committees and have been made available to the Chairmen and Ranking Members of both Judiciary Committees.

Leahy 82 **In your testimony on January 18, 2007, you stated that the President has not reauthorized the TSP and, in your letter of January 17, 2007, you wrote that "any electronic surveillance that was occurring under the [TSP] will now be conducted subject to the approval of the Foreign Intelligence Surveillance Court [FISC]."**

To you knowledge, are there any other electronic eavesdropping programs that are not being conducted with the approval of the FISC or the federal judiciary?

<u>ANSWER:</u> We take your question to refer to electronic surveillance, as that term is defined in FISA, that is conducted by the Executive Branch for foreign intelligence purposes. FISA itself expressly authorizes such electronic surveillance without court order under certain circumstances, *see, e.g.*, 50 U.S.C. § 1802; 50 U.S.C. § 1805(f), as does Title III in the context of criminal investigations, *see, e.g.*, 18 U.S.C. 2518(7). Outside of these circumstances, we are not aware of any electronic surveillance that is not being conducted subject to approval by the FISA Court or another federal court.

Leahy 83 **If so, please explain what those programs are and why they are not being reviewed by the FISC or the federal judiciary?**

<u>ANSWER:</u> Please see the response to Question 82, above.

Leahy 84 **Given the President's recent signing statement for the Postal Accountability and Enhancement Act, I was somewhat reassured by your testimony that the U.S. Government is not opening Americans' mail without a warrant to your knowledge. But, I remain concerned about whether the President believes that he has the legal authority to do so under either the Authorization for the Use of Military Force ("AUMF"), or the Constitution. You said that you were not prepared to ANSWER these questions during the hearing. Because this privacy issue is of paramount concern to most Americans, please ANSWER the following questions: Does the President believe that he has the inherent constitutional authority to open Americans' mail without a warrant? If so, please explain the legal basis for this position.**

<u>ANSWER:</u> As the Attorney General explained in his testimony before the Committee on January 18, 2007, the Department of Justice during this Administration has not analyzed whether the President has inherent authority under the Constitution or under the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001) ("Force Resolution"), to open domestic mail without a judicial warrant.

Leahy 85 **Do you maintain that the President has such authority under the AUMF, notwithstanding the requirements of the FISA statute? If so, please explain the legal basis for this position.**

<u>ANSWER:</u> Please see the response to Question 84, above.

Leahy 86 **During the hearing, you testified that there is no physical search of mail currently ongoing under either the AUMF or the President's inherent power under the Constitution. Has the Administration engaged in mail searches based upon the AUMF**

or the Constitution in the past? If so, please describe the circumstances for those searches and state how many searches were conducted by the Administration under this authority.

ANSWER: To the best of our knowledge, searches of domestic mail have not been performed during this Administration based on the President's constitutional authority or his authority under the Force Resolution.

Leahy 89 **You also testified that you would be troubled if the press reports about the DoD and CIA engaging in domestic surveillance of Americans were true. But, you stated that you had not asked anyone at the DoD, or CIA about this issue. Will you contact officials within DoD and CIA about this matter, and if so, will you tell the Committee what you learn about the extent to which these agencies are using national security letters to obtain the financial records of American citizens?**

ANSWER: Should the Committee be interested in the specifics of any Department of Defense or Central Intelligence Agency program or effort, those agencies should be able to provide the information necessary in the first instance. Accordingly, we respectfully defer to those agencies to answer this question.

Leahy 95 **When the new Congress convened on January 4, I reintroduced my war profiteering prevention bill (S. 119) which would make it a crime for military contractors to materially overvalue goods and services with the specific intent to defraud the United States in connection with the war or reconstruction effort in Iraq. Given the growing evidence of wide-spread contracting fraud in Iraq, will you support this legislation?**

ANSWER: As you are aware, the Department submitted its views on S.119 in a letter to the Committee, dated March 28, 2007. That letter is attached for your reference.

Leahy 96 **During the hearing, you stated that you did not know how many Department prosecutors and investigators were looking in contracting fraud in Iraq, but that you would get that information to me. Please state how many Department prosecutors and investigators are currently examining contracting fraud in Iraq?**

ANSWER: More than 70 federal attorneys (including civil and criminal) and approximately 40 FBI agents and 10 intelligence analysts from FBI Headquarters and various field offices are involved either on a part-time or full time basis in prosecuting fraud and corruption cases associated with the global war on terror, which includes, but is not specifically limited to, matters involving Iraq, Kuwait, and Afghanistan.

Leahy 97 **You also mention the Procurement Fraud Task Force. Please state how many prosecutors and investigators are assigned to this task force? What percentage of the task force's work involves contracting fraud in Iraq? Would you support creating a separate task force to focus exclusively on Iraq contractor fraud, similar to the Hurricane Katrina Fraud Task Force?**

ANSWER: The National Procurement Fraud Task Force utilizes the resources of six key sections or divisions within the Department including the Public Integrity, Fraud, and Asset Forfeiture and Money Laundering Sections of the Criminal Division, the Antitrust Division, the Tax Division, and the Civil Division – in addition to calling upon the 94 the U.S. Attorneys' Offices across the country – to ensure that competing resource needs are balanced and meritorious cases are identified, investigated, and pursued efficiently and effectively in appropriate venues.

The U.S. Attorneys' Offices that are participating in the Task Force have coordinated and organized their own procurement fraud regional working groups, which are working to implement the strategies and mission of the Task Force as well as to facilitate the exchange of information among agencies at the regional level. To date, the following U.S. Attorneys' Offices have agreed to lead regional procurement fraud working groups: Northern District of Alabama, Central District of California, Eastern District of California, Eastern District of New York, Northern District of New York, Western District of Missouri, District of Massachusetts [includes the District of Connecticut], District of Kansas, Southern District of Florida, Northern District of Georgia [includes the Middle District of Florida, the Middle District of Alabama, the Southern District of Georgia, the Middle District of North Carolina, the Eastern District of North Carolina and the Western District of North Carolina, the Eastern District of Tennessee and the District of South Carolina], Eastern District of Pennsylvania, Northern District of Texas, Southern District of Texas, Eastern District of Virginia [includes the District of Columbia and the District of Maryland], and the Western District of Washington.

Additionally, investigative resources are being provided by a number of federal agencies participating in the Task Force including, among others, the FBI, the Special Inspector General for Iraq Reconstruction (SIGIR) and the OIGs associated with DoD, Central Intelligence Agency, National Aeronautics and Space Administration, GSA, Department of Housing and Urban Development, Department of Justice, Department of Homeland Security, Department of Energy, Department of Veterans Affairs, Nuclear Regulatory Commission, Small Business Administration, Social Security Administration, U.S. Postal Service, Office of the Director of National Intelligence, National Reconnaissance Office, Department of State, Department of Transportation, Department of Treasury, Department of Interior, and Department of Agriculture. In addition, given the overwhelming size of the defense slice of the procurement pie, all defense-related investigative agencies -- Defense Criminal Investigative Service (DCIS), Naval Criminal Investigative Service, Army-CID, and the Air Force Office of Special Investigations -- are full participants.

The Task Force's emphasis is accelerating civil cases and criminal prosecutions, forfeitures, and other lawful means to recover ill-gotten gains from procurement fraud. The Task Force is evaluating cases involving fraud and corruption associated with the war effort and will aggressively pursue those cases with prosecutive potential. In addition, the Task Force has established a special committee to address fraud and corruption associated with the war effort. Among other things, this committee is operating its own International Contract Corruption Task Force (ICCTF) consisting of members of the law enforcement community including DCIS, Army-CID, SIGIR, FBI, and the Offices of Inspectors General for the State Department and the Agency for International Development. Agents from the ICCTF currently are deployed in Iraq, Afghanistan, and Kuwait for the purpose of providing real-time investigative support on cases involving contracting fraud and corruption.

The Department has charged 25 individuals criminally for fraud associated with public corruption and government fraud associated with the global war on terror, which includes matters involving Iraq, Kuwait, and Afghanistan. Sixteen of these individuals have been convicted (seven are awaiting sentencing). The other nine individuals have charges pending either though indictments or criminal complaints. Two civil cases have been settled involving contracting in connection with the Iraq war

QUESTIONS FROM SENATOR SPECTER

Specter 106 **Are there any new steps or measures that DOJ is planning or exploring to combat the recent dramatic rise in Philadelphia and Reading, particularly with respect to gangs?**

The 222 Corridor Anti-Gang Initiative - Over the past decade, each of the seven cities in the 222 Corridor, which includes Easton, Bethlehem, Allentown, Reading, and Lancaster in the Eastern District of Pennsylvania (EDPA), and York and Harrisburg in the Middle District of Pennsylvania (MDPA), has experienced a dramatic increase in gangs and their associated criminal activities. Operating in each of these cities are numerous neighborhood street gangs, regional gangs, and national gangs, including gang members from the East Coast and from Mexico and Central American countries. Violent gang members from major metropolitan areas such as New York City, Newark, Philadelphia, and Baltimore travel to and through the 222 Corridor using the smaller urban communities as part of their drug distribution networks.

In the spring of 2006, the U.S. Attorney's Office (USAO) for the EDPA received one of the six Department of Justice $2.5 million grants for a Comprehensive Anti-Gang Initiative – $1 million for law enforcement, $1 million for prevention, and $500,000 for reentry. Working with state and local law enforcement and community partners, the EDPA is using these grants to focus on the gang violence along the 222 Corridor. In November of 2006, the USAO for the EDPA joined with the USAO for the MDPA to expand the initiative to include York and Harrisburg.

To combat criminal activity by gangs in the 222 Corridor, the USAO in EDPA has established an unprecedented law enforcement partnership that combines the resources of federal, state, and local law enforcement, including the two USAOs, five federal agencies, the Pennsylvania State Police, six district attorneys, and seven mayors and their police chiefs. In addition, a 222 Corridor Coordinating Committee has been established to bring together representatives of each law enforcement agency as well as four intelligence analysts to obtain, evaluate, and disseminate intelligence information about gangs and gang members and to provide strategies to prosecute them.

Under the leadership of the mayors of Easton, Bethlehem, Allentown, Reading, and Lancaster, a separate anti-gang prevention task force has been established in their respective cities. These task forces will utilize existing local resources, supplemented by the planned prevention funding, to enhance existing efforts to prevent gang activity among youths and young adults through the combined forces of government, community and faith-based organizations. To provide assistance and coordination in the prevention effort, a Prevention Coordinator has been hired.

Re-entry activity is underway in each of the four counties in the EDPA – Northampton, Lehigh, Barks, and Lancaster. County prison, probation, and social service officials, joined in some counties by representatives of non-profit organizations, will identify approximately 25 gang members being released from county prisons to participate in an intensive re-entry effort. The Eastern District's re-entry coordinator is currently working with these groups. In addition, two case managers (each responsible for two counties) will be hired once grant funds are available.

Philadelphia - In 2006, the USAO in EDPA dramatically expanded the Project Safe Neighborhoods program in Philadelphia. Working closely with the Philadelphia Police Department, the Philadelphia District Attorney's Office, and federal law enforcement agencies including ATF, DEA, FBI, ICE, and the U.S. Marshal's Service, separate working groups in each of the six Philadelphia Police Detective Divisions were established to identify gangs, groups, and other violent organizations and criminals in those areas. Staffed by at least two federal prosecutors, one local prosecutor, and members of federal, state, and local law enforcement, these working groups are providing an unprecedented opportunity to share information among law enforcement, including identifying gangs and gang members, chronic offenders, straw purchasers, and potential cooperators. Where appropriate, many of the defendants and groups identified are being prosecuted in federal court. Additionally, the FBI established a Hobbs Act Robbery Task Force to aggressively target offenders who commit multiple Hobbs Act robberies with firearms.

Intelligence Sharing - Additionally, the USAO, in conjunction with the Middle-Atlantic Great Lakes Organized Crime Law Enforcement Network (MAGLOCLEN), a Regional Information Sharing Systems (RISS) Center, created a district-wide, electronic system to collect and share PSN data for the nine-county task forces in the EDPA called the PSN Mapping and Analysis Program (PSN MAP). This system utilizes and relies on the RISS network. The RISS network stores criminal intelligence information and is governed by 28 CFR 23, the federal Criminal Intelligence Systems Operating Policies, which ensure that data collected, stored, maintained and disseminated are accurate, reliable, relevant to criminal activity, and secure. PSN MAP provides the district attorneys' offices, the police departments, and other PSN in the Eastern District participants (and eventually in the Middle District) with an easy-to-use Web-deployed mapping tool that enables the users to gain a geographical perspective on firearm and homicide incidents within their own jurisdiction, bordering jurisdictions, and the entire Eastern District. The project has been successful and has been well received by our PSN participants. During the coming year, PSN Map will be expanded to include more than 50 partners throughout the EDPA and MDPA and New Jersey, Delaware, and New York City.

Historically, the USAO in EDPA has obtained substantial cooperation from defendants and witnesses through proffers. While primitive efforts were made to retain information from these interviews, these efforts have failed to store or retain the information for access by other prosecutors in the office. IPAC, or the Intelligence Proffer Analysis Case Management System, is revolutionary in the following respects. First, for the first time, IPAC stores proffer information in a database that can be retrieved by AUSAs and other members of law enforcement with certain security restrictions. Second, IPAC allows users to access a mapping program to map crime prior to and during proffers to assist in the questioning of suspects. Third, IPAC consolidates all of the databases in the USAO into one data base, which will, over time, dramatically reduce and eliminate the workload of staff to input data. Finally, it will be combined with the U.S. Marshals database to give AUSAs and staff instantaneous access to biographical data and photographs of defendants.

Specter 108 **How is DOJ working to coordinate resources with the U.S. Attorney's Office to strengthen its anti-gang initiatives, including the Route 222 Corridor Anti-Gang project? Are more resources needed?**

ANSWER: The DOJ Six Site Support Team (consisting of representatives from ODAG, BJA, OJJDP and EOUSA) in Washington supports the 222 Corridor Anti-Gang project, along with the other five sites chosen for the Attorney General's Comprehensive Anti-Gang Initiative. The Six Site Support Team assists with everything from providing guidance during the grant application process to sending training and technical assistance to the sites in each of the elements of re-entry, enforcement, and prevention. Additionally, the sites are given resources to help implement the initiative. These resources consist of examples of position descriptions (for hiring reentry and prevention coordinators), resources from the National Gang Intelligence Center, PSN monographs on gun prosecution case screening, offender notification meetings, crime incident reviews, and chronic violent offender lists, information on the US Dream Academy (a youth mentoring program), and numerous resource articles, including articles and publications on probation and solutions, examination of the role of the police in reentry partnerships, and youth mentorship.

