

Responses to Questions of Senator Edward M. Kennedy

Hearing before the Senate Judiciary Committee on September 26, 2007 *Executive Nomination of Michael J. Sullivan to be Director, Bureau of Alcohol, Tobacco, Firearms and Explosives*

Questions for Acting Director Michael J. Sullivan

Questions on Gunshow Loophole

As you know, the U.S. firearms laws currently have a gun show loophole. At gun shows, holders of Federal Firearms Licenses must conduct background checks and keep records for all sales, but unlicensed private sellers have no such responsibility. The Brady Law doesn't apply to them. Recent studies by the Department of the Treasury, the Violence Policy Center, the University of California Davis Violence Prevention Research Program, and others have clearly documented that gun shows are a large market for illegal gun trafficking, and have become a favorite sales outlet for criminals.

Shortly before you took over as Acting Director, ATF came under criticism for a sting operation at a gun show in Richmond, Virginia, facing accusations that its activities may have intimidated some lawful purchasers. In a report issued in June 2007—nearly a year into your service as Acting Director—the Department of Justice Office of the Inspector General found that ATF “does not have a formal gun show enforcement program,” and that “ATF’s operations at gun shows constitute a small percentage of its overall investigative activities.” Yet the report also found that “[p]ast [ATF] operations at gun shows have yielded multiple arrests and convictions of individuals engaging in firearms trafficking, as well as seizures of firearms that were purchased for sale illegally,” and that “[m]ost gun show promoters and all state and local law enforcement personnel . . . interviewed supported ATF operations at gun shows.”

We know from the vast body of evidence that the gun show loophole has led to increased firearms trafficking, illegal purchases, and violent crime. Groups like Stop Handgun Violence in Massachusetts and the Brady Center have been working diligently to keep this problem in the spotlight. Obviously, any effort by ATF to adopt a rigorous gun show enforcement program will meet with intense opposition from the gun lobby.

1. Do you agree that the gun show loophole is a significant problem and that background checks should be required for all gun show purchases?

RESPONSE: As stated in the President’s Project Safe Neighborhoods Fact Sheet, issued May 14, 2001, the Administration supports requiring instant background checks for all firearms transfers at gun shows. I support that position.

- 2. As long as the gun show loophole stays open, do you believe that ATF has a responsibility to minimize the illegal behavior and social harm that the loophole causes? If so, how should ATF fulfill this responsibility?**

RESPONSE: One of ATF's highest priorities is to interrupt the illegal flow of firearms to felons and others whose possession of firearms is prohibited under the law. ATF has a responsibility to utilize available laws and resources to ensure that prohibited persons do not acquire firearms.

We focus our investigative activity in the areas that will have the most impact on reducing firearms violence. In some areas of the country, gun shows have not proven to be a significant source of firearms used in criminal activity and have not, therefore, been a significant focus over the past several years. In other areas, however, gun shows have proven to be a significant source of crime guns. For this reason, ATF conducts enforcement operations and engages in educational outreach activities (such as promotion of the "Don't Lie for the Other Guy" program) at gun shows. In this regard, we will continue to work closely with our State and local law enforcement partners. We also will continue to foster communication with firearms dealers, unlicensed firearms sellers, and gun-show promoters to ensure that they are aware of—and are able to fulfill—their obligations under the law. I believe that, working together in continued partnership, we can reduce the number of guns that make their way from gun shows into the hands of criminals—while ensuring at the same time that we do not unduly interfere with the rights of law-abiding citizens to lawfully acquire and possess firearms.

- 3. As Acting Director of ATF, have you taken any steps to establish a gun show enforcement program? If so, what does this program do?**

RESPONSE: ATF enforcement activities at gun shows are part of a comprehensive national firearm enforcement strategy. ATF's policy regarding gun shows, which has not changed significantly since 1989, provides guidance and best practices to our investigators concerning dealers and other persons involved in firearms transactions at gun shows. This policy was reissued to ATF field personnel in January 2006. ATF's existing policy and best practices concerning enforcement operations at gun shows support ATF's national objective to prioritize investigation efforts that have the greatest potential to prevent crime and violence and to disrupt illegal firearms activity.

- 4. Would you be willing to work with Congress to establish such an enforcement program if confirmed?**

RESPONSE: If confirmed, I certainly would be willing to work with Congress on any issues falling within ATF's areas of responsibility.

Gun shows are basically part of an unregulated firearms market that includes practices such as flea markets, Internet sales and private sales and transfers of firearms between individuals. As a result, many gun sales are made without the benefit of a mandatory background check. An IACP Report recently recommended that all gun sales and transfers be processed through federal firearms licensees in order to ensure that every individual who purchases a firearm undergoes a mandatory background check.

1. Do you believe that all firearms purchasers should undergo mandatory background checks?

RESPONSE: As stated in the President's Project Safe Neighborhoods Fact Sheet, issued May 14, 2001, the Administration supports requiring instant background checks for all firearms transfers at gun shows. I support that position.

2. Would you support legislation requiring anyone dealing in firearms to be licensed?

RESPONSE: The Gun Control Act (GCA) currently requires that anyone dealing in firearms must be licensed. The GCA, with certain exceptions, defines a "dealer" as someone who "devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms."

Questions on ATF Dealer Inspections and License Revocations

One of ATF's primary responsibilities is inspecting federal firearms licensees to ensure they are in full compliance with gun safety laws. With over 105,000 of these dealers throughout the country, it's understandable that ATF can't conduct annual inspections of every licensee. Of course, ATF works hard to fulfill its mission, and I understand from testimony last year by Deputy Assistant Director Audrey Stucko at a House hearing that ATF conducts approximately 4,000 inspections every year, which means that about 4% of licensees are actually inspected each year.

The inspections are instrumental in keeping firearms out of the hands of criminals, but the process for inspecting dealers and revoking the licenses of rogue dealers is problematic. In a recent case, it took ATF nine years to revoke the license of a gun dealer whose illegal conduct occurred in Baltimore. When ATF inspected the gun shop in 1997, it discovered that 45 firearms were missing from inventory and that the dealer sold numerous firearms at gun shows without recording the sales. ATF issued a warning letter to the dealer, but two additional inspections over the next six years found even more flagrant violations, including a 2001 inspection that revealed 133 missing guns.

Nevertheless, the ATF responded to those inspections only with more warning letters. Finally, in 2003, it moved to revoke the dealer's license after finding that 422 guns were missing, more than a quarter of the inventory. Even after all this, ATF allowed the dealer to keep his shop open throughout the three years of appeals. The license was finally revoked in 2006. Obviously, an inspection process that allows such delayed outcomes is unacceptable. In 2004, the Department's Inspector General reviewed the inspection program and concluded it was not effective, and that even with its limited resources, ATF had not organized its resources efficiently.

1. What steps has ATF taken to use its resources in the most effective way to make the dealer inspection process more efficient?

RESPONSE: To use resources efficiently, ATF has implemented a Firearms Disposition Emphasis Inspection strategy, which focuses on inspecting licensees whose noncompliance have the greatest potential to cause harm to the public. This strategy also streamlines the traditional compliance inspection to focus on high-risk areas of business operations, such as inventory verification, purchaser eligibility, reporting of multiple handgun sales and suspicious purchasers, all of which can lead to the discovery of illegal firearms diversion. These techniques, along with standard reporting guidelines, ensure that inspections are conducted thoroughly and consistently throughout the country.

