U.S. Department of Justice

Office of Legislative Affairs

Washington, D.C. 20530

July 3, 2008

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 Michael B. Mukasey following his appearance before the Committee on January 30, 2008. The hearing concerned Department of Justice Oversight. This submission supplements our transmittals, dated June 27 and July 2, 2008, and provides responses to the remaining questions posed by the Committee.

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

Keith B. Nelson
Principal Deputy Assistant Attorney General

Enclosures

cc: The Honorable Arlen Specter
Ranking Minority Member

Questions for the Record Posed to
U.S. Attorney General Michael B. Mukasey
Senate Committee on the Judiciary
DOJ Oversight Hearing on January 30, 2008
Part Three

QUESTIONS FROM CHAIRMAN LEAHY

Leahy 5 In recent court filings, the Administration revealed that the White House overwrote email backup tapes for the first two years of this Administration, resulting in a failure to archive those emails, many of which are "missing" from that period and from subsequent years—by some counts millions. In addition, it was revealed in the course of our investigation into the firing of U.S. Attorneys, that dozens of White House officials made extensive use of non-governmental email accounts, such as Republican National Committee accounts, for government work. For example, former Deputy White House Political Director Scott Jennings testified that he emailed extensively using his RNC blackberry and email after he was denied a blackberry by the White House. The White House's shifting accounts of its emails and the widespread use of non-governmental emails raises many questions. Have you begun any review of the White House's policies on email and email retention?

ANSWER: No.

Leahy 6 Have you investigated whether in the implementation of those policies there has been noncompliance with laws requiring retention of White House records that belong to the American people?

ANSWER: We are not aware of any facts that would warrant a criminal investigation. The Presidential Records Act is not a criminal statute.

Leahy 7 Are you going to inquire as to whether there has been an intentional effort to avoid those laws and Congressional oversight?

ANSWER: We are aware of no facts that would suggest that such an inquiry would be warranted.

Leahy 18 We read in the newspaper the morning of your hearing that you were in line to receive a monitoring contract in connection with the diversion of a corporate criminal case. What was your involvement in the matter, how did you come to be considered, and what would the compensation have been?

ANSWER: The corporation initially recommended several candidates for the potential monitorship to the Department component handling the investigation. The Department component interviewed those candidates, but wanted to see a broader range of candidates. One additional candidate, whom the Department component interviewed on June 7, 2007, was Michael Mukasey, who at the time was a partner at Patterson, Belknap, Webb & Tyler and the retired Chief Judge of the United States District Court for the Southern District of New York. The corporation also proposed additional candidates, and the Department component continued to interview candidates through October 2007. On September 17, 2007, Judge Mukasey was nominated to be Attorney General. As a result, he was no longer considered a candidate for this monitor position. Judge Mukasey had no discussions regarding fees or pricing during his interview process.

Leahy 26 The Judiciary Committee's hearing last month also looked into Inspector General Glenn Fine's highly critical review of the Department's implementation of the Coverdell grant program for forensic improvements. The Justice for All Act required that states receiving money under the Coverdell program certify that they have an independent entity to investigate allegations of serious negligence or misconduct. Inspector General Fine's report found many problems with the Department's implementation of this provision. Perhaps most astonishing, he found that the Department has taken the legal position that, while agencies must certify they have an independent entity where they can refer allegations of misconduct or serious negligence by forensic labs, the agencies have no obligation to actually refer such allegations for investigation. So they need to have a process, but they do not need to use it. This is clearly contrary the bi-partisan intent of Congress in the Justice for All Act. Why would the Justice Department would take a legalistic position that is so clearly contrary to the intent of the Justice for All Act?

ANSWER: The Department of Justice agrees that allegations of serious negligence or misconduct in forensic programs should be appropriately investigated. In its recent FY 2008 solicitation for the Coverdell program, the National Institute of Justice strongly encouraged the reporting of allegations of serious negligence or misconduct to the appropriate government entity. The Department is currently working collaboratively with the Office of the Inspector General to further clarify, in the best way possible, the grantees' responsibilities when they receive allegations of serious negligence or misconduct.

Leahy 29 As a former judge, do you not share my belief drawn from my days as a prosecutor that it is absolutely vital and beneficial to both sides for every defendant, particularly in cases where their lives could be on the line, to receive adequate representation?

ANSWER: Effective assistance of counsel is a fundamental right of criminal defendants, guaranteed by the Constitution. The Attorney General shares your conviction that all defendants must be accorded this right.

Leahy 35 Many letters submitted by me and others on the Committee to you and your predecessor have gone answered for many months. Among these is a letter I sent last June to Attorney General Gonzales regarding what appears to have been false testimony to the Committee by Brett Kavanaugh, then a nominee and now a sitting judge on the powerful D.C. Circuit, that he was not aware of the Administration's legal justifications for torture until it became public in 2004. I referred the matter to the Department for investigation and any prosecutorial action the Department determined to be warranted. When can I expect an answer to my letter and an update from the Department regarding the Kavanaugh testimony?

ANSWER: On June 27, 2007, you wrote to the Attorney General concerning alleged false statements by Brett M. Kavanaugh during his judicial confirmation hearing on May 9, 2006, and in response to follow-up questions from Senators.

The Department of Justice takes allegations regarding false statements to Congress very seriously. All such matters are handled fairly and appropriately by career prosecutors in the United States Attorneys' Offices and the Department's Criminal Division. The allegations set forth in your June, 27, 2007, letter were promptly referred to the Public Integrity Section for review. Following careful review by career prosecutors in the Public Integrity Section, a determination was made that there was insufficient basis to initiate a criminal investigation.

QUESTIONS FROM SENATOR SPECTER

Specter 45 In deciding that the McNulty Memo "strikes the appropriate balance," did you talk to Norman Veasey, the former Chief Judge of the Delaware Supreme Court, who reported on a number of abuses under the McNulty Memo?

ANSWER: The Department has carefully reviewed Judge Veasey's memorandum dated September 13, 2007, in which he recounts allegations about government demands for attorney-client waiver. Because every one of the allegations is anonymous -- identifying neither the parties, defense attorneys, or prosecutors involved -- it is difficult to evaluate the claims set forth in the memorandum. Nonetheless, the Department, as part of its examination into the attorney-client waiver issue, contacted Judge Veasey in May 2008 in an effort to assess the purported facts set forth in his report. Judge Veasey explained that he had acted only as a conduit for others at the request of the Association of Corporate Counsel, and doubted that he could be of much value. Nevertheless, Judge Veasey agreed to contact the complainants who had alleged misconduct by prosecutors after the McNulty Memo was issued, and ask them if they would be willing to speak with the Department. He said he would let the Department know what he heard. Judge Veasey has not contacted the Department since that conversation.

Specter 46 Have you done anything to assess the facts reported by Justice Veasey? For example, have you done anything to determine if a federal prosecutor, in fact, told company counsel, "I don't give a flying ---" about the policy?

ANSWER: Please see the response to Question 45.

Specter 51 The Solicitor General's amicus brief in District of Columbia v. Heller, 478 F.3d 370 (2007), the D.C. gun ban case, advocates in favor of a lower level of scrutiny of the 2nd amendment – intermediate scrutiny – would have the Court review the burden on 2nd Amendment rights against "the strength of the government's interest in enforcement." The Solicitor General acknowledged in his brief that, under intermediate scrutiny, "important regulatory interests are typically sufficient to justify reasonable restrictions."
In deciding to advocate for intermediate scrutiny, what weight did the Department place on its own initiatives, such as Project Safe Neighborhoods, to prosecute violations of 18 U.S.C. 922(g) and related offenses?

ANSWER: In District of Columbia v. Heller, the Supreme Court held, consistent with the government's brief in the case, that the Second Amendment's "right * * * to keep and bear Arms" protects an individual right to possess and use a firearm for lawful purposes, such as self-defense within the home, that is unconnected to service in the militia. The Court further held that the District of Columbia's complete ban on the possession of functional firearms in the home "would fail constitutional muster" under any of the

standards of scrutiny generally applied to enumerated constitutional rights. The Court did not establish an explicit standard for reviewing Second Amendment claims.

Consistent with the government's brief in the case, the Court also made clear in its opinion that "the right secured by the Second Amendment is not unlimited" and does not confer a "right to keep and carry any weapon whatsoever in any manner and for whatever purpose." In particular, the Court stated that "nothing in [its] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." The Department is studying the Court's decision to determine what standard is appropriate in defending Federal firearms laws. At a minimum, the Court's decision indicates (by rejecting rational-basis review) that a form of heightened scrutiny is appropriate. In advocating for a particular standard of review, the Department considers its customary responsibility to defend the constitutionality of Federal laws but generally does not focus on any particular policy initiative.

Specter 52 Do you believe that a complete ban on handgun possession in a non-prohibited person's home can be viewed as reasonable restriction? If so, what regulatory interests, if any, would be sufficient to justify such a reasonable restriction?

ANSWER: No. In the Heller case, the Supreme Court held that a complete ban on handgun possession in a non-prohibited person's home for a lawful purpose such as self-defense violates the Second Amendment.

Specter 53 Does the Department regard 2nd Amendment rights as inferior to other Constitutional rights and classifications that are afforded protection greater than intermediate scrutiny? If so, please cite the superior rights and explain the rationale for greater protection.

ANSWER: No. As explained in the government's brief, and as the Supreme Court held in Heller, the Second Amendment protects an individual's right to possess firearms, including for private purposes unrelated to militia operations, such as self-defense of the home. In addition, as explained in the government's brief, and as the Supreme Court held in Heller, that individual right-- like the rights protected by the surrounding provisions of the Bill of Rights -- is "not unlimited" and does not confer a "right to keep and carry any weapon whatsoever in any manner and for whatever purpose." For example, consistent with the government's brief, the Court stated in its decision that "nothing in [its] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill."

Specter 54 On January 25, 2008, you reportedly told the press that you did not see any signs of turmoil when you took over the reigns at the Department of Justice. You took over those reigns from Peter Keisler, who served as the Acting Attorney General from the date of your nomination was announced until you were confirmed (September-November 2007). In your work with Peter Keisler in transitioning into the role of Attorney General, what was your impression of Peter Keisler's legal and management abilities?

ANSWER: Although Attorney General Mukasey overlapped only briefly with Mr. Peter Keisler, Attorney General Mukasey quickly recognized that Mr. Keisler's reputation as a lawyer of extraordinary intellect and judgment and, equally important, as an uncommonly honorable and decent person, was well deserved. The Attorney General believes that the Department was superbly served by Mr. Keisler's leadership and integrity during his tenure as Acting Attorney General, and also during his tenure as Assistant Attorney General for the Civil Division, among other positions.

Specter 55 Do you believe Peter Keisler deserves credit for the lack of turmoil you cited in your January 25 comments?

ANSWER: Yes.

Specter 56 On October 13, 2006, it was reported in the media that the Justice Department was investigating Rep. Curt Weldon. Three days later, FBI agents raided his daughter's home as well as five other locations in the Philadelphia area and in Jacksonville, Florida. This investigation presumably cost him his re-election. The DOJ /FBI has investigated this leak, and in the FBI responses to our questions for the record (dated 01/25/08) the FBI stated that the "investigators were unable to identify a suspect or substantially narrow the pool of suspects. Accordingly, the investigation was closed on October 1, 2007." Considering the fact that I personally asked about this investigation at a prior hearing on 12/06/06, why didn't the DOJ or FBI inform me of this closure earlier, and why was it buried in a huge document of responses to our questions for the record?

ANSWER: We respect the Senator's interest in this matter. However, we are not always in a position to provide information about particular investigations for reasons of individual privacy and law enforcement.

Specter 57 Is this demonstrative of the Department's prior noted problems giving notice of the end of an investigation to the targets of your criminal investigations?

ANSWER: The Department has an existing policy regarding advising former targets and subjects of investigations that the investigation has closed, giving the U.S. Attorney the discretion to notify an individual who has been the target of a grand jury investigation

that he or she is no longer considered a target by the U.S. Attorney's Office. That established policy, which is set forth in the U.S. Attorney's Manual Section 9-11.155, lists the circumstances under which notification may or may not be appropriate.

