U.S. Department of Justice

Office of Legislative Affairs

Washington, D.C. 20530

July 6, 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 April 19, 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 with this, or any other matter.

Sincerely,

Richard A. Hertling

Richard A. Hertling
Principal Deputy Assistant Attorney General

Enclosures

cc: The Honorable Arlen Specter
Ranking Minority Member

Department of Justice Responses to Questions for the Record posed to Attorney General Alberto Gonzales Senate Judiciary Committee Oversight Hearing April 19, 2007
(Part 1)

Leahy 1 **I am very concerned about the Department's lack of competence in issuing National Security Letters ("NSLs") to obtain sensitive information about ordinary Americans. Recently, the Justice Department's Inspector General reported on a pattern of unacceptable abuses of NSLs by the FBI, where time and time again the FBI did not follow the law, or even its own rules, in obtaining sensitive personal information about thousands of ordinary Americans and others. According to the Inspector General's report, one in every five of the NSL files reviewed contained violations of the law, and more than half of the NSLs reviewed did not even meet the FBI's own standards. Please state when you first became aware of the widespread abuses of NSLs at the FBI.**

ANSWER: Prior to the public release of the Inspector General's report on March 9, 2007, the Office of the Inspector General provided drafts of the report for classification and factual review. Upon learning of the findings contained in the draft report, the Attorney General was concerned, promptly ordered a detailed review of report's findings and recommendations, and directed senior Department officials, including officials at the FBI, to address the shortcomings identified by the Inspector General's report.

Leahy 2 **Please describe what, if any steps you undertook to address and stop these abuses.**

ANSWER: NSLs are, as the IG found, an "indispensable tool" in the Department of Justice's counterterrorism efforts. They are, however, a tool that must be used responsibly and in a manner consistent with applicable laws, regulations, and policies. To ensure that this vital tool is used appropriately, the Attorney General has ordered broad and significant efforts within the Department of Justice, including the FBI, to fully address the issues raised by the Inspector General's report.

First, the Attorney General has ordered the National Security Division (NSD) and the Department's Chief Privacy and Civil Liberties Officer to work closely with the FBI to take corrective actions, including implementing all of the recommendations made by the Inspector General, and to report directly to him on a regular basis and advise whether any additional actions need to be taken. The Attorney General has also asked the Inspector General to report back to him in July on the FBI's implementation of the recommendations made in the IG's report.

Second, the FBI Director ordered a one-time review of ten percent of all national security cases in the 56 FBI field offices and headquarters. The FBI is currently reviewing and assessing information from this review and will brief Congress on its findings. At the Attorney General's direction, the National Security Division has also begun conducting regular National Security Investigation reviews at FBI field offices, working in conjunction with the FBI. These regular reviews represent a substantial new level and type of oversight of national security investigations by career Justice Department lawyers with years of intelligence experience. This enhanced oversight capability will allow the NSD to more fully evaluate FBI national security investigations and help ensure their compliance with applicable legal requirements and guidelines.

Third, with respect to the use of so-called "exigent letters," the FBI has issued a Bureau-wide directive prohibiting the use of the type of letters described in the Inspector General's report. Following discussions between the Office of the Inspector General (OIG) and the FBI, the OIG and the FBI decided to conduct a joint investigation, led by the OIG, into the FBI's use of exigent letters. The joint review will examine whether there has been any violation of criminal law, administrative misconduct, or improper performance of official duties with regard to the use of these exigent letters. In addition, the Attorney General has asked an Associate Deputy Attorney General and the Justice Department's Office of Professional Responsibility to examine the role FBI attorneys played in the use of exigent letters.

Fourth, the Attorney General has directed the National Security Division to begin reviewing all violations that the FBI refers to the Intelligence Oversight Board (IOB) in order to identify recurring problems and to assess the FBI's response to such violations. This review will focus on whether the IOB referrals suggest that a change in policy, training, or oversight mechanisms is required. The Attorney General has instructed the NSD to report to him semiannually on such referrals and to inform the Department's Chief Privacy and Civil Liberties Officer of any referral that raises serious civil liberties or privacy issues. The Department of Justice also consulted and obtained input from the Privacy and Civil Liberties Oversight Board.

Fifth, the FBI is already taking a number of steps to improve the accuracy of the reporting of NSL statistics to Congress. Last year, the FBI began developing a new NSL tracking database and plans to deploy the system to one field office for testing in July 2007. The system is expected to be deployed to all field offices by the end of CY 2007. FBI field offices are conducting hand counts of NSLs to compare against the information contained in the current database. The FBI has corrected deficiencies in its current database to reduce the potential for error, and is working to correct any known errors in the data.

Sixth, the Attorney General has asked the NSD to consult with the FBI as it reviews and makes any necessary revisions to existing FBI guidance regarding NSLs. The FBI has issued comprehensive guidance throughout the Bureau concerning the proper use of NSLs. This comprehensive guidance was been briefed prior to being finalized both to the Congress and to privacy and civil liberties groups. A number of their suggestions were incorporated into the guidance. The Attorney General has also instructed the Department's Executive

Office for United States Attorneys to review its existing training materials and guidance regarding terrorism investigations and prosecutions in order to ensure that NSLs are properly described in such materials. In addition, the FBI has initiated the development of a new training course on the use of NSLs. Once this course has been fully developed, the FBI will issue a directive mandating training for all Special Agents-in-Charge, Assistant Special Agents-in-Charge, Chief Division Counsel, and all appropriate FBI agents and analysts. While this course is being developed, the FBI's Office of General Counsel has instructed its National Security Law Branch attorneys that any time they are in a field office, no matter the reason for their visit, they must schedule mandatory NSL training.

Finally, the Attorney General and the Director of National Intelligence (DNI) jointly directed the Department of Justice's Privacy and Civil Liberties Office and the Office of the DNI to convene a working group to examine how NSL-derived information is used and retained by the FBI, and that working group has been convened and has begun its examination.

These steps, along with others that the Department of Justice is taking, demonstrate the Attorney General's commitment to ensure that National Security Letters are used responsibly as the Department, including the Bureau, continues its efforts to protect the Nation during the War on Terror.

Leahy 3 **One of the most disturbing findings in the Inspector General's Report was that the FBI improperly issued more than 700 so-called "exigent letters," seeking telephone and financial records on an emergency basis, which contained blatant factual misrepresentations. Is the Department still using these "exigent letters" in any form, and if so, what is the legal authority that the Department is relying upon to do so?**

ANSWER: As noted in the response to Question 2, above, the FBI has issued a Bureau-wide directive prohibiting the use of the type of letters described in the Inspector General's report.

Leahy 4 **The Senate Judiciary Committee has received numerous letters and briefings from the Justice Department falsely assuring us that the Department was following all appropriate legal authorities governing the use of NSLs. For example, in a November 2005 letter to then-Chairman Specter, Assistant Attorney General William Moschella asserted emphatically and repeatedly that the FBI was not abusing the process for seeking NSLs. Please explain why the Department has repeatedly misled this Committee about its use of National Security Letters.**

ANSWER: The Department has always tried to provide this Committee with accurate information regarding the use of NSLs. As you know, the Department's November 2005 letter emphasized the oversight mechanisms in place with respect to the FBI's use of NSLs, as well as the statutory, guideline, and policy restrictions on the FBI's use of NSLs. The IG's report found that these oversight mechanisms did not always work and the limitations in place were not always followed. In addition, the IG's report found that there were errors with the reporting of NSL statistics to Congress. When the Department, including the FBI, learned of these issues, we took immediate and substantive action to address the concerns raised by the report. We look forward to fully briefing Congress and this Committee on the implementation of these remedial measures.

Leahy 5 **When he testified before the Committee on March 21, 2007, Justice Department Inspector General Fine concluded that these NSL violations were "widespread" and a "serious misuse" of the FBI's authority under the PATRIOT Act. Mr. Fine also described the pattern of abuse with regards to NSLs as ""the product of mistakes, carelessness, confusion, sloppiness, lack of training, lack of adequate guidance, and lack of adequate oversight." Do you agree with Inspector the General's conclusions?**

ANSWER: We agree with the IG's conclusion that the use of so-called exigent letters was improper, and that the FBI committed an unacceptable number of errors in the use of NSLs.

While NSLs have enhanced America's ability to detect and avert terrorist attacks, the Inspector General's report has identified problems concerning the use of NSLs that must be addressed. The Attorney General appreciates the Inspector General's important work identifying these shortcomings. Failure to properly use a critical authority such as NSLs can erode public support for vital antiterrorism measures. The Attorney General is dedicated to remedying these deficiencies and is committed to protecting Americans from terrorist attacks while protecting the liberties that define this nation. To this end, the Attorney General and the Director of the FBI have ordered that broad and significant corrective actions be taken to address the issues raised by the Inspector General's report. These corrective actions are detailed in response to Question 2, above.

Leahy 6 **The Inspector General's report also contains several recommendations to address the widespread abuse of NSLs at the FBI. See A Review of the FBI's Use of National Security Letters, March 2007, at pages 124-126. Do you agree with these recommendations and if so, will you direct the Director of the FBI to adopt and implement all of these recommendations?**

ANSWER: The Department of Justice agrees with the Inspector General's recommendations. As noted above in the response to Question 2, the Attorney General has ordered the NSD and the Department's Chief Privacy and Civil Liberties Officer to work closely with the FBI to take corrective actions, including implementing *all* of the recommendations made by the Inspector General, and to report directly to him on a regular basis and advise whether any additional actions need to be taken. The Attorney General has also asked the Inspector General to report back to him in July on the FBI's implementation of the recommendations made in the IG's report.

Leahy 7 **In your written testimony, you stated that the Department is beginning a new effort to "closely examine the use of National Security Letters and other national security authorities by the Federal Bureau of Investigation (FBI)". Please describe in detail the additional steps that you have taken to address the illegal and improper use of NSLs, so that these abuses do not occur again in the future.**

ANSWER: Please see the response to Question 2, above.

Leahy 8 **In the Patriot Act and its reauthorization last year, the FBI was given independent authority to issue NSLs without any oversight by a court, or anyone outside the FBI. Basically, the FBI wanted us to trust them, and them alone, to follow the law and their own rules in issuing NSLs. Unfortunately, as the Inspector General report makes clear, the FBI has breached that trust. What are your views about whether there should be an independent review of the FBI's authority to issue NSLs?**

ANSWER: At the outset, we note that National Security Letter authorities existed prior to the enactment of the USA PATRIOT Act and have never required court approval. There is a good reason for this, and for the change in the USA PATRIOT Act that enabled the FBI to issue National Security Letters upon a standard of relevance to certain authorized national security investigations; namely, that National Security Letters are vital building blocks during preliminary stages of national security investigations, and will not be as productive a tool if they cannot be used swiftly and effectively. We therefore urge the Congress not to take steps that would diminish the effectiveness of what the Inspector General described as an "indispensable tool" in our counterterrorism efforts, and instead to allow the corrective measures ordered by the Attorney General and the FBI Director be given a chance to work.

Leahy 9 **I am very concerned about the Department's lack of competence in conducting terrorism investigations under the Foreign Intelligence Surveillance Act ("FISA"). The Washington Post reported recently that an internal review at the FBI revealed numerous errors and inaccurate information in secret applications for wiretap and other warrants before the Foreign Intelligence Surveillance Court ("FISC"). In fact, it appears that these problems began as early as 2005, when the Chief Judge of the FISA Court wrote to you complaining of inaccuracies in the FBI's FISA applications.**
a) Given the concerns expressed by the Chief Judge of the FISC in 2005, why have you allowed this serious credibility problem with the Department's FISA applications to fester for two years?

ANSWER: We respectfully disagree with your statement that the issues raised by the Chief Judge of the FISC were not promptly addressed by the Justice Department. The inaccuracies the Chief Judge described were, in fact, brought to the FISC's attention by the Department's Office of Intelligence Policy and Review (OIPR) after OIPR attorneys and agents of the Federal Bureau of Investigation (FBI) discovered them. After receiving the Chief Judge's letter, OIPR and the FBI moved swiftly to implement additional requirements and procedures to ensure the accuracy of applications submitted to the FISC. Those requirements and procedures are described in the response to Question 10, below.

It also bears noting that while we are concerned about any errors in FISA applications, the vast majority of the errors the Chief Judge described did not implicate facts material to the FISC's determinations of probable cause. It also is important to note that even those few applications that contained errors that implicated facts material to the probable cause determination, upon being notified of the error, the FISC did not order the termination of any electronic surveillance or physical search authorities, find any declarant in a FISA application to be less than credible, or otherwise sanction the Government as a result of the inaccuracies described in the 2005 letter.

Leahy 10 **What, if any, steps have you take to correct the problem with inaccurate FISA applications?**

ANSWER: The Department has long-standing procedures and practices designed to ensure the accuracy of FISA applications. In April 2001, the FBI adopted procedures for this purpose. In addition, for several years, OIPR and FBI attorneys have periodically traveled to FBI field offices and reviewed selected applications to ensure their accuracy.
During an accuracy review, the FBI field agent assigned to a FISA application is required to produce documented support for each factual allegation contained in the application, excluding standard language used to describe foreign powers and techniques. If a material inaccuracy is discovered, or if the agent is unable to produce such support for an allegation during or after the review, OIPR notifies the FISC and the FBI. Of course, such notice is also given if OIPR or the FBI discovers such an inaccurate or unsupportable statement in a FISA application in any context other than an accuracy review. Additionally, reports of each trip are prepared by experienced OIPR attorneys and disseminated to the FBI. The relevant lessons then are passed on to OIPR and FBI personnel through training sessions, which are updated based on the results of the reviews.

By early 2006, however, it became apparent that the procedures adopted in 2001 were not always being followed. The FBI undertook to develop and implement an in-house training program, to better specify exactly what was expected from all participants and to mandate the creation of sub-files containing the materials on which the agents rely to support the factual allegations in their FISA applications. This requirement helps field agents ensure that they have support for every factual allegation before an application is submitted to the FISC. We believe the efforts of OIPR and the FBI have resulted in a reduction of inaccuracies in FISA applications. OIPR and the FBI are committed to continuing these efforts and to submitting complete and accurate applications to the FISC.

Leahy 11 **Do you believe that it is necessary to require federal agents to appear before the FISC and swear under oath regarding the accuracy of these applications to ensure that the Department is providing truthful and accurate information to the Foreign Intelligence Surveillance Court?**

ANSWER: FISA requires an application to be "made by a Federal officer in writing upon oath or affirmation." 50 U.S.C. §§ 1804, 1823. Accordingly, FBI Supervisory Special Agents (SSAs) assigned to Headquarters swear, under penalty of perjury, that the allegations set forth in FISA applications are true. In many instances, the FISC also requires personal appearances by OIPR attorneys and FBI SSAs. We do not believe that this system needs to be altered.

