U.S. Department of Justice

Office of Legislative Affairs

Washington, D.C. 20530

April 5, 2007

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

Dear Mr. Chairman:

Please find enclosed 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. 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

<u>Department of Justice Responses to</u>
<u>Questions for the Record posed to</u>
<u>Attorney General Alberto Gonzales</u>
<u>Senate Judiciary Committee</u>
<u>Oversight Hearing January 18, 2007</u>
(Part 1)

<u>QUESTIONS FROM CHAIRMAN LEAHY</u>

Leahy 2 **While we are sending more resources and funds for Iraqi police, this Administration is cutting funding for state and local police. How do you explain this policy? Would you support increasing federal funding for state and local law enforcement?**

<u>ANSWER:</u> The Department's portion of the President's FY 2008 budget contains over $1.2 billion in discretionary grant assistance to State, local, and Tribal governments including funding for the creation of *four new, competitive grant programs:* (1) Violent Crime Reduction Partnership, (2) Byrne Public Safety and Protection (Byrne) Program, (3) Child Safety and Juvenile Justice Program, (4) Violence Against Women Grants. These programs will provide States, localities, and Tribes with considerable flexibility to address their most critical needs and allow the Department to respond in a targeted way to local up-ticks in the crime rate. Like the recently-passed joint resolution providing full-year continuing appropriations for FY 2007, the FY 2008 President's Budget also proposes to eliminate earmarks from state and local funding so that limited federal resources can be directed to the most urgent crime problems.

The Violent Crime Reduction Partnerships Program will be used to help communities suffering from high rates of violent crime address this problem by forming and developing effective multi-jurisdictional law enforcement partnerships between local, State and federal law enforcement agencies. We believe that this focused approach will allow communities to tackle their violent crime problem quickly after receiving their grant.

Leahy 3 **In recommendation #57, the Iraq Study Group recommends that the practice of embedding U.S. police trainers with Iraqi police units be expanded and that the number of civilian officers training Iraqi police be increased. In your January 16, 2007 letter, you stated that the Department's International Criminal Investigative Training and Assistance Program ("ICITAP") has deployed senior law enforcement advisors to oversee teams of approximately 250 police trainers and 80 trainers for the Iraqi Correctional System. Will the Department send additional advisors to participate in the training of the Iraqi Police Service? If so, how many advisors will the Department send?**

ANSWER: The size and functional scope of the ICITAP police training efforts are determined by the Department of Defense's Civilian Police Assistance Training Team (CPATT) and are closely controlled by the Department of State's Bureau for International Narcotics and Law Enforcement Affairs (INL). CPATT controls the number of ICITAP assets required for police program efforts and INL orchestrates ICITAP participation through budgetary control measures. Accordingly, we respectfully defer to those agencies to answer this question.

Leahy 8 **Will the Department meet its reporting requirements for this upcoming calendar year?**

ANSWER: The Department will continue to make every effort to meet its reporting requirements.

Leahy 10 **Recently released FBI documents reveal that the Nixon and Reagan Administrations ordered the FBI to run background checks on Senate witnesses who were critical of the late Chief Justice William Rehnquist when he was nominated to the Supreme Court in 1971, and later nominated to the position of Chief Justice in 1986. According to press reports, in 1971, Deputy Attorney General Richard Kleindienst directed the FBI to conduct criminal investigations of witnesses who were scheduled to testify against Chief Justice Rehnquist during his conformation hearing. The press also reports that, 15 years later, the late Senator Strom Thurmond asked John R. Bolten, then an Assistant Attorney General in the Reagan Justice Department, to investigate Democratic witnesses for the 1986 confirmation hearing. (a) Please state whether you believe that such blatant political use of the FBI is appropriate?**

ANSWER: Political use of the FBI is never appropriate.

Leahy 11 **Did the Bush Administration direct the FBI to criminally investigate witnesses that testified during the Alito and Roberts confirmation hearings, or for other judicial nominees? If so, please explain why.**

ANSWER: The Bush Administration did not direct the FBI to criminally investigate witnesses who testified during the Roberts and Alito confirmation hearings or during confirmation hearings for other judicial nominees.

Once a candidate's biographical information is submitted to the FBI by the Department's Office of Legal Policy on behalf of the White House, the FBI interviews appropriate individuals who have knowledge of the candidate in the context of a background investigation (BI). Following completion of the BI, it is provided to the Department and, along with other checks conducted by Department, is provided to the White House for review and thereafter to members of the Senate Judiciary Committee. The Committee may also make independent inquiries concerning information in the package. The American Bar Association also investigates and rates each nominee. In those rare circumstances in which a BI reveals criminal allegations regarding a candidate or witness, the allegations are appropriately addressed independent of the BI. A 4/15/02 memorandum from the Attorney General advises that the Department will not provide information to the White House concerning pending criminal investigations except when doing so is important to the performance of the President's duties. In accordance with this protocol, the FBI does not directly advise the White House or the Senate of pending criminal or other investigations revealed in the context of a BI.

Leahy 12 **Will you give me your assurances that you will not permit the FBI to be used in this political manner while you are the Attorney General?**

ANSWER: As stated above, political use of the FBI is never appropriate. Moreover, the FBI's authority to conduct investigations is governed by several sources, including Federal regulations and Attorney General (AG) Guidelines. For example, the AG Guidelines on General Crimes, Racketeering Enterprise, and Terrorism Enterprise Investigations (5/30/02) govern the circumstances under which the FBI's general crimes and criminal intelligence investigations may be begun, and the permissible scope, duration, subject matters, and objectives of these investigations. The FBI understands that investigations must be authorized by competent authority.

Leahy 15 **Do you believe the interrogation techniques used on Mr. Padilla are consistent with the Constitutional guarantees protecting all American citizens? For example, Mr. Padilla was denied any contact with counsel for 21 months.**

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. The District Court recently found Mr. Padilla competent to stand trial. However, as a general matter and consistent with what we have publicly stated before, the right to counsel, among others, is a critical component of our civilian criminal justice system. This system has an extremely important role to play in the struggle against global terrorism, as shown by the successful prosecutions brought by the Department of Justice. But in limited cases, after careful consideration of a host of factors, the President has deemed it necessary to defend our Nation by detaining individuals as enemy combatants. A critical element of that detention is intelligence gathering. Accordingly, where individuals have associated themselves with terrorist forces in armed conflict with the United States, detention as an enemy combatant allows immediate, ongoing, and uninterrupted interrogations for intelligence that are critical to protecting our citizens and armed forces.

Leahy 16 **Were you aware of the interrogation techniques used on Mr. Padilla at the time you approved of his prosecution, and, if so, what was your analysis of these interrogation techniques at the time? Did you believe they violated Mr. Padilla's rights at the time you approved his prosecution? Please provide the Committee with copies of any documents regarding your review of the interrogation techniques used on Mr. Padilla.**

<u>ANSWER:</u> 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. The District Court recently found Mr. Padilla competent to stand trial.

Leahy 19 **This Committee seriously considered media shield law legislation last Congress, holding several hearings on this important issue. I plan to work on legislation this session with my colleague Senator Specter, as well as Senators Lugar and Dodd. The Department of Justice testified in opposition to the shield law bills last Congress. Are there any media shield law proposals that would be acceptable to the Department? If so, please identify those proposals.**

<u>ANSWER:</u> On multiple occasions over the last two years – both in written and spoken testimony before this Committee – the Department has made clear its position in opposition to proposed legislation in this area.

Specifically, the Department believes that the media shield legislation inevitably would transfer to the judiciary determinations rightfully vested in the Executive – including determinations about what evidence is "critical" to an ongoing criminal investigation or prosecution and what constitutes harm to the national security. Indeed, under the most recent version of the proposed legislation, the government would bear the burden of establishing its need for the information it seeks – a dramatic departure from existing law, which requires the party resisting a subpoena to prove that the subpoena is unreasonable and oppressive.

One of the hallmarks of the Department's own policies governing the issuance of compulsory process to the media, *see* 28 C.F.R. § 50.10, is the flexibility afforded the Department in times of emergency. The proposed legislation, however, would vitiate that flexibility by shifting final authority over core executive and prosecutorial decisions to the judiciary, and by forcing the government to bear a heavy burden of proof in order to obtain information that is essential to the investigation and prosecution of serious crimes.

For these reasons – and numerous others set forth in the Department's written and oral testimony before this Committee – the Department continues to believe that legislation in this area is both unnecessary and likely to cause substantial harm to law enforcement and national security.

Leahy 20 **In your responses to questions submitted after your July 18, 2006 testimony before the Committee, you declined "to comment upon the existence or non-existence of any investigation . . . of journalists for publishing classified information." Yet, in response to other questions related to ongoing investigations you have offered to provide briefings to the Chairman and Ranking Member, as well as provide basic information on the number and general status of investigations in other areas. Will you provide the Committee with the same non-specific information related to investigations of journalists or news organizations for publishing classified information? If so, how many of these investigations are ongoing at the Department and what is there general status?**

ANSWER: Where possible, the Department makes every effort to provide Congress with information essential to the fulfillment of its oversight responsibilities. These efforts, however, cannot extend to the provision of information that could imperil a pending investigation or wrongfully prejudice an innocent party. Moreover, there are instances in which simply affirming or denying that an investigation exists – even in general terms – can have similarly harmful effects. This is one of those instances. Accordingly, it would be inappropriate for me to comment upon the existence or non-existence of any investigation.

Leahy 21 **The media shield legislation proposed last Congress was largely based on the current DOJ guidelines for requesting information from the media. However, the statutory codification would apply these guidelines to civil cases and special prosecutors. This would be a very positive outcome. What is the Department's position on the application of these provisions to civil cases and special prosecutors?**

ANSWER: As an initial matter, we would like to address the assertion that the media shield legislation proposed in the last Congress was "largely based on the current DOJ Guidelines for requesting information from the media." Some supporters of the media shield legislation have suggested that the proposed bill is no more than a codification of the Department's own guidelines. That view is mistaken. The Department's guidelines preserve the constitutional prerogatives of the Executive branch with respect to key decisions regarding, for example, the kind of evidence that is presented in grand jury investigations and what constitutes harm to national security. The proposed legislation, by contrast, would shift ultimate authority over these and other quintessentially executive and prosecutorial decisions to the judiciary.

Furthermore, the proposed legislation would replace the inherent flexibility of the Department's guidelines, which can be adapted as circumstances require – an especially valuable attribute in a time of war – with a framework that is at once more rigid (by virtue of being codified by statute) and less predictable (by virtue of being subject to the interpretations of many different judges, as opposed to a single Department with a clear track record of carefully balancing the competing interests at stake).

It is important to note that the Department's policies, set forth at 28 C.F.R. § 50.10, apply in both civil and criminal cases alike. *See* 28 C.F.R. § 50.10(f)(4) As with subpoenas to the news media in criminal cases, we believe that the Department's policies regarding subpoenas in civil cases strike an appropriate balance between the government's interest in successfully litigating cases of substantial importance with the public interest in a free press.

Finally, in at least one recent high-profile case from which the Department was recused, a federal court concluded that the Special Prosecutor had complied with the Department's policies on the issuance of subpoenas to the news media. *See In re Grand Jury Subpoena, Judith Miller,* 438 F.3d 1141, 1152 (D.C. Cir. 2006) (noting that the District Court "found that . . . Special Counsel had fully complied with the [Justice Department] guidelines").

Leahy 22 **There have been a number of concerns raised about the Department's decision to criminally prosecute reporters for refusing to reveal their confidential sources in the BALCO case. (a) Is the Department's decision to investigate the "leak" in the BALCO case consistent the Justice Department's guidelines for issuing subpoenas to the news media? If so, what were the exigent circumstances that warranted issuing a subpoena to the reporters involved in this case?**

ANSWER: The Department's decisions related to the media subpoenas issued in connection with the BALCO matter were fully consistent with the Department's guidelines governing such media subpoenas. The conduct at issue is serious and potentially criminal, including contempt of court, perjury before the District Court, and obstruction of justice. In light of the seriousness of the conduct and the inability to complete the investigation through other means, the subpoenas were fully consistent with Department policy.

Leahy 23 **Why is the Department seeking jail time for these reporters, who simply asserted their First Amendment rights in this case, which would be for a longer term than the jail sentences for all of the BALCO defendants combined?**

ANSWER: The federal courts, including the Supreme Court, have consistently refused to recognize a First Amendment right on the behalf of a reporter to refuse to comply with a grand jury subpoena. The length of any time in jail (including no time in jail) would be completely the result of the reporter's own choice, since the reporter could eliminate any such action simply by complying with the grand jury subpoena. The Department has not sought jail time for the reporters; it has sought the information that the reporters are legally obligated to provide. Moreover, the Department agreed that the reporters should not be jailed during the pendency of their appeal.

Leahy 25 **Last year, when the President signed into law a measure reauthorizing the Voting Rights Act that had passed 390-33 in the House and 98-0 in the Senate, I commended him for committing to aggressive enforcement of the Voting Rights Act and to defending the VRA from legal attacks. In nearly 20 hearings in the House and Senate, Congress established not only that the VRA remains one of the landmark achievements of the Civil Rights Era, but that a continuing need exists for the vital voting rights protections it provides all Americans. Yet, in nearly six years of power, the Bush Administration has brought only one suit on behalf of African-American voters alleging discrimination under Section 2 of the Voting Rights Act, the key section that provides a cause of action for discrimination against minority voters. Under President Bush, the Department has brought only a handful of cases alleging discrimination in voting on behalf of Hispanic Americans. (a) Given the President's statement last year that he would aggressively enforce the Voting Rights Act and after Congress voted nearly unanimously to reauthorize it after reviewing extensive evidence of ongoing discrimination in voting against minorities why has your Justice Department not brought more Section 2 actions on behalf of minority voters?**

ANSWER: The Administration strongly supported reauthorization of the Voting Rights Act and is currently vigorously defending the Act's constitutionality in court. When Congress approved the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, the Attorney General stated that: "The Department of Justice is proud to have supported the passage of this historic legislation. The Voting Rights Act of 1965 was a critical chapter in the still-unfolding story of American freedom. As President Johnson said when he signed that bill, the right to vote is the lifeblood of our democracy. The reauthorization of this act is an important and proud American moment, and I know that President Bush looks forward to signing the bill. The Department of Justice stands ready and looks forward to continuing, vigorous enforcement of its protections."

During this Administration, the Department has vigorously enforced all of the provisions, including Section 2, of the Voting Rights Act. In fact, the 18 new lawsuits we have filed in CY 2006 is more than twice the average number of lawsuits filed by the Division annually over the preceding 30 years. During this Administration, moreover, we have filed approximately 60 percent of *all* cases ever filed under the minority language provisions of the Voting Rights Act, as well as approximately 75 percent of all cases ever filed under Section 208. We also have used Section 2 of the Voting Rights Act to challenge barriers to participation, as in *United States v. Long County* (S.D. Ga.), which specifically involved race-based challenges to Latino voters, and *United States v. City of Boston* (D. Mass.), which involved practices and procedures that discriminate against members of language-minority groups, specifically persons of Spanish, Chinese, and Vietnamese heritage, so as to deny and abridge their right to vote in violation of Section 2. We have filed the first voting rights case in the Division's history on behalf of Haitian Americans; the first voting rights case in the Division's history on behalf of Filipino Americans; and the first voting rights cases in the Division's history on behalf of Vietnamese Americans. We will continue vigorously to protect *all* Americans from unlawful discrimination in voting.

Leahy 26 **I am concerned that the relative few voting rights cases brought by the Justice Department suggests that you have determined that enforcing laws to combat racial discrimination – particularly against African-American voters – is no longer a priority. If this is still a priority, why have you brought the same number of Section 2 voting discrimination cases against white voters — one — as you have against African-American voters?**

ANSWER: In this Administration, the Voting Section of the Civil Rights Division has filed a number of cases, in addition to a number of Section 5 objections, on behalf of African-American voters in various jurisdictions. The cases filed include *United States v. Crockett County* (W.D. Tenn.); *United States v. Euclid* (N.D. Ohio); *United States v. Miami-Dade County* (S.D. Fla.); and *United States v. North Harris Montgomery Community College District* (S.D. Tex.), which also involved protecting the rights of Hispanic citizens. In addition, we successfully litigated *United States v. Charleston County, South Carolina* (D.S.C.) and successfully defended that victory through appeal to the U.S. Supreme Court. *Crockett County, Euclid*, and *Charleston County* are all Section 2 cases.

The Department continues to seek out, investigate and, when facts warrant, prosecute cases on behalf of African-American citizens. The Voting Section continues to actively identify at-large and other election systems that violate the Voting Rights Act. Where we find such systems and where the facts support a claim, we do not hesitate to bring lawsuits. We continue to be interested in allegations of possible Voting Rights Act violations from all sources and have solicited such information widely.

Leahy 29 **At last November's Civil Rights Division Oversight Hearing, I asked Assistant Attorney General Wan Kim about a letter Senator Kennedy and I sent you last October 20 requesting a federal investigation into the activities of Republican congressional candidate Tan Nguyen. Mr. Nguyen admitted that his campaign staffer sent letters to 73,000 households, spreading misinformation about voting requirements apparently designed to suppress Latino voter turnout. At the November 16, 2006 Civil Rights Division Oversight Hearing, Mr. Kim assured me that an investigation into the Orange County case was ongoing. However, Mr. Kim has yet to respond to my written-follow question asking for a description and status report on this investigation. Can you update me on the status of the Department's investigation?**

ANSWER: Upon learning of the Orange County mailing, the Division immediately initiated an investigation. In addition, the Division also dispatched Department personnel to monitor the polls in Orange County for the November 7, 2006, elections. The matter remains the subject of an ongoing investigation. As you are aware, we are not at liberty to discuss the details of any ongoing investigation.

Leahy 31 **What conclusions do you draw about the success of the Department's efforts to combat voter intimidation and suppression from the Department's decision as expressed in the January 11 letter not to pursue charges arising from the deceptive conduct during the elections in Maryland?**

ANSWER: The Department's decisions regarding the enforcement of federal law are always based on a careful and impartial review of the relevant facts and the applicable legal standards.

Leahy 32 **"Recent news reports have brought to light the degree to which the Civil Rights Division has cut career attorneys out of the decision-making process and disregarded their recommendations, driving away many veteran attorneys, and undermining those you have not been able to replace. According to an October 6, 2005 article in Legal Affairs, "[s]ome career professionals who have left the Civil Rights Division say they left because they were shut out of the decision making process in a way that did not occur under previous administrations." For example, as reported in a November 17, 2005 Washington Post article, political appointees overruled the recommendation of career attorneys to block a Georgia voter ID law under Section 5 of the Voting Rights Act. Ultimately, federal and state courts blocked Georgia from implementing its ID requirement for voting, calling the law a "poll tax." By ignoring the advice of career attorneys in**

evaluating compliance with the Voting Rights Act, is the Justice Department allowing political considerations to trump enforcement of one of our nation's most important civil rights laws?

ANSWER: The Department is committed to the vigorous and even-handed enforcement of the Voting Rights Act on behalf of all Americans and has brought lawsuits on behalf of African-American voters, Hispanic-American voters, Asian-American voters, Native-American voters, and white voters. This Administration also has brought the first lawsuits in history to protect the voting rights of citizens of Vietnamese, Filipino, and Haitian heritage.

Our record of even-handedly enforcing federal law best demonstrates that the Division makes litigation decisions that do not turn on partisan considerations. Career staff continues to be involved in the recommendation and decision-making process of every enforcement action brought by the Division under the Voting Rights Act, including the review of every Section 5 submission. Voting Section (and other Civil Rights Division) attorneys are in fact required to prepare detailed memoranda in enforcement actions, including Section 5 preclearance decisions, setting forth the facts and law on each proposed matter. Every legal analysis, including recommendations under Section 5, must be balanced and include all relevant information. The Voting Section Chief – a 30 year veteran career attorney – expects and encourages thoughtful deliberation and recommendations from Section staff, and this career official has decisional responsibility for many matters. When the decisions come to the Assistant Attorney General for the Civil Rights Division, he also welcomes opposing views and is available for responsible, productive discussion.

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. These lawsuits 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. Long County*; *United States v. City of Boston*; *United States v. Hale County, TX*; *United States v. Brazos County, TX*; *United States v. City of Springfield, MA*; *United States v. Westchester County, NY*; *United States v. City of Azusa, CA*; *United States v. City of Paramount, CA*; *United States v. City of Rosemead, CA*; *United States v. Ector County, TX*; *United States v. Cochise County, AZ*; *United States v. San Benito County, CA*. These cases accelerated enforcement of the rights of voters to participate free from barriers at the polls during the 2002-2004 period.

The 18 new lawsuits we filed in CY 2006 is more than twice the average number of lawsuits filed by the Division annually over the preceding 30 years.

During CY 2006, the Division's Voting Section continued to aggressively enforce all provisions of the Voting Rights Act, filing nine lawsuits to enforce various provisions of the Act. These cases included a lawsuit under Section 2 against Long County, Georgia, for improper challenges to Hispanic voters, including at least three United States citizens on active duty with the United States Army, based entirely on their perceived race and ethnicity, and challenges to election systems that discriminate against African American voters in Euclid, Ohio, and Hispanic citizens of Port Chester, New York. We also recently won a major Section 2 lawsuit against Osceola County, Florida, overturning that county's discriminatory at-large election system. The Civil Rights Division also currently is defending the constitutionality of the VRARA.

In FY 2006, the Voting Section processed the largest number of Section 5 submissions in its history, and interposed important objections to protect minority voters in Texas and Georgia. With over 7,100 submissions, the Division handled roughly 40 percent more submissions in FY 2006 than in a normal year. The Voting Section also brought the first Section 5 enforcement action since 1998. And the Voting Section has begun a major enhancement of the Section 5 review process; soon jurisdictions will be able to submit voting changes online, making the process easier, more efficient, and more cost effective for covered jurisdictions and for the Department.

Our commitment to enforcing the language minority requirements of the Voting Rights Act, reauthorized by Congress this summer, remains strong. We filed five such lawsuits in 2006, which was only one short of the all-time record set in 2005.

The Division also had a record-breaking year with regard to enforcement of Section 208 of the Voting Rights Act. In FY 2006, the Division's Voting Section obtained 37.5%, or three out of eight, of the judgments ever obtained under Section 208 in its twenty-four year history.

In CY 2006 the Voting Section filed the largest number of cases under UOCAVA in any year since 1992. We filed successful UOCAVA suits in Alabama, Connecticut, and North Carolina. In addition, we reached a voluntary legislative solution without the need for litigation in South Carolina and worked with some additional states and localities to forestall or mitigate late ballot transmissions.

In CY 2006, the Voting Section also filed the largest number of suits under the National Voter Registration Act since immediately following the passage of the Act in 1995. We filed and successfully resolved lawsuits in Indiana, Maine, and New Jersey and are litigating a fourth suit filed in Missouri.

As of January 1, 2006, virtually all of HAVA's requirements became fully enforceable. In advance of this first year of nationwide implementation of the database and accessible voting machine requirements of HAVA and into this year, the Division worked hard to help states achieve timely voluntary compliance. Where that did not appear possible, the Division brought enforcement actions, filing five lawsuits under HAVA in 2006. Four suits were filed against states for failure to complete the database requirements of HAVA; two of those suits also were for violations of the accessible voting requirements. In addition, one suit was filed against a locality for its failure to meet the Election Day informational posting requirements of HAVA.

We also successfully defended three additional lawsuits challenging the congressional mandates of HAVA. In addition, in Pennsylvania, where a state court had enjoined compliance with HAVA, our formal notice to the state of our intended lawsuit assisted state officials in overturning an erroneous lower court decision, so that we did not ultimately need to file to ensure compliance in Pennsylvania.

During CY 2006, the Division also deployed a record number of monitors and observers to jurisdictions across the country for a mid-term election. On November 7, 2006, more than 800 federal personnel monitored the polls in 69 political subdivisions in 22 states. In CY 2006, we sent over 1,500 federal personnel to monitor elections, double the number sent in CY 2000, a presidential election year.