ATF also maximizes its resources by using analytical data to direct inspection efforts. Such data includes: FFLs' theft history and compliance history, gun trace information, and the type of license (e.g. ATF is currently engaging in a 3-year initiative to inspect all pawnbrokers).

2. Has ATF implemented a system for tracking and monitoring adverse actions?

RESPONSE: ATF field managers provide monthly updates on the status of adverse action cases to Headquarters managers, who closely review them to ensure that all follow-up action is timely completed. Quarterly Division Reports (QDRs) are used to track adverse actions taken throughout each fiscal year. In addition, senior field and Headquarters managers receive and review all significant activity reports concerning revocation action.

3. A recent report released by the International Association of Chiefs of Police has recommended strengthening the laws requiring federal firearms dealers to report lost or stolen firearms. Would you support such legislative action to require more stringent reporting requirements?

RESPONSE: Section 923(g)(6) of the Gun Control Act requires that “[e]ach licensee shall report the theft or loss of a firearm from the licensee’s inventory or collection, within 48 hours after the theft or loss is discovered, to [ATF] and to the appropriate local authorities.” The IACP report recommended that, among other things, federal law “should be strengthened to ensure that dealers keep track of their inventories by requiring them to report *missing* firearms within 48 hours after they know or should know that the gun is *missing*” (emphases added). ATF has interpreted section 923(g)(6) to require that dealers report “missing” firearms as “lost.” ATF also has interpreted the law to require reports of thefts or losses (or missing firearms) within 48 hours after the dealer knows or reasonably should have known about the discrepancy in inventory. Thus, I believe that Federal law—and ATF’s implementation thereof—already incorporates the IACP recommendation.

4. What additional resources does ATF need to make its inspection program more effective?

RESPONSE: In 2004, ATF’s firearms compliance inspection program was reviewed by DOJ’s Office of the Inspector General. In its report, OIG recommended ATF revise its staffing requirement so that it could conduct triennial inspections of the firearms license population to effectively regulate the industry. ATF agrees increased triennial inspections would result in greater compliance with recordkeeping and business requirements, thus furthering public safety. Additionally, ATF is constantly seeking to use technological solutions to increase the efficiency of the current IOI workforce. Nonetheless, given our available resources presently, ATF’s inspection program is effective and efficient, with increased efficiencies continually being realized.

5. What are your goals to improve on inadequate past inspections?

RESPONSE: ATF is continually evaluating its own performance and results in order to refine processes and make the best use of resources. Some of our recent efforts are described above. Additionally, over the past three years ATF added approximately 180 non-supervisor field IOIs, which represents a nearly 50% increase. ATF also has enhanced executive-level oversight by establishing a deputy assistant director position to direct its national inspection strategy. Under this new leadership, ATF has improved data collection and analysis processes and developed clear instructions for the field in the form of annual operating plans and procedural guidelines. Training for field supervisors has also been updated and expanded to ensure performance and productivity expectations and are clear.

In questions to former Attorney General Gonzales last January, I asked him to provide the number of federal firearms license revocations between 2000 and 2006. He provided that information, and significantly, the number of license revocations tripled in 2006, compared to the year 2000.

1. What resources does ATF need for an effective license revocation program to prevent rogue firearm dealers putting more guns on the street?

RESPONSE: It is ATF's experience that the overwhelming majority of FFLs do not engage in schemes to illegally divert firearms from lawful commerce. Out of a licensed population of approximately 107,000 dealers and collectors, on an annual basis, approximately 20 FFLs are prosecuted and 100 licenses are revoked. Working to achieve increased compliance will in turn reduce the number of firearms intentionally diverted for criminal use by dealers and purchasers.

Last year in the House, a bill was introduced to require ATF to prove that a dealer specifically intended to violate federal law in order to take action against the dealer. It would have weakened the ATF inspection process even more, especially when rogue gun dealers often claim that their missing weapons were stolen or lost. The bill would have also compromised ATF's ability to revoke the licenses of the worst gun dealers by reclassifying a number of serious federal gun law violations as "minor." The bill was not supported by the Federal Law Enforcement Officers Association. In a letter to Congress last year, the organization expressed strong opposition to the bill, noting it "would have a devastating effect on the ability of law enforcement to stem the flow of firearms from lawbreaking gun dealers to violent criminals."

1. Are you familiar with this legislation?

RESPONSE: I believe you are referring to HR 5092.

2. If similar legislation came up again, what position would you take on such a bill?

REVISED RESPONSE: If the bill is re-introduced, I would be sure to review its specific provisions. In general, I am supportive of the concept of a graduated scale of administrative sanctions for FFLs. Such a scale, if carefully developed, would provide ATF with additional tools to more narrowly tailor sanctions to fit the seriousness of a particular FFL's violations. Such a system was proposed in the Department's Violent Crime and Anti-Terrorism Act of 2007 which was transmitted to Congress earlier this year.

3. What is the long term impact of the bill on ATF's ability to sanction and prosecute rogue gun dealers?

RESPONSE: If the bill is re-introduced, I would be sure to review its specific provisions.

One of the most important findings of research done before the Tiahrt restrictions is that the underground market for guns is concentrated among a very tiny fraction of high risk dealers. Several studies have found that nearly 60% of crime guns traced by the ATF come from just 1% of federal firearms licensees. By focusing on high risk dealers, ATF could make an important difference in keeping illegal firearms out of the hands of criminals.

1. What steps has ATF taken to identify high risk firearms dealers?

RESPONSE: ATF's Firearms Disposition Emphasis Inspection strategy focuses on inspecting licensees who have the greatest potential to cause harm to the public by streamlining the compliance inspection process to focus on high-risk areas of business operations such as inventory verification, purchaser eligibility, reporting of multiple handgun sales and suspicious purchasers. All of these factors can lead to the discovery of illegal firearms diversion.

Specifically, ATF uses analytical data to direct inspection efforts to high risk firearms dealers. Such data includes an FFLs' compliance history, gun trace information, and the type of license possessed.

2. What is ATF doing to prevent firearms licensees from participating in the underground firearms market?

RESPONSE: ATF takes seriously its responsibility to ensure the lawful firearms industry complies with all relevant laws and regulations. This process begins prior to an individual becoming a licensee. ATF will conduct an in-person interview with the applicant to ensure that he or she understands his or her responsibility as a federally-licensed firearms dealer. ATF considers the education of its licensed population an ongoing process and frequently holds seminars and publishes newsletters and open letters to keep licensees informed of recent rulings and industry trends.

During licensee inspections, ATF not only ensures compliance with the Gun Control Act and its implementing regulations, but also works with the industry member to identify and improve those internal controls outside of the regulatory scheme that serve to improve the accountability of firearms and Federal record keeping requirements. ATF also has partnered with the National Shooting Sports Foundation to implement “Don’t Lie for the Other Guy,” which is a campaign to increase awareness of the criminal penalties and fines associated with the straw purchase of a firearm.

While the overwhelming majority of the licensed industry does not engage in illegal activity, when ATF does develop information that a licensee is participating in a scheme to divert firearms, ATF seeks to revoke the license and criminally prosecute the licensee. Out of a licensed population of approximately 108,000 dealers and collectors, on an annual basis, approximately 20 FFLs are prosecuted and 100 licenses are revoked.

ATF released data on missing firearms in its 2005 Annual Report. A disturbing statistic emerged from that report. In 2005, 97 rogue dealers had nearly 12,000 guns disappear from their stores and shops. These 97 dealers represented 96% of all missing guns from over 3,000 federal firearms licensees.