Specter 60 This administration has been criticized by some organizations for its readiness to invoke the States Secrets privilege in cases such as El-Masri v. United States and other cases involving the practice of rendition operations. Can you explain the criteria used to determine whether information that might come out in a case that poses a threat to national security and thus warrants the invocation of the privilege?

ANSWER: The determination of whether the state secrets privilege should be invoked to prevent the disclosure of information that poses a threat to national security is a judgment made by the head of an agency based upon the expertise of the Executive Branch in the area of national security, military affairs, or foreign intelligence. As the courts have recognized, "[t]he executive branch's expertise in predicting the potential consequences of intelligence disclosures is particularly important given the sophisticated nature of modern intelligence analysis, in which '[t]he significance of one item of information may frequently depend upon knowledge of many other items of information,'" and "'[w]hat may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context.'" *El-Masri v. United States*, 479 F.3d 296, 305 (4th Cir. 2007) (quoting *United States v. Marchetti*, 466 F.2d 1309, 1318 (4th Cir. 1972)).

Out of respect for the court's role, the Executive Branch routinely provides federal courts with both unclassified and classified declarations that justify, often in considerable detail, the basis for an assertion of the state secrets privilege. By way of example, the Court of Appeals for the Ninth Circuit recently noted that the Government's assertion of the state secrets privilege was "exceptionally well documented" and that the court had "spent considerable time examining the government's declarations (both those publicly filed and filed under seal)." *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1204 (9th Cir. 2007). *See also El-Masri*, 479 F.3d at 312 (noting the "extensive information" in United States' classified filing that set forth "in detail the nature of the information that the Executive seeks to protect and explains why its disclosure would be detrimental to national security").

Specter 62 Sen. Kennedy and I have introduced some legislation, S. 2533, the State Secrets Privilege Act, which seeks to codify the case law that has developed over the years regarding the state secrets privilege. This has the advantage of standardizing the privilege throughout the federal court system. Do you recognize the authority of Congress to legislate in this area?

ANSWER: We believe that S.2533 goes far beyond codifying the case law regarding the state secrets privilege, and instead would alter the constitutionally based privilege recognized by the Supreme Court. Congress has general authority to legislate with respect to the jurisdiction and procedures in the federal courts, but we believe a serious question exists whether it is constitutionally permissible for Congress to impose limitations on the state secrets privilege, which is rooted in the Constitution. *See Dickerson v. United Sta*tes, 530 U.S. 428, 437-38, (2000) (Congress may not alter *Miranda* requirements, which are "constitutionally based"); *see also Salisbury v. United States*, 690 F.2d 966, 975 & n.4 (D.C. Cir. 1982) (by enacting the Federal Tort Claims Act, "Congress did not, and perhaps could not for constitutional reasons, abrogate the state secrets privilege of the executive") (citing *Black v. Sheraton Corp. of Am.*, 564 F.2d 531, 541 (D.C. Cir. 1977)). The Department has serious constitutional concerns with respect to legislation that would purport to alter the Executive's well recognized constitutional authority and responsibility to protect national security information.

As the Supreme Court has long recognized, the state secrets privilege is a privilege with a firm foundation in the Constitution. In *United States v. Nixon*, 418 U.S. 683 (1974), the Supreme Court explained that, to the extent a claim of privilege "relates to the effective discharge of the President's powers, it is constitutionally based." *Id.* at 711. The Court went on to recognize expressly that a "claim of privilege on the ground that [information constitutes] military or diplomatic secrets" necessarily involves "areas of Art. II duties" assigned to the President. *Id.* at 710; *see Department of Navy v. Egan*, 484 U.S. 518, 527 (1988) (President's "authority to classify and control access to information bearing on national security . . . flows primarily from" his constitutional authority under Article II as Commander in Chief "and exists quite apart from any explicit congressional grant"). The lower courts have reached the same conclusion. *See, e.g., El-Masri v. United States*, 479 F.3d 296, 303-04 (4th Cir. 2007) (holding that state secrets privilege "has a firm foundation in the Constitution"). As the Fourth Circuit stated in *El-Masri*, the Supreme Court in *United States v. Reynolds*, 345 U.S. 1 (1953), "itself suggested that the state secrets doctrine allowed the Court to avoid the constitutional conflict that might have arisen had the judiciary demanded that the Executive disclose highly sensitive military secrets." 479 F.3d at 303.

Specter 64 The Senate bill we introduced is S. 2533. Upon reviewing it, will you tell me whether DOJ supports the legislation or if Department suggests any modifications to the bill?

ANSWER: The Department of Justice strongly opposes a Manager's Amendment to S.2533, as adopted by the Committee on April 24, 2008. In a letter, dated March 31, 2008, to Chairman Leahy, we expressed the Department's view that the Manager's Amendment to S. 2533 "would needlessly and improperly interfere with the appropriate constitutional role of both the Judicial and Executive Branches in state secrets cases; would alter decades of settled case law; and would likely result in the public disclosure of national security information that would not be disclosed under current doctrine."

Specter 65 Maher Arar is a Canadian software engineer born in Syria in 1970. On September 26, 2002, during a stopover in New York, Arar was detained by the United States Immigration and Naturalization Service and, despite carrying a Canadian passport, was deported to Syria. Arar was then held in solitary confinement in a Syrian prison and allegedly tortured until his eventual release and return to Canada in October 2003. Currently, at the request of Chairman Leahy and I, the DOJ Office of Professional Responsibility is reviewing this matter. What is the status of this investigation?

ANSWER: The Attorney General has been informed by OPR that its investigation into the Maher Arar matter is continuing, and he will be advised of the results of that Office's investigation when it is completed.

Specter 66 If it is concluded, what were the results of this investigation?

ANSWER: Please see the response to Question 65.

Specter 67 Do you believe that Congress has the constitutional authority to create National Security Courts to try cases against accused terrorists?

ANSWER: Yes.

Specter 79 According to the Executive Office of Immigration Review Statistical Yearbook, in 2006, approximately 100,000 or 60% of aliens who were not detained pending their hearing, failed to appear before an immigration judge as ordered. This number is nearly double what it was in '02. By comparison, the failure to appear rates for released federal criminal defendants is consistently less than 3%. What is the Department doing to improve upon the statistic cited in the 2006 report regarding failure to appear?

ANSWER: It is important to understand the distinction between aliens who have never been detained or were released before commencement of removal proceedings, and those who were detained at the commencement of the proceedings but then were released pending a hearing. The figures cited in this question relate to the first category, which the Executive Office for Immigration Review (EOIR) Statistical Yearbook defines as "non-detained aliens." For this category of cases, virtually all decisions to release the alien prior to commencement of removal proceedings are made by DHS. EOIR generally has no contact with non-detained aliens unless and until they are placed in removal proceedings and scheduled for a master calendar hearing. At the conclusion of a master calendar hearing, as well as other hearings, immigration judges provide all aliens with written, and usually oral, warnings regarding the consequences of failing to appear.

In FY 2007, the failure to appear rate for non-detained aliens dropped substantially, with 34,507 or 35% of such aliens failing to appear for a hearing before an immigration judge. This substantial decline in the failure to appear rate of non-detained aliens may largely be due to the "catch and return" policy implemented by DHS beginning in August 2006, which resulted in larger numbers of aliens being placed in detention. We also note that DHS in appropriate cases has been making greater use of alternative procedures instead of placing aliens into regular removal proceedings, including expedited removal procedures for many aliens apprehended along the border and reinstatement of removal orders against aliens who had previously been ordered removed. The comparable figures for FY 2002 indicate that 28,043 or 38% of non-detained aliens failed to appear for their removal hearings.

Among aliens who were detained at the commencement of the proceedings but then were released pending their hearings, 7,407 failed to appear in FY 2007, for a failure to appear rate of 33%. These statistics are lower than in 2002, when 15,794 or 49% of aliens who were released after the commencement of removal proceedings failed to appear for their immigration judge hearing. With the exception of aliens arriving at the ports of entry, and many criminal aliens, most aliens who are detained and issued a Notice to Appear for a removal proceeding can seek a bond hearing before an immigration judge. In determining whether to order the alien's release on bond, the immigration judge takes into account, in addition to national security and danger to the community, the likelihood that the alien will appear at a hearing if released on bond.

Also, EOIR administers legal orientation programs (LOP) for detained aliens in removal proceedings, currently located at twelve immigration court sites for detained aliens, six of which are along or near the Southwest Border. Through the LOP, representatives from local nonprofit organizations provide comprehensive presentations about immigration court procedures and other basic legal information to groups of detained aliens. In addition to assisting aliens in identifying potential forms of relief from removal (including voluntary departure), the LOP emphasizes the importance of attending all immigration judge hearings after an alien has been released, and the negative consequences for failing to appear. Studies based on the first six LOP sites, which included three along the Southwest Border region, demonstrate that the LOP has a positive effect in reducing failures to appear for aliens released on bond. Expansion and improvement of EOIR-sponsored pro bono programs such as the LOP is a priority for the Department, particularly because of the positive impact such programs have on the effectiveness and efficiency of the immigration hearing process.

QUESTIONS FROM SENATOR KENNEDY

Kennedy 90 Do you agree or disagree with the memo's claim that for purposes of the Torture Act, physical suffering can never be "severe" unless it is of "extended duration or persistence"?

ANSWER: The Bybee memo did not suggest that physical suffering could not be "severe" unless it is of "extended duration or persistence." Rather, it concluded that "severe physical suffering" was not a separate concept from "severe pain" under the anti-torture statute. The Attorney General disagrees with that conclusion and, more generally, he disagrees with the unduly narrow definition of "severe physical pain or suffering" adopted by the Bybee memo.

Kennedy 103 I was also troubled by your exchange with Senator Whitehouse at the oversight hearing. In that exchange and in other remarks, you suggested that you are strongly disinclined to open any kind of investigation into possible acts of torture by government officials or the role of the Department in authorizing such acts. Coupled with your statements about how it would be irresponsible to give an opinion on the legality of interrogation techniques in the absence of concrete facts and circumstances, you essentially refused to consider torture either backward or forward in time. You won't investigate torture that may have happened in the past, and you won't set clear rules to prohibit torture from happening in the future. Have you taken any steps to determine whether an investigation into possible past acts of torture, and the role of the Justice Department in authorizing such acts, would be appropriate? If so, please specify clearly what steps you have taken.

ANSWER: The Department has conducted investigations and, where appropriate, brought prosecutions in response to allegations of unlawful treatment of prisoners in United States custody. We have determined, however, that such an investigation would not be appropriate with respect to the use of waterboarding by the CIA. Before the CIA used this technique, the CIA sought advice from the Department of Justice, and the Department informed the CIA that its use would be lawful under the circumstances and within the limits and safeguards of the program. It is vital that our intelligence professionals be able to rely on the advice of the Department about what the law permits and what it does not. They will be unable to perform their duties to protect the country if they fear that the advice provided by one Attorney General will survive only as long as the tenure of the person who gave it, and that a subsequent Attorney General could disregard their prior reliance in deciding whether they acted within the law. Accordingly, no one who relied in good faith on the Department's past advice should be subject to criminal investigation for actions taken in reliance on that advice.

Kennedy 107 I was also troubled by comments you made in your letter and at the hearing suggesting that it would be unwise for you to rule out specific interrogation techniques because the enemy might gain a strategic advantage from this. Exactly what advantage does the enemy gain if we publicly rule out specific torture techniques?

ANSWER: The Central Intelligence Agency's interrogation program was developed because members of al Qaeda train their members to resist traditional interrogation practices, including those disclosed in the Army Field Manual on Interrogations. While the CIA's alternative procedures are safe and lawful, they differ in important ways from those publicly authorized by other Government agencies. The continued effectiveness of the CIA program hinges in substantial part on its secrecy and the terrorists' inability to train against it and to know what interrogation practices are part of or not part of the program.

Kennedy 132 Several months ago, the Inspector General and the Office of Professional Responsibility began an investigation of the U.S. Attorney firings and the improper influence of partisan politics on personnel decisions affecting career civil servants. The politicization of personnel matters has undermined the Department's work and reputation – particularly in civil rights. The results of this joint investigation could greatly assist the Committee as it reviews several pending nominations to the Department, including the nomination for Assistant Attorney General for Civil Rights. Have you been given any indication of when the investigation will be completed?