With regard to the preclearance of the Georgia identification law, in August 2005, the Department precleared a Georgia voter identification law, which itself amended an existing voter identification statute that had been precleared by the prior Administration. This preclearance decision followed a careful analysis that lasted several months and considered all of the relevant factors, including the most recent data available from the State of Georgia on the issuance of state photo identification and driver's license cards and the views of minority legislators in Georgia (as well other current and former minority elected officials). The data showed, among other things, that the number of people in Georgia who already possessed a valid photo identification greatly exceeded the total number of registered voters, and that there was no racial disparity in access to the identification cards. The state subsequently adopted, and the Department precleared in April 2006, a new form of voter identification that would be available to voters for free at one or more locations in each of the 159 Georgia counties.

In *Common Cause/Georgia v. Billups*, the district court did not conclude that the identification requirement violated the Voting Rights Act. To the contrary, the court refused to issue a preliminary injunction on that ground. The court instead issued a preliminary injunction on constitutional grounds that the Department cannot lawfully consider in conducting a preclearance review under Section 5 of the Voting Rights Act. Accordingly, the court's preliminary ruling, in a matter that is still being actively litigated, does not call into question the Department's preclearance decision. In addition, the state court decision blocking Georgia's implementation of the identification requirement was issued on state constitutional grounds, and, therefore, also did not call into question the Department's preclearance decision.

Leahy 33 **According to a December 8, 2005 article in the Dallas Morning News, after public reports surfaced about the overruling of career staff, the Justice Department adopted a new policy barring career staff from making recommendations in voting rights cases. Has the Department implemented a policy to exclude the recommendations of career voting rights lawyers in certain voting cases? If so, why did the Department change this policy? Do you believe the Section 5 pre-clearance decisions of career attorneys in the Voting Section are being accorded sufficient weight?**

ANSWER: Please see our response to question 32, above.

Leahy 34 **I find it troubling that the Bush Administration has been remaking the Justice Department's Civil Rights Division by filling the permanent ranks with lawyers who have strong ideological backgrounds but little civil rights experience. Hiring for career jobs in the Civil Rights Division under all recent administrations, Democratic and Republican, had been handled by civil servants – not political appointees. However, according to a July 23, 2006 article in the Boston Globe, "in the fall of 2002, then-[A]ttorney [G]eneral John Ashcroft changed the procedures. The Civil Rights Division disbanded the hiring committees made up of veteran career lawyers" and "since 2003 [] the administration changed the rules to give political appointees more influence in the hiring process." (a) Why did the Civil Rights Division disband the career lawyer hiring committees and diminish the role of veteran career lawyers in hiring new career lawyers?**

ANSWER: We respectfully disagree with many of the assertions made in the *Boston Globe* article. There is no political litmus test used in deciding to hire attorneys in the Civil Rights Division. During the past six years, we have hired people from an extremely wide variety of backgrounds and experiences. We will continue to hire the best attorneys available. It is our goal to ensure that every attorney hired to work in the Civil Rights Division has a demonstrated record of excellence, is a talented attorney consistent with that excellent record, and shares a commitment to the work of the Division.

The *Globe* article, among other things, incorrectly suggests that a central hiring committee of career employees within the Civil Rights Division made all hiring decisions during previous Administrations; obtained limited information regarding attorneys hired in only three of the ten litigating sections in the Division; and did not obtain resumes of attorneys hired during previous Administrations in order to make an objective comparison. Most significantly, the *Globe* article was not based on any personal interviews of these attorneys to measure their interest in, and dedication to, enforcing the nation's civil rights laws.

The talented and accomplished individuals hired in the Civil Rights Division have a profound commitment to public service and law enforcement. Generalizations are often inaccurate and unhelpful in defining an individual. No attorney is hired based solely on his or her resume, but rather after a profoundly more comprehensive review, including detailed personal interviews.

In addition, veteran career attorneys continue to make hiring recommendations throughout the Department and within the Civil Rights Division. The procedure implemented by Attorney General Ashcroft throughout the Department for hiring attorneys through the Attorney General's Honors Program (HP) offers several improvements to the previous program. Prior to 2002, HP applicants paid their own way to interview in various locations across the country; they often met with a single representative from the Justice Department. The Department of Justice now pays for candidates to come to Washington, D.C., or other major cities, where they meet with both political and career attorneys for an interview. *More* individuals are now typically involved in the hiring process, not fewer. And applicants who might have otherwise been prohibited from seeking an interview because of costs and location now have equal access to the program.

Leahy 35 **Considering the laudable purpose of having career attorneys and the essential role they play in the Division, how can you justify the decision to disband the career attorney hiring committees?**

ANSWER: Please see our response to question 34, above.

Leahy 36 **The effects of this shift in the Division's hiring policy have been significant. The Boston Globe examined the resumes of "successful applicants to the voting rights, employment litigation, and appellate sections" for the past five years. According to the July 23 Boston Globe article, "[t]he documents show that only 42 percent of the lawyers hired since 2003 [] have civil rights experience. In the two years before the change, 77 percent of those who were hired had civil rights backgrounds." What steps has the Department taken to ensure that the dramatic shift away from hiring career attorneys with a civil rights background does not interfere with the ability of the Civil Rights Division to vigorously enforce anti-discrimination laws?**

ANSWER: We respectfully disagree with many of the assertions made in the *Boston Globe* article. It is also unclear what methodology the *Globe* employed in reaching its conclusions. The Civil Rights Division, like every other component of the Department of Justice, is charged with enforcing the laws passed by Congress. As such, we seek to hire outstanding attorneys with demonstrated legal skills and abilities. The Department considers attorneys from a wide variety of educational backgrounds, professional experiences, and demonstrated qualities. Attorneys from an extremely wide variety of backgrounds and experiences have been hired to work in the Division under this Administration. For example, the Division has hired not only attorneys with significant prior civil rights experience but also attorneys with other crucial skills, such as a significant record of actual litigation or management experience.

The *Boston Globe* article ignores salient facts pertaining to the Division's hiring record during this Administration. For example, all five individuals hired as career section chiefs during this Administration had previously served as career attorneys in the Division. These five chiefs have an average of approximately 17 years of experience in the Division, and also had a wide variety of work experiences, including working in the Clinton White House, with the American Civil Liberties Union, and as Special Assistant to Acting Assistant Attorney General Bill Lann Lee. In sum, there is no political litmus test used in deciding to hire attorneys in the Civil Rights Division.

Leahy 41 **In response to the recent statistics, you announced a study to be conducted by the Justice Department in 18 cities to understand what might explain the recent rise in violent crime. Have you drawn any conclusions yet based on this study? How long before the Department expects results?**

ANSWER: The Attorney General's Initiative for Safer Communities is ongoing. The initiative has brought together local law enforcement from 18 jurisdictions throughout the country and

Department of Justice officials to investigate the factors contributing to a rise in violent crime in certain cities and identify programs that have been successful at keeping communities safer.

The Department has recently completed its city visits. This spring, with the benefit of the information received during these meetings, the Attorney General will announce additional steps the Department of Justice will take to assist state and local law enforcement to address the violent crime issues in their respective communities.

Leahy 47 **"Recent press reports indicated that the Secret Service and the White House secretly signed an agreement last spring closing from public view the records identifying visitors to the White House. This agreement was apparently signed in the midst of the Justice Department's investigation into disgraced lobbyist Jack Abramoff and related litigation concerning visitor logs referencing Mr. Abramoff. Press reports further indicate that the agreement has been used by the White House in litigation in an effort to fight public disclosure of visitor logs. (a) Did you play any role in this agreement between the Secret Service and the White House, and did the Department of Justice provide any legal basis for the agreement?**

ANSWER: We cannot comment on the confidential and privileged advice that the Department of Justice provides to clients within the Executive Branch. We can, however, discuss the legal basis supporting the agreement, which we will transmit to the Committee in a supplemental response containing Question 48.

Leahy 50 **Given concerns about resources available for corruption investigations and prosecutions, as well as this disturbing agreement with the Secret Service, can you assure me that the offices investigating and prosecuting the Abramoff case and related matters are receiving the resources and the access they need to fully and successfully investigate that matter?**

ANSWER: The investigation and prosecution of public corruption is one of the top priorities of the Federal Bureau of Investigation and the Department of Justice, and we are dedicated to providing ample resources to aggressively combat this form of crime. There is a formidable team of experienced FBI agents and career prosecutors assigned to handle the Abramoff investigation, and that team has had, and will continue to have, all of the resources needed to handle this very important matter fairly, thoroughly, and appropriately.

Leahy 53 **Would the FBI, the U.S. Attorney's offices, and the Public Integrity Section of the Department of Justice benefit from additional resources to combat public corruption? If so, what types of resources would be the most helpful?**

ANSWER: The investigation and prosecution of public corruption is a labor- and resource-intensive effort. The Federal Bureau of Investigation, the United States Attorneys' Offices, and the Public Integrity Section of the Department's Criminal Division currently devote substantial resources to combating public corruption. The resources that contribute most greatly to this effort are investigators and prosecutors, supported by sufficient funds for investigative techniques, litigation expenses, and travel.

Leahy 67 **In January, I joined with Senator Specter in asking the Chief Judge of the Foreign Intelligence Surveillance Court ("FISC") to provide copies of the decisions of the FISC that the Department cited when it publicly announced that it would terminate the Terrorist Surveillance Program ("TSP"). During the hearing, I asked you whether you had any objection to the FISC providing these materials to the Judiciary Committee and you said that you had no objection, but wanted to consult with the President.**
(a) Do you consent to the FISC providing these materials, including the applications, affidavits, and orders, to the Committee? If not, please explain the basis for your decision, and whether you assert the documents are classified or subject to any privilege.

ANSWER: As you know, Members of the Intelligence Committees have been briefed on the new orders, consistent with their oversight authority relating to intelligence matters and the National Security Act. Copies of these highly classified documents, specifically the January 10, 2007 orders, the Government's applications, and certain exhibits to the applications (including supporting memoranda of law) have been provided to both Intelligence Committees. We note that these documents contain information involving intelligence sources and methods and that the provision of Foreign Intelligence Surveillance Act ("FISA") applications to even these Committees is an extraordinary action. For these reasons, the Intelligence Committees have agreed to strict access limitations with respect to these particularly sensitive documents.

In addition, we have taken the extraordinary step of offering briefings to the Chairmen and Ranking Members of both Judiciary Committees on this highly classified matter. We also agreed to allow the Chairmen and Ranking Members to review certain exceptionally sensitive documents, including the orders, applications, and supporting memoranda of law, in the Intelligence Committee's special facilities.

Leahy 68 **Notwithstanding the FISC court's willingness to provide these materials to the Committee, please state whether the Department has copies of these materials, and whether the Department will provide them to the Committee. If not, please explain the basis for your decision, and whether you assert the documents are classified or subject to any privilege**

ANSWER: Please see our response to Question 67, above.

Leahy 69 **Do any of these materials contain legal arguments concerning the interpretation of FISA, the Fourth Amendment, or the President's inherent authority, and, if so, would you agree to provide those portions of the materials? If not, please explain the basis for you decision, and whether you assert those portions of the documents are classified, or subject to privilege.**

<u>ANSWER:</u> Please see our response to Question 67, above.

Leahy 70 **To the extent you claim that the documents are classified or privileged, do you claim that the entire documents are classified or privileged, and no portions can be released to the Committee? Please explain the basis for this decision.**

<u>ANSWER:</u> Please see our response to Question 67, above. The materials made available to the Chairmen and Ranking Members of the Judiciary Committees are highly classified.

Leahy 71 **You also testified that, shortly after you became Attorney General, the Department redoubled its efforts to bring the TSP into compliance with the FISA laws and that the Department has been working on this effort for a long time. Please state exactly when the Department began this process and specifically what efforts were undertaken.**

<u>ANSWER:</u> First, we emphasize that the recent orders of a Judge of the Foreign Intelligence Surveillance Court ("FISC") did not "bring the TSP into compliance with the FISA laws." As noted in the Attorney General's letter, dated January 17, 2007, and as he reiterated in the hearing, the TSP was fully consistent with FISA.

As noted in the January 17th letter, the Department of Justice began exploring options for subjecting to FISC approval any electronic surveillance that may have occurred as part of the Terrorist Surveillance Program ("TSP") in the spring of 2005, well before the first press account disclosing the existence of the TSP. It took considerable time and work for the Government to develop the approach that was proposed to the Court and for the Judge on the FISC to consider and approve the January 10 orders. Further 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 73 **Please state when the Department first learned of the FISC's orders with respect to these application(s).**

<u>ANSWER:</u> As noted in our letter of January 17, the relevant orders were issued by the FISC on January 10, 2007. The Department learned of the FISC's orders on that date.

Leahy 74 **Please state whether you were personally involved in reviewing the FISA application(s) or participated in the "negotiations" with the FISC, and, if so, please briefly describe your involvement in this process?**

<u>ANSWER:</u> As you know, FISA requires that the Attorney General (as that term is defined in FISA) approve applications for electronic surveillance orders under FISA based upon his finding that such applications satisfy the requirements of FISA. *See* 50 U.S.C. §§ 1804(a), 1805(f). The

Attorney General approved the applications that resulted in the orders issued by a Judge of the FISC on January 10, 2007, before the applications were filed.

Leahy 75 **Please state whether there were other Administration officials involved in this process, and, if so, please identify those officials and briefly describe their involvement in this process?**

ANSWER: As noted in our letter of January 17, 2007, the orders issued on January 10 are innovative and complex, and many attorneys in the Department of Justice and throughout the Executive Branch worked diligently to prepare the applications that resulted in these orders. Further 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 78 **Please provide copies of any memoranda or other documents reflecting your responses to questions 44(a-f) and, if you decline to provide these materials, please explain the basis for your decision, including whether you assert the documents are classified or subject to any privilege.**

ANSWER: Please see our response to Question 67, above.

Leahy 79 **The Administration has been operating its warrantless surveillance program for five years, without any court review and amid growing concerns from Congress and the American people. You testified that it took the Department "a period of time to develop what we thought would be an acceptable legal argument and fit it into the operational capabilities and possibilities of NSA." Given the clear requirements of the FISA statute, why did it take at least two years to complete this process?" Please explain why the Department did not seek the FISC's approval of the TSP much earlier?**

ANSWER: As we have previously explained, the TSP fully complied with the law, including FISA. Nevertheless, in the spring of 2005, the Administration began exploring options for subjecting to FISC approval any electronic surveillance that may have occurred as part of the TSP. Any court authorization had to ensure that the Intelligence Community would have the speed and agility necessary to protect the Nation from al Qaeda—the very speed and agility that was offered by the TSP. The orders issued by the FISC on January 10, 2007, are innovative and complex, and it took considerable time and work for the Government to develop the approach that was proposed to the Court and for the Judge on the FISC to consider and approve these orders. Further 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 80 **You also testified that the FISA application(s) approved by the FISC was different than a normal application. Please explain how so. Does the subject FISA application(s) apply to specific individuals, locations or facilities? If not, is it more general authority to conduct surveillance of terrorism suspects?**

ANSWER: As we have explained, the contents of the FISC orders are highly classified. As noted above, the Intelligence Committees have been briefed on them, and we have offered to brief the Chairmen and Ranking Members of both Judiciary Committees on these orders.

Leahy 87 **You also testified that FISA allows for physical searches under certain circumstances. First, please identify the provision in the FISA statute that you maintain permits the Government to open Americans' mail. Second, please state whether the Government has conducted physical searches of Americans' mail based upon FISA, and if so, please state how many such searches have occurred since September 11, 2001?**

ANSWER: As you know, FISA specifically authorizes the Attorney General to seek a court order from the Foreign Intelligence Surveillance Court ("FISC") to conduct "a physical search in the United States of the . . . property, information, or material of a foreign power or an agent of a foreign power for the purpose of collecting foreign intelligence information." *See* 50 U.S.C. § 1822(b). The property that may be searched pursuant to an order from the FISC includes property that is "in transit to or from an agent of a foreign power or a foreign power." *Id.* § 1824(a)(3)(B). FISA also specifically authorizes the Attorney General, under certain circumstances, to authorize the emergency physical search of such property if he then obtains an order from the FISC authorizing the search. *See id.* § 1824(e). In addition, FISA specifically authorizes the Attorney General to "authorize physical searches without a court order . . . to acquire foreign intelligence information" if the "physical search is solely directed at . . . information, material, or property used exclusively by, or under the open and exclusive control of, a foreign power or powers." *Id.* § 1822(a)(1). The use of these authorities for the purpose of collecting foreign-intelligence information is highly classified, and it would be inappropriate to reveal the use of such authorities in this setting. Consistent with long-standing practice, the Department of Justice informs Congress of this information through classified semi-annual reports and through appropriate briefings pursuant to the National Security Act of 1947.

Leahy 88 **During the hearing, I also asked you about press reports in the New York Times and elsewhere stating that the Department of Defense and CIA have greatly expanded their use of non-compulsory national security letters to acquire Americans' sensitive financial records. According to the New York Times, DoD has made more than 500 requests for financial records since September 11, 2001. What legal authority are DoD and the CIA relying upon to request these records?**

ANSWER: The Department of Justice defers to the Department of Defense and the Central Intelligence Agency for a response to this inquiry.

Leahy 91 **One of the lessons from 9-11 was that the Government's law enforcement and counterterrorism agencies must better coordinate and share critical counterterrorism information. If the press reports are true, the DoD and CIA are not sharing this critical information with the FBI when it comes to their own domestic investigations. In you view, does this suggests that the Administration has failed in its efforts to improve information-sharing across the government?**

ANSWER: The FBI is actively engaged with the Department of Defense (DoD) and the Central Intelligence agency (CIA) elements that have "homeland" responsibilities to ensure that our mutual engagement and information exchange is consistent with the expectations of the 9/11 Commission and the American people. That engagement extends to operational, investigative, intelligence, process, and procedural matters, as well as to how we can best integrate our activities related to the Information Sharing Environment. One example of this is the number of FBI field offices that participate in exchanges of analysts and operational personnel with CIA and DoD entities; a number of CIA and DoD analysts are integrated in or working closely with FBI Field Intelligence Groups or serving in Joint Terrorism Task Forces (JTTFs), and in a number of State Fusion Centers, both FBI and DoD elements are included in the core intelligence presence. While we are always looking for ways to formalize and strengthen our joint targeting, joint source development, and joint reporting enterprises, we believe the successes and progress are clear.

Leahy 94 **Are there safeguards in place to ensure that state and local law enforcement agencies will protect the security of this data and not abuse it? If so, please describe these safeguards and how they will be implemented.**

ANSWER: The information is shared with other trusted federal, state and local law enforcement entities in selected geographic areas of the country so that those entities can more effectively investigate, disrupt, and deter criminal activity, including terrorism, to better protect the nation.

User role-based access is implemented to ensure that R-DEx is used for law enforcement purposes only and that access to R-DEx information only is provided to law enforcement personnel who have undergone background checks and have received appropriate training, and who have an official need for access in order to perform their professional duties. In addition, the security controls, both administrative and technological, were developed and implemented in order to reduce the risk of unauthorized access to the data.

R-DEx has an audit capability that logs the date, time, subject, and originating account of all user queries. The parties maintain these audit logs for five years or for the life of the records accessed, whichever is longer.

Memorandums of Understanding (MOUs) have been established between all information sharing partners. The MOUs govern use of all information and stipulate how recipients may use data shared via R-DEx. One stipulation states that R-DEx information may not be used as the basis for any action or disseminated for any other purpose or in any other manner outside of the agency that accessed the information, unless that agency first obtains the express permission of the agency that contributed the information. These MOUs include sanctions for misuse of the system and/or the submitted component data. Sanctions can be applied to an individual or entire agency, depending on the circumstances and severity of the misuse.

Training is required for all R-DEx users. This training is provided to make users of R-DEx information aware of what information can be accessed from R-DEx and the procedures applicable to such access.

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 prosecutorial resources of six key sections or divisions within the Department including the Public Integrity Section, the Fraud Section, the Asset Forfeiture and Money Laundering Section, the Antitrust Division, the Tax Division, and the Civil Division – in addition to calling upon the 94 U.S. Attorneys' Offices across the country – to ensure that competing resource needs are balanced and meritorious cases are identified, investigated, and prosecuted 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: Central District of California, Eastern District of Virginia (through which the District of Maryland and the District of Columbia are participating), Southern District of Florida, Northern District of Alabama, District of Connecticut, the District of Massachusetts, Eastern District of Pennsylvania, Central District of Illinois; Northern District of Georgia, Northern District of Texas, Southern District of Texas and 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 the Treasury, Department of the 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 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.

To date, the Department has charged 18 individuals criminally for fraud associated with government contracting in support of the Iraq war effort. Thirteen (13) of these individuals have been convicted (nine are awaiting sentencing). The other five individuals have charges pending either through indictments or criminal complaints. Two civil cases have been settled involving contracting in connection with the Iraq war.

Leahy 98 **On January 21, 2007, the Department of Justice's Office of the Inspector General issued a report highly critical of the Department's handling of the investigation into allegations that former Congressman Mark Foley sent sexually explicit emails to former Congressional Pages. The OIG's report found, among other things, that the FBI should have taken at least some follow-up steps with regard to these e-mails, such as interviewing the former page involved or notifying the House of Representatives authorities in charge of the page program about the allegations. Do you agree with the OIG's conclusions regarding the FBI's handling of this matter, and if so, what steps will the Department take to ensure that it handles investigations of this nature better in the future?**

ANSWER: The Department of Justice Office of the Inspector General (OIG) concluded that the FBI acted within the range of its discretion in deciding not to open a criminal investigation in July 2006 after receiving e-mails between Foley and a former page from Citizens for Responsibility and Ethics in Washington (CREW). As detailed in the OIG report, the United States Attorney's Office for the District of Columbia later reviewed these same e-mails and agreed that no further investigation was warranted.

The OIG determined that the e-mails were reviewed by three separate investigative squads and that FBI agents acted quickly and appropriately in assessing the information and providing it to the Cyber Crimes Squad where the decision was made not to pursue a criminal investigation. The OIG found that this decision was not influenced in any way by the fact that Foley was then a Member of Congress. Although the OIG concluded that the FBI acted within its discretion, the review suggests certain follow-up steps that could have been undertaken with regard to the e-mails. The OIG acknowledges that its assessment was conducted after the fact and after explicit instant messages surfaced, none of which were part of the FBI's initial evaluation.

The OIG also reviewed the accuracy of DOJ and FBI statements made to the media in October 2006 regarding the e-mails received from CREW, concluding that inaccurate information about the emails provided by CREW was disseminated within the FBI and DOJ. This information resulted in misunderstandings on the part of FBI and DOJ spokespersons and may have contributed to the provision of inaccurate information to the news media.

The FBI shares the OIG's interest in ensuring that information regarding potential criminal activity is evaluated objectively and in conformance with established policies and practices. Accordingly, the FBI will carefully examine the OIG review for any changes to existing policies or procedures that may be warranted.

Leahy 99 **The OIG also found that the information about the Foley matter provided by the FBI and the Department to the media inaccurately portrayed the information that CREW provided to the FBI, and inaccurately suggested that CREW's actions were the cause of the FBI's decision not to investigate Mr. Foley's conduct. The OIG also indicated that it was unable to identify the Department officials responsible for these inaccurate statements. Have you identified the individual(s) responsible for this conduct? If so, will the individual(s) who made these misleading statements been disciplined?**

ANSWER: According to the OIG report, three FBI media representatives were interviewed and said they "d[id] not recall making any of these statements to any reporter." The OIG report characterized what reporters were told as "incorrect information" which was "mistakenly believed" by FBI and DOJ spokespersons as a result of information provided by investigators. The OIG did not find intentional misconduct, but instead unintentional communications errors, concluding only that "these misunderstandings may have contributed to inaccurate information being provided to the media."