1. What is ATF doing to find these missing guns?

RESPONSE: For those firearms that are discovered missing by ATF during an inspection, ATF Industry Operations Investigators make every effort to locate the missing firearms. On average, ATF IOIs, working with the industry members, will determine the disposition of approximately 75% of those firearms initially thought to be missing. Any remaining missing firearms are then reported as lost (or stolen) to ATF as required. Criminal referrals are made where appropriate. Additionally, all firearms reported lost or stolen are handled as investigative leads. For example, should any “missing” firearm be subsequently recovered and traced by ATF or any other law enforcement agency, ATF’s Firearms Tracing System will recognize the firearm as reported stolen and will notify the affected law enforcement agency.

ATF's Stolen Firearms Program also provides support to Federal firearms licensees, law enforcement agencies and the public in an attempt to prevent thefts and losses of firearms, the identification and apprehension of those responsible for stealing firearms and the recovery of lost and stolen firearms.

2. What role does ATF have in preventing rogue dealers from obtaining licenses?

RESPONSE: ATF employs a stringent screening process for all firearms license applications. This process includes background checks on applicants and any employees responsible for firearms operations in the business. Background checks are run before an ATF investigator meets personally with every applicant for an interview and inspects the proposed business premises. Applicants in prohibited categories (e.g., felons, drug users, etc.) are denied FFLs.

ATF also denies applications from those who have had previous licenses revoked or who are known to have willfully violated the Gun Control Act. When ATF revokes an FFL, it flags that license in its database. If that dealer re-applies at a later time, an ATF investigator will run the new applicant's name in the database, which will match the earlier record and help the investigator identify the applicant as ineligible for another license.

Furthermore, ATF conducts face to face inspections for all non-collector applicants for a Federal firearms license. ATF typically inspects 5,000 new applicants a year and 14% result in a denial recommendation. Denials are recommended for different reasons including the applicant being prohibited, hidden ownership and the applicant was not able to comply with state or local law, e.g., zoning requirements.

3. What steps will you take to address this issue of "missing guns"?

RESPONSE: Many of the missing guns are a result of FFLs not complying with the recordkeeping requirements under the Gun Control Act (GCA). Recordkeeping is a critical aspect of conducting firearms transactions and operating a firearms business, and industry compliance reduces the risk to public safety. ATF has increased its efforts to help industry members achieve compliance. However, noncompliant FFLs pose a danger to public safety because their substandard business practices compromise the traceability of the firearms they sell and the individuals who purchase them. The increase in the number of Federal Firearms Licensee (FFL) revocations during the past few years is, in part, due to these improvements to ATF regulatory programs. ATF will continue to take steps to better utilize information to conduct more inspections of "at-risk" dealers (e.g., those who have recently had compliance problems). Further, ATF will remain focused on certain public safety-related issues, including the inability of an FFL to account for firearms sold. ATF's efforts in this area are having an effect on FFL compliance. ATF has a performance measure in place which specifically focuses

on the improvement in accountability among FFLs who have identified compliance problems. Follow up inspections (conducted during fiscal year 2006) of licensees in serious violation revealed a 91-percent reduction in unaccounted for firearms (missing guns).

In addition, ATF has produced a detailed publication (ATF P 3317.2) to provide assistance to FFLs in safeguarding their inventories and guidance in reporting the theft or loss when it occurs. ATF also provides a publication (ATF 3312.8) to assist citizens in recording the identification of their firearms so that a full description is available to law enforcement in the event of theft or loss. Both of these forms are available online.

Questions on the Tiahrt Amendment

The restrictions on providing gun source data, popularly known as the Tiahrt Amendment, prevent law enforcement organizations from sharing gun source information with each other and prevent law enforcement agencies from obtaining gun source data outside their geographic jurisdictions. The information cannot be used as evidence in any state license revocation, civil lawsuit or any other administrative proceeding unless specifically filed by ATF. The Amendment also prevents ATF from publishing reports that use source data to analyze the flow of guns at the national level.

Several organizations have spoken out against the Amendment. Mayors Against Illegal Guns, a coalition of 210 mayors led by Mayor Tom Menino of Boston and Michael Bloomberg of New York City, has been active in opposing the Tiahrt Amendment and one of the coalition's top priorities is to have the Amendment repealed. In spite of the criticism, the Amendment has been included in the Justice Department Appropriations Bill since 2003 and an even more restrictive version of the gun tracing data restrictions is contained into this year's Senate bill.

The Shelby Amendment, which was recently added to the Justice Appropriations bill, keeps these restrictions in the bill and is even more restrictive than the existing Tiahrt prohibitions. Under the Shelby Amendment, law enforcement officers would be required to certify the reasons why they are requesting gun trace information. This outrageous requirement could result in our police being charged with a criminal offense while investigating gun crimes.

In a May 2nd op-ed in the Boston Herald, you defended the policy of limiting the release of gun trace data, stating that the restrictions merely codify "ATF's longstanding policy of sharing data with other law-enforcement agencies for the purpose of conducting a criminal investigation." Quite frankly, your position surprises me.

- 1. Can you provide any example in which the release of crime gun trace information has compromised an ongoing police investigation, or endangered an officer or witness?**

RESPONSE: Pursuant to ATF's longstanding trace data release policy, we have not disclosed beyond the recovering law enforcement agency with the need to know any trace-related information that could potentially compromise an ongoing investigation or endanger a law enforcement officer or witness.

- 2. What is your position on the Shelby Amendment, which could potentially subject law enforcement officers seeking crime trace data to criminal charges?**

RESPONSE: The Department of Justice does not believe that the "certification" language included in the Shelby Amendment imposes any new or additional requirement on law enforcement, because the current trace process already requires such a certification.

ATF recently released state-by-state reports on the number of guns recovered between January 1, 2006 and December 31, 2006. Earlier in 2006, ATF Regional spokesman James McNally said that the Tiahrt appropriations restriction prevented ATF from releasing to the public any “information derived from tracing of firearms.” Likewise in an Associated Press article dated February 22, 2006, Regional ATF spokesman John Hagemen said that ATF could not provide to the public statistical breakdowns of gun sold in crimes.

1. Is ATF now reading the Tiahrt Amendment as not prohibiting the release of summary reports like the ones ATF has recently made available to the public on its website?

RESPONSE: While there has been some internal and external confusion, ATF has always believed that the Tiahrt Amendment does not prohibit the publishing of summary reports because, in every appropriation since its inception in 2003, Congress has also enacted language requiring that ATF Tracing Studies contain a disclaimer to make it clear that trace data cannot be used to draw broad conclusions about firearms-related crime. See, e.g., Section 621 of the Science, State, Justice, Commerce, and Related Agencies Appropriations Act of 2006, Pub. L. No. 109-108 (2005). The inclusion of this provision indicates that ATF may publish tracing studies or reports.

2. What prompted the release of this information by ATF after such a long period of refusing to provide this type of data?

RESPONSE: I asked that we review previous internal policies regarding the release of aggregated firearms trace data. The determination was made that disclosure of this information would not compromise criminal investigations or cause officer safety issues, and that the disclosure is permitted under an exception to the appropriations restriction (P.L.109-108, Sec.621). Pursuant to this exception, ATF will share aggregated trace data studies or reports with Congress and with requesting law enforcement agencies, regardless of their geographic jurisdiction. ATF also will be publishing aggregated trace data reports on our public website.

3. If confirmed, do you plan to continue the releasing this?

RESPONSE: Yes, so long as Congress continues to enact the trace study provision described above.