In November, the DOJ Team sponsored a Six Site Comprehensive Anti-Gang Kick-Off Conference in Dallas, Texas. The attendees at the conference included USAO and federal representatives, but the majority of the approximately 120 attendees were from state and local law enforcement, prevention, and reentry components. Additionally, fiscal agents and community leaders attended.

DOJ coordinates with the USAO in the Eastern District of Pennsylvania, as well as all 93 USAOs, by providing additional funding for use in their PSN and Anti-Gang Initiatives. Beyond the funding for the 222 Corridor Six Site, in fiscal year 2006, the USAO in the Eastern District of Pennsylvania received grant funds from DOJ in the amount of $222,388 as a PSN allocation and $314,159 to support their Anti-Gang Initiative. Additionally, in October of 2006, the USAO was awarded an additional $35,100 as part of a One-Time Reprogramming Fee from the Asset Forfeiture Super Surplus Fund (AFSSF) designated for use in their Anti-Gang Initiative. The two other USAOs in Pennsylvania were also awarded grant money and an award from the AFSSF. DOJ and the USAO are always sensitive to the needs of the state and locals with respect to resources. However, the $2.5 million provided for the 222 Corridor Six Site was only recently released, and any determination about additional resource needs may be premature at this date.

Specter 109 **Despite the murder wave and other gun crime resources funded through Project Safe Neighborhoods, the Philadelphia Police Department is suffering declining resources among its ballistics and firearms examiners. The Department has gone from 14 examiners to only 5. Without these examiners, the justice system remains backlogged on shooting cases. What is DOJ doing to address this problem?**

ANSWER: ATF is committed to assisting local law enforcement by helping to train firearms examiners. While the demand for such training increases each year, budget constraints allow ATF to select only a limited number of attendees for each session. As such, there are a number of rigorous criteria ATF uses to choose students for admittance into the National Firearms Examiner Academy NFEA, a 12 month long program. One requirement is that applicants be employed full-time as a firearm examiner trainee in law enforcement laboratory. Another requirement is that the laboratory with which the applicant is affiliated must have a low examiner-to-trainee ratio. The rationale behind this requirement is that a laboratory with a low ratio is particularly burdened because the few experienced examiners must spend a significant amount of their time training the trainees, which takes away from their case work; however, a laboratory with a high ratio allows its experienced examiners to spread out their training responsibilities and spend more time on their case work. ATF typically selects students from laboratories with ratios of 2 to 1 or lower. With respect to Philadelphia, 2005 was the last time they submitted an application. At that time, its laboratory has 11 examiners and 2 trainees, for a ratio of 5.5 to 1. In January 2007, ATF offered a 3 day Serial Number Restoration class, and trained 2 examiners from the Philadelphia Police Department. Another offering is scheduled for March 2007, and 3 of the 13 attendees will be from the Philadelphia.

Specter 114 **In section 1199 of the Violence Against Women Act and the Department of Justice Reauthorization Act of 2005, Congress authorized the Youth Violence Reduction Partnership. Has the grant solicitation process authorized by this program begun? When do you expect to award grants under this program and what entities do you expect to receive grants under this program, if any? What can be done to improve the ability for the Department of Justice to award grants under this authority?**
ANSWER: Although the Youth Violence Reduction Partnership has been authorized, funding for the program has not been appropriated. Should Congress appropriate funding for the program, the Department will begin the grant process as soon as possible.

Specter 118 **Does the Department intend to create a privilege review system or review teams to ensure that the privileged information given to the prosecution team does not relate to criminal defense strategies and other matters protected by the Sixth Amendment? If not, why not?**

ANSWER: No. If the corporation waives the privilege, the Department assumes that attorneys for the corporation have already undertaken a thorough assessment as to whether the information to be disclosed relates to criminal defense strategies that the corporation does not want revealed.

If the corporation does not want the information disclosed to the government, it can decline the government's waiver request. If the corporation produces after such a request, it has waived the privilege. There is no necessity to create a privilege review team to review information for which the privilege has been waived.

Specter 119 **The McNulty Memo provides that prosecutors may still negatively weigh a corporation's refusal to disclose factual, privileged "Category I" information. Such information includes copies of key documents, witness statements, and reports containing investigative facts documented by counsel. To make such a request, a prosecutor must establish a "legitimate need" for the information and must obtain authorization from the United States Attorney, who must "consult" with the Assistant AG for the Criminal Division. What is the consultation that must take place for the prosecutor to make such a request, and may the request be made even without the Assistant AG's assent?**

ANSWER: Before acting on the request for Category I information, the United States Attorney must contact and consult with the Assistant Attorney General of the Criminal Division. It is anticipated that the United States Attorney will forward all the materials to the AAG who will review those materials and discuss with the United States Attorney whether the approval should be granted. Contact could take place telephonically or in-person, depending on the complexity of the request. Prosecutors in the Fraud Section of the Criminal Division will review the request for the AAG and provide input during the consultation process. After such consultation has occurred, the United States Attorney will decide whether to approve the request.

Specter 122 **May the corporation appeal the DOJ's decision to request the information or its possibly subsequent finding of non-cooperation as a result?**

ANSWER: There is no appeal process set forth in the McNulty Memorandum if a decision is made to charge the corporation, based in part on its lack of cooperation in the government's investigation. As a practical matter, corporations can, and often do, seek review by the Deputy Attorney General when they are notified that prosecution of a corporation is contemplated. The Deputy Attorney General may conduct an internal review of the charging decision and, where appropriate, meet with defense attorneys to consider their arguments.

Specter 128 **How can you reconcile these two very different tests for whether a suspected terrorist can be sent to a country or not?**

ANSWER: Please see our answer to question 141, below.

Specter 129 **Which test is the Administration currently applying to rendition cases?**

ANSWER: Please see our answer to question 141, below.

Specter 130 **Why?**

ANSWER: Please see our answer to question 141, below.

Specter 131 **Are you concerned that DoD and CIA efforts to collect information about US persons may be encroaching upon DOJ's jurisdiction?**

ANSWER: We do not view the authorized use by other agencies of non-binding requests for financial or other information pursuant to longstanding statutory authority as encroaching upon the jurisdiction of the Department. Congress has provided clear statutory authority for specified officials from the Department of Defense and other agencies to issue requests for certain information in connection with counterterrorism and counterintelligence investigations. *See* 12 U.S.C. § 3414(a)(1)(A) & (C) (authorizing disclosure of financial records to "a Government authority authorized to conduct foreign counter- or foreign positive-intelligence activities for purposes of conducting such activities" and to "a Government authority authorized to conduct investigations of, or intelligence or counterintelligence analyses related to, international terrorism for the purpose of conducting such investigations or analyses," respectively); 15 U.S.C. § 1681v(a) (authorizing disclosure of consumer credit information to "a government agency authorized to conduct investigations of, or intelligence or counterintelligence activities or analysis related to, international terrorism"); 50 U.S.C. § 436(a)(1) (authorizing disclosure of financial and consumer record information to "[a]ny authorized investigative agency . . . as may be necessary in order to conduct any authorized law enforcement investigation, counterintelligence inquiry, or security determination"). Executive Order 12333 further directs that certain counterintelligence activities conducted by the Department of Defense and the Central Intelligence Agency shall be coordinated with the Federal Bureau of Investigation. *See, e.g.*, Exec. Order No. 12333 § 1.8(c) (Dec. 4, 1981) (CIA shall "conduct counterintelligence activities within the United States in coordination with the FBI"); *id.* at § 1.11(d) (same obligation imposed on intelligence components within the Department of Defense). Executive Order 12333 further provides that agencies within the Intelligence Community may collect, retain, or disseminate information concerning United States persons only in accordance with procedures approved by the Attorney General. *Id.* at § 2.3. Therefore, as clear statutory authority exists and appropriate coordination is taking place, we do not view authorized requests for information by other agencies to encroach upon the Department's authority. Rather, it is an essential element of counterintelligence and counterterrorism activities that protect the national security of the United States.

Specter 132 **Is there adequate coordination between the DoD and DOJ?**

ANSWER: Yes. As required by Executive Order 12333 and other guidelines, the Department of Defense coordinates appropriately with the FBI in its conduct of counterintelligence investigations, a term that is defined to encompass the collection of information conducted to protect against international terrorist activities. *See* Executive Order 12333 § 1.11, 3.4(a).

Specter 133 **Are you concerned that DoD's activities may implicate the Posse Comitatus Act, which generally prohibits use of the military "to execute the laws" of the U.S.?**

ANSWER: No. The Department of Defense's requests for information do not appear to implicate the Posse Comitatus Act. The Act provides: "Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years." 18 U.S.C. § 1385. We understand that the Department of Defense makes requests for information under several statutes, namely the Right to Financial Privacy Act, the Fair Credit Reporting Act, and the National Security Act. Such actions are "expressly authorized by … Act of Congress" and would not implicate the Posse Comitatus Act. Moreover, apart from statutory authorization, the Department of Defense's requests for information would not appear to constitute the kind of military law enforcement activity that is subject to the Posse Comitatus Act. *See, e.g., Bissonette v. Haig*, 776 F.2d 1384, 1390 (8th Cir. 1985).

Specter 134 **Should we require audits and public reports regarding the use of NSLs by the DoD and CIA, similar to those required of the FBI?**

ANSWER: Questions concerning the scope of the reporting obligations of the Department of Defense and the Central Intelligence Agency should be directed to officials at those agencies, who will have more extensive understanding of the scope and nature of the information they provide to Congress and the potential national security implications of public reporting.

Specter 141 **Your prepared remarks for your speech at the International Institute for Strategic Studies in London, England, on March 7, 2006, asserted the following regarding renditions: "We do not transport anyone to a country if we believe it more likely than not that the individual will be tortured; and we seek assurances, where appropriate, that transferred persons will not be tortured. We do not use the airports or air space of any country in Europe or anywhere in the world for the purpose of transporting a detainee to a country where he will be tortured." However, on March 16, 2005, just one year earlier, President Bush promised that before a third-country "rendition" of a suspected terrorist can take place, the CIA must obtain from the receiving country "the promise that they**

won't be tortured." How can you reconcile these two different tests for whether a suspected terrorist can be sent to a country or not? Which test is the Administration currently applying to rendition cases? Why?

ANSWER: Article 3 of the Convention Against Torture ("CAT") requires that the United States not "expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." In ratifying the CAT, the Senate entered an understanding clarifying that the obligations of the United States under Article 3 would be triggered if the United States determined that "it is more likely than not that [the transferee] would be tortured." *See* 8 U.S.C. § 1231 note.

In making that determination, the United States relies on a variety of facts and circumstances, including diplomatic assurances from the recipient country that the detainee will not be tortured. Diplomatic assurances, however, are usually not the only basis for the determination, and indeed the CAT requires that the United States consider and determine what weight to give "all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights." CAT Art. 3(2).

The remarks of the Attorney General and the President both reflect these principles; they do not establish separate tests. The President's statement reflected the fact that, where appropriate, we rely on diplomatic assurances in making transfer decisions. But the President did not suggest that such assurances are the only relevant consideration. *See* Press Conference of the President (Mar. 16, 2006) ("In the post-9/11 world, the United States must make sure we protect our people and our friends from attack. That was the charge we have been given. And one way to do so is to arrest people and send them back to their country of origin with the promise that they won't be tortured. That's the promise we receive. This country does not believe in torture. We do believe in protecting ourselves."). The United States considers all the relevant circumstances in making transfer decisions, and regardless of diplomatic promises, we would not transfer an individual to a foreign country if we concluded that it is more likely than not that he would be tortured.

Specter 150 **Mr. Attorney General, three weeks before the November election, the Washington Post leaked information regarding the investigation of Congressman Curt Weldon and his daughter. The leak has been scrutinized because of the election being only weeks away. In my view, that is extraordinarily unfair and prejudicial. Has the Department of Justice determined the source of the leak and what is Department protocol for handling these types of leaks so close to an election?**

ANSWER: An internal review of this matter is being conducted by the FBI. Pursuant to longstanding DOJ policy against disclosing non-public information concerning pending matters, we are unable to provide a further response at this time. While the Department does not have a formalized protocol in connection with investigating suspected leaks based on their proximity to an election, individual components may have investigative protocols that are triggered by specified circumstances. For example, the FBI may consider leaks of Federal grand jury information to be tantamount to obstruction of justice, assigning the investigation of such leaks to its Public Corruption Section based on the nature of the material leaked. The proximity of a leak to an election would not, however, trigger a specific FBI investigative protocol.

Specter 153 **Several times, the FBI has refused to produce requested information to, or its agents for interviews with, the Judiciary Committee. Each time, they have claimed that existing DOJ policy bars them from producing this information or these agents, citing a letter, originally sent out in 2000, written by then Assistant Attorney General Robert Raben. However, the DOJ/FBI's reasoning behind this policy is not a correct reading of the law and/or history. (see CRS Report "Investigative Oversight" by Rosenberg, 1995) Does the DOJ still contend that Congress should not be given access to information regarding all pending investigations?**

ANSWER: We appreciate the Committee's interests in our law enforcement efforts, as well as your recognition that when investigations are pending, our confidentiality interests require particular protection. These interests, of course, pertain only to non-public information -- indictments, pleadings, and other documents we have placed in the public domain are readily available to the Committee. Our longstanding policy of protecting non-public information derives in part from our interest in avoiding any perception that our law enforcement and litigation decisions have been politically influenced or otherwise politicized. We trust that you share that goal and that we will work to find alternatives that satisfy legitimate Committee needs, consistent with our law enforcement and litigation responsibilities.