Leahy 100 **Maher Arar, a Canadian citizen who was returning home from a vacation, was detained by federal agents at JFK Airport in New York City in 2002 on suspicion of ties to terrorism and deported to Syria, where he was held for 10 months. A Canadian commission found that there was no evidence to support that Arar had any terrorist connection or posed any threat, but that he was tortured and held in abhorrent conditions in Syria. Why was Mr. Arar sent to Syria, rather than to Canada, where he is a citizen, which would have been easier and would have eliminated the risk that he could be tortured?**

ANSWER: The Department provided a classified briefing on the Arar matter to Chairman Leahy and Ranking Member Specter on February 1, 2007. In addition, the Department has sent classified documents regarding the Arar matter to the Senate Select Committee on Intelligence (SSCI), and notified Chairman Leahy and Senator Specter that they can view those documents via SSCI.

Leahy 101 **What steps have you taken to make sure that the United States does not send other people in the future to places where they will be tortured?**

ANSWER: Please see our response to Question 100, above.

Leahy 102 **Is the government taking any steps to apologize to Mr. Arar or to compensate him for his ordeal?**

ANSWER: Please see our response to Question 100, above.

QUESTIONS FROM RANKING MEMBER SPECTER

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 program. One requirement is that each applicant be employed full-time as a firearm examiner trainee in a 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 110 **Can something be done to allow ATF to expedite firearms examination training so the Police Department can train new personnel? What is the current delay for such training?**

ANSWER: The National Firearms Examiner Academy is an aggressive 12-month program. The training curriculum was designed based upon peer review consensus, and to modify the program in any way would compromise the training standards established by field experts. The training delivery for the current fiscal year has been postponed due to the uncertainty of final budget figures. Without a final budget allocation, ATF must ensure that mandatory training needs for Bureau employees are met prior to those of our State and local partners.

Specter 115 **Other than advice in furtherance of a crime or fraud and advice that is the subject of an advice of counsel defense – both of which are expressly exempted from the memo's requirements—why does DOJ need to acquire the attorney advice given to corporations? Give examples of instances where this would be needed to effectively**

prosecute a case and where the instance isn't already covered by the crime/fraud exception or an advice of counsel defense?

ANSWER: The Department would rarely request attorney-client advice not related to an advice of counsel defense or covered by the crime-fraud exception. In fact, such instances would be extremely unusual. However, there may be instances where the advice is relevant and necessary to the investigation. For example, the Department may want the legal conclusions of an internal investigation to determine when and how officers and directors of a corporation may have been put on notice about regulatory or criminal violations. Or the Department may want the legal advice given to the corporation at the time of an employee's termination if the government concluded that employee was part of a fraud scheme, especially if the corporation is now giving the government a more benign reason for the termination. In cases where the corporation's actions are the basis for a defense or for the impeachment of corporate witnesses, the Department may also need the substance of legal advice to explain the corporation's actions and thus rebut the defense or rehabilitate the impeached corporate witnesses. Those instances would not be covered by the above exceptions.

Specter 116 **What standards does the DAG intend to use in determining whether or not to approve such a request?**

ANSWER: Before federal prosecutors, through their United States Attorney or component head, can even make a request of the Deputy Attorney General, they must establish a legitimate need for the information. If they cannot meet that test, the request to obtain the privileged information will not be authorized. To meet that test, prosecutors must show: (1) the likelihood and degree to which the privileged information will benefit the government's investigation; (2) whether the information sought can be obtained in a timely and complete fashion by using alternative means that do not require waiver; (3) the completeness of the voluntary disclosure already provided; and (4) collateral consequences to a corporation of a waiver.

Specter 117 **What safeguards are in place to prevent a routine approval of every single request made?**

ANSWER: This question assumes that the approval process is illusory. The approval process outlined in the McNulty Memorandum sets forth a specific test, the legitimate needs test, that federal prosecutors have to meet to seek any waiver of privileged materials. The United States Attorney must personally authorize a request for factual information in writing and the Deputy Attorney General must personally authorize a request for attorney-client communications in writing. Records must be kept for these approvals. These officials will review each request in good faith to determine whether the legitimate needs test is met and act accordingly. If the test is not met, the request will not be approved.

The approval process set forth in the McNulty Memorandum is very similar to other Main Justice approval requirements in the USAM which require no additional safeguards to ensure that requests are properly processed. The fact that records are maintained will allow the

Department to keep track of how many waiver requests are submitted and how many of those requests are approved over time.

Specter 120 **Can the Assistant Attorney General overrule the U.S. Attorney's decision?**

ANSWER: The United States Attorney must consult with the AAG, but the AAG cannot overrule the ultimate decision by the United States Attorney. If warranted, the AAG can always request further review from the Office of the Deputy Attorney General.

Specter 121 **Is there a standard for this type of review?**

ANSWER: The standard of review for all requests is the legitimate needs test. When the AAG is consulted, the AAG reviews the request to make a determination that the test is satisfied and to render advice to the United States Attorney requesting the consultation.

Specter 123 **This decision relies upon the fact that "Hamdan is to face a military commission newly designed . . . acting according to guidelines laid down by the Supreme Court." What is the DOJ doing to ensure that, after five years, Hamdan will have swift access to a hearing on the merits of his case?**

ANSWER: Military prosecutors charged Salim Hamdan with conspiracy and material support of terrorism on February 2, 2007. If and when those charges are approved by the Convening Authority, they will be referred for trial by military commission. Under the Rules for Military Commissions ("RMC"), that trial must begin within 120 days following the referral of charges, unless the military judge finds good cause for departing from that schedule. *See* RMC 707. We therefore would expect that the trial would be scheduled for the summer of 2007, although the exact timing of the trial may be influenced by pretrial motions and discovery over the next several months.

Specter 124 **How can you say that the Habeas Corpus Restoration Act, which I authored along with Chairman Leahy "def[ies] common sense," when we are merely seeking to restore through legislation the opinion propounded by the United States Supreme Court in Rasul v. Bush?**

ANSWER: The Supreme Court's decision in *Rasul v. Bush,* 542 U.S. 466 (2004), reflected the Court's interpretation of the existing habeas statute, not a policy judgment as to whether enemy combatants should have the opportunity to file writs of habeas corpus. Before *Rasul*, alien enemy combatants captured outside the United States during prior armed conflicts had no right to file a writ of habeas corpus under the Constitution, nor had such a right been recognized under the statute. Thereafter, in both the Detainee Treatment of 2005 and the Military Commissions

Act of 2006, Congress reaffirmed that alien enemy combatants have no entitlement to access our Nation's courts.

At the same time, we provide those at Guantanamo Bay, Cuba, with the opportunity to challenge the legality of their detention in federal court by appealing the determinations of their Combatant Status Review Tribunals. This process goes well beyond what is required for lawful prisoners of war under both international and domestic law. Accordingly, we believe it would be a mistake to open an additional, and historically unprecedented, path of litigation by amending the Military Commissions Act to provide alien enemy combatants with the opportunity to file habeas actions and civil suits against the Department of Defense.

Specter 125 **Has the Department of Justice prevented detainees, such as Mr. Khan, from disclosing facts about their detention and interrogation from their lawyers and others?**

ANSWER: No. The Department of Justice, of course, does not have control over the access to any detainee. The Department of Defense generally has permitted the detainees at Guantanamo Bay, Cuba, to have access to lawyers, where those individuals are represented by counsel and where an appropriate protective order is in place.

Majid Khan is one of the fourteen high-value al Qaeda operatives who were recently transferred from the custody of the CIA to that of the Department of Defense in Guantanamo Bay. In that regard, Khan possesses extremely classified information about the nature of the CIA interrogation program. In connection with a next-friend habeas suit filed in federal district court, an attorney retained by Khan's wife sought a court order to permit visits with Khan. Because that proposed order was insufficient to protect the classified information in question, and because the federal court had no jurisdiction over the habeas action in the first place, the Department of Justice opposed the requested order. On November 17, 2006, the district court denied the motion. Khan will have the opportunity to consult fully with counsel, subject to an appropriate protective order, in the event that a Combatant Status Review Tribunal confirms his status as an enemy combatant (and he chooses to appeal), or in the event that he is charged with an offense under the Military Commissions Act.

Specter 126 **As for matters of national security, why would Mr. Khan and other detainees be exposed to information that is classified at the TOP SECRET level?**

ANSWER: As mentioned above, Khan was detained and interrogated by the CIA as part of a program that remains highly classified. As the President explained on September 6, 2006, disclosing the details of the CIA program "would help the terrorists learn how to resist questioning, and to keep information from us that we need to prevent new attacks on our country." Thus, Khan has been exposed to highly classified information, and appropriate steps must be taken to guard against his disclosure of that information.

Specter 127 **What would be the rationale for not allowing Mr. Khan access to a lawyer?**

ANSWER: As mentioned above, Khan is currently being held by the Department of Defense at Guantanamo Bay. In light of the classified information in his possession, we must restrict access to the detainee except where measures have been taken to protect national security. Khan will have the opportunity to consult with a lawyer in the event he appeals the determination of a Combatant Status Review Tribunal that he is an enemy combatant or that he is charged under the Military Commissions Act. *See* 10 U.S.C. § 948k(a)(3).

Specter 135 **Why didn't you disclose that DOJ was exploring ways to submit the program to the FISC?**

ANSWER: We repeatedly noted in response to questions from Members of Congress that we were continually exploring our legal options concerning the TSP. With that said, the Department of Justice does not generally disclose to Congress internal deliberations regarding legal theories, strategies, or arguments, and the disclosure of such deliberations would have been particularly problematic here, given the highly classified nature of the subject matter. Further 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.

Specter 136 **Why did it take nearly two years – from spring 2005 until early 2007 – to determine that the program could be submitted to the FISC?**

ANSWER: As stated in our letter of January 17, 2007, any court authorization had to ensure that the Intelligence Community would have the speed and agility necessary to protect the Nation from al Qaeda—the very speed and agility that was offered by the TSP. The orders issued by the FISC on January 10 are innovative and complex, and it took considerable time and work by the Government to develop the approach that was presented to the Court and for the Judge to consider and approve these orders. Further details on this matter are highly classified and have been provided in briefings to the Intelligence Committees and have been made available to the Chairmen and Ranking Members of both Judiciary Committees.

Specter 137 **Was the decision to submit the program to the FISC motivated by a desire to remove jurisdiction from courts now hearing challenges?**

ANSWER: As you know from our letter of January 17, the Administration began exploring options for seeking FISC approval in this matter in the spring of 2005, well before the first press account disclosing the existence of the TSP, and well before the filing of any court challenges to the program were filed in court.

Specter 138 **Does DOJ now intend to seek the dismissal of those cases?**

ANSWER: On January 25, 2007, the Department of Justice filed submissions in the United States Court of Appeals for the Sixth Circuit in cases 06-2095 and 06-2140 arguing that the cases should be dismissed. The impact of the January 10 orders on other litigation will be assessed on a case-by-case basis.

Specter 139 **Why doesn't the administration terminate the program now?**

ANSWER: As noted in our letter of January 17, any electronic surveillance that was occurring as part of the TSP will now be subject to the approval of the FISC. As a result, the President did not reauthorize the TSP when the then-current authorization expired.

Specter 142 **How do you square this prosecution with Department of Justice regulations (28 CFR § 50.10) that say "the prosecutorial power of the government should not be used in such a way that it impairs a reporter's responsibility to cover as broadly as possible controversial public issues."?**

ANSWER: The Department is not prosecuting the reporters and the reporters face no criminal charges or criminal sanctions. Instead, the Department has sought only to secure information relevant to the grand jury's investigation of possible violations of criminal law by those who violated the District Court's order protecting certain materials and who may have lied to the District Court about their role in the release of protected materials. The Department guidelines identify a set of considerations and a review process that insure a careful balancing of the media's interest in broadly covering events with the public's interest in the fair administration of justice. In this case, various efforts were made to secure the necessary information before the subpoenas issued. The subpoenas, therefore, were fully consistent with the Department's guidelines related to media subpoenas.

Specter 143 **The guidelines require Attorney General approval before a federal subpoena is issued to a reporter. Did you approve the subpoena? Did DOJ first seek to get the needed information from alternative sources in accordance with Section 50.10(b)?**

ANSWER: The Attorney General approved issuance of the subpoenas. Efforts were made to secure the needed information through alternative sources before the subpoenas were issued.

Specter 144 **The guidelines provide that "[t]he use of subpoenas to members of the news media should, except under exigent circumstances, be limited to the verification of published information" and its accuracy. How does the BALCO leak investigation -- which involves steroid and banned substance use in sporting events years ago -- involve exigent circumstances? If so, why and what definition are you using?**

__**ANSWER:**__ The BALCO leak investigation involves potentially serious criminal violations including violation of a District Court confidentiality order, perjury before the District Court, and obstruction of justice. The fact that the conduct here involved significant matters warranting thorough investigation is shown by the District Court's decision to formally refer the conduct to the Department for investigation.

Specter 149 **On January 9, the New York Times published an article highlighting the need for sentencing reform to prevent low-level offenders from burdening prison systems without achieving any real reduction in crime rates. Given the increase in both crime rates and incarceration rates, what changes, if any, in federal sentencing law might you suggest?**

__**ANSWER:**__ The suggestion that America's prisons are filled with low-level offenders is inaccurate. According to the Bureau of Justice Statistics, of the more than 600,000 ex-offenders now returning to society from prison annually, 85% are either violent or repeat offenders or both. We think low-level offenders should not be subject to unduly harsh sentences, but we also believe federal law largely and adequately assures that this does not happen in federal criminal cases.

As to suggestions for change in federal sentencing law, we remain committed to the core principles underlying the Sentencing Reform Act of 1984 and the Federal Sentencing Guidelines that resulted from the Act—fair, tough, uniform, predictable and proportionate sentences. According to the FBI UCR, the violent crime rate in 2005 was 23% lower than it was when the Guidelines went into effect, and the property crime rate was 31% lower. (2006 data are not yet available.) Both rates increased from 1987 to 1991 but have been in steady decline for over a decade until the recent slight uptick from the historical lows of 2004. Some experts have argued that the reduction in crime is directly attributable to the increased incarceration rates and that it took some time for the Guidelines to have an effect both as to the federal offenders and as a model that resulted in increased sentences at the state level.

Consistency and fairness in sentencing are important; a defendant's sentence should not depend on which judge happens to preside over the case. It is for this reason that we have favored legislation that would restore the full protections and principles of the Sentencing Reform Act in a manner consistent with the requirements of the Sixth Amendment. In *United States v. Booker*, the Supreme Court held that judicial fact-finding pursuant to the Guidelines violated defendant's Sixth Amendment right to a jury trial, and remedied the problem by rendering the Guidelines advisory. Thus, sentencing courts are no longer bound to follow the Guidelines as they once were but must consult the Guidelines and take them into account when sentencing. Under our proposed legislation, sentencing courts would once again be bound by the Guidelines minimum, just as they were before the *Booker* decision. The Guidelines maximum would remain advisory, and the court would be bound to consider it, but not bound to adhere to it.

Specter 151 **Mr. Attorney General, on December 12 of last year Director Mueller testified before this committee and verified that the FBI is pursuing the Weldon investigation and is, in fact, "having some success." Is the Department of Justice pursuing this investigation and have there been any conclusions as to the source of the leak and the circumstances surrounding it?**

ANSWER: An internal review of this matter is being conducted by the FBI. Pursuant to longstanding Department policy prohibiting disclosure of non-public information concerning pending matters, we are unable to provide further information at this time.
Specter152

Specter 152 **Has it been determined if the leak was politically motivated to coincide with the November election?**

ANSWER: An internal review of this matter is being conducted by the FBI. Pursuant to longstanding Department policy prohibiting disclosure of non-public information concerning pending matters, we are unable to provide further information at this time.

Specter 159 **Have the ISG recommendations been useful and would you give examples of successes and failures experienced by DOJ following ISG's recommendations?**

ANSWER: The ISG report presents many recommendations that relate to the Department's efforts in Iraq that are currently under review. To date, the Department has not made any decisions relating to those recommendations. The ISG report's recommendations relating to the Department of Justice presume dramatic realignment of several Iraqi ministries. As outlined in the letter from Assistant Attorney General Richard Hertling, dated January 16, 2007, the Department has undertaken numerous significant projects which collectively aim to provide Iraqis with the skills, experience and insight to assume responsibility for their own judicial security on or about the end of calendar year 2007.

QUESTIONS FROM SENATOR KENNEDY

Kennedy 163 **Warrantless Surveillance Programs: Please provide the following information on any and all warrantless telephone and electronic communication surveillance programs conducted by the US Government within the United States since September 2001: (a) The total number of any and all telephone and electronic communications intercepted, recorded or tracked in each year, by type of surveillance and by state or territory.**

ANSWER: As you know, operational details concerning the Terrorist Surveillance Program remain highly classified. Throughout the war on terror, the Administration has notified the Congress concerning the classified intelligence activities of the United States through appropriate briefings of the intelligence committees and congressional leadership. The full membership of each Intelligence Committee has been briefed on the TSP, as have other Members of the Congressional leadership.

Kennedy 164 **A complete list of any and all criminal convictions and indictments for terrorist-related activities, which relied upon information obtained by the warrantless telephone and electronic surveillance programs.**

ANSWER: Please see our response to Question 163, above.

Kennedy 165 **The total number of any and all warrantless telephone and electronic communication intercepts in which the subject or subjects had no connection to terrorism.**

ANSWER: Please see our response to Question 163, above.

Kennedy 166 **The total number of records generated by the warrantless surveillance programs in question that have since been destroyed.**

ANSWER: Please see our response to Question 163, above.

Kennedy 167 **The total number of records acquired via Warrantless Surveillance Programs that have been or are currently stored in databases, broken out by database, and the criteria used in approving data for storage in the databases.**

ANSWER: Please see our response to Question 163, above.

Kennedy 178 **The [Law Enforcement Officers' Safety Act] lacks adequate safeguards. It doesn't allow a police department to deny permits. The privilege to carry a concealed weapon is not one which should be handed out routinely. What is the benefit of taking such decisions out of the hands of the agencies and states that will be enforcing the law, when the law was very clearly designed to leave licensing discretion in their hands?**

ANSWER: The Law Enforcement Officers' Safety Act permits certain active and retired law enforcement officers to carry a concealed firearm notwithstanding any other provision of the law of any State or any political subdivision. The law defines who is qualified for this exemption. In particular, the law provides that a qualified law enforcement officer means an employee of a governmental agency who is authorized by the agency to carry a firearm; who is not the subject of any disciplinary action by the agency; and who meets standards established by the agency which require the employee to regularly qualify in the use of a firearm.

The law also provides certain conditions and certain exceptions. For example, the law "shall not be construed to supersede or limit the laws of any State that permit private persons or entities to prohibit or restrict the possession of concealed firearms on their property; or prohibit or restrict the possession of firearms on any State or local government property, installation, building, base, or park."

Congress established the criteria under which law enforcement agents can carry a concealed firearm.

Kennedy 183 **Is OneDOJ a data-mining program?**

ANSWER: OneDOJ is a concept to foster a broader exchange of existing criminal investigative data among DOJ components and trusted law enforcement partners. R-DEx is the system the Department of Justice currently uses to implement the OneDOJ concept. R-DEx is not a data mining program. R-DEx allows agents and officers to query specific items, such as vehicle descriptions, license plates, specific crime scene data, and types of weapons used in a crime. R-DEx has analytical capabilities, such as link analysis and geo-mapping of related incidents. However, these analytical capabilities are used only on data within existing law enforcement case management source systems. The information contained in source systems consists of unclassified criminal law enforcement records collected and produced by the following Department of Justice components: Federal Bureau of Investigation (FBI), Federal Bureau of Prisons (BOP), United States Marshals Service (USMS), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), and Drug Enforcement Administration (DEA). R-DEx does not merge law enforcement data with commercial data sources or non-law enforcement data.

Kennedy 185 **What types or categories of information are included? Are any types or categories of information specifically excluded?**

ANSWER: The information submitted to R-DEx consists of unclassified criminal law enforcement records collected and produced by ATF and DEA (closed case information), and

FBI, BOP, and USMS (open case information), including: investigative reports and witness interviews from both open and closed cases; criminal event data (e.g., characteristics of criminal activities and incidents that identify links or patterns); criminal history information (e.g., history of arrests, nature and disposition of criminal charges, sentencing, confinement, and release); and identifying information about criminal offenders (e.g., name, address, date of birth, birthplace, physical description). The system also consists of audit logs that contain information regarding queries made of the system. Aside from the audit logs, all information in R-DEx represents copies of files from existing source systems. The following categories of information are generally excluded from the system: public corruption investigations; internal investigations; administrative and personnel investigations; regulatory matters; civil rights investigations involving color of law violations; sensitive sources, methods, and targets; and information prohibited from release by law or policy.

Kennedy 186 **Is the program effective? Please describe typical cases in which information gathered under the program leads to an investigation, arrest, or prosecution.**

ANSWER: Yes, the OneDOJ program is effective. The information shared among the Department's contributing components and with other federal, state and local law enforcement entities helps those entities to more effectively investigate, disrupt, and deter criminal activity, including terrorism, and protect the national security.

There have been success stories from the pilot implementations of R-DEx from around the country:

(1) In Seattle, the DEA was able to find important information on four specific cases last year where part of the data was with local police and the federal agents had another piece of key data. By finding the critical link, arrests were made. In another case, results from an R-DEx search identified potential targets and associates in other criminal acts not before captured through traditional investigative tools such as the National Crime Information Center. The result significantly aided law enforcement in identifying gang-related crime trends not seen before due to local jurisdictional issues, differing reporting protocols, and in some cases, even variable spelling of potential subjects' names.

(2) A detective from the St. Louis Metropolitan Police Department performed an R-DEx query on a phone number that had been recovered from a suspect. The search provided important and relevant information not previously known. This allowed the detective to make a significant arrest in an investigation that had otherwise been stalled.

(3) In Missouri, a witness described a man with a *teardrop tattoo* who was seen leaving the scene of one of the crimes. A law enforcement official from the Missouri State Highway Patrol ran a search in R-DEx for anyone who fit the description and immediately found several matches. Locating suspects with similar descriptions across the St. Louis region would have previously taken 1 – 2 days.

Kennedy 187 **What safeguards are in place to ensure that the information included in the OneDOJ database is both complete and accurate?**

ANSWER: The Regional Data Exchange System (R-DEx) system that the Department uses to implement its OneDOJ program was developed and is operated consistent with the Federal Information Security and Management Act (FISMA). Data within R-DEx is limited to that contributed from existing records maintained by the Department's investigative components. Each DOJ contributing component has the duty, responsibility, and accountability to make reasonable efforts to ensure that the information it collects and then shares via R-DEx is accurate, complete, timely, and relevant. Within each component, investigators verify the information within the particular components records system. In addition, each component conducts periodic file reviews in order to verify the information.

Kennedy 188 **What safeguards are in place to ensure that the privacy rights and civil liberties of individuals are not violated by the OneDOJ program?**

ANSWER: The Regional Data Exchange System (R-DEx) system that the Department uses to implement its OneDOJ program was developed and is operated consistent with the Federal Information Security and Management Act (FISMA) and the Privacy Act.

Records submitted to R-DEx may be used for official criminal law enforcement and national security purposes only. R-DEx information may not be accessed or used for any other purpose, including general licensing, employment, eligibility for federal or state benefits, and background investigations. The Department retains control and ownership of the information that its components contribute to R-DEx. The Department information available via R-DEx may not be disclosed in response to a request made under any state or local access law, and is disclosable only in accordance with applicable federal law, including the Freedom of Information Act and the Privacy Act.

All users and the participating agencies of R-DEx are responsible for protecting the privacy interests of individuals identified in the system. These responsibilities are mandated in the Memorandums of Understanding (MOUs) between each law enforcement partner and are reiterated to each user through training.

Each Department component that contributes records to R-DEx is responsible for auditing access by other agencies to ensure appropriate use of the information. Each participating Department component is responsible for reviewing its own use of the R-DEx system and taking action to address any misuse.