4. What would prevent ATF from continuing to release this data in future years?

RESPONSE: If the above-referenced trace study exception was not included in the appropriations language, then it is our interpretation that ATF could no longer provide these types of data releases to the general public, to researchers, or to public policy makers.

What resources would ATF need to continue to make annual releases of aggregate gun trace data?

RESPONSE: ATF can continue to provide annual releases of aggregate trace data with existing resources.

Question on Judge Wolf's Criticisms

As you know, Mark L. Wolf is the Chief Judge for the U.S. District Court in Massachusetts. He was appointed to the court over 20 years ago, by President Reagan, and he's a distinguished jurist who is respected throughout the legal community.

He's been very critical of some of your actions as U.S. Attorney. One time, he criticized you for failing to promptly provide defense attorneys with evidence that might help their clients' cases, as the law requires. He called it "a dismal and persistent pattern of errors by prosecutors . . . that is wreaking havoc on my ability to administer justice." Another time, he criticized you for bringing a high volume of gun and drug cases that could be handled more efficiently by state prosecutors. He said your focus on these cases was coming "at the expense of important federal cases that it would take a lot of hard work to develop." A few months ago, he wrote the Attorney General to protest the lack of punishment for an assistant U.S. Attorney guilty of extraordinary professional misconduct, including a failure to turn over exculpatory evidence. As that Attorney's boss, you were a logical person to discipline him.

1. What is your response to Judge Wolf's criticisms?

RESPONSE: Let me respond to the three points raised in your question separately;

A. Regarding the matter of "discovery," I would respectfully disagree with Judge Wolf. I would also note that his criticism was directed at the Office generally, and referenced what he claimed was a historical problem; it was not a criticism of me personally. In fact, Judge Wolf made this statement in his March 29, 2000 dismissal of a matter against Boubacar Diabate, some 18 months before I assumed the position of United States Attorney.

Regardless, the facts and history do not support such an opinion. In December 2001, in response to a request by Judge Wolf, we examined our practice and assessed our performance during the previous two years. It was apparent that there were only a handful of alleged discovery violations. The number, as measured against the number of cases and defendants we handled, did not support a conclusion of a "persistent pattern." In fact, it is important to note in almost each instance, it was the Assistant United States Attorney who discovered and disclosed to the defense and the Court, the late discovery. In several instances, it was a legitimate dispute between the government and the defendant as to whether there was an obligation to turn over certain information to the defendant.

We had investigated and prosecuted hundreds of defendants during the period in question. We had on staff, over 100 Assistant United States Attorneys, and had worked with hundreds of investigators, officers, troopers, agents and other prosecutors, yet only a few incidents were identified, and none that I recall resulted in prejudice to the defendant.

I take my ethical and professional responsibilities seriously. I, as well as the dedicated and talented staff of the United States Attorney's Office, strive for perfection. They honor their obligation to the Court, to the people we serve and to those we charge. As I stated in my March 2002 affidavit, "They are, however, human beings, and as such, they-like all those involved in

the administration of justice – are subject to occasions of unintended human error, particularly given the time and work pressures under which they sometimes operate.” I believe our efforts and success in complying with our discovery obligations has been extremely remarkable.

I also would respectfully disagree with Judge Wolf’s criticism that our prosecution of gun and drug cases is misguided. First, I begin with a very simple approach: Congress determines what conduct constitutes a federal crime and the Executive determines which matters to pursue. I have used the statutes and resources provided to help address violent crime in Massachusetts. I have done it on occasion over the objections of Judge Wolf, but in conjunction with our local and state partners. We have used our federal statutes to help target neighborhoods plagued with violent crime, or terrorized by violent repeat offenders. Both Congress and the Administration see the wisdom in this strategy.

At a meeting with the Mayor of Boston and a number of state court judges, Judge Wolf heard, first hand from them, about the importance of federal participation and prosecution of certain crimes, and repeat offenders. These gun and drug cases are indeed important federal cases. They stop some of the most violent offenders from terrorizing neighborhoods, where small children hide in bath tubs to avoid stray bullets. They help neighbors and neighborhoods reclaim their communities. They send the right message of deterrence as we attempt to prevent young people from engaging in violence. We approach the challenge of safer communities through a partnership with the District Attorney’s Offices. Each case is reviewed by an AUSA and a member of the local district attorney’s office to make a determination about where a defendant, or matter, would be best investigated and prosecuted with a goal of achieving the greatest positive impact on a community.

Interestingly, as best as I can tell, the mix between violent crime cases and non-violent crime cases prosecuted in the United States Attorney’s Office in the District of Massachusetts has not changed substantially over the past 20 years.

Additionally, our tremendous success in other practice areas certainly shows we are not doing these important violent crime cases at the expense of other significant federal investigations, prosecutions and interests. For example, we have recovered over \$4 billion dollars in health care and economic crime related settlements and fines since October 2001. There have been a number of successful public corruption investigations and prosecutions and several high profile terrorism related investigations and prosecutions, including Richard Reid, the so-called “Shoe Bomber.”

With regard to Judge Wolf’s criticism regarding what he considered a lack of punishment for an Assistant United States Attorney, the Assistant and the conduct in question were referred to the Department’s Office of Professional Responsibility (OPR), as required. They recommended a range of sanctions. I took into consideration the findings of OPR, the service and reputation of the Assistant, and imposed a sanction consistent with the OPR recommendation.

2. How do you account for an eminent, Republican-appointed judge repeatedly taking the unusual step of singling you out for public criticism?

RESPONSE: Judge Wolf has every right to express his opinion regardless of his political affiliation.

3. What is your response to Judge Wolf's concerns about the lack of punishment in a case where a federal prosecutor – under your supervision – failed to turn over exculpatory evidence, which the defense was required to be given?

RESPONSE: As I stated in my answer to Question 1, as is required in matters such as this, the Assistant and the conduct in question were referred to the Department's Office of Professional Responsibility (OPR). They recommended a range of sanctions. I took into consideration the findings of OPR, the service and reputation of the Assistant, and imposed a sanction consistent with the OPR recommendation.

As former Attorney General Robert Jackson said in 1940, "The prosecutor has more control over life, liberty and reputation than any other person in America. While the prosecutor at his best is one the most beneficent forces in our society, when he acts from malice or other base motives, he is one of the worst." The common theme in Judge Wolf's criticisms seems to be that you were overzealous in your prosecution of certain types of cases. Others have criticized you for always seeking the maximum sentence, no matter how small the crime, and for seeking the federal death penalty in Massachusetts, a state that has no death penalty statute.

1. What is your response?

RESPONSE: I have always believed that the public's confidence in our criminal justice system is critical. I have also believed that the federal sentencing guidelines add to the public's confidence, in that defendants with comparable criminal histories, convicted of similar offenses, are treated similarly. I have approached my charging authority and sentencing policy and practice the same way. I have however attempted to recognize each matter, each case and each defendant on an individual basis.

While there may be a perception that I seek the maximum sentence each and every time, this is simply not true. We do regularly seek sentences within the guideline range.

As the U.S. Attorney, it is incumbent upon me to utilize all of the tools Congress provides, and to recommend a punishment that fits the crime. This is also true of death penalty eligible crimes. While Massachusetts does not have a death penalty statute, that does not prevent or preclude the federal government from seeking the death penalty for a federal violation that Congress has authorized as eligible for a death sentence.

2. Did anyone in the Bush Administration contact you at any point about taking these actions?

RESPONSE: Except for the requirement to seek Attorney General authorization regarding the death penalty, I have never been contacted by anyone in President Bush's Administration about the death penalty in general, or seeking opportunities to charge death penalty crimes.