Leahy 12 **In January, the Department announced that the Bush Administration was terminating the Terrorist Surveillance Program ("TSP") and that the surveillance activities under this program would now be subject to review by the Foreign Intelligence Surveillance Court ("FISC"). In response to requests from me and many other Senators to review the FISC's order, the Department provided a copy of this classified order to the Senate Intelligence Committee. The Department allowed Senator Specter and me to review the order, but has not allowed other Judiciary Committee members to do so, and has not provided a copy of the order to the Committee. However, the FISA statute, 50 U.S.C. § 1871(a)(4), requires that the Department also report to the Judiciary Committee on any "significant legal interpretations of [FISA]" before the Court or "presented in applications or pleadings filed with" the Court. The law further requires that the Department provide "copies of all decisions or opinions" of the Court that "included significant construction or interpretation of the provisions" in FISA. Given that the FISA applications and FISC order(s) at issue involve new legal interpretations of FISA, why has the Department refused to provide the Judiciary Committee copies of the orders?**

ANSWER: The provision you reference, 50 U.S.C. § 1871, requires the Department to report semiannually, in a manner consistent with national security, specified information concerning its FISA applications with respect to the preceding 6-month period. These reports are to include "a summary of significant legal interpretations of [FISA] involving matters before the Foreign Intelligence Surveillance Court or the Foreign Intelligence Surveillance Court of Review" and "copies of all decisions (not including orders) or opinions" of these courts. The Department will issue its next semiannual report at the end of June, and that report will be consistent with these requirements.

We emphasize the extraordinary steps that the Department has taken to keep the Congress informed with respect to the January 10 Orders, which go beyond any reporting obligation in FISA. The Department has provided copies of these highly classified orders, the Government's applications, and exhibits attached to the applications (including supporting memoranda of law) to both Intelligence Committees. Additionally, the Department has briefed members of the Intelligence Committees on the new orders, consistent with their oversight authority relating to intelligence matters and the National Security Act. We have also briefed you and the Ranking Member of this Committee on this matter, and have made exceptionally sensitive documents, including the orders, applications, and supporting memoranda of law, available to you. We would be pleased to brief you again on these matters if you so desire.

Leahy 13 **I have been concerned for some time about the Department's record on enforcing our Nation's civil rights laws. Recently, the Citizens Commission on Civil Rights released a report entitled "The Erosion of Rights: Declining Civil Rights Enforcement Under the Bush Administration," documenting how the Justice Department has mismanaged the Civil Rights Division by politicizing the hiring and firing of career level attorneys and making Section 5 Voting Rights Act case determinations on the basis of politics rather than law. As the Nation's chief law enforcement officer, are you concerned that the public's confidence in the Department of Justice to enforce our civil rights laws and to protect their civil liberties has been severely diminished?**

ANSWER: The Department's record of accomplishments during this Administration demonstrates our strong commitment to civil rights enforcement. The report referenced in your question ignores the Civil Rights Division's significant accomplishments over the past six years in numerous areas, such as prosecuting human trafficking offenders; convicting law enforcement officials for willful misconduct, such as excessive force; enforcing Section 203 of the Voting Rights Act; helping more than 3 million Americans with disabilities through Project Civic Access; ensuring constitutional policing by law enforcement agencies; and protecting the religious liberties of all Americans. Indeed, recent years have seen the Civil Rights Division launch several initiatives to protect the civil rights of Americans. Our many accomplishments demonstrate that the Civil Rights Division is fully committed to combating discrimination consistent with the Federal laws passed by Congress. Our extraordinary record of success in the courts demonstrates a record of fair and even-handed law enforcement through cases that are thoroughly grounded in the facts and the law.

The Division's many accomplishments are the result of the talent, hard work, and dedication of the Division's professional attorneys and staff. These records could not have been achieved without a high level of teamwork between career attorneys and political appointees. While the report alleges that political appointees are unwilling to draw on the expertise of career staff, quite the contrary is true. The Division's political appointees consistently rely on career attorneys for expertise in their respective areas of civil rights enforcement.

The policy of the Assistant Attorney General is to maintain open communication between the sections' career staff and the Office of the Assistant Attorney General. In contrast to the allegations in the report, he conducts regular meetings with all Section Chiefs and has met with trial attorneys to discuss their cases. Moreover, his Deputy Assistant Attorneys General communicate daily with career section management as well as conduct regular meetings with the sections they oversee.

We find it unfortunate that the report's mischaracterization of the Division's hiring procedures unfairly casts doubt on the demonstrated excellence of the outstanding attorneys whom the Division has been fortunate to hire. While the report claims that hiring decisions are made by political appointees with little or no input from career staff, this simply is not accurate. The Civil Rights Division hires attorneys through a collaborative approach that includes both career employees and political appointees. The Assistant Attorney General places great weight on the recommendations of career section management in all personnel matters, including hiring decisions. The Division hires outstanding attorneys from an extremely wide variety of backgrounds. There is no political litmus test in making hiring decisions.

Leahy 14 **Recently, the New York Times had two front page stories about the scant evidence of voter fraud, despite efforts by the Justice Department to prioritize prosecutions of this crime. The first article was about the Election Assistance Commission's report and a previously unreleased draft report on voter fraud. Investigative reporters revealed that the draft report concluded that little voter fraud existed around the nation. One of the two election lawyers who were hired to draft the report was a Republican from Arkansas. He acknowledged in an email that the finding of little voter fraud would be unwelcome by the conservative members of the Republican Party, but he and his Democratic colleague were "unwilling to conform results for political expediency." Apparently, the politically appointed members of the Election Assistance Commission were, in fact, willing to conform the report results for political expediency because they actually altered the report to inflate the findings on voter fraud and to find specifically that registration drives by nongovernmental groups are a source of fraud when nothing in the original report supported that conclusion. The second New York Times story connects the alteration of the EAC's findings on voter fraud to the Justice Department's inability to demonstrate any organized efforts to skew federal elections. Despite the Department's intense focus on criminally charging individuals for "voter fraud," scant evidence of actual voter fraud had been found. Why has the Department prioritized the prosecution of voter fraud when there is scant evidence that this crime is being committed?**

ANSWER: As an initial matter, we do not agree that there is scant evidence of voter fraud in this country. In fact, during the past five years almost 100 persons have been convicted by the Department of various types of vote fraud offenses, including vote buying, ballot fraud, multiple voting, and registration fraud. Moreover, voter fraud tends to be an invisible crime; like bribery, its participants have a motive to conceal their illegal conduct, not to complain about it. Hence the frequency of voter fraud cannot be equated with the number of federal voter fraud convictions. In addition, most election fraud is directed at local elections, and, with a few exceptions, local election fraud is not reachable under current federal criminal statutes. Finally, the Department's experience in supervising the nationwide prosecution of voter fraud over the past three decades is that many types of voter fraud, such as vote buying and absentee ballot fraud, target the economically and socially disadvantaged, who are generally reluctant witnesses against those who corrupted or stole their votes.

Voter fraud is a form of public corruption and it is easy to understand why. Although these crimes have different short-term objectives (stealing an election, on the one hand, and using public office for private gain, on the other), both types of offenses strike at the heart of our representative form of government. Regardless of whether a public official accepts a bribe after being sworn into office or prior to his or her election, the result is the same: a corrupt official serving in a position of public trust who is responsive to private interests rather than the public good. In short, voter fraud destroys honest elections, and, if successful, destroys honest government. Accordingly, the Department has made the investigation and prosecution of all public corruption offenses, including voter fraud, a law enforcement priority.

In 2002, then-Attorney General John Ashcroft established a Department-wide ballot integrity initiative to spearhead its enforcement responsibilities in two overlapping areas: the protection of individual voting rights and the protection of society's interest in the integrity of the election process by deterring and prosecuting voter fraud. The initiative recognizes that it does little good to protect a person's voting rights if that person's vote is subsequently diluted or eliminated by fraud.

Since the creation of the initiative almost five years ago, almost 100 persons have been convicted of voter fraud offenses throughout the country. As noted above, the number of convictions is not an accurate reflection of the frequency of these crimes, nor do conviction numbers measure how many instances of voter fraud have been deterred. However, they do reflect the Department's continuing efforts to protect the integrity of future elections by utilizing the tools that Congress has provided to prosecute those who have corrupted the election process.

Leahy 15 **What impact has the Department's focus and devotion of resources on prosecuting voter fraud had on the Department's other efforts to enforce the Nation's civil rights laws, including voting rights laws?**

ANSWER: The Department is committed to evenhandedly enforcing the laws that Congress has passed with respect to both ballot access and voter fraud.

Prosecuting voter fraud has not impinged on the Department's enforcement of the Nation's civil rights laws. The Department has long divided responsibility for voting matters between the Civil Rights and Criminal Divisions. The Civil Rights Division is responsible for enforcing the civil rights laws that pertain to voter access as well as the small percentage of voting-related offenses involving race or the denial of other secured rights. In contrast, the Criminal Division is responsible for supervising the prosecution of those federal election crimes that do not involve voting rights offenses, such as vote buying, ballot-box stuffing, and absentee ballot fraud. These are the vast majority of federal election crimes, and they are prosecuted by the Criminal Division and the Department's United States Attorneys Offices.

The Civil Rights Division has achieved many successes during this Administration. Some of the highlights of this Administration's record in civil rights enforcement are:

During the past 6 years, the Civil Rights Division has litigated more cases on behalf of minority language voters than in all other years combined since 1975, when the minority language provisions were enacted. Specifically, we have successfully litigated almost 60 percent of all language minority cases in the history of the minority language provisions of the Voting Rights Act.

During the past six years, we have brought seven of the nine cases ever filed under Section 208 of the Voting Rights Act in the history of the Act, including the first case ever under the Voting Rights Act to protect the rights of Haitian Americans.

In the past six fiscal years (FY 2001 - 2006), as compared to the previous six years (FY 1995 - FY 2000), the Criminal Section filed 25% more color of law cases, charged 15% more defendants, and obtained the convictions of 50% more defendants.

In Fiscal Year 2004, we brought ninety-six criminal civil rights prosecutions, a record for cases filed in a single year.

From FY 2001 through FY 2006, the Division has brought 39 cross-burning prosecutions, charging a total of 60 defendants. The Division obtained the convictions of 58 defendants during that same period.

From FY 2001 to FY 2006, the Department prosecuted 360 human trafficking defendants, secured almost 240 convictions and guilty pleas, and opened nearly 650 new investigations. That represents a six-fold increase in the number of human trafficking cases filed in court, quadruple the number of defendants charged, and triple the number of defendants convicted in comparison to 1995-2000.

In recent years, the Division has teamed up with local prosecutors in an effort to prosecute historical Civil Rights era murders. On January 25, 2007, the federal district court in Jackson, Mississippi, unsealed an indictment charging James Seale, 71, with two counts of kidnapping resulting in death and one count of conspiracy in connection with the 1964 abductions and murders of 19-year-old African-Americans, Charles Moore and Henry Dee. Seale, a former member of the White Knights of the Ku Klux Klan, is charged with having acted in concert with fellow Klansmen to kidnap Moore and Dee, beat them, transport them across state lines, and murder them by attaching heavy weights to them and throwing them, still alive, into the Old Mississippi River. If the defendant is convicted, he will face a maximum sentence of life imprisonment on each count.

We also assisted a Mississippi district attorney's office in reopening the investigation into the 1955 murder of Emmett Till, a 14 year-old African-American teenager, who was kidnapped and killed in rural Mississippi. We reported the results of that investigation to the District Attorney for Greenville, Mississippi, for consideration of whether to pursue state charges. A state grand jury in Mississippi declined to indict the case.

Also, in 2003, the Justice Department convicted Ernest Avants for the 1966 killing of Ben Chester White, an African-American sharecropper, on national forest land. White was murdered as part of a plot by white supremacists to lure Martin Luther King, Jr., to Mississippi so that they could assassinate him.

Since the January 2001 announcement of the President's New Freedom Initiative, the Division's Disability Rights Section has secured positive results for people with disabilities in over 2,000 actions under the Americans with Disabilities Act of 1990 (ADA), including lawsuits, settlement agreements, and successful mediations.

During the past 6 years, we have obtained more than 80% of the agreements reached under Project Civic Access since it began in 1999, improving the lives of more than 3 million Americans with disabilities.

We have worked to ensure the integrity of law enforcement by more than tripling the number of settlements negotiated with police departments across the country since 2001. From 2001 to 2006, we successfully resolved fourteen pattern or practice police misconduct investigations involving eleven law enforcement agencies, compared to only four investigations resolved by settlement during a comparable time period of the previous administration.

From 2001 to 2006, the Division filed more consent decrees (4 vs. 3) with police departments under the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141 than in the preceding relevant time period. We have also issued more than six times the numbers of technical assistance letters to police departments (19 vs. 3).

In 2002, we established a Special Counsel for Religious Discrimination to coordinate the protection of religious liberties. We have won virtually every religious discrimination case in which we have been involved and have increased the enforcement of religious liberties in all areas of our jurisdiction. For example, we reviewed 82 cases of alleged religious discrimination in education from FY 2001 to FY 2006, resulting in 40 investigations. This is compared to one review and one investigation in the prior six-year period.

Under our post 9/11 backlash initiative, the Department has investigated over 750 incidents since 9/11 involving violence, threats, vandalism, and arson against Arab Americans, Muslims, Sikhs, South-Asian Americans, and other individuals perceived to be of Middle Eastern origin. We have obtained 32 federal convictions in such cases. We have also assisted local law enforcement in bringing more than 160 such criminal prosecutions.

During this Administration, we have used the Division's housing testing program in new ways. The program is conducted primarily through paired tests, an event in which two individuals – one acting as a "control group" (e.g., white male) and the other as a "test group" (e.g., black male) – pose as prospective buyers or renters of real estate for the purpose of determining whether a housing provider is complying with the fair housing laws. We have tested for the first time to detect discrimination against guide-dog users. We filed and settled the first case developed by the testing program that alleged that a retirement community discriminated against wheelchair users. In addition, we have tested for the first time to detect discrimination against certain minorities.

During this Administration, we have filed forty cases alleging that multi-family housing was not designed and constructed in compliance with the Fair Housing Act's requirements for accessible housing. Our settlements in FY 2005 alone created more than 12,000 new accessible housing opportunities.