Access to the R-DEx system is restricted to authorized law enforcement personnel who have undergone background checks and have appropriate training, and who have an official need for access in order to perform their professional duties, such as supervisors, law enforcement agents/officers, and task force members associated with agencies that have signed the MOU. In addition, limited access to the R-DEx system is provided to system administration and system security personnel for purposes of conducting system operation and maintenance tasks. All such personnel (either government employees or contractors/subcontractors) are required to be vetted and cleared for system access and their access is required to be monitored and audited.

Kennedy 203 **Your response of January 18, to question 88 simply restates part of the Department of Justice regulation on the administration of Section 5 of the Voting Rights Act of 1965. Please clarify your response by listing the specific statute or statutes the Department used as the benchmark for its review of the 2006 Georgia voter photo ID law. In particular, please state whether the Department relied on the 2005 Georgia photo ID law, which was enjoined by the federal district court in Common Cause v. Billups, and if so, explain the reason for that reliance.**

ANSWER: In 2006, we precleared only those portions of the submitted 2006 Act that had neither been previously precleared, nor enjoined, which would thus make them legally unenforceable and incapable of administration pursuant to a court order, consistent with our long-standing practice.

As set forth in the State's submission, therefore, the only specific changes before us were that the Act:

(1) Required the State Election Board to formulate and conduct a voter education program with particular emphasis on proper voter identification subject to funding, whereas there was no such requirement before;

(2) Created and provided the requirements for issuance of the Georgia voter identification card, a new form of permissible voter identification to be available without cost or an oath requirement, as an acceptable form of identification for voting purposes, whereas there was no such form of identification before;

(3) Required each county board of registrars to provide at least one location within the county for the issuance of Georgia voter identification cards, whereas there had been no such requirement before;

(4) Required that the State Election Board provide each county board of registrars with the necessary equipment, forms, supplies, and training to produce Georgia voter identification cards referenced in (2); and

(5) Required the State Election Board to adopt rules and regulations for the administration of the Georgia voter identification card program referenced in (2).

Kennedy 204 **You failed to respond fully to question 89 in your answer on January 18. Please provide a report of your review of the Civil Rights Division's enforcement of Section 5, including a description of any involuntary transfers from the Voting Section. Where you mention involuntary transfers, please include the involuntary detail of Robert Berman to the Office of Personal Development.**

ANSWER: The Attorney General has had discussions with both the current Assistant Attorney General for the Civil Rights Division, who began serving in this position in November 2005, and with his predecessor about the Division's enforcement of Section 5. The Department remains confident that the Division is appropriately enforcing Section 5.

Generally, with regard to involuntary transfers, the authority to involuntarily reassign attorneys has been delegated to component heads, such as an Assistant Attorney General. Staffing decisions in the Division are based on the talents and interests of an individual and the needs of the Department. In this process, great weight is placed on the judgments of career section management.

There has been one involuntary transfer of a line attorney from the Voting Section to another Section within the Division during this Administration. That attorney was not specifically assigned to Section 5 enforcement but, as with most Section attorneys during the period between 2002 and 2005, was involved with some Section 5 review. He was not involved at all in the Georgia or Texas submissions referenced in question 89.

With regard to Mr. Berman, he requested and received a detail with the Administrative Office of the United States Courts, which he completed from September 26, 2005, to January 27, 2006. Mr. Berman decided to pursue this detail in connection with a program designed to better prepare employees for becoming candidates for the Senior Executive Service. Since Mr. Berman's return to the Civil Rights Division, he has served in a senior position in the Office of Professional Development based on the conclusion that this transfer would serve Mr. Berman's talents and interests and the needs of the Department, as they were understood.

Kennedy 205 **The Washington Post and other publications have reported that after it became public that the Department had overruled career personnel's recommendation against preclearing Georgia's 2005 voter photo ID law, Civil Rights Division employees were told to omit preclearance recommendations from their memoranda on Section 5 submissions. Please provide copies of all communications from the Chief of the Voting Section to employees of the Section addressing the procedures for administering Section 5.**

ANSWER: Career staff continues to be involved in the review and decision-making process of every Section 5 submission. We are not aware of any written communication announcing a change in policy of career staff involvement in Section 5 analysis. As with every legal analysis, recommendations under Section 5 must be balanced and include all relevant information. It is my understanding that each person involved in the Section 5 analysis shares his or her assessment and recommendation with senior career management, and the ultimate recommendation of the Section is made with the full awareness of the views of each staff member involved in the matter. For those Section 5 recommendations that are forwarded to the Assistant Attorney General, see 28 CFR § 51.3, it is my understanding that he is informed whenever a difference of opinion may exist.

Kennedy 206 **Enforcing Section 5 of the Voting Rights Act is one of the Department's most important responsibilities. Yet it appears that in recent years, the number of personnel, particularly civil rights analysts, assigned to the unit that reviews Section 5 submissions has declined sharply. Has the Department reduced the resources for the Voting Section's Section 5 enforcement unit? If so, please explain the reasons for this decision. Given the reduction in personnel, how does the Division plan to ensure that Section 5 submissions are thoroughly reviewed within the 60-day limit provided in the statute?**

ANSWER: Traditionally, resources devoted to Section 5 review have risen during the periods with many submissions for review of redistricting plans, as occurred during the first half of this decade, and receded as the redistricting season waned. In FY 2006, contrary to tradition, the Voting Section reviewed a record number of Section 5 submissions. The more than 7,000 submissions were approximately 40 percent over the normal Section 5 review workload. The Section responded with an "all hands on deck" effort; virtually all Section attorneys, including the Section Chief, assisted in the review of routine submissions.

Moreover, the Department has invigorated the Section 5 review process in the past couple of years. For example, the Voting Section has eliminated redundant and ministerial tasks previously handled by analysts, is better using technology to more efficiently use resources, is increasing the number and diversity of contacts with minority community members during review of a submission, and has increased Section 5 review process training of Section personnel.

Kennedy 207 **Please state: The number of Section 5 analysts who have left the Voting Section since 2004.**

ANSWER: Since January 1, 2004, six Section 5 analysts have retired, 4 have left to attend graduate school, 1 has left for a promotion, 1 has been promoted to attorney status, and 2 have moved to other Sections of the Civil Rights Division.

As of January 1 of each year, beginning in 2004, the number of analysts assigned to Section 5 review are as follows: 2004 - 14 analysts; 2005 - 12 analysts; 2006 - 14 analysts; and 2007 - 12 analysts.

Kennedy 208 **The number of Section 5 analysts currently in the Voting Section.**

ANSWER: As of April 1, 2007, there were 11 full time Section 5 analysts. There are also three attorneys who currently work full time on Section 5 review. In addition to these personnel resources devoted full time to Section 5 review, there are a number of additional personnel resources spent on Section 5 review on an ongoing basis: (1) there is an additional attorney currently working part time on Section 5 review; (2) each of the 8 paralegal specialists in the Section also now assist with Section 5 review; (3) each new Section attorney assists with Section 5 review; (4) Section support staff who are interested are provided the opportunity to assist in

Section 5 review; and (5) annually, the Section brings on board over 25 college and law school interns who assist in review of Section 5 submissions. Finally, other Section attorneys assist in the review of Section 5 submissions on an as-needed basis.

Kennedy 209 **The number of supervisory attorneys assigned to the Voting Section's Section 5 unit.**

ANSWER: There is one supervisory attorney for the Section 5 unit. Two additional attorneys are assigned on a full-time basis to review the work generated by the full-time Section 5 analysts, as well as the other non-full time personnel assisting in review of Section 5 submissions. At this time, one additional attorney is working temporarily on Section 5 review and other attorneys are assigned on an as-needed basis.

Kennedy 210 **In July 2006, the Boston Globe reported that political ideology has an increased role in the hiring of career attorneys in the Civil Rights Division. The Globe also reported that after the Department's hiring rules were changed in 2002 to reduce the input of career attorneys in the hiring process, only 42% of new attorneys have civil rights experience, while previously 77% had such experience. Do you agree that ideology and partisanship should have no role in the Department's hiring? Do you agree that civil rights experience is a significant qualification for those seeking employment as career attorneys in the Civil Rights Division.**

ANSWER: We respectfully disagree with many of the assertions made in the *Boston Globe* article. It is also unclear what methodology the *Globe* employed in reaching its conclusions. The Civil Rights Division, like every other component of the Department of Justice, is charged with enforcing the laws passed by Congress. As such, we seek to hire outstanding attorneys with demonstrated legal skills and abilities. The Department considers attorneys from a wide variety of educational backgrounds, professional experiences, and demonstrated qualities. Attorneys from an extremely wide variety of backgrounds and experiences have been hired to work in the Division under this Administration. For example, the Division has hired not only attorneys with significant prior civil rights experience, but also attorneys with other crucial skills, such as a significant record of actual litigation or management experience.

The *Boston Globe* article ignores salient facts pertaining to the Division's hiring record during this Administration. For example, all five individuals hired as career section chiefs during this Administration had previously served as career attorneys in the Division. These five chiefs have an average of approximately 17 years of experience in the Division, and also had a wide variety of work experiences, including working in the Clinton White House, with the American Civil Liberties Union, and as Special Assistant to Acting Assistant Attorney General Bill Lann Lee. In sum, there is no political litmus test used in deciding to hire attorneys in the Civil Rights Division.

Kennedy 212 **At the November 2006 hearing on oversight of the Civil Rights Division, former Deputy Assistant Attorney General Robert Driscoll testified that a number of new attorneys had been hired to work in the Special Litigation Section during the current Bush Administration. Please state: (a) How many new attorneys have been hired to work in the Civil Rights Division's Special Litigation Section since 2001?**

ANSWER: Fifty attorneys were hired to work in the Special Litigation Section between 2001 and 2006. Three of these attorneys were hired by the previous Administration. An additional six attorneys were hired by the Special Litigation Section from other Civil Rights Division sections.

Kennedy 213 **How many of these attorneys had litigation experience in federal court before they were hired?**

ANSWER: The Department does not track this information.

Kennedy 214 **How many of these attorneys had experience in civil rights cases?**

ANSWER: The Department does not track this information.

Kennedy 215 **How many were members of the Federalist Society?**

ANSWER: The Department does not track this information.

Kennedy 216 **In 2003, the Department announced a diversity initiative to improve its personnel policies with respect to all employees, including minorities and women. The Department hired an outside consultant, KPMG, which examined the Department's practices, interviewed a large number of employees, and issued a report of its findings, which included concerns by minority and female attorneys and staff that they did not receive equal opportunities with respect to assignments and promotions. After the report was completed, the diversity initiative seems to have been abandoned. Please state whether the Department remains committed to the principle of diversity in its workforce, and what, if anything, has been done in response to the recommendations in the consultant's report.**

ANSWER: The Department of Justice is committed, as it has always been, to an open work force with equitable opportunities for all employees. Pursuant to the 2003 initiative, during the past four years the Department has developed and implemented a number of new programs and initiatives to promote transparency and to address essential elements of employment impacting attorneys in our work force.

These new initiatives include:

- increased outreach to students and lawyers about careers at Justice via the creation of a Deputy Director for Recruitment and Outreach;

- the requirement that components advertise all career attorney vacancies on the Department's Internet web site;
- the development and implementation of a management training program that provided coordinated diversity training to more than 300 department managers and several component heads;
- the establishment of an SES career development program that includes attorneys and other staff who may wish to apply and develop the skills necessary to assume these positions;
- the establishment of an Attorney Student Loan Repayment Program open to all Department attorneys with qualifying student loans on a competitive basis; and
- the creation of a Mentor Program for new Department attorneys and Assistant United States Attorneys.

Currently, the Department is developing additional management training programs and an improved Exit Survey system to assist in identifying what factors influence attorneys who leave the Department and what steps we can take to encourage them to stay.

Kennedy 217 **Recently, anonymous postings have appeared on the internet website criticizing the Civil Rights Division's only African American Section Chief and other Division employees. Some of these postings appear to have racial overtones, and contain information suggesting that they may have been posted by a Department employee. Is the Civil Rights Division aware of these internet postings, and has the Department taken any steps to determine whether they were made using a Department of Justice computer?**

ANSWER: The Civil Rights Division is aware of the internet postings to which you refer, and we can assure you that the Department is taking appropriate action with respect to this matter.

Kennedy 220 **For each calendar year since 2001, please list the number of section 5 analysts in the Voting Section and the number of Section 5 submissions received by the Voting Section.**

ANSWER: There were 14 Section 5 analysts in the Voting Section in 2001, 15 in 2002, 13 in 2003, 14 in 2004, 12 in 2005, and 14 in 2006. There are currently 12 Section 5 analysts in the Voting Section. The Voting Section received 4,227 Section 5 submissions in 2001; 5,910 in 2002; 4,829 in 2003; 5,211 in 2004; 4,699 in 2005; and 7,080 in 2006.

Kennedy 221 **What criteria does ATF use to decide which gun dealers to inspect? Does ATF focus its inspections on gun dealers with the largest number of crime gun traces?**

ANSWER: ATF uses several criteria in determining which Federal firearms licensees to inspect each year. ATF considers, for example, the number of firearms traces (especially the number of unsuccessful traces), the number of multiple sales transactions, and the geographical location of the states from which the firearms were manufactured or lawfully transferred prior to the firearms' recovery at a crime scene. Local offices may also assign inspections based upon information received locally (e.g., allegations of wrongdoing received from purchasers, employees, or the public).

Where a licensee is inspected and violations are found, ATF meets with the licensee and explains the nature of the violations uncovered and the licensee has the opportunity to ask questions and learn how to avoid violations in the future. ATF conducts recall inspections of all firearms licensees with whom such a conference was held. ATF also plans to inspect all licensed pawnbrokers by the end of FY 08 because of the high correlation between firearms recovered in crime and pawnbroker transactions.

Kennedy 222 **In light of the inordinate length of time that it takes to revoke the license of lawbreaking gun dealers, does the Department support reducing the burden of proof to revoke a license from a "willful" violation to a "knowing" violation, one that would not require years of repeat offenses to revoke a license? Does ATF support repealing the Federal law that requires it to stay license revocations through lengthy administrative appeals?**

ANSWER: The Gun Control Act (GCA) employs the "willful" standard for revocation of licenses held by manufacturers, importers, dealers and collectors. As courts have explained, willful violations require ATF to prove the licensee intentionally violated a known legal duty or acted with indifference to a known obligation.

Since 1986 and the passage of the Firearms Owners Protection Act, ATF has revoked Federal firearms licensees for "willful violations" of the Gun Control Act. The courts have repeatedly upheld revocations of licenses based on the current willfulness standard.

There is no Federal law requiring the issuance of a stay during the appeal process. The current Federal regulation pertaining to revocation procedures provides ATF with discretion to grant a stay where "justice so requires" and ATF finds this authority sufficient to issue or deny a stay of revocation where appropriate.

Kennedy 223 **In light of the atrocious record of these and other gun dealers who have had their licenses revoked and the failure to bring charges against them, does the Department's failure to bring such charges suggest that the laws regulating gun dealers need to be strengthened?**

ANSWER: The Gun Control Act contains sufficient authority to pursue criminal charges against Federal Firearms licensees who have violated the law. ATF conducts criminal investigations and—working with the United States Attorneys' Offices-- pursues criminal charges when appropriate.

Kennedy 225 **Given the value of trace data to Congress, law enforcement agencies, researchers and the public, does the Department support ending these legislative restrictions on ATF's disclosure of crime gun trace data? If not, why shouldn't the public know as much as possible about how guns get into the hands of criminals, with appropriate exemptions for ongoing investigations, as ATF has done in the past?**

ANSWER: Both ATF and the Department of Justice are in favor of protecting law enforcement sensitive trace data from disclosures unrelated to law enforcement investigations. By way of background, a form of the disclosure restriction has appeared in ATF's annual appropriation since 2003. The restriction was originally passed in support of ATF's long-standing policy of disclosing firearms trace results only to the law enforcement agency that recovered the crime gun and requested ATF to trace the firearm. *See, e.g.*, H.R. Rep. No. 575, 107th Cong., 2d Sess. 20 (2002). This policy recognizes the legitimate interest of the law enforcement agency that provided the investigative information to ATF concerning the traced crime gun in deciding how to utilize and whether to disseminate sensitive law enforcement information that could jeopardize pending investigations. These law enforcement concerns would not be present with respect to releases of aggregate trace-related information that does not provide information relative to a specific investigation.

Kennedy 226 **Why shouldn't ATF have maximum flexibility in sharing crime gun trace information with other law enforcement agencies and Congress? Isn't it true that the release of the aggregate number of FN Herstal Five Seven firearms traced to crime would not hinder law enforcement investigations?**

ANSWER: ATF has the flexibility to share crime gun trace information with a law enforcement agency or a prosecutor as pertains to their geographic jurisdiction. The current restriction also allows for the disclosure of statistical information concerning total production, importation, and exportation by each licensed manufacturer and importer. ATF's primary law enforcement concern is the disclosure of data that could impact ongoing investigations, i.e., by linking the traced firearm to the firearms dealer, retail purchaser(s) and possessor(s), and where the crime occurred, which is prohibited under the current restriction. The release of the "aggregate" number of FN Herstal Five Seven firearms traced would not hinder law enforcement investigations.

Kennedy 227 **Please explain whether this review of California license revocations was initiated by ATF and why ATF is conducting this review. Please provide a copy of any "ATF guidelines and policy" concerning license revocations. Please explain ATF's procedure for conducting this review and how and when the results of this review will be disseminated to the public.**

ANSWER: At the request of an industry association, ATF initiated a review of license revocations in California. Partnerships are critical to ATF's success; therefore, ATF takes very seriously concerns from members of the industry concerning alleged abuse of discretion in pursuing administrative actions such as license revocations.

ATF has thoroughly reviewed each case requested by the association and has found that, in every case, ATF field officials acted appropriately in pursuing license revocation, or, as the case may be, a lesser sanction, for apparent willful violations of the law. ATF typically does not release the results of internal deliberations and has no plans to do so in this case. ATF's license revocation policies are not released to the public under the Freedom of Information Act because such release could reasonably be expected to interfere with pending or prospective enforcement proceedings.

Kennedy 228 **Please state the number of federal firearms license revocations in California and nationwide each year from 2000 to the present, and any actions that ATF is planning to take as a result of this review.**

ANSWER:

FFLs Revoked	**National Totals**	**CA Totals**
2000	37	4
2001	22	2
2002	22	0
2003	21	4
2004	54	4
2005	104	4
2006	115	19

ATF has thoroughly reviewed each case brought to its attention by the industry association and has found that, in each instance, ATF field officials acted appropriately in pursuing license revocation, or, as the case may be, a lesser remedy, for apparent willful violations of the law. ATF does not anticipate taking any further action at this time.

Kennedy 229 **Did anyone at ATF or the Justice Department bring to the gun industry's attention what NSSF calls an "apparent spike" in license revocations? Has ATF or the Justice Department met with or spoken with any representatives of NSSF, gun dealers, or manufacturers, or gun lobby groups such as the National Rifle Association, concerning gun dealer revocations or this review of dealer revocations? If so, with whom has ATF or the Department met or spoken, and when did these meetings or conversations occur?**

ANSWER: ATF routinely discusses firearms compliance-related matters with industry members and other interested parties. For example, ATF makes a presentation and hosts a booth at the Sporting and Hunting and Outdoor Trade Show, holds quarterly meetings with major firearms industry trade groups, and communicates with the firearms industry and the public through newsletters, web postings and other media. Further, ATF field offices regularly hold firearms seminars throughout the country (in FY 06, ATF conducted approximately 120 firearms industry seminars).

Kennedy 234 **Does the Department attach a high priority to ensuring that the NICS system operates as effectively as possible to prevent sales of guns to criminals?**

ANSWER: Yes.

Kennedy 239 **Please state the number of cases that the ATF has referred to prosecutors for Brady Law violations in each year from 2003 to 2006, and the number of convictions obtained in each of these years.**

ANSWER: Please see the chart, below.

NICS/Brady Cases		
	Referred to US Attorney	**Convictions**
Year	**Cases**	**Defendants**
2003	363	161
2004	307	154
2005	293	133
2006	222	101

Kennedy 240 **Are you satisfied with the Bush Administration's record of failing to prosecute 99% of the cases where criminals have committed a federal crime by lying about their criminal records in attempting to obtain guns?**

ANSWER: The Administration takes gun crime seriously and the Department of Justice has made the aggressive prosecution of those who violate our nation's gun laws a top priority. In the six years since Project Safe Neighborhood's inception, the Department has filed twice as many federal firearm cases than in the six years prior to Project Safe Neighborhood. The Administration maximizes limited resources by targeting the most serious offenders who lie on criminal background checks, especially those who have used that lie to successfully obtain a firearm. It is paramount to note that the overwhelming majority of the individuals who lie on the background check form are prevented from illegally buying firearms from federally licensed firearm dealers. In short, the system works. Individuals who are ineligible to possess firearms are denied firearms by the National Instant Background Check System (NICS). Moreover, in the small number of cases in which NICS is able to obtain information about a purchaser's prohibited status only after the sale, NICS refers the case to the Bureau of Alcohol, Tobacco, Firearms and Explosives for retrieval of the firearm.

<u>QUESTIONS FROM SENATOR BIDEN</u>

Biden 243 **Can you assure the members of the Senate Judiciary Committee and the Senate Select Committee on Intelligence that if the Administration revives the so-called Terrorist Surveillance Program or initiates any program that intercepts without Article III or FISA Court approval the communications of American citizens in the United States, you will inform all members of both Committees?**

<u>ANSWER:</u> Throughout the War on Terror, the Administration has notified the Congress concerning the classified intelligence activities of the United States through appropriate briefings of the intelligence committees and congressional leadership. The Administration is committed to this process and will continue to provide such briefings.

Biden 244 **The so-called Terrorist Surveillance Program was begun in October 2001. You noted in your January 17, 2007 letter to Judiciary Committee Chairman Leahy and Ranking Member Specter that, "In the spring of 2005 … the Administration began exploring options for seeking such FISA Court approval." Why did it take the Administration three-and-a-half years to explore options for obtaining FISA Court approval?**

<u>ANSWER:</u> As explained in our letter, the orders are innovative and complex. The President has been committed to making maximum use of the authorities provided by FISA, and taking full advantage of developments in the law. Further details on this question have been provided in briefings to the Intelligence Committees and have been made available to the Chairmen and Ranking Members of both Judiciary Committees.

Biden 245 **Your January 17, 2007 letter also stated that "any electronic surveillance that was occurring as part of the Terrorist Surveillance Program will now be conducted subject to the approval of the Foreign Intelligence Surveillance Court." Can you assure the American people that all national security related interception of communications will now be overseen by the FISA Court?**

<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 electronic surveillance without court order under certain circumstances. *See, e.g.*, 50 U.S.C. § 1802; 50 U.S.C. § 1805(f). Outside of these circumstances, we are not aware of any electronic surveillance that is being conducted without FISA Court approval or the approval of a federal court under Title III.

Biden 246 **Please provide me and my appropriately cleared staff a copy of the FISA Court orders referenced in your January 17, 2007 letter to Judiciary Committee Chairman Leahy and Ranking Member Specter.**

ANSWER: Please see our response to Question 67, above.

Biden 253 **On November 30, 2001, you wrote an op-ed touting the Administration's decision to implement military commissions, saying they can "dispense justice swiftly." But more than five years after September 11, 2001, the Administration has not successfully tried a single person under the military commission system. If the Administration's objective was to "dispense justice swiftly," why did the Administration not seek to utilize a more established legal forum?**

ANSWER: As that op-ed noted, military commissions were, and remain, necessary not only to administer justice efficiently, but also to deal with issues relating to classified information and the availability of witnesses. Those issues would make it difficult in many cases to simply utilize the federal courts. Moreover, we must take issue with the suggestion that military commissions are not well established: George Washington used military commissions during the American Revolution, President Lincoln used military commissions during the Civil War, and President Roosevelt used military commissions during World War II. The commissions established pursuant to the President's initial order went above and beyond the process provided in those historical examples.