3. We know that in many areas of government, the Bush Administration has placed politics and ideology above the law. Do you feel that you have the commitment to justice and the rule of law to resist any political pressures you would face as Director of ATF that are inconsistent with your best view of what the position requires?

RESPONSE: Yes. I would note for the record that this Administration has never asked nor encouraged me to place politics and ideology above the law. In fact, I have always been expected to seek justice, and be faithful to my oath and the rule of law. If I am confirmed as the Director of ATF, I will continue to be faithful to my oath and do my best to secure our country.

Questions on Dual Roles as U.S. Attorney and ATF Chief

Last September, President Bush named you Acting Director of the Bureau of Alcohol, Tobacco, Firearms and Explosives. But it wasn't until this March, nearly seven months later, that the President actually nominated you to be Director of ATF. You will have served in this position on an interim basis for over a year if you are confirmed by the Senate.

As Acting Director, you oversee nearly 5,000 employees and an annual budget of close to \$1 billion. At the same time, you have continued to serve as U.S. Attorney for Massachusetts. You've been the principal litigator for the United States in the state, and you've also been delegated full control in the areas of personnel management, financial management, and procurement. According to an April 2007 *Washington Post* article, you are one of six U.S. Attorneys to have served double duty, with an important posting in Washington as well as your home state.

Under longstanding rules, U.S. Attorneys had been required to reside in the district for which they were appointed. However, a provision sought by Republicans during the reauthorization of the PATRIOT Act changed the law to allow U.S. Attorneys to live elsewhere if the Attorney General assigns them dual or additional responsibilities. This provision flies in the face of the proud history of U.S. Attorneys serving only the residents of their district. Any U.S. Attorney position requires an enormous commitment of time and energy, and it would be impossible to do the job adequately from Washington—much less while running another major federal agency.

1. How have you managed to run the Bureau of Alcohol, Tobacco, Firearms and Explosives and the Massachusetts U.S. Attorney's Office at the same time?

RESPONSE: First, I am honored that the President of the United States nominated me as U.S. Attorney, and as Acting Director of ATF, and it has been a privilege to serve in both capacities.

Certainly the dual responsibilities have been challenging, but not impossible, and I remain closely involved with all matters at the U.S. Attorney's Office. I am only a phone call, e-mail or flight away. I believe that my experience in Washington, D.C., has assisted me in being more effective as a United States Attorney because I better understand the Department, its priorities, and its available resources. In turn, I believe that my experience in the field, both as the U.S. Attorney and as a local prosecutor, has helped inform my management of ATF.

I am fortunate to have exceptionally talented and committed people in both offices. These dedicated career Assistant U.S. Attorneys and law enforcement officers understand our priorities and have a commitment to serving the people of the United States. The staff, both at the U.S. Attorney's Office and ATF, are doing an exceptional job of assisting me with leading and managing the respective offices.

- 2. Did you ever feel that you were compromising the quality of your work in either position? Isn't a disservice to the Massachusetts U.S. Attorney's Office to be deprived of permanent leadership for over a year?**

RESPONSE: I don't believe that the quality of my work has been compromised, either as U.S. Attorney, or Acting ATF Director. I have relied on my capacity to put in long days, assisted by my respective staff and management teams, to ensure that both positions received the attention they needed from me personally. I do not take these responsibilities lightly and have worked tirelessly to ensure that the American public, and each agency, has the benefit of the commitment and leadership that they deserve.

- 3. Did you ever suggest to anyone that it might inadvisable or inappropriate for you to hold these two positions simultaneously for so many months?**

RESPONSE: I was asked by the President of the United States to serve, and I accepted the responsibilities humbly, wholeheartedly and without reservation. I have never suggested to anyone that it would be inappropriate for me to hold both positions, for any length of time.

- 4. When and how will there be a transition to a new U.S. Attorney in Massachusetts if you are confirmed as Director of ATF?**

RESPONSE: Upon my resignation as United States Attorney, I assume that the President of the United States will nominate a U.S. Attorney for the District of Massachusetts. During the pendency of the nomination process, the Department in all likelihood would name an Acting U.S. Attorney.

As U.S. Attorney for Massachusetts and as Acting Director of ATF, you have had broad discretion in the use of resources and in the choice of strategies for enforcing criminal laws and regulating the firearms and explosives industries. Sometimes, the goals and priorities of ATF will be the same as the goals and priorities of the Massachusetts U.S. Attorneys. But other times, I wonder if the two have not been exactly in line.

- 1. Do you believe there was any conflict of interest, or any potential conflict of interest, in running ATF and the Massachusetts U.S. Attorney's Office at the same time?**

RESPONSE: There have not been any conflicts of interest in running ATF and the U.S. Attorney's Office.

2. Did you ever look into the legal ethics of this situation or develop your own guidelines as to how to handle potential ethical or practical conflicts of interest?

RESPONSE: I have not developed my own guidelines. If faced with an ethical issue, I would seek the advice of the Department of Justice ethics officer and Office of Professional Responsibility.

3. Were there ever any instances in which the goals or priorities of the offices were not completely in sync with each other?

RESPONSE: The agencies' priorities and goals overlap in most areas, with great success. As with all interagency interaction, it is imperative that the lines of communication are open and clear, so that when conflicts arise they can be addressed immediately.

- **If not, how did two independent federal agencies end up overlapping so perfectly?**

RESPONSE: They do not overlap perfectly, but disagreement between ATF and the U.S. Attorney's Office in Massachusetts, just like disagreements between ATF and any U.S. Attorney's Office, are resolved through open communication and working in partnership.

- **If so, how did you handle those cases?**

RESPONSE: Each case is unique, but when conflict does arise, I have always encouraged my management teams to do what is in the best interest of the investigation, the victim or the public. On a rare occasion, I have asked senior level managers to intervene and resolve the issues.

We know that an inappropriate level of political influence has made its way into the Department of Justice, which causes great concern as to whether we have independent thinking leaders in critical positions. It's unacceptable for individuals in key governmental positions to advance the political interests of the Administration, to the detriment of the public.

1. As Director of ATF, what steps will you take to ensure that the agency remains free of inappropriate political influence?

RESPONSE: I wholeheartedly agree that it is unacceptable for individuals in key governmental positions to advance the political interests of the Administration, to the detriment of the public. Our job is to serve the public and to protect public safety. I do not and would not tolerate inappropriate political influence at any level of government, and will communicate my expectation to the staff at ATF that if they experience such influence, that they should report it to me and I will deal with it appropriately. Having said that, it is important to point out that I have never seen, nor been pressured within the Department of Justice by inappropriate political influences.

2. Have you or any member of your staff attended political briefings by senior Administration leadership?

RESPONSE: I have not, and I am not aware that any member of my staff, attended any political briefings.

Question on Sheriff Cabral Grand Jury Investigation

Under your leadership, the Massachusetts U.S. Attorney's Office conducted a grand jury investigation of Suffolk County Sheriff Andrea Cabral and two of Cabral's top aides from 2003 to 2005 on whether they acted illegally in banning a contract employee from the Suffolk County House of Correction. After 28 months, the grand jury returned no indictments, and no criminal charges were ever brought. There were many troubling features of the investigation:

- it lasted an unusually long time and became unusually hostile and public in nature;
- there were allegations that the actions of you and your employees were motivated by personal enmity and/or political goals;
- there were allegations that you and your employees misled Sheriff Cabral and improperly coached the terminated employee;
- at one point, Sheriff Cabral was asked to testify before the grand jury on the day of the Sheriff's election (which she then won as a Democrat);
- press accounts suggest that confidential grand-jury information was leaked to the media.