Leahy 16 **The New York Times article on voter fraud several weeks ago highlighted a change of Justice Department criminal policy that has occurred since President Bush took office. Craig Donsanto, head of the elections crime branch of the Public Integrity Section, noted in the New York Times article that "[p]reviously, charges were generally brought just against conspiracies to corrupt the election process, not against individual offenders." Mr. Donsanto notes however that you, as Attorney General, "authorized prosecutors to pursue criminal charges against individuals" with regard to elections. The handbook for attorneys on the federal crime of election fraud authored by Mr. Donsanto notes that "as a general rule, the federal crime of voter fraud embraces only organized efforts to corrupt the election process itself . . . [t]his definition also excludes isolated acts of individual wrongdoing that are not part of an organized effort to corrupt the voting process. If such isolated acts of fraud are to be subjected to criminal penalties, that is a task for the states not the federal government to do. Indeed, there is a still-unresolved constitutional issue that dates back to the 19th century concerning whether the federal courts have authority to hear criminal cases involving isolated incidents of electoral fraud." The Times article goes on to note how judges have criticized this new approach. Why was this change in the Departments' procedures implemented? Has the Justice Department's handbook for attorneys been updated and how were the many constitutional and federalism concerns resolved in support of your apparent change of policy in prosecuting voter fraud?**

ANSWER: The Department determined that protecting the integrity of the electoral process should include attempts to prosecute isolated-instances of voter fraud, in part to deter individual acts of election fraud in future elections and also to learn, if possible, the impact of such conduct on the election process. The cases we have brought are not by any means indicative of the dimensions of this kind of crime. There are two main reasons for this. First, unlike traditional crimes such as robbery and burglary, voter fraud generally does not produce an easily ascertainable "victim" who has motive to complain to authorities. For example, voters who are paid to vote are unlikely to report this fact, and, if questioned, are generally reluctant to admit it. Second, even when there are ascertainable victims -- such as persons whose votes are stolen either through outright intimidation or more subtle forms of aggressive "assistance" – these individuals are often unaware of the fraud or reluctant to report the person responsible.

A single instance of voter fraud dilutes the effect of a ballot that has been honestly cast. Many such instances can subvert the entire election and destroy representative government by those elected by the fraud. The Department therefore continues to believe that vote fraud offenses are serious crimes against both individuals and society. As for the prosecutions we have brought, most have resulted in convictions, and we have learned valuable lessons from those that did not.

The Department recently has published an update to its 1995 election crime manual: Federal Prosecution of Election Offenses (Seventh Edition) May 2007, available at http://www.usdoj.gov/criminal/pin/.

Leahy 17 **The article also notes that the Interim United States Attorney for the Western District of Missouri, Brad Schlozman, filed indictments against a few people hired to register new voters just days before the national election last year. This is surprising since the Justice Department handbook on election fraud notes that "in election matters lacking Voting Rights Act overtones, and except where as is absolutely necessary to preserve evidence or to round out a seemingly valid complaint . . . no overt federal investigation should be conducted in election fraud matters before the outcome of the election at issue has been certified by appropriate state authorities." Mr. Schlozman claims that the Justice Department agreed to the filing of these indictments. Has this "non-interference" doctrine also been overruled by the Justice Department? On what basis?**

ANSWER: The Department's noninterference policy to which you refer has not been overruled. For the most part, the policy addresses the timing of investigations of alleged voter fraud -- not the timing of charges that have already been investigated. The policy discourages overt criminal investigation, such as interviewing individual voters, during the period immediately prior to an election or on election day. This investigative restraint is designed to avoid action that has the potential to chill lawful voting activity, interfere with the administration of the election process, or interject the fact of a criminal investigation as a campaign issue.

As noted above, the Department has published a new election crimes manual, Federal Prosecution of Election Offenses (May 2007), which provides guidance to Department attorneys regarding election crime matters. This guidance provides that federal law enforcement personnel should carefully evaluate whether an investigative step under consideration has the potential to affect the election itself. The manual counsels that "overt criminal investigative measures should not ordinarily be taken in matters involving alleged fraud in the manner in which votes were cast or counted until the election in question has been concluded . . . .", p. 92 (emphasis added). However, the policy does not "apply to investigations or prosecutions of federal crimes other than those that focus on the manner in which votes were cast or counted," because concerns about interference with the administration of the election or voting activity are not present. Id.

The Department's handling of the registration fraud prosecutions in the Western District of Missouri was consistent with the guidance set forth in the manual. The cases involved bogus voter registrations that were turned in to a voter registration group called ACORN by individuals who had been hired by ACORN to register voters. The defendants were paid on a per-registration basis by ACORN and their motive in submitting the fake registrations was to obtain enhanced piecework fees for each fake registration generated. ACORN was the main victim, and it was ACORN that brought these offenses to our attention. The alleged fraud involved registering to vote, not voting or counting ballots. Moreover, there were no voters to be interviewed, as the registration forms that underlay the charges were fakes. Thus the bringing of these cases did not implicate the core concerns of the consultation requirement.

Leahy 19 R**ecently, I joined Senator Dodd in reintroducing the Emmett Till Unsolved Civil Rights Crime Act. This bill creates permanent unsolved civil rights crimes units within the FBI and the Civil Rights Division of the Justice Department to investigate and prosecute these crimes. This bill will also give law enforcement the resources to ensure that justice is served. Would you support the Emmett Till bill? Do you believe this bill gives the FBI the resources needed to thoroughly investigate unsolved civil rights murders?**

ANSWER: Last Congress, the Department submitted a views letter strongly supporting the important legislative goals of S. 2679, legislation substantially similar to that which was recently introduced. The Department believes that racially motivated murders from the civil rights era constitute some of the greatest blemishes upon our country's history. Earlier this year, the Attorney General and the FBI Director announced an initiative to investigate unresolved civil rights era murders for possible prosecution to the extent permitted by the available evidence and the limits of Federal law. We will carefully review and consider the reintroduced version of the bill.

In June of 2006, the Criminal Section of DOJ's Civil Rights Division forwarded to Senator Specter a letter advising that DOJ and the FBI support the goals of S. 2679, but offered three recommendations to improve its effectiveness.

First, the bill should establish an "Unsolved Crimes Unit" within the Criminal Section. The Criminal Section and the FBI have successfully handled numerous civil rights era murder investigations, including that of the Reverend Dr. Martin Luther King, Jr. The Criminal Section has developed the expertise to address complex issues raised by these historical cases, and the separate, stand-alone "Unsolved Crimes Section" that would be created by subsection 4(a) would duplicate the work now performed by the Criminal Section and would risk draining some of the expertise and experience that currently resides in the Criminal Section. In our view, creating a discrete "Unsolved Crimes Unit" within the Criminal Section would be more efficient and more economical. Similarly, rather than creating a new FBI "Unsolved Civil Rights Crime Investigative Office" at FBIHQ, resources could be more efficiently used if the FBI were provided the flexibility to allocate Special Agent (SA) and intelligence analyst positions in the localities where these cases place a burden on investigative resources.

Second, the FBI and DOJ agree that S. 2679 should include a five-year sunset provision, at which time DOJ could report, and the Congress could consider, the status of this work. A finite number of "violations of criminal civil rights statutes . . . result[ing] in death" occurred before 1970, and the advanced age of potential defendants and witnesses should be considered when calculating the window of time available to address these matters. Under these circumstances, the creation of a permanent unit to investigate these crimes may not be warranted. Five years would provide adequate time to evaluate the number of these potential crimes, coordinate with state law enforcement officials, conduct investigations, review the available evidence, and report to Congress on DOJ's ability to resolve these crimes.

Third, the FBI appreciates the authorization of funds in S. 2679. Full appropriation of these funds will be necessary to provide the FBI and DOJ with sufficient resources to accomplish the goals of S. 2679. Given the Federal government's limited jurisdiction in these cases, the FBI also believes the Attorney General or his designee should be authorized to use these funds to provide grants to state and local officials to assist in the state prosecutions of civil rights era murders, because these complex investigations and prosecutions are often prohibitively costly for the budgets of state and local law enforcement officials.

Leahy 20 **The Federal Rules of Criminal Procedure – in particular Federal Rule of Criminal Procedure 6(e) – forbid prosecutors, with few exceptions, from discussing ongoing criminal investigations. When he appeared before this Committee in March 2007, former New Mexico US Attorney David Iglesias testified under oath that he received two telephone calls right before the November 2006 elections from members of Congress, regarding an ongoing grand jury investigation into public corruption allegations against prominent Democrats in New Mexico. Mr. Iglesias also testified that when asked about that ongoing investigation, he refused to provide any information. Would you agree that if asked to reveal information about an ongoing grand jury investigation, a federal prosecutor must refuse to answer any questions, and to do otherwise would be to risk engaging in prosecutorial misconduct?**

ANSWER: In the absence of a court order, Rule 6(e) generally prohibits an "attorney for the government" from disclosing a "matter occurring before the grand jury" to an individual who is not assisting the attorney in the performance of his duty to enforce the federal criminal law. In determining whether the secrecy rule applies to a particular piece of information, the courts consider whether disclosure of the information would reveal something of substance about the grand jury's investigation, including the identity of witnesses, targets, or subjects, the substance of grand jury testimony, or the identity of physical or documentary evidence sought by or presented to the grand jury. The grand jury secrecy rule does not reach evidence gathered in a parallel investigation. Further, the rule does not bar the disclosure of internal Department of Justice deliberations on whether to seek an indictment except to the extent that those deliberations reveal what has actually transpired in the grand jury room. In re Sealed Case No. 99-3091, 192 F.3d 995, 1003-04 (D.C. Cir. 1999).

A knowing violation of Rule 6(e) is punishable as a contempt of court. Fed. R. Crim. P. 6(e)(7). Accordingly, by disclosing to an unauthorized person a matter covered by the grand jury secrecy rule, a prosecutor risks engaging in prosecutorial misconduct. See also United States Attorney's Manual Section 1-7.530 (prosecutors "shall not respond to questions about the existence of an ongoing investigation or comment on its nature or progress" except in "unusual circumstances," such as where the matter has "already received substantial publicity, or about which the community needs to be reassured that the appropriate law enforcement agency is investigating the incident, or where release of information is necessary to protect the public interest, safety, or welfare").

Leahy 22 **I am very concerned about the authority granted under the PATRIOT Act that gives the Department the ability to secretly obtain Americans' library records. During a recent hearing that the Committee held on National Security Letters, Connecticut librarian George Christian testified about his experience after the FBI issued NSLs seeking library records to four Connecticut librarians, and he testified that this kind of NSL in particular raises serious privacy and civil liberties concerns. Particularly troubling to me is the fact that the NSL involved in that case prohibited the librarians from even disclosing the fact that they had received the NSL or its contents pursuant to the so-called "gag order" under the PATRIOT Act. Did the Justice Department and FBI abuse their authority in this case?**

ANSWER: The report that NSLs were served on four Connecticut librarians is erroneous. The FBI served one NSL on the Executive Director of Library Connections, Inc., a non-profit cooperative that provides technological services, such as Internet access, to certain libraries. No library was served. Three directors of Library Connections, Inc., have apparently each described him or herself as an NSL recipient, but the case agent who served the NSL on one official had no contact with the other three. This one NSL was issued in connection with an international terrorism case to obtain subscriber information, billing information, and access logs of individuals related to the use of a specific IP address on a specific date and for a specific 45-minute of time. The NSL was as narrowly tailored to the threat being investigated as was feasible under the circumstances.

The non-disclosure requirement that was imposed on the recipient was a function of the statute as it existed at that time. Since then, the NSL statutes have been amended to require a case-by-case evaluation of whether non-disclosure is required. In the case of Library Connections, promptly after the law was changed, the FBI agreed that the NSL could be disclosed.

Leahy 23 **What are you doing to make sure that Americans' privacy rights and civil liberties will be protected when the government issues NSLs to libraries and educational institutions?**

ANSWER: The FBI's national security investigations are conducted pursuant to the Attorney General's 10/31/03 Guidelines for FBI National Security Investigations and Foreign Intelligence Collection (NSI Guidelines). Those Guidelines were designed to ensure the privacy of Americans while permitting the FBI to use lawful investigative techniques to protect the United States from threats to the national security. All FBI investigative activities must be consistent with the U.S. Constitution and all applicable statutes, executive orders, and regulations.

The NSI Guidelines authorize three levels of FBI investigative activity (threat assessments, preliminary investigations, and full investigations) and provide clear and concise predicates required for each level of investigative activity. Those specific predicates are articulated in classified portions of the NSI Guidelines because they relate to intelligence activities, sources, or methods.

NSLs are an important tool in FBI national security investigations and are accompanied by significant safeguards. The FBI's Office of the General Counsel has issued FBI-wide guidance to explain the standards, procedures, and forms for issuing NSLs. That guidance makes it clear that NSLs may be issued only when the information sought is relevant to a national security investigation and that NSLs may not be used in investigations that are unrelated to international terrorism or clandestine intelligence activities. Moreover, NSLs are only available to request narrow categories of records from a limited set of institutions, such as electronic communications records from electronic communications providers. An NSL must be approved by a senior FBI official; this person is always an SES official and is typically the Special Agent in Charge of a field office.

The FBI also reports improper activities, as appropriate, to the Intelligence Oversight Board (IOB) and has internal processes in place to review such activities and take necessary action. The Attorney General has recently ordered the National Security Division to review FBI referrals to the IOB in order to identify recurring problems and to assess the FBI's response to such violations. This review will focus on whether the IOB referrals suggest that a change in policy, training, or oversight mechanisms is required. The Attorney General has instructed the NSD to report to him semiannually on such referrals and to inform the Department's Chief Privacy and Civil Liberties Officer of any referral that raises serious civil liberties or privacy issues.

Finally, the FBI is subject to oversight within the Justice Department, as well as Congressional oversight. For example, all of the FBI's terrorism and counterintelligence related cases are subject to in-progress review by the National Security Division and the Attorney General has recently ordered additional reviews to be conducted with respect to the use of national security authorities, including NSLs. The FBI is also subject to statutory reporting requirements and is in the process of improving its mechanism for tracking NSLs.

These mechanisms, as well as the actions that the Department of Justice, including the FBI, is taking with respect to the FBI’s use of national security authorities as discussed in the response to Question 2, above, are designed to ensure that the privacy and civil liberties of Americans are protected.