ANSWER: As the Committee is aware, the Office of Professional Responsibility and the Office of the Inspector General recently completed a report pertaining to the improper consideration of political or ideological affiliations in the hiring of career attorneys for the Department's Honors Program and Summer Law Intern Program. The OIG and OPR have indicated to the Attorney General that they are working expeditiously to complete the remaining aspects of this joint review.

Kennedy 133 Has the Inspector General or Office of Professional Responsibility shared preliminary results of the investigation with your office?

ANSWER: Please see the response to question 132.

Kennedy 136 More than 12 million undocumented immigrants continue to live in the shadows, fearful of the present and uncertain about the future. The Senate's failure to pass comprehensive immigration reform last year will have tragic consequences for some. Many of the people we have been unable to help may find themselves in immigration court, struggling to comprehend the arcane and complex immigration laws. I'm confident we can resolve our immigration crisis, but it will

take the strong commitment of Congress and the Administration to make this happen. As Attorney General, you can do much to set the tone for the treatment of undocumented immigrants. The Department of Homeland Security has enforcement authority, but the Department of Justice ultimately determines the legal status of those who appear before the Immigration Judges, who submit appeals to the Board of Immigration Appeals, and whose cases may be certified for your review. Your decisions, and the decisions made by your assistants, can have a life or death impact on immigrants. Your agenda in pursuing certain legal cases can also have a dramatic effect on the immigration debate. Strong enforcement against discrimination based on nationality or ethnicity and strong action against unconstitutional state and local laws attempting to regulate immigration should be a high priority. If not, the immigration debate will be filled with more rancor and hate.I'd like to know your thoughts about immigration reform. Do you believe an enforcement-only bill is a viable strategy for gaining control of our borders and worksites? What alternatives are available for dealing with the large undocumented population already living and working in the United States? Will you make a commitment to protect immigrants—both those with legal status in the United States and those who are undocumented—from discrimination and hate crimes?

ANSWER: Please see our following responses to Questions 148 and 150. The Department remains deeply committed to the vigorous enforcement of our nation's civil rights laws, including on behalf of immigrants. In recent years, the Department has prosecuted a number of high-profile hate crime cases.

Kennedy 143 It has been reported that DHS received 1.4 million naturalization applications between October 2006 and September 2007. Over the past year the naturalization backlog wait has increased from 6 months to 18 months. This is troubling. A significant number of potential U.S. citizens filed their naturalization applications hoping to vote in the upcoming November election. Thousands of applicants are left in limbo. Basic fairness dictates that the Administration should do everything possible to ensure that these naturalization applications are processed in time to allow these individuals the chance to participate in our democracy. Although this issue falls under the general jurisdiction of the Department of Homeland Security, it's an important voting rights issue, and the Department serves as the voice of civil rights within the Administration. In my view, this is an urgent matter, as failure to act timely will effectively result in vote suppression. What steps has the Department of Justice taken to alert Homeland Security to the urgency of addressing this backlog in citizenship applications? Will you reach out to Homeland Security and others in the Administration to impress on them the urgency of this matter?

ANSWER: The Department's Office of Immigration Litigation defends naturalization delay cases in the federal courts and is very familiar with the backlog issue. Our litigators have advised the Department of Homeland Security that it is important to

resolve the backlog as soon as possible without compromising national security, and they continue to meet regularly with officials at DHS and other agencies to ensure that the government is moving as expeditiously as reasonably possible to process these applications.

Kennedy 144 Under the current sentencing structure, the ratio for powder and crack cocaine is 100:1. One gram of crack cocaine triggers the same penalty as 100 grams of powder cocaine. In addition, possession of 5 grams of crack cocaine triggers a 5 year mandatory minimum penalty. This is the only drug that has a mandatory prison sentence for a first-time possession offense. The crack powder laws were originally designed to punish those at the highest levels of the illegal drug trade, such as traffickers and kingpins. However, the amount of the drug that triggers the harsh sentences is not associated with high-level drug dealing. A report in 2005 by the Sentencing Commission found that only 15% of cocaine traffickers are high-level dealers. The overwhelming majority of defendants are low-level participants, such as street dealers, lookouts, or couriers. These laws also have a disparate impact on African Americans. In 2005, 82% of crack cocaine defendants were African Americans, even though they represent only a third of those who actually use the drug. Last year, the Sentencing Commission amended the federal sentencing guidelines to modestly reduce penalties for crack cocaine offenses by two levels. That amendment was enacted on November 1st. On December 13th the Commission made the reduction retroactive, effective March 3rd of this year, permitting prisoners already sentenced to seek the benefit of the reduction. In comments you made to the U.S. Conference of Mayors on January 24th, you stated that the decision to make the sentence reduction retroactive will result in a "sudden influx of criminals from federal prison into communities [that] could lead to a surge in new victims." I was surprised and disappointed by your comments. You told the mayors that "many of [the crack cocaine prisoners] are violent gang members." But according to the United States Sentencing Commission, the vast majority of crack cocaine offenders were not involved in violence. In 2005, fully 89 percent of all crack offenses did not involve violence and of the remaining cases, 4.9 percent involved threats but not acts of violence. You also told the mayors that there would be a "sudden influx of criminals" into their communities. But, guideline retroactivity is hardly a get out of jail free card. A prisoner must petition a federal court for the sentence reduction and convince the court that they deserve early release. The court must determine whether and to what extent a prisoner will benefit from the amended guideline. This process will take time and prisoners will not be released without a court's careful consideration of the merits, including consideration of the government's position. You further characterized these prisoners as dangerous to their communities. In fact the rate of recidivism of drug offenders is likely to be lower than estimated by the Department. According to a 2004 report from the Sentencing Commission, for Criminal History Categories II and higher, drug offenders actually have the lowest or second lowest rate of recidivism of all offenders. More important is that across all criminal history categories and for all offenders, the largest proportion of "recidivating events" that

count toward these rates of recidivism are supervised release revocations, which can include revocations based on anything from failing to file a monthly report to failing to file a change of address. In fact, drug trafficking accounts for only a small fraction of recidivating events for all offenders. Moreover, the crack cocaine amendment will not apply to those convicted under the career offender or armed career criminal act. In addition, your statement does not address the responsibility to ensure public safety. Courts considering sentence reduction motions must take public safety into account when weighing their decision. Any prisoners eligible to seek a reduction must first convince a court that they deserve one. If a U.S. Attorney believes prisoners will pose a risk to the community if released early or feels that they are not adequately prepared for reentry, the U.S. Attorney is entitled to explain to the court why the prisoner does not deserve the reduction. The court can deny a sentence reduction on this basis. Furthermore, once released, a former inmate will be closely supervised during the reentry period. On what evidence did you base your assertion to the Mayors that many of the crack defendants who will be released are "violent gang members " and violent crime will spike in our nations' cities as these defendants are released?

ANSWER: Our assertion that many of the crack defendants who became eligible for release under the amendment are violent gang members and crime will increase is based on close analysis of the pool of offenders, which showed the majority to have significant criminal histories and close to a third to have weapon enhancement or other aggravating factors associated with the offense of arrest, which in turn increases recidivism rates. Specifically, a close look at the pool of offenders eligible for early release is illustrative of our assertion. The data from the U.S. Sentencing Commission shows that nearly 80 percent of the offenders who are eligible for early release have a criminal history category of II or higher. According to the 2004 report from the Sentencing Commission you cite, 20% to 48% of Drug Traffickers in Criminal History Category II or higher recidivated within the first two years of release. We believe the recidivism rates will be even higher for the crack offenders eligible for release because that study included only offenders sentenced in fiscal year 1992 who had both been released by 1999 and had been released from prison for two whole years. As such it excluded 15% of the offenders sentenced that same year, specifically those who were serving sentences longer than seven years and are therefore according to studies more likely to recidivate. By contrast, the crack offenders estimated by the Commission to be eligible for reductions and or release have an average original sentence of 152 months (more than 12 years), and therefore have a much higher risk of recidivating than the narrow sample included in the 2004 study.

In addition, many of the offenders eligible for release received an enhanced sentence because of a weapon or received a higher sentence because of their aggravating role in the offense. This is characteristic of crack offenders, as there is far greater violence at the local level associated with the distribution of crack as compared to powder. For example, according to Commission studies crack cocaine offenders had access to, had possession of, or used a weapon in 32.4 percent of cases in 2005, as opposed to powder cocaine offenders who had access to, had possession of, or used a

weapon in 15.7 percent of cases. Furthermore, in addition to the Sentencing Commission's data regarding criminal history, it has been our experience in the field that gang membership or affiliation has been present in a significant number of cases. This connection to gangs is also reflected in a significant number of the presentence reports and case files.

Moreover, the dangers that could result from the early release of these offenders are amplified by the fact that retroactive application of the crack amendment means that many prisoners being will be unable to participate in specific pre-release programs provided by the Bureau of Prisons (BOP). Your sponsorship of the Second Chance Act, which the President was proud to sign into law earlier this spring, suggests that you recognize the value of these programs. In any event, preparation to reenter society intensifies as the inmate gets closer to release. As part of this process, BOP provides a specific release preparation program and works with inmates to prepare a variety of documents that are needed upon release, such as a resume, training certificates, education transcripts, a driver's license, and a social security card. BOP also helps the inmate identify a job and a place to live. Finally, many inmates receive specific pre-release services afforded through placement in residential re-entry centers at the end of their sentences. With no adjustments to BOP's prisoner re-entry processes, any reductions in sentence such as those contemplated by the retroactive application of the guideline may reduce or eliminate inmates' participation in the Bureau's re-entry programs. Without that, the offender's chance of re-offending will likely increase.

Kennedy 146 We know that 95% of offenders will eventually be released from incarceration, whether through early release or at the expiration of their term. What are you doing to ensure that the Bureau of Prison is providing adequate programming and support for successful reentry and reintegration of all former drug offenders?

ANSWER: The vast majority of the Bureau of Prisons' (BOP's) inmate programs and services are geared toward helping offenders prepare for their eventual reentry into the community. The BOP provides many self-improvement programs, including work in prison industries and other institution jobs, vocational training, education, substance abuse treatment, religious observance, parenting, anger management, counseling, and other programs that impart essential life skills. The BOP also provides other structured activities designed to teach inmates productive ways to use their time. The Department believes that Federal inmates should be held responsible for the behavior that led to their incarceration and for participating in self-improvement programs that will provide them with the skills they need to be productive, law-abiding citizens upon release. As will become apparent from the description of inmate programs that follows, preparation for reentry begins in the first days of an inmate's incarceration.

Inmate Work Programs

The BOP provides work programs that teach inmates occupational skills and instill sound and lasting work habits and a work ethic in offenders. All sentenced inmates in Federal correctional institutions are required to work (with the exception of those who for security, educational, or medical reasons are unable to do so). Most inmates are assigned to an institution job such as food service worker, orderly, plumber, painter, warehouse worker, or groundskeeper. Approximately 18% of the BOP's eligible sentenced inmates work in Federal Prison Industries (FPI) factories -- arguably the BOP's most important correctional management tool and program.

The goal of the FPI program is to provide inmates with job skills training and work experience, thereby reducing recidivism. Through the day-to-day experience of working in a real-life factory setting, the FPI program provides the opportunity for inmates to gain specific work skills and a general work ethic -- both of which can lead to viable, sustained employment upon release.

Education, Vocational Training, and Occupational Training

The BOP offers a variety of programs for inmates to achieve at least a high school level education and to acquire marketable skills to help them obtain employment after release. All institutions offer literacy classes, English as a Second Language, adult continuing education, post-secondary education, and library services.

With a few exceptions, inmates who do not have a high school diploma or a General Educational Development (GED) certificate must participate in the BOP's literacy program for a minimum of 240 hours or until they obtain the GED. The English as a Second Language program provides inmates with limited proficiency in English with an opportunity to improve their English language skills. The BOP also facilitates vocational training for inmates and provides occupationally-oriented higher education programs. Occupational and vocational training programs are based on the needs of a specific institution's inmate population, general labor market conditions, and institution labor force needs. A limited number of traditional college courses are also available to inmates. On-the-job training is afforded to inmates through formal apprenticeship programs, institution job assignments, and work in the FPI program.