Specter 154 **If so, will they be willing to produce more supportive evidence for this policy?**

ANSWER: We have enclosed three additional documents that set forth these longstanding policies. They are letters from 1) Attorney General Reno to the Chairman of the Senate Judiciary Committee, dated May 17, 2000, responding to a Committee subpoena for Department records relating to the then pending investigation relating to Loral Space and Communications, Ltd.; 2) Attorney General William French Smith to the Chairman of the Subcommittee on Oversight and Investigations, House Committee on Energy and Commerce, dated November 30, 1982, regarding the Committee's effort to compel production of open law enforcement records of the Environmental Protection Agency; and 3) Attorney General Robert H. Jackson to the Chairman of the House Committee on Naval Affairs, dated April 30, 1941, regarding the Committee's request for Department documents, including records of the Federal Bureau of Investigation, pertaining to investigations of naval contracts.

Specter 158 **Mr. Attorney General, Recommendation 60 of the Iraq Study Group Report states that, "DOJ is better suited than the Department of Defense to carry out the mission of reforming Iraq's Ministry of the Interior and Iraq's judicial system." Has DOJ taken this recommendation into consideration and initiated a strategic plan to deal with the administrative procedures, codes of conduct, and operational measures that would be necessary?**

ANSWER: We have considered, and will continue to consider, the ISG's recommendations relating to or affecting the mission and work of the Department. These recommendations interrelate with many other ISG recommendations, as well as the work of other Executive Agencies and the Government of Iraq. It is our view that, while it does not adopt the ISG Report's DOJ-related recommendations verbatim, the President's announced New Way Forward addresses the essential elements of those recommendations. The Department will continue its discussions with its American and Iraqi partners regarding the Department's presence and efforts in Iraq, which will include discussion of the ISG's recommendations. As described at some length in the Answer to Question #1, and in the letter to Senator Leahy from Acting Assistant Attorney General Hertling, dated January 16, 2007, the Department has engaged in extensive efforts to help Iraqis build and maintain the law enforcement capacity necessary to promote the Rule of Law. Working with other Executive Branch Agencies, the Department will continue this vital work in support of the Iraqi Government.

Specter 160 **Is your lack of timeliness in responding [to questions for the record] a function of a lack of resources? What can we do ensure that this committee receives responses in more timely manner?**

ANSWER: We regret any inconvenience that may be caused by the time that is required for the Department to provided responses to questions for the records of hearing (QFRs). As you know, QFRs have become expansive requests that routinely set forth scores of multi-faceted questions seeking information about a variety of Department activities. Upon receipt at the Department, they are carefully reviewed and responsibility for drafting responses is assigned to the relevant components. Component responses then must be vetted within the Department and eventually circulated to the Office of Management and Budget (OMB) for clearance. This is an extremely labor intensive and time-consuming process that involves extensive resources both within and outside of the Department. We are pleased to devote these resources in order to respond to Committee interests and we are constantly searching for means to improve the timeliness of our responses. Any streamlining by the Committee of QFR documents could materially assist in reducing the time required for our responses.

Kennedy 161 **Please provide the Committee with an update on the status of implementation of section 637 of the Walsh Act, which mandated a Sex Offender Risk Classification Study. Under the Act, the Attorney General is required to report to Congress on the results of this study within 18 months after the Act's enactment date, July**

20, 2006. Would you be willing to work with Congress on the individuals to be selected to conduct this study?

ANSWER: Work on collection and compilation of the data for this report is in the early stages. The SMART Office will coordinate efforts for the successful completion of this study. Risk assessment, or risk-based sex offender classification, is currently employed by a number of states around the country, thereby allowing for evaluation of continuing data. The Attorney General is glad to work with Congress towards a successful completion of this report.

Kennedy 162 **As you mentioned in your testimony, the President appointed Laura L. Rogers to be Director of the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking at the Department of Justice, which was established by the Adam Walsh Act. Please provide the Committee with details on the current status and operations of the Office, as well as its plans for future activities.**

ANSWER: On November 29, 2006, the President appointed Laura L. Rogers to be Director of the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking at the Department of Justice.

Pursuant to Public Law 109-248, the Adam Walsh Child Protection and Safety Act, establishes the Sex Offender Sentencing, Monitoring, Apprehending, Registering and Tracking (SMART) Office. This Office will oversee the development of national standards for sex offender registration and notification. It will also serve as a focal point for coordinating federal assistance to State, local and tribal governments in the areas of sex offender registration and notification under the provisions of Public Law 109-248. It will also promote collaborative efforts to address issues related to sex offender registration and notification among all levels of government and

QUESTIONS FROM SENATOR KENNEDY

Kenndy 179 **The U.S. Marshal Service is America's oldest federal law enforcement agency, and its role continues to be indispensable to federal law enforcement today. It protects federal judges and witnesses, transports prisoners, apprehends fugitives, implements court orders and arrest warrants, and responds to terrorist incidents and civil disturbances. With the wide variety of its responsibilities it is essential for the Marshals service to have the appropriate leadership and staff in place in all parts of the country. Yet there is not a confirmed U.S. Marshal in place for 8 Districts, and in some Districts the position has been vacant since 2004. Without appropriate leadership, the Marshals Service cannot effectively protect our courtrooms, judges, their families and our communities. What is being done to fill these vacant positions as expeditiously as possible, in accordance with the requirements in the Patriot Act, particularly that the nominee have experience in coordinating with other agencies and in protecting court personnel, jurors, and witnesses?**

ANSWER: All U.S. Marshals, with the exception of the position in the U.S. Virgin Islands, are appointed by the President with the advice and consent of the Senate. Candidates for the position of U.S. Marshal are recommended to the President by the senior Member of Congress from the President's political party in the state where the vacancy exists. In cases where a state's entire Congressional delegation is from the party opposite the President, the White House determines from whom it will seek a recommendation.

Currently, eight of the 94 USMS districts do not have a confirmed U.S. Marshal. In regard to the district that has been vacant since November 2004, the Chief Deputy U.S. Marshal who leads the district was, in fact, the U.S. Marshal prior to that time. The other seven districts are lead by senior USMS Deputies, each of whom is an experienced leader. In these eight districts, the absence of a U.S. Marshal has not diminished the USMS' ability to effectively perform all its missions, especially the missions of protecting the judiciary and apprehending violent fugitives who prey on our communities.

Of the eight U.S. Marshal vacancies, one nomination expired with the end of the 109th Congress, three nominations are pending in the Senate, and four are in various stages of the selection process (background investigation, review of qualifications, interviews, etc.). We believe that all the candidates possess the law enforcement experience and attributes recommended in the USA PATRIOT Act.

Kennedy 181 **Will the report provide the detail we need to exercise our oversight authority, or will you withhold information based on a claim of executive authority?**

ANSWER: As provided by section 126 of the USA PATRIOT Improvement and Reauthorization Act, for each data mining initiative, as defined by section 126, the Department will provide a "thorough description of the pattern-based data-mining technology"; a "thorough discussion of the plans for the use of such technology"; an "assessment of the likely efficacy" of the initiative in "providing accurate and valuable information"; an "assessment of the likely impact of the implementation … on privacy and civil liberties"; an analysis of the applicable laws and regulations; and a "thorough discussion of the policies, procedures, and guidelines … protect[ing] the privacy and due process rights of individuals; and ensur[ing] that only accurate information is collected and used or account[ing] for the possibility of inaccuracy in that information and guard[ing] against harmful consequences of potential inaccuracies."

Kennedy 192 **On January 18, I asked you a series of questions about the authority of Congress during time of war. I asked whether you agreed with twenty-three leading constitutional scholars, who concluded (letter attached): "Congress may limit the scope of the present Iraq War by either of two mechanisms. First, it may directly define limits on the scope of that war, such as by imposing geographic restrictions or a ceiling on the number of troops assigned to that conflict. Second, it may achieve the same objective by enacting appropriations restrictions that limit the use of appropriated funds." Do you agree that Congress may limit the Iraq War through each of these means? Please explain.**

ANSWER: The Constitution provides Congress certain expressly enumerated powers regarding war and the Armed Forces, including the power of the purse, but it also vests the executive power in the President and makes him Commander in Chief. The Commander in Chief long has been understood, including by administrations of both parties, as having the authority to make and to implement the decisions that he deems necessary or advisable for the successful conduct of military missions in the field. Although it is difficult to answer this general question in the abstract, congressional efforts to define "limits on the scope of" the war in Iraq, whether directly or through appropriations restrictions, may well create constitutional difficulties.

Kennedy 193 **Do you believe that the President needed congressional authorization to take the country to war in Iraq? Please explain.**

ANSWER: In signing the Authorization for Use of Military Force Against Iraq Resolution of 2002, the President stated: "While I appreciate receiving that support, my request for it did not, and my signing this resolution does not, constitute any change in the long-standing positions of the executive branch on either the President's constitutional authority to use force to deter, prevent, or respond to aggression or other threats to U.S. interests or on the constitutionality of the War Powers Resolution." *See* 2 *Papers of George W. Bush* 1812 (Oct. 16, 2002). The Authorization itself, in its preamble, recognizes that "the President has authority under the Constitution to take action in order to deter and prevent acts of international terrorism against the United States."

Kennedy 194 **The original authorization to use force in Iraq was based on the purported need to remove the threat posed by the government of Iraq and to enforce U.N. Security Council Resolutions. Those purposes bear no relevance to the current activity of our troops in Iraq. As a legal matter, does the authorization remain valid as a basis for the current use of force in Iraq?**

ANSWER: The Authorization for Use of Military Force Against Iraq Resolution of 2002 provides that "[t]he President is authorized to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to--(1) defend the national security of the United States against the continuing threat posed by Iraq; and (2) enforce all relevant United Nations Security Council resolutions regarding Iraq." Pub. L. No. 107-243, § 3(a), 116 Stat. 1498, 1501 (2002). The Administration believes that there continues to be clear authority for U.S. military operations within the territory of Iraq based upon the Authorization and the President's constitutional authority. As the President has stated, success in Iraq is critical for the safety of the American people. Furthermore, as the Administration has consistently made clear in its regular report to the Congress consistent with the War Powers Resolution, the United States also continues to use military force to enforce relevant United Nations Security Council resolutions regarding Iraq.

Kennedy 195 **What would be the legal consequence if Congress were to repeal the authorization to use force in Iraq? Could American forces remain in Iraq?**

ANSWER: It is difficult to answer this question in the abstract. Among other things, the specifics of any repeal would be relevant, as would any other indications of congressional support, such as continued funding.

Kennedy 196 **The War Powers Resolution establishes a framework for consultation between the President and Congress before troops are sent into harm's way and while they remain there. It states that unless Congress has specifically authorized the use of troops, they must be withdrawn by the President within 60 days. Do you accept that the President is bound to act in conformity with the War Powers Resolution?**

ANSWER: A memorandum from the Office of Legal Counsel regarding the War Powers Resolution ("WPR") can be found at *Overview of the War Powers Resolution,* 8 Op. O.L.C. 271 (1984). It addresses the WPR's consultation, reporting, and withdrawal requirements, among other things, and discusses Executive Branch practice; it also notes the Executive Branch's longstanding position that section 2 of the WPR "does not constitute a legally binding definition of Presidential authority to deploy our armed forces." *Id*. at 274. In the context of Iraq, of course, the Authorization for Use of Military Force expressly states that it constitutes statutory authorization under the WPR.

Kennedy 197 **How many interim United States Attorneys are now serving?**

ANSWER: The Department has an obligation to ensure that someone is able to carry out the important function of leading a U.S. Attorney's Office during the period when there is not a Presidentially appointed, Senate-confirmed United States Attorney. While the Department often looks to the First Assistant U.S. Attorney to serve as U.S. Attorney on an interim basis, it looks to other qualified Department employees as well. Fifteen U.S. Attorneys currently serve on an interim basis (14 by Attorney General appointment and one by court appointment) and six Acting U.S. Attorneys currently serve under operation of the Vacancies Reform Act.

Kennedy 198 **Please state the date that each was appointed to his or her current position, and the time that elapsed between the departure of the confirmed United States Attorney and the appointment of the interim United States Attorney.**

ANSWER: Please see the attached chart.

Kennedy 199 **Please state whether a replacement has been nominated for each position and when each replacement nomination was sent to the Senate.**

ANSWER: The President has nominated two individuals for U.S. Attorney positions currently held by an interim U.S. Attorney. They are Rosa Rodríguez-Vélez, District of Puerto Rico (nominated 1/16/07 and currently the interim U.S. Attorney) and Jeffrey Taylor, District of Columbia (nominated 2/27/07 and currently the interim U.S. Attorney). Another individual nominated for a position held by an interim U.S. Attorney—John Wood, Western District of Missouri—was confirmed by the Senate on 3/29/07.

Kennedy 218 **Under the No Fear Act, federal agencies must notify employees and applicants for employment about their rights to be free from discrimination and retaliation based on whistleblower activities. On November 2, 2006, the Department issued a notice under the Act, which failed to mention that, as provided in Executive Orders 13,087 and 13,153, federal civilian workers are protected from discrimination based on sexual orientation and parental status. Other federal agencies, such as the Department of Commerce, include these important protections in their No Fear Act notice. (a) Please explain why the notice failed to mention the federal protection from sexual orientation discrimination and parental status discrimination.**

ANSWER: The Office of Personnel Management (OPM) issued final regulations concerning the implementation of Title II of the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 - Notification & Training on July 20, 2006 (see Federal Register Vol. 71, No. 139, Thursday, July 20, 2006). These final regulations to carry out the notification and training requirements of the No Fear Act included model language to be used by agencies when drafting the required "No Fear Act Notice." The model language does not include the terms "sexual orientation" or "status as a parent." However, the Department of Justice's web-based training for employees includes both sexual orientation and status as a parent, as does the Department's Human Resources Order (DOJ 1200.1)

Kennedy 219 **Please indicate when the Department will correct this omission in its No Fear Act notice and provide the Committee with a copy of the corrected notice mentioning the protections against discrimination based on sexual orientation and parental status.**

ANSWER: The Department used the model language required government-wide by OPM in the Federal Register (Vol. 71, No. 139, Thursday, July 20, 2006).