Leahy 24 **Pursuant to a little noticed provision in the Violence Against Women Act reauthorization bill, the Department of Justice is currently developing new guidelines that would greatly expand the Government's ability to collect DNA samples – which reveal the most sensitive genetic information about an individual – from most individuals who are arrested or detained by federal authorities. Under this policy, the**

Government will store this sensitive biological information in a federal data base known as the National DNA Index System. I am very concerned about the privacy implications of this new policy because, unlike fingerprinting -- which is commonly used as a means of identification -- DNA profiles reveal all kinds of sensitive biological information about a person, including the presence of physical diseases or mental disorders.
a) What privacy protections are in place under the Department's new guidelines to ensure that sensitive DNA data contained in the National DNA Index System will not be misused or improperly disclosed by the Justice Department?

ANSWER: While the Department of Justice is working to finalize the regulations relating to DNA sample collection for federal arrestees and detainees, there are already a number of protections in place and they are vigorously enforced. When arrestee and detainee DNA samples are collected, the resulting DNA profiles are placed in the National DNA Index System (NDIS) offender database. The offender and crime scene databases are populated by profiles from Federal, state, and local law enforcement agencies. The profiles within the database use only genetic markers that provide identification; no other genetic information, such as medical status, can be gleaned from these markers, and NDIS, which is in essence a pointer system, does not contain any names or personally identifying information. Instead, each profile is associated with a unique identifier that traces back to the laboratory that developed that particular profile and placed it in the database. Once a "hit" occurs and is confirmed, then the two laboratories involved will exchange information regarding the individual involved.

Although all states participate in NDIS, they do not have direct access to the national database. NDIS is searched once a week at the FBI and a hit report is generated. If an individual laboratory (generally the lab that contributed the forensic sample) desires to follow up on a particular hit, it contacts the laboratory that provided the offender information and a confirmation process begins. During that process, the laboratories follow written procedures to ensure the hit is related to the correct offender; these procedures include re-working a portion of the remaining sample and re-comparing results. Under procedures established by the NDIS Board, no names or other personally identifying information may be reported until the confirmation process is complete.

Federal law also provides privacy protections, including criminal penalties. Under 42 U.S.C. § 14132(b)(3), NDIS may only include DNA information that is:

> Maintained by Federal, State, and local criminal justice agencies (or the Secretary of Defense in accordance with section 1565 of Title 10) pursuant to rules that allow disclosure of stored DNA samples and DNA analyses only--
> (A) to criminal justice agencies for law enforcement identification purposes;
> (B) in judicial proceedings, if otherwise admissible pursuant to applicable statutes or rules;
> (C) for criminal defense purposes, to a defendant, who shall have access to samples and analyses performed in connection with the case in which such defendant is charged; or

> (D) if personally identifiable information is removed, for a population statistics database, for identification research and protocol and development purposes, or for quality control purposes.

These protections are further bolstered by provisions that reiterate these protections and provide criminal penalties for individuals who knowingly disclose DNA information from the database to a person or agency not authorized to receive it. (*See*, for examplee.g., 42 U.S.C. §§ 14133(c), and 42 U.S.C. § 14135e(c).)

Leahy 25 **Another concern that I have about this policy is that it will just add to the already notorious backlog at the FBI's laboratory. According to press reports, the FBI acknowledges that this new policy will result in an increase of as many as one million additional DNA samples a year. Is the Bureau's laboratory equipped to handle this additional workload?**

ANSWER: The FBI's Federal Convicted Offender (FCO) Program is responsible for collecting and processing DNA samples collected from those convicted of Federal felonies for the purpose of retention and cataloging in the FBI's National DNA Database. The FCO Program supplies collection kits and receives samples from over 500 collection sites across the country. Since the program's inception in June 2001, over 225,000 samples have been received. The FCO Program currently receives 7,000 to 8,000 samples monthly. To date, the FCO Program has uploaded over 34,000 samples into the National DNA Database, which has resulted in over 600 hits. The volume of sample submissions to the FCO Program has increased dramatically since 2001.

While much of the DNA analysis process has been automated, a bottleneck continues to exist at the DNA data review stage, which is currently conducted manually. To alleviate this bottleneck, the FBI is evaluating data analysis software packages and expert systems to automate this part of the process. Once implemented, the resulting system would be able to assess 85% to 90% of the convicted offender data without manual intervention, reducing data analysis time per 80 samples from approximately 60 minutes to less than 15 minutes (a four-fold increase in efficiency).

Leahy 27 **In written questions following the January 18 oversight hearing, I asked whether you were considering an apology to Mr. Arar or any compensation for the ordeal he went through, as Canada has seen fit to do. You did not completely answer my question. Accordingly, I ask again: Is the Department or the Administration considering any form of apology or compensation for Mr. Arar?**

ANSWER: As you may know, in January 2004, Mr. Arar filed suit in the Eastern District of New York, in *Arar v. Ashcroft, et al.*, 0249-CV-04, asserting a complaint under the Torture Victim Protection Act and the Fifth Amendment of the United States Constitution. Mr. Arar named as defendants in the lawsuit the former Attorney General, the former Deputy

Attorney General, the Director of the Federal Bureau of Investigation, the Secretary of Homeland Security, the former Commissioner of the Immigration and Naturalization Service (INS), and other officials from the former INS. The lawsuit sought unspecified declaratory relief against the United States and compensatory and punitive damages from some of the defendants in their individual capacity. On February 16, 2006, the district court dismissed Mr. Arar's suit. Mr. Arar appealed the dismissal to the United States Court of Appeals for the Second Circuit. The appeal has been fully briefed but has not yet been argued. Pursuant to long-standing Department policy, we cannot offer further comments while Mr. Arar's case is pending in the courts.

Leahy 28 **You similarly failed to answer a question that I asked about steps taken to avoid repeating the mistakes made in this case by referring to the classified briefing. So I ask again, what steps has the Department of Justice taken to ensure that it will not participate in sending other people to places where they will be tortured in the future?**

ANSWER: In January 2004, the United States and Canada exchanged letters providing that, when a national of one country is subject to involuntary removal from the other country to a third country, the United States and Canada will so advise each other. I wish to emphasize, however, that at the present time, the Department of Justice's role in determining where to send individuals deemed inadmissible to the United States is in support of other agencies that have the direct responsibility for ensuring that removals comport with the relevant laws and treaties. This was not the case at the time of Mr. Arar's removal, when the Immigration and Naturalization Service (INS), which was responsible for determining whether Mr. Arar was inadmissible to the United States, and whether he could be removed to Syria in accordance with the Convention on Torture and applicable U.S. laws, was a part of the Department of Justice. The Homeland Security Act of 2002 transferred most of the functions of the INS, including its investigative and enforcement functions, to the Department of Homeland Security. Accordingly, the direct responsibility for developing and implementing policies and procedures to address potential torture concerns in the context of removal now falls to the Department of Homeland Security and not the Department of Justice.

Leahy 29 **Despite having been cleared of all terrorism allegations by Canada, Mr. Arar remains on a United States terror watch list. In fact, the Washington Post reported last month that our watch lists keep growing, with the Terrorist Identities Datamart Environment ("TIDE") – the master list from which other lists, like the No Fly list, are taken – now numbering about 435,000 people. Doesn't such a large and constantly growing list actually make it harder for the Department of Justice, the FBI, and others to use the information and identify actual terrorists?**

ANSWER: The FBI's counterterrorism watchlisting strategy is designed to enable law enforcement and screening personnel to effectively detect, disrupt, and/or assist national security components in tracking those suspected of involvement in terrorist networks. This effort begins with the FBI's watchlisting policy, which requires that the subjects of both preliminary and full-field investigations be watchlisted. Part of this watchlisting obligation is the removal of those determined not to pose terrorism threats. This strategy empowers Federal, state, local, and tribal security and law enforcement officials who serve as "first preventors" in the global war on terrorism. Critical to success is the inclusion of all suspected and known terrorist subjects.

The circumstances in which a preliminary or full-field counterterrorism investigation may be initiated are dictated by the 10/31/03 NSI Guidelines. Because the subjects of these investigations are automatically nominated for inclusion on the watchlist, the value and accuracy of the watchlist depend on the FBI's compliance with these AG Guidelines in initiating counterterrorism investigations. Other United States agencies that submit watchlist nominations are similarly required to ensure their nominations are made pursuant to appropriate guidelines. The Terrorist Screening Center (TSC) reviews all watchlist nominations to ensure they are adequately supported and meet Terrorist Screening Database (TSDB) criteria. The TSC also works hard to ensure that individuals are promptly removed from the watchlist as soon as it receives information indicating removal is appropriate.

It continues to be imperative that TSDB nominations be properly supported and that entries be promptly removed when errors occur or other circumstances warrant deletion. It is accuracy, far more than volume, that defines the value of the TSDB, and the FBI is committed to ensuring that our policies and practices ensure the greatest possible accuracy.

Leahy 30 **The Washington Post article also noted the difficulties that people on the list, or with names similar to people on the list, have in getting off of government lists -- which restrict their travel and their lives. The Government Accountability Office issued a report last year setting out some of the failures throughout the government in allowing individuals effective redress if they are wrongly placed on these lists. In light of the Arar situation, Senator Specter and I asked the Government Accountability Office to update their review. What steps has the Department of Justice taken to allow individuals who may be wrongly on watch lists to challenge and correct those designations?**

ANSWER: In January 2005, the TSC established a formal watchlist redress process. That process allows agencies using TSDB data during a terrorism screening process (screening agencies) to refer individuals' complaints to the TSC when it appears those complaints are watchlist related. The goals of the redress process are to provide for timely and fair review of individuals' complaints and to identify and correct any data errors, including errors in the TSDB itself.

The TSC has worked closely with screening agencies to develop a redress procedure that receives, tracks, and researches watchlist-related complaints and corrects TSDB or other TSC data that is causing an individual unwarranted hardship or difficulty during the screening process. While the terrorist watchlist is an effective counterterrorism tool in large part because its contents are not revealed, and the redress process consequently does not inform individuals whether they are on the terrorist watchlist, the TSC's inability to provide transparency to affected individuals means the burden is on the government to perform a critical, in-depth review of the information supporting a person's inclusion in the TSDB to ensure it meets the watchlisting criteria. If sufficient information does not exist to justify a person's inclusion in the TSDB or its subsets (such as the No Fly List), the person will be removed. An enhanced redress process for individuals on the No Fly List provides for an administrative appeal of any adverse redress decision, the ability to request any releasable information, and the complainant's ability to submit information for consideration during the appeal.

Those who are misidentified as watchlisted can experience varying levels of difficulty when they fly or attempt to cross national borders. When these misidentified persons file redress complaints, review and any corrective actions are accomplished by the screening agency.

As you noted, the Government Accountability Office (GAO) recently completed a comprehensive review of the ongoing interagency efforts to improve the experience of misidentified persons (GAO Report 06-1031), including efforts by DHS to annotate their record systems to distinguish those persons more quickly in the future. The GAO Report highlights the TSC's significant efforts to improve the redress process and to assist misidentified persons, including a procedure for maintaining records of encounters with misidentified persons and for reviewing records when new encounters occur so the TSC can rapidly identify and clear known misidentified persons during screening. Information regarding the watchlist redress process and how to file a complaint with a screening agency is available to the public on the TSC's website at www.fbi.gov. Other agencies that use TSDB data for screening, including the TSA, also provide redress information on their websites.

Finally, the Department's Office of the Inspector General is in the final stages of a follow-up audit of the TSC that is examining whether accurate and complete records are disseminated from the watchlist database in a timely fashion and whether TSC has developed procedures to minimize the impact of individuals incorrectly identified as watchlist suspects.

Leahy 31 **Earlier this month, the Seattle Post-Intelligencer reported that, since September 11, the number of criminal investigations conducted by the FBI has declined significantly, and white collar investigations in particular have dropped precipitously. Many cases that would have been pursued in the past are simply going unsolved. I have asked you and the FBI Director in the past about declining prosecutions of civil rights cases and public corruption cases, and last week's study shows that the problem is even broader than was previously known. While it is crucial that the FBI devote all necessary resources to protecting the country from terrorism, that effort should not be at the expense of protecting the country from crime. Americans count on the FBI to aggressively investigate crime, particularly those types of crime that cannot always be adequately addressed by the states, like corruption, fraud, civil rights offenses, and the most serious violent crime. The FBI's apparent retreat from fulfilling these core duties**

comes at a time of rising violent crime rates in the country and dwindling public confidence in the Department's objective handling of corruption cases.
a) Are the Department of Justice and the FBI capable of handling the dual tasks of protecting the country from terrorism and aggressively enforcing the Nation's criminal laws at the same time?

ANSWER: In 2002, the FBI established as its criminal program priorities: public corruption, civil rights, transnational and national criminal enterprises (which include violent gangs and the MS-13 initiative), white collar crimes (which include corporate fraud and health care fraud), and violent crimes (which include crimes against children).

Since public corruption was designated as the top criminal priority, over 250 additional agents were shifted from other criminal duties to address corruption cases. The FBI is singularly situated to conduct these difficult investigations, and our effectiveness is demonstrated by the conviction of more than 1,000 corrupt government employees in the past two years.

The FBI has also maintained a steady commitment to addressing civil rights matters, and the number of these cases has remained fairly constant even as the complexity of the cases has increased. For example, the number of complex human trafficking cases increased since 2001, and the resolution of these cases has generally required both more time and more agents than the average non-human trafficking case.

The FBI has continued to combat drug-related crime by leveraging resources through the Organized Crime Drug Enforcement Task Force and High Intensity Drug Trafficking Area initiatives. In addition, the FBI has shifted criminal resources to implement the Child Prostitution and Violent Crime Task Force initiatives. The child prostitution initiative is a coordinated national effort to combat child prostitution through joint investigations and task forces that include FBI, state and local law enforcement, and juvenile probation agencies. This initiative has resulted in more than 500 child prostitution arrests (local and federal combined), over 100 indictments, and the identification, location, and/or recovery of over 200 children. To address violent crime, the FBI has partnered with other state and local law enforcement agencies to create Violent Crime Task Forces throughout the U.S. The FBI also funds and operates Safe Trails Task Forces to address violent crime in Indian Country.

In addition to the above initiatives, the FBI has continuously worked to use technology, intelligence analysis, and enhanced response capability to leverage criminal program resources. In October 2005, the National Crime Information Center (NCIC) fugitive data base was integrated with the Department of State passport application system, resulting in automatic notification when fugitives apply for United States passports. In December 2005, eight Child Abduction Rapid Deployment Teams were established in four regions of the United States. These teams are available to augment field office resources during the crucial initial stages of a child abduction. The FBI is developing a means of integrating sex offender registries and other public data bases to better identify sex offenders in the vicinities of child abductions and to "flag" sex offenders who have changed locations without satisfying registration requirements.