Sheriff Cabral told one newspaper "that there was no basis for an investigation and certainly no basis for an indictment." She said that as the grand jury investigation entered its second year, she became "increasingly less confident in its integrity and fairness." Her lawyer filed a complaint against you with the Department of Justice's Office of Professional Responsibility. In his complaint to the DOJ's Office of Professional Responsibility, Sheriff Cabral's lawyer accused your office of questionable investigative tactics and motives in your handling of her case. He claimed the following:

- you and your aides pursued Cabral with extraordinary and excessive zeal;
- you deceived Cabral by setting up a meeting under false pretenses;
- the true purpose of convening the grand jury was not to investigate a potential felony but rather to preserve an informant's credibility for future cases;
- you ignored evidence of the terminated employee's misconduct and credibility problems as well as exculpatory evidence from the Sheriff's Department; and
- you leaked confidential information to the press in an effort to discredit Cabral.

1. Can you comment on these allegations?

RESPONSE: As a general matter, I cannot comment on the initiation or substance of any grand jury investigation. However, it is public information that the FBI and my office received a complaint from Nurse Sheila Porter that she had been fired from her position with the Suffolk County House of Correction in violation of her civil rights. Nurse Porter said that she had been fired because she provided information to the FBI about an inmate at that facility who claimed he had been beaten by guards. This was a serious allegation. If true, and if there was sufficient evidence to prove the allegation, it could have been a violation of criminal law. However, there was insufficient evidence to prove a crime beyond a reasonable doubt.

At the conclusion of my offices' evaluation of Nurse Porter's complaint, Ms. Porter was provided a letter explaining our office's position. In addition, counsel for Sheriff Cabral was provided a letter. I believe these letters respond to the issues set forth above.

I should also note that Nurse Porter filed a federal civil law suit against Sheriff Cabral and the Suffolk County House of Correction alleging civil rights violations. Those violations arose from her firing by the Suffolk County House of Correction for providing information to the FBI. On January 19, 2006, after a seven day trial at which Sheriff Cabral and her senior staff testified, a federal jury held in Nurse Porter's favor. The jury awarded Nurse Porter \$360,000 in compensatory damages and \$250,000 in punitive damages. Notably the jury concluded that Sheriff Cabral, "acted with a callous and reckless disregard to the plaintiff's federally protected rights." Judge Woodlock has subsequently upheld the jury verdict and awarded Nurse Porter an additional \$275,000 in attorneys' fees.

Sadly, Nurse Porter suddenly died of cancer a few weeks ago. Because her civil case was on appeal, she did not collect any damages prior to her passing.

2. Do you know if the Department of Justice has taken any action in response to this complaint?

RESPONSE: Your question states that in a complaint to DOJ OPR, Cabral's lawyer claimed that USA Sullivan and his aides "pursued Cabral with . . . excessive zeal"; deceived Cabral by setting up a meeting under false pretenses"; convened a grand jury in the matter for the "true purpose" of "preserv[ing] an informant's credibility," and "not to investigate a potential felony"; "ignored" exculpatory evidence; and "leaked confidential information."

I have been advised by OPR that their records reflect that Cabral's lawyer brought only one of these five allegations to its attention -- the alleged leak of confidential information. Specifically, in a May 19, 2005 letter to OPR, Cabral's attorney alleged improper disclosures, in violation of Fed. R. Crim. Proc. 6 (e) and the Department's Press Guidelines at 28 CFR 50.1, of matters occurring before the grand jury investigating his client. (Cabral's attorney provided OPR with a copy of a May 12, 2005 *Boston Globe* article in which the disclosures appeared.) Cabral's attorney reiterated the request in a June 17, 2005 letter to OPR. Thereafter, in an August 3, 2005 letter to OPR, I joined in the request.

The Department's protocol for handling requests for investigation of unauthorized disclosures requires OPR and the Office of the Inspector General (OIG) to confer with the Office of the Deputy Attorney General (ODAG) with regard to whether an investigation is warranted. The protocol was followed, and ultimately the Department determined not to initiate an investigation in this case.

It has been reported in the media that the Office of Public Responsibility may be conducting an investigation into improper leaks from your office about Sheriff Cabral's grand jury proceedings. A December 2002 press release from your office requested such an investigation.

- 1. If these reports are correct, do you know the status of this investigation and whether it has produced any findings?**

RESPONSE: As set forth above, no DOJ entity initiated an investigation into the alleged unauthorized disclosures.

- 2. Do you know how the *Boston Globe* came to possess confidential information from the grand jury about Sheriff Cabral's case?**

RESPONSE: I don't know if, or how, the Boston Globe received confidential grand jury information.

In addition to Sheriff Cabral's complaints, a June 8, 2005 press release issued by the Massachusetts U.S. Attorney's Office indicates that Common Cause had criticized remarks you made as "justifying and defending . . . the misuse of federal email for political canvassing." And an October 3, 2003 press release indicates that you personally contacted the head of the Office of Professional Responsibility to request "that OPR initiate and conduct a review" of an unspecified matter involving possible misconduct by members of your office.

- 1. Are you aware of any other complaints that have been made against you or your subordinates to the Office of Professional Responsibility or to other state or federal bodies? If so, are you aware of any action that has been taken on those complaints?**

RESPONSE: I self reported to OPR a potential appearance of a conflict of interest regarding my District's hiring of an AUSA with whom I am personal friends and jointly own a vacation home. OPR and OIG were provided with the applicable details and both offices determined that the matter did not warrant a formal referral to them for further investigation or inquiry into my conduct. I understand that this matter is still under internal review in the Executive Office for U.S. Attorneys.

I have been advised by OPR that its records reflect no matters warranting initiation by that office of either an investigation or an inquiry into my professional conduct since I began my tenure as U.S. Attorney in September 2001. OPR further informed me that while, during my tenure, it

initiated and conducted investigations of a number of line AUSAs in my office, in none of those investigations did my own performance of duties merit investigation. I am unaware of any complaints made against me or any employee of my office to "other state or federal bodies."

For the record, according to my recollection, there was no U.S. Attorney press release issued on October 3, 2003. I believe the quote you have cited is from a letter I sent to H. Marshall Jarrett, Esq. on October 2, 2003.

2. Are any complaints still under investigation?

RESPONSE: OPR informs me that, while it has several open inquiries into the conduct of AUSAs in my office, none has been initiated regarding my performance of duties or professional conduct.

Questions on Microstamping

California recently enacted a law to require microstamping technology on guns sold in the state after 2010. The measure was supported by Mayor Villaraigosa, 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 merely enhance the work currently conducted by the agency. But 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 to improve officer and public safety, such as innovations like microstamping.

I know that ATF is in the forefront of technology on firearms and ballistics research. The ATF labs are critical for quickly and accurately identifying the sources of specific firearms, and the types of ammunition used at a particular crime scene.

1. What is your opinion of microstamping technology?

RESPONSE: At this time there is limited research available to support an informed opinion of "microstamping" and its value to firearm crime investigations. There are many variables that should be addressed which include but are not limited to: application within the gun manufacturing process; suitability with different types of ammunition and guns; ease of defeating the process; and ease of viewing the engravings (e.g. naked eye, microscope or higher technology).

The California law gives manufacturers and law enforcement until January 2011 to investigate these variables and others that might be identified with the "microstamping" technology. I have directed the ATF Laboratories to initiate a study of "microstamping" and its application in firearms manufacture and the marking of shell casings.