Kennedy 236 **Are you concerned about the finding of GAO that the 24-hour record destruction requirement will make it harder to retrieve guns from criminals who were wrongly approved for gun purchases?**

ANSWER Under the NICS regulation as revised pursuant to the Omnibus Act, the FBI continues to retain for not more than 90 days non-identifying information 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 provides the NTN, which the agency can reference in any response to the NICS. By retaining the FFL and the NTN numbers for up to 90 days, the FBI is 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 Form and must keep those forms for 20 years if the firearm is transferred. As a result, the FBI retains 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 helps ensure that firearm retrievals can continue under the language of the Omnibus Act.

Kennedy 237 **When Attorney General Ashcroft proposed the 24-hour record destruction requirement, he said it was necessary to protect the privacy of gun buyers. Do you believe the retention of background check records for 90 days is such a serious invasion of the privacy rights of gun owners that such privacy concerns override the need to prevent the sale of guns to criminals?**

ANSWER: Congress intended to protect the privacy of lawful gun buyers by requiring in the Brady Act that the NICS destroy all system information about proceeded firearms transfers except for the transaction number and the date of the transaction. After a series of regulatory attempts by the Department to define the appropriate retention period to account for those privacy interests, Congress determined in the Omnibus Act to set the retention period at 24-hours.

QUESTIONS FROM SENATOR BIDEN

Biden 247 **With respect to the September 25, 2001 Office of Legal Counsel memorandum entitled, "The President's Constitutional Authority to Conduct Military Operations against Terrorists and Nations Supporting Them:" Has this memorandum been rescinded or is it still operative legal guidance for this Administration?**

ANSWER: This memorandum has not been rescinded.

Biden 248 **Has the Office of Legal Counsel written any subsequent memoranda on the issue of the President's Constitutional authority to conduct military operations? If so, please provide me with copies.**

ANSWER: The Office has not published or otherwise released any subsequent memoranda on this issue, apart from a brief discussion in a Memorandum Opinion for the Deputy Counsel to the President from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Constitutional Issues Raised by Commerce, Justice, and State Appropriations Bill* (Nov. 28, 2001), *available at* www.usdoj.gov/olc/opinions.htm.

Biden 249 **The September 25, 2001 memorandum states, "the Framing generation well understood that declarations of war were obsolete." It goes on to note that, "if the Framers had wanted to require congressional consent before the initiation of military hostilities, they knew how to write such provisions." Please elaborate further on what exactly this means.**

ANSWER: With regard to the first quotation in the question, the memorandum explains that "during the seventeenth and eighteenth centuries, Great Britain and colonial America waged numerous conflicts against other states without an official declaration of war" and quotes Alexander Hamilton's observation in *The Federalist* that "the ceremony of a formal denunciation of war has of late fallen into disuse." *See* Memorandum Opinion for the Deputy Counsel to the President from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them* at 3 & n.8 (Sept. 25, 2001) ("*Operations Against Terrorists*"), *available at* www.usdoj.gov/olc/opinions.htm. (The citation uses the pagination of the memorandum on the Office's Web site.) With regard to the second quotation in the question, the memorandum explains the distinction between the power to "declare" war and the broader power to "make" (or "engage in") war and that the Constitutional Convention specifically changed the congressional power from "make" in an earlier draft to "declare." *Id*. at 3 & n.7.

Biden 250 **The memo also states, "In the exercise of his plenary power to use military force, the President's decisions are for him alone and are unreviewable." Please elaborate.**

<u>ANSWER:</u> The quotation in the question comes from the memorandum's final footnote. The full footnote, and the sentence in the main text to the end of which the footnote is attached, provide elaboration. The latter (quoted below in your next question) states: "Military actions need not be limited to those individuals, groups, or states that participated in the attacks on the World Trade Center and the Pentagon: the Constitution vests the President with the power to strike terrorist groups or organizations that cannot be demonstrably linked to the September 11 incidents, but who, nonetheless, pose a similar threat to the security of the United States and the lives of its people, whether at home or overseas." *Operations Against Terrorists* at 16. The full footnote then states:

> We of course understand that terrorist organizations and their state sponsors operate by secrecy and concealment, and that it is correspondingly difficult to establish, by the standards of criminal law or even lower legal standards, that particular individuals or groups have been or may be implicated in attacks on the United States. Moreover, even when evidence sufficient to establish involvement is available to the President, it may be impossible for him to disclose that evidence without compromising classified methods and sources, and so damaging the security of the United States. *See, e.g.*, *Chicago & Southern Air Lines, Inc.*, 333 U.S. at 111 ("The President . . . has available intelligence services whose reports are not and ought not to be published to the world."); *see also* Ruth Wedgwood, *Responding to Terrorism: The Strikes Against Bin Laden*, 24 Yale J. Int'l L. 559, 568-74 (1999) (analyzing difficulties of establishing and publicizing evidence of causation of terrorist incidents). But we do not think that the difficulty or impossibility of establishing proof to a criminal law standard (or of making evidence public) bars the President from taking such military measures as, in his best judgment, he thinks necessary or appropriate to defend the United States from terrorist attacks. In the exercise of his plenary power to use military force, the President's decisions are for him alone and are unreviewable.

Id. n.32.

Biden 251 **The memo also states: "we think it beyond question that the President has the plenary constitutional power to take such military actions as he deems necessary and appropriate to respond to the terrorist attacks upon the United States on September 11, 2001. Force can be used both to retaliate for those attacks, and to prevent and deter future assaults on the Nation. Military actions need not be limited to those individuals, groups, or states that participated in the attacks on the World Trade Center and the Pentagon: the Constitution vests the President with the power to strike terrorist groups or organizations that cannot be demonstrably linked to the September 11 incidents, but that, nonetheless, pose a similar threat to the security of the United States and the lives**

of its people, whether at home or overseas." Please elaborate on the Department's view of the scope of the legal authority related to the underlined passage above.

ANSWER: As discussed in the memorandum, this passage rests on (and concludes) a detailed analysis of "the text, plan and history of the Constitution, its interpretation by both past Administrations and the courts, the longstanding practice of the Executive Branch, and the express affirmation of the President's constitutional authorities by Congress." *Operations Against Terrorists* at 16. The scope of this constitutional authority of the President in any specific situation is of course "likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

Biden 252 **The memo also states: "From the very beginnings of the Republic, the vesting of the executive, Commander-in-Chief, and treaty powers in the executive branch has been understood to grant the President plenary control over the conduct of foreign relations…. Conducting military hostilities is a central tool for the exercise of the President's plenary control over the conduct of foreign policy…. Construing the Constitution to grant such power to another branch could prevent the President from exercising his core constitutional responsibilities in foreign affairs." Please elaborate on the specific meaning of "plenary" as used in the passage above.**

ANSWER: The September 25, 2001, memorandum quotes Thomas Jefferson, Alexander Hamilton, and John Marshall in support of its interpretation of presidential authority over the conduct of foreign relations. For example, Marshall, while a Member of Congress, stated: "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." *See Operations Against Terrorists* at 4-5. The Office of Legal Counsel in 1995 elaborated on the President's control over the conduct of foreign relations as follows: "It is well settled that the Constitution vests the President with the exclusive authority to conduct the Nation's diplomatic relations with other States. This authority flows, in large part, from the President's position as Chief Executive, U.S. Const. art. II, § 1, cl. 1, and as Commander in Chief, *id*. art. II, § 2, cl. 1. It also derives from the President's more specific powers to 'make Treaties,' *id*. art. II, § 2, cl. 2; to 'appoint Ambassadors . . . and Consuls,' *id*.; and to 'receive Ambassadors and other public Ministers,' *id*. art. II, § 3." *Bill to Relocate United States Embassy From Tel Aviv to Jerusalem*, 19 Op. O.L.C. 123, 124 (1995). The Supreme Court similarly has "recognized 'the generally accepted view that foreign policy was the province and responsibility of the Executive.'" *Department of Navy v. Egan*, 484 U.S. 518, 529 (1988) (quoting *Haig v. Agee*, 453 U.S. 280, 293-94 (1981)).

Biden 268 **Do you believe that local crime is a purely local problem, or do you believe that the federal government has a role to play in combating local crime?**

ANSWER: The Department of Justice plays a significant role in combating local crime. Not only does the Department have grant programs to assist states and locals in combating local crime, the Department continues to do everything within its power to aggressively investigate and prosecute those who violate federal law.

Biden 269 **Do you agree that national, and even international, problems may have a local impact and may manifest themselves in local crime?**

ANSWER: Some national and international problems, such as drug trafficking, clearly do manifest themselves in local crime.

Biden 270 **Please state the Department's position on the appropriate role of the federal government in supporting local law enforcement and combating local crime.**

ANSWER: The Department's role is to work in partnership with state and local law enforcement and prosecutors to ensure that federal resources are utilized in the most effective way and in coordination with local resources.

QUESTIONS FROM SENATOR FEINSTEIN

Feinstein 280 **Background: In December 2006, the President issued a signing statement in which he claimed the right to open mail in "exigent circumstances" or in situations "specifically authorized by law for foreign intelligence collection." The signing statement gives one example of "exigent circumstances": to "protect human life and safety against hazardous materials." What are other examples of "exigent circumstances" in which the Administration believes it would have the authority to open mail without a warrant?**

ANSWER: The Supreme Court has held that, under the Fourth Amendment, "[t]he need to protect or preserve life or avoid serious injury is justification" for a warrantless search. *Mincey v. Arizona*, 437 U.S. 385, 392 (1978) (internal quotation omitted). During the Clinton Administration, the United States Postal Service promulgated a regulation describing such "exigent circumstances." *See* 39 C.F.R. § 233.11(b); 61 Fed. Reg. 28,059 (June 4, 1996). That regulation provides:

> Mail, sealed or unsealed, reasonably suspected of posing an immediate danger to life or limb or an immediate and substantial danger to property may, without a search warrant, be detained, opened, removed from postal custody, and processed or treated, but only to the extent necessary to determine and eliminate the danger and only if a complete written and sworn statement of the detention, opening, removal, or treatment, and the circumstances that prompted it, signed by the person purporting to act under this section, is promptly forwarded to the Chief Postal Inspector.

That regulation describes the circumstances under which mail or parcels may be opened because of "exigent circumstances." We understand that "exigent circumstance" searches are initiated when a postal inspector observes a suspicious package and concludes it may contain an explosive device or other material posing an immediate danger to life or limb or an immediate and substantial danger to property. Packages may be suspicious, for example, because they are vibrating, making noises consistent with a timing device that may be attached to explosives, or leaking suspicious substances consistent with explosives or hazardous material.

Feinstein 281 **Turning to the other category the President mentioned, what are the specific laws that authorize opening the mail for foreign intelligence collection?**

ANSWER: Congress has enacted at least four provisions that "specifically authorize[]" searches of first-class mail without first obtaining a court order or search warrant. Section 304 of FISA, 50 U.S.C. § 1824(e), specifically authorizes the Attorney General, under certain circumstances, to authorize the execution of an emergency physical search of property, including property that "is in transit to or from an agent of a foreign power or a foreign power," provided that he thereafter obtains an order from the Foreign Intelligence Surveillance Court authorizing the search within 72 hours. Section 302 of FISA, 50 U.S.C. § 1822, specifically authorizes the Attorney General to "authorize physical searches without a court order . . . to acquire foreign intelligence information" if directed against information, material, or property "used exclusively by, or under the open and exclusive control of, a foreign power or powers." Section 1583(a)(1) of title 19, United States Code, explicitly provides: "a Customs officer may . . . stop and search at the border, without a search warrant, mail of domestic origin transmitted for export by the United States Postal Service and foreign mail transiting the United States that is being imported or exported by the United States Postal Service." Section 1583(c) of title 19, United States Code, provides, "Mail weighing in excess of 16 ounces sealed against inspection . . . may be searched by a Customs officer, subject to paragraph (2), if there is reasonable cause to suspect that such mail contains" certain items, such as monetary instruments, weapons of mass destruction, drugs, national defense or related information and merchandise; note, however, that the statute requires a judicial warrant or consent before any correspondence found during the search may be read. *See also United States v. Ramsey*, 431 U.S. 606, 616 (1977) (holding that Fourth Amendment permits warrantless searches of mail at international border).

Feinstein 287 **When the Department of Defense and the Central Intelligence Agency send "informal" National Security Letters, what makes it clear to the recipient that their response is voluntary?**

ANSWER: This question is more appropriately addressed to officials at the Department of Defense and the Central Intelligence Agency.

Feinstein 288 **What restrictions exist that limit the Defense Department's or CIA's ability to take adverse actions against companies that refuse its "informal" National Security Letter requests?**

ANSWER: It is our understanding that, in contrast to NSLs issued by the FBI, requests for certain information issued by the Department of Defense or the CIA are not legally binding upon the recipient of the request. For example, the Right to Financial Privacy Act requires that a financial institution "shall comply" with an NSL request issued by the FBI, and only where the Director or a specified designee has certified that such records are sought for foreign counterintelligence or counterterrorism purposes. 12 U.S.C. § 3414(a)(5). There is no such provision for requests made by other agencies, such as the Department of Defense and the CIA, pursuant to section 3414(a)(1) (c*ompare also* 15 U.S.C. § 1681u(a), (c) (FBI NSL letters) *with* 15 U.S.C. § 1681v(a)(1) (information requests from other agencies authorized to conduct counterintelligence and counterterrorism investigations). We are not aware of other restrictions or limitations upon the information-requesting authority of other agencies. We suggest that you direct this question to the Department of Defense or the CIA for additional information.

Feingold 291 **Did any FISC judge at any point deny or seek modifications of any application or applications the Administration made to bring the NSA wiretapping program under FISA?**

ANSWER: Details on this matter have been provided in briefings to the Intelligence Committees and have been made available to the Chairmen and Ranking Members of both Judiciary Committees.