In those past conflicts, the United States was successful in relying on military commissions "to dispense justice swiftly." In this case, the detainees charged before military commissions succeeded in using the federal courts to stop military commission trials before they could even begin. Such a challenge was historically unprecedented and reflects the more assertive role that the courts have assumed in recent decades. Now that Congress has clarified the governing law under the Military Commissions Act, we are hopeful that the trials will move forward expeditiously.

Biden 254 **Why did the Administration choose not to work with Congress immediately after September 11, 2001, to ensure that the Administration's approach to the trial of terrorist detainees was firmly supported by law?**

ANSWER: As the Supreme Court recognized in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), the President's power to convene military commissions is firmly supported by both the Constitution and the law of war. *See id.* at 2774. In our Nation's history, Congress had never established a statutory system of military commissions, and indeed, Article 21 of the Uniform Code of Military Justice expressly preserved the President's authority to conduct such trials apart from the court-martial system. Following the Supreme Court's decision in *Hamdan*, the Administration worked with Congress to establish a statutory structure under the Military Commissions Act.

Biden 255 **Have you learned any lessons through this experience? If so, please explain those lessons learned.**

ANSWER: We have learned that the institutions of American democracy are strong and flexible enough to respond to the threats posed by the War on Terror. The Military Commissions Act reflects an extended conversation among the Executive Branch, Congress, and the Supreme Court that has resulted in a fair and appropriate system for the trial of captured terrorists in this armed conflict.

Biden 261 **How many DEA agents and non-agents do you expect to retire in the next two years? How does the Department intend to ensure that DEA retains the personnel, resources, and capabilities to do its job as current agents and non-agents resign and retire, and new personnel are not hired to assume their duties?**

ANSWER: Our retirement statistics for the last four Fiscal Years are as follows:

Fiscal Year	03	04	05	06
Agents	86	86	99	95
Non-Agents	93	110	123	114
Total	179	196	222	209

The population is aging at a steady rate, and in light of the decrease in retirements during FY 06, we project between 230 and 300 retirements (for both agents and non-agents) for each of the next two Fiscal Years. The chart below displays total annual losses of employees due to all factors, including resignations, retirements and other employee actions.

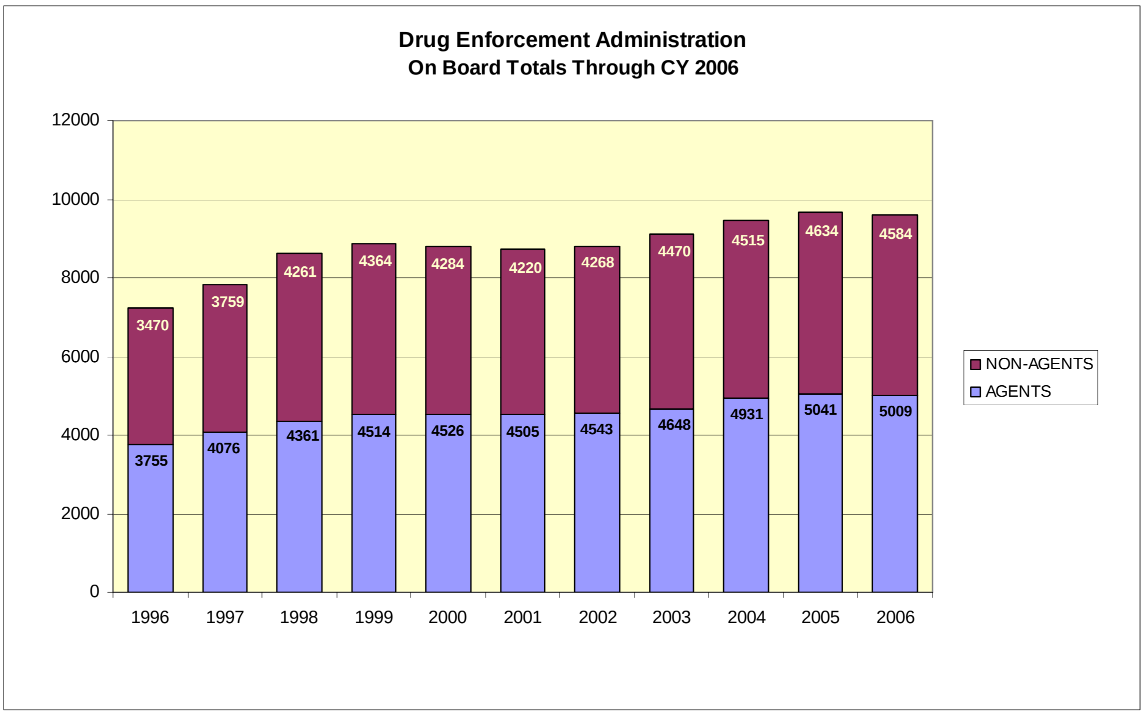
Series Category	03	04	05	06	Total
Other	271	321	315	327	1234
Special Agent	158	149	156	157	620
Total	429	470	471	484	1854

DEA will stretch its resources using the "force multiplier" effect of its agent force, task force officers and technological investments in order not to lose ground gained in past years. In doing so DEA will continue to support its most critical programs such as priority drug investigations, the drug flow prevention strategy and financial investigations. Relying on the cooperative partnerships nurtured around the country, DEA will continue to carry out its core missions and enforcement efforts.

Biden 264 **Please provide data in the form of a chart regarding DEA agent and non-agent personnel for the years 1996-2006. Please also list specifically: (1) the number of personnel employed under each category (agent and non-agent) for each year; (2) the cost of each agent and non-agent; (3) the percentage of the President's DEA budget request that relates to these positions; and (4) the percentage of appropriated funds that were dedicated to salary and expense for these DEA agents and non-agents.**

ANSWER: Please see the four charts, below.

264 (1) – The number of personnel employed under each category (agent and non-agent) for each year.



264 (2)- Cost of each agent and non-agent for each fiscal year covering the period: (FY 1996 - FY 2006)

	Special Agent			Non-Agent		
	Pay & Benefits	Other Expenses	Total	Pay & Benefits	Other Expenses	Total
FY 1996	93,992	55,396	149,388	56,860	27,120	83,980
FY 1997	94,473	60,784	155,257	57,151	29,758	86,909
FY 1998	99,580	62,407	161,987	60,240	30,552	90,792
FY 1999	103,314	60,908	164,222	62,500	29,818	92,318
FY 2000	110,161	62,183	172,344	66,641	30,443	97,084
FY 2001	117,854	69,970	187,823	71,295	34,255	105,549
FY 2002	125,397	76,317	201,714	75,858	37,362	113,221
FY 2003	130,273	81,933	212,206	78,808	40,111	118,919
FY 2004	139,104	80,915	220,019	84,150	39,613	123,763
FY 2005	144,990	83,127	228,117	87,711	40,696	128,407
FY 2006	151,633	83,443	235,076	91,730	40,851	132,580

Notes:
1. Pay and Benefits obligations were obtained via DEA's Financial System. Please note that DEA converted to a new financial system in FY 1998, and as a result, FY 1996 and FY 1997 figures are based on estimates.
2. Other expenses (non-pay and non-benefits) were obtained using the recurring costs from DEA's new position cost modules. Via this methodology, approximately 50% of DEA's non-pay and non-benefits obligations are tied to FTE. Other expenses exclude program costs not directly tied to a position.

264 (3)- Percentage of FY 2007 President's Budget request that relates to these positions:

	Special Agent			Non-Agent		
	Pay & Benefits	Other Expenses	Total	Pay & Benefits	Other Expenses	Total
FY 2007	30%	18%	48%	17%	8%	25%

Note: Of the FY 2007 President's Budget, 48% (30% Pay & Benefits; 18% Other Expenses) funds Special Agent positions, and 25% (17% Pay & Benefits; 8% Other Expenses) funds non-Special Agent positions.

264 (4)- Percentage of appropriated funds that were dedicated to salary and expense for these DEA agents and non-agents for each fiscal year covering the period: (FY 1996 - FY 2006)

	Special Agent			Non-Agent		
	Pay & Benefits	Other Expenses	Total	Pay & Benefits	Other Expenses	Total
FY 1996	32%	19%	51%	17%	8%	25%
FY 1997	32%	19%	51%	17%	8%	25%
FY 1998	30%	19%	49%	16%	8%	25%
FY 1999	31%	18%	49%	18%	8%	26%
FY 2000	31%	18%	49%	18%	8%	26%
FY 2001	31%	19%	50%	18%	8%	26%
FY 2002	31%	19%	50%	18%	9%	26%
FY 2003	31%	20%	51%	18%	9%	26%
FY 2004	32%	19%	51%	18%	8%	26%
FY 2005	33%	19%	53%	18%	8%	26%
FY 2006	32%	17%	49%	17%	8%	25%

Notes: Please see the notes that accompany Part 2 of Question 264.

Biden 272 **I recently introduced legislation, entitled the Homeland Security Trust Fund Act of 2007, to create a homeland security trust fund that will set aside $53.3 billion for the exclusive purpose of investing in our homeland security. With this funding, I propose to implement the 9/11 Commission Recommendations, fully fund the COPS program, hire 1,000 new FBI agents, and invest in critical infrastructure protection. What priorities would you fund with the benefit of the additional resources contemplated by the legislation?**

ANSWER: On Monday, February 5, 2007, the President transmitted his FY 2008 budget request to the Congress. The President's Budget contains the details of the Justice Department's resource requirements, including a total of $3.3 billion in counterterrorism and homeland security-related program needs for the FBI, DEA, ATF, the litigating components (including the U.S. Attorneys and the National Security Division), and the Office of Justice Programs (including the COPS program), as well as other DOJ components engaged in protecting the Nation from acts of terrorism. Of the Department's total FY 2008 budget, some $227 million is requested to fund program enhancements in these components. These investments, as detailed in our FY 2008 budget request, represent the priorities that would benefit from additional resources.

Biden 273 **"Several years ago, the Voting Section of the Civil Rights Division began tracking the time spent by its attorneys and staff on each case to facilitate responses to congressional inquiries and congressional oversight requests. To facilitate this Committee's oversight efforts, please provide the following information concerning the work of the Voting Section staff: a) For each year between January 2003 and the present, identify the total number of staff hours, broken down by job title (e.g., Chief, Deputy Chief, Trial Lawyer, Paralegal, Civil Rights Analyst, etc.) for the following ("litigation" includes pre-filing settlement negotiations and time spent developing and implementing any consent decrees or memoranda of agreement):**
(1) Investigations under Section 2 of the Voting Rights Act ("VRA");
(2) Litigation under Section 2 of the VRA;
(3) Investigations under Section 203 of the VRA;
(4) Litigation under Section 203 of the VRA;
(5) Investigations under Section 208 of the VRA;
(6) Litigation under Section 208 of the VRA;
(7) Investigations under the National Voter Registration Act ("NVRA");
(8) Litigation under the NVRA;
(9) Investigations under the Help America Vote Act ("HAVA");
(10) Litigation under HAVA;
(11) Investigations under the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA")
(12) Litigation under UOCAVA;
(13) Investigations for failure to comply with Section 5 of the VRA;
(14) Section 5 enforcement actions;
(15) Investigations in response to Section 5 declaratory judgment actions;
(16) Litigation of Section 5 declaratory judgment actions;
(17) Investigation of bailout actions under Section 4(a) of the VRA;

(18) Litigation of bailout actions under Section 4(a) of the VRA;
(19) Federal observer coverage;
(20) Review of submissions under Section 5 of the VRA;

ANSWER: The Voting Section uses the Interactive Case Management System, as does every litigating section in the Civil Rights Division. ICM does not provide for accurate calculation and/or categorization of the information requested. The Department of Justice is in the process of developing a Department-wide Litigation Case Management System (LCMS). The LCMS is projected to improve the flow of case information across components in the Department. The Division's ICM system will be replaced by LCMS in the next few years.

Biden 274 **"For each activity identified in (a), specify the number of staff hours broken down by job title (e.g., Chief, Deputy Chief, Trial Lawyer, Paralegal, Civil Rights Analyst, etc.) and case (if applicable) for all actions primarily for the benefit of the following groups (e.g., a Section 2 case brought on behalf of African-American voters). Jurisdictions currently under investigation that have not been sued need not be identified by name, but the staff time spent on all such investigations should be included separately.**
(1) African-Americans;
(2) Latinos;
(3) American Indians;
(4) Alaska Natives;
(5) Asian-Americans; and
(6) Arab-Americans.

ANSWER: Please see our response to question 273, above.

Biden 276 **Do you support a congressional effort to ban it?**

ANSWER: President George W. Bush has said that "racial profiling is wrong and we will end it in America." In 2001, the President directed the Attorney General to review the use of race by federal law enforcement agents and to develop specific recommendations to end racial profiling. Implementing that directive, the Department of Justice issued racial profiling guidelines in 2003, becoming the first Administration in history to generally prohibit the use of racial profiling by federal law enforcement officials.

QUESTION FROM SENATOR FEINSTEIN

Feinstein 285 **Are there mechanisms in place to allow individuals to correct records in the OneDOJ database if it collects false or inaccurate information about them? If so, what are they? If not, why not?**

ANSWER: Each Department component that contributes data to R-DEx is responsible for making reasonable efforts to ensure that information contributed is accurate, complete, timely, and relevant. Individuals seeking to contest or amend information maintained in the R-DEx system are entitled to do so in accordance with the Privacy Act of 1974, 5 U.S.C. § 552a. The R-DEx Privacy Act system of records notice, 70 Fed. Reg. 29,790, 39,792 (July 11, 2005), amended in non-pertinent part, 70 Fed. Reg. 72,315 (December 2, 2005) and 72 Fed. Reg. 4532 (January 31, 2007), sets forth procedures for individuals seeking to contest or amend information maintained in R-DEx. In the system notice, it is noted that certain information may be exempt from contesting record procedures in accordance with the exemption established for criminal law enforcement information in subsection (j)(2) of the Privacy Act , 5 U.S.C. § 552a(j)(2). In accordance with the Privacy Act, the Department has published an exemption regulation applicable to R-DEx at 28 C.F.R. 16.33 (2006).

QUESTIONS FROM SENATOR FEINGOLD

Feingold 289 **On January 17, 2007, you sent a letter to the Chairman and Ranking Member of the Senate Judiciary Committee informing them that the President had decided to terminate the NSA wiretapping program and bring it under recently issued FISA court orders. Section 601 of FISA requires that the Department provide the following, as part of its next semi-annual report: "a summary of significant legal interpretations of [FISA] involving matters before the Foreign Intelligence Surveillance Court or the Foreign Intelligence Surveillance Court of Review, including interpretations presented in applications or pleadings filed with the Foreign Intelligence Surveillance Court or the Foreign Intelligence Surveillance Court of Review by the Department of Justice," and "copies of all decisions (not including orders) or opinions of the Foreign Intelligence Surveillance Court or Foreign Intelligence Surveillance Court of Review that include significant construction or interpretation of the provisions of this Act." Because of the significance of these materials, and the Committee's strong interest in them, please provide them immediately. If you are not willing to do so, explain why not.**

ANSWER: Please see our response to Question 67, above. The Department also will continue to submit semi-annual reports consistent with 50 U.S.C. § 1871.

Feingold 290 **Please answer the following questions about the FISA court's orders. To the extent that your answers require the disclosure of classified information, please provide them in the appropriate setting. (a) You told the Senate Judiciary Committee that the President is still "doing what he can do under the law to protect America." What circumstances caused you to conclude that the NSA wiretapping program could be conducted under FISA without undermining American security interests?**

ANSWER: As we stated in our letter of January 17, any court authorization had to ensure that the Intelligence Community would have the speed and agility necessary to protect the Nation from al Qaeda—the very speed and agility that was offered by the TSP. The orders issued by the FISC on January 10 will allow the necessary speed and agility while providing substantial advantages. Further details on this highly classified 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 292 **Your letter referred to the FISA court issuing "orders." How many orders did the FISC issue?**

ANSWER: The contents of the orders (including the number of orders) are highly classified. However, the highly classified orders have been provided to the Intelligence Committees, and have been made available to the Chairmen and Ranking Members of both Judiciary Committees.

Feingold 293 **Do you currently have plans to file more applications with the FISA court under this new framework?**

<u>ANSWER:</u> As you know, FISA requires periodic renewals of orders issued authorizing electronic surveillance. *See* 50 U.S.C. § 1805(e). The Government anticipates filing applications for renewals of the January 10, 2007 orders.

Feingold 294 **Are the court's orders based on the court's determination that probable cause exists with respect to particular identified individuals, to identifiable groups of individuals, or to some other classification?**

<u>ANSWER:</u> As we have explained, further details concerning the FISC orders cannot meaningfully be provided in this format without exposing highly classified operational details. Further details concerning the orders have been provided to the Intelligence Committees and have been made available to the Chairmen and Ranking Members of both Judiciary Committees.

Feingold 295 **The FISA statute requires that each FISA court order contain findings that there is probable cause to believe that the specific target of the electronic surveillance is a foreign power or an agent of a foreign power, and that each of the facilities or places at which the electronic surveillance is directed is being used or is about to be used by a foreign power or an agent of a foreign power. Were each of these requirements met in this case?**

<u>ANSWER:</u> Yes.

Feingold 296 **During your testimony, you mentioned that the relevant FISA applications are "different than a normal FISA application." If you are utilizing individualized orders, as FISA contemplates, how do the FISA orders your letter discusses differ from standard FISA orders?**

<u>ANSWER:</u> Please see our response to Question 294, above.

Feingold 297 **I understand that the Department filed your January 17 letter in the pending lawsuit in the Sixth Circuit Court of Appeals, which is currently considering whether the wiretapping program is unconstitutional. What effect does the Department think this letter will have on that and other pending lawsuits?**

<u>ANSWER:</u> On January 25, the Department of Justice filed submissions in the United States Court of Appeals for the Sixth Circuit in cases 06-2095 and 06-2140 arguing that the cases should be dismissed. The impact of the January 10 orders on other litigation will be assessed on a case-by-case basis.

Feingold 298 **Does the Department intend to seek to dismiss the constitutional challenge currently pending before the Sixth Circuit on the NSA wiretapping program?**

ANSWER: On January 25, the Department of Justice filed submissions in the United States Court of Appeals for the Sixth Circuit in cases 06-2095 and 06-2140 arguing that the cases should be dismissed.

Feingold 300 **According to the New York Times' Executive Editor, Bill Keller, the Bush Administration knew the New York Times was investigating this program a year before the story broke on December 16, 2005. Your letter states you first sought FISA authorization in the spring of 2005, which would apparently have been after you knew the New York Times investigation was under way. When you were before the Judiciary Committee on January 18, 2007, you said your decision to seek FISA Court approval for the NSA wiretapping program did not relate to the New York Times investigation of the program. Instead, you said, you were moved to seek FISA approval "because of the discourse, the concerns raised, questions asked in [the Judiciary] Committee." However, the New York Times story was not published until December 16, 2005, so there was no public discourse or Committee questions about the program in the spring of 2005. With that in mind, do you wish to add to your ANSWER to my question? Why did you decide to seek FISA Court approval in the spring of 2005?**

ANSWER: Our January 17 letter does not state that the Administration first sought FISA authorization in the spring of 2005. Rather, our letter states that "[i]n the spring of 2005 – well before the first press account disclosing the TSP – the Administration began exploring options for seeking . . . FISA Court approval" of the electronic surveillance being conducted as part of the TSP. As you know, the first press account of the TSP was published in December 2005, and the FISC did not issue orders until January 10, 2007. During the time period between when TSP was publicly disclosed and the FISC orders were issued, substantial public discourse took place. This discourse, of course, was one of the factors that contributed to the ultimate decision to seek FISC orders, but the fact is that the Administration began exploring options for obtaining such authorization well before the TSP was publicly disclosed. Further details concerning the orders have been provided to the Intelligence Committees and have been made available to the Chairmen and Ranking Members of both Judiciary Committees.

Feingold 301 **When you were last before the Committee in July 2006, I asked you to provide the Judiciary Committee with some basic information about the Administration's legal theories, as they evolved from 2001 to 2005, regarding the NSA wiretapping program. At that time, you would not commit to providing this information to the Committee. I also received a letter on January 16, 2007, from the Office of Legislative Affairs indicating that you will not do so. (a) Given your letter of January 17, 2007, will you now provide this information to this Committee? If not, why not? What privilege do you rely on in refusing to comply with a legitimate oversight request?**

<u>ANSWER:</u> With respect to the FISC orders, see response to Question 67. To the extent your question concerns the Terrorist Surveillance Program (TSP), operational details concerning the TSP remain highly classified. Throughout the war on terror, the Administration has notified the Congress concerning the classified intelligence activities of the United States through appropriate briefings of the intelligence committees and congressional leadership. The full membership of both intelligence committees has been briefed on the TSP.

Feingold 302 **Please explain to what you were referring in your January 17, 2007, letter when you used the phrase "developments in the law."**

<u>ANSWER:</u> Please see our response to Question 294, above.

Feingold 304 **Is it the position of the Justice Department that after the Military Commissions Act, individuals who are picked up inside the United States and detained as enemy combatants, and who are not U.S. citizens, cannot challenge their detention in court through habeas proceedings?**

<u>ANSWER:</u> We believe Congress answered that question in section 7 of the Military Commissions Act (MCA), which provides that "[n]o court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination." 28 U.S.C. § 2241(e)(1). We would expect, however, that any individual picked up inside the United States and detained as an enemy combatant would be given a hearing before a CSRT, with a subsequent appeal to the United States Court of Appeals for the District of Columbia Circuit. That appeal would provide for federal court review of the lawfulness of the detention of the individual in a manner that fully satisfies the constitutional right to habeas corpus, even if that right applied.

Feingold 305 **The Defense Department recently issued its rules for trial by military commission. (a) What role did the Justice Department play in drafting these rules? Who, specifically, was involved?**

<u>ANSWER:</u> The Department of Defense had the primary responsibility for issuing the Manual for Military Commissions. The MCA provides that the Secretary of Defense shall consult with the Attorney General in issuing those rules, and accordingly, members of the Department of Justice worked with the Department of Defense on the Manual. *See* 10 U.S.C. § 949a(a).

The initial draft was prepared by career military lawyers from the Office of Military Commissions within the Department of Defense. Attorneys from the Department of Justice then worked with that Office and representatives from DOD's Office of General Counsel, the service general counsels, and the Judge Advocates General in further developing the draft. The results of that work were submitted for comment to other interested departments in the Executive

Branch, and the final product was submitted for review and approval by the Secretary of Defense.

Feingold 306 **To what extent did Justice Department officials working on these rules consult with Judge Advocates General with experience in military trials?**

ANSWER: As noted, representatives of the Judge Advocates General worked closely with other attorneys at the Department of Defense and the Department of Justice in preparing the Manual for Military Commissions. These rules were developed through an exhaustive and collaborative interagency process, which drew upon the experience of military lawyers and civilian lawyers at both departments.

Feingold 307 **What other agencies and officials were involved in developing these rules?**

ANSWER: In addition to the Department of Justice, we understand that the Department of Defense received input from other interested departments and agencies in the Executive Branch, including the Department of State, the Central Intelligence Agency, and the Office of the Director of National Intelligence.

Feingold 308 **Has the Department engaged in contingency planning for any future attack inside the United States?**

ANSWER: Yes. The Department participates actively in interagency planning to prepare for a future attack in the United States. Pursuant to Homeland Security Directive (HSPD) – 5, the Department participated in the development of the National Response Plan to align Federal coordination structures, capabilities and resources into a unified, all-discipline, and all-hazards approach to the management of domestic incidents, including terrorist attacks. A copy of this plan, including its Terrorism Incident Law Enforcement and Investigation Annex, is publicly available on the Department of Homeland Security home page at www.dhs.gov/nrp. Every United States Attorney's Office nationwide has a critical incident plan in place as well. Since September 11, 2001, these plans have been strengthened and an annual exercise requirement was added to them. The Department also plans and participates in exercises throughout the year, at the intergovernmental and interagency level, as well as within the Department itself, to work to ensure preparedness in the event of an attack.