2. Following up on my question from the hearing, would you support funding for a study of microstamping technology?

RESPONSE: As indicated in my response to the previous question, there needs to be additional study of this "microstamping" technology if it is to be used successfully by law enforcement for the reason intended. The ATF Laboratories will study "microstamping", beginning with a full review of any completed studies or ongoing studies. This review will be followed by actual

testing of the technology by ATF scientists. We plan to partner with a State or local law enforcement laboratory in this study. Finally, we will also evaluate the compatibility of “microstamping” with the ATF NIBIN Program.

3. Would you support federal legislation requiring microstamping technology for guns manufactured in the United States? If not, can you please explain why not?

RESPONSE: It would be premature of me to take a position on such proposed legislation before the conclusion of the various studies.

Questions on the Assault Weapons Ban

I've long been opposed to the sale of assault weapons. Assault weapons are killing machines intentionally designed to maximize their deadly power by using a rapid rate of fire. Over and over, we've endured horrific mass shootings that might have been less devastating if we had an effective and permanent ban on these killing weapons and their ammunition. As the Virginia Tech tragedy reminded us, the high capacity ammunition clips used with these weapons virtually guarantee that a killer can inflict severe damage in a brief period of time.

In one of the worst mass shootings in recent history, a troubled college student engaged in a killing spree lasting only 9 minutes that inflicted over 100 wounds on the victims. An estimated 170 shots were fired – about one shot every three seconds. In the end, more than 50 students, staff and faculty were injured or killed. Although the weapons involved at Virginia Tech were not semiautomatic weapons, investigators recovered 15-round and 10-round magazines -- magazines that were banned for ten years under the Assault Weapons Ban.

Many organizations have called for a renewal of the assault weapons ban. In a recent report, the International Association of Chiefs of Police called for a complete ban on military-style assault weapons. They pointed out that a 2003 analysis of FBI data revealed that almost 20% of officers who died in the line of duty between 1998 and 2001 were killed with weapons that could be classified as assault weapons. They've also called for a ban on .50 caliber sniper rifles, which can penetrate armor plating and destroy aircraft. These weapons are currently sold with less restrictive federal controls than standard handguns.

We know from a GAO report that these weapons have been obtained by drug dealers in Indiana, Missouri and California. As Seattle policy analyst Bob Scales points out, the assault weapons issue is "not just a police issue. It's a public health issue, it's a youth issue and our schools are involved." The failure to renew the ban has undermined the safety of our streets, our neighborhoods and our schools. These high-capacity weapons and ammunition have no place in any community in America. We can no longer fail to act when so many lives are at stake.

1. What is your position on the assault weapons ban? What about .50 caliber rifles?

RESPONSE: I agree with the President's previously announced position supporting reenactment of the ban on semiautomatic assault weapons. I would be willing to review any specific legislative proposals to ban .50 caliber weapons.

2. Would you support legislation that regulates high capacity magazines?

RESPONSE: I agree with the President's previously announced position supporting reenactment of the ban on high capacity magazines.

The risks of these weapons not only jeopardize lives in our communities. They also pose a serious threat to law enforcement. According to the National Law Enforcement Officers Memorial Fund, during the first six months of 2007, more than 101 U.S. police officers have been killed on duty already this year – the highest number of such deaths in 29 years. More than half were the result of fatal shootings.

Homicides involving assault weapons are on the rise. A few weeks ago in Miami, a shooter killed a police officer and injured three others using an AK-47. U.S. Attorney Alex Acosta has said, “These bullets are powerful: they go through walls, they go through cars and if you just spray the general vicinity you’re going to get innocent bystanders. A shooting that might have been an injury previously is now a death.”

1. **My understanding is that the federal government does not keep track of the number of crimes involving assault weapons. Would you be willing to support an effort to keep track of the number of crimes committed with these violent weapons?**

RESPONSE: It is important to note that there is no longer a definition of “assault weapon” within the Gun Control Act (after the expiration of the Violent Crime Control and Law Enforcement Act of 1994). Although ATF does not currently track all crime and the involvement of different types of firearms in those crimes, ATF’s National Tracing Center and Violent Crime Analysis Branch closely monitor the type of firearms recovered and traced by law enforcement. This information is analyzed to identify trends regarding “weapons of choice” in different areas of the country. ATF uses this information in formulating strategies to address the trafficking of these firearms into the hands of criminals.

2. **Part of the answer to this violence is linked to reducing the number of assault weapons on the street. Would you be willing to work with us in Congress opposed to the ban?**

RESPONSE: I agree with the President’s previously announced position supporting reenactment of the ban on the semiautomatic assault weapons.

Brady Act Violations

ATF has a central role in the enforcement of the Brady Act. Relying on referrals from the FBI, ATF has the responsibility to investigate whether individuals provided false information in order to purchase a gun.

1. Are you aware of steps taken toward prosecutions based on Brady Act violations that have occurred during your tenure as Acting Director? If so, how many?

RESPONSE: I have discussed this specific issue with the nation's US Attorneys. They are interested in and committed to ensuring that appropriate matters are investigated and prosecuted. We all agree that prosecution could have a valuable deterrent effect.

Within each of ATF's field divisions, the special agent in charge (SAC) has coordinated with their respective U.S. Attorneys to establish guidelines for the referral of Brady Act violations for prosecution. These guidelines ensure the best use of investigative and prosecutorial resources. During FY 07, ATF referred 139 cases for prosecution based on Brady Act violations, based upon Brady Act violations such as possession of a firearm by a prohibited person and/or providing false/fictitious information to a FFL. Currently, 44 defendants have been prosecuted, with the remaining defendants still in the judicial process.

2. How much discretion do individuals working in the agency have to pursue these cases? Would you be willing to provide the Committee with updated statistics on the number of prosecutions and the nature of the charge in each case?

RESPONSE: Each of ATF's field SACs works in coordination with the U.S. Attorneys within their geographic areas of responsibility to establish guidelines for the referral of Brady cases for prosecution. These guidelines are developed in conjunction with the SACs overall strategy to direct investigative efforts that will have the greatest impact in the communities for which they are responsible. Several factors might be taken into consideration when establishing these guidelines such as the type of firearm involved, prior convictions and criminal intent of the individual. Available statistics for FY 07 are above. ATF would be pleased to provide the Committee with updated statistics, as requested.

Under the Gun Control Act of 1968, all businesses manufacturing, importing or selling firearms must have a federal license. Since the passage of the Brady Act of 1993, federally licensed gun dealers are required to contact the FBI or state authorities to run a background

check prior to each and every gun sale. Over 70 million background checks have been conducted since the Brady Act became law. The background check is intended to confirm whether a person is eligible to purchase a firearm, or a “prohibited purchaser.” Under the Brady Act, the categories of “prohibited purchasers” include felons, individuals fleeing an outstanding arrest warrant, drug users or addicts, mentally ill individuals, and those found guilty of domestic violence.

The background check system is a tremendous tool, but an obvious problem is whether all the information on prohibited purchasers is getting into the database since there are so many gaps in the system. States are under no requirement to submit information to the database. Estimates suggest that 90 percent of disqualifying mental health records – and perhaps as many as 25 percent of felony records – have not been provided by the States. More than half of all states do not provide any records about mental health disqualifications at all.