Feingold 299 **The only way that a decision of the FISA court can be appealed to the FISA Court of Review is if the government loses. Please confirm that under the statute, there is no way that the FISA court judge's decision to issue the orders you describe in your letter will ever be reviewed by either the FISA Court of Review or the Supreme Court.**

ANSWER: FISA provides that the Foreign Intelligence Surveillance Court of Review "shall have jurisdiction to review the *denial* of any application made under this Act." 50 U.S.C. § 1803(b) (emphasis added). Approvals are not subject to appeal under the statute. FISA orders for electronic surveillance are subject to periodic renewals, 50 U.S.C. § 1805(e), and FISA also contains processes for aggrieved persons to challenge certain evidence obtained or derived from an electronic surveillance under FISA if that evidence will be introduced or used against them in a trial, hearing, or other proceeding, 50 U.S.C. § 1806(e).

Feingold 303 **Last year the Administration supported S. 3931, legislation that would have rendered the FISA statute essentially optional. But there was another little-noticed provision in this bill. It included a provision that would have repealed one of the changes, made just a year ago in the Patriot Act reauthorization process, to deal with the problem of "John Doe" roving intelligence wiretaps, which would not identify the person or the phone to be wiretapped. Did anyone in the Administration request that this provision be included in the bill? Is the Administration seeking the authority to issue John Doe roving taps?**

ANSWER: S. 3931, like other bills introduced last year, would have made many critically important changes to FISA, including amending the definition of "electronic surveillance" to restore the statute to its original focus of protecting the privacy of U.S. persons in the United States.

Although the Department provided technical assistance with several bills designed to modernize FISA, including S. 3931, we are unaware that anyone in the Department or the Administration sought this specific change. In any event, we are not aware of any pending legislative proposal that would repeal the provisions of FISA that you reference. We continue to believe, however, that FISA must be modernized. This would serve to protect our national security better while also increasing privacy protections. We are eager to work with Congress to accomplish this goal.

Feingold 310 **The 2005 FBI Uniform Crime Report shows a startling increase in violent crime, reporting the largest single year percent increase in violent crime in fourteen years. The figures from the Midwest—and Wisconsin in particular—are especially troubling. While violent crime increased 2.3% overall at the national level, in the Midwest crime increased 5.6% and in Wisconsin it increased 15.8%. The 2006 FBI interim report also shows a continued rise in violent crime rates. I am hearing from law enforcement back in Wisconsin that this is a very real problem—and not just in the big cities. Yet you opened your discussion of violent crime by stating that "the overall violent crime rate is down, near a 30-year low." In response to a question from Senator Kohl, you distinguished his characterization of the problem as a "crime wave" from your own estimation that there were "increases, disturbing trends, with respect to certain areas of the country and certain-size communities." This suggests to me that you may not agree that the situation is as dire as the news reports or law enforcement officials in Wisconsin suggest. (a) Do you believe that the statistics cited above accurately reflect what is happening in our communities or is there another explanation for these statistics?**

ANSWER: According to the Uniform Crime Reports from the FBI, the violent crime rate in Wisconsin rose sharply in 2005 (up 15%) – representing the largest increase among the 12 Midwestern states. Nevertheless, violent crime in Wisconsin (241 per 100,000) is lower than in all but 2 of the 12 Midwestern states (only North and South Dakota have lower rates).

The 2004 violent crimes rates in Wisconsin were especially low (at 210 per 100,000, having dropped steadily for a decade). The violent crime rate in 2005 was the highest since 1999 (246 per 100,000).

The statewide increases in violent crime were attributable to a sharp increase in Milwaukee in aggravated assaults (from 1,823 in 2004 to 2,804 in 2005) and robberies (from 2,551 to 2,927). Overall, three-quarters of the rise in number of violent crimes statewide occurred in Milwaukee. The number of violent crimes in Milwaukee rose by 1,373, while in the rest of the state the violent crimes rose by 450 during 2005.

The crime trends in Milwaukee mirror trends recorded in other large cities in the Midwest. Sharp increases in robbery, for example, were reported in 2005 for cities including Detroit, Minneapolis, St. Louis, Kansas City, Des Moines, Indianapolis, and Cleveland.

Feingold 312 **Law enforcement officers in my state are struggling to respond to the increase in the violent crime rates in their communities and tell me they are particularly affected by the decrease in federal spending on domestic crime fighting initiatives. In the past you have stated that the decision to decrease funding "reflects a decision by the administration that this is a program that either is no longer efficient or effective, that there is a better way to address the particular problem." Explaining your answer more**

fully in response to my Question for the Record from the July 2006 DOJ oversight hearing, you noted that in 2002 the COPS program was rated as "results not demonstrated," but also noted the OMB has developed new performance measures to evaluate COPS since then. When every state and local law enforcement official I speak to emphasizes the importance of COPS, I am inclined to believe this is something we should be funding. Your own testimony before the committee talked about the importance of having crime responses tailored to the "particular circumstances" of each city, something that COPS funding certainly promotes. (a) What are the new OMB performance measures that you reference?

ANSWER: In working with local law enforcement over the years, the Department, including the COPS program, has amassed a wealth of knowledge on community policing, law enforcement best practices, and other information of strategic value that is useful to local law enforcement. Recently, the COPS Office developed a new set of annual and long term performance measures. The new measures focus on the COPS Office performance in meeting its mission to advance community policing and place an additional emphasis on the COPS Office's performance related to providing knowledge resource products (training/technical assistance and publications) to state, local and tribal law enforcement. The new measures completed two PART follow-up actions requiring better long term goals focused on criminal justice outcomes and better evaluation strategies to assess effectiveness of program performance.

Following is the breakdown of outcome and output annual and long term performance measures:

Outcome: Average community policing capacity implementation rating (0 to 100) of grantees

Outcome: Percent of U.S. population served by local police departments engaged in community policing activities

Output: Improve knowledge resource recipient satisfactions rating

Outcome: Average community policing capacity implementation rating (1 to 100) of knowledge resource recipients

Outcome: Total number of COPS knowledge resource products requested

Output: Number of publications distributed

Output: Number of people trained

Feingold 313 **Has OMB made any findings pursuant to these new performance measures?**

ANSWER: With the exception of the number of people trained, these are new measures and will be tracked beginning in FY 2008.

Feingold 314 **Are you willing to reconsider your position on COPS funding?**

ANSWER: Every year the Department and OMB evaluate the needs of state, local, and tribal law enforcement. The annual budget reflects the current and emerging needs. The FY09 budget process will convene in early 2007, and will again address the needs of state, local, and tribal law enforcement.

Feingold 329 **The Commission on Safety and Abuse in America's Prisons also recommended that reforms be made to the laws governing the Medicaid and Medicare eligibility of prisoners, suggesting that correctional facilities should be able to receive federal funds to help cover the costs of providing health care. In general, the recommendations raise concerns regarding both the availability of federal funds for care provided at the pre-conviction and post-conviction phases and the process by which former inmates are returned to the rolls following release. The Commission report argues that this is a matter of public health as well as one of fiscal responsibility. (a) Based on the Commission's report, do you believe that reforms to the Medicaid and Medicare rules governing the incarcerated are warranted?**

ANSWER: With regard to individuals incarcerated in Federal prisons, the Bureau of Prisons (BOP) is required by statute to provide for the custody and care of offenders sentenced to imprisonment for Federal crimes, as well as the District of Columbia's sentenced felon inmate population. The BOP provides for the care and confinement of inmates using appropriated funds. Seeking payment through either Medicare or Medicaid to meet the medical care needs of inmates in BOP custody is not necessary.

Feingold 330 **If so, what types of reforms do you think might be most appropriate for further consideration or legislative action?**

ANSWER: Please see our answer to question 329, above.

QUESTIONS FROM SENATOR SCHUMER

Schumer 341 **In September 2006, the Department of Justice Inspector General released a report on "The Federal Bureau of Prisons' Monitoring of Mail for High-Risk Inmates." The Inspector General concluded that the Bureau of Prisons (BOP) is not adequately monitoring the mail and phone calls of terrorists in American prisons and that the Federal Bureau of Investigation (FBI) is not coordinating adequately with the BOP on intelligence activities in prisons. What agency has the lead responsibility for preventing terrorist recruitment and investigating possible terrorist activity in federal prisons?**

ANSWER: The National Joint Terrorism Task Force (NJTTF) has the lead regarding terrorism matters in correctional institutions, including BOP facilities. The NJTTF directly addresses this tasking through the Correctional Intelligence Initiative, which is designed to detect, deter, and disrupt efforts by terrorist or extremist groups to radicalize or recruit in Federal, state, and local prisons. All Federal prisons are directly included in the Correctional Intelligence Initiative program and BOP intelligence staff are primary partners in this nationwide initiative.

The BOP has two full-time employees assigned to the NJTTF to facilitate its involvement on this task force and to coordinate the exchange of intelligence related to corrections. These two members of the NJTTF manage the Correctional Intelligence Initiative (CII). This initiative involves training of correctional administrators by each local JTTF; exchange of intelligence; communicating best practices to local JTTFs in order to detect, deter, and disrupt radicalization; and coordination of liaison and intelligence-sharing activities between local JTTFs and correctional agencies.

Through the NJTTF's Correctional Intelligence Initiative, intelligence regarding any attempts by inmates, religious providers, or others to radicalize any segment of the population is gathered and shared, and interdiction action is taken by the appropriate law enforcement authority.

A primary concern of ours is the prevention of radicalization in Federal prisons. The Department of Justice is committed to ensuring that Federal prisoners are not radicalized or recruited for terrorist causes. We know that inmates are particularly vulnerable to radical recruitment and we must guard against the spread of terrorism and extremist ideologies. The BOP's practices in institution security and inmate management are geared toward the prevention of any violence, criminal behavior, disruptive behavior, or other threats to institution security or public safety, including the radicalization of inmates.

The BOP has taken a number of significant measures and is actively engaged in several ongoing initiatives to ensure that Federal inmates are not recruited to support radical organizations or terrorist groups. The BOP eliminated most inmate organizations in order to control the influence that outside entities have on Federal inmates. The agency enhanced its information and monitoring systems, its intelligence gathering and sharing capabilities, and its identification and management of disruptive inmates.

The BOP screens all civil service staff, volunteers, and contractors to avoid hiring or contracting with anyone who would pose a threat to institution security; and the BOP continues to work closely with the FBI and the NJTTF with regard to the screening of religious service providers. Information on staff chaplains and on contractors and volunteers (whether the contractor or volunteer is being considered to help provide religious services or not) is checked against databases supported by the FBI. The support that has been provided by the FBI, the agencies represented on the NJTTF, other components of the Department of Justice, and many other members of the law enforcement and intelligence communities has been invaluable in our efforts in this area.

Schumer 342 **Do you think it would be helpful to establish a high-level task force to improve coordination between the FBI and BOP to address issues associated with individuals suspected and convicted of terrorism in federal custody? The current strategy of BOP participation on local Joint Terrorism Task Forces does not seem to be effective.**

ANSWER: As discussed above, the NJTTF has the designated lead for addressing this issue and is taking active steps to continually expand and improve the Correctional Intelligence Initiative (CII) program. These efforts include ensuring an effective intelligence partnership between the FBI and BOP both at the agency level and at the local correctional institution level. This CII partnership between the FBI and BOP receives active executive support from both agencies, and BOP intelligence staff directly assigned to the NJTTF have access to FBI information systems. Intelligence sharing protocols and FBI training for BOP intelligence staff are continually being improved. We believe the NJTTF is the correct "high-level task force" to directly address and manage this issue.

For more than a decade, the BOP has managed inmates determined to have ties to terrorism by confining them in more-secure conditions and by closely monitoring their communications. The BOP's strategy focuses on the appropriate levels of containment and isolation to ensure that inmates with terrorist ties do not have the opportunity to radicalize or recruit other inmates. All inmates determined to have terrorist ties are clearly identified and tracked in the BOP's information systems. The most dangerous terrorists are confined under the most restrictive conditions allowed.

The BOP has worked diligently to enhance its intelligence gathering and sharing capabilities to ensure a seamless flow of intelligence information between the BOP and other law enforcement and counter-terrorism agencies. The BOP monitors and records all telephone communication (except attorney-client conversations) involving inmates with terrorist ties and shares any relevant information with the FBI, the NJTTF, and other agencies. BOP institutions work closely with local Joint Terrorism Task Forces to share information and intelligence about these inmates.

Schumer 345 **What other specific steps, if any, have you taken to ensure that prison staff have the information they need to keep terrorism-related inmates secure and to keep communities and correctional staff safe?**

ANSWER: As mentioned above, the BOP recently activated a Counter Terrorism Unit to coordinate a variety of counter-terrorism activities within the agency. Among these activities are the production and distribution of intelligence-related documents to BOP staff and the development and provision of counterterrorism training programs for BOP staff. The Unit also monitors and analyzes terrorist inmate communications and coordinates and shares information and intelligence with other correctional and law enforcement agencies.

In addition, BOP staff receives basic correctional skills training at the beginning of their career, and on an annual basis BOP employees receive additional training that addresses current security and inmate management issues. Since 2004, the BOP has included a training segment titled "Terrorism Management and Response" in Annual Training for all BOP staff. In addition, Religious Services personnel present a segment during Annual Training that emphasizes an awareness of discriminatory language, behaviors, rhetoric, and speech that could indicate the presence of radical ideology present in the inmate population.

In 2003, the BOP distributed a Terrorism Training for Law Enforcement CD, developed by the Bureau of Justice Assistance, to all of its facilities. The BOP is in the process of distributing the updated 2006 version of the Terrorism Training for Law Enforcement CD to all institutions.

Every BOP facility has one or more special investigative supervisors/special investigative agents who serve as the focal point in the BOP's efforts to manage all security threat groups, including terrorists. This staff helps identify and track members and associates, monitor mail and telephone communications, provide enhanced supervision of identified security threat group members, and share intelligence on the activities of any security threat group. Special investigative agents serve as a liaison to the FBI, U.S. Marshals Service, and U.S. Secret Service regarding the activities of security threat group members and the investigation of criminal activity in BOP facilities.

Special investigative supervisors and special investigative agents receive specialized training in the control and management of terrorist inmates. In 2004 and 2005, special investigative supervisors and special investigative agents from every BOP institution received special terrorist management training. In December 2006, twenty BOP intelligence staff participated in a 35-hour intelligence gathering and analysis training course provided by the FBI. Two additional classes are planned for special investigative supervisors and special investigative agents in May and June of 2007.