Substance Abuse Treatment

The BOP provides a comprehensive substance abuse treatment program that includes drug abuse education, non-residential drug abuse treatment, residential drug abuse treatment, and community transition treatment. Inmates must participate in a drug abuse education course if: (1) there is evidence in their pre-sentence investigation report that alcohol or drug use contributed to the commission of their offense; (2) they violated supervised release, parole, conditions of placement in a residential reentry center, or conditions of home confinement as a result of alcohol or drug use; or (3) the sentencing judge recommended that they participate in a drug abuse treatment program during

incarceration. Participants in the drug abuse education course learn the connection between drugs and crime; are taught to distinguish drug use, abuse, and addiction; and acquire the information they need to challenge the thinking errors that led to their criminal behavior. Inmates who need further treatment are encouraged to participate in non-residential or residential drug abuse treatment, as appropriate.

Non-residential drug abuse treatment is available to 100 percent of eligible inmates in every BOP institution. Specific populations targeted for non-residential treatment services include: (1) inmates with a relatively minor or low-level substance abuse impairment; (2) inmates with a more serious drug use disorder whose sentence does not allow sufficient time to complete the residential drug abuse treatment program; (3) inmates with longer sentences who are in need of treatment and are awaiting placement in the residential drug abuse treatment program; (4) inmates identified with a drug use history who did not participate in residential drug abuse treatment and are preparing for community transition; and (5) inmates who completed the unit-based component of the residential drug abuse treatment program and are required to continue treatment until placement in a residential reentry center, where they will receive transitional drug abuse treatment.

The residential drug abuse treatment program is available in 59 BOP institutions, offering treatment to approximately 17,500 inmates each year. The program provides intensive half-day programming and half-day education or work, 5 days per week, to inmates diagnosed with a drug use disorder. The programs are managed by a doctoral-level psychologist who supervises the treatment staff and the overall provision of treatment services to inmates. Inmates in the residential program are housed together in a unit that is separated from the general population. Treatment is provided for a minimum of 500 hours over 9 - 12 months.

Residential drug abuse treatment targets major criminal/drug-using risk factors, especially anti-social and pro-criminal attitudes, values, beliefs, and behaviors. The BOP targets these anti-social and pro-criminal behaviors by reducing anti-social peer associations; promoting positive relationships; increasing self-control, self-management, and problem solving skills; ending drug use; and replacing lying and aggression with pro-social alternatives.

The BOP provides residential drug abuse treatment to all inmates with a need and who volunteer for treatment. The treatment is provided toward the end of an inmate's sentence -- approximately 36 months before release.

The fourth component of the BOP's drug abuse treatment program is community transition treatment. Community transition treatment is offered as a service to all inmates in a residential reentry center (halfway house) and is a required component of the residential drug abuse treatment program. As part of community transition treatment and to help ensure a seamless transition from the institution to the community, the BOP provides a treatment summary to the residential reentry center where the inmate will reside, to the community-based treatment provider who will treat the inmate, and to the

U.S. Probation Office before the inmate's arrival at the residential reentry center. Participants in community transition drug abuse treatment typically continue treatment during their period of supervised release after they leave BOP custody.

Pro-Social Values Programs

Based on the proven success of the residential substance abuse treatment program, the BOP has implemented a number of other programs to address a variety of needs among certain segments of the inmate population (such as younger offenders and high-security inmates). These programs use the cognitive-behavioral therapy treatment model that is the underpinning of the residential drug abuse treatment program. The programs focus on inmates' emotional and behavioral responses to difficult situations and emphasize life skills and the development of pro-social values, respect for self and others, responsibility for personal actions, and tolerance. Many of these programs have already been found to significantly reduce inmates' involvement in institution misconduct. The positive relationship between institution conduct and post-release success offers encouragement about the ability of these programs to reduce recidivism.

Religious Programs

BOP institutions accommodate religious services and programs for inmates of the approximately 30 faiths represented within the population. Religious programs are led or supervised by staff chaplains, contract spiritual leaders, and community volunteers. Chaplains oversee worship services and self-improvement programs, such as the study of sacred writings, spiritual development, and religious workshops. BOP chaplains also provide pastoral care, spiritual guidance, and counseling to inmates. Upon request and approval, inmates may receive visits and spiritual counseling from community representatives.

Life Connections Program

The Life Connections Program is a residential multi-faith-based program that provides the opportunity for inmates to deepen their spiritual life and integrate their faith with other dimensions of their life in order to assist them with their personal growth and their reintegration into the community. Under the direction of a Chaplain and with the assistance of other Bureau staff, volunteer mentors, contracted spiritual guides, and mentors after incarceration, the program strives to contribute to an inmate's personal transformation; to bring reconciliation to the inmate, his or her victims, and the community; and to reduce recidivism. The Life Connections Programs are currently underway at five BOP facilities. BOP research has found a reduction in serious institution misconduct among Life Connections program participants. Further research is planned to assess the effect of the program on recidivism, after a sufficient number of graduates have been released.

Medical Care, Mental Health Treatment, and Counseling

The BOP provides a full range of medical and mental health treatment services through staff health care providers, psychologists, and psychiatrists, enhanced by contract services from community medical and mental health professionals. Psychologists are available for professional counseling and treatment on an individual or group basis. In addition, staff in an inmate's living unit are available for informal counseling. The BOP also offers a variety of self-help programs to improve inmates' ability to succeed after release, such as anger management, parenting skills, health education, and health promotion programs.

Inmate Skills Development Initiative

The Inmate Skills Development initiative is a comprehensive strategy the BOP is undertaking to identify inmates' reentry needs and to track inmates' progress toward meeting those needs. The three principles of the Inmate Skills Development strategy are: (1) identifying skill strengths and deficits through a comprehensive assessment and targeting program recommendations to address identified skill needs; (2) linking programs to relevant inmate reentry skills and measuring program success by skill acquisition and demonstrable outcomes rather than simply completing the program; (3) resources are allocated to target inmates with a high risk for reentry failure. Under this initiative, the BOP will continually assess inmates' progress in reentry skills development in most of the program areas described above, as well as in other areas where inmates need skills for successful reentry.

Maintaining Family and Community Ties

The Department recognizes how important it is for inmates to maintain contact with their family and friends while in prison -- research has shown that maintaining ties with family contributes to an offender's avoidance of crime following release from prison. Visiting, telephone privileges, and correspondence are three activities the BOP provides that help inmates maintain family and community ties while incarcerated. Inmates may have contact visits with their family, friends, attorney, and other special visitors except in the BOP's administrative maximum security prison, where all visiting is non-contact. Inmates also maintain contact with the community through telephone calls and by writing and receiving letters.

Specific Release Preparation Efforts

In addition to the wide array of inmate programs described above, the BOP provides a Release Preparation Program in which inmates become involved toward the end of their sentence. The program includes classes in resume writing, job seeking, and job retention skills. The program also includes presentations by officials from community-based organizations that help ex-inmates find employment and training opportunities after release from prison.

General preparation for reentry includes other inmate pre-release services provided at BOP institutions, such as mock job fairs where inmates learn job interview techniques and community recruiters learn of the skills available among inmates. As part of this activity, inmates prepare release portfolios, which include a resume, education and training certificates, diplomas, education transcripts, and other significant documents needed for a successful job interview.

In addition, the BOP has established employment resource centers in approximately 75 institutions. Employment resource centers assist inmates with creating release folders to use in job searches; soliciting job leads from companies that have participated in mock job fairs; identifying additional potential job openings; and identifying points of contact for information on employment references, job training, and educational programs.

Residential Reentry Centers

The BOP uses residential reentry centers (also known as community corrections centers or halfway houses) to place inmates in the community prior to their release from custody in order to help them adjust to life in the community and find suitable post-release employment. Residential reentry centers provide a structured, supervised environment and support in job placement, counseling, and other services. These centers allow inmates to gradually rebuild their ties to the community and allow correctional staff to supervise offenders' activities during this important readjustment phase. Some inmates are placed in home confinement for a brief period at the end of their prison terms -- the inmates serve this portion of their sentences at home under strict schedules, curfew requirements, telephonic monitoring, and sometimes electronic monitoring.

Kennedy 147 Why are you against a policy that would correct an imbalance in our sentencing laws and restore legitimacy to the criminal justice system?

ANSWER: The Department had stated it was open to addressing the quantity differential as part of an effort to address the Sentencing Commission's decision to apply new lower crack guidelines retroactively, but Congress chose to let the Sentencing Commission's decision stand. The Department recognizes that the quantity differential remains an important issue. Accordingly, and as we have indicated in the past, the Department remains open to addressing the quantity differential as part of an effort to obtain comprehensive sentencing reform that would invigorate the Sentencing Guidelines.

Kennedy 148 Hate crimes violate everything our country stands for. More than 8,000 hate crimes are reported every year in the United States, but that's only the tip of the iceberg. The Justice Department confirmed in 2001 that many hate crimes go unreported, and the Southern Poverty Law Center estimates that the actual

number of hate crimes committed in the United States each year is closer to 50,000. Despite the large number of such crimes every year, there has been a steady decline in hate crime prosecutions and convictions by the Department of Justice. In 1999, the Department charged 45 persons with hate crimes and convicted 38. In 2006, the Department charged 20 and convicted 19. The Hate Crime Statistics Act requires the Justice Department to publish an annual summary of crimes which "manifest prejudice based on race, religion, sexual orientation, disability, or ethnicity," using data from law enforcement agencies across the country. In 2006, there were over 9,500 victims of such crimes, an almost 10% increase from 2005. If the incidence of hate crimes is increasing, why is the prosecution of hate crimes decreasing?

ANSWER: The Department remains deeply committed to the vigorous enforcement of our nation's civil rights laws. In recent years, the Department has prosecuted a number of high-profile hate crime cases.

As permitted by federal criminal law, the Department of Justice continues to aggressively prosecute those within our society who attack others because of the victims' race, color, national origin, or religious beliefs, where the conduct satisfies the elements of a hate crime under federal criminal law. For example, from Fiscal Year 2001 to Fiscal Year 2007, the Department of Justice charged 62 defendants in 41 cross-burning cases.

In addition, the Department – including the Civil Rights Division, the U.S. Attorneys' Offices and the Federal Bureau of Investigation – recently began a racial threats initiative to aggressively investigate dozens of noose hangings and other recent racially motivated threats around the country that have occurred following incidents in Jena, Louisiana. In partnership with state and local law enforcement and civil rights organizations, the Department is examining each of the allegations, which will result in prosecution where the facts and law warrant. As part of this initiative, the Department prosecuted a case near Jena involving nooses hung from the back of a truck that slowly and repeatedly circled around a group of peaceful civil rights demonstrators who were waiting at a bus stop. On April 25, 2008, the defendant pled guilty to a federal hate crime.

Importantly, until last year, the FBI's crime statistics documented a decade-long decline in the number of hate crimes reported across the country. In 2005, the number of reported hate crimes was the lowest in a decade. Although the FBI's latest report reflected an eight percent increase in reported hate crimes for 2006, the overall downward trend is consistent with the number of matters reported to the Civil Rights Division's Criminal Section. In 1997, there were 799 allegations reported to the Criminal Section. In 2007, that number was 252 complaints, which is a decrease of 68% over ten years.

In the past five years, the Department has invested significant resources in investigating and prosecuting murders that occurred during the civil rights era. This "Cold Case Initiative" seeks to identify unresolved civil rights era murders for possible prosecution to the extent permitted by the available evidence and the limits of Federal

law. The FBI already has identified approximately 100 such cases that merit additional review to determine whether Federal criminal charges can be brought. Just this past year, the Department secured a conviction in *United States v. Seale*, resulting in three life sentences for a former KKK member who was involved in the brutal 1964 murder of two African-American young men in Mississippi.

In addition, following the attacks on September 11, 2001, the Department began its 9/11 Backlash Initiative. Under this initiative, the Division investigates and prosecutes backlash crimes involving violence and threats aimed at individuals perceived to be Arab, Muslim, Sikh, or South Asian. The Department has investigated more than 800 bias-motivated incidents since September 11, 2001, has brought Federal charges against 41 defendants, and has obtained 35 convictions. With the help of the Justice Department in many cases, state and local authorities have brought more than 160 bias crime prosecutions since 9/11.