Feingold 309 **Does it have written plans for steps to take in the event of another attack, including such steps as arrests, detentions, or legislative proposals? Have you considered how to respond to an attack effectively without alienating the communities that may be important to helping with an investigation? If so, please describe those plans and supply a copy of them.**

ANSWER: As described in the answer to question 308, above, the Department has undertaken extensive activities with the goal of preventing, containing, and responding to another attack. The Department regularly evaluates whether additional authorities or other legislation is needed to better protect the country against the threat of terrorism, but none of the Department's legislative proposals are contingent on the occurrence of another terrorist incident. The Department is engaged in ongoing outreach efforts to the Arab-American and Muslim communities on civil rights issues. This effort was particularly intense at critical junctures, such as the three months after 9/11 or during events such as the conflict in Lebanon and the London bombings, but is part of a sustained and ongoing process of outreach. The Department participates in a Department of Homeland Security rapid response protocol that brings together government officials and community representatives within hours after an incident. This protocol was, for example, activated after the London terror arrests in August 2006, and allowed government officials to help dispel rumors, as well as to hear community concerns about public rhetoric and the government response.

Feingold 319 **Do you support legislation banning racial profiling?**

ANSWER: President Bush has said that "racial profiling is wrong and we will end it in America." In 2001, the President directed the Attorney General to review the use of race by federal law enforcement agents and to develop specific recommendations to end racial profiling. Implementing that directive, the Department of Justice issued racial profiling guidelines in 2003, becoming the first Administration in history to generally prohibit the use of racial profiling by federal law enforcement officials.

Feingold 322 **If the reports are true, do you believe that barring the Ismails from entering the U.S. was legal? If so, under what legal authority?**

ANSWER: Pursuant to the longstanding DOJ policy against disclosing non-public information concerning pending law enforcement and litigation matters, we are unable to provide a response at this time.

Feingold 323 **If the reports are true, did you or anyone else under your authority participate in the decision to keep the Ismails out of the country, including giving advice on whether such actions would be legal?**

ANSWER: Pursuant to the longstanding DOJ policy against disclosing non-public information concerning pending law enforcement and litigation matters, we are unable to provide a response at this time.

Feingold 325 **Have any charges been filed against Muhammad or Jaber Ismail?**

ANSWER: Pursuant to the longstanding DOJ policy against disclosing non-public information concerning pending law enforcement and litigation matters, we are unable to provide a response at this time.

Feingold 327 **Do you believe that the law could benefit from any legislative improvements? Please provide detailed recommendations for what areas might benefit from further reform.**

ANSWER: The statistics indicate that the PLRA is successfully striking an appropriate balance between discouraging meritless suits while allowing inmates with substantive claims to litigate in the federal courts without prepayment of filing fees. The jurisprudence regarding the PLRA's application is fairly well-settled at this juncture, providing ample guidance to litigants. Accordingly, we do not believe that the PLRA requires amendment at this time.

Feingold 328 **The Commission specifically suggested four improvements: 1) eliminating the physical injury requirement; 2) amending the rules governing filing fees and attorneys fees; 3) revising the settlement requirements; 4) changing the exhaustion rule. Which of these, if any, do you think would be worthwhile?**

ANSWER: We believe the PLRA is functioning effectively and we do not support the amendments proposed by the Commission.

The physical injury requirement codified at 42 U.S.C. § 1997e(e) discourages the filing of unsupported claims for mental and emotional injuries, and accomplishes Congress' purpose in limiting unmeritorious prisoner lawsuits. This requirement comports with well-settled tort principles and the Supreme Court's decision in *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 309-10 (1986), which held that a constitutional tort plaintiff could not recover for the abstract "value" or "importance" of a constitutional right. *Id.* at 309-10; *see also Carey v. Piphus*, 435 U.S. 247, 255 (1978) (holding constitutional tort plaintiff must prove actual injury to be entitled to recover damages).

The PLRA's filing fee provisions permit inmates to pay the filing fee over time – a right not afforded to other plaintiffs in federal courts. This approach strikes a good balance between giving inmates access to the courts and deterring frivolous suits. As several courts of appeals have noted, the filing fee provisions of the PLRA, codified at 28 U.S.C. § 1915, serve a valuable purpose by exposing inmates to the same financial risks and considerations faced by other litigants. *See, e.g., Lyon v. Krol*, 127 F.3d 763, 764 (8th Cir. 1997); *Leonard v. Lacy*, 88 F.3d 181, 185 (2d Cir. 1996). Also, the PLRA's provisions on attorneys' fees, codified at 42 U.S.C. § 1997e(d)(2)-(3), allow attorneys who represent inmates who prevail in suits filed under 42 U.S.C. § 1983 to be fairly compensated for their services.

The PLRA generally requires that consent decrees including prospective relief be narrowly drawn, extend no further than necessary to correct the violation of a federal right, and be the least intrusive means necessary. Moreover, the PLRA requires courts to give substantial weight to any adverse impact on public safety or the operation of the criminal justice system. *See* 18 U.S.C. § 3626(a)(1), 3626(c)(1). These provisions permit parties to litigation raising broad challenges to prison conditions to resolve those cases via settlement, while at the same time ensuring that prison administrators retain appropriate flexibility to accomplish their critical mission of protecting public safety.

With regard to the PLRA's requirement that inmates permit prison officials to administratively resolve their grievances before filing suit, subsequent to the publication of the Commission's report, the Supreme Court decided two cases interpreting 42 U.S.C. § 1997e(a), *Woodford v. Ngo,* 126 S. Ct. 2378 (2006) and *Jones v. Bock*, 75 U.S.L.W. 4058 (U.S. Jan. 22, 2007). Combined with the Supreme Court's decision in *Porter v. Nussle*, 534 U.S. 516 (2002), those opinions have appropriately resolved the main concerns regarding the PLRA's exhaustion requirement.

QUESTIONS FROM SENATOR SCHUMER

Schumer 331 **At the hearing on January 18, 2007, you refused to answer whether the orders signed by a judge or judges of the FISA Court authorized individual warrants or broader program warrants. Please answer that question. If you do not, please explain what national security interest would be jeopardized by answering that general question.**

ANSWER: As we have explained, further details concerning the FISC orders—including the legal theories underpinning those orders—cannot meaningfully be provided in this format without exposing highly classified operational details. Further details concerning the orders have been provided to the Intelligence Committees and have been made available to the Chairmen and Ranking Members of both Judiciary Committees.

Schumer 332 **At the hearing on January 18, 2007, I asked you whether – notwithstanding the apparent decision finally to conduct the NSA surveillance program within FISA – you believed that you were legally required to go to the FISA court. You evaded the question. Please answer directly and provide an answer beyond merely stating that "moving forward," it is the Administration's intent to work within FISA. Do you believe that FISA court approval is legally required to conduct electronic surveillance of the type you have described or do you believe court approval is merely voluntary?**

ANSWER: With respect, the Attorney General did not "evade" questions concerning whether the Administration was legally "required" to obtain the orders issued by a Judge of the FISC on January 10, 2007. The Administration was not required to do so. As we have consistently explained, the TSP was fully consistent with the law.

Schumer 333 **If and when the Administration were to conduct electronic surveillance outside of FISA once more, how would members of Congress and the public discover that fact?**

ANSWER: At the outset, we note that the TSP was fully consistent with FISA, for reasons that have been explained in detail to this Committee. With that said, throughout the war on terror the Administration has notified the Congress concerning the classified intelligence activities of the United States through appropriate briefings of the intelligence committees and congressional leadership. The Administration will continue such notifications to the appropriate committees and Members of Congress.

Schumer 334 **Do you commit to advising the full Congress and the American people if and when the Administration ever decides to conduct electronic surveillance outside of FISA?**

ANSWER: Please see our response to Question 333, above.

Schumer 335 **Often during your prior testimony before the Committee, you have been careful to limit your statements to "the program the President described." With respect to the announcement that the TSP program will shortly be terminated, will you confirm that when that happens, the Administration will thereafter not be conducting any electronic surveillance collection of any sort outside of FISA, whether or not it is of the type you or the President have previously described?**

<u>ANSWER:</u> As you know, not all electronic surveillance is subject to the provisions of FISA. For example, electronic surveillance is also authorized by statute under Title III. The President is committed to using all lawful tools to protect our Nation from the terrorist threat. However, as noted in our letter of January 17, 2007, any electronic surveillance that was occurring as part of the TSP is now subject to the approval of the FISC. We are aware of no programs of electronic surveillance, as that term is defined in FISA, that are being conducted by the executive branch for foreign intelligence purposes pursuant to the Authorization to Use Military Force, or pursuant solely to the President's authority under Article II of the Constitution. We note that FISA itself expressly authorizes electronic surveillance without court order under certain circumstances. *See* 50 U.S.C. § 1802; 50 U.S.C. § 1805(f).

Schumer 336 **In the same vein, will you confirm that the Administration does not intend to conduct any electronic surveillance collection of any sort outside of FISA, whether or not it is of the type you or the President have previously described?**

<u>ANSWER:</u> Please see our response to Question 335, above.

Schumer 337 **Some have suggested that your surprise announcement that the NSA surveillance program would now be conducted within the FISA law and with the supervision of the FISA court is that it is, among other things, an attempt to head off any pending legal challenge to the NSA surveillance program. Indeed, one of your own officials was quoted in the media as saying that current challenges to the constitutionality and legality of the program are "now moot." Does the Department of Justice plan to file any motion or application in any court arguing that such challenges are moot or otherwise without merit in light of the decision to terminate the so-called Terrorist Surveillance Program? If so, please describe such intentions.**

<u>ANSWER:</u> At the outset, we respectfully disagree with your statement that the TSP was not "conducted within the FISA law." As the Department has repeatedly explained to this Committee, the TSP was fully consistent with FISA. On January 25, the Department of Justice filed submissions in the United States Court of Appeals for the Sixth Circuit in cases 06-2095 and 06-2140 arguing that the cases should be dismissed.

Schumer 339 **Your letter, dated January 24, 2007, announced that the FISA Court had issued one or more orders in connection with the NSA surveillance program. Given that those applications were ex parte and may (because you have not denied it) involve warrants or orders that did not issue on an individualized basis, is there any mechanism for further judicial review of the constitutionality and legality of those already-issued orders?**

ANSWER: FISA requires periodic renewals of all orders issued pursuant to its provisions. *See* 50 U.S.C. § 1805(e). This statutory renewal process provides for ongoing judicial review of the orders.

Schumer 340 **Your January 17, 2007 letter also claims that this new program is the result of "taking full advantage of developments in the law." Please explain to which developments you refer, with specific citations to case law and other legal authority.**

ANSWER: As we have explained, further details concerning the FISC orders cannot meaningfully be provided in this format without exposing highly classified operational details. Further details concerning the orders have been provided to the Intelligence Committees and have been made available to the Chairmen and Ranking Members of both Judiciary Committees.

Schumer 343 **In order to resolve its recommendation to the FBI, the Office of the Inspector General asked that the FBI provide, by December 1, 2006, an update on the status of improvements to the FBI's Correctional Intelligence Initiative. Did the FBI provide this information to the IG by the deadline of December 1, 2006? Please provide me with a copy of this update on the Correctional Intelligence Initiative.**

ANSWER: Attached as an Enclosure is the FBI's update regarding the status of completed and pending improvements regarding the Correctional Intelligence Initiative, highlighting those enhancements or accomplishments that will directly assist the Bureau of Prisons (BOP).

Schumer 344 **In the same study of prison policies and practices, the Inspector General reported that detention center personnel receive only a single page of information when a terrorist suspect is sent into their custody. In one shocking incident, staff at the Metropolitan Correctional Center in New York learned only from a news report that one of their inmates was a high-level al Qaeda operative trained in martial arts and urban warfare. What specific steps, if any, are you taking to improve information sharing between the FBI and BOP to ensure that the FBI is providing the BOP with the information that prison staff need to manage terrorist inmates safely and securely?**

ANSWER: Foremost in our efforts to ensure a fully effective intelligence partnership with the BOP is the comprehensive access to FBI intelligence information resources afforded BOP staff assigned to the National Joint Terrorism Task Force and to a number of local JTTFs. We have recently provided Intelligence Analyst (IA) training to BOP intelligence staff, and we will continue to provide this training as appropriate. We are also in the process of developing additional instructions to all FBI field offices emphasizing intelligence sharing procedures with BOP facilities.

Schumer 347 **The Inspector General's September 2006 report on federal prisons' mail and telephone monitoring also found that your Department has no mandatory review process to determine whether SAMs are needed for inmates suspected or convicted of terrorism-related crimes. To close this gap in security, the Criminal Division merely needs to make a simple change to the U.S. Attorneys' Manual. Has this been done yet? If not, can you commit to a firm date when this change will be made?**

ANSWER: The United States Attorneys' Manual (USAM) has not been changed to create a specific mandatory procedure for reviewing each terrorism-related prisoner to determine whether special administrative measures (SAMs) should be sought. A proposal for a USAM change specifically mandating such a procedure is currently under discussion by appropriate Department officials. We will complete those discussions as soon as possible.

The Department of Justice is dedicated to considering and addressing all issues that involve the protection of our nation from acts of terrorism. The appropriate use of SAMs in terrorism-related prosecutions is one such issue. The Department's terrorism prosecutors have been directed to vigilantly consider the appropriate use of SAMs in every terrorism-related matter. Furthermore, several existing USAM provisions require prosecutors to notify, consult with, and obtain the approval of the National Security Division at several stages of terrorism-related cases. This procedure ensures appropriate Department oversight over each terrorism prosecution.

Schumer 354 **The campaign season and midterm elections of November 7, 2006, were marred by many instances of wrongdoers cynically attempting, probably with some success, to intimidate or deceive voters headed to the polls with the aim of disenfranchising these voters. According to media reports, these attempts ranged from calls to Virginia voters wrongly telling them that they were not registered, to deceptive flyers distributed by the Ehrlich and Steele campaigns in southern Maryland, to an armed man who harassed Hispanic voters outside a polling place in Arizona. I believe that the Department of Justice should be using all available means to respond to these despicable tactics.**
How many investigations, if any, is the FBI conducting that pertain to questionable or illegal tactics used during the midterm election of November 7, 2006, and the campaign season leading up to it?

ANSWER: Specific facts indicating that a violation has occurred are required in order for the FBI to initiate an investigation into allegations of election-related crimes. The initiation of each investigation must be supported by the Public Integrity Section, Election Crimes Branch or the Criminal Section of the Civil Rights Division. As a result, the FBI does not initiate investigations related to "questionable" tactics; only allegations involving violations of applicable federal law. Between 1/1/06 and 11/30/06, the FBI opened 38 formal investigations involving alleged federal election law violations related to activity leading up to and surrounding the 11/7/06 election. These investigations encompass allegations of campaign finance violations, ballot fraud, voter intimidation, and voter fraud.

Schumer 355 **Please list all completed or ongoing FBI investigations, if any, into tactics used during the campaigns or elections of November 7, 2006, and for each case give the location and nature of the conduct being investigated.**

ANSWER: Longstanding Department policy generally precludes the FBI from commenting on the existence or status of ongoing investigations. In addition to protecting the privacy interests of those affected, the policy serves to avoid disclosures that could provide subjects with information that might result in the destruction of evidence, witness tampering, or other activity that would impede the FBI's investigation.

The following election crime investigations related to the 11/7/06 national election were opened by the FBI on or after 1/1/06 and closed on or before 12/22/06.

- Diebold software theft: investigation by the Baltimore Division into the possible theft of Diebold Election Systems, Inc., electronic voting machine software.

- Ohio State Medical Association (OSMA) Political Action Committee (PAC) embezzlement: investigation by the Cincinnati Division regarding allegations of an $83,000 embezzlement from the OSMA PAC and related false filings with the Federal Election Commission.

- Lieberman “denial of service” website attack: investigation by the New Haven Division regarding allegations of an attempted “denial of service” attack on Senator Joseph Lieberman's official Internet website immediately prior to the Democratic primary in August 2006.

- Multiple voting referral (Galesburg, Illinois, Election Department): investigation by the Springfield Division of allegations of multiple voting by a specifically identified individual.

- Harrington felon voting: investigation by the Tampa Division of taunting letters from a convicted felon who claimed to be regularly voting, despite his previous disqualifying federal felony conviction.

Schumer 359 **During Assistant Attorney General Wan Kim's appearance before the Senate Committee on the Judiciary on November 16, 2006, he indicated that voting-related enforcement is divided between the Civil Rights and Criminal Divisions due to historic "concerns that Federal prosecutors being involved in voter access issues would lead to intimidation of voters at the polls." Federal criminal prosecutors, including Assistant United States Attorneys, reportedly have served as election monitors under the auspices of the Department of Justice. Please explain how you reconcile deploying prosecutors as election monitors with the historic division between the Civil Rights and Criminal Divisions.**

ANSWER: A person's status as an Office Personnel Management employee, an attorney, or a prosecutor does not conflict at all with his or her sole function on Election Day as an observer or monitor. When Assistant United States Attorneys, prosecutors in the Criminal Section of the Civil Rights Division, or other Department attorneys and staff monitor elections, they are under the supervision and control of the Voting Section of the Civil Rights Division. Such monitoring is focused solely on the enforcement of the federal civil voting rights statutes for which the Voting Section is responsible. Any investigation of federal criminal statutes is kept separate from the enforcement of federal civil voting rights laws and is conducted under the supervision of the appropriate prosecuting office. Non-Voting Section personnel provide necessary resources that allow the Section to investigate and deter discrimination in far more places than would be possible otherwise. These personnel also add to the language skills available to the Section and enhance our ability to obtain evidence of mistreatment of language minority voters.

Schumer 360 **Currently, what Department of Justice Division or official is ultimately responsible for protecting the right to vote in America?**

ANSWER: The Attorney General of the United States bears the ultimate responsibility to enforce the federal laws that protect the right to vote in the United States.

Schumer 361 **As an organizational alternative to this historic division, the Department could unify its voting rights activities under a single manager to provide accountability and programmatic coherence. Of course, any such reorganization should be structured to ensure that voter protection activities by DOJ prosecutors will not unintentionally inhibit the exercise of the right to vote. In your view, what would be the costs and benefits of unifying the Department of Justice's voter protection activities under a single manager?**

ANSWER: 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.

Schumer 362 **Can you suggest any restructuring of the Department's activities that would enhance your ability to protect the right to vote?**

ANSWER: The Department is constantly reevaluating its structure and performance. We welcome ideas on how we can better enforce federal law.

Schumer 363 **Currently, under 18 U.S.C. § 594, the maximum sentence of imprisonment for voter intimidation is 1 year imprisonment. Do you believe that a higher maximum penalty would be appropriate for this crime?**

ANSWER: The Department has not been presented with a specific legislative proposal in this regard but will enforce, as appropriate, any legislation that is enacted into law.

Schumer 374 **Recently released papers revealed that the FBI conducted background investigations of witnesses who were scheduled to appear at the confirmation hearings of the late Chief Justice Rehnquist. Did the FBI or any other law enforcement agency engage in any investigation of any actual or potential witness in connection with the confirmation hearing of then-judge John Roberts?**

ANSWER: To the best of our knowledge, neither the FBI nor any other law enforcement agency investigated actual or potential witnesses in connection with the confirmation of Judge Roberts. Additionally, as indicated in our answer to Question 10, above, political use of the FBI is never appropriate.

Schumer 375 **Did the FBI or any other law enforcement agency engage in any investigation of any actual or potential witness in connection with the confirmation hearing of then-judge Samuel Alito?**

ANSWER: To the best of our knowledge, neither the FBI nor any other law enforcement agency investigated actual or potential witnesses in connection with the confirmation of Judge Alito.

Schumer 379 **Please explain what specific steps, if any, you and/or Director Mueller are taking to raise the percentage of agents who have proficiency or advanced proficiency in Arabic.**

ANSWER: The FBI has a variety of training programs designed to improve the language abilities of onboard Special Agents (SAs). For example, in October 2005, the FBI established a year-long overseas Arabic language training program for SAs, with instruction concentrating on practical Arabic for professional use and including familiarization with Arab customs and traditions and with the culture of Islam. Six SAs completed the first program in November 2006.

In addition to this program, the FBI provides shorter-term Arabic language training to SAs on a regular basis. In FY 2006, 34 SAs at various levels of proficiency were provided with survival, full-time, and immersion Arabic language training. For FY 2007, 72 SAs at varying levels of proficiency have submitted applications for Arabic language training programs at DOS's Foreign Service Institute, Middlebury College, and commercial schools with which the FBI has contracts. Approval of these training requests will depend on available funding.

The FBI is in the process of developing an interactive self-study computer-based "survival" Arabic language training program that will target the specific language needs of SAs, providing them with a strong foundation in language skills on which to build higher-level proficiency. The FBI has also originated a self-study computer-based program both to teach agents to Romanize Arabic names according to Intelligence Community (IC) standards and to predict nonstandard Romanizations that may be encountered. In addition, the FBI has created new listening and speaking exams that can test for dialect-specific Arabic ability, including Egyptian, Palestinian (Levintine), Algerian, and Iraqi, and we are considering adding other dialects. In the past, all SAs studying Arabic and those applying for SA positions were tested only with exams that measured ability in the Modern Standard Arabic. These exams were not always indicative of true useful speaking or comprehension ability.

The FBI's recruitment and marketing strategies targeting Arab Americans for FBI recruitment have greatly expanded to include the following initiatives:

- A strategy to expedite the testing of SA candidates possessing fluency in Middle Eastern languages has been implemented and will continue throughout FY 2007 and 2008. This strategy immediately identifies new applicants possessing language fluency and expedites all FBI testing and processing of these critically skilled language candidates.

- The FBI has dedicated staff who are solely responsible for the development and implementation of targeted Middle Eastern recruitment strategies. These strategies include building relationships (national and regional outreach to both the public and private sector and to the academic community); education (dispelling myths and misconceptions); direct recruitment; candidate referrals, special career invitational events; collegiate recruitment; high school information sessions and career days; enhanced advertising and marketing; and the promotion of cultural awareness.

- The National Recruitment Program has been restructured to ensure greater accountability and targeted recruitment programs have been implemented nationwide.

- A Middle Eastern Recruitment Task Force has been developed, comprising respected member of Middle Eastern Professional Organizations, a Middle Eastern Advertising Agency, and current Middle Eastern FBI SAs. The Task Force held its first meeting on 11/13/06 and will meet monthly throughout FY 2007 to develop targeted recruitment strategies and to ensure these strategies are implemented with measurable results. The Task Force will also develop plans to build relationships with Middle Eastern communities and to provide appropriate training to FBI personnel and recruiters in all 56 field offices.

- The FBI is using the services of both Allied Media (a Middle Eastern Marketing Agency) and Bernard Hodes Advertising Agency to develop and implement a robust marketing strategy targeting Middle Eastern linguists for the SA position. This marketing campaign includes special career invitational events and Internet and direct marketing strategies.

- In 2006, the FBI developed the Middle Eastern Foreign Language Honors Internship Program, a targeted internship program designed specifically for students fluent in critical Middle Eastern languages. This program creates an immediate pipeline of SA candidates fluent in Middle Eastern languages.

- Advertisements have been placed in various mediums, including Al Manassah Weekly, Al Arab Weekly, Arab American Business, Copts.net, Arab American News, Aramica, The Arab Voice, Al Hureya, Al Akhbar, Al Nahar, Al Offok, Al Arabi, Detroit Chaldean Times, Arab World, Al Nashra, The Beirut, The Foreign Affairs Journal, Language Magazine, Arab American Business Journal, The Arab American Chaldean Council, Al Sahafa newspaper, Dandana Arabic Television.

- In partnership with numerous Middle Eastern organizations, the FBI hosted "An Evening with the FBI - Career Invitational" on 10/25/06 at FBI Headquarters (FBIHQ). The participating organizations invited selected members of their communities who qualified and were interested in SA positions to attend the event, and 80% of the attendees spoke a critical foreign language.