Some states – such as Virginia, Maryland, Florida, Connecticut, California and Illinois – have taken strong steps to improve their laws, so that more information is entered into the database. But much more still needs to be done. Some States are hesitant to provide information due to privacy concerns – but States can provide information in the NICS system without indicating the facts about a person’s disqualification. For example, information can be entered without identifying the details of a mental health diagnosis or a medical history of drug abuse.

1. Do you agree that states should have more federal incentives to provide information to the background check system?

RESPONSE: The Department of Justice supports the goal of strengthening the National Instant Criminal Background Check System (NICS), including providing appropriate assistance to states to make information available to the background check system.

2. What steps do you plan to take to make sure that States are aware of the methods to provide information to the federal database without disclosing any private medical information?

RESPONSE: In partnership with the FBI, ATF has taken steps to ensure that States are aware of specific methods to provide information to NICS, particularly private information concerning persons with health needs. For example, ATF has issued letters to all State Attorneys General and federal firearms licensees explaining the federal firearms prohibition relating to “mental defectives” in the GCA and encouraging states to make relevant information available to the NICS. These letters are available on the ATF’s website at <http://www.atf.gov/firearms/openletters.htm>. ATF also has revised the Federal Firearms Transaction Record Form, used by individuals in purchasing firearms from FFLs, to make it clear that any person who has been found by a court, board, or other lawful authority to be a danger to self or others is prohibited from purchasing a firearm or ammunition.

ATF is also working with the Department to implement the recommendations concerning federal databases and privacy laws as set forth in the “Report to the President on Issues Raised by the Virginia Tech Tragedy.” As you may know, this Report was developed by the Departments of Justice, Health and Human Services, and Education, and delivered to the President on June 13, 2007. The report concluded that accurate and complete information on individuals prohibited from possessing firearms is critical to the effectiveness of federal firearms law. To improve information sharing, the report recommended that the Department of Justice, through the FBI and ATF, should:

- Reiterate the scope and requirements of federal firearms laws, including guidance on the federal firearms prohibition in the GCA and how to provide information to the NICS on persons whose receipt of a firearm would violate state or federal law.
- Continue to encourage state and federal agencies to provide all appropriate information to the NICS so that required background checks are thorough and complete.

Specifically regarding privacy laws, the Report concluded that the Department of Health and Human Services and the Department of Energy should develop additional guidance clarifying how information can be shared legally under the federal privacy laws and disseminated widely to mental health, education and law enforcement communities

A link to this report may be found at
http://www.usdoj.gov/opa/pr/2007/June/vt_report_061307.pdf.

3. Keeping guns out to the hands of prohibited purchasers has to a top priority. The IACP Report recommends that the federal government increase funding for ATF personnel and technical assistance to deal with gun violence. What specific resources does ATF require to help keep guns away from prohibited purchasers?

RESPONSE: In 2004, ATF’s firearms compliance inspection program was reviewed by DOJ’s Office of the Inspector General. In its report, OIG recommended ATF revise its staffing requirement so that it could conduct triennial inspections of the firearms license population to effectively regulate the industry. Given our available resources, ATF’s inspection program is effective and efficient, with increased efficiencies continually being realized. Further, given the significant impact made by ATF’s limited special agent workforce in stemming the flow of firearms trafficking and stopping violence in our communities, any increase in special agent staffing would proportionately increase ATF’s investigative impact.

Incredibly, terrorists are not included among those prohibited from purchasing a weapon in this country. Despite many efforts by myself, Senator Lautenberg and others, we still haven’t

been able to close this loophole. In 2001, a training manual was discovered in Afghanistan, instructing terrorists how to purchase guns in the United States. In January 2005, GAO reported that 35 gun sales to suspects took place - even though background checks resulted in hits on the FBI's Violent Gang and Terrorist Offender Watchlist. I've supported legislation in the past to require the FBI to be notified immediately if a known or suspected terrorist is discovered through a gun background check. The legislation would also require records of such background checks be kept for more than 24 hours.

Recently, the Justice Department has agreed to support legislation to close the gap in current law and allow the Attorney General to bar the purchase of a gun or explosive device by any person under suspicion for involvement in any terrorist-related act. I would hope that we could work together to close the loophole in current law.

- 1. What's your view on such legislation? Can you offer any explanation why anyone would oppose including terrorists among those barred from purchasing a gun in this country?**

RESPONSE: I agree with the Department's position that the GCA should be amended to address the possession by or transfer of firearms to persons on the terrorist watch lists.

- 2. Do you think that terrorist watch list checks should be part of the Brady background check process?**

RESPONSE: Yes, I believe that terrorist watch list checks should be part of the Brady background check process. As you may know, currently NICS background checks will "delay" a potential firearms transaction at an FFL that finds a hit on the Violent Gang and Terrorist Organization File (VGTOF). The current delay in these cases allows the FBI to coordinate with field personnel who may have information about the person that is not yet posted in NICS and that reveals that he or she falls into one of the current prohibiting categories. These delays are conducted pursuant to the Acting Deputy Attorney General's November 17, 2003 directive and began on February 3, 2004.

- 3. Shouldn't suspected terrorists on the watch lists be statutorily prohibited from buying or possessing a firearm?**

RESPONSE: I agree with the Department's position that the GCA should be amended to address the possession by or transfer of firearms to persons on the terrorist watch lists.

Assistance to Undercover Agents

The ATF has a history of successfully using undercover agents to infiltrate suspected criminal organizations to obtain information and build criminal cases against members who engage in illegal conduct. When these undercover agents complete these types of assignments, their lives may be threatened by members of the organization they infiltrated.

1. What are the general policies and procedures for protecting agents in undercover assignments?

RESPONSE: When undercover is used as an investigative technique, it is the responsibility of the special agent in charge, group supervisor, case agent and undercover agent to continually review and utilize all available intelligence during the time the undercover agent is participating in the investigation to ensure that the operation is conducted in a safe manner. ATF policy clearly describes those procedures that will ensure undercover operations are conducted in a proper and secure manner with the goal of reaching predetermined objectives.

In addition, ATF policy requires special agents to complete operational plans. Operational plans are used in the planning phase of enforcement activities such as those involving the use of special agents in an undercover assignment. An operational plan is utilized to identify critical elements and set parameters for the enforcement operation in an effort to increase the level of preparation and safety of all special agents.

ATF's Undercover Branch is responsible for ensuring the undercover agent has all the necessary tools and documentation needed to carry out their undercover role. Personnel from the Undercover Branch frequently meet with undercover agents, case agents and supervisors to tailor their identities and identify required tools to suit their undercover role. This is done to ensure the success of the investigation and the undercover agent's ability to withstand close scrutiny or compromise.

2. When threats are made against former undercover agents or their families, what policies and procedures are used to ensure that they are aware of these threats?

RESPONSE: ATF policy addresses the reporting of all credible threats to ATF employees, facilities and operations. This policy discusses the responsibility to report threats and in turn determine the response necessary for the protection of ATF personnel and assets. It is incumbent upon the immediate supervisor and the appropriate chain of command to ensure the undercover agents and their families are fully aware of the threats and that we attempt to make them safe while ATF investigates their credibility.

3. What problems have arisen in carrying out these policies and what steps have you taken to resolve these problems and to prevent them the future?

RESPONSE: The most prevalent problem we have encountered is miscommunication. This includes miscommunication between Headquarters offices and field divisions, as well as miscommunication within Headquarters. Policies and procedures are being revised to ensure appropriate coordination to facilitate the safety of the affected agent and his/her family. This includes ensuring the agent and his/her family are kept informed of any threats, the progress of any follow up investigation, and discussions which may result in a permanent relocation to a more safe and secure location.