In the past two years, the Department has created intelligence, investigative and prosecutorial entities to attack gang-related crime in the United States. Since 2005, the FBI's National Gang Intelligence Unit (NGIC) has worked to support law enforcement agencies through timely information sharing and analysis of federal, state and local law enforcement intelligence, focusing on the growth, migration, criminal activity, and association of gangs that pose a significant threat to communities throughout the United States. The FBI has also addressed violent street gang matters though its Violent Gang Safe Streets Task Force program, which leverages Federal, state, and local law enforcement resources to investigate violent gangs in urban and suburban communities.

In 2006, the Departments of Justice and Homeland Security established a multi-agency National Gang Targeting, Enforcement and Coordination Center (GangTECC) with participation from DOJ's Criminal Division, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), the Bureau of Prisons (BOP), the Drug Enforcement Administration (DEA), the Federal Bureau of Investigation (FBI), the U.S. Immigration and Customs Enforcement (ICE), and the U.S. Marshal's Service (USMS). Through collaborative efforts of the participating agencies, GangTECC serves as a catalyst in a unified, federal effort to disrupt and dismantle the most violent gangs in the United States as they implicate national security, border protection and public safety.

In 2006, the Department also created a new office within the Criminal Division, the Gang Squad, to target significant gang-related crime. The Gang Squad is a specialized group of federal prosecutors charged with developing and implementing strategies to attack the most significant regional, national and international gangs operating in the United States. The Gang Squad prosecutes select gang cases of national importance, but also helps formulate policy, assists and coordinates with United States Attorneys Offices on legal and multi-district cases, and works with numerous domestic and foreign law enforcement agencies to construct effective and coordinated prevention and enforcement strategies.

Leahy 32 **What steps is the Department taking to ensure that the FBI and the Department do not sacrifice crucial criminal investigations and prosecutions as a result of increased emphasis on terrorism?**

ANSWER: Please see the response to Question 31, above.

Leahy 33 **Congress has always been willing to support both of these core missions. We have up to now been given the impression that the Department and the FBI were getting sufficient resources to do these jobs effectively. What more does the Department need to live up to its responsibilities?**

ANSWER: The FBI has allocated its resources to ensure priorities are addressed in all its programs, including the criminal programs. We have established policies regarding resource allocation, we monitor resource use within each program to ensure that the most serious crime problems are addressed, and we ensure valid reasons exist for the diversion of resources from lower priority programs to higher priorities. The FBI remains committed to working alongside our Federal, state, and local law enforcement and intelligence partners to effectively and aggressively investigate violent crime and address national security threats. The FBI and DOJ will continue to work with OMB and the Congress to ensure that the President's budget request adequately addresses our needs in these critical programs.

Leahy 34 **The Department of Justice Inspector General found in another recent report that the FBI failed to accurately report eight of the ten terrorism statistics that it reviewed for this report – that is an 80% failure rate. Among other things, the FBI overstated the number of terrorism-related convictions for 2004, because it included cases where no terrorism link was actually found. This is no small matter. The Congress relies upon these statistics to conduct oversight and to make funding and operational decisions regarding the Bureau. What steps have you taken to address the problems with the reporting of terrorism statistics?**

ANSWER: The FBI has modified and substantially improved the systems and internal controls related to terrorism reporting. Following the attacks of 9/11/01, the FBI underwent a substantial reorganization and restructuring. Many of the apparent weaknesses in statistical reporting discussed in the OIG report entitled, "The Department of Justice's Internal Controls over Terrorism Reporting" occurred during, and were a result of, that reorganization and restructuring. The backbone of the FBI's statistical reporting system is the case management system, along with its supporting information technology systems. These systems were not originally designed to capture or report on the enhanced requirements developed as part of the FBI's post-9/11 reorganization and restructuring. The FBI recognized this challenge in 2002 and began a concentrated effort to build supporting systems that include additional internal controls to ensure that we accurately capture and report on the activities involved in our post-9/11 intelligence mission. The FBI has made significant progress in the development and implementation of these systems, which are being upgraded as part of the FBI's Sentinel project.

Also, since the time period examined by the OIG Report, the FBI has made significant strides in the development of a new central management information system known as the Comprehensive Operational Management Plan Advancing Specific Strategies (COMPASS). COMPASS accumulates statistical accomplishments from various stand-alone systems and presents the information in a unified format available to all senior managers both at FBIHQ and in FBI Field Offices. The bulk of the information captured in COMPASS is used internally to identify trends and evaluate progress against the FBI's defined strategic objectives. The FBI continues to make extensive efforts to redefine performance metrics that measure the FBI's achievements against strategic outcomes.

For a more detailed discussion of steps taken by the FBI and the Department to ensure accuracy in statistical reporting, please see the Department's comments to the OIG report, which appear therein.

Leahy 35 **I am deeply concerned about the chilling effect that the recent firing of eight U.S. Attorneys will have throughout the nation. I worry that even a perception that decisions in specific corruption cases affected decisions whether or not to fire prosecutors could play into how future corruption cases are handled. In your written testimony, you state that public corruption prosecutions are a priority for the Department of Justice and an example of what the Department is doing right. Earlier this year, Senator Pryor and I introduced S. 118, the "Effective Corruption Prosecutions Act of 2007," and you said in answer to my written question that this bill "contains several provisions that would assist investigators and prosecutors" in combating corruption and that "[w]e welcome the opportunity to work with your Committee on anti-corruption legislation that would provide additional tools for investigators and fill gaps in existing corruption law." Will you support this legislation and commit to work with the Judiciary Committee to pass this meaningful anti-corruption legislation?**

ANSWER: The Department will review the proposal and work with Congress on anti-corruption legislation.

Leahy 36 **In connection with your appearance before this Committee on January 18, 2007, I asked your view on the propriety of FBI intelligence-gathering on witnesses in connection with hearings for Supreme Court nominees in the 1970's and 1980's. In written responses you provided to this Committee on April 5, 2007, you stated categorically that "political use of the FBI is never appropriate." (Tr. 2, 69). Do you also agree that it is never appropriate to use the Department of Justice for political purposes?**

ANSWER: The Department of Justice must investigate violations of the nation's laws and prosecute the perpetrators of those violations in a neutral and dispassionate manner. We agree that it would be improper to interfere with or influence a particular prosecution for partisan political gain.

Leahy 37 **If so, please explain your views on this issue and describe the dangers of using the Department for political purposes?**

ANSWER: The Department of Justice is the nation's principal law enforcement agency. As such it bears a special responsibility for vindicating the rule of law. The Department's mission statement thus concludes with the objective of "ensur[ing] fair and impartial administration of justice for all Americans." That essential goal means first and foremost that neither investigations of offenses nor prosecutions of offenders should be motivated by partisan affiliation or the prospect of political advantage.

Politicizing the enforcement of the nation's laws would undermine them completely. The perception that some Americans are insulated from prosecution—while others are targeted for it—because of a partisan affiliation or political connection would engender cynical disregard for the law itself.

Of course, Americans obey the law even when they know that they will not be punished for violating it. But even voluntary compliance would be undermined by the politicization of law enforcement. Americans obey the law irrespective of punishment because they recognize the moral imperative of obeying the law and conforming to the societal values that it represents. If the law is seen to be a political tool rather than a neutral statement of democratic will, however, it loses the power to inspire compliance without punishment.

Leahy 38 **The Attorney General's Honors Program has been the Department of Justice's entry-level hiring program since the Eisenhower administration. Hiring for this prestigious and competitive program was done by career Department officials until 2002 when Attorney General Ashcroft placed the program under the control of the Deputy Attorney General and political officials. Hiring for the Department's Summer Law Intern program was also moved under the control of political officials. In the years since, press reports, anecdotal accounts, and an anonymous letter sent to me and to other members of Congress by career Department officials have all suggested that the hiring for the Honors Program and the internship program has become highly political. These accounts have suggested that applicants with Republican and conservative credentials have been preferentially interviewed and hired, and applicants from law schools known to be conservative have been favored. These complaints have been particularly frequent in the Department's Civil Rights Division, but have arisen elsewhere as well. The recent anonymous letter said that this past year, political officials eliminated from the interview list proposed by career employees many applicants with liberal or Democratic experience on their resumes.**
In the wake of these charges, the Department announced on April 27 that hiring for the Honors Program and the Summer Law Intern Program will be returned to career Department employees. Why was this policy changed?

ANSWER: In 1981, the Deputy Attorney General (DAG) was assigned the responsibility for the administration of the Attorney General's recruitment program for honor law graduates and judicial law clerks and for the employment of law students. **(***See* Order No. 960-81, 46 FR 52340, October 27, 1981, which amended Parts 0 through 60, Title 28 of the Code of Federal Regulations to reflect a reorganization of the Department of Justice. This reorganization restructured the focus of authorities and responsibilities vested in the Deputy Attorney General and the Associate Attorney General.) Oversight of the Honors Program (HP) and the Summer Law Intern Program (SLIP) has remained unchanged over the past 26 years through six amendments to the responsibilities of the Deputy Attorney General (*See* 28 CFR §§ 0.15(b)(1)(i) and (2)). The Deputy Attorney General has, in turn, charged the Office of Attorney Recruitment and Management (OARM) with administrative responsibility for the programs. OARM is a career office that administers matters relating to career attorneys and law students within the Department.

Since 1953, adjustments to the mechanics of the hiring process have been routine. For example, immediately prior to 2002, the Department accepted paper applications that only allowed candidates to apply to two components. Interviews were conducted in 14 regional locations and required interviewers, and often candidates, to travel extensively. In 2002, pursuant to government-wide mandates and in response to competitive changes in the legal market, the Department instituted changes to the operating procedures of the HP/SLIP to make it e-Gov compliant and to make it accessible and responsive to the needs of the broadest possible pool of well-qualified candidates. Key changes included the conversion of applications to paperless e-submissions, a modification of the Honors Program interview process that eliminated financial burdens on candidates selected for interview, and a renewed emphasis on excellence that included a Department-level review of candidates selected for interview.

During the past five years, a staff member from either the Office of the Deputy Attorney General (ODAG) or the Office of Associate Attorney General (OASG) has been responsible for assembling an *ad hoc* working group to conduct the Department-level review of candidates. In addition to Honors qualifications, they consider the amount of money allocated to pay for candidates' travel to interviews and the hiring needs of the components in determining the number of candidates who can be interviewed.

In 2006, the Department-level review was subject to considerable delay and processing issues. Individuals conducting the review were from leadership staff with other responsibilities connected to other mission requirements. In December 2006, at the end of the interview cycle, in light of these delays and questions related to qualifications and review process, the ODAG hosted a meeting with OARM and component representatives to discuss a number of processing issues, including the reasons component candidates were removed from consideration. At the meeting, the components were informed that candidates were deselected for three reasons: 1) the applicants came from lower-ranked schools and/or had inferior grades; 2) applications demonstrated poor writing or grammar skills; or 3) applicants posted inappropriate material on the internet. At the conclusion of the meeting, ODAG asked the components to submit suggestions on how to improve the process to OARM by mid-January. In turn, OARM consolidated the comments, reviewed the suggestions, and provided recommendations to ODAG regarding their implementation. As a result of suggestions made during the meeting and in subsequent component recommendations, ODAG approved a number of recommended procedural changes, as reflected in an April 26, 2007, memorandum (attached).

The changes in the April 26, 2007, memorandum are designed to facilitate and expedite the review and other related processes. The new procedures further encourage quality review throughout the process and will increase understanding of the basis of the review at all levels.

Leahy 39 **How is the Department implementing the announced plan to return hiring for these two programs to career employees?**

ANSWER: As reflected in the attached April 26, 2007, memorandum the 2007 Honors Program review will be directly administered by OARM with the ad hoc working group composed of representatives of the hiring components. Components will have increased opportunity to articulate any additional component-specific qualifications used in making interview selections, and will be provided with specific reasons for the proposed removal of any individual from their candidate pool. An appeals process will afford components the ability to request a second level review. Review of SLIP selections will be significantly reduced.

Leahy 40 **What steps are being taken to ensure that political influence is not exercised in the hiring process?**

ANSWER: The Honors Program attracts applicants from diverse backgrounds attending law schools throughout the nation. Historically, each year it hires about 140-150 entry-level attorneys from 70 to 80 law schools. In 2006, 75 law schools were represented in the incoming Honors Program class, most with 1 to 2 hires. Law schools represented by higher numbers of entry-level hires are: Harvard (16), George Washington University (10), Georgetown University (7), American University (5), New York University (4), Stanford University (4), University of Texas (3), Washington University in St. Louis (4), and Yale University (4). The modifications outlined in the responses to Questions 38 and 39 reflect additional steps to ensure the continued selection of highly qualified candidates from the broadest applicant pool on a fair and impartial basis.

Honors Program hires, like experienced hires made by the components, are subject to a full field FBI background investigation, a suitability adjudication by OARM and, when necessary for the position, a national security clearance by the Security and Emergency Preparedness Staff (SEPS).

Leahy 42 **Would you be willing to make career Department employees who are involved in the hiring process available on occasion to answer questions about how the process is proceeding?**

ANSWER: As with all Congressional requests, the Office of Legislative Affairs will work with you to provide an appropriate responder on behalf of the Department. Normally, career employees are not expected to testify, but do assist Department representatives in providing appropriate responses.

Leahy 70 **Are you aware of reports that Mr. Griffin was involved in an effort during the 2004 election to challenge voting by primarily African-American voters serving in the Armed Forces overseas?**

ANSWER: We are unaware of reports that Mr. Griffin was involved in an effort during the 2004 election to challenge voting by primarily African-American voters serving in the Armed Forces overseas.

It is important to note, however, that during this Administration the Civil Rights Division has continued to work diligently to protect the voting rights of our nation's military and overseas citizens. The Division has enforcement responsibility for the Uniformed and Overseas Citizen Absentee Voting Act (UOCAVA), which ensures that overseas citizens and members of the military, and their household dependents, are able to request, receive, and cast a ballot for Federal offices in a timely manner for Federal elections.