Kennedy 152 Is there a legal impediment to making that change, or can the Bureau take this step on its own?

ANSWER: Please see the response to Question 151.

Kennedy 155 California recently enacted a law to require microstamping technology on guns sold in the state after 2010. The measure was supported by Mayor Villaraigosa, Police Chief Bratton and Sheriff Baca in Los Angeles, and by Chiefs of Police from departments across California. Microstamping is an innovative technology that uses lasers to make precise, microscopic engravings of a gun's make, model and serial number on the firing pin and chamber. This information is transferred onto the cartridge casing when the handgun is fired. As a result, the casings can provide law enforcement with important and timely information, without the need to consult a database or imaging system that may or may not contain a match. Microstamping would in no way replace any of the methods currently used by ATF to conduct ballistics tests; it would enhance the work conducted by the agency. There's no doubt that the technology will substantially improve law enforcement's ability to quickly identify and link shell casings found at a crime scene to the particular handgun from which it was fired. An IACP Report recently called for greater investments in advanced technologies such as microstamping to improve officer and public safety. ATF is in the forefront of technology on firearms and ballistics research, and the ATF labs are vital for quickly and accurately identifying the sources of specific firearms and the types of ammunition used at a particular crime scene.Is a study of microstamping being conducted by ATF? Will you take steps to ensure that such as study begins immediately?

ANSWER: The National Institute of Justice (NIJ) has funded the National Research Council (NRC) of the National Academies to study the question of developing a National

Ballistic Image Database. The NRC examined micro stamping for tracing point of sale as a part of this study. The results of this study are included in a new report entitled "Ballistic Imaging" (available at http://www.nap.edu/catalog.php?record_id=12162).

ATF laboratories have reviewed the above mentioned report, and based on published and non- published literature, ATF has concluded that further research is necessary to determine the viability of microstamping. ATF proposes a second phase of study which would involve partnering with other firearms laboratories (public and private) to study the scientific and practical feasibility of microstamping as it relates to firearms and ammunition. ATF believes it is in the best interest of the government to partner with other firearm experts to fully explore the feasibility of microstamping.

QUESTIONS FROM SENATOR BIDEN

Biden 166 Are there comprehensive reports being prepared by the Department related to forensic sciences? If so, when can Congress expect to see these reports?

ANSWER: As noted in the response to question 162, NIJ has two studies underway that will examine forensic backlogs, including, but not limited to DNA cases. Both studies are scheduled for completion by the end of 2008.

One study includes a survey of law enforcement agencies to determine their existing backlogs of criminal cases and forensic evidence. This project will also identify challenges that contribute to the backlog. The project is scheduled to be completed by the end of 2008. The second study will identify crime laboratory policies and practices that influence the size and nature of backlogs in various forensic disciplines, including DNA. This study will provide a detailed view of emerging areas in forensic DNA, and how these areas may impact demand for DNA analysis.

As noted in the response to question 165, OJP has funded the National Academy of Sciences (NAS) to undertake a fundamental review of forensic practice in the United States. The award was made in response to a Congressional recommendation in the conference report that accompanied the Department of Justice Appropriations Act, 2006. The NAS is expected to issue its report in 2008. OJP believes that this report will address the important issues identified by Congress in forensic science improvement, including backlog reduction, professional and laboratory standards, governance of forensic disciplines, training and certification, validation of forensic disciplines, and related matters.

The Department of Justice is also drafting a Report to Congress on the implementation of Title II and Title III of the Justice for All Act and progress made by federal, state, and local entities. The report should be available by the end of 2008.

In addition, the Department's Bureau of Justice Statistics (BJS) issued a report, *Census of Publicly Funded Forensic Crime Laboratories, 2002*, that indicated that the nation's public forensic crime labs ended 2002 with more than 500,000 backlogged requests for forensic services. Of these, nearly 49,000 were for DNA analysis. The BJS study included 33 federal, 203 state or regional, 65 county and 50 municipal forensic crime laboratories. This report is available at: http://www.ojp.usdoj.gov/bjs/pub/pdf/cpffcl02.pdf.

BJS expects to release findings from the C*ensus of Publicly Funded Forensic Crime Laboratories*, 2005 in summer 2008. The report will present findings from a survey of the Nation's nearly 400 publicly funded forensic crime laboratories. These agencies perform a variety of forensic services, including DNA testing and controlled substance identification, for federal, state, and local jurisdictions. The report will examine the number of forensic requests received by these labs and the resources needed to

complete them. Data will also be presented on crime lab budgets, staffs, funding sources, and backlogged cases. The report will provide a comparative analysis with findings from the 2002 census.

Biden 173 On July 24, 2007, former Attorney General Gonzales was asked by this Committee about the Department's position on the current statutory structure of our cocaine sentencing laws—specifically, the 100-to-1 cocaine sentencing disparity whereby it takes 100 times more crack than powder cocaine to trigger the same sentence in federal court. To date, we have not been told where the Department stands on this issue. What is the Department's position with regard to the current cocaine sentencing laws in the United States Code?

ANSWER: We believe the current federal sentencing policy and guidelines for crack cocaine offenses reflected in the existing mandatory minimum statutes are reasonable, and we opposed the Sentencing Commission's amendment to reduce the penalties for crack cocaine offenders and the decision to make the amendment retroactive.

The Department had stated it was open to addressing the quantity differential as part of an effort to address the Sentencing Commission's decision to apply new lower crack guidelines retroactively, but Congress chose to let the Sentencing Commission's decision stand. The Department recognizes that the quantity differential remains an important issue. Accordingly, and as we have indicated in the past, the Department remains open to addressing the quantity differential as part of an effort to obtain comprehensive sentencing reform that would reinvigorate the Sentencing Guidelines.

Biden 174 If you support the existing 100:1 disparity, what rationale—including specific, empirical evidence—can you point to that supports your position?

ANSWER: The Department's view that the 100:1 ratio is reasonable justified rests on the fact that crack cocaine is associated with much greater dangers than powder, including increased potential for addiction and increased violence, and that lowering crack penalties would signal a retreat from the battle against drug abuse.

As reflected in the U.S. Sentencing Commission's latest Special Report to Congress on Cocaine and Federal Sentencing Policy the method of administering crack makes it more addictive to typical users. Typically, crack cocaine is smoked whereas powder cocaine typically is snorted. Smoking crack cocaine produces quicker onset of shorter-lasting and more intense effects than snorting powder cocaine. These factors in turn result in a greater likelihood that the user will administer the drug more frequently to sustain these shorter "highs" and develop an addiction. United States Sentencing Commission 2007 Report to Congress: Cocaine and Federal Sentencing Policy (May 2007), at 62-63.

NIDA studies show that smoking produces quicker and higher peak blood levels in the brain and therefore a faster euphoria. (Written statement by Nora D. Volkow, M.D., Director, National Institute on Drug Abuse (NIDA), to the Senate Judiciary Committee Subcommittee on Crime and Drugs, February 12, 2008, at 2). They further show that smoking crack cocaine causes a much greater risk of addiction than does snorting cocaine. (Written statement by Nora D. Volkow, M.D., Director, National Institute on Drug Abuse (NIDA), to the U.S. Sentencing Commission, regarding Cocaine Sentencing Policy, November 14, 2006, at 163).

The Department believes that higher penalties for crack offenses are fully justified by its greater harm. In addition, crack cocaine offenders are generally more violent and have longer criminal histories than powder cocaine offenders. A review of the Sentencing Commission data shows that crack cocaine defendants possess or use weapons at about twice the rate as powder cocaine defendants. According to the Commission, in 2005, the percentage of crack cocaine offenders receiving statutory or guideline weapon enhancements was 26.5% as opposed to 13.0% for powder traffickers. Moreover, crack cocaine offenders have more extensive criminal histories than powder cocaine offenders. Only 22% of crack cocaine offenders are in Criminal History Category I (containing offenders with little or no criminal history) compared to 61.7% of powder cocaine offenders in that category. Further, 24.5% of crack cocaine offenders fell under to Criminal History Category VI (the most extensive criminal histories) compared to only 7.1% in that category.

Biden 175 If you don't have a position, when can I expect one from you?

ANSWER: The Department had stated it was open to addressing the quantity differential as part of an effort to address the Sentencing Commission's decision to apply new lower crack guidelines retroactively, but Congress chose to let the Sentencing Commission's decision stand. The Department recognizes that the quantity differential remains an important issue. Accordingly, and as we have indicated in the past, the Department remains open to addressing the quantity differential as part of an effort to obtain comprehensive sentencing reform that would invigorate the Sentencing Guidelines.

Biden 177 As the Mexican government has been waging war on drug trafficking organizations within its borders, violence just south of the U.S. border has exploded and there are reports that firearms—including assault weapons—are flowing freely from the United States into Mexico to fuel criminal conduct by these organizations. What is the Department doing to investigate this trafficking and stop this flow of guns?

ANSWER: ATF has long been committed to investigating and disrupting firearms trafficking along the U.S.-Mexican border. In April 2006, in response to the escalating violence along the south west border, ATF initiated Project Gunrunner. This ongoing

southwest border strategy combats firearms-related violence perpetrated by warring drug trafficking organizations in border cities such as Laredo, Texas, and Nuevo Laredo, Mexico. It is a comprehensive investigative, enforcement and interdiction strategy, incorporating ATF's expertise, regulatory authority and investigative resources to attack the problem domestically and internationally. It includes approximately 100 Special Agents and 25 Industry Operations Investigators (IOIs) dedicated to the issue, as well as outreach efforts with the firearms industry and other law enforcement agencies to reinforce the importance of identifying and reporting suspected illegal purchases and other sources of firearms intended for Mexico.

Through bilateral forums, such as the annual Senior Law Enforcement Plenary sessions with Mexico, ATF and the Mexican Government jointly develop operational strategies and policies to minimize the firearms-related violence afflicting communities on both sides of the border. ATF's Mexico City Office has developed working partnerships with Mexican law enforcement counterparts, and in FY 2008, will provide needed training and other assets, such as ATF's eTrace system, to help the Mexican government effectively counteract the firearms-related violence caused by drug traffickers. Specifically, the deployment of eTrace in Mexico will be expanded to the nine U.S. Consulates and 31 Mexican States. From FY 2006 to FY 2007, ATF received approximately 1,000 more trace requests from Mexico.

In addition, ATF plans to add four intelligence research specialists (IRSs) and two additional analysts to the El Paso Intelligence Center (EPIC), along with additional analysts to each of its four border field divisions. Plans now underway include adding an additional thirty-five Special Agents and fifteen IOIs to be permanently assigned to the Southwest border to curb the illegal export of U.S. sourced firearms and ammunition to Mexico.

ATF is further collaborating with the Mexican government by deploying Special Agents to U.S. Consular offices in Hermosillo and Monterrey, with additional deployments planned for Baja California, Ciudad Juarez, and Tijuana in the near future, if funding is available. As a result, ATF will be able to work directly with their Mexican counterparts, taking advantage of real-time intelligence that will benefit drug-related firearms trafficking investigations on both sides of the Border. Intelligence sharing and transnational collaboration will provide valuable resources for ATF and its law enforcement partners.

Biden 178 Do you believe that renewing the assault weapons ban or closing the gun show loophole would help stop the flow of these dangerous weapons into Mexico?

ANSWER: Firearms traffickers employ both legal and illegal means to procure firearms in the U.S., and there is no way to determine definitively the reduction in firearms trafficking that would result from the two aforementioned legislative changes. Ultimately, reducing the illegal firearms trafficking into Mexico will require ATF Special

Agents and Industry Operation Investigators (IOIs) working with our law enforcement partners as well as industry along the Southwest border.

Biden 180 Who would decide whether the value of the information that could be obtained would justify the use of waterboarding?