- The FBI continues to identify and participate in career and job fairs throughout the country in an effort to reach Middle Easterners interested in SA positions.

Schumer 380 **Earlier this year, the DOJ Inspector General reported that nearly 1 in 3 intelligence analyst positions at the FBI were not filled. The FBI was reportedly aiming to hire 880 new intelligence analysts by the end of this year, yet Director Mueller's testimony prepared for his last appearance before the Senate Committee on the Judiciary stated that the FBI hired only 370 analysts in FY 2006. How many intelligence analyst positions at the FBI remain to be filled, and can you commit to a date by which all of these positions will be filled?**

ANSWER: The FBI has a funded staffing level of 2,579 IAs (hollow work-year reductions are not represented in this FSL total), with an onboard complement of 2,193 IAs. Currently, we have 25 IA applicants who have completed the background investigation (BI) process and are waiting to receive letters of appointment to the FBI. Additionally, 162 IA applicants are in the BI process, and we expect that this number will yield approximately 80 new IAs, who will be eligible for hire in FY 2007. We are continuing our efforts to recruit and hire top level candidates to the FBI and are working to assess and develop workforce strategies to retain and attract applicants to the specific job skills and backgrounds needed to fill our remaining vacancies through a targeted recruitment approach.

Schumer 381 **What percentage of intelligence analysts left FBI employment in FY 2006?**

ANSWER: In FY 2006, the overall attrition rate of FBI IAs was 9%, which includes individuals who were removed, who retired, and who left the IA position but remained with the FBI. Excluding retirements and removals, the attrition rate for IAs leaving the FBI was 4.3%.

Schumer 383 **What specific steps, if any, are you and/or Director Mueller taking to remedy the current situation and to ensure that top FBI officials have a basic understanding of Islam and of Middle Eastern cultures?**

ANSWER: It is important that all FBI investigators understand the dynamics that shape the terrorist threat facing our country. The FBI has placed particular emphasis on understanding Muslim culture and the Islamic religion and has also made it a priority to ensure that our work force understands the bases of violent Islamic extremist ideologies. This dual effort is evidenced by the counterterrorism and cultural training made available to our employees. This training teaches us to interact better with Muslim communities and to build the trust critical to effective community policing. Within the counterterrorism program, the provision to our counterterrorism workforce of the correct tools and relevant knowledge is one of our highest priorities. The current senior leaders in the FBI's Counterterrorism Division (CTD) have acquired this familiarity through their daily work, their past interactions with Muslim communities during field assignments, and study in this area. These leaders are also knowledgeable regarding terrorists' operational methods and their criminal activities. Because management and leadership qualities are as important as substantive expertise, it is also important that CTD managers come to their jobs with lengthy and in-depth experience managing high-profile investigative and intelligence efforts.

Since 9/11, the FBI's counterterrorism program has grown quickly and is the FBI's top investigative priority. This rapid growth has been fueled by a reallocation of our best investigators, managers, and leaders to the counterterrorism mission. We have also refocused our recruiting and hiring to attract individuals with skills critical to our counterterrorism and intelligence missions. These new recruits have included hundreds of IAs, translators, and SAs.

Schumer 384 **In April 2005, a DOJ Inspector General review of eight FBI field offices, conducted over three days, found that three of these offices failed to review their high-priority FISA interceptions within 24 hours.**
Please state the FBI's current rule regarding how quickly FISA interceptions must be reviewed.

ANSWER: FBI policy is to review within 24 hours those intercepts under the Foreign Intelligence Surveillance Act (FISA) in the highest priority counterterrorism and counterintelligence cases (those in which the subject potentially presents a direct threat of violent terrorist activity).

Schumer 385 **Please describe what is entailed by such a review of a FISA interception.**

ANSWER: A review is completed when the linguist or analyst determines whether a session contains a threat to safety and/or security or contains actionable intelligence. If the reviewer determines there is a threat or actionable intelligence contained in the session, this information is immediately reported to parties that can act on the information.

Schumer 386 **Please explain what specific steps, if any, you and/or Director Mueller are taking to clarify the rule on reviewing FISA interceptions and to ensure that field offices are abiding by this rule.**

ANSWER: The FBI disseminated policy in 2004 and in 2006 reiterating the rule that a session is not considered reviewed until the threat information/actionable intelligence or lack thereof has been determined. This policy is reinforced through repeated FISA training.

Schumer 387 **As you know, the United Kingdom has a domestic agency, known as MI5, that is devoted to counter-intelligence and national security. Some have called for the creation of a similar agency in the United States.**

Do you think that creating an agency like MI5 would make our domestic counterterrorism efforts more effective?

ANSWER: Please see our answer to Question 388, below.

Schumer 388 **What would be the costs and benefits of using an MI5 model instead of our current counterterrorism model?**

ANSWER: The FBI believes there is no reason to separate the functions of law enforcement and domestic intelligence, as would occur if the MI-5 model were adopted. On the contrary, combining law enforcement and intelligence affords us ready access to every weapon in the government's arsenal against terrorists, allowing us to make strategic and tactical choices between the use of information for law enforcement purposes (arrest and incarceration) or intelligence purposes (surveillance and source development).

The benefits of this approach have been clearly borne out. Since 9/11/01, the FBI has identified, disrupted, and neutralized numerous terrorist threats and cells, and we have done so in ways an intelligence-only agency like the United Kingdom's MI-5 cannot.

Because of its personnel, tools, and assets, the FBI is uniquely suited for the counterterrorism mission. These resources include:

- A worldwide network of highly trained and dedicated SAs;
- Intelligence tools to collect and analyze information on threats to national security;
- Law enforcement tools to act against and neutralize those threats;
- Expertise in investigations and in the recruitment and cultivation of human sources of information;
- Longstanding and improving relationships with those in state and local law enforcement, who are the intelligence gatherers closest to the information we seek from these communities; and
- Nearly a century of experience working within the bounds of the United States Constitution.

For these reasons, the FBI believes the United States is better served by enhancing the FBI's dual capacity for law enforcement and intelligence gathering/analysis than by creating a new and separate domestic intelligence agency, which would constitute a step backward in the war on terror, not a step forward.

Experience has taught the FBI that there are no neat dividing lines distinguishing criminal, terrorist, and foreign intelligence activities. Criminal, terrorist, and foreign intelligence organizations and activities are often interrelated or interdependent. FBI files contain numerous examples of investigations in which information sharing between counterterrorism, counterintelligence, and criminal intelligence efforts and investigations was essential to the FBI's ability to protect the United States from terrorists, foreign intelligence activities, and criminal efforts. Some cases that begin as criminal cases become counterterrorism cases, and vice versa. The FBI must sometimes initiate parallel criminal and counterterrorism or counterintelligence cases to maximize the FBI's ability to identify, investigate, and address threats to the United States. The success of these cases is entirely dependent on the free flow of information between the respective investigations, investigators, and analysts.

That said, the FBI is in the process of adopting some aspects of MI-5. One of the benefits inherent in an intelligence organization like MI-5 is its ability to establish a "requirements" process where current intelligence requirements are reviewed (whether they be terrorism, international crime, cyber crime, etc.) and knowledge gaps are identified. The next step is to get the intelligence collectors (in this case, FBI SAs from around the country) to fill in those gaps. The FBI has adapted and is incorporating this kind of intelligence requirements process, not just with respect to terrorism but for all programs. This process is invaluable in helping to better prioritize FBI resources and to identify the gaps in understanding.

In arguing that a separate domestic intelligence agency should be created, Judge Posner asserts that "the bureau's conception of intelligence is of information that can be used to obtain a criminal conviction." We emphatically disagree with this assertion. In the nearly 5 years since the attacks of 9/11/01, the FBI has evolved from a law enforcement agency focused on investigating crimes after the fact into an intelligence and law enforcement organization focused largely on preventing terrorist attacks. We have entered an era of unprecedented information sharing among the law enforcement and intelligence communities and we are continuing to build on our success in strengthening our intelligence capabilities.

The most recent step in the FBI's evolution is the establishment of its National Security Branch (NSB), which combines the capabilities, resources, and missions of the CTD, the Counterintelligence Division, and the Directorate of Intelligence (DI) under one leadership umbrella. The NSB will build on the FBI's strengths, ensure the integration of national security intelligence and investigations, promote the development of a national security workforce, and facilitate a new level of coordination with others in the IC.

Three major assessments of the FBI's intelligence capabilities have agreed that the FBI should retain its domestic intelligence responsibilities: the report of the National Commission on Terrorist Attacks Upon the United States (9/11 Commission), the assessment by the National Academy of Public Administration (NAPA) of the FBI's evolving emphasis on intelligence functions, and the report of The Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction (WMD Commission). In its March 2005 report, "Transforming the FBI: Progress and Challenges," the NAPA Panel on FBI Reorganization wrote: "This Panel, like the 9/11 Commission, is convinced that the FBI is making substantial progress in transforming itself into a strong domestic intelligence entity, and has the will and many of the competencies required to accomplish it. That Panel recommended that the FBI continue to be the key domestic intelligence agency responsible for such national security concerns as terrorism, counterintelligence, cyber, and transnational criminal activity."

The WMD Commission also examined the FBI's intelligence program and concluded in March 2005 that it had been significantly improved since 9/11/01. The commission rejected the need for a separate agency devoted to internal security without any law enforcement powers, recognizing that the FBI's hybrid intelligence and investigative nature is one of its greatest strengths and emphasizing the importance of the ongoing effort to integrate intelligence and investigative operations. At the same time, the commission noted that the FBI's structure did not sufficiently ensure that intelligence activities were coordinated with the rest of the IC. Accordingly, the commission recommended the creation of a "National Security Service." In response to the President's directive endorsing that recommendation, the FBI created the NSB.

Schumer 389 **I have previously questioned Department of Justice personnel about reports of FBI personnel's non-compliance with the Attorney General's guidelines on to confidential informants. To address these concerns, Director Mueller pledged that new training would be implemented as a part of the Confidential Human Source Re-engineering Project by the fall 2006. Has that training been implemented? If not, please explain why and provide a deadline for when it will be implemented.**

ANSWER: The formal training regarding the Confidential Human Source Re-engineering Project has not yet been implemented. For the past two years, the DI Human Source Re-engineering Team has worked to revise and simplify policies and processes associated with the management of confidential human sources. The principal results of this effort are the December 2006 AG Guidelines, consolidated FBI policy, and the Validation Standards Manual that flows from the AG Guidelines and the validation standards of the Office of the Director of National Intelligence. These extensively cross-referenced documents have been developed to standardize processes and ensure agency-wide compliance in terms of source management, operation, administration, and validation. Although we originally anticipated beginning training in the fall of 2006, we had to revise our training schedule because much of our time was devoted to revising the draft AG Guidelines. Only after the revised those Guidelines were signed in mid-December 2006 could detailed planning for the required training program begin. We plan to deliver this training beginning in April 2007.

The training phase of the DI's Re-engineering Project is being addressed by the Policy Implementation Team, which is composed of representatives from the FBI's Training and Development Division and DI, as well as contractors from the MITRE Corporation. The core team is augmented by an attorney from the FBI's OGC, an IA from the Criminal Investigations Branch, a member of the NSB's Communications Unit, and confidential file room personnel from the Washington Field Office. This team works in close coordination with a team representing the information technology system (Delta) that is being designed in order to ensure consistency between the information technology piece and the policy implementation piece and to facilitate the administration of the re-engineered source management processes.

The implementation plan includes Bureau-wide training for all employees (FBIHQ and the field) who are involved in human source matters. Most immediately, this plan proposes an initial three-day train-the-trainer conference on 4/15-27/07 (two consecutive sessions) for all Human Sources Coordinators and other confidential file room personnel. FBIHQ entities with a role in Human Intelligence (HUMINT) will also be required to attend one of these sessions. The training is designed to be very interactive, consisting of an overview of the Human Source Re-engineering Project, presentations on the new and old AG Guidelines, a detailed presentation on the new validation standards policy and manual, inspection implications, and integrated case scenarios.

The newly trained trainers will be responsible for training personnel in their respective field offices and others who work with HUMINT (such as Special Agents in Charge (SACs), Assistant SACs, Chief Division Counsel, and IAs) will receive revised blocks of instruction during management and program conferences. The New Agents Training curriculum is also being revised to accommodate training in this regard.

Schumer 390 **In Director Mueller's written responses to questions I submitted following his appearance at a May 2006 oversight hearing, he stated that it was too early to determine the value of the FBI's new wInsight software tool to improve tracking of project costs. Is the wInsight program now fully functional?**

ANSWER: Yes. The wInsight software suite used by the FBI's Sentinel Program became fully operational in October 2006. Since then, wInsight has been available to multiple Sentinel managers to access data and analyze Sentinel's Earned Value Management (EVM) performance through the FBI's unclassified intranet.

Schumer 391 **If yes, please state whether the wInsight tool is meeting the FBI's expectations and requirements for project cost tracking.**

ANSWER: Please see our answer to Question 392, below.

Schumer 392 **If it is not yet fully functional, when do you expect that it will be sufficiently implemented to determine whether the Inspector General's concerns have been resolved?**

ANSWER: The wInsight tool is meeting the FBI's expectations. The Sentinel EVM System includes wInsight as a primary EVM data collection and performance analysis tool. The Sentinel EVM system has proven to be an excellent means of capturing accrued costs and the value of work accomplished, months before they appear in an invoice from Lockheed Martin. This gives the FBI an early view into work accomplished versus work planned in terms of value associated with that work.

EVM data is briefed to the FBI Director weekly and to the DOJ's Department Investment Review Board monthly. EVM data is also provided at least quarterly to the eight Congressional committees and/or Subcommittees that have Sentinel oversight. In addition, as it becomes available, EVM data is provided to GAO auditors, DOJ's OIG, and DOJ EVM auditors.

Schumer 396 **What future changes, if any, do you intend to make to respond to concerns about politicization of the hiring process?**

<u>ANSWER:</u> We do not intend to make any future changes in response to concerns about politicization. However, we have included a large number of career employees to participate in the Honors Program hiring process.

QUESTIONS FROM SENATOR DURBIN

Durbin 397 **I am concerned about the Justice Department's commitment to enforcing our nation's civil rights laws. I was pleased that the President signed Congress's re-authorization of the Voting Rights Act last summer, but it is one thing to have civil rights laws on the books and another thing to enforce them. In six years, the Bush Administration has filed only one lawsuit on behalf of African Americans. Last week, the Justice Department went to trial to enforce the Voting Rights Act on behalf of white voters. The 1965 Voting Rights Act has never been used to vindicate Caucasian voting rights, until now. Where is this bastion of discrimination against white voters? In Noxubee County, Mississippi, a county with a long history of discrimination against African Americans. As a prominent black Republican lawyer recently told the Washington Post: "Majority rule came to South Africa before it came to Noxubee County."**

The Justice Department has also used the Voting Rights Act to approve state photo ID laws that have an adverse impact against minority voters, the poor, and the elderly. Such laws constitute a "poll tax" according to a federal judge in Georgia. It has been reported in the Washington Post that decisions in these and other voting rights cases have been influenced by a cadre of political appointees in the Justice Department with partisan Republican backgrounds who, in several instances, have overruled the recommendations of career attorneys. At your nomination hearing in 2005, you testified that you would give "special emphasis" to the protection of voting rights. Mr. Attorney General, what efforts have you made, if any, to try and take politics out of the Justice Department when it comes to enforcing our voting rights laws?

ANSWER: The Department is committed to the vigorous and even-handed enforcement of the Voting Rights Act on behalf of all Americans and has brought lawsuits on behalf of African-American voters, Hispanic-American voters, Asian-American voters, Native-American voters, and white voters. This Administration also has brought the first lawsuits in history to protect the voting rights of citizens of Vietnamese, Filipino, and Haitian heritage. As the Jackson, Mississippi, *Clarion-Ledger* editorialized on January 31, 2007, "Discrimination is discrimination – and it's wrong in whatever color it comes. That's the law."

Our record of even-handedly enforcing federal law best demonstrates that the Civil Rights Division ("Division") makes litigation decisions that do not turn on partisan considerations. Career staff continues to be involved in the recommendation and decision-making process of every enforcement action brought by the Division under the Voting Rights Act, including the review of every Section 5 submission. Voting Section (and other Civil Rights Division) attorneys are in fact required to prepare detailed memoranda in enforcement actions, including Section 5 preclearance decisions, setting forth the facts and law on each proposed matter. Every legal analysis, including recommendations under Section 5, must be balanced and include all relevant information. The Voting Section Chief – a 30 year veteran career attorney – expects and encourages thoughtful deliberation and recommendations from Section staff, and this career official has decisional responsibility for many matters. When the decisions come to the Assistant Attorney General for the Civil Rights Division, he also welcomes opposing views and is available for responsible, productive discussion.

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. These lawsuits 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. Long County*; *United States v. City of Boston*; *United States v. Hale County, TX*; *United States v. Brazos County, TX*; *United States v. City of Springfield, MA*; *United States v. Westchester County, NY*; *United States v. City of Azusa, CA*; *United States v. City of Paramount, CA*; *United States v. City of Rosemead, CA*; *United States v. Ector County, TX*; *United States v. Cochise County, AZ*; *United States v. San Benito County, CA.* These cases accelerated enforcement of the rights of voters to participate free from barriers at the polls during the 2002-2004 period.

The 18 new lawsuits we filed in CY 2006 is more than twice the average number of lawsuits filed by the Division annually over the preceding 30 years. During CY 2006, the Division's Voting Section continued to aggressively enforce all provisions of the Voting Rights Act, filing nine lawsuits to enforce various provisions of the Act. These cases included a lawsuit under Section 2 against Long County, Georgia, for improper challenges to Hispanic voters, including at least three United States citizens on active duty with the United States Army, based entirely on their perceived race and ethnicity, and challenges to election systems that discriminate against African American voters in Euclid, Ohio, and Hispanic citizens of Port Chester, New York. We also recently won a major Section 2 lawsuit against Osceola County, Florida, overturning that county's discriminatory at-large election system. The Civil Rights Division also currently is defending the constitutionality of the VRARA.

In FY 2006, the Voting Section processed the largest number of Section 5 submissions in its history, and interposed important objections to protect minority voters in Texas and Georgia. With over 7,100 submissions, the Division handled roughly 40 percent more submissions in FY 2006 than in a normal year. The Voting Section also brought the first Section 5 enforcement action since 1998. And the Voting Section has begun a major enhancement of the Section 5 review process; soon jurisdictions will be able to submit voting changes online, making the process easier, more efficient, and more cost-effective for covered jurisdictions and for the Department.

Our commitment to enforcing the language minority requirements of the Voting Rights Act, reauthorized by Congress this summer, remains strong. We filed five such lawsuits in 2006, which was only one short of the all-time record set in 2005.

The Division also had a record-breaking year with regard to enforcement of Section 208 of the Voting Rights Act. In FY 2006, the Division's Voting Section obtained 37.5%, or three out of eight, of the judgments ever obtained under Section 208 in its twenty-four year history.

In CY 2006 the Voting Section filed the largest number of cases under UOCAVA in any year since 1992. We filed successful UOCAVA suits in Alabama, Connecticut, and North Carolina. In addition, we reached a voluntary legislative solution without the need for litigation in South Carolina and worked with some additional states and localities to forestall or mitigate late ballot transmissions.

In CY 2006, the Voting Section also filed the largest number of suits under the National Voter Registration Act since immediately following the passage of the Act in 1995. We filed and successfully resolved lawsuits in Indiana, Maine, and New Jersey and are litigating a fourth suit filed in Missouri.

As of January 1, 2006, virtually all of HAVA's requirements became fully enforceable. In advance of this first year of nationwide implementation of the database and accessible voting machine requirements of HAVA and into this year, the Division worked hard to help states achieve timely voluntary compliance. Where that did not appear possible, the Division brought enforcement actions, filing five lawsuits under HAVA in 2006. Four suits were filed against states for failure to complete the database requirements of HAVA; two of those suits also were for violations of the accessible voting requirements. In addition, one suit was filed against a locality for its failure to meet the Election Day informational posting requirements of HAVA. We also successfully defended three additional lawsuits challenging the congressional mandates of HAVA. In addition, in Pennsylvania, where a state court had enjoined compliance with HAVA, our formal notice to the state of our intended lawsuit assisted state officials in overturning an erroneous lower court decision, so that we did not ultimately need to file to ensure compliance in Pennsylvania.

During CY 2006, the Division also deployed a record number of monitors and observers to jurisdictions across the country for a mid-term election. On November 7, 2006, more than 800 federal personnel monitored the polls in 69 political subdivisions in 22 states. In CY 2006, we sent over 1,500 federal personnel to monitor elections, double the number sent in CY 2000, a presidential election year.

With regard to the preclearance of the Georgia identification law, in August 2005, the Department precleared a Georgia voter identification law, which itself amended an existing voter identification statute that had been precleared by the prior Administration. This preclearance decision followed a careful analysis that lasted several months and considered all of the relevant factors, including the most recent data available from the State of Georgia on the issuance of state photo identification and driver's license cards and the views of minority legislators in Georgia (as well other current and former minority elected officials). The data showed, among other things, that the number of people in Georgia who already possessed a valid photo identification greatly exceeded the total number of registered voters, and that there was no racial disparity in access to the identification cards. The state subsequently adopted, and the

Department precleared in April 2006, a new form of voter identification that would be available to voters for free at one or more locations in each of the 159 Georgia counties.

In *Common Cause/Georgia v. Billups*, the district court did not conclude that the identification requirement violated the Voting Rights Act. To the contrary, the court refused to issue a preliminary injunction on that ground. The court instead issued a preliminary injunction on constitutional grounds that the Department cannot lawfully consider in conducting a preclearance review under Section 5 of the Voting Rights Act. Accordingly, the court's preliminary ruling, in a matter that is still being actively litigated, does not call into question the Department's preclearance decision. In addition, the state court decision blocking Georgia's implementation of the identification requirement was issued on state constitutional grounds, and, therefore, also did not call into question the Department's preclearance decision.

Durbin 398 **What assurance can you make to African Americans that the Justice Department will do a better job of enforcing their voting rights?**

ANSWER: The Department is committed to the vigorous and even-handed enforcement of the Voting Rights Act on behalf of all Americans, including African Americans. In this Administration, the Voting Section of the Civil Rights Division has filed cases on behalf of African-American voters in many jurisdictions, including: *United States v. Crockett County* (W.D. Tenn.); *United States v. Euclid* (N.D. Ohio); *United States v. Miami-Dade County* (S.D. Fla.); and *United States v. North Harris Montgomery Community College District* (S.D. Tex.), which also involved protecting the rights of Hispanic citizens. We also successfully litigated *United States v. Charleston County, South Carolina* (D.S.C.) and successfully defended that victory through appeal to the U.S. Supreme Court.

The Department continues to seek out and prosecute cases on behalf of African-American citizens. The Voting Section continues to actively identify at-large and other election systems that violate the Voting Rights Act. Where we find such systems and where the facts support a claim, we do not hesitate to bring lawsuits. We are interested in allegations of possible Voting Rights violations from all sources and have solicited such information widely. The Department, of course, vigorously enforces all of the provisions of the Voting Rights Act. During FY 2006, the Voting Section filed 17 new lawsuits, which is double the average number of lawsuits filed in the preceding 30 years. In FY 2006, the Voting Section also processed the largest number of Section 5 submissions in its history and interposed important objections to protect minority voters in Texas and Georgia. During this Administration, moreover, we have filed approximately 60 percent of all cases ever filed under the minority language provisions of the Voting Rights Act, as well as approximately 75 percent of all cases ever filed under Section 208. We also have used Section 2 of the Voting Rights Act to challenge barriers to participation, as in *United States v. Long County* (S.D. Ga.) and *United States v. City of Boston* (D. Mass.). We have filed the first voting rights case in the Division's history on behalf of Haitian Americans; the first voting rights case in the Division's history on behalf of Filipino Americans; and the first voting rights cases in the Division's history on behalf of Vietnamese Americans. We will continue vigorously to protect all Americans from unlawful discrimination in voting.