As a result of our efforts, in Fiscal Year 2006, the Voting Section filed the largest number of cases under UOCAVA in any year since 1992. In Calendar Year 2006, we filed successful UOCAVA suits in Alabama, Connecticut, and North Carolina and reached a voluntary legislative solution without the need for litigation in South Carolina. In Alabama and North Carolina, we obtained relief for military and overseas voters in the form of State legislation. In response to the lawsuit, the Alabama General Assembly enacted legislation that extends the period between the primary and run-off elections to six weeks and allows ballots cast by military and overseas voters to be counted if they are received within seven days after the election. In North Carolina, the legislation expanded the time between primary and run-off elections from 4 to 7 weeks and extended voters' opportunity to send and receive absentee ballots via facsimile to all categories of voters protected by UOCAVA. The South Carolina legislature passed legislation requiring an absentee instant runoff ballot, to be mailed simultaneously with primary ballots at least 45 days before the primary election, and extending provisions allowing electronic transmission of applications and absentee ballots to all UOCAVA covered voters. We also obtained permanent relief in the form of legislation in a suit originally filed against Pennsylvania in 2004; the Pennsylvania legislation extends the deadline for receiving absentee ballots from UOCAVA voters to seven days after an election All of these accomplishments prompted an award from the Department of Defense to the Deputy who supervised all of these cases. The Division also filed a second UOCAVA suit in 2004 and two UOCAVA suits in 2002. The Civil Rights Division will continue to make every effort to ensure that our citizens abroad and the brave men and women of our military are afforded a full opportunity to participate in Federal elections.

Specter 120 **A report submitted to Congress by DOJ's Inspector General on the FBI's use of National Security Letters (NSLs) reveals flagrant misuse of NSLs. The Report "found widespread and serious misuse of the FBI's national security letter authorities." It also "found that the FBI did not provide adequate guidance, adequate controls, or adequate training on the use of these sensitive authorities." And, it concluded "the FBI's oversight of the use of NSL authorities expanded by the Patriot Act was inconsistent and insufficient." Director Mueller testified about the actions that he is taking to remedy the FBI's misuse of NSLs. As Attorney General, you have responsibility over the FBI. What have you done to see that the FBI complies with the law and discontinues its flagrant abuse of NSLs?**

ANSWER: Please see the response to Question 2, above.

Specter 121 **In your letter dated January 17th, 2007 to Chairman Leahy and Ranking Member Specter, you explained that on January 10th, the FISA Court issued orders "authorizing the Government to target for collection international communications into or out of the United States where there is probable cause to believe that one of the communicants is a member or agent of al Qaeda or an associated terrorist organization." You further said that in light of this order, "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." You also stated that the President had determined not to reauthorize the Terrorist Surveillance Program because the FISA Court orders will "allow the necessary speed and agility." What are the factors for establishing "probable cause to believe that one of the communicants is a member or agent of al Qaeda or an associated terrorist organization"?**

ANSWER: As you know, the Attorney General wrote a letter to you and Chairman Leahy on January 17, 2007, informing you that on January 10, 2007, a Judge of the Foreign Intelligence Surveillance Court issued orders authorizing the Government to target for collection international communications into or out of the United States where there is probable cause to believe that one of the communicants is a member or agent of al Qaeda or an associated terrorist organization. The Attorney General also explained in his letter that, as a result of these orders, any electronic surveillance that was being conducted pursuant to the Terrorist Surveillance Program will now be conducted subject to the approval of the Foreign Intelligence Surveillance Court. Further details concerning these orders—including the information you seek in this question—cannot meaningfully be provided in this format without exposing highly classified operational details. However, we have briefed you and the Intelligence Committees on the operational details of these orders and also made exceptionally sensitive documents concerning these orders available to you. We would be pleased to answer this or any other questions you may have concerning the orders, to the extent our briefings to date have not fully addressed those questions.

Specter 122 **What are the factors required to establish probable cause on the communications coming from outside the United States into the United States?**

ANSWER: Please see the response to Question 121, above.

Specter 123 **Your January 17th letter referenced above suggest that the current framework (i.e., FISA together with the new FISA Courts orders) provides sufficient flexibility for the Administration to conduct foreign intelligence surveillance as needed.**

ANSWER: We note that our January 17th letter discussed a need for "speed and agility" to protect the Nation from the threat posed by al Qaeda and associated terrorist organizations. For the reasons set forth in our answer to question 124, there remains a need to modernize FISA to reflect the new threats and technologies of the 21st century.

Specter 124 **Given this backdrop, why is there a need for the FISA Modernization bill that the Administration submitted to the Congress on Friday, April 13th, 2007?**

ANSWER: The existence of the FISA Court orders does not alter the Administration's position that FISA needs to be modernized to reflect the new threats and technologies of the 21st Century. The Administration's FISA Modernization proposal incorporates many provisions supported by members of Congress last year--including several proposals made in the bill you introduced last summer, S.2453. FISA still needs to be modernized to account for sweeping changes in telecommunications technology that have occurred since FISA was drafted in 1978. These changes have resulted in FISA requiring in a significant number of cases the Government to obtain court orders to intercept the communications of foreign persons overseas -- a result that hampers our intelligence capabilities in a manner that we believe was not intended by FISA's drafters and that does not advance the privacy interests of Americans. We also feel strongly that companies alleged to have cooperated with authorized communications intelligence activities in the wake of the September 11 attacks should be protected from liability. The Department of Justice looks forward to working with the Congress and with this Committee on this important issue.

Kennedy 165 **You stated in your written testimony that you had "asked the Justice Department's Office of Professional Responsibility to further investigate this matter." You said, "Working with the department's Office of Inspector General, these nonpartisan professionals will complete their own independent investigation so that Congress and the American people can be 100 percent assured of what I believed and what the investigation thus far has shown: that nothing improper occurred."**

Recent events, however, have demonstrated that this Administration does not respect the Office of Professional Responsibility as an independent organization to find and report the truth. We know, for example, that OPR was not permitted to investigate the involvement of Department attorneys in the unlawful warrantless wiretapping conducted by the National Security Agency. OPR's investigating attorneys were denied security clearances to conduct the investigation, even though many other attorneys in the Department were granted clearances. Recently, the career attorney leading the lawsuit against the tobacco companies charged that OPR engaged in a whitewash in its investigation of allegations that political interference produced a $100 billion reduction in the remedy the government requested.

An OPR investigation into allegations that the head of the Civil Rights Division's Voting Section engaged in unprofessional conduct and procedural irregularities in approving a Georgia photo ID law that disadvantaged minority voters has been

pending for 18 months with no resolution. Unfortunately, we simply cannot be certain that the politicization of the Department of Justice has not spread to OPR. What is the precise matter being referred. In other words, what will be the scope of the investigation?

ANSWER: The Attorney General initially requested that the Office of Professional Responsibility (OPR) conduct an investigation to examine issues related to the recent removals of United States Attorneys. When the Office of the Inspector General (OIG) learned of the request, the OIG discussed with OPR the OIG's belief that, within the Department, the OIG was the entity that should conduct such an investigation. OPR disagreed because it believed that it had jurisdiction to conduct the investigation. The interim Chief of Staff to the Attorney General discussed the matter with OPR and the OIG, and he asked OPR and the OIG to jointly conduct the investigation, which they are doing currently. The Attorney General, the Deputy Attorney General, and their respective Offices are recused from this matter. As the Department has advised the Committee previously, the findings in the final OIG and OPR report will be made public upon completion of the joint investigation. Additional requests for responses should await release of this final report.

Kennedy 166 **Please provide any and all written material that discusses the scope or nature of the referral to OPR.**

ANSWER: Please see the response to Question 165, above.

Kennedy 167 **Can you give us any assurance that the investigation will be completed in a reasonable amount of time? 30 days? 60 days? 90 days?**

ANSWER: Please see the response to Question 165, above.

Kennedy 168 **Will the results of the report be made public?**

ANSWER: Please see the response to Question 165, above.

Kennedy 169 **To whom does the head of OPR report?**

ANSWER: Please see the response to Question 165, above.

Kennedy 170 **Is an OPR report subject to review in the Department before it is finalized? Can it be changed? Can it be delayed? Do you have the authority to stop an investigation?**

ANSWER: Please see the response to Question 165, above.

Kennedy 171 **Can you assure us that neither you nor the President will interfere with the OPR investigation?**

<u>ANSWER:</u> Please see the response to Question 165, above.

Kennedy 172 **Will OPR investigators be given complete access to Department of Justice and White House communications and witnesses?**

<u>ANSWER:</u> Please see the response to Question 165, above.

Kennedy 173 **During your confirmation hearings, you pledged to "commit the Department to investigating and prosecuting bias-motivated crimes at the federal level to the fullest extent of the law." Those were your words. Yet, there has been a steady decline in hate crime prosecutions and convictions. In 1999, the Department charged 45 individuals with hate crimes and convicted 38. In 2006, the Department charged 20 individuals with hate crimes and convicted 19. Hate crime prosecutions have essentially been cut in half under this Administration even though official data say more than 8,000 hate crimes occur every year. The largest decrease in prosecutions occurred after you took office. The number of hate crime charges dropped from 38 in 2004 to 16 in 2005 and hate crime convictions dropped from 26 to13. The 2005 edition of the FBI crime data compendium, Crime in the United States, was published without a summary of hate crime data for the first time since 1996. Hate crimes have obviously become less of a priority in your time at the Department. The numbers suggest a serious shift in the Department's priorities away from hate crimes. Why is that?**

<u>ANSWER:</u> Violent crime motivated by prejudice or animus against a particular class or group of citizens should never be tolerated. Prosecuting bias-motivated crimes to the fullest extent of federal law remains a priority of the Department.

Generally speaking, with respect to bias-motivated crimes and other criminal civil rights matters, the Department initially determines whether the local law enforcement authorities intend to proceed with a prosecution. Not only are bias-motivated crimes prosecutable as violent crimes under existing laws in every state, but they are specifically prohibited by the vast majority of states. The Department will prosecute such cases if the state either fails to prosecute the matter or a state prosecution does not vindicate the underlying federal interest that is at stake.

The Civil Rights Division has brought a number of high profile bias-motivated crime cases in recent years. In fact, Criminal Section Deputy Chief Barbara Bernstein was selected earlier this year to receive the coveted Helene and Joseph Sherwood Prize for Combating Hate by the Anti-Defamation League. As one of the select few in law enforcement to receive the prestigious award, the ADL said that Deputy Chief Bernstein "exemplifies an ongoing commitment, support, and contribution in helping to eliminate hate and prejudice."

Examples of recent prosecutions include:

- *United States v. Coombs* (M.D. Fla.): In August 2006, a defendant in Florida pleaded guilty to burning a cross in his yard to intimidate an African-American family that was considering buying a house located next door to the defendant's residence.

- *United States v. Laskey*, (D. Or.): In April 2007, defendant Jacob Laskey, a member of the Volksfront white supremacist group, was sentenced to 11 years and three months in federal prison for conspiring to vandalize the Temple Beth Israel by throwing rocks with swastikas etched in them through the closed windows during an evening service.

- *U.S. v. Walker.* (D. Utah): Three members of the National Alliance, a white supremacist organization, were charged with assaulting a Mexican-American bartender in the Salt Lake City bar where he was working. Less than three months later, the defendants assaulted an individual of Native-American heritage outside a different bar in Salt Lake City. In 2007, all three defendants were convicted at trial. The ADL praised the Department for its successful prosecution of this case.

- *United States v. Saldana*, (C.D. Cal.): In August 2006, four Latino gang members were convicted of threatening and assaulting African Americans in a neighborhood that the defendants and their gang members sought to control. All four defendants, members of the notorious Avenues street gang, were convicted of a conspiracy charge that alleged numerous violent assaults against African Americans, including murders that took place in 1999 and 2000. Specifically, the jury found that the defendants caused the death of Christopher Bowser, an African-American man who was shot while waiting at a bus stop in Highland Park on December 11, 2000. The jury also found that the defendants caused the death of Kenneth Kurry Wilson, an African-American man who was gunned down while looking for a parking place in Highland Park on April 18, 1999. Three of the defendants were also convicted of murdering Wilson because he was African American and because he was using a public street, and using a firearm during the commission of a conspiracy and hate crime. All four defendants received life sentences.

- *United States v. Oakley* (D.D.C.): In April 2006, the defendant entered a guilty plea to emailing a bomb threat to the Council on American Islamic Relations.

- *United States v. Baird* (W.D. Ark.): In April 2006, the defendant entered a guilty plea to burning a cross near the home of a woman whose white daughter's African-American boyfriend was living with her and her daughter. Three additional defendants were charged in May 2006 with participating in the cross burning. The defendant was sentenced in November 2006. Three additional defendants were tried in September 2006, two of whom were convicted on charges of conspiracy and are awaiting sentencing.

- *United States v. Nix* (N.D. Ill.): In March 2006, the defendant entered a guilty plea to interference with an Arab-American family's housing rights by igniting an explosive device inside the family's van that was parked near their home.

- *United States v. Baalman.* (D. Utah): From December 2005 through January 2006, in Salt Lake City, three white supremacists pleaded guilty to assaulting an African-American man riding his bicycle to work because of his race and because they wanted to control the public streets for the exclusive use of white persons.

- *United States v. Frederícy and Kuzlik* (N.D. Ohio): In October and November 2006, defendants Joseph Kuzlik and David Fredericy pleaded guilty to conspiracy, interference with housing rights, and making false statements to federal investigators. In February 2005, these defendants poured mercury on the front porch and driveway of a bi-racial family in an attempt to force the family out of their Ohio home.

- *United States v. Hobbs* (E.D.N.C.): In a case stemming from a series of racially-motivated threats aimed at an African-American family in North Carolina, four adults were convicted and one juvenile was adjudicated delinquent. Two of the adults were convicted at trial for conspiring to interfere with the family's housing rights and, on July 5, 2005, were sentenced to 21 months in prison. A third defendant pleaded guilty to a civil rights conspiracy charge, and the fourth defendant pleaded guilty to obstruction of justice for his role in the offense.

- *United States v. Hildenbrand.* (W.D. Mo.): In April 2004, five white supremacists pleaded guilty to assaulting two African-American men who were dining with two white women in a Denny's restaurant in Springfield, Missouri. One of the victims was stabbed and suffered serious injuries. The defendants were sentenced to terms of incarceration ranging from 24 to 51 months.

- *United States v. May* (W.D.N.C.): On March 4, 2004, in a case personally argued by the then-Assistant Attorney General for the Civil Rights Division, the United States Court of Appeals for the Fourth Circuit agreed with the Division that the district court should have imposed a stiffer sentence on the perpetrator of a cross burning in Gastonia, North Carolina. On March 28, 2005, the defendant was re-sentenced by another district court judge to one year and one day in prison.

An additional bias-motivated murder case is set for trial later this year. In *United States v. Eye and Sandstrom*, attorneys from the Civil Rights Division and the United States Attorney's Office for the Western District of Missouri are prosecuting two men who, according to the indictment, fatally shot an African-American man as he was walking to work in downtown Kansas City. If convicted, the government will seek the death penalty.