ANSWER: Waterboarding is not currently among those techniques authorized for use under the CIA program. As the Attorney General testified, however, there is a defined process by which a technique would be considered for possible addition to the CIA program. The CIA Director, with review by Director of National Intelligence and discussion with other National Security policymaking officials, would have to determine that the technique was necessary under the circumstances. The Attorney General then would have to analyze the lawfulness of the technique under the circumstances and limits proposed, under both the Detainee Treatment Act and the other applicable legal standards. Finally, even if the Attorney General deemed the proposed technique to be lawful, the President still would have to give his specific approval to its use.

Biden 181 What factors would be considered in making that determination?

ANSWER: Please see the response to Question 180.

QUESTION FROM SENATOR KOHL

Kohl 185 When I asked you about court secrecy, you said that you think judges "should consider the effect on public safety of keeping any settlement secret." You also said that you did not know of a case where somebody was sweeping a public safety issue under the rug in a settlement and that you would not want any court to approve of that. As you may know, in 2005, Eli Lilly settled 8,000 cases related to harmful side effects of its drug Zyprexa. All of those settlements required plaintiffs to agree, "not to communicate, publish or cause to be published…any statement…concerning the specific events, facts or circumstances giving rise to [their] claims." In that case, the plaintiffs uncovered documents which showed that, through its own research, Lilly knew about the side effects as early as 1999. All were kept confidential through protective orders and the subsequent settlements. While the plaintiffs kept quiet, Lilly continued to sell Zyprexa and generated $4.2 billion in sales that year. More than a year later, information about the case was leaked to the New York Times and another 18,000 cases settled. Had the first settlement not included a secrecy agreement, consumers would have been able to make informed choices and decide for themselves whether they wanted to risk the harmful side effects which included enormous weight gain, dangerously elevated blood sugar levels and diabetes. As a former federal judge and now top law enforcement officer, would you support legislation that would require judges, in cases involving public health and safety, to weigh the public's interest in information about potential health and safety dangers with interests in confidentiality before issuing protective orders or approving sealed settlements?

ANSWER: The Department of Justice follows 28 C.F.R. Section 50.23 entitled "Policy against entering into final settlement agreements or consent decree[s] that are subject to confidentiality provisions and against seeking or concurring in the sealing of such documents." The regulation generally limits the ability of the Department to enter into such non-public settlements absent specific approval from the Assistant Attorney General or United States Attorney to depart from the policy. It is not clear whether the public policy rationale supporting the Department's regulation would apply equally in all instances to private settlements, but the Department of course stands ready to review any proposed legislation on this issue.

QUESTION FROM SENATOR FEINSTEIN

Feinstein 197 What is the appropriate legal process for dealing with the Guantanamo detainees when the facility is closed and the detainees are detained in U.S. detention facilities?

ANSWER: The President has stated that it should be a goal of the United States to close the Guantanamo facility. He has made it clear, however, that our efforts to do so must be consistent with logistical realities and with our national security. Many of the Guantanamo detainees are dangerous and uncooperative prisoners. Any place of military detention in the United States would have to manage the risks posed by the detainees themselves and also the risk that the facility, lacking the geographic and security barriers present at Guantanamo, could itself become a target for terrorist attack. In addition, the United States would have to detain enemy combatants separate from common criminals. The Supreme Court's recent opinion in *Boumediene v. Bush*, which held that detainees at Guantanamo Bay have a constitutional right to challenge their detention as enemy combatants in habeas corpus proceedings, leaves unanswered several significant questions about the nature of these habeas proceedings.

QUESTIONS FROM SENATOR FEINGOLD

Feingold 200 You testified that whether waterboarding was torture was an issue on which "people of equal intelligence and equal good faith and equal vehemence have differed and have differed within this chamber." That testimony obscures the fact that for decades, the United States has taken the unequivocal position that waterboarding is torture, even prosecuting people for engaging in the practice. The notion that this is a "close question," to my knowledge, has its origins in, and is held only by certain members of, this administration. The only evidence you cited to the contrary is the fact that the Senate voted in 2006 against an amendment that would have banned specific interrogation techniques rather than simply banning torture. But at the time, those Senators who opposed the amendment made very clear that their opposition to identifying specific techniques did not signify that they believed these techniques to be lawful, or that they believed it to be a "close question." In the words of Senator Warner, who voted against the amendment, "I don't want [the amendment's] rejection to be misconstrued by the world in any way as asserting that the techniques mentioned in the amendment are consistent with the Geneva Convention or that they could legitimately be employed against our troops our anyone else . . . The types of conduct described in this amendment, in my opinion, are in the category of grave breaches of Common Article Three of the Geneva Convention." Please identify all instances of which you are aware in which any government official, member of Congress, legal scholar, military officer, or other respected American, at any time in history, has opined that the specific practice of waterboarding is not or might not be torture under some circumstances.

ANSWER: Because waterboarding is not among the techniques currently authorized for use in the CIA program, the Attorney General has not had occasion to determine, as the Attorney General, whether the technique would be permissible under existing legal standards. The Department of Justice did advise the CIA in the past that the technique would be lawful under the anti-torture statute, and, as the Attorney General testified, reasonable people have differed as to whether the practice is lawful under that statute or under current law. For example, during the debate over the Military Commissions Act of 2006 ("MCA"), a number of Senators expressed the view that it was unclear whether the stricter standards of the MCA would prohibit waterboarding and other interrogation techniques. *See, e.g.*, 152 Cong. Rec. S10,416 at S10,381-82 (The MCA's ambiguity "suggests that those who employ techniques such as waterboarding, long-time standing and hypothermia on Americans cannot be charged with war crimes.") (statement of Sen. Clinton). Other Senators have made statements suggesting that waterboarding or other acts may be permissible under certain circumstances. *See, e.g.*, 154 Cong. Rec. S805-07 (2008) ("I am glad the Attorney General has reviewed [the CIA techniques] carefully. I am glad he is able to say waterboarding was utilized only three times, that it had not been used in 5 years. But I am glad he also said he would not say it would never be done again. This would be unwise advice to the enemy we face.") (statement of Sen. Sessions).

Outside of Congress, a number of commentators, including Alan Dershowitz and Stuart Taylor, have expressed similar views. *See, e.g.*, Stuart Taylor, *What to Do About Waterboarding*, Nat'l J., Mar. 3, 2008 ("It can at the very least be plausibly argued (as detailed below) that if waterboarding is limited in duration and carefully controlled, it does not meet the 1994 law's narrow definition of torture."); Alan Dershowitz, *Democrats and Waterboarding*, Wall. St. J., Nov. 7, 2007 ("Under prevailing precedents—some of which I disagree with—the court must examine the nature of the governmental interest at stake, and the degree to which the government actions at issue shock the conscience, and then decide on a case-by-case basis. In several cases involving actions at least as severe as waterboarding, courts have found no violations of due process."); Carol Rosenberg, *Detainee Wants Judges to Rule on Torture*, Miami Herald, Dec. 15, 2007 (quoting retired Lt. Col. Jeffrey F. Addicott as explaining that waterboarding "is not torture" because it is essentially trickery that takes seconds and "does not constitute severe physical or mental suffering"); Rich Lowry, *Circumstances Matter*, Nat'l Rev., Nov. 2, 2007 ("[C]ommon sense suggests that the practice [of waterboarding] belongs in a murky space short of unambiguous torture."); Mark Bowden, *In Defense of Waterboarding*, Philadelphia Inquirer, Dec. 23, 2007 ("There is a difference between gouging out a man's eyes and keeping him awake, and waterboarding falls somewhere in between.").

Feingold 212 Chairman Leahy asked you if John Durham would testify before the Judiciary Committee once he'd finished his investigation. You responded: "[W]e have never, I think, U.S. attorneys have not testified as to pending cases. I don't see any reason to make an exception here." But in fact, U.S. Attorneys have testified before the Committee about pending cases. Just last July, for example, the U.S. Attorney for the Western District of Texas, Johnny Sutton, testified about the criminal prosecutions of border agents Ignacio Ramos and Jose Compean, whose cases were then pending before a federal appeals court. Furthermore, if Mr. Durham's investigation does not result in a criminal prosecution or other legal action, the case will no longer be "pending." Will you reconsider your statement about whether Mr. Durham would testify before the Judiciary Committee after the conclusion of his investigation?

ANSWER: Because Mr. Durham's investigation is ongoing, it is premature for the Department to discuss whether it might be appropriate for Mr. Durham to testify before the Judiciary Committee at some point in the future. After Mr. Durham completes his investigation, we would be happy to respond to any specific request for his testimony.

Feingold 213 I commend the Department for its efforts to investigate the alleged killing of 17 Iraqi civilians in Baghdad in September. To date, however, there has not been a single conviction of any contractor for the misuse of force against civilians in the field, despite the fact that there are at least four statutes (including the Military Extraterritorial Jurisdiction Act) that create extraterritorial jurisdiction over contractors operating abroad. The U.S. government has more than

20,000 private security contractors operating in Iraq. While many of them serve honorably, abuses can and do occur. Indeed, Secretary Gates has expressed concern that the failure of some contractors to show proper regard for civilian life is at odds with the military's mission in Iraq. It is clear that accountability needs to be strengthened in this area. How many prosecutions have been initiated against private security contractors for misuse of force in the field?

ANSWER: Under long-standing Departmental policy, we cannot comment on the number or scope of ongoing investigations or prosecutions of past misconduct by private security contractors. I can assure you that we take very seriously allegations related to misuse of force against civilians in the field and are committed to investigating and prosecuting such cases where we have jurisdiction and the evidence to do so. Indeed, we sent a team of FBI agents to investigate allegations regarding the shooting by Blackwater contract employees of Iraqi civilians in Nisoor Square. At the same time, we would note that investigations of extra-territorial crimes are among the toughest. Difficulties include the logistics of collecting and preserving evidence abroad, maintaining respect for the sovereign jurisdiction, and obtaining evidence from foreign countries. Layered upon these difficulties - in Iraq - we often face battle conditions in the course of our investigations. Field investigation in an active war zone can be dangerous and requires extensive security precautions. Notwithstanding these difficulties, we do and we must pursue these cases.

Feingold 215 In his confirmation hearing, Deputy Attorney General Paul McNulty testified that the Justice Department had opened 19 investigations by January 2006 of U.S. contractors who allegedly abused detainees in Iraq and Afghanistan after the cases were referred to the Department by the CIA and the Defense Department. No civilian has yet been prosecuted for abuse of any detainee in Iraq. Only one civilian – David Passaro – has been prosecuted for abuse of a detainee in Afghanistan. In contrast, the Defense Department has already concluded several prosecutions of U.S. military personnel alleged to have abused detainees. How many of the investigations described by Deputy Attorney General McNulty are still open, and how many are closed?

ANSWER: One investigation is still open and pending from the first group of 19 investigations referred to the United States Attorney's Office for the Eastern District of Virginia. That office has been designated as the primary point of referral for these cases. The other 18 referrals from that first group of referrals have been declined and closed. Since January 2006, one additional matter was referred later in 2006, four matters were referred in 2007, and three matters have been referred in 2008. There are four open investigations currently pending: one from the original group and three that were referred in 2008. All the other referrals have been declined.

The Department of Defense has charged a number of persons with offenses under the Uniform Code of Military Justice -- such as dereliction of duty -- that have no analog in Title 18, United States Code, or other provisions of law applicable to civilians.

Moreover, under the Military Extraterritorial Jurisdiction Act of 2000 (MEJA), misdemeanor charges are not available to the Department of Justice. Some of the matters referred did not meet the standards for referral under MEJA. Under Defense Department guidelines, there should be a probable cause finding by a qualified legal officer (Staff Judge Advocate) before referral. That did not happen in every case. Nevertheless, the referrals were accepted by the Department because of the importance of investigating civilians who are alleged to have abused detainees in Iraq or Afghanistan. Upon further review, some of these referrals had to be later declined.

Feingold 216 For any cases that were closed, what was the basis for closing these cases?

ANSWER: A complete investigation by agents and a thorough review by prosecutors was conducted on all matters referred. Matters where no charges were brought were declined because the allegations could not be proven beyond a reasonable doubt, the alleged misconduct did not rise to a level warranting criminal prosecution, or both—or there was no jurisdiction over the person who was referred or the conduct in which the person was allegedly involved, or both. All of the decisions to decline prosecution were concurred in by the career investigators who referred the charges and the career prosecutors who reviewed the matters.