BOP chaplains receive specialized training to ensure they have the necessary information about each religion to oversee and manage religious services and programs effectively. The BOP has prepared a comprehensive technical reference manual that describes appropriate religious services procedures and behaviors. The manual is available for use by any staff member overseeing a religious service or activity. Thirty BOP chaplains recently participated in mandatory training designed to enhance their awareness and knowledge about identifiers of radical religious groups. The training will be repeated each year until all BOP chaplains have attended.

In addition to containing and isolating inmates who could attempt to radicalize other inmates, the BOP helps inmates become less vulnerable to attempts to be radicalized through the provision of sound correctional programs. Some experts have identified the societal marginalization of inmates as a key factor in their becoming radicalized. The BOP provides inmates with a broad variety of programs that have been proven to assist in the development of key skills, thereby minimizing the likelihood of the inmates being marginalized. These programs include work (including prison industries), vocational training, education, and drug treatment. The BOP has for many years worked diligently and with great success, at targeting these programs toward inmates with substantial needs. The result has been demonstrable gains in the effort to return inmates to society with the skills necessary to become productive, law-abiding members of society.

Schumer 346 **As you know, the FBI is also responsible for monitoring inmates who are being held under Special Administrative Measures (SAMs). Do you think that this fact creates a disincentive for agents to identify terrorist suspects as needing SAMs or other restrictions when they enter federal custody?**

ANSWER: In the course of their investigations, FBI agents routinely assess what steps are necessary to advance our national security, making these assessments without regard to the amount of work they may require.

Schumer 356 **Please provide a list of the matters related to the November 7, 2006, election that are or were under investigation by the Civil Rights Division, the Criminal Division, or any other unit of the Department of Justice. For each matter on the list, please include the location of the activity, the nature of the matter, the legal basis for the investigation, the Division or Divisions handling the matter, and the conclusion reached by that Division.**

ANSWER:

A. Civil Rights Division - Voting Section

In November 2006, the Department opened multiple phone lines in order to handle calls from citizens with election complaints and maintained an internet-based system for reporting problems. On or about November 7, 2006, the Voting Section received approximately 147 calls and 94 e-mail contacts through its website. These 241 election day contacts raised approximately 351 issues, as some contacts raised multiple issues.

On election day, we were able to resolve all issues raised by approximately 36 of the 241 election day contacts we received. Of the additional election day contacts, 6 simply provided comments, and 7 individuals contacted us seeking only election-related information, such as where they should go to vote.

The information provided to us by approximately 150 of these election day contacts did not indicate a possible violation of any of the federal laws the Department enforces. For example, a number of voters called complaining about an isolated mechanical failure of an individual piece of voting equipment.

As a result of pre-election investigation and outreach, the Department assigned more than 800 federal observers and Department monitors to selected polling places across the country. Approximately 470 federal observers from the Office of Personnel Management and 358 Department of Justice staff monitored the general election in 69 jurisdictions in 22 states in areas that we determined warranted scrutiny to prevent and document possible violations of voting laws. Election monitoring, among other things, involved receiving numerous calls and contacts within the course of the site monitoring. Consistent with past practice, Department personnel addressed and documented potentially discriminatory practices regardless of whether they were the subject of a formal complaint.

After Election Day, we reviewed all complaints and determined which matters warranted additional action. We have since initiated new investigations of these matters or incorporated them into ongoing investigations in the relevant jurisdiction. Any comment on these current investigations would be inappropriate at this time.

The Criminal Section of the Civil Rights Division has three matters related to the November 7, 2006, election under investigation. The first matter relates to the cross burning in Grand Coteau, Louisiana. The second matter involves the alleged mailing of misleading letters in Orange County, California. The third matter relates to allegations of the presence of armed men at the polls in Pima County, Arizona. The basis for each investigation is the allegation that persons attempted to intimidate voters because they were exercising their right to vote and because of their race or national origin. The investigations are continuing, and further comment would be inappropriate at this time.

Although most election crimes are handled by the Department of Justice's Criminal Division, election crimes motivated by racial animus may be handled by the Criminal Section of the Civil Rights Division.

At this time, the Criminal Division is aware of over 80 criminal investigations of election fraud pending throughout the country. As these are open criminal matters it would not be appropriate to comment on them. It is likely that the actual number of current election fraud investigations is higher, as United States Attorneys' Offices may commence criminal investigations of election fraud matters without notifying Headquarters.

Schumer 357 **It is my understanding that the Civil Rights Division's Criminal Section is responsible for vote protection matters that also involve racial animus. Please provide a list of such matters that have been opened by the Criminal Section since January 1, 1980. For each matter on the list, provide a description and state whether and how the matter was resolved.**

ANSWER: The Civil Rights Division's Criminal Section has been involved in the prosecution of two election-related matters involving racial animus since 1980: *U.S. v. Dorman*, (N.D. Miss. 1984) and *U.S. v. Limehouse*, (D.S.C. 1987). The Section conducted approximately 21 additional investigations of election-related matters involving racial animus during this period. These investigations were closed for a variety of reasons, including the inability to develop facts establishing a necessary element of the offense. This could include failure to establish evidence to support legally cognizable threats, the subject's identity, or racial animus, among other reasons. As you are aware, the Criminal Section handles voting or election matters involving the use of force or the threat of force, pursuant to 18 U.S.C. § 245, when there is discrimination based on race, color, religion, or national origin. Under 18 U.S.C. §§ 241 and 242, the Civil Rights Division also handles criminal voting or election matters that relate to discrimination based on race or color.

Schumer 358 **Please specify the number of attorneys in each Division, and in each Section of the relevant Division(s), who are currently assigned to address election- and voting-related matters arising from any Federal primary or general election.**

ANSWER: As of February 2007, 33 attorneys work in the Voting Section of the Civil Rights Division, and each of these attorneys receives work assignments related to voting maters. The Criminal Section of the Civil Rights Division does not assign a specific number of attorneys to address election and voting-related matters. Rather, cases that are opened are assigned to an attorney at the time the case is opened. Additionally, the Criminal Division's Public Integrity Section has one attorney assigned full time, and another part time, to handle election crime matters. On occasion, other Section attorneys may be assigned to handle a particular election fraud matter.

Schumer 365 **Please explain what the Administration considers to be "exigent circumstances" that would justify opening the mail of Americans without a warrant, beyond the example in the signing statement of protecting "human life and safety against hazardous materials." Please both provide a general explanation of the term "exigent circumstances" and offer examples of any instances in the past when the Administration has deemed such circumstances to exist.**

ANSWER: Please see the response to Question 280. In keeping with longstanding practice dating back many years, persons authorized by the United States Postal Service have, on occasion, opened parcels suspected of containing explosive devices. In keeping with the regulation cited in response to Question 280, if upon opening, the parcels are determined not to pose a threat, they are resealed and delivered to the addressee, and "a complete written and sworn statement of the detention, opening, removal, or treatment, and the circumstances that prompted it," signed by the person who took the actions, "is promptly forwarded to the Chief Postal Inspector." 39 C.F.R. § 233.11(b).

Schumer 366 **Please also provide the legal authorities and analysis that support your interpretation of the term "exigent circumstances."**

ANSWER: Please see the response to Question 280.

Schumer 367 **On average, what is the minimum time that the Department estimates is required for DOJ attorneys to obtain a judicial warrant to search first class U.S. mail?**

ANSWER: Once the corroborating information to establish probable cause has been developed (which itself can take anywhere from several hours to several days or even weeks), we estimate that it takes an attorney and agents, on average, a minimum of approximately six hours to prepare and obtain a warrant.

Schumer 368 **What restrictions, if any, typically apply to a warrant issued to law enforcement for the purpose of searching first class U.S. mail?**

ANSWER: Typically, warrants to search first-class U.S. mail are obtained pursuant to Rule 41 of the Federal Rules of Criminal Procedure. Accordingly, restrictions and conditions applicable to the use of warrants under Rule 41 would apply to such warrants—for example, the warrant must be executed in the time specified (not to exceed 10 days), the warrant must be returned to the designated magistrate judge, etc.

Schumer 370 **You stated during your appearance that, to the best of your knowledge, the Administration is not conducting "ongoing physical searches of mail[.]" Since the Authorization of the Use of Military Force, has the Administration on any occasion searched the mail of any individual without first obtaining a warrant supported by probable cause?**

ANSWER: The Department previously answered this question in response to a previous set of questions for the record. Please see the response to Question 158 in the set of questions for the record returned to the Committee on January 18, 2007.

Schumer 372 **Does the Department take the position that the President has the inherent constitutional authority to open and search Americans' first class mail without first obtaining a warrant? If so, please provide the legal analysis that supports this interpretation of executive power.**

ANSWER: Please see the response to Question 84, above.

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

March 26, 2007

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This letter presents the views of the Department on S. 849 , the "Openness Promotes Effectiveness in our National Government Act of 2007" or the "OPEN Government Act of 2007," which amends the Freedom of Information Act (FOIA), 5 U.S.C. § 552. The FOIA is a vital and continuously developing government disclosure mechanism that has been refined over time to accommodate both technological advancements and society's maturing interests in a transparent and fully responsible government. The Department is firmly committed to full compliance with the FOIA as a means of maintaining an open and accountable system of government, while also recognizing the importance of safeguarding national security, enhancing law enforcement effectiveness, respecting business confidentiality, and preserving personal privacy.

As a sign of the Department's continued commitment to the FOIA, it serves as the lead agency in the implementation of Executive Order 13,392, "Improving Agency Disclosure of Information," issued on December 14, 2005. This Order has immediately brought high visibility and focused attention on the FOIA by mandating the designation of a Chief FOIA Officer, FOIA Requester Service Centers, and FOIA Public Liaisons, in each agency. The Order has also focused on the improvement of FOIA processing by ensuring that agency FOIA operations are both "citizen-centered" and "results-oriented." The benefits of instituting these policies are already felt Government-wide, as agencies have developed comprehensive FOIA improvement plans and have issued their first reports mandated by this Order.

The Department opposes several sections of S. 849, as currently drafted, including, most importantly, section 6, which prevents the Government from relying on a number of FOIA exemptions, including exemptions for highly sensitive law enforcement information and privileged material, if the Government does not meet the statutory deadline for responding to requests. The Department also has concerns with section 3, which expands the definition of "representative of the news media" for purposes of assessing FOIA fees; and section 4, which reinstates the so-called "catalyst theory" for reimbursement of attorneys fees in FOIA litigation. More generally, the Department is very concerned about the substantial administrative and financial burdens that this legislation would impose upon the Executive branch, without authorizing the resources necessary to implement its statutory scheme.

Section 6 – Time Limits for Agencies to Act on Requests

Of grave concern to the Department is section 6(b) of the legislation, which prevents an agency from relying on a number of statutorily provided exemptions from FOIA unless it meets the twenty-day accelerated deadline established in section 6, or unless the agency can make a "clear and convincing" showing to a court that there was "good cause" for its failure to meet the applicable deadline. Although this provision preserves exemptions for national security information, Privacy Act-protected information, "proprietary information," and information otherwise protected by law, section 6(b) eviscerates several critical exemptions in FOIA including exemptions for inter- or intra-agency memoranda and highly sensitive categories of law enforcement records, unless an agency persuades a court that it has good cause for failing to meet the deadline.

Section 6 of S. 849 is a misguided attempt to remedy one perceived problem – compliance with the statutory response deadlines – with a measure that would eviscerate a central principle of FOIA -- protection of sensitive information. While the basic purpose of FOIA is to ensure an informed citizenry, it balances society's strong interest in open government with other compelling public interests, such as protecting national security, enhancing the effectiveness of law enforcement, protecting sensitive business information, protecting internal agency deliberations and common law privileges and, not least, preserving personal privacy.

This provision, which would establish that failure to meet an applicable deadline would lead to the automatic release of all information with only a few narrow exceptions, is a draconian remedy with enormous consequences. For example, the automatic waiver of privileges, including privileges for attorney-client and attorney work-product information that are incorporated in FOIA through Exemption 5 and well-established by common law for centuries, is unprecedented. This would frustrate the policy behind these privileges and, among other things, would doubtless create a chilling effect on policy discussions, create public confusion that could result from disclosure of reasons and rationales that were not the grounds for agency action, and cause the premature disclosure of proposed policies before they have been sufficiently considered. It would also greatly interfere with government attorneys' work in preparing for litigation, exposing their legal strategies, approaches, and views to their opposing counsel, thereby greatly undermining their ability to represent their client. It would also chill the exchange of information to government attorneys from their clients, reducing their ability to properly represent them.

Of greatest concern to the Department is the automatic waiver of the existing exemption for law enforcement information. The wholesale release of law enforcement-related documents would have devastating consequences for ongoing criminal investigations. Sensitive law enforcement techniques could be exposed, and the lives of witnesses, confidential informants, and law enforcement officials would, without a doubt, be placed in imminent danger. Indeed, the very system of confidentiality inherent in the federal government's law enforcement activities would be shattered by the lack of predictability that this provision would yield. This is also troubling since there is greater convergence between law enforcement activities and homeland security activities.

Further, under section 6(b), any person or organization with criminal intent (including terrorist organizations) could possibly gain access to internal military force protection information (i.e., information concerning the protection of the Pentagon reservation, munitions sites, and any other military installation) if an agency possessing such information were forced to automatically waive any applicable exemption. Disclosures of such highly sensitive information could have dire consequences for our military.

Among the limited exceptions that section 6 would allow the government to invoke after the twenty-day deadline, the exception stated for "personal private information" would be inadequate in any event. Because this exception is limited to "personal private information protected by section 552a" it would apply only to information protected by the Privacy Act. This lack of protection for information not protected by the Privacy Act could result in the public disclosure of personal information, such as third parties' social security numbers. Such a disclosure could have severe consequences for unsuspecting third parties, especially if the social security numbers were used for criminal purposes, such as identity theft. Under current law, personnel, medical, and similar files are exempt from FOIA if disclosure "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); *see also id.* § 552(b)(7)(C). This category of information is far broader than the information covered by the Privacy Act. The existing exemption has been interpreted by the courts to mean that a government decision-maker must balance the severity of the threat to an individual's privacy against the public interest in disclosure. *See Dep't of the Air Force v. Rose*, 425 U.S. 352 (1976). By narrowing this important exemption to protect only information covered by the Privacy Act, S. 849 repudiates the policy of balancing any individual's privacy interest against the public interests in disclosure. Thus, S. 849 will significantly limit personal privacy safeguards.