The Division also has a strong and ongoing commitment to reexamining and investigating unsolved Civil Rights-era murders and other crimes. In February 2007, the Attorney General, the Assistant Attorney General for the Civil Rights Division, and the FBI

Director announced an initiative to investigate Civil Rights-era crimes and a new partnership with non-governmental organizations.

James Ford Seale was indicted on January 25, 2007, by a federal grand jury for two counts of kidnapping resulting in death and one count of conspiracy for his participation in the abductions and murder of two nineteen-year-old African-American men, Henry Dee and Charles Moore, in 1964. According to the allegations in the indictment, the victims in this case were kidnapped by a group of White Knights of the Ku Klux Klan that included James Seale. Dee and Moore were beaten by their captors, then transported and finally forcibly drowned by being thrown into the Old Mississippi River. They were tied to heavy objects alleged to have included an engine block, iron weights, and railroad ties. A federal jury returned guilty verdicts against Seale on all three counts on June 14, 2007.

In February 2003, the Division successfully prosecuted Ernest Henry Avants for the 1966 murder of Ben Chester White, an elderly African-American sharecropper in Mississippi who, because of his race and efforts to bring the Reverend Martin Luther King, Jr., to the area, was lured into a national forest and shot multiple times. That conviction was affirmed in April 2004.

In 2004, the Division announced that federal assistance would be provided to local officials conducting a renewed investigation into the 1955 murder of Emmett Till, a 14-year old African-American boy from Chicago. Till was brutally murdered while visiting relatives in Mississippi after he purportedly whistled at a white woman. Two defendants were acquitted in state court four weeks after the murder. Subsequent to the trial, the defendants admitted their guilt. Both men are now deceased. The investigation showed that there was no federal jurisdiction. Thus, on March 16, 2006, the Justice Department reported the results of its investigation to the district attorney for Greenville, Mississippi, for her consideration. A state grand jury in Mississippi declined to indict the case.

Moreover, after September 11, 2001, the Civil Rights Division implemented an initiative to combat "backlash" crimes involving violence and threats aimed at individuals perceived to be Arab, Muslim, Sikh, or South Asian. This initiative has led to numerous prosecutions involving physical assaults, some minor and some involving dangerous weapons, resulting in serious injuries, as well as threats made over the telephone, on the internet, through the mail, and in face-to-face interactions. We have also prosecuted cases involving shootings, bombings, and vandalism directed at homes, businesses, and places of worship. The Department has investigated more than 750 bias-motivated incidents since September 11, 2001. Our efforts have resulted in 32 federal convictions in “backlash” cases. The Department also assisted local law enforcement in bringing more than 160 such criminal prosecutions.]

Durbin 195 **Defense Secretary Robert Gates has argued that the detention facility at Guantanamo Bay should be closed. According to recent media reports, Secretary of State Condoleeza Rice agrees with Secretary Gates, but you have objected. Is it true that you have objected to closing the Guantanamo Bay detention facility?**

ANSWER: It would be inappropriate to discuss the internal deliberations of the Executive Branch. The President, however, has made the position of the Administration clear. As the President explained on September 6, 2006, the United States is continuing "to urge nations across the world to take back their nationals at Guantanamo who will not be prosecuted by our military commissions. America has no interest in being the world's jailer. But one of the reasons we have not been able to close Guantanamo is that many countries have refused to take back their nationals held at the facility. Other countries have not provided adequate assurances that their nationals will not be mistreated -- or that they will not return to the battlefield, as more than a dozen people released from Guantanamo already have. We will continue working to transfer individuals held at Guantanamo, and ask other countries to work with us in this process. And we will move toward the day when we can eventually close the detention facility at Guantanamo Bay."

Durbin 196 **If so, why do you believe that Guantanamo Bay should remain open?**

ANSWER: The Guantanamo Bay detention facility currently serves a vital national purpose, namely, preventing members of al Qaeda and other enemy combatants from attacking the United States and its allies. As explained above, the United States is working with other nations to transfer detainees from Guantanamo to the custody of other nations under conditions where they will not pose an unacceptable threat to the United States and where they will be treated humanely. This process presents a number of practical difficulties, and it will not occur overnight.

For those awaiting transfer to their home countries, for those whose transfer would pose an unacceptable risk to the security of the United States, and for those who will be tried by military commission, closing the Guantanamo Bay detention facility and incarcerating large numbers of alien enemy combatants on United States soil is not the solution. Many of these detainees are hardened terrorists. They include terrorist trainers, bomb makers, terrorist financiers, body guards for Osama bin Laden, potential suicide bombers—and the mastermind of the September 11th attacks. Bringing them closer to the American people would not make this country more secure. Holding these members of al Qaeda and affiliated organizations on United States soil also would present a variety of legal difficulties, including barriers to transferring them back to their home countries when circumstances warrant. In any event, there is simply no reason to immediately close the professional and secure detention facility that the United States operates at Guantanamo Bay. The unlawful enemy combatants detained at Guantanamo Bay have received extensive procedural protections, including access to our Nation's own domestic courts. Such measures are not required by domestic or international law, and they are unprecedented in the history of war. The Guantanamo Bay detention facility serves an important purpose of securing dangerous enemies of the United States and preventing them from retuning to the battlefield, all the while providing the detainees with generous procedural safeguards that exceed the requirements of the law of war.

Durbin 197 **In a December 2005 Washington Post op-ed, you said, "There have been no verified abuses in the four years of the [Patriot] act's existence." However, a recent investigation by the Justice Department's Inspector General concluded that the FBI was guilty of "serious misuses" of the National Security Letter authority. Will you now acknowledge that there have been verified abuses of the Patriot Act?**

ANSWER: The statutory authorization for the issuance of NSLs predated the USA PATRIOT Act. While the USA PATRIOT Act and its reauthorizing legislation made significant changes to the NSL authorities in order to better protect the national security, the problems identified by the Inspector General with respect to the FBI's use of NSL authorities relate to the failure to have sufficient internal controls, the failure to provide adequate training, and in some instances, the failure to follow FBI's own policies and the Attorney General's Guidelines. We note that the Inspector General did not find intentional or deliberate violations of the national security letter statutes, Attorney General Guidelines, or internal FBI policies with respect to the issuance of NSLs. However, the Attorney General recognizes that the deficiencies identified by the Inspector General are serious, and has ordered substantial and significant corrective actions to address those problems. Those measures are detailed in response to Question 2, above.

Durbin 198 **In April 2005, in testimony to this Committee, you stated that, "The government should not be obtaining the library records of law-abiding Americans, and I will do everything within my power to ensure that this will not happen on my watch." According to recent testimony before Senator Feingold's Constitution Subcommittee, the FBI issued an NSL for the records of every patron at a Connecticut library. Surely the vast majority of these library patrons are innocent American citizens. Will you now acknowledge that the Justice Department has sought the library records of law-abiding Americans?**

ANSWER: The question appears to relate to an NSL that was served on Library Connection, Inc. on May 19, 2005. The NSL at issue was not issued to a library and it did not seek the "library records" of "every patron at a Connecticut library." To the contrary, the NSL at issue was sent to a non-profit cooperative that provides technological services, such as Internet access, to certain libraries. The NSL at issue sought subscriber information, billing information, and access logs related to the use of a specific IP address on a specific date and for a specific 45-minute period of time. The NSL therefore, did not seek any information about books checked out by any individual, but sought information about the use of a specific IP address for a particular period of time. The NSL was issued as part of a counterterrorism investigation and was as narrowly tailored as possible, given the underlying facts.

Durbin 199 **How can you assure law-abiding Americans that the government will not obtain their library records on your watch when the law allows government agents to obtain these records without your approval and without any connection to a suspected terrorist?**

ANSWER: The NSL authorities permit the government to seek only certain records that are relevant to the conduct of authorized investigations of international terrorism or clandestine intelligence activities. The NSL statutes also permit judicial review of NSLs and applicable nondisclosure provisions. Moreover, as discussed above, in the response to Question 2, the Department of Justice is undertaking significant efforts to ensure that the legal requirements applicable to national security investigations are fully met.

Durbin 200 **In your written testimony you noted that the FBI has prohibited the use of exigent letters. However, there is a crucial area of disagreement between the FBI and the Inspector General. The Inspector General found that the use of exigent letters violates the law. FBI Director Mueller has said that "the FBI does not believe that the use of exigent letters is improper in itself." What is your view? Is the use of exigent letters illegal?**

ANSWER: The IG identified four problems with the so-called exigent letters as they were used by the FBI's Communications Analysis Unit (CAU): 1) although the letter asserted there were exigent circumstances, that was not always the case; 2) the CAU maintained no records supporting the claimed emergency; 3) although many of the letters asserted that a Federal grand jury subpoena had been requested, in fact, in most circumstances a grand jury subpoena had not been requested and the intent was to provide the carrier with an NSL; and 4) in many cases, although subsequent legal process had been promised to the carrier, no process (neither a grand jury subpoena nor an NSL) was delivered in a timely fashion.

It was not until the FBI received the IG's draft report that executive leadership became aware of the full scope of the problems with the use of the so-called exigent letters. Upon learning of this matter, the FBI worked quickly to develop guidance that would address the shortcomings identified in the IG's report, while ensuring that the policy did not undermine the Bureau's ability to receive information under 18 U.S.C. § 2702(c)(4), a critical provision allowing communications service providers to give the government information in certain emergency circumstances. That policy, which was issued on March 1, 2007, discontinues the use of "exigent letters" of the sort described in the IG's report, but affirms that the Bureau may continue to receive information pursuant to section 2702. The new form 2702 letter makes it very clear that: production of the records is at the carrier's discretion; no other legal process is promised; and, by policy, the emergency justifying this requirement must be documented. Accordingly, the FBI believes the new policy deals precisely with the problems identified by the IG and appropriately balances privacy concerns with investigative needs in case of dire, life-threatening emergencies.

Durbin 201 **Why was Cho Seung-Hui, who was found by a court to be mentally ill, permitted to buy guns and ammunition?**

ANSWER: The Gun Control Act makes it unlawful for any person who has been "adjudicated as a mental defective" or who has been "committed to a mental institution" to receive or possess firearms. ATF regulations published in 1997 (27 C.F.R. § 478.11) define those terms as follows:

> **Adjudicated as a mental defective.**
> (a) A determination by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease:
>
> (1) Is a danger to himself or to others; or
>
> (2) Lacks the mental capacity to contract or manage his own affairs.
>
> (b) The term shall include—
>
> (1) A finding of insanity by a court in a criminal case; and
>
> (2) Those persons found incompetent to stand trial or found not guilty by reason of lack of mental responsibility pursuant to articles 50a and 72b of the Uniform Code of Military Justice, 10 U.S.C. 850a, 876b.
>
> **Committed to a mental institution**. A formal commitment of a person to a mental institution by a court, board, commission, or other lawful authority. The term includes a commitment to a mental institution involuntarily. The term includes commitment for mental defectiveness or mental illness. It also includes commitments for other reasons, such as for drug use. The term does not include a person in a mental institution for observation or a voluntary admission to a mental institution.

Documents obtained by the Department from the Commonwealth of Virginia show that Cho Seung-Hui was found by a Virginia Special Justice to present an imminent danger to himself as a result of mental illness. The court also found that a less restrictive alternative to involuntary hospitalization and treatment was suitable in his case and, instead, ordered Cho to receive out-patient treatment. The court's determination made Cho prohibited under the "adjudicated as a mental defect" portion of the Federal firearm prohibitions.

The State of Virginia is one of the few states to develop a system by which information about orders by courts or other lawful authorities relating to persons with disqualifying mental illness are reported to state authorities that conduct background checks on prospective firearm purchasers. Virginia is also one of only a handful of states that makes significant amounts of information about the existence of such disqualifying state records available at the national level for purposes of firearms checks by the National Instant Criminal Background Check System (NICS) established under the Brady Act. However, the Virginia law requiring the sharing of this information for this purpose was limited to cases involving involuntary commitments. Thus, a case in which a person has been adjudicated to have a mental defect, as defined in the ATF regulations, but was not involuntarily committed, was not reportable to the NICS under the Virginia law. As a result of this legal limitation, the information about the court's order finding that Cho was a danger to himself because of mental illness was not available to the Virginia State Police when the NICS check was performed at the time Cho purchased the firearms he used in the shootings at Virginia Tech. However, Virginia Governor Kaine has recently issued an Executive Order requiring agencies to report any mental health adjudication making a determination of dangerousness and ordering involuntary treatment, whether or not the treatment is to be received in an inpatient or outpatient setting.

Durbin 202 **Please describe the steps that the Department of Justice was taking prior to April 16, 2007, to ensure that mentally ill persons were prevented from purchasing guns or ammunition.**

ANSWER: The effectiveness of the NICS in preventing gun transfers to prohibited persons depends directly on the availability to the system of automated information about which individuals are prohibited from receiving a firearm. The NICS is a computerized system that queries several national databases simultaneously in order to process a name-based background check. The databases checked include (1) the Interstate Identification Index (III or "Triple I"), a database of criminal history records, (2) the National Crime Information Center (NCIC), which includes files of protection orders and wanted persons relevant to gun background checks, and (3) the NICS Index, which includes records collected by the FBI relevant to gun background checks that are not in the III or NCIC.

The Brady Act requires Federal agencies to submit to the NICS upon the request of the Attorney General information on persons prohibited from receipt of a firearm under Federal or State law. The Brady Act does not require States to submit information on prohibited persons to the NICS. Thus, the States are under no obligation or requirement under the Brady Act or any other Federal law to submit information on disqualified persons to the NICS. To the extent that States submit information on prohibited persons to the NICS, they do so voluntarily. Similarly, States' submission to the FBI of criminal history and other information relied upon by NICS and generally used by law enforcement officials in the III and NCIC is not mandated by Federal law. States submit such information voluntarily in order to gain the mutual benefit of having ready access to criminal history and other information relevant to law enforcement activities on an individual arising in other States. Thus, all of the relevant State information available for NICS checks is provided voluntarily by the States to the FBI and entered into one of the three information systems checked by the NICS – the III, the NCIC, or the NICS Index.