Feingold 217 How many additional detainee abuse cases have been referred to the Department since January 2006?

ANSWER: Please see the response to Question 215.

Feingold 218 The FBI is launching a $1 billion effort to build a computer database of Americans' biometric data, such as facial features, ear lobe shapes, and iris patterns. A major concern about this planned database is that the technology required to create, store, and match many of these kinds of biometrics is just not that advanced. Facial recognition technology, for example, is certainly not accurate enough to be relied upon for purposes of identification in a law enforcement context. I understand that the database is in the planning phase and that these technologies may become more accurate in the future, but using a biometrics database that generates significant numbers of false positive matches could result in massive disruption to innocent people's daily lives. Will you ensure that the FBI implements an appropriate accuracy requirement before relying on this database?

ANSWER: The FBI continues to invest in improving its biometric identification technologies in order to provide the most reliable information possible for use in law enforcement and counterterrorism efforts. Fingerprint identification is a highly reliable and widely accepted means of biometric identification, and will continue to be relied on by the FBI as an accurate means of identification. Although fingerprint data will remain

the primary means of identification, the Next Generation Identification (NGI) initiative seeks to advance the collection of additional biometric information for investigative purposes. While there are no formal plans to incorporate ear lobe shapes as a biometric modality, the FBI will consider this and other technologies as they mature. The NGI development and integration contract includes a series of biometric search analysis studies that will assess biometric technology and provide recommendations for implementation. Issues identified through these studies will be addressed through the National Science and Technology Council (NSTC) National Biometric Challenge. The NGI will provide the framework for the fusion of these additional biometric modalities into a highly accurate identification system.

Recognizing that facial recognition technology is only one investigative tool along with other investigative aids and information, the FBI will use guidance from user community representatives to promulgate policies and procedures emphasizing the limits of this technology, making clear that photographic matches are not to be considered "positive" identifications and that photographs may be used only to develop potential candidate lists.

Feingold 219 The privacy and security implications of this database are significant. Identity theft, for example, becomes exponentially more problematic when dealing with the theft of iris scans and fingerprints, as opposed to credit cards and bank statements. A victim of identity theft can always change his or her credit card number, but it is impossible to change one's fingerprints.

a. What security measures will be in place for this database, and can you guarantee that they will work?

ANSWER: Title 28 U.S.C. § 534 and 28 CFR §§ 20.33 and 50.12 require that records be used only for authorized purposes and that the exchange of records is subject to cancellation if dissemination is made outside the receiving departments or related agencies. In addition, security and privacy protocols are addressed in the CJIS Division Security Policy, to which all users must adhere.

According to Federal Information Processing Standard (FIPS) 199, systems and information are to be assigned a security categorization according to the security objectives of confidentiality, integrity, and availability. FIPS 200 establishes the minimum security requirements covering seventeen different areas for these systems, and NIST 800 53 was developed to provide the minimum security controls and assurance requirements according to the impact level of the data it will be processing. This database meets these minimum requirements, sitting within a system architecture that has been specifically engineered to support the security of this particular system and the rest of the FBI's CJIS systems. In addition, numerous other controls have been instituted based on industry standards and best practices.

Internally, an Information System Security Officer (ISSO), who is responsible for ensuring that operational security is maintained on a day-to-day basis, has been is assigned to the Integrated Automated Fingerprint Identification System (IAFIS). The roles and rules are tested as part of the security certification and accreditation process, and all users are required to acknowledge "Rules of Behavior" in writing annually as part of security awareness training. The CJIS Computer Security Incident Response Capability (CSIRC) also defines processes and procedures for responding to computer and data misuse concerns, and CJIS User Agreements and Outsourcing Standards provide for security and privacy to ensure compliance.

To ensure IAFIS security policies are fully implemented, the CJIS Division's Audit Unit visits authorized recipients on a recurring basis and reports deficiencies to the CJIS Division Advisory Policy Board's (APB) Sanction Subcommittee and the Compact Council's Sanctions Committee. Access may be terminated for improper access, use, or dissemination of records obtained from the system of records. The Audit Unit also conducts periodic external audits to assess and evaluate compliance with the terms of the applicable user agreements and contracts.

Finally, as discussed in response to Question 3, above, 28 CFR §§ 16.30-16.34 establish alternative procedures for the subject of an FBI identification record to obtain a copy of his or her own record for review and correction.

b. What would the FBI's course of action be in the case of a security breach, given that it's not possible for a person to simply replace a stolen biometric with new data?

ANSWER: OMB has provided clear direction and requirements for handling Personally Identifiable Information (PII) and responding to PII breaches. Memorandums M-06-16 (Protection of Sensitive Agency Information) and M-07-16 (Safeguarding Against and Responding to the Breach of Personally Identifiable Information) provide the required processes and procedures. DOJ has implemented these OMB guidelines for its component agencies in its own directive and the FBI has generated internal processes consistent with the Department's Incident Response Procedures for Data Breaches Involving Personally Identifiable Information. When a data breach occurs in the FBI, established policy requires the FBI's Security Division and Chief Privacy Officer to jointly assess the risk of the data's exposure, its sensitivity, and the presence or absence of mitigating factors (such as data encryption). Based on this assessment, a determination is made whether to take any of a list of corrective actions, including notice to affected individuals. In addition, lessons learned about system integrity and policy effectiveness are evaluated and changes are made if appropriate.

With respect to CJIS systems in particular, an FBI audit unit visits authorized recipients periodically and reports deficiencies to the CJIS APB's Sanctions Subcommittee and the Compact Council's Sanctions Committee. If recommended by the sanctioning body, such audits may include additional biometric data. Access may be

terminated for the improper access, use, or dissemination of records obtained from the system of records.

Feingold 220 According to the Assistant Director of the FBI's Criminal Justice Information Services Division, the fingerprints that the FBI currently retains in its database are those belonging to people of law enforcement interest, such as criminals. When an entity or agency submits to the FBI a set of fingerprints that do not fall into that category, those prints are generally destroyed after being matched against the FBI's data. As I understand it, however, the FBI is working to implement a "rap-back" service, under which, at the request of an employer, the FBI would keep employees' fingerprints in the database so that if that employees are later arrested or charged with a crime, the employers could be notified. Needless to say, this would constitute a dramatic expansion in the degree and nature of the federal government's retention of biometric data. What evidence exists that undisclosed criminal conduct among employees is a sufficiently urgent problem to justify this step?

ANSWER: The NGI Rap Back Service was developed because states have identified a growing need for additional security and safety procedures for applicants who hold positions of trust. For example, many states have recently enacted statutes requiring fingerprints and criminal background checks for all school employees and others who have contact with children. About one million school employees are expected to provide fingerprints through 2011. The school-safety effort grew out of concerns related to teachers who had been arrested on suspicion of having inappropriate sexual contact with children. Because employees' aliases can thwart background checks based on names, fingerprints are widely viewed as the best means of identifying those who have incentives to falsify their identities. This danger was recently highlighted when school officials learned that a sex offender employed as a middle school custodian had passed a background check using a false name. Many states require fingerprints from new teachers, but this law does not address teachers who are already certified. Research of the 2004-05 school year indicated that in one state school system 66 teachers were registered sex offenders. In response, that state implemented a new law requiring all teachers to submit fingerprints and undergo criminal background checks. Since those checks began, state officials have advised that the records of almost 200 teachers and teaching candidates have included serious offenses, including sexual misconduct and crimes against children. Rap Back functionality will provide significant additional protection against those who violate their positions of public trust.

Feingold 226 Has the Justice Department evaluated the legality, as a general matter, of the CIA and Pentagon issuing NSLs to obtain information on Americans?

ANSWER: As noted in response to Question 224, agencies other than the FBI may use national security letters to obtain information. For example, 50 U.S.C. § 436, permits "[a]ny authorized investigative agency" to request particular categories of information

under specified circumstances. *See* 50 U.S.C. § 436(a)(1). The response to Question 224 further notes the distinction in the compulsory nature of the FBI's NSLs in contrast to the voluntary nature of the other agencies' NSLs.

Feingold 228 In a recent Washington Post story, a White House official confirmed that the President has issued a new classified cyber-security directive. The Director of National Intelligence also has discussed publicly the new cyber-security initiative that the Intelligence Community is working on. The government should make it a priority to protect its computer networks against attack. But the news reports about this new initiative suggest that it may involve sweeping surveillance of domestic Internet communications, which could raise serious First and Fourth Amendment questions. What involvement has the Justice Department had in the development of this new directive? Has it reviewed it on legal grounds? If so, what conclusions has it drawn? If necessary, provide any classified portion of your response in a classified annex.

ANSWER: The Department of Justice has been involved in the interagency process with respect to the development and implementation of the classified directive discussed above and has provided informal legal and policy guidance, along with other interagency partners, on certain aspects of the directive. The Committee has been provided with briefings on the initiative generally, and a classified briefing on the directive. The Department is also available to provide the Committee with a classified briefing focused on legal issues associated with particular aspects of the directive if the Committee so desires.

Feingold 229 Cuts in federal funding for programs like COPS, Byrne Justice Assistance Grants, and juvenile delinquency prevention programming have coincided with increases in violent crime across the country, including in my home state of Wisconsin. These cuts also have contributed to the perception that the federal government has largely abandoned state and local law enforcement agencies in their fight to combat violent crime. The recently released Administration budget for fiscal year 2009 makes even deeper cuts to these programs, stripping law enforcement assistance to the bone. Will you support Congressional attempts to restore funding for these programs to effective and necessary levels?

ANSWER: The Department's core mission includes assisting our state, local and tribal partners to prevent and control crime. We carry out this mission through enhanced enforcement and prosecution initiatives, task force activity and grants, training and technical assistance.

Since 2001, the Bush Administration has committed over $2 billion to Project Safe Neighborhoods to hire more than 200 federal prosecutors to prosecute gun crime, make grants available to hire more than 550 new state and local gun crime prosecutors, train over 33,000 individuals in national and regional training events, and promote other

strategies to reduce gun violence in our communities. Through PSN we have doubled the number of gun crime prosecutions over the last seven years compared to the preceding seven years. The cost of incarcerating these additional gun criminals is more than $1.5 billion – costs that would have otherwise been carried by the states in terms of prison beds or decreased public safety.

In addition to national initiatives such as PSN, the Department supports joint local and federal law enforcement task force activity. Examples led by federal law enforcement include the FBI Safe Streets task forces operated in 187 sites, 31 ATF Violent Crime Impact Teams, and 90 U.S. Marshals Service fugitive apprehension task forces (6 regional fugitive task forces and 84 full time district task forces). In addition, whenever criminal proceeds are recovered from joint federal-state/local law enforcement operation, we share the funds under the equitable sharing program. Last year, the Department returned a record $360 million to our partners. Together we leverage our collective strength to stop gangs, drug-related violent crime and illegal guns.

Finally, we also assist our partners through grants, training and technical assistance. The President's budget proposes to consolidate more than 70 of the Department's state and local grant programs in order to provide our partners with more flexibility in addressing our Nation's most critical criminal justice needs, especially targeting violent crime. Notable here is the Violent Crime Reduction Partnership Initiative for which the President seeks $200 million. Funding for this initiative will be used to help communities suffering from high rates of violent crime to tackle this problem by forming and developing effective multi-jurisdictional law enforcement partnerships between local, state, and federal law enforcement agencies. Through a competitive grant process, OJP will provide funding and technical assistance to communities seeking to establish partnerships to investigate and reduce violent crime, including efforts to address drug trafficking and criminal gang activity, which contribute to many violent offenses.

QUESTIONS FROM SENATOR DURBIN

Durbin 260 The Justice Department's Inspector General and Office of Professional Responsibility are conducting a joint investigation into whether politicized prosecutions and hiring practices at the Justice Department under your predecessors involved violations of federal laws and policies. When will this report be released?

ANSWER: As the Committee is aware, the Office of Professional Responsibility and the Office of the Inspector General recently completed a report pertaining to the improper consideration of political or ideological affiliations in the hiring of career attorneys for the Department's Honors Program and Summer Law Intern Program. The OIG and OPR have indicated to the Attorney General that they are working expeditiously to complete the remaining aspects of this joint review.