Durbin 399 **Last summer, an article in the Boston Globe entitled "Civil rights hiring shifted in Bush era" raised troubling questions about the hiring practices of the Justice Department's Civil Rights Division. The article said:**

"For decades, [career attorney hiring] committees had screened thousands of resumes, interviewed candidates, and made recommendations that were only rarely rejected. Now, hiring is closely overseen by Bush administration political appointees to Justice, effectively turning hundreds of career jobs into politically appointed positions."

The Boston Globe article reported that 26% of the lawyers hired into key sections of the Civil Rights Division since 2003 are members of the Federalist Society, and 17% are members of the Republican National Lawyers Association. The article also indicated that only 42% of lawyers hired into the Civil Rights Division since 2003 had any civil rights experience, while 77% hired in 2001 and 2002 had such experience. And of the 42% who had civil rights experience, half of those attorneys gained that experience by defending allegations of discrimination or fighting affirmative action. Mr. Gonzales, are you concerned about the politicization of the Civil Rights Division hiring process? Please explain.

ANSWER: We respectfully disagree with many of the assertions made in the *Boston Globe* article. It is also unclear what methodology the *Globe* employed in reaching its conclusions. There is no political litmus test used in deciding to hire attorneys in the Civil Rights Division. The Civil Rights Division, like every other component of the Department of Justice, is charged with enforcing the laws passed by Congress. As such, we seek to hire outstanding attorneys with demonstrated legal skills and abilities. The Department considers attorneys from a wide variety of educational backgrounds, professional experiences, and demonstrated qualities. Attorneys from an extremely wide variety of backgrounds and experiences have been hired to work in the Division under this Administration. For example, the Division has hired not only attorneys with significant prior civil rights experience, but also attorneys with other crucial skills, such as a significant record of actual litigation or management experience. In addition, veteran career attorneys continue to make hiring recommendations throughout the Department and within the Civil Rights Division.

The *Globe* article, among other things, incorrectly suggests that a central hiring committee of career employees within the Civil Rights Division made all hiring decisions during previous Administrations; obtained limited information regarding attorneys hired in only three of the ten litigating sections in the Division; and did not obtain resumes of attorneys hired during previous Administrations in order to make an objective comparison. Most significantly, the *Globe* article was not based on any personal interviews of these attorneys to measure their interest in, and dedication to, enforcing the nation's civil rights laws.

The talented and accomplished individuals hired in the Civil Rights Division have a profound commitment to public service and law enforcement. Generalizations are often inaccurate and unhelpful in defining an individual. No attorney is hired based solely on his or her resume, but rather after a profoundly more comprehensive review, including detailed personal interviews.

The *Boston Globe* article ignores salient facts pertaining to the Division's hiring record during this Administration. For example, all five individuals hired as career section chiefs during this Administration had previously served as career attorneys in the Division. These five chiefs have an average of approximately 17 years of experience in the Division, and also had a wide variety of work experiences, including working in the Clinton White House, with the American Civil Liberties Union, and as Special Assistant to Acting Assistant Attorney General Bill Lann Lee. In sum, there is no political litmus test used in deciding to hire attorneys in the Civil Rights Division.

Durbin 400 **What steps have you taken, if any, to take politics out of the hiring of career attorneys in the Civil Rights Division?**

ANSWER: Please see our response to question 399, above.

Durbin 401 **"The Justice Department has taken some troubling positions in civil rights cases that have come before the U.S. Supreme Court. In two recent cases, your department filed briefs endorsing a very restrictive view of Title VII, the nation's primary employment discrimination law. In the area of education, you have supported positions that would turn Brown v. Board of Education on its head. In the University of Michigan cases, the Supreme Court rejected your attempt to stop affirmative action on our college campuses.**

And in two cases that are pending before the Supreme Court this year, the Justice Department filed amicus briefs on behalf of white parents in opposition to voluntary school integration programs. The Justice Department briefs argue that the Seattle and Louisville public school districts should not be permitted to use race as a factor in attempting to achieve a degree of racial diversity in their schools. If the Justice Department prevails, it would likely result in the re-segregation of America's high schools and elementary schools.

Mr. Gonzales, why did the Bush Administration file amicus briefs in the Seattle and Louisville cases? Why did you feel it was in the United States Government's interest to tell local school districts that they could not try and integrate their schools?

ANSWER: The Department's position was set forth clearly in the briefs that we filed in these cases, including our statement of interest. A copy of these briefs can be found at: http://www.usdoj.gov/osg/briefs/2006/3mer/1ami/2005-0908.mer.ami.html (Seattle) and http://www.usdoj.gov/osg/briefs/2006/3mer/1ami/2005-0915.mer.ami.html (Louisville).

Durbin 402 **When you were debating internally what position to take in the Seattle and Louisville cases, what position did you personally advocate? Do you agree with the position taken by the Bush Administration in these cases?**

ANSWER: Disclosure of the requested information would violate the Department's long-standing policy against revealing internal deliberations.

Durbin 403 **In your briefs to the Supreme Court in the Seattle and Louisville cases, you argued that the use of race to try and achieve integrated schools is just as invidious as old-fashioned racial discrimination and segregation. Do you truly hold that belief?**

ANSWER: The Attorney General supports the position set forth in the briefs.

QUESTIONS FROM SENATOR GRASSLEY

Grassley 404 **I am a strong supporter of the False Claims Act, the law under which whistleblowers can sue those who have defrauded the federal government by filing false claims. These whistleblowers are key to uncovering waste, fraud, and abuse in the government and returning money to its rightful place, saving the American taxpayer millions of dollars. Your department reported that $18 billion has been recovered under my whistleblower amendments to the FCA in the 20 years since they were passed. In fact, $3.1 billion was recovered in FY06 under the FCA, nearly a billion dollars more than any other previous year's recovery. Can you tell us what the Department has been doing to increase these recoveries? Can you also tell us what kind of return that is on what is invested in these investigations? How much is being recovered for every dollar spent?**

ANSWER: The Department has always taken an aggressive approach in fighting fraud, waste, and abuse, and whistleblowers have certainly been a significant part of that fight. As you know, settlements and judgments under the False Claims Act have grown exponentially in the years since Congress amended the statute in 1986, significantly enhancing the *qui tam* provisions under the Act. Of the $18 billion recovered since 1986, $12 billion has been recovered in the last seven years. Since fiscal year 2000, the Department has recovered an average of $1.7 billion a year, with a record $3.1 million in fiscal year 2006. It is difficult to pinpoint our return on investment, but it is certainly good. False Claims Act litigation is handled jointly between Civil Division attorneys and U.S. Attorneys' Offices, along with the intensive efforts of agency lawyers, investigators, auditors, and others essential to the Department's success, each with its separate budget. It would be misleading to single out the Department's costs alone to measure return, but there can be no question that the return is high.

Regarding the Department's efforts, we have endeavored to form good relationships with whistleblowers who have brought claims of fraud against the Government supported by substantial evidence. Even when those claims are based on a mere suspicion, we work tirelessly to investigate each claim thoroughly before deciding whether to intervene or decline. We have also formed teams or task forces to handle similar claims brought in an array of cases against an industry, such as the pharmaceutical cases and the Iraqi procurement cases. This team approach establishes a reservoir of expertise and fosters cross-pollination of ideas. But, above all, we hire the best lawyers available, who are dedicated to protecting the public and whose goal in every case is to obtain the best resolution possible in the interests of justice and the United States.

Grassley 405 **Is there something more we can do here in Congress to enable you to continue or increase these investigations and recoveries?**

ANSWER: First, keep the False Claims Act strong. The False Claims Act remains one of our most effective tools in fighting fraud, both as a means of recovering funds paid as a result of fraud and as a deterrent to those who would commit fraud. From time to time, various groups have proposed amendments that would weaken the False Claims Act and make enforcement of its provisions more difficult. We will remain vigilant in our review of such proposals and trust that we can work with Congress in keeping the False Claims Act strong.

Second, we urge Congress to pass the President's budget which includes increased funding for our enforcement efforts. With increased spending in health care, defense, homeland security, and disaster relief, it is now more critical than ever that our enforcement resources keep pace in order to address fraud adequately in those areas.

Grassley 406 **Are there other things Congress has considered doing, such as a limitation on extensions of the 60-day seal in qui tam cases, which would hamper your ability to fully investigate and prosecute the cases?**

ANSWER: We are unaware of any proposals currently being considered by Congress that would hamper our ability to fully investigate and prosecute cases, although limiting extensions of the seal to investigate what are often complex fraud allegations with criminal implications certainly would pose obstacles. We would also be wary of the establishment of reporting or other requirements which would affect the manner in which False Claims Act matters were required to be settled.

Grassley 407 **During your confirmation hearings to be Attorney General in 2005, the number of cases, brought to it by whistleblowers, the Department was joining was between 17 – 25%. You explained in your answers to my written questions that in FY03, it was 18%, and 25% in FY04.**
Can you tell me what percentage of these cases DOJ has joined in FY05 and FY06?

ANSWER: In FY05, the Department intervened in 24.8% of *qui tam* cases, and in FY06, 24.2%.

Grassley 408 **Of the cases that were declined by the Government, how many produced significant recoveries? What were the dollar amounts recovered in those cases?**

ANSWER: In FY05-06, the United States recovered $42.6 million in declined cases (as compared to over $2.5 billion in intervened or otherwise pursued cases). Recoveries ranged from $2,000 to $9.6 million, with the majority being well under $1 million. Settlements exceeded $1 million in only seven *qui tam* cases in which the Government declined to intervene.

Grassley 409 **Also during your confirmation hearings, you promised to increase the Department's commitment to qui tam cases and the whistleblowers who aid in those investigations. This commitment includes interpretation of the laws that foster qui tam, filing briefs in support of these interpretations, increased interaction with relators and their attorneys, and improved publication of successful recoveries. Can you tell me how your Department has improved in these areas in the nearly two years you've been at its helm?**

ANSWER: Our commitment to *qui tam* cases is first and foremost demonstrated by the $368 million in settlement and judgment proceeds awarded to relators in FY05-06, and also in the overwhelming success we have in such suits. Even in *qui tam* cases the Department declines, the Department continues to give support to relators in the form of *amicus* briefs to assist courts in interpreting the False Claims Act. The Department has spent extensive time monitoring *qui tam* cases pursued by relators and filing *amicus* briefs supporting the legal positions advanced by the relators in such cases. During the past year alone, the Department filed several dozen *amicus* briefs in the district and appellate courts (where we often also appeared at oral argument) arguing that cases pursued by relators were improperly dismissed due to erroneous interpretations of the False Claims Act, including whether and to what extent the Act contains a presentment requirement, the test for determining when a false statement or misrepresentation is material, and the proper standard for assessing damages. In addition, in *United States ex rel. Stone v. Rockwell International Corp.*, a case in which the United States intervened, the Department filed an *amicus* brief in the Supreme Court and appeared at oral argument defending the relator's right to receive a share of the Government's recovery. In that case, the defendant challenged the relator's right to proceed on the ground that there had been a prior public disclosure of the relator's allegations and the relator did not qualify as the original source of those allegations. In its *amicus* brief, the Government argued that the relator did qualify as an original source and urged the Supreme Court to uphold the Tenth Circuit's ruling that the relator was a proper relator under the False Claims Act.

We also continue to foster relations with relators and their counsel in other ways as well. For example, we recently amended our agreement that we typically enter into with relators and their counsel regarding information sharing. We made these changes specifically to address concerns by the relator bar.

We also participate in TAF's annual conference on *qui tam* litigation. As you know, TAF (Taxpayers Against Fraud) is a private, non-profit organization dedicated to promoting and facilitating *qui tam* litigation for whistleblowers and their counsel. We provide our more senior staff as speakers to this conference and send our more junior attorneys as participants.

Regarding publication of successful recoveries, as a matter of policy, we issue press releases in virtually all significant settlements. In *qui tam* cases, we are careful to attribute the source of the claims to the *qui tam* relator and to identify the relator award, if known at the time of settlement. In our year-end press release, we again identify our most significant recoveries and the awards made to the relators in those cases. In addition to touting the Department's successes, we regard this press release as a means of promoting the importance of *qui tam* litigation and the partnership we have with the whistleblowers who file these cases.

Grassley 410 **As you know, the President signed into law a bill many of us here on Committee worked hard on, the Adam Walsh Child Protection and Safety Act, on July 27 of last year. Can you tell us how this bill has helped in your efforts to prosecute child sex offenders so far?**

ANSWER: The Department of Justice was pleased to work with you on the Adam Walsh Act. While the Act is still relatively new, it has helped us in the following ways:

First, new 18 U.S.C. § 3509(m) is helping prosecutors keep contraband – images of child pornography – in the care, custody, and control of either the government or the court during the pendency of criminal proceedings. While defendants are currently challenging this new statute, we are cautiously optimistic that ultimately the courts will recognize that just as any other item of contraband, images of child pornography should properly remain in the custody of the government or the court.

Second, new 18 U.S.C. § 4248 provides us an important new tool to protect society from sexually dangerous persons by providing for civil commitment of these persons. As of March 2, 2007, the Bureau of Prisons had certified 26 sexually dangerous persons. While this statute has also been challenged, we are aware that one district court has rejected that challenge, finding it constitutional facially as well as applied. We look forward to continuing to use this new authority.

Third, the amendment to 18 U.S.C. § 3142 providing for electronic monitoring as a mandatory condition of pre-trial release for specified sex offenses involving minors is an additional means to protect society in those cases where courts find pre-trial release is appropriate. This amendment has also been challenged, with conflicting results so far in the courts. We are hopeful, however, that ultimately the courts will find that this amendment is constitutional.

Fourth, new 18 U.S.C. § 2250 establishes a new federal offense for failure to register as a sex offender. The United States Marshals Service has been engaged, in coordination with the Federal Bureau of Investigation and the National Center for Missing & Exploited Children, in efforts to identify and locate unregistered sex offenders. We are aware of two defense challenges to indictments under the new statute, both of which have been rejected by the courts. In one of these cases, the defendant has already pled guilty. We anticipate additional cases as the Marshals Service has, as of February 20, 2007, arrested 33 fugitives in investigations of Section 2250 violations since the enactment of the statute.

Fifth, the creation of the SMART Office within the Department of Justice's Office of Justice Programs has enabled us to provide guidance to states and other jurisdictions concerning their sex offender registration and notification programs, and to provide guidance to state legislators regarding updating of current applicable legislation. The SMART office is actively engaged in training front line state and federal law enforcement professionals, state prosecutors and other relevant parties regarding SORNA requirements. The SMART office is looking forward to the publication of guidelines that will assist jurisdictions in the implementation of the Adam Walsh Act.

Grassley 413 **Attorney General Gonzales, you probably know that I've been concerned about concentration in agriculture for quite some time. Just this past September, I wrote a letter to the Antitrust Division expressing my serious reservations with the proposed merger between Smithfield Foods and Premium Standard Farms. I'm concerned about reduced market opportunities, possible anti-competitive and predatory business practices, and increasing agribusiness consolidation. For example, in the pork industry, expanded packer ownership of hogs, exclusive contracting and captive supply are adversely impacting the ability of small independent producers and family farmers to compete in the marketplace. I'm concerned about fewer competitors, vertical integration, as well as less choice for consumers. So I wasn't particularly happy when a January 8, 2007 Legal Times article questioning the Antitrust Division's merger enforcement record was brought to my attention. I'd like some assurances that the Justice Department is doing all it can to enforce the antitrust laws, by challenging problematic deals, as well as being aggressive in going after anti-competitive business practices. How do you respond to the allegations that the Justice Department's Antitrust Division is not challenging anti-competitive mergers?**

ANSWER: The Department has a strong commitment to effective merger enforcement. In the last year, the Antitrust Division has achieved tangible results in improving its ability to identify and investigate thoroughly mergers that threaten harm to competition, and to block such mergers when appropriate. In its 2006 fiscal year, the Antitrust Division filed ten merger enforcement actions in federal district court, and in response to Division investigations, an additional six transactions were restructured by the merging parties in a manner that preserves competition without the Department needing to go to court. This represents the highest level of merger enforcement activity in the last five years. Consequently, we disagree with the allegations referenced in the question.

Grassley 414 **What is the status of the Justice Department's review of the Smithfield Foods/Premium Standard Farms merger?**

ANSWER: The Department is reviewing the proposed Smithfield Foods/Premium Standard Farms merger to determine whether it would likely harm competition in any affected market. While we cannot comment in detail on an ongoing investigation, it can be noted that the parties to this merger have publicly disclosed that they have received "second requests" for information from the Antitrust Division. The Antitrust Division is conducting a thorough analysis of the proposed merger. If it determines that the proposed merger would substantially lessen competition in any affected market, we will take appropriate enforcement action to prevent such harm.

Grassley 415 **How is the Justice Department going to be pro-active in its efforts to police anti-competitive activity in the agriculture industry?**

<u>ANSWER:</u> The Department takes concerns expressed by agricultural producers about competitive problems very seriously, and accordingly, the Department has been actively involved to protect competition in the agricultural sector with aggressive antitrust enforcement. Two of the Antitrust Division's litigating sections usually handle matters involving agriculture, including mergers and conduct aimed at exercising market power, and over many years of activity in the field, these sections maintain expertise specific to many agricultural industries. They are on the lookout for anticompetitive practices in the agricultural sector of our economy. In addition, the Antitrust Division's Special Counsel for Agriculture, who engages in special outreach and contact with producers and the agriculture community, works with the litigating sections to evaluate and, if appropriate, investigate complaints they learn about from that community and other sources. Finally, the Department has a longstanding practice of consulting with and sharing information and expertise with the Department of Agriculture.

Grassley 416 **Will the Justice Department work with the U.S. Department of Agriculture to address concerns that are raised by family farmers and independent producers about possible anti-competitive and abusive business practices?**

<u>ANSWER:</u> We are committed to preventing anticompetitive mergers or conduct from harming the agricultural marketplace, and when the facts warrant it, we take appropriate enforcement action. We have had a longstanding practice of consulting and sharing expertise with the Department of Agriculture, as memorialized in the 1999 "Memorandum of Understanding between the Antitrust Division, Department of Justice and the Federal Trade Commission and the Department of Agriculture Relative to Cooperation with respect to Monitoring Competitive Conditions in the Agricultural Marketplace." Pursuant to the Memorandum of Understanding, for many years the Department has consulted with the Department of Agriculture when appropriate regarding a number of mergers or business practices to get their views on how agricultural producers stand to be affected by the merger or practice in question, and to take advantage of USDA's knowledge and expertise in our efforts to understand the workings of often complex agricultural markets. In addition to cooperation on specific investigations, upper management of the Antitrust Division and the USDA meet intermittently to share information on agricultural issues that affect competition under our respective missions. Moreover, we have held several antitrust training sessions for USDA employees, including having an economist from USDA work on detail for several months at the Antitrust Division.

Grassley 417 **Please explain what steps the Justice Department has taken, in conjunction with its responsibility to oversee the operations of the FBI, to investigate and determine the source of leaks to the media of sensitive case information to the media in the Amerithrax case. Have any reporters been questioned about stories citing anonymous FBI sources?**

ANSWER: Pursuant to the longstanding Department policy against disclosing non-public information concerning pending law enforcement and litigation matters, we are unable to provide a response at this time.

Grassley 418 **Have the phone records of FBI personnel been reviewed to determine whether and when they had contact with reporters?**

ANSWER: Pursuant to the longstanding Department policy against disclosing non-public information concerning pending law enforcement and litigation matters, we are unable to provide a response at this time.

Grassley 419 **If the Justice Department has not taken these steps to determine who is responsible for the media leaks in the Amerithrax case, then please explain why not and describe how the Department expects to hold any individuals responsible for inappropriate disclosures.**

ANSWER: Pursuant to the longstanding Department policy against disclosing non-public information concerning pending law enforcement and litigation matters, we are unable to provide a response at this time.

Department of Justice Responses to
Questions for the Record posed to
Attorney General Alberto Gonzales
Senate Judiciary Committee
Oversight Hearing January 18, 2007
(Part 1)

Answer #343 Enclosure

U.S. Department of Justice

Federal Bureau of Investigation

In Reply, Please Refer to
File No.

January 25, 2007

The Honorable Paul A. Price
Assistant Inspector General
Office of the Inspector General
Evaluation and Inspection Division
Department of Justice
Suite 6100
1425 New York Avenue, NW
Washington, D.C. 20530

RE: OIG Recommendation 14, Status Update

Dear Mr. Price:

This letter is in response to the Office of the Inspector General (OIG) review of the "Federal Bureau of Prisons' Monitoring of Mail for High-Risk Inmates", A-2005-006, specifically Recommendation number 14. This Recommendation states "The FBI should continue to develop and reinforce procedures for interacting with the Bureau of Prisons (BOP) regarding international terrorist inmates, including monitoring of inmates, intelligence gathering, and sharing information and intelligence." The FBI agrees with this Recommendation and will continue to develop procedures regarding information sharing with BOP.

The FBI provided you with a letter dated September 22, 2006 in which we outlined our continuing efforts to improve and expand information sharing with the BOP. The purpose of this letter to provide you with a status report regarding our ongoing efforts.

Central to the success of the Correctional Intelligence Initiative (CII) is effective training for correctional staff in the skills necessary to accomplish the program goals. The following training initiatives have recently been completed or are well under way:

1. During the week of December 4-8, 2006, the FBI Center for Intelligence Training in Quantico, VA provided Intelligence Analyst Training for 20 BOP staff assigned as Special Investigative Agent and Linguists from ADX

Florence, Colorado; Intelligence Officers and Intelligence Research Specialists from the Joint Intelligence Sharing Initiative (JISI); the BOP's Chief of Intelligence, Central Office; the Chief, Intelligence Analysts, and Linguists from the Counter Terrorism Unit, Martinsburg, WV; and the Deputy Chief of the Sacramento Intelligence Unit.

2. The FBI held the 2006 National CII Coordinators Conference on December 12-13 at the National Counter Terrorism Center in McClean, Virginia. This training was based on the "train the trainer" concept. CII Coordinators from each FBI field office who will conduct the outreach and training for all correctional agencies within their geographical area, to include BOP facilities were in attendance.

3. An electronic communication (EC) issued on December 7, 2006 which directed all FBI field offices to develop formalized CII Outreach and Training Plans by March 1, 2007. Field offices were directed to include target dates, performance measures, CII program updates, and required reporting dates.

Progress continues to be made in the following areas:

- Continued FBI support of BOP intelligence needs with regard to vetting and screening of contractors and volunteers, information on terrorist offenders entering BOP custody, and special monitoring of BOP offenders under Special Administrative Measures (SAMs) controls.

- Continued comprehensive access to FBI resources through BOP staff assigned to the National Joint Terrorism Task Force (NJTTF) and respective JTTFs.

- FBI support to the new BOP Counterterrorism Unit (CTU) recently opened in Martinsburg, WV. Specifically, the FBI will assess the staffing of two personnel and identify necessary databases to support the mission.

- Provide guidance to all FBI field offices to clarify and expand intelligence sharing initiatives regarding terrorism matters between the FBI, BOP, and other state, county, and private correctional agencies.

- Provide continued CII training at various state, regional and national conferences. Completed CII training at recent conferences which BOP attended have included the 2006 Major Gang Task Force National Training Conference in Indianapolis, IN on September

12, 2006; FBI Boston regional training conference on September 28, 2006; and the FBI Atlanta regional conference on December 18, 2006. A CII presentation will also be made at the pending American Correctional Association (ACA) Winter Conference in Tampa on January 24, 2007, and as well as the scheduled National JTTF Conference during fiscal year 2007.

- The FBI will continue to support BOP efforts regarding internal intelligence training by providing speakers and resources as appropriate.

We believe the above noted steps will help ensure that the FBI continues our current emphasis on our ever-expanding intelligence partnership with the BOP regarding terrorism matters.

Sincerely,

Joseph Billy, Jr.
Assistant Director
Counterterrorism Division