Section 6(b) does contain a purported safety valve that would permit a court to waive the harsh application of the section if an agency "demonstrates by clear and convincing evidence that there was good cause for the failure to comply with the applicable time limit provisions." However, by focusing on the agency's reason for failing to meet the twenty-day deadline, rather than upon the potential harm that reasonably could be expected to be caused by the radical disclosures that would occur, this provision ignores the substantial public interest in avoiding the disclosure of highly sensitive records.

Although section 6(b) would not eliminate the availability of the President's constitutional privilege to protect the interests covered by the statutory exemptions, section 6(b) would nonetheless raise substantial constitutional concerns that could make it unconstitutional as applied in particular circumstances. The uncertainty created by a system that depends on a court finding "good cause" for delay or upon the invocation of constitutional privilege would likely chill the candor of the constitutionally-protected deliberations of the Executive branch or otherwise harm the interests protected by the statutory exemptions in a way that could compromise the Executive's discharge of its constitutional functions. Rather than fostering responsible disclosure, this provision actually could well force agencies to deny requests by the twenty-day deadline in order to avoid waiving any exemptions, and thus needlessly increase appeals and litigation. In addition, this provision fails to take into account the complexity of many requests, the need to consult with other agencies, or the need to search for records in multiple locations, including at Federal records centers, all of which necessarily and reasonably add to the time it takes to respond to a request.[1]

The Department is also opposed to section 6(a) of S. 849, which would amend 5 U.S.C. § 552(a)(6)(A)(i) by changing the twenty-day time limit so that it commences on the date that the request "is first received by the agency." This represents a very significant change from current practice in which the twenty-day clock begins once the appropriate element of an agency has received the request in accordance with the agency's FOIA regulations. Beginning the twenty-day time limit as soon as a request "is first received by the agency" does not allow for the practical necessity of forwarding a request to an appropriate field office, division, or component, which could take several or more days.[2] This provision is thus at odds with the longstanding practice at all Federal agencies, under regulations that have been duly promulgated and followed in accordance with the explicit direction of the Act itself. *See* 5 U.S.C. § 552(a)(3)(A). For example, Department of Justice FOIA regulations provide that "[a] request will be considered [as] received as of the date it is received by the proper component's FOIA office." 28 C.F.R. § 16.3 (2006). Additionally, given that agencies make addresses readily available on their Web sites and in their FOIA Reference Guides, it is not imposing any undue burden on a requester to direct his/her request to the appropriate office. Further, when a requester neglects to address

[1] If enacted, the penalties imposed by section 6(b) would have an equally adverse effect on NARA's ability to protect under the FOIA records that are also subject to the Presidential Record Act (PRA). When processing requests for Presidential records, the PRA requires NARA to inform the former President of its intent to publicly disclose the requested records. In conjunction with this statutory requirement, Executive Order 13,233, "Further Implementation of the Presidential Records Act," affords the former President (and the incumbent President) ninety days to conduct a records review. As a result of the drastic penalties contained in section 6(b) of S. 849, NARA would, after only twenty-days, forfeit its ability to protect certain records under the FOIA, even if such records contain sensitive private information not protected by the Privacy Act, including FBI background files and other law enforcement or investigatory information. Additionally, it would be an added burden for NARA to attempt to compel a court to waive this provision in an effort to protect information for which it already has a sound legal basis to withhold.

[2] Importantly, additional mail processing time is required in the post-9/11 world because the Department, as well as other agencies, now must x-ray or irradiate incoming mail, including FOIA requests. Five days might pass while the request is being irradiated and before any program office of an agency receives the x-rayed mail.

his/her request properly, agencies routinely route the request to the proper office, so the requester is not penalized in any way for a failure to properly address a request. Conversely, this proposed change in the way the time periods are calculated penalizes the agency for something completely out of its control. Requesters will have no incentive to properly address their requests. More significantly, they will actually have an incentive to use the most obscure address possible in the hope that the time expended in properly routing it will render the agency unable to meet the response deadline.

The Department is opposed to the second clause of section 6(a) which states that the twenty-day time period to respond to a request "shall not be tolled without the consent of the party filing the request." In the course of processing a FOIA request there are numerous occasions when an agency must stop its processing in order to get information from the requester, and the agency should not be penalized for the time it takes the requester to provide needed information to the agency. For example, after a request is first received by an agency the personnel responsible for processing it might determine that the request fails to reasonably describe the records that are being sought. In such situations agency personnel routinely go back to the requester for clarification of the request. Similarly, during the course of processing a request, the agency may determine that the search for responsive records will take longer than anticipated and so will cost more than the requester has agreed to pay. Again, in such situations the agency routinely goes back to the requester to see if the requester would like to narrow its request to reduce the fees owed, or to see if the requester will agree to pay the fees that are anticipated. In these situations, when the processing of the request is necessarily "on hold" while the agency awaits a decision by the requester, the time period for responding has traditionally been tolled. The language in section 6(a) would not allow that to happen without the consent of the requester. That means that absent consent – which is not likely to be given – the agency will be penalized for the failure of requesters to provide necessary information in order for their requests to be processed. Rather than having an incentive to respond quickly to the agency in order to get their request back on track, this provision will actually give requesters an incentive to delay responding to the agency's request for clarification, or for a commitment to pay fees, etc. because by doing so, they know that the twenty-day time period is ticking.

We believe that the draconian penalties in section 6 not only are unwise, but are also unnecessary since Executive Order 13,392 has improved FOIA operations by requiring agencies to review their administration of the FOIA and their compliance with the statutory deadlines. The Executive Order also requires agencies to implement improvement plans specifically focused on eliminating or reducing any backlog of FOIA requests. The Department's preliminary review of reports in this regard indicates that agencies overall are devoting increased resources to processing FOIA requests more efficiently and quickly, and indeed some agencies have already realized meaningful backlog reduction.

Section 3 – Protection of Fee Status for News Media:

Section 3 of the legislation, titled "Protection of Fee Status for News Media," expands the definition of "representative of the news media," and thereby exempts a larger class of requesters from the obligation to pay what can sometimes be quite significant fees assessed for searching for responsive documents. The current law represents a carefully-struck balance that establishes differing fee levels for different categories of requesters. For example, an agency is permitted to charge a requester for document search time, duplication, and review costs if the request is made for a "commercial use." 5 U.S.C. § 552(a)(4)(A)(ii)(I). An agency may charge a requester only for document duplication if the request is made by an educational or non-commercial scientific institution, whose purpose is scholarly or scientific, or by a representative of the "news media." 5 U.S.C. § 552(a)(4)(A)(ii)(II). Section 3 of the legislation amends subclause (II) so that an agency "may not deny [to a representative of the news media] status solely on the basis of the absence of institutional associations of the requester, but shall consider the prior publication history of the requester" including Internet publications. Most significantly, it would further require an agency, in the absence of such prior publication history, to "consider the requestor's stated intent at the time the request is made to distribute information to a reasonably broad audience." Because it can be assumed that virtually all requesters claiming to be representatives of the news media will readily state that it is their "intent" to distribute the records to a broad audience, this expansion of the definition of "representative of the news media" would render the concept of "representative of the news media" virtually meaningless.

Such an expansion of the definition of "representative of the news media" would have severe fiscal and other practical consequences for the Executive branch, and is ill-advised without empirical evidence that the current definition of "representative of the news media" is insufficient to carry out FOIA's purposes. The increased taxpayer burden that would result from the changed definition should be undertaken only after careful review by Congress in light of limitations being imposed across the board on domestic discretionary spending. Indeed, the limitation in section 3 on the Government's ability to collect fees for FOIA processing seems inconsistent with the stated desire of many Members of Congress to improve FOIA timeliness. With no requirement that requesters pay search fees, they have no incentive to tailor their requests and so they are likely to make overly broad requests. This, in turn, will stretch agency resources and will increase the time it takes to process all requests. The Executive branch cannot process FOIA requests expeditiously without adequate manpower and resources, which is dependent on adequate funds, including FOIA processing fees deposited in the Treasury Department's general fund.

Section 4 – Attorneys' Fees.

Section 4 of the legislation would reinstate the so-called "catalyst theory" for the reimbursement of FOIA litigation fees. Current law permits a court to assess reasonable attorneys' fees and litigation costs incurred when the complainant in a lawsuit challenging an agency's response (or lack thereof) to a FOIA request has "substantially prevailed." Section 4 of S. 849 would amend 5 U.S.C. § 552(a)(4)(E) by altering and expanding the definition of "substantially prevailed" to include situations in which a "complainant has obtained relief through either (I) a judicial order, an administrative action, or an enforceable written agreement or consent decree; or (II) a voluntary or unilateral change in position by the opposing party, where the complainant's claim or defense was not frivolous." We understand this provision's intent to be the overruling of the Supreme Court's decision in *Buckhannon Board & Care Home, Inc. v. W. Va. Dep't of Health & Human Resources*, 532 U.S. 598 (2001), and of a number of recent court of appeals decisions that have applied *Buckhannon* to reject the catalyst theory as a basis for FOIA attorneys' fee awards. *See OCAW v. Dep't of Energy*, 288 F.3d 452 (D.C. Cir. 2002); *Union of Needletrades v. INS*, 336 F.3d 200 (2d Cir. 2003).

The Department does not support the reinstatement of the catalyst theory, for many of the same reasons enunciated in Chief Justice Rehnquist's *Buckhannon* opinion. Proponents of the catalyst theory have argued that it is needed for two reasons. First, they argue that it would encourage plaintiffs with meritorious but expensive cases to bring suit. Second, they argue that it would prevent defendants from unilaterally mooting an action before judgment to avoid an award of attorneys' fees. As Chief Justice Rehnquist noted in his opinion in *Buckhannon*, however, "these assertions . . . are entirely speculative and unsupported by any empirical evidence." *Buckhannon*, 532 U.S. at 608.

More importantly, the Department is especially concerned that the catalyst theory, if reinstated, will serve as a disincentive to a Government agency's decision to voluntarily change decisions and procedures with respect to FOIA requests, because doing so could make the agency liable for a complainant's legal fees. Such a result would be inconsistent with FOIA's underlying purpose of promoting, rather than inhibiting, disclosure.

Furthermore, it is unclear what is meant by the inclusion of an "administrative action" as a possible means by which a requester can obtain "relief" that would justify attorneys' fees. If it is deemed to apply to a requester who receives documents through the administrative FOIA appeals process, that would be a major departure from long-standing administrative law practice and would severely undercut the traditional function of the administrative appeal process, which is designed to provide the requester with an avenue of further review at the agency, as well as provide the agency with a second opportunity to evaluate its response, thereby reducing the likelihood of a lawsuit. If this provision covers relief provided at the administrative appeal stage, this could increase the FOIA program costs dramatically, and would serve as a disincentive to release records at the administrative appeal stage.

<u>Section 7 – Tracking Numbers:</u>

Section 7 would require agencies to establish systems to assign an individualized tracking number to each request and to notify requesters of this number within ten days. In addition, the legislation mandates the establishment of a telephone line or Internet service to provide information about the status of the request, including receipt date and estimated completion date. The need for this provision has been mitigated by the issuance of the FOIA Executive Order which required that agencies establish FOIA Requester Service Centers to provide requesters with information concerning the status of their FOIA requests. In addition, supervisory personnel have been appointed as FOIA Public Liaisons to ensure that FOIA requesters receive appropriate assistance from the service centers. Moreover, many agencies which receive higher volumes of requests already notify requesters of assigned tracking numbers when they first acknowledge receipt of requests.

<u>Section 8 – Specific Citations in Exemptions:</u>

Section 8 of S. 849 would amend FOIA's Exemption 3, which protects information otherwise statutorily exempted from disclosure, by requiring that newly enacted statutes that purport to limit public disclosure of information specifically cite to this section of S. 849. We believe this amendment is unnecessary. The current version of Exemption 3 was enacted in 1976 (*see* Pub. L. No. 94-409) to limit Exemption 3's availability to specific categories of statutes: those that require agencies to withhold documents with no agency discretion, or, alternatively, that establish particular criteria for withholding or refer to particular types of matters to be withheld. The 1976 amendment to Exemption 3 has worked well now for over thirty years. Courts have recognized that the congressional intent to maintain the confidentiality of particular information is the central consideration in determining whether a statute falls within Exemption 3. In focusing on congressional intent, courts have avoided imposing additional requirements that Congress use any particular "magic words" to establish a statute as an Exemption 3 statute. Thus, the Census Act, the Internal Revenue Code, the National Security Act of 1947, and the grand jury secrecy rule, Fed. R. Crim. P. 6(e), to take several well-known examples, have been determined by the courts to qualify as Exemption 3 statutes even though those statutes do not specifically refer to Exemption 3.

Moreover, subsection (e)(1)(B)(ii) of FOIA now requires agencies to include in their annual FOIA reports a complete list of all statutes that the agency relies upon to authorize withholding under Exemption 3, together with other pertinent information concerning such withholding. Thus, Congress has a ready mechanism under current law, created in the 1996 e-FOIA amendments (Pub. L. No. 104-231), to determine how Exemption 3 is being administered.

Additionally, section 8 could unduly hamper Congress in the future or even constitute a hidden trap. For example, Congress has recently enacted appropriations laws to bar the Bureau of Alcohol, Tobacco, Firearms, and Explosives from releasing certain sensitive law enforcement data to the public. Because congressional intent to maintain the confidentiality of such data is apparent from these appropriations laws, there is no reason to require, in addition, a specific reference to Exemption 3 in every subsequent annual appropriations law. Most significantly, Congress over the years has acted to revitalize certain export laws that periodically expire while Congress deliberates over policy matters. These statutes protect confidential business information submitted to the Government in connection with export applications, and the courts have upheld Exemption 3 protection for such matters, based upon the clear import of the overall statutory scheme. *See Times Publ'g. Co. v. Dep't of Commerce*, 236 F.3d 1286 (11th Cir. 2001). Under S. 849, such confidential business information would necessarily be subject to disclosure if Congress failed to meet the additional requirement imposed by S. 849. Additionally, if this provision is enacted, it is possible that there would be recurring disagreement as to whether subsequent nondisclosure statutes that do not clearly reference Exemption 3 have impliedly repealed or amended section 8. This sort of uncertainty would eviscerate what appears to be the central purpose of this provision.