Durbin 261 Will you pledge to implement all recommendations contained within this report after it is released?
ANSWER: The Attorney General has directed that the Department implement the recommendations contained in the report concerning the Department's Honors Program and summer intern hiring processes. The Department will evaluate any additional recommendations when and if they are provided.

Durbin 262 In response to a written question I sent you last October, you pledged that "selective prosecution of anyone for political purposes will not be tolerated. If confirmed, I will communicate additional clear guidance through appropriate channels." What "additional clear guidance" have you communicated on this issue, to whom has it been communicated, and which "appropriate channels" have you used to do so? Please submit a copy of any written guidance you have issued or statements you have made on this issue.

ANSWER: Attorney General Mukasey sent a memorandum to all Department employees reminding them that the Department is entrusted to enforce the law in an impartial and neutral manner. A copy of that memorandum is attached. In addition, the Attorney General has frequently and repeatedly said in speeches and meetings, including to Department employees, that cases are to be brought only on the facts and the law. In February, he delivered this message to all United States Attorneys. Most recently, the Attorney General gave a lengthy public speech on public corruption, in which he stated the following:

> "When the Department of Justice pursues [public corruption] cases . . . on behalf of the United States, the Department bears a solemn responsibility. Like the public officials we sometimes investigate and prosecute, we too are public servants, invested with a public trust that we are sworn to uphold. We thus have a

duty to ensure that the Department's investigations of public corruption are conducted without fear or favor, and utterly without regard to the political affiliation of a particular public official. After all, a corruption investigation that is motivated by partisan politics is just corruption by another name.

"Let me be perfectly clear: Politics has no role in the investigation or prosecution of political corruption or any other criminal offense, and I have seen absolutely no evidence of any such impropriety in my time at the Department, and would not tolerate it.

"I consider it one of my paramount responsibilities to ensure that the Department continues to handle its public corruption investigations and prosecutions in a consistent, non-partisan, and appropriate manner throughout the nation."

Durbin 264 Is it your belief that there were no selective prosecutions brought by the Justice Department between 2001-2007? If your answer is not in the affirmative, please list all instances in which you believe a selective prosecution was or may have been brought.

ANSWER: Yes. We believe that no selective prosecutions for political purposes were brought by the Justice Department between 2001-2007. However, we are aware that OPR is currently investigating several allegations of politically-motivated prosecutions, including the prosecutions (1) in the Middle and Northern Districts of Alabama of former Democratic Governor Donald Siegelman; and (2) in the Eastern District of Wisconsin of Georgia Thompson, a state official accused of giving politically-motivated preferential treatment to contractors to curry favor with her Democratic superiors. In addition, OPR is reviewing the recent denial of a defense motion alleging improper political motivation in the prosecution of Democratic contributor Geoffrey Fieger in the Eastern District of Michigan.

QUESTIONS FROM SENATOR GRASSLEY

Grassley 272 How are disclosures of classified material to cleared congressional staff by individuals acting outside the chain of command different than those authorized by the chain of command?

ANSWER: The President has the constitutional authority to decide, based upon the national interest, how, when, and under what circumstances particular classified information should be disclosed to Congress. Legislation permitting an individual to disclose classified national security information without receiving proper authorization to do so would deprive the President of his constitutional authority to control access to national security information and, in the case of employees and officers of the Executive Branch, would infringe upon the President's constitutional authority to supervise the Executive Branch. *See Whistleblower Protections for Classified Disclosures*, 22 Op. O.L.C. 92, 100 (1998). Indeed, in 1998 the Department testified that legislation similar to S. 274:

> Would deprive the President of his authority to decide, based on the national interest, how, when and under what circumstances particular classified information should be disclosed to Congress. This is an impermissible encroachment on the President's ability to carry out core executive functions. In the congressional oversight context, as in all others, the decision whether and under what circumstances to disclose classified information must be made by someone who is acting on the official authority of the President and who is ultimately responsible to the President. The Constitution does not permit Congress to authorize subordinate executive branch employees to bypass these orderly procedures for review and clearance by vesting them with a unilateral right to disclose classified information—even to Members of Congress.

Id. By allowing any covered employee with access to classified information to go directly to Congress, section 1(b)(3) of S. 274 would implicate these same constitutional concerns. The President's constitutional authorities to protect national security information are meaningless if every covered employee of the Executive Branch is vested with the right to determine for himself or herself, without any official authorization, those disclosures of national security information to Congress that are appropriate.

Grassley 273 What is the remedy for a whistleblower who properly reports up the chain of command but the underlying violation continues?

ANSWER: Where proper reporting up the chain of command of an alleged violation of law is ineffective, the individual may report alleged violations of law to the Inspector General of an agency. *See* Inspector General Act of 1978, 5 U.S.C. App. § 3. In appropriate circumstances, an individual also may report retaliation for reporting alleged violations of law to the Office of Special Counsel. *See* 5 U.S.C. § 2302(b)(8)(B).

Grassley 274 Why isn't it enough to require that whistleblowers report classified information to those with the necessary security clearances?
ANSWER: Please see the response to Question 272. A security clearance is an indicator that an individual is allowed to receive classified information. Merely having a security clearance is not sufficient; an individual with a clearance also must have a need to know the classified information. Otherwise, he is not permitted to access that classified information. An appropriate authorizing official within the Executive Branch must determine whether an individual to whom disclosure is to be made has a need to know; the whistleblower himself cannot make that determination.

Grassley 275 If S.274 is "not the way to do it" how do you propose to allow individuals, who have knowledge of wrongdoing in the Executive Branch related to classified or protected matters, to report improprieties when their supervisors will not correct the wrongdoing?

ANSWER: The current statutory and regulatory structure provides adequate remedies by permitting individuals to report up the chain of command within the Executive Branch, or to an agency Inspector General or to the Special Counsel, in appropriate circumstances.

Grassley 276 During the hearing, I asked whether the Justice Department is committed to actively pursing cases against employers who knowingly hire illegal aliens and whether this is an important priority for the Department. You responded clearly, "It is, we are, and I do." Could you please elaborate about the efforts of the Department in enforcing worksite immigration laws? Specifically, could you provide statistics on the type and number of prosecutions that have been completed or are ongoing? Further, would you please outline the resources devoted to worksite enforcement by the Department?

ANSWER: The Department of Justice does not keep a separate statistical database for worksite enforcement prosecutions. Rather, virtually all worksite enforcement prosecutions are reflected in our immigration program category case information, as are a number of other types of immigration-related prosecutions. Moreover, an enforcement action might be termed "worksite enforcement" if employers and corporate officials were prosecuted for knowingly hiring aliens illegally in the United States; or if aliens illegally in the United States were prosecuted for various immigration related offenses including, but not limited to, such offenses as re-entering the United States after removal (8 U.S.C. 1326), false statements (18 U.S.C. 1001), false claims to United States Citizenship (18 U.S.C. 911); fraudulent use of a social security card or number (42 U.S.C. 408), visa fraud (18 U.S.C. 1546), document fraud (18 U.S.C. 1028), or aggravated identity theft (18 U.S.C. 1028A); or if there was an administrative enforcement operation which did not result in any criminal prosecutions. This lack of a common definition of worksite

enforcement makes it problematic to respond with specificity regarding how many prosecutions have been completed or are ongoing.

This is particularly the case when making reference to an administrative enforcement action which did not result in any criminal prosecutions. In those instances the Department of Justice would usually not be notified by the Department of Homeland Security nor have any statistical information to report to Congress. Because of legal and ethical considerations, we can neither confirm nor deny the existence of particular matters or investigations, nor can we discuss the status of any matter that may be pending in a United States Attorney's Office, other than facts on the public record.

The Department of Justice is committed to supporting the Department of Homeland Security and its Immigration and Customs Enforcement (ICE) arm, which is the principal investigative agency responsible for worksite enforcement. United States Attorneys work closely with their ICE counterparts in supporting ICE efforts in worksite enforcement.

Grassley 291 What are the benchmarks for determining success?

ANSWER: We are currently working with the State Department and the Government of Mexico to create benchmarks for determining the success of the many and diverse programs proposed for funding under the Merida Initiative. In fact, State Department employees traveled to Mexico during the week of March 17 for the sole purpose of creating and refining these benchmarks. At those discussions, there was general agreement on the goals and objectives we are pursuing, but recognition that further efforts would be needed to better refine the actual measurements that we will use to establish benchmarks for success. Those efforts are ongoing.

Grassley 293 The Merida Initiative is focused on combating drug trafficking within Mexico. What programs do you believe should be implemented on the U.S. side of the Southwest Border to help ensure the success of these programs?

ANSWER: The Merida Initiative is intended to combat drug trafficking as well as terrorism and other transnational crime, as well as promote regional security. The Initiative will build upon recent efforts by Mexico and Central American countries to combat the drug cartels and other organized crime within their countries. The United States will continue to wage its multi-faceted war against crimes along our common border using all the tools and strategies encompassed in our National Southwest Border Counter Narcotics Strategy. There are several areas where increased efforts on our side of the border could bolster the efforts demonstrated by law enforcement authorities in Mexico and other South American countries. The President's FY 2009 budget requests resources to support programs critical to our Southwest Border strategy. Additional funding provided in the President's Budget will support the hiring of additional border AUSAs to prosecute these gun smugglers.

Grassley 298 I understand that the Justice Department has suspended debtor audits required by the bankruptcy reform law, Pub. L. No. 109-8. Why has the Justice Department stopped these audits? Can you tell me what the legal authority is for this decision?

ANSWER: As mandated in section 603(a) of Public Law 109-8, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), the United States Trustee Program (USTP) established procedures for independent audit firms to audit petitions, schedules, and other information in consumer bankruptcy cases filed on or after October 20, 2006. Pursuant to 28 U.S.C. § 586(f), the USTP contracted with independent accounting firms to perform audits in cases designated by the USTP.

Funding is available to the Department and its components for purposes and in amounts according to the terms and conditions specified in annual Appropriations Acts. The President's FY 2007 budget request for the USTP included an enhancement of $4.7 million to fund debtor audits; however, the Congress did not approve the enhancement. In order to fund debtor audits in FY 2007, the USTP utilized FY 2006 carryover monies. In the FY 2008 Consolidated Appropriations Act, Public Law 110-161, Congress reduced the USTP's funding by more than $13 million from its FY 2007 level and used $20 million in prior year unobligated balances to fund the FY 2008 appropriation. Further, the Explanatory Statement accompanying Division B of the Appropriations Act directed agencies to inform the Appropriations Committees of any departure from budget plans presented in the agency's budget justification which formed the basis of the Act, and required the submission of agency operating plans within 60 days of the bill's enactment. As a result, the USTP temporarily suspended its designation of cases subject to audit, notified the independent accounting firms of the suspension of audits, and began working with the Department to find a means of funding the audits.

In accordance with directives accompanying the FY 2008 Consolidated Appropriations Act, the Department submitted on March 6, 2008, an Operating Plan for review by the Appropriations Committees of the Senate and the House of Representatives. This Operating Plan includes a notification to the Appropriations Committees of the USTP's intention to use $4.05 million in prior year unobligated balances for several operational purposes, including debtor audits. The USTP will resume a debtor audit program once the Operating Plan has been cleared by the Appropriations Committees.

Grassley 319 To what extent does the new Sentinel computer system include automatic red-flags for suspicious computer activity such as that in which Prouty engaged?

ANSWER: The FBI's ESOC will analyze Sentinel audit data and conduct insider threat analysis to detect unauthorized activity. The Sentinel system will employ auditing and monitoring capabilities that generate "silent hits" when users attempt unauthorized access to information, checking each search query and set of search results. When the system

detects an unauthorized attempt to access information, notification will be sent to a designated entity without providing any indication to the user. In the event a user engages in suspicious activity or the ESOC discovers a security incident, Sentinel will have the auditing capability to reconstruct a user's activities to determine what queries were conducted and what information was obtained.

Grassley 320 Will such activity be investigated by the dedicated internal security unit being developed in response to the Inspector General's recent follow-up report on recommendations made in the wake of the Robert Hanssen case?

ANSWER: Yes, in response to the Webster Commission's report, the FBI established the Analysis and Investigations Unit, which is dedicated to handling internal security matters.