The Brady Act established the NCHIP Federal funding program, administered by BJS, as the primary means to improve the automation and accessibility of State criminal records at the national level. NCHIP awards totaled just over $506 million between 1995 and 2006, and the States have spent approximately $30 million in matching funds since a matching requirement was imposed in 2000. In addition to providing funding to States through NCHIP, the FBI, in coordination with ATF, has been working to encourage the States to submit information on prohibited persons to the NICS. This outreach has included education on the Federal firearm prohibitions as well as technical support to facilitate the electronic submission of information. Despite the tremendous progress NCHIP and the Department's other efforts have made in creating a national system for automated access to criminal history records and other information used by law enforcement, significant shortcomings remain in the completeness of the records in the system and the availability of relevant records for NICS checks. The continuing need for record improvement as it relates to NICS checks was discussed in greater detail in a statement by Rachel L. Brand, Assistant Attorney General for Legal Policy, at a May 10, 2007 hearing before the Committee on Oversight and Government Reform, Subcommittee on Domestic Policy, United States House of Representatives. A copy of Ms. Brand's statement is enclosed for your information.

There are two files in the NICS Index into which Federal agencies and the States can enter information about individuals who have a disqualifying mental health history – the Mental Defective File and the Denied Person File. The Mental Defective File contains only the names and other biographical information, such as date of birth or social security numbers, of the individuals with a disqualifying mental health history. The Denied Persons File contains the names and biographical information of individuals who are prohibited from receiving a firearm, but whose record is not entered into another system or file checked by the NICS. The FBI allows States to enter names about disqualifying mental health histories in the Denied Persons file. This allows a State to share this information for purposes of NICS checks without necessarily identifying the person whose name is entered as having a mental health history. Neither file contains information about medical records or the details of the mental health history. If a prospective firearm purchaser is found to match a name in the file, the proposed gun transfer is denied. If the individual wishes to challenge the denial, the agency that provided the name then becomes involved in the appeal and the review of the underlying facts.

The FBI NICS Section, in coordination with ATF, has made continuing efforts to encourage States to provide more mental health records to NICS. Examples of outreach efforts seeking relevant mental health information or history include a letter sent by the NICS in June 2001 to the heads of all State central records repositories urging the States to make submissions to the NICS Index, including mental health records. Letters specifically urging the submission of relevant mental health records also were sent on May 14, 2004, to all State attorneys general, all State governors, and to all State departments of mental health. A similar letter was sent on March 7, 2007, to the Attorneys General of all States and territories that are not yet making significant, or any, submissions of records to the Mental Defective File. Additional outreach by the NICS Section includes, for example, presentations on the topic of disqualifying mental health records to annual NICS User Conferences that have in attendance representatives from most States, State clerk of court and court manager conferences, the National Association of State Mental Health Program Directors, judicial conferences, and sheriff association meetings. Several of the NICS Operation Reports published by the FBI since the NICS began have also included information on this topic.

In addition to these efforts by the FBI to encourage State submission of mental health records to the NICS, the Bureau of Justice Statistics has included in all National Criminal History Improvement Program (NCHIP) program announcements as an allowable cost funding for providing disqualifying mental health information for gun background checks. Every NCHIP program announcement since 2002 has identified the submission of such information to the NICS Index as a "program priority."

The FBI has obtained 138,766 disqualifying mental health records from the Veterans Administration and one such record from the Department of Defense, all of which are entered into the Mental Defective file. The following is a list of States that submit mental health information directly to the Mental Defective File. The totals represent the number of records submitted as of April 30, 2007.

Alabama	24	Missouri	401
Arkansas	51	North Carolina	330
Arizona	1	New Hampshire	1
California	27	New York	1
Colorado	9,269	Ohio	2
Florida	1,530	South Carolina	1
Iowa	47	Tennessee	15
Kentucky	1	Utah	12
Kansas	1,506	Virginia	81,233
Maryland	3	Washington	63
Michigan	73,382	Wyoming	3

States may, at their discretion, submit the names of persons disqualified on mental health grounds into the Denied Persons File instead of the Mental Defective File. When a State submits a name to the Denied Persons File, it does not indicate why the person is disqualified. Therefore, the NICS Section is unaware of how many of the records submitted to the Denied Persons File relate to mental health. A State may choose to submit information this way if, for example, it has privacy-related concerns about informing the Federal system which records relate to mental health. The States of Georgia and Washington have advised the NICS that they submit mental health information to the Denied Persons File, although they did not specify the number of mental health records entered. The total entries in the Denied Persons File by those States are:

Georgia	2,713
Washington	37,453

Some of the States that serve as NICS Points of Contact (i.e., States with designated agencies that perform all or some of the NICS checks for gun dealers in their state), including California, Oregon, Illinois, Nebraska, and Connecticut, check their own state mental health records when processing their gun eligibility background checks even though they have not submitted that information to the NICS Index. This ensures that a person disqualified on mental health grounds by a State agency in Illinois, for example, will not be allowed to purchase a gun from a dealer in that state. It does not, however, prevent such a person from purchasing a gun in another State to which he has moved because a check performed in that State will not have access to Illinois' records. Virginia began submitting its mental health information to the NICS Index in November 2003, and the hits on those records demonstrate the difference this can make. As of November 2006, the Virginia disqualifying mental health records had resulted in 438 denials, of which 60 of the attempts to purchase were in Virginia and 378 of the attempts were in other States.

Some States that do not currently submit mental health information to the NICS Index have State statutes that require a court order to allow the sharing of mental health information. In some States, a change in law would be required to allow the sharing of such information with the NICS. Other States simply do not have the funding to support the gathering and submission of mental health information.

Some States already are working with the NICS to make the necessary changes in State law to authorize the submission of mental health records to the NICS Index. For example, in February 2007, based on a recent State law change, the State of Florida began the process of collecting and submitting information on current involuntary commitments to the Mental Defective File. FBI representatives testified before the Connecticut legislature on the submission of mental health records to the NICS and provided State officials with information on the definition of the Federal mental health prohibitor. On November 17, 2006, the NICS Section signed a memorandum of understanding with the Connecticut Department of Public Safety authorizing the submission of mental health information to the NICS Index. The NICS and the California Department of Justice have been working through the technical requirements that will enable California to soon submit to the NICS Index information on the existence of disqualifying mental health records held by California on over 300,000 individuals. In addition, the FBI's NICS Index Liaison Office has worked with officials in the States of Arkansas, New York, and Texas, where State legislative proposals recently were introduced to allow the submission of information about disqualifying mental records to the NICS Index. In Arkansas, the legislation was passed on March 23, 2007, and will become effective on July 1, 2007.

Durbin 203 **Prosecution of those who commit gun crimes is important, but for those who are mentally ill and suicidal, like Cho, the threat of prosecution is not a deterrent from committing gun crimes. In light of the terrible tragedy at Virginia Tech, what, if any, additional steps, will the Department of Justice take to prevent mentally ill individuals from obtaining guns and using them to commit crimes?**

ANSWER: At the direction of the President, the Attorney General is participating in a joint initiative with the Secretaries of Health and Human Services and Education involving consultation with educators, mental health experts and state and local officials in communities across the nation to identify and recommend to the President appropriate responses to the Virginia Tech tragedy. A report with findings and recommendations by that interdepartmental initiative is expected to be provided to the President soon. In addition, since the Virginia Tech tragedy, ATF has taken steps to increase its outreach efforts to communicate the law and regulations regarding the Gun Control Act's prohibitions. For example, ATF has (1) sent a May 9, 2007, letter from the ATF Director to all State attorneys general, providing additional guidance on the Federal mental health prohibitor and offering to work with the States in reviewing State laws to make relevant mental health records available for NICS checks, (2) begun the process of amending the ATF form 4473 (the firearms transaction record) to provide additional information to purchasers about the definitions of "adjudicated mentally defective" and "committed to a mental institution," and (3) issued an Open Letter to all federal firearms dealers clarifying the meaning of the Federal prohibition relating to mental illness. ATF gave a presentation on the mental illness prohibitor to dozens of State and local law enforcement officials at the annual NICS User Conference held during the week of April 30, 2007. Finally, BJS is currently developing and expects to soon send to state NCHIP points of contact a request for information to identify States whose barriers to sharing this information are simply resource limitations, rather than issues of law or policy.

Durbin 204 **According to a recent Washington Post story, Timothy Flanigan assisted you with your preparations for this hearing. Mr. Flanigan was your deputy when you were White House Counsel and he was nominated to serve under you as Deputy Attorney General. The President withdrew Mr. Flanigan's nomination after concerns arose about his relationship with Jack Abramoff and his role in crafting the Administration's torture policies. In light of the Justice Department's ongoing Abramoff and detainee abuse investigations, why would you choose Mr. Flanigan to assist you with your preparations for this hearing?**

ANSWER: Mr. Flanigan did not assist the Attorney General in preparing for his April 19, 2007, appearance before the Committee. Mr. Flanigan did participate in sessions to help the Attorney General prepare for his March 26, 2007, NBC interview with Pete Williams.

Durbin 205 **How many times did you meet with Mr. Flanigan to prepare for this hearing?**

ANSWER: Mr. Flanigan did not assist the Attorney General in preparing for his April 19, 2007, hearing before the Committee.

Durbin 206 **Did you and Mr. Flanigan ever discuss Jack Abramoff or detainee abuses?**

ANSWER: The Attorney General did not discuss Jack Abramoff or detainee matters in either of his meetings with Mr. Flanigan to prepare for his March 26, 2007, NBC interview.

Durbin 207 **Who else assisted you with your preparations for this hearing?**

ANSWER: The Attorney General was assisted in preparing for the Committee's hearing on April 19, 2007, by the following Department employees: the U.S. Attorney for the Eastern District of Virginia; the Attorney General's Chief of Staff, Deputy Chief of Staff, and senior Counsels; Associate Deputy Attorneys General and Senior Counsels to the Deputy Attorney General; Assistant Attorneys General, Principal Deputy Assistant Attorneys General, and Deputy Assistant Attorneys General for the following Department components: Civil Rights Division, Office of Legislative Affairs, Office of Legal Counsel, Office of Legal Policy, Civil Division, National Security Division, Justice Management Division, and the Tax Division; the Director and Deputy Director for the Office of Public Affairs; and other senior officials from across the Department.

<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 April 19, 2007</u>
(Part 1)

<u>Answers #38 and 39 Attachment</u>

U.S. Department of Justice
Office of Attorney Recruitment and Management

Washington, D.C. 20530

MEMORANDUM

TO: Heads of Offices, Boards, Bureaus and Divisions

FROM: Louis DeFalaise, Director LD

SUBJECT: Changes to the Attorney General's Honors Program and Summer Law Intern Program

DATE: April 26, 2007

This memorandum outlines significant changes and highlights Component responsibilities for the 2007-2008 Attorney General's Honors Program (HP) and the Summer Law Intern Program (SLIP). At a meeting on December 5, 2006, Components were invited to submit recommendations to improve the selection process. Based on recommendations made by the participating Components and the review that followed, the Office of the Deputy Attorney General (ODAG) has authorized this office (OARM) to implement the changes outlined below to improve the selection process. Major changes include:

- Clarifying Program standards and providing process guidance for Component use during the initial review process;
- Modifying the AVUE system to allow reviewers to add comments indicating the component specific criteria for individual selections;
- Delegating the Departmental review process to OARM and the Components;
- Providing the reasons for nonconcurrence to the Components for the purpose of reconsideration; and,
- Exempting SLIP selections from Departmental review (subject to audit) and deferring the review to Funnel Offer candidates.

1. Component Level Review

Each Component will ensure that its internal selection process is focused on selecting highly qualified candidates with credentials that establish their eligibility to be considered as an Honors level hire by the Attorney General. Initial Component-level review must comply with the review standards guidance and include an internal quality review prior to forwarding the names of candidates for interviews to OARM.

Component Review Standards Guidance

Candidates selected for interviews should have outstanding academic credentials. Reviewers should pay close attention to academic performance (as reflected by class rank, where available), grades, academic accolades, graduation honors and other achievements. Components that select a candidate with less than an outstanding academic record must provide a justification for the selection based on the candidate's skills, background, experience or training in a relevant field of the Component's practice. Suitable skills and experience include: judicial clerkships (particularly at the Supreme Court or Federal Circuit Court level); law review/journal positions and articles; competitive moot court experience demonstrating superior oral advocacy ability; or special education, skills or background directly relevant to the Department's and/or Component's priorities and missions. This list is not exhaustive. The justification should articulate the basis for selecting the candidate for interview, explain how the candidate would positively contribute to the component's mission, and should demonstrate the lack of suitable candidates possessing both the identified qualifications and a strong academic background.

Components should, as a matter of practice, check a candidate's references and review any information about the candidate that is easily accessible to the general public. When considering web-posted information, Components should exercise due caution to ensure correct identification and attribution.

It is also very important that a candidate's overall submission reflect the level of writing skills, organization, and persuasiveness commensurate with selection as an Honors level hire by the Attorney General. The quality of the candidate's overall submission, particularly the structure and content of responses in the "short answer questions" are critical factors that should be considered in assessing the candidate's character, judgment and maturity.

Finally, each Component's internal review should ensure that the selection process identifies candidates that meet Department and Component needs and that selected candidates, when compared objectively to those who were not selected, are, in fact, the best candidates for these positions.

2. Department Level Review

An ad hoc working group composed of representatives from the major participating Components will conduct a Department-level review to ensure that selections comply with the Component Review Standards and that the number of interviews does not exceed budgetary limitations. Each formally participating major Component should designate one individual to participate in this process full-time for approximately two working days. The reviews will be conducted on-site at OARM. After the review is completed, OARM will provide affected Components with a list of candidates that have been identified as noncompliant, as well as the basis for that conclusion. If, after further review, the Component still wishes to proceed with an interview, it may return a candidate's name to OARM with further explanation. If OARM concurs, the interview can proceed; if not, the Component head can elect to request reconsideration of the candidate consistent with the practice in other career personnel matters.

3. <u>SLIP and Funnel Offer Reviews</u>

In order to reduce the burden on the Ad Hoc working group for Department level review and to ensure timely responses to the Components, OARM will instead randomly monitor SLIP selections for compliance with Component Review Standards and notify Components of any discrepancies along with the basis for that conclusion.

Funnel offers are subject to the same Component-level review standards and process that apply to the Honors Program. Components should forward proposed funnel offers to OARM for review and concurrence before issuing offers. OARM will provide the Component with the reason for the nonconcurrence of any proposed funnel offer. The nonconcurrence may be appealed, consistent with the practice in other career personnel matters.

The adoption of these changes, supported by the continued interest and dedication of Component personnel at all levels, should enhance one of the goals of the Attorney General's Honors Program – to continue to attract and hire highly qualified individuals from the broadest base possible.

Your personal involvement, interest in and support of the Attorney General's Honors Program is greatly appreciated. As with these and other past changes, OARM is interested in your comments and suggestions for improving the Honors Program and Summer Legal Intern Program and how we conduct them. Your further ideas and suggestions are always welcome. Thank you again.