Section 9 – Reporting Requirements

Pursuant to the 1996 e-FOIA amendments (Pub. L. No. 104-231), the Department of Justice has responsibility for collecting information from other Executive branch agencies concerning FOIA compliance, including the number of determinations not to comply with requests for records, the number of appeals, the number of pending requests, and the median time to process such requests. *See* 5 U.S.C. § 552(e)(1). Section 9 expands the existing requirements in five principal areas: (1) Agencies' detailed response data based upon the date on which the request was originally received including the average number of days, the median number of days, and the range of dates to respond; (2) data concerning the 10 active requests with the earliest filing dates; (3) data concerning the 10 active administrative appeals with the earliest filing dates; (4) data concerning requests for expedited review; and (5) data on fee waiver requests.

The Department believes that these new reporting requirements would be a largely unnecessary burden upon agencies that, as described above, cuts against the timeliness objectives pursued elsewhere in the bill. In addition, as described above, using the date a request is "originally received by the agency" as the starting point for determining time periods will result in a great distortion of the annual report statistics. If requesters misdirect requests, then the time spent correcting that error (i.e., the time spent forwarding the request to the proper office) would be counted against the agency's processing time. This will result in statistics that do not actually reflect processing time. Further, it is not clear that providing the additional data will provide any new or useful information regarding agency response times. Importantly, as part of their new Executive Order reporting requirements, agencies now report on the range of dates for both pending requests and consults. Moreover, there has been a great deal of focus on the ten oldest requests by agencies.

Section 10 – Agency Records Maintained by a Private Entity:

Current law defines an agency record as information that is "maintained by an agency in any format, including an electronic format." 5 U.S.C. § 552(f)(2). The Supreme Court elaborated on this standard by holding that an "agency record" is a document ". . . either created or obtained by an agency and under agency control at the time of the request." *Dep't of Justice v. Tax Analysts*, 492 U.S. 136 (1989). The Supreme Court has also held that Federal participation in, or funding of, the generation of information by a privately controlled organization does not render that information an "agency record" under the terms of FOIA. *See Forsham v. Harris*, 445 U.S. 169 (1980).

Section 10 of S. 849 amends the existing statutory definition in 5 U.S.C. § 552(f)(2) to include information "that is maintained for an agency by an entity under a contract between the agency and the entity." The Department does not object to section 10 if its intention is solely to clarify that agency-generated records held by a Government contractor for records-management purposes are subject to FOIA. On the other hand, the Department would have very serious concerns if section 10 of S. 849 were intended to disturb over twenty-five years of settled law by overruling the *Forsham* and *Tax Analysts* decisions. At the very least, section 10 is ambiguous as currently drafted and should be clarified.

<u>Section 11 – Office of Government Information Services:</u>

The Department has significant questions and concerns about section 11, which would create an "Office of Government Information Services" within the Administrative Conference of the United States. This new office would be charged with responsibility for reviewing policies and procedures of agencies, conducting audits of those agencies, issuing reports, recommending policy changes to the President and Congress to improve the administration of the FOIA, and offering mediation services between requesters and administrative agencies.

The Department is concerned about any intent that the proposed Office of Government Information Services would be given any sort of policymaking and adjudicative role with respect to FOIA compliance. Such a role is foreign to the traditional mission of the Administrative Conference of the United States, which was tasked with promoting improvements in the efficiency, adequacy, and fairness of procedures of the government's regulatory programs by conducting research and issuing reports. *See* 5 U.S.C. § 594 (2000). Importantly, the aforementioned policymaking role remains appropriately placed with the Department of Justice, which has long held responsibility for ensuring compliance with the FOIA throughout the Executive branch. This role is all the more important, now that the Department serves as the lead agency in implementing Executive Order 13,392.

Of additional concern is that the Office of Government Information Services would be authorized by S. 849 to provide mediation services between agencies and FOIA requesters. It should be noted that many FOIA disputes are not particularly well-suited to mediation because, inter alia, the two matters generally at issue in FOIA litigation – the adequacy of the search and the assertion of exemptions – are questions of law. Moreover, the authority given this Office under the bill may constitute the kind of significant authority that can only be exercised by officers duly appointed under the Appointments Clause, U.S. Const. art. II, sec. 2, cl. 2, and if that is the case, the provision would raise constitutional concerns.

Further, the establishment of such an office would be unwarranted and redundant. Agencies routinely review their FOIA policies and procedures to ensure that they are adequately funded for the administration of the program. In fact, with the recent issuance of Executive Order 13,392, agencies are now required to scrutinize their processing of FOIA requests and report to the Department of Justice on their improvements made in that regard. Agencies then report any deficiencies in the implementation of their improvement plans to the Attorney General and the President's Management Council. Also, the Executive Order required agencies to appoint Chief FOIA Officers, who "have agency-wide responsibility for efficient and appropriate compliance with the FOIA." This requirement ensures high-level visibility and accountability by an agency's "senior official." Further, the Department of Justice and the Government Accountability Office (GAO) already perform the function of holding agencies accountable, working quite well together. Indeed, there have been several GAO reports analyzing Government-wide administration of FOIA during just the past four years.

Additionally, the creation of a separate, independent office to provide Ombudsmen-type services to requesters is unnecessary in light of all agencies' meeting the Executive Order's requirement to designate FOIA Public Liaisons and establish FOIA Requester Service Centers. The Public Liaisons and Requester Service Centers are there to provide information to the public about the status of their requests, to ensure that agencies use a "service-oriented" approach in responding to FOIA-related inquiries, and to resolve disputes.

Finally, both sections 11 and 13 of the bill appear to require the submission of legislative recommendations to Congress by Executive branch agencies, requirements which conflict with the President's authority to submit only such legislative proposals as he deems "necessary and expedient." *See* U.S. Const. art. II, sec. 3. Any such provisions in the bill should be precatory rather than mandatory.

Conclusion:

Since its enactment in 1966, FOIA has firmly established an effective statutory right of public access to Executive branch information in the Federal government. But the goal of achieving an informed citizenry is often counterpoised against other vital societal aims, such as the public's interest in effective and efficient operations of government; the prudent use of limited fiscal resources; and the preservation of the confidentiality and security of sensitive personal, commercial, and governmental information.

Though tensions among these competing interests are characteristic of a democratic society, their resolution lies in providing a workable scheme that encompasses, balances, and appropriately protects all interests, while placing primary emphasis on the most responsible disclosure possible.

Regrettably, S. 849, however well intentioned, does not provide a workable regime for effective, efficient compliance with the FOIA, nor does it provide a reasonable balance for the competing and equally compelling governmental aims involved here.

Thank you for the opportunity to present our views. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

Richard A. Hertling

Richard A. Hertling
Acting Assistant Attorney General

cc: The Honorable Arlen Specter
Ranking Minority Member

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

March 28, 2007

The Honorable Patrick J. Leahy
Chairman
Committee on Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This letter presents the views of the Department of Justice on S. 119, the "War Profiteering Prevention Act of 2007." While we welcome new tools to combat fraud committed by military contractors, which is a priority enforcement area for the Department, we are concerned that S. 119 would have a negative impact upon existing criminal statutes. We welcome the opportunity to work with Committee staff to address these concerns.

Currently, the Department has a number of powerful statutes that are not limited to specific international undertakings by the United States. These statutes have universal application to all fraudulent schemes undertaken against the United States, including those schemes associated with war profiteering. We are concerned that legislation targeted toward fraud occurring during particular events (as S. 119 is targeted) may have the unintended consequence of eroding the application of time-tested general fraud statutes to specific events, setting the precedent that fraud in each new situation requires its own new fraud statute before effective prosecution can be undertaken.

The Department has had great success in prosecuting contractor fraud under 31 U.S.C. § 5332 (bulk cash smuggling), 41 U.S.C. § 51 *et seq.* (the Anti-Kickback Act), and 18 U.S.C. §§ 1031 (major fraud against the United States), 1001 (false statements made in any matter within the jurisdiction of the United States), 1956 and 1957 (money laundering), 1341 (mail fraud) and 1343 (wire fraud), among others (hereinafter, the "general fraud statutes"). To the extent that problems have surfaced in applying these statutes or others to the types of criminal procurement fraud associated with war profiteering, we offer the following suggestions for amending the general fraud statutes in order to eliminate those obstacles:

- To the extent that establishing venue over criminal targets in Iraq and other overseas locations could be a problem in future criminal matters, a new provision (similar to the one contained in S. 119) could be added to the general fraud statutes that places venue "in any district where any party to the contract or provider of goods or services is located."

· The general fraud statutes could be amended to provide for higher statutory maximum sentences if the illicit conduct occurred in connection with "war, military action, or relief or reconstruction activities" (assuming these terms were defined adequately).

· 18 U.S.C. § 1956 (money laundering) could be amended to list certain general fraud statutes (*e.g.*, 18 U.S.C. § 1031 and 41 U.S.C. § 51) as "specified unlawful conduct."

· 18 U.S.C. §§ 981 (civil forfeiture) and 982 (criminal forfeiture) could be amended to include forfeiture of property derived from proceeds traceable to violations of certain general fraud statutes (*e.g.*, 31 U.S.C. § 5332 (bulk cash smuggling) and 41 U.S.C. § 51 *et seq*. (the Anti-Kickback Act)).

· The general fraud statutes could be amended to include an explicit provision for extraterritorial jurisdiction.

By amending our time-tested general statutes in these ways, Congress would improve these statutes significantly without creating a new fraud regime.

If, notwithstanding these problems, the Committee proceeds with S. 119, we would welcome the opportunity to work with your staff to eliminate several technical problems with the current language that might weaken our ability to successfully use these provisions. We offer the following examples:

· In subsection (a)(1), the phrase "in connection with a war, military action, or relief or reconstruction activities" is vague. Clearer definition of the terms in this phrase would deflect future legal challenges.

· In subsection (a)(1), the meaning of "within the jurisdiction of the United States" is unclear. We recommend adopting language from 18 U.S.C. § 1031(a), which is more specific in that it links the illicit conduct to a primary or subcontractor's "contract with the United States." For example, we would want to clarify the extent to which the proposed legislative language is distinct from terms like "special and maritime jurisdiction" articulated in 18 U.S.C. § 7(9).

· Subsection (a)(1) would impose an additional element of proof that would complicate our prosecutions. The provision includes the term "willfully" notwithstanding that other existing provisions in title 18 such as those relating to bank fraud, wire fraud, mail fraud, and major fraud against the United States, do not impose a "willful" requirement. We are concerned about including an additional and unnecessary element of proof. Similarly, the use of the term "specific intent," which is not found in statutes such as the securities fraud provision of 18 U.S.C. § 1348, seems to create a higher burden of proof for the Government than would be necessary in order to address this type of criminal conduct effectively.

· Subparagraph (a)(1)(A)(ii) does not provide a means by which we can determine whether a good or service is "materially overvalued." Similarly, the term "excessively profit" is problematic, especially as applied to military contractors in a war zone where reasonable profits may be difficult to ascertain.

· Subparagraph (a)(1)(B)(i) appears to be unnecessarily vague. The provision would make it a crime "to falsify, conceal, or cover up by any trick or scheme a material fact." However, it is unclear to what the material fact must be material. It may be that subsection (a)(1) could be read to limit this to a material fact "in any matter involving a contract or the provision of goods. . .," but this does not appear to solve the vagueness problem with respect to subparagraph (a)(1)(B)(i).

· Subsection (b) provides for "extraterritorial Federal jurisdiction." Although we do not necessarily oppose this provision, we are concerned that it might have the unintended consequence of undermining the Department's efforts to apply the general statutes extraterritorially because the general statutes do not contain such a provision. Circuit Courts have held the general statutes could be applied extraterritorially notwithstanding the absence of such a provision. *See United States v. Kim*, 246 F.3d 186 (2d Cir. 2001) (holding wire fraud statute could be extraterritorially applied).

· The Committee might consider including in S. 119 a provision for conspiracy or attempt.

· We recommend amending 18 U.S.C. § 2516(c) (authorization for wire interception) to include S. 119 as a predicate statute for authorizing wire interception.

Thank you for the opportunity to present our views. Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

Richard A. Hertling

Richard A. Hertling
Acting Assistant Attorney General

cc: The Honorable Arlen Specter
Ranking Minority Member

Interim United States Attorneys						
DISTRICT	**USA**	**TYPE**	**OATH OF OFFICE**	**PRESIDENTIAL RESIGNED**	**TIME ELAPSED**	
AK	Nelson Cohen	AG	8/23/2006	1/23/2006	212 days	
AZ	Daniel Knauss	AG	1/31/2007	1/30/2007	0 days	
ARE	Tim Griffin	AG	12/20/2006	12/20/2006	0 days	
CAN	Scott Schools	AG	2/17/2007	2/17/2007	0 days	
CAS	Karen Hewitt	AG	2/16/2007	2/15/2007	0 days	
DC	Jeff Taylor	AG	9/28/2006	9/28/2006	0 days	
IAN	Matt Dummermuth	AG	1/30/2007	12/31/2006	30 days	
NE	Joe Stecher	AG	10/2/2006	10/2/2006	0 days	
PR	Rosa Rodriguez-Velez	AG	6/9/2006	6/8/2006	0 days	
TNE	Russ Dedrick	AG	6/17/2006	11/18/2005		*Dedrick took oath 11/18/05 under VRA
TNM	Craig Morford	AG	10/10/2006	10/1/2006	9 days	
WAW	Jeff Sullivan	AG	1/27/2007	1/26/2007	0 days	
WVS	Chuck Miller	AG	2/24/2006	7/29/2005		*Miller took oath 7/29/05 under VRA
ME	Paula Silsby	Court	9/3/2001	5/5/2001	0 days	*Silsby took oath 5/6/01 as an AG appointee
MIW	Brian Delaney	AG	3/16/2007	3/16/2007	